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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**  
**COMITE EUROPEEN POUR LES PROBLEMES CRIMINELS**  
**(CDPC)**

**COMMITTEE OF EXPERTS**  
**ON THE OPERATION OF EUROPEAN CONVENTIONS**  
**ON CO-OPERATION IN CRIMINAL MATTERS**

**COMITE D'EXPERTS**  
**SUR LE FONCTIONNEMENT DES CONVENTIONS EUROPEENNES**  
**SUR LA COOPERATION DANS LE DOMAINE PENAL**  
**(PC-OC)**

**Questionnaire on the use and efficiency of CoE instruments as regards international co-operation in the field of seizure and confiscation of proceeds of crime, including the management of confiscated goods and asset sharing.**

**Questionnaire sur l'utilisation et l'efficacité des instruments du CdE dans le domaine de la coopération internationale en matière de saisie et de confiscation des produits du crime, y compris la gestion des biens confisqués et le partage des avoirs**

**REPLIES / REPONSES**

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**Questionnaire on the use and efficiency of CoE instruments as regards international co-operation in the field of seizure and confiscation of proceeds of crime, including the management of confiscated goods and asset sharing.**

1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. asset sharing?

(Please specify)

Table 1: Possibilities for co-operation under ETS No 030

State	a.	b.	c.
<b>Albania</b> <sup>1</sup>	yes	yes	yes
<b>Andorra</b>	yes	no	no
<b>Azerbaijan</b>	yes	yes	yes
<b>Belgium</b> <sup>2</sup>	only as evidence	no	no
<b>Bulgaria</b> <sup>3</sup>	no	no	no
<b>Croatia</b>	yes	yes	yes
<b>Cyprus</b>	yes	no	no
<b>Czech Republic</b>	yes <sup>4</sup>		
<b>Finland</b>	yes	yes	yes
<b>France</b>	no	no	no
<b>Georgia</b>	yes	yes <sup>5</sup>	yes
<b>Germany</b>	yes	yes	no

<sup>1</sup> We deem the European Convention for Mutual Legal Assistance in Criminal Matters (STE n. 30) and its additional protocols as appropriate instruments for cooperation in the above fields.

<sup>2</sup> ETS n° 30 – and both Additional Protocols - is a 'traditional' MLA-instrument that applies only to the 'seizure' and the transmission of evidence. As such only the object(s) of crime are targeted and not the proceeds of crime.

<sup>3</sup> Nevertheless the Convention and the protocols are instruments suited very well to serve the demands of the judicial authorities and could be successfully used in cases that could give rise to search and seizure of proceeds of crime or/and confiscation of such assets.

<sup>4</sup> If it is a requirement of requested state, our authority (a prosecutor in a pre-trial proceedings or a court) can issue a decision about a seizure even if it shall be executed on the territory of the requested state. Some Council of Europe states refuse to execute Czech requests without a decision of the Czech court.

<sup>5</sup> As to the confiscation of proceeds of crime and asset sharing, there are no specific provisions on this matter in the Convention or in its protocols; however in Article 1 §1 of the Convention there is a general obligation for the Contracting Parties to undertake to afford each other the widest measure of mutual assistance. The above-mentioned obligation provides certain ground for cooperation in those two areas.

<b>Hungary</b>	yes	yes	no
<b>Latvia<sup>6</sup></b>			
<b>Netherlands</b>	yes <sup>7</sup>	no	no <sup>8</sup>
<b>Norway</b>	yes	yes	no
<b>Portugal</b>	yes <sup>9</sup>	no <sup>10</sup>	no <sup>11</sup>
<b>Romania<sup>12</sup></b>	yes	no	no
<b>Slovak Republic<sup>13</sup></b>	no	no	no
<b>Slovenia</b>	yes	yes	yes
<b>Sweden<sup>14</sup></b>	no	no	no
<b>Switzerland</b>	search only	no	no
<b>Turkey</b>	yes	no	no
<b>Ukraine</b>	yes	yes	no
<b>United Kingdom<sup>15</sup></b>			

<sup>6</sup> The mentioned Convention is used as basis for the international cooperation, similarly like special Conventions on legal assistance. We have encountered no practical problems in relation with the application of the mentioned provisions.

<sup>7</sup> Under conditions, see reply by the Netherlands.

<sup>8</sup> In principle, the Netherlands does not require a treaty basis for this. The Netherlands does not consider ETS 30 as a basis for asset sharing

<sup>9</sup> The positive answer to the first question is linked to the scope of Portuguese domestic law, which allows for the seizure both of evidence and of the instruments of a crime and its proceeds.

<sup>10</sup> An exequatur would be needed to enforce a foreign confiscation order.

<sup>11</sup> Portugal does not believe the Convention can be interpreted so broadly.

<sup>12</sup> Although the scope of its application is extensive (non-specific offences) and it has been quite successful, it does apply only to search and seizure for the purposes of securing evidence. However, it might be used in the context of the asset-tracing investigation.

<sup>13</sup> Seizure of proceeds is temporary institute to secure proceeds of crime. If we even admitted the possibility of application of the said convention and protocols thereto, conditions are missing as regards further procedure as well as regulation of responsibility for subsequent actions made by countries involved; those conditions are clearly regulated in both Strasbourg and Warsaw conventions. It is predominantly for those reasons that we do not consider the European Convention ETS 30 and protocols thereto as sufficient legal basis for procedure stated in par. a) to c).

<sup>14</sup> Our conclusion is thus that the 1959 Convention is not a very useful tool in the fields of search and seizure of proceeds of crime, confiscation of proceeds of crime and asset sharing. These matters are not mentioned in the Convention or its additional protocol ...If the requested country's domestic legislation does not provide sufficient legal basis to provide the assistance sought it ought to be possible to find a legal basis in the 1959 Convention for at least some measures concerning search and seizures of proceeds of crime.

<sup>15</sup> The UK does not require a treaty basis to provide assistance relating to proceeds of crime and asset sharing. There are frustrations from law enforcement agencies about the timeliness and complicated nature of the mutual legal assistance (MLA) process. The existing arrangements work well with many countries but not others. It is imperative that there is a streamlined system (not necessarily MLA) for international cooperation to identify assets, for example, firstly the supply systems for goods and, secondly, trace the benefits. Law enforcement agencies wonder if a specific provision could be made relating to assistance in asset tracing.

2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

(Please specify)

Table 2: Possibilities for co-operation under ETS No 141

State	a.	b.	c.	d.	e.
<b>Albania</b> <sup>16</sup>	yes	yes	yes	yes	yes
<b>Andorra</b>	yes	yes	no	no	no
<b>Azerbaijan</b> <sup>17</sup>					
<b>Belgium</b> <sup>18</sup>					
<b>Bulgaria</b>	yes	yes	yes	yes	yes <sup>19</sup>
<b>Croatia</b> <sup>20</sup>	yes	yes	yes	yes	yes
<b>Cyprus</b>	yes	yes	yes		yes
<b>Czech Republic</b>	yes	yes <sup>21</sup>		yes <sup>22</sup>	no <sup>23</sup>
<b>Finland</b>	yes	yes	yes	yes	yes
<b>France</b>	yes	yes	yes <sup>24</sup>	no <sup>25</sup>	no <sup>26</sup>

<sup>16</sup> No legal or practical difficulties are encountered for the implementation of ETS no. 141. Standard procedures are practically followed for execution of a letter of request, specifically after the transmission by Ministry of Justice, the letter of request is sent to the General Prosecutor's Office which further sends it to the Competent Judicial District Prosecutor. As for the execution of a letter of request, the permissive court decision should be taken in advance, which determines in the permissive decision the authority to deal with execution of actions requested from the foreign judicial authority. We have observed that member states often encounter problems in terms of tracking and/or transfer of the enforcement of confiscation order.

<sup>17</sup> Article 3.10 (scope of application) of the Law of the Republic of Azerbaijan on Legal Assistance in Criminal Matters concerns the matters of determination of proceeds and property from crime, as well as the means used for commitment of crime.

<sup>18</sup> The classic MLA-approach that is the very foundation of ETS n° 141 is hardly fit for today's needs for cooperation in the field of finding, seizing and confiscating criminal proceeds. By the time the request is written, the money to be searched or seized is gone.

<sup>19</sup> It should be noted that in cases of asset sharing and asset return an agreement is necessary between the Requesting and the Requested party, otherwise the national legislation applies.

<sup>20</sup> Croatia will apply provisions of this convention in all above stated cases. With regard to c, d and e, the convention leaves opportunity for applying domestic provisions and mutual agreement between parties.

<sup>21</sup> The fact that states have different provisions concerning so called extended confiscation is a problem.

<sup>22</sup> Assets found can sometimes not be returned to victims because there are bona fide parties.

<sup>23</sup> there are no specific rules for asset sharing within the Council of Europe – Czech Republic practical experience is very limited in this area.

<sup>24</sup> Management of seized property is possible only with a court order, and concerns complex goods.

<b>Georgia</b> <sup>27</sup>	yes	yes	yes	yes	yes
<b>Germany</b>	yes	yes	yes	yes	yes
<b>Hungary</b> <sup>28</sup>					
<b>Latvia</b> <sup>29</sup>					
<b>Netherlands</b> <sup>30</sup>	yes	yes	yes	yes	yes
<b>Norway</b> <sup>31</sup>	yes	yes	yes <sup>32</sup>	yes	yes
<b>Portugal</b> <sup>33</sup>	no	no	no	no	yes <sup>34</sup>
<b>Romania</b> <sup>35</sup>	yes	yes	no	no	yes
<b>Slovak Republic</b>	yes	yes	yes <sup>36</sup>	no <sup>37</sup>	<sup>38</sup>
<b>Slovenia</b>	yes	yes	yes	yes	yes
<b>Sweden</b> <sup>39</sup>					
<b>Switzerland</b>	yes	yes	yes	yes	yes <sup>40</sup>
<b>Turkey</b> <sup>41</sup>	yes	yes	yes		yes

<sup>25</sup> Confiscated goods become state property . However, if victims participated in the penal procedure as “parties civiles”, they may obtain compensation under certain conditions. Seizure may also serve to reconstitute assets to victims (answer to question 10).

<sup>26</sup> Except if provided otherwise by agreement and if requested by the requesting state.

<sup>27</sup> For asset sharing and returning of assets to victims an ad hoc agreement with the requesting country would be required.

<sup>28</sup> According to national experts, they didn't encounter requests for mutual legal assistance in which the mentioned two Conventions (ETS 141 and ETS 198) were referred to. Also when being the Requesting Party experts prepare their requests referring to more general Conventions

<sup>29</sup> The mentioned Convention is used as basis for the international cooperation, similarly like special Convention on the legal assistance. We have encountered no practical problems in relation with application of the mentioned provisions.

<sup>30</sup> For the conditions see the detailed reply by the Netherlands.

<sup>31</sup> For out-going requests, the most practical challenge is to identify the assets from crime.

<sup>32</sup> In Norway there is no central office for management of confiscated assets. This is handled by the police on a case to case basis

<sup>33</sup> The obstacles listed do not stem directly from the Convention but rather from the lack of practical experience owing to the very hesitant use of this instrument. Furthermore, the speed with which money is transferred is difficult to reconcile with a conventional co-operation procedure.

<sup>34</sup> . As to asset sharing, we have very little experience. A first case is nearing completion but it will not be based on this instrument.

<sup>35</sup> Types of assistance currently offered by ETS 141 do not include c) and d). When using ETS 141, as a requesting state, difficulties encountered are: lack of acknowledgement, lack of communication, delay in replying or executing the requests especially those involving investigative assistance.

<sup>36</sup> If a decision was made to confiscate assets, they are subject to State ownership/are owned by the state unless contractual parties agree otherwise in accordance with the Article 15 of the convention.

<sup>37</sup> However, an injured party can put forward a claim within Slovak civil proceedings.

<sup>38</sup> We have not any experience as regards asset sharing so far.

<sup>39</sup> The Convention was ratified last fall and we have limited or no practical experience with it. [...] One problem that exists in this area is the lack of opportunity to secure funds for the execution of a decision on damages.

<sup>40</sup> National law will be applied if more favourable. This is particularly the case for sharing of assets which allows also for restitution of funds to another state. The main difficulty lies for the requesting state in demonstrating the link between the facts under investigation in their country and the proceeds of crime located in Switzerland and, subsequently, to obtain the confiscation order establishing the illegal origin of the funds and their attribution.

<sup>41</sup> • Inability to provide relation between the values of the assets requested to be seized and the offence claimed to have been committed,

• Even though it is accepted in Turkish law as an exceptional method to liquidate the value of seized assets without a finalized judgment or manage during the trials by the State authorities, requiring a significant number of the requests to implement these measures,

• Experiencing disruptions to provide information concerning judicial process carried out in the requesting State after the assets are seized.

<b>Ukraine</b>	yes	yes	no	yes	no
<b>United Kingdom<sup>42</sup></b>					

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- The uncertainty concerning how to share the economic value which has been liquidated.

<sup>42</sup> The Proceeds of Crime Act 2002 ("POCA") sets out the UK legislative scheme for the recovery of the proceeds of crime. This includes a value-based confiscation order following any criminal conviction. There are other means of recovering the proceeds of crime which do not require a conviction, namely civil recovery, cash seizure and taxation powers. UK legislation also provides for a number of financial investigative powers, namely production orders, search and seizure warrants, disclosure orders, customer information orders and account monitoring orders. There are also powers that allow for the "restraint" or "freezing" of assets to prevent dissipation of assets prior to orders being made. All these powers are also available to assist overseas countries in their cases where evidence and property is located in the UK. We have not encountered any legal or practical difficulties which directly relate to this Convention in relation to criminal confiscation; although the number of requests is low.



3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

(Please specify)

**Table 3: Possibilities for co-operation under ETS No 198**

N.P.: not a Party to this convention

State	a.	b.	c.	d.	e.
<b>Albania</b> <sup>43</sup>	yes	yes	yes	yes	yes
<b>Andorra</b>	N.P.				
<b>Azerbaijan</b>	N.P.				
<b>Belgium</b> <sup>44</sup>					
<b>Bulgaria</b>	yes	yes	yes	yes	yes <sup>45</sup>
<b>Croatia</b> <sup>46</sup>	yes	yes	yes	yes	yes
<b>Cyprus</b> <sup>47</sup>	yes	yes	yes	yes <sup>48</sup>	yes
<b>Czech Republic</b>	N.P.				
<b>Finland</b>	yes	yes	yes	no <sup>49</sup>	yes
<b>France</b>	N.P.				
<b>Georgia</b> <sup>50</sup>	yes	yes	yes	yes	yes
<b>Germany</b>	N.P.				
<b>Hungary</b> <sup>51</sup>					

<sup>43</sup> No legal or practical difficulties are encountered for the implementation of ETS no. 198

<sup>44</sup> CETS n° 198 is rarely used since CETS N° 141 provides for a sufficient basis for the search, seizure, confiscation (and possibly the sharing) of proceeds of crime, regardless of the alleged proven origin of the proceeds

<sup>45</sup> It should be noted that in cases of asset sharing and asset return an agreement is necessary between the Requesting and the Requested party, otherwise the national legislation applies.

<sup>46</sup> In our experience, some difficulties can accrue in respect of NCBC in civil procedures, since our domestic law does not cover such situations. Also, speaking of management, there were cases where the issue of expenses arises. Those expenses can be very high, and Requesting state in some cases had stated its opinion, that it is not obliged to cover those expenses.

<sup>47</sup> From our experience, a problematic area in the application of both Conventions following a request for freezing/seizure of assets, is the lack of feedback. As a result, assets may remain frozen for years without any substantial progress or information. This practice poses a great problem and places the executing state in a risk to be held liable for damages.

<sup>48</sup> Returning the assets to victims is possible as a matter of practice on a case by case basis.

<sup>49</sup> A victim's claim for compensation has to be pursued in civil proceedings

<sup>50</sup> For asset sharing and returning of assets to victims an ad hoc agreement with the requesting country would be required.

<sup>51</sup> Hungary didn't encounter any problems regarding this Convention.

<b>Latvia</b> <sup>52</sup>					
<b>Netherlands</b>	yes	yes	yes	yes	yes
<b>Norway</b>	N.P.				
<b>Portugal</b> <sup>53</sup>					
<b>Romania</b>	yes	yes	no	no	yes
<b>Slovak Republic</b> <sup>54</sup>	yes	yes	<sup>55</sup>	no <sup>56</sup>	<sup>57</sup>
<b>Slovenia</b>	yes	yes	yes	yes	yes
<b>Sweden</b> <sup>58</sup>					
<b>Switzerland</b>	N.P.				
<b>Turkey</b>	N.P.				
<b>Ukraine</b>	yes	yes	no	yes	no
<b>United Kingdom</b> <sup>59</sup>					

<sup>52</sup> The mentioned Convention is used as basis for the international cooperation, similarly like special Convention on the legal assistance. We have encountered no practical problems in relation with application of the mentioned provisions.

<sup>53</sup> This instrument has very rarely been used so a lack of significant experience makes it impossible to draw conclusions.

<sup>54</sup> See detailed reply by the Slovak Republic.

<sup>55</sup> This is problematic area because separate legal regulation on management of seized property is missing so far.

<sup>56</sup> A regulation on the possibility to return assets directly for victims is still missing.

<sup>57</sup> We have not any experience as regards asset sharing so far.

<sup>58</sup> There are possibilities under Swedish law to co-operate, however we have limited or no practical experience with the convention

<sup>59</sup> . Note that this Convention has only entered into force for the UK on 1 August 2015. The UK are aware of the advantages that this Convention will provide including making it easier to obtain compliance by other States when making MLA requests request. However, without further experience the UK is unable to provide any further details.

#### 4. Introduction

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence. Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

(Please specify)

**Table 4:** Possibilities for co-operation as regards value based seizure/confiscation

State	a.	b.	c.	d.	e.
<b>Albania</b>	yes	yes <sup>60</sup>			
<b>Andorra</b>	yes	yes	yes	yes	no
<b>Azerbaijan</b>	yes	yes		yes	
<b>Belgium</b>	yes	yes			
<b>Bulgaria</b> <sup>61</sup>	no	no	no	no	no
<b>Croatia</b>	yes	yes	yes	yes	yes
<b>Cyprus</b>	yes	yes	yes	yes	yes
<b>Czech Republic</b>	yes	yes			
<b>Finland</b>	yes	yes	yes	no <sup>62</sup>	yes
<b>France</b>	yes	yes <sup>63</sup>			
<b>Georgia</b>	yes	yes	yes	yes	yes
<b>Germany</b>	yes	yes	yes	yes	yes
<b>Hungary</b>	yes	yes			
<b>Latvia</b> <sup>64</sup>	yes	yes			

<sup>60</sup> See details in reply by Albania..

<sup>61</sup> There is no value – based confiscation equivalent in Bulgaria

<sup>62</sup> A victim's claim for compensation has to be pursued in civil proceedings

<sup>63</sup> For value based seizure and confiscation, a direct link of the goods (as an instrument or proceed of crime) with the criminal act concerned has to be established, in principle. Enlarged or general seizures outside the EU are possible only on the basis of an explicit international agreement to this effect.

<b>Netherlands</b>	yes	yes	yes	yes	yes
<b>Norway</b>	yes	yes	yes	yes	yes
<b>Portugal<sup>65</sup></b>	yes	yes	yes	yes	yes
<b>Romania<sup>66</sup></b>	yes	yes	no	no	yes
<b>Slovak Republic</b>	yes	yes	<sup>67</sup>	no <sup>68</sup>	<sup>69</sup>
<b>Slovenia</b>	yes	yes	yes	yes	yes
<b>Sweden</b>	yes	yes	yes	no	yes
<b>Switzerland<sup>70</sup></b>					
<b>Turkey</b>	no	no	no	no	no
<b>Ukraine</b>	yes	yes	no	yes	no
<b>United Kingdom<sup>71</sup></b>	yes	yes	yes	yes	yes

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<sup>64</sup> Reply is “Yes”. The Section 358(2) of the Criminal Procedure Law provides that “If criminally acquired property has been alienated, destroyed, or hidden, and the confiscation of such property is not possible, other property, and financial resources, at the value of the property to be confiscated may be subjected to confiscation or recovery.”

<sup>65</sup> Portuguese law allows for value-based confiscation (Law 5/2002) so the preventive or preliminary measures referred to in a., b. and c. are possible, as is returning assets to victims. The same applies to asset sharing. However, there may be certain difficulties where it comes to the decisions of the courts, where a certain amount of resistance can be discerned.

<sup>66</sup> Romanian criminal legislation allows for value confiscation under certain conditions: Article 112 (3) and (5), and Article 112 indent 1 (5) of the Romanian Criminal Code.( see details in answer)

<sup>67</sup> Confiscated assets become State property unless a court decided otherwise on the basis of a promulgated international treaty by which the Slovak Republic is bound.

<sup>68</sup> A regulation on the possibility to return assets directly for victims is still missing.

<sup>69</sup> We have not any experience as regards asset sharing so far.

<sup>70</sup> In Swiss law a link needs to exist between the facts investigated and the funds located in Switzerland. Value based confiscation ignores this link and refers to the notion of “credit”. If the “product” does not exist the payment of a compensatory credit can be ordered. MLA related to such credit can be granted.

<sup>71</sup> The lack of identifying actual assets against which a restraint order or confiscation order can be enforced can cause difficulties in providing timely and focused assistance. It can be difficult to provide powers to seize and sell specific assets.

5. Several member States recognise the possibility of seizure and confiscation of assets which belong de facto to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.

Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

(Please specify)

**Table 5: Possibilities for co-operation as regards seizure/confiscation of “Straw man’s” property**

State	a.	b.	c.	d.	e.
<b>Albania</b>	yes <sup>72</sup>	yes			
<b>Andorra</b>	yes	yes	yes	yes	no
<b>Azerbaijan</b>	yes	yes		yes	
<b>Belgium</b>	yes				
<b>Bulgaria</b> <sup>73</sup>	yes	yes			
<b>Croatia</b>	yes	yes <sup>74</sup>			
<b>Cyprus</b>	yes	yes <sup>75</sup>			
<b>Czech Republic</b>	yes	yes <sup>76</sup>			
<b>Finland</b> <sup>77</sup>	no	no	no	no	no
<b>France</b>	yes <sup>78</sup>	yes		yes	
<b>Georgia</b>	yes	yes	yes	yes	yes
<b>Germany</b> <sup>79</sup>	yes	yes	yes	yes	yes
<b>Hungary</b> <sup>80</sup>	yes	yes			

<sup>72</sup> The enforcement of such requests is possible in the framework of Law no. 10192 dated 03. 12. 2009 “On prevention and fight against organized crime and trafficking through preventive measures against property”,

<sup>73</sup> The competent Bulgarian Authority could execute a request, concerning “Straw man”, but only if there is a well explained and evident connection between the convicted person and the Straw man.

<sup>74</sup> There is a provision in our domestic law that allows such confiscation, if it is a matter of criminal offence of corruption and organized crime. The condition is that there is certain degree of probability that the asset that is requested to be searched or confiscated derives from crime.

<sup>75</sup> Third parties’ assets can be subject to freezing and may be affected by confiscation measures e.g. receivers of unlawful gifts.

<sup>76</sup> Anyone, who possesses proceeds of crime, has an obligation to render it to authorities active in criminal proceedings (police, a prosecutor, a court).

<sup>77</sup> No, if the property has been transferred to a third party.

<sup>78</sup> Yes, seizure and confiscation are possible if the asset was the instrument of crime and if the real owner could freely dispose of it. Yes also if the assets are the direct or indirect proceeds of crime.

<sup>79</sup> Access to assets of uninvolved third parties may be ordered under section 73 (3) and (4) of the German Criminal Code (StGB). See reply for details.

<sup>80</sup> It is possible to execute such requests; it depends on the question of evidence. In case it is proved that the accused is the actual owner.

<b>Latvia</b> <sup>81</sup>	yes	yes			
<b>Netherlands</b>	yes	yes	yes	yes	yes
<b>Norway</b>	yes	yes	yes	yes	yes
<b>Portugal</b> <sup>82</sup>	yes	yes	yes	yes	yes
<b>Romania</b> <sup>83</sup>	yes	yes	no	no	yes
<b>Slovak Republic</b>	yes	yes	<sup>84</sup>	no <sup>85</sup>	<sup>86</sup>
<b>Slovenia</b>	yes	yes	yes	yes	yes
<b>Sweden</b> <sup>87</sup>	yes	yes	yes	no	yes
<b>Switzerland</b>	yes	yes	yes	yes	yes
<b>Turkey</b> <sup>88</sup>	yes	yes	yes	yes	yes
<b>Ukraine</b>	yes	yes	no	yes	no
<b>United Kingdom</b> <sup>89</sup>	yes	yes	yes	yes	yes

<sup>81</sup> "Yes" provided that direct relation is found. See reply by Latvia for further details. "

<sup>82</sup> It will always be possible to enforce a request concerning one of these measures provided that the link between the "straw man" and the laundering offence has been well established and the person concerned has been properly identified.

<sup>83</sup> Confiscation from third parties is also foreseen in the Romanian legislation: See the reply by Romania for further details.

<sup>84</sup> Confiscated assets become State property unless a court decided otherwise on the basis of a promulgated international treaty by which the Slovak Republic is bound.

<sup>85</sup> A regulation on the possibility to return assets directly for victims is still missing.

<sup>86</sup> We have not any experience as regards asset sharing so far.

<sup>87</sup> .A confiscation order can only be directed against the owner of the assets It is up to the prosecutor to prove that the person subject to the confiscation order in fact owns the property. See reply by Sweden for details.

<sup>88</sup> Pursuant to Turkish law, it is possible at all times to confiscate property used for committing an offence, or proceeds of an offence, in possession of third parties not acting in good faith

<sup>89</sup> Execution of requests is a matter of application of resources on a case by case basis. This may depend on the proposed value and assessed risk and potential criminality of the subject.

6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

(Please specify)

**Table 6:** Possibilities for co-operation as regards seizure/confiscation on reciprocity basis, without treaty

State	a.	b.	c.	d.
<b>Albania</b> <sup>90</sup>	yes	yes	yes	yes
<b>Andorra</b>	yes	yes	yes	no
<b>Azerbaijan</b>	yes	yes		
<b>Belgium</b> <sup>91</sup>	no	no	no	no
<b>Bulgaria</b> <sup>92</sup>	yes	yes	yes	yes
<b>Croatia</b> <sup>93</sup>	yes	yes	yes	yes
<b>Cyprus</b>	yes <sup>94</sup>	yes	yes	yes
<b>Czech Republic</b>	yes	yes	yes	yes
<b>Finland</b>	yes	yes	yes	yes
<b>France</b> <sup>95</sup>	yes	yes	yes	yes
<b>Georgia</b> <sup>96</sup>	yes			
<b>Germany</b> <sup>97</sup>	yes	yes	yes	yes
<b>Hungary</b>	no	no		
<b>Latvia</b> <sup>98</sup>	yes	yes		

<sup>90</sup> Yes, the Republic of Albania is in a position to cooperate with other states on the basis of reciprocity. This is expressly provided for in article 9 "Reciprocity" of Law no. 10 193/2009.

<sup>91</sup> Apart from search of proceeds – which can be requested or conversely performed under the more general MLA umbrella, the seizure, confiscation and the sharing of assets requires a treaty basis. Under 'Treaty basis', also a subsidiary basis must be understood such as UNTOC. Returning assets to victims can be an entirely different type of cooperation: under MLA it is perfectly possible to return e.g. the stolen television sets.

<sup>92</sup> There is a possibility for Bulgaria to co-operate with other States on the basis of reciprocity. Such requests should be addressed to the Ministry of Justice. The declaration is issued on a case by case basis.

<sup>93</sup> We are in a possibility to cooperate in all stated, with a condition that executing such request would not be contrary to the public order, that a person had a possibility to participate in the proceedings that led to this decision and under the condition of reciprocity

<sup>94</sup> Cyprus is in a position to cooperate with other States on the basis of reciprocity and in the absence of a treaty. Specifically, with regards to points (a) to (d) we never had such experience.

<sup>95</sup> Under the conditions mentioned in the answers to the previous questions

<sup>96</sup> Requests to Georgia related to the activities listed in subparagraphs b, c and d cannot be executed on the basis of reciprocity. In those cases, there will be a need for an ad hoc agreement.

<sup>97</sup> Yes, according to the provisions of the national law, in particular the Act on international cooperation in criminal matters.

<sup>98</sup> Reply is "Yes". In absence of the treaty the cooperation on the basis of reciprocity principle is possible.

<b>Netherlands</b>	no	no	no	no
<b>Norway</b>	yes	yes	yes	yes
<b>Portugal</b>	yes	yes	yes	yes
<b>Romania<sup>99</sup></b>	yes	yes	yes	yes
<b>Slovak Republic<sup>100</sup></b>	no	no	no	no
<b>Slovenia</b>	yes	yes	yes	yes
<b>Sweden</b>	yes	yes	no	yes
<b>Switzerland</b>	yes	yes	yes	yes
<b>Turkey</b>	yes	yes	yes	yes
<b>Ukraine</b>	yes	yes	yes	yes
<b>United Kingdom</b>	yes	yes	yes	yes

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<sup>99</sup> Yes. This possibility is foreseen by Article 140 (1) of the Law 302/2004 on international judicial cooperation in criminal matters

<sup>100</sup> As regards to par. a), c) and d) the Slovak Code of Criminal Procedure includes the possibility to proceed on the basis of reciprocity principle but practical application and efficient execution of this provision is problematic in the conditions of the Slovak Republic.



7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.

Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

Table 7: Possibilities for co-operation as regards NCBC

State	a.	b.	c.	d.	e.	f.
<b>Albania</b> <sup>101</sup>	yes	yes	yes	yes	yes	yes
<b>Andorra</b>	no	no	no	no	no	no
<b>Azerbaijan</b>	no	no	no	no	no	no
<b>Belgium</b> <sup>102</sup>	yes	yes	no	no	no	no
<b>Bulgaria</b> <sup>103</sup>	yes	yes	yes	yes	yes	yes
<b>Croatia</b> <sup>104</sup>						
<b>Cyprus</b> <sup>105</sup>	no	no	no	no	no	no
<b>Czech Republic</b>	no <sup>106</sup>	no	no	no	no	no
<b>Finland</b>	yes	yes	yes	yes	yes	yes
<b>France</b>	yes <sup>107</sup>	yes				

<sup>101</sup> Albania is able to provide judicial assistance in the framework of confiscation measures and other related measures not based on a conviction in the framework of Law no. 10192 "On prevention and fight against organized crime and trafficking through preventive measures against property",

<sup>102</sup> . MLA allows to provide any evidence on assets located in Belgium, the fact that those assets are subjected to a foreign NCB is irrelevant. Seizure is also possible since it is a provisional measure. NCB is, for the time being, non-existent in Belgian law. EU-instruments however may well offer a solution by recognizing the judicial measure that qualifies as NCB in accordance with the law of the 'emitting' MS.

<sup>103</sup> MLA is within the powers of the Prosecutor's Office. Following the receipt through the Prosecutor's Office of a request concerning seizure/confiscation procedures the Commission may provide the requested information regarding all the phases of the Non Conviction Based (NCB) proceedings. There is no difference if it concerns criminal or civil confiscation.

<sup>104</sup> Based on domestic law, the Republic of Croatia is in a possibility to execute such request if it is part of criminal procedure. See reply for further details. .

<sup>105</sup> Some limited assistance may be possible regarding the use of evidential material, gathered following the execution of a MLA Request, using as a basis paragraph (5) of Article 23 of the Convention of 2005, but not as far as seizure or confiscation measures are concerned.

<sup>106</sup> The Czech Republic cannot provide legal assistance for purposes of civil forfeiture since there is no legal framework for such a confiscation.

<b>Georgia</b>	yes	yes	yes	yes	yes	yes
<b>Germany</b> <sup>108</sup>	yes	yes	yes	yes	yes	yes
<b>Hungary</b>	no	no	no	no	no	no
<b>Latvia</b> <sup>109</sup>	no	no	no	no	no	no
<b>Netherlands</b> <sup>110</sup>	yes	yes	yes	yes	yes	yes
<b>Norway</b> <sup>111</sup>						
<b>Portugal</b> <sup>112</sup>	no	no	no	no	no	no
<b>Romania</b> <sup>113</sup>	yes	yes				
<b>Slovak Republic</b> <sup>114</sup>	<sup>115</sup>	<sup>116</sup>	<sup>117</sup>			
<b>Slovenia</b>	yes	yes	yes	yes	no <sup>118</sup>	yes <sup>119</sup>
<b>Sweden</b> <sup>120</sup>	no	no	no	no	no	no
<b>Switzerland</b>	yes	yes	yes	yes	yes	yes
<b>Turkey</b> <sup>121</sup>						

<sup>107</sup> Although the French legislation only recognises confiscation as a penalty based upon a criminal law conviction, case-law established that a request for NCB can be accepted if there are sufficient indications that the assets concerned by the court decision are the proceeds of a crime that amounts to a decision of a penal nature.

<sup>108</sup> Under German law there are so-called independent proceedings for obtaining an order (also referred to as “objective proceedings”), This allows for the confiscation of instrumentalities and the forfeiture of proceeds to take place even where, for certain reasons, no conviction can be obtained. A link to criminal proceedings is a mandatory requirement.

<sup>109</sup> “No”. It is not possible in civil and administrative proceedings.

<sup>110</sup> See the detailed answer given by the Netherlands for details

<sup>111</sup> The Norwegian legislation has no specific reference to the above measures, and a foreign request would have to be considered on a case to case basis.

<sup>112</sup> No, it would be problematic for Portugal to enforce non-conviction-based decisions as the law provides that it is only on the basis of a criminal conviction that such decisions can be taken

<sup>113</sup> The recognition and enforcement of foreign decision ordering measures to confiscation, which, according to the Romanian law, are not criminal penalties/sanctions, may be ordered only if:  
a) The measures result in the final dispossession of those assets; b) The measures were ordered by a competent judicial authority of the issuing State related to one or several criminal acts; c) The assets are related products or instruments. (see answer by Romania)

<sup>114</sup> See details in the reply by the Slovak Republik

<sup>115</sup> Pursuant to SK requirements, it is always necessary to prove link to criminal proceedings. This does not affect Police cooperation or competencies of the Financial Intelligence Unit which is the central national unit in the area of prevention and detection of legalization of proceeds from crime and financing of terrorism.

<sup>116</sup> Pursuant to national legislation, seizure of proceeds anticipates subsequent confiscation which is impossible unless judgment/conviction is rendered

<sup>117</sup> For b, c, d,e: granting legal assistance or enforcing confiscation is always necessary to be considered/decided ad hoc.

<sup>118</sup> The Forfeiture of Assets of Illegal Origin Act determines NCB in civil procedure and does not deal with questions of guilt and therefore nor with victims. On the other hand the law protects the “bona fide” beneficiaries (explanation in the answer by Slovenia).

<sup>119</sup> YES, if international agreements or the European Union’s legal acts which are directly applicable in the Republic of Slovenia so determine.

<sup>120</sup> Confiscation without connection to a criminal conviction is generally not allowed. However, if a sanction no longer can be imposed because of e.g. the death of the offender, proceeds or instrumentalities of a crime may under limited circumstances be confiscated without a criminal conviction (it is still necessary to fully establish that a crime has been committed). It is also possible under some limited circumstances to confiscate objects that can be used to commit crimes without a criminal conviction.

<sup>121</sup> In our legal system, confiscation must be based on a court judgment. Confiscation is regulated under the Turkish Criminal Code and the subject matter of confiscation is the material/goods used in commission of a deliberate offence or provided in commission of an offence or those acquired from an offence.

<b>Ukraine</b> <sup>122</sup>	yes	yes	yes	no	yes	no
<b>United Kingdom</b> <sup>123</sup>	yes	yes	yes	yes	yes	yes

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<sup>122</sup> The Criminal Procedure Code envisages the possibility of seizing the property and assets which may originate from crime at the stage of pre-trial investigation as security for a civil claim in the criminal proceedings or property confiscation in accordance with a court judgment.

<sup>123</sup> The UK court has to be satisfied, on the balance of probabilities that the identified property was obtained as a result of crime.

8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.

**Table 8:** Possibilities for MLA as regards liability of legal entities

State	assistance	Legal basis/conditions
<b>Albania</b>	yes	Article 45 of the Criminal Code and Law no. 9754 “On liability of legal entities”
<b>Andorra</b>	yes	National Law, art 71 Criminal Code
<b>Azerbaijan</b>	yes	Art 99 Criminal Code
<b>Belgium</b>	yes <sup>124</sup>	National law
<b>Bulgaria</b>	yes <sup>125</sup>	
<b>Croatia</b>	yes <sup>126</sup>	Domestic law
<b>Cyprus</b>	yes	Domestic legislation
<b>Czech Republic</b>	yes <sup>127</sup>	
<b>Finland</b>	yes	
<b>France</b>	yes	Art 131-39 and 131-21 Code Pénal
<b>Georgia</b>	yes	Law of 22.08.2006
<b>Germany</b>	yes	Administrative Offences Act “
<b>Hungary</b>	yes <sup>128</sup>	
<b>Latvia</b>	yes <sup>129</sup>	
<b>Netherlands</b>	yes	Existing conventions
<b>Norway</b>	yes	Penal Code/Extradition Act
<b>Portugal</b>	yes	Same conditions as for individuals
<b>Romania</b>	yes	National law, subject to reciprocity
<b>Slovak Republic</b>	yes	Section 551, Code of Criminal Procedure
<b>Slovenia</b>	yes	Art 42 Criminal Code
<b>Sweden</b>	yes <sup>130</sup>	Penal Code chapter 36, sections 4 and 5
<b>Switzerland</b>	yes	Art. 102 Criminal Code
<b>Turkey</b>	yes	Art 60 Criminal Code
<b>Ukraine</b> <sup>131</sup>	yes	Penal/Civil Code

<sup>124</sup> If a seizure order would originate from another authority than an authority that would qualify as a judicial authority, issues may rise as to the application of criminal seizure and confiscation

<sup>125</sup> CIAF could execute a request and provide assistance, related to the liability of legal entities, but only if there is a well explained and evident connection.

<sup>126</sup> In domestic law the legal basis for such execution is law that proscribes the possibility of criminal proceedings against legal persons.

<sup>127</sup> The Czech Republic can provide legal assistance only in criminal proceedings related to the liability of legal entities.

<sup>128</sup> In theory the answer is yes, nevertheless we never encountered such requests.

<sup>129</sup> It is possible only within the frameworks of the criminal procedure.

<sup>130</sup> Under Swedish law a confiscation order can be directed against a legal person if the legal person has derived financial advantages as a result of a crime committed in the course of its business.

<b>United Kingdom</b>	yes	Interpretation Act 1978
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<sup>131</sup> The possibility of holding legal entities liable for administrative offences is not provided for by the national legislation.

9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?

Table 9: Possibilities for co-operation as regards virtual currencies

State	assistance	Comment
<b>Albania</b>	no <sup>132</sup>	
<b>Andorra</b>	yes	All proceeds of crime
<b>Azerbaijan</b>	no	no
<b>Belgium</b>	yes	in principle
<b>Bulgaria</b>	no	
<b>Croatia</b>		no practice yet
<b>Cyprus</b>		no experience
<b>Czech Republic</b>	yes	First case in August 2015 <sup>133</sup>
<b>Finland</b>		unknown
<b>France</b>	yes	
<b>Georgia</b>	yes	
<b>Germany</b>	yes <sup>134</sup>	German law considers bitcoins to be objects which are subject to confiscation (section 73 (1), first sentence, StGB)
<b>Hungary</b>	yes	no experience
<b>Latvia</b>	yes	If we receive a legal assistance request with demand to impose the arrest.
<b>Netherlands</b>	yes	Case law from 2012
<b>Norway</b>	yes <sup>135</sup>	Criminal Procedure Act, chapter 16
<b>Portugal</b>	yes <sup>136</sup>	
<b>Romania</b>	yes	no experience
<b>Slovak Republic</b>	yes <sup>137</sup>	no experience
<b>Slovenia</b>	yes	
<b>Sweden</b>	yes	no experience
<b>Switzerland</b>		no experience
<b>Turkey</b>	yes	
<b>Ukraine</b> <sup>138</sup>	yes	

<sup>132</sup> Our domestic legislation has currently provisions for electronic trade, respectively Law no. 10128 dated 11. 5. 2009 but has no specifications or rule for the virtual currency of bitcoin type.

<sup>133</sup> The seizure was done according to Sections 79e of the Czech Criminal Procedural Code:

<sup>134</sup> The Federal Court of Justice has not yet issued a final-instance ruling on this issue; however, an appeal on points of law is currently pending before that court, which will clarify this question

<sup>135</sup> The National Criminal Investigation Service possesses the technical abilities to seize and confiscate virtual currencies in "virtual wallets" of suspects of crimes and possible third parties.

<sup>136</sup> We see no reason to create a different system for bitcoins. However, factors linked to the inflexibility of criminal procedures are all the more palpable in such cases.

<sup>137</sup> Theoretically we are able to seize virtual currency, but some sort of virtual purse should be created in future in order to enable transfer of virtual currency thereto.

<sup>138</sup> There is no statutory regulation of the procedures for circulation and use of "virtual currencies/crypto-currencies" in Ukraine. Legal assistance in proceedings regarding virtual currencies is possible when it involves conducting procedural actions in the territory of Ukraine unrelated to seizure or confiscation thereof.

<b>United Kingdom</b>	yes	order on the value of bitcoin. The UK can also restrain virtual currencies depending on the nature of how they are held
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10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.

Table 10: Possibilities for assistance in restitution to victims

State	assistance	Condition/legal basis
<b>Albania</b>	yes	Law 10193/2009, as amended
<b>Andorra</b>	yes	Exequatur request needed by victim/National Law,
<b>Azerbaijan</b>	yes	Art 99.3 CC
<b>Belgium</b>	yes	If victims are civil parties to the procedure
<b>Bulgaria</b>	yes	Chapter 7a of the Act on Forfeiture in Favour of The State of Illegally Acquired Property.
<b>Croatia</b>	yes	In national law, such procedure is part of civil proceedings, under condition that there is a criminal sentence.
<b>Cyprus</b>	no <sup>139</sup>	
<b>Czech Republic</b>	yes <sup>140</sup>	
<b>Finland</b>	no	
<b>France</b>	yes	Article 12 ETS No 182
<b>Georgia</b>	yes	On the basis of a court decision <sup>141</sup>
<b>Germany</b>	no answer	
<b>Hungary</b>	yes	
<b>Latvia</b> <sup>142</sup>		
<b>Netherlands</b>	yes <sup>143</sup>	treaty basis required
<b>Norway</b>	yes	national law
<b>Portugal</b>	yes	no difficulties/obstacles
<b>Romania</b>	yes	

<sup>139</sup> No method available other than through a confiscation decision

<sup>140</sup> Apart from a return of an item to a victim (an aggrieved person) as a legitimate owner, Czech Republic has a possibility to seize assets of an accused person for purposes to secure claims of aggrieved persons according to Sections 47 – 49 of the Czech Criminal Procedural Code. The damages is a civil claim, however a court can decide about it within the criminal proceedings in the Czech Republic – seizure is done according to Sections 47 – 49 of the Czech Criminal Procedural Code, however the decision of a court about damages that was done in criminal proceedings (according to sections 228 - 229 of the Czech Criminal Procedural Code) is executed subsequently according to provisions of civil law.

<sup>141</sup> According to the legislation of Georgia, the restitution to victims can be provided on the basis of the court decision. Respectively, if victims are not participants of domestic proceedings, Georgia will not be in a position to provide assistance, independently from a confiscation decision.

<sup>142</sup> It is possible only according to the procedures laid down by the Chapter 59 of the Criminal Procedure Law (see reply No.7). No unified praxis is established.

<sup>143</sup> See conditions in reply by the Netherlands.



<b>Slovak Republic</b>	yes	Section 550 Criminal Code
<b>Slovenia</b>	no answer	
<b>Sweden</b>	yes <sup>144</sup>	
<b>Switzerland</b>	yes	Illegal origin of funds
<b>Turkey</b>	no	New Turkish CC
<b>Ukraine</b>	yes	final and binding decision by a competent court of a foreign jurisdiction
<b>United Kingdom</b>	yes	Compensation order

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<sup>144</sup> A State or an individual, who is the victim of a crime, can initiate civil action in Swedish courts to establish title to or ownership of property acquired through the commission of the crime. A Swedish court can also order those who have committed a crime to pay compensation or damages to another State or individual that has been harmed by the crime. If it is specifically prescribed, foreign private law judgments or decisions can also be enforced in Sweden.

11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).

Table 11: Proposals

State	CoE instrument	Proposal
<b>Albania</b>		none
<b>Andorra</b>		none
<b>Azerbaijan</b>		none
<b>Belgium</b>	Unspecified. The main problem lies in the respective domestic legal framework that appear to impose too much formalities for the execution of foreign request, esp. for the seizure/confiscation of illegal proceeds <sup>145</sup>	1.update to more types of transnational seizure and confiscations 2. possibility to seize & confiscate (just) for the benefit of victims.
<b>Bulgaria</b>		none
<b>Croatia</b>		none
<b>Cyprus</b>		none
<b>Czech Republic</b>		The Council of Europe states should respect in greater extent the law of requesting states concerning authorities that are competent to decide about a seizure in pre-trial proceedings, as those competent authorities may differ according to the national law of the respective states.  Czech Republic proposes consideration of adopting at least general rules for asset sharing.
<b>Finland</b>		none
<b>France</b>	ETS No 141	The subject matter of offences is not expressly covered by the Convention of 8 November 1990 although it

<sup>145</sup> Main problems are:

1. The necessity in some systems to provide evidence of the predicate offence(s) having generated the illegal proceeds that were laundered, while in other states money laundering is an autonomous offence.
2. Confiscation is still a 'sentence', imposed by a judge or court. This means that the execution of confiscation orders or decisions remains a primary type of cooperation, i.e. cooperation that requires double criminality in concreto just like any request for the transfer of the execution of sentences. Another negative consequence is that non conviction based types of confiscation cannot be executed.

		<p>may be included within “other property liable to confiscation” and the Second Additional Protocol talks of articles obtained by criminal means.</p> <p>Similarly, no provision is made for extended confiscation despite the fact that some states have a national system which would make it possible to enforce these types of request for mutual assistance. States which did not wish to enforce such requests could make a declaration to that effect.</p>
<b>Georgia</b>		none
<b>Germany</b>		<p>a) Establishment of a database operated by and accessible through a central office, comprised of bank data that may be provided to another state upon request, as an essential step before submitting a request for disclosure of bank information and “freezing” of bank accounts.</p> <p>b) Getting more states to accede to and become involved in international networks for asset recovery (e.g. CARIN), expanding personal contacts.</p>
<b>Hungary</b>		<p>In practice all requests refer to the MLA Convention, also in cases where ETS no.141 and CETS no.198 could be referred to. Nevertheless in our point view these special instruments for international cooperation are very effective since they provide smoother procedural rules.</p>
<b>Latvia</b>		none
<b>Netherlands</b>		<p>. We would welcome it if the existing instruments could be extended with the option to search for assets, the imposing of seizures and the confiscation of objects especially for restitution to victims.</p>

<b>Norway</b>		It could be useful to have guidelines/model agreements on asset sharing. Or perhaps it should be considered to have a protocol on asset sharing? Such an instrument could e.g. regulate the sharing of the assets and the priority of liability for compensation for victims.
<b>Portugal</b>		There are no instruments providing a basis for co-operation with regard to NCBC. Without such an instrument Portugal will be unable to co-operate when the request is based on an NCBC.
<b>Romania</b>		none
<b>Slovak Republic</b>	ETS 198	Increased ratification, Co-operation of COP 198 with PC-OC to address international co-operation as regards seizure of bitcoins and other virtual currencies.
<b>Slovenia</b>		none
<b>Sweden</b>		none
<b>Switzerland</b>		Establish the principle of reciprocity in relation to restitution. Ideally, include in a binding instrument compulsory co-operation requirements in the field of seizure and confiscation of assets (a standard model for applications for mutual assistance common to States Parties with both common law and civil law systems, limiting the possibility of refusing to co-operate as much as possible).
<b>Turkey</b>		none
<b>Ukraine</b>		none
<b>United Kingdom</b>		none <sup>146</sup>

<sup>146</sup> See however UK's reply to question 1 : . It is imperative that there is a streamlined system (not necessarily MLA) for international cooperation to identify assets, for example, firstly the supply systems for goods and, secondly, trace the benefits. Law enforcement agencies wonder if a specific provision could be made relating to assistance in asset tracing.



## QUESTIONNAIRE

1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. asset sharing?

(Please specify)

2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

(Please specify)

3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

(Please specify)

4. Introduction

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

(Please specify)

5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.

Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

(Please specify)

6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

(Please specify)

7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.

Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.

9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?

10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.

11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).

1. Estimez-vous que la Convention européenne d'entraide judiciaire en matière pénale (STE n° 30) et ses protocoles additionnels sont des instruments adaptés à la coopération dans les domaines suivants :

- a. dépistage et saisie des produits du crime ?
- b. confiscation des produits du crime ?
- c. partage des avoirs ?

(Veuillez préciser)

2. En appliquant la Convention relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime (STE n° 141) comme base de la coopération, quelles sont les modalités d'application au sein de votre système national ? Avez-vous rencontré des difficultés juridiques ou pratiques ? Veuillez préciser votre réponse en ce qui concerne :

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?
- d. restitution des avoirs aux victimes ?
- e. le partage des avoirs ?

(Veuillez préciser)

3. En appliquant la Convention relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime et au financement du terrorisme (STCE n°198) comme base de la coopération, quelles sont les modalités d'application au sein de votre système national ? Avez-vous rencontré des difficultés juridiques ou pratiques ? Veuillez préciser votre réponse en ce qui concerne :

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?
- d. la restitution des avoirs aux victimes ?
- e. le partage des avoirs ?

(Veuillez préciser)

4. Introduction

Les Etats membres rencontrent souvent un problème dans la saisie et/ou le transfert de l'exécution de l'ordre de confiscation, ils ne sont pas toujours en mesure de s'assurer de l'exécution de la requête établie sur le système de confiscation fondé sur la « valeur ». Dans les deux conventions, ce système est décrit comme permettant une possible coopération à côté du système de confiscation fondé sur les « biens ». Dans les deux systèmes, une condamnation pénale est nécessaire. Dans le système de confiscation fondé sur la « valeur », les profits illicites sont estimés. A la fin, sur la base de ces estimations, le juge impose une obligation de payer une somme équivalente aux profits acquis par l'activité criminelle. L'ordre de confiscation peut ensuite être exécuté sur tous les avoirs appartenant à la personne condamnée. A cet égard, il n'est pas nécessaire de prouver que ces avoirs ont été directement obtenus par les actes délictueux.



Question : Les compétences mentionnées à la question 2 et 3 peuvent-elle être exercées dans le cas d'une requête établie sur le système de confiscation fondé sur la « valeur » ? Veuillez préciser votre réponse en ce qui concerne :

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?
- d. la restitution des avoirs aux victimes ?
- e. le partage des avoirs ?

(Veuillez préciser)

5. Plusieurs Etats membres reconnaissent la possibilité d'une saisie et d'une confiscation des avoirs qui appartiennent de facto à la personne accusée/condamnée mais qui légalement appartiennent à une tierce personne, la plupart du temps à des « hommes de paille ».

Avez-vous la possibilité d'exécuter une telle requête ? Si non, pour quelles raisons ? Si oui, sous quelles conditions ? Veuillez préciser votre réponse en ce qui concerne :

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?
- d. la restitution des avoirs aux victimes ?
- e. le partage des avoirs ?

(Veuillez préciser)

6. Votre Etat est-il en position de coopérer avec d'autres Etats sur la base de la réciprocité et en l'absence d'un traité dans les domaines suivants :

- a. dépistage et saisie des produits du crime ?
- b. confiscation des produits du crime ?
- c. restitution des avoirs aux victimes ?
- d. partage des avoirs ?

(Veuillez préciser)

7. Votre Etat est-il en position d'apporter une entraide judiciaire aux fins ou dans le cadre de mesures de confiscation ou autres non fondées sur une condamnation (par exemple une confiscation civile) ? Si oui, veuillez préciser les conditions et instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.

Pouvez-vous, en particulier, fournir l'information requise en ce qui concerne les étapes d'une procédure judiciaire non fondée sur une condamnation ? :

- a. l'étape de collecte de données, durant laquelle l'information pénale est souvent requise à des fins d'une procédure judiciaire non fondée sur une condamnation
- b. saisie des produits du crime ?
- c. confiscation des produits du crime ?
- d. gestions des avoirs saisis et confisqués ?
- e. restitution des avoirs aux victimes ?
- f. partage des avoirs ?

8. Votre Etat est-il en position d'apporter une assistance dans le cadre de procédures pénales, civiles ou administratives liées à la responsabilité des personnes morales aux fins de la saisie ou de la confiscation des produits du crime ? Si oui, veuillez préciser les conditions et instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.
9. Votre Etat est-il en position d'apporter une assistance dans le cadre de procédures liées à des monnaies virtuelles comme le « bitcoin », notamment en matière de saisie et de confiscation ?
10. Votre Etat est-il en position d'apporter une assistance, indépendamment d'une décision de confiscation, aux fins de restituer à la victime des avoirs obtenus par des moyens illicites ? Si oui, veuillez préciser les conditions et les instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.
11. Avez-vous des propositions à faire pour modifier et/ou faciliter l'application des instruments du Conseil de l'Europe dans le domaine de la coopération internationale en matière de dépistage, de saisie et de confiscation des produits du crime, y compris la gestion des biens saisis et confisqués et le partage des avoirs ? (Veuillez préciser votre proposition ainsi que le ou les instrument(s) concerné(s).)

## ALBANIA

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

**(Please specify)**

We deem the European Convention for Mutual Legal Assistance in Criminal Matters (STE n. 30) and its additional protocols as appropriate instruments for cooperation in the above fields. Convention and its additional protocols have general provisions on mutual legal assistance in criminal matters and submission of letters of request regarding the search, seizure/confiscation of proceeds of any criminal offences, may be based on this Convention/Protocol.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**(Please specify)**

No legal or practical difficulties are encountered for the implementation of Convention for Laundering, Seizure and Confiscation of Crime Proceeds and Financing of Terrorism (STE no. 198). Standard procedures are practically applied for the execution of a letter of request, specifically after the submission from the Ministry of Justice, the letter of request is sent to the General Prosecutor's Office which further transmits it to the Competent Judicial District Prosecutor's Office. A permissive court decision should be taken beforehand for the execution of a letter of request, which, in its permissive decision determines the authority to deal with the execution of actions requested from the foreign judicial authority.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**(Please specify)**

No legal or practical difficulties are encountered for the implementation of Convention on Laundering, Seizure and Confiscation of Crime Proceeds (STE no. 141). Standard procedures are practically followed for execution of a letter of request, specifically after the transmission by Ministry of Justice, the letter of request is sent to the General Prosecutor's Office which further sends it to the Competent Judicial District Prosecutor. As for the execution of a letter of request, the permissive court decision

should be taken in advance, which determines in the permissive decision the authority to deal with execution of actions requested from the foreign judicial authority.

We have observed that member states often encounter problems in terms of tracking and/or transfer of the enforcement of confiscation order. They are not always able to ensure the execution of the request drafted the "value" based confiscation system. In both conventions this system is described as potential cooperation along the "property" based confiscation system. In both systems the criminal sentence is necessary. Illegal profits are estimated in the "value" based confiscation system. Finally, based on these assessments, the judge imposes the obligation to pay an equivalent sum with benefits derived from the criminal activity. The confiscation order can be then enforced on all assets attributed to the inmate. For this purpose, it is not necessary to prove that those assets have directly derived from criminal offences.

#### **4. Introduction**

**A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.**

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for the victims?**
- e. asset sharing?**

**(Please specify)**

The requests grounded on the "value" based confiscation system, transmitted by foreign judicial authorities are normally accompanied by a judicial decision. According to our legislation, this judicial decision shall be recognized by the Albanian judicial authorities via an administrative-criminal process. The Albanian court recognizes the judgment when a number of conditions are met but without dealing with the merits. Although our domestic legislation has no specific provisions for the enforcement of such requests, this legislation also provides for that if the foreign judicial authority requests in the letter of request the fulfilment of special conditions regarding the form and procedure, the local judicial authority acts for its execution under these requests, provided that requests are not contrary to the fundamental principles of legal order of the Republic of Albania.

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for the victims?**
- e. asset sharing?**

**(Please specify)**

The enforcement of such requests is possible in the framework of Law no. 10192 dated 03. 12. 2009 "On prevention and fight against organized crime and trafficking through preventive measures against property", which provides for:

When it is proven that some properties are transferred or registered on behalf of the third parties by means of false or simulated juridical actions, the court reports the nullity of those legal acts. For this purpose, if not proven otherwise, false and simulated acts are also presumed: a) transfers and registrations on behalf of the third parties and with encumbrance title, conducted within two years prior to the submission of request for the adoption of preventive measure against relatives (spouse, children, predecessors, assignees, brothers, sisters, uncles, aunts, grandsons, granddaughters, children of brothers and sisters, mother in law, father in law, son in law, daughter in law, sister in law, brother in law, cohabitant, stepson, stepdaughter, stepmother, stepfather); b) transfers and registrations on behalf of the third parties and with free or clear title below the market value, carried out within two years prior to the submission of request for the adoption of preventive measure.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

**(Please specify)**

Yes, the Republic of Albania is in a position to cooperate with other states on the basis of reciprocity. This is expressly provided for in article 9 "Reciprocity" of Law no. 10 193/2009, as amended.

" Letter of request of the foreign judicial authority is accepted if it includes guarantees for reciprocity, data from the requesting state involving the expectation that this state executes a similar request sent by the local judicial authorities.

2. Notwithstanding the first paragraph of this article, the Ministry of Justice can transmit letters rogatory even in absence of express guarantees for reciprocity."

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

Albania is able to provide judicial assistance in the framework of confiscation measures and other related measures not based on a conviction in the framework of Law no. 10192 date 03. 12. 2009 "On prevention and fight against organized crime and trafficking through preventive measures against property", which provides for:

-Procedure for the definition and implementation of preventive measures according to this law, is independent in terms of the phase, degree or termination of criminal proceeding taken place against persons, subject to this law.

-Verifications, investigation and trial, according to this law, are based on the procedural rules of this law and are supplemented with rules set out in the Civil Procedure Code.

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**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Yes, the criminal liability of legal entities is regulated by article 45 of the Criminal Code and Law no. 9754 dated 14. 06. 2007 "On liability of legal entities". Further, the above mentioned Law 10192 provides for that provisions of this law apply to natural persons or legal entities for whom there are sufficient data that their properties or activities are possessed, fully or partly, directly or indirectly, are used, have facilitated or in a way have influenced unlawful activities by persons provided for in the first paragraph of this article.

Further, for the execution of requests of the foreign authorities, general rules of the mutual legal assistance in criminal matters shall apply.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

Our domestic legislation has currently provisions for electronic trade, respectively Law no. 10128 dated 11. 5. 2009 but has no specifications or rule for the virtual currency of bitcoin type.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Yes, our state is in a position to provide assistance as above and specifically it is provided for in Law 10193/2009, as amended:

1. The seized items shall be sent to the foreign judicial authority upon his request, for the execution of letter rogatory, to be confiscated or be returned to the lawful owner.
2. These items include:
  - a) Items used for the commission of a criminal offence;
  - b) Items deriving from the commission of a criminal offence or their equivalent value;
  - c) Profits from a criminal offence or their equivalent value;
  - ç) Other items provided for the purpose of instigation for commission of a criminal offence and remunerations for a criminal offence.
3. Items or profits can be permanently held in Albania, if:
  - a) their owner has the domicile or place of residence in the Republic of Albania;
  - b) has serious claims of the Albanian state authorities in relation to items or profits.
  - c) the person who has not participated in the commission of a criminal offence and whose claims are not guaranteed by the requesting state, proves that has acquired rights over these items and profits, in good faith, as well as the person domiciled in Albania.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

No

## ANDORRA (TRANSLATION)

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. asset sharing?

**(Please specify)**

As far as the Principality of Andorra is concerned, the answer is yes, but only as regards search and seizure of the proceeds of crime.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

**(Please specify)**

This convention does indeed apply in the area of search and seizure of the proceeds of crime and confiscation. However, it does not apply to the management and return of confiscated assets or to asset sharing.

Under Andorran legislation, particularly Article 39 of the Law on International Criminal Co-operation and Combating the Laundering of Money or the Proceeds of International Crime and the Financing of Terrorism (LCPI), confiscations will always be to the benefit of the Andorran State, except where an international convention or agreement provides otherwise.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

**(Please specify)**

Andorra has not signed this convention.

## 4. Introduction

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a

request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

a), b), c) and d) are possible. This is provided for expressly in Articles 70 of the Criminal Code, 116 of the Code of Criminal Procedure and 38 of the LCPI.

However, asset sharing is not possible in principle as, under Andorran national legislation, all confiscated assets must go to the Andorran state, except where an international convention or agreement provides otherwise.

Consequently, under Article 2 of the Agreement between the Government of Andorra and the Government of the United States of America regarding the sharing of confiscated proceeds and instrumentalities of crime (Andorran Official Gazette (BOPA) of 5 June 2013, <https://www.bopa.ad/bopa/025026/Pagines/7F0F2.aspx>). The aim of this agreement is to enable "all the parties to share any assets confiscated in connection with crimes".

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

As with the previous answer, a), b), c) and d) are possible and provided for in Article 70.3 of the Criminal Code, but there is no provision for asset sharing (see Article 39 LCPI), except under the Agreement between the Andorran and US Governments.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?



- c. returning the assets for the victims?
- d. asset sharing?

(Please specify)

Search, confiscation and return of assets are possible as they are provided for by national legislation (the LCPI), but asset sharing is not, except under the Agreement between the Andorran and US Governments.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

Andorra is not in a position to provide mutual legal assistance related to non-conviction-based measures.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

The answer is yes, because this is provided for in Andorran national legislation, specifically Article 71 of the Criminal Code.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

Yes, this would be possible as the concept of "proceeds of crime" is very broad in Andorra and can encompass virtual currency.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Yes. The remedy would be for the victim to apply to the Civil Division of the High Court of Andorra for it to issue an enforcement order rendering the confiscation order enforceable in Andorra (Article 19 of the Law on the Judiciary and Articles 47 to 51 of the Transitional Law on Judicial Procedures).

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

No.

**AUSTRIA**

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. **search and seizure of proceeds of crime?**  
*Yes.*
- b. **confiscation of proceeds of crime?**  
*No.*
- c. **asset sharing?**  
*No.*

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. **search and seizure of proceeds of crime?**
- b. **confiscation of proceeds of crime?**
- c. **management of seized and confiscated assets?**
- d. **returning the assets for victims?**
- e. **asset sharing?**

In principle problems do not arise from the application of the Convention, but relate to practical constraints. Major problems arise with regard to the management of seized and confiscated assets, if confiscated objects are subject to a rapid decline in value or their storage entails disproportionate costs. Sometimes requests for seizure cannot be complied with due to the fact, that money is swiftly transferred onwards.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. **search and seizure of proceeds of crime?**
- b. **confiscation of proceeds of crime?**
- c. **management of seized and confiscated assets?**
- d. **returning the assets for victims?**
- e. **asset sharing?**

Austria has not ratified the Convention CETS 198 yet.

**4. Introduction**

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

Value-based confiscation is foreseen under Austrian law, accordingly measures a-d can be complied with. However e) confiscated assets accrue to the State according to Section 64 para 7 of the Federal Law on Extradition and Mutual Legal Assistance.

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

Section 20a of the Penal Code provides:

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

*(2) Forfeiture is also excluded:*

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

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

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

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

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

Cooperation on the basis of reciprocity is possible with regard to measures a to c

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding**
- b. seizure of proceeds of crime?**
- c. confiscation of proceeds of crime?**
- d. management of seized and confiscated assets?**
- e. returning the assets for the victims?**
- f. asset sharing?**

A non-conviction based confiscation decision from foreign courts can be executed to the extent, that in a so-called independent procedure pursuant to Section 445 and 445a of the Code on Penal Procedure a respective confiscation order on forfeiture, extended forfeiture, redemption or any other offence-related property order could be issued under domestic law.

Independent procedures can be initiated if:

- i. it is evident that the suspect cannot be punished, but the court can decide on an offence-related property order;
- ii. the property order shall be issued against a third party, while no criminal proceedings can be conducted against the suspect.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

All investigation and coercive measures provided under the Austrian Code on Penal Procedure can also be applied in relation to legal entities, insofar as they are not tailor-made for natural persons.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

From a legal point of view, yes. However, so far no experience has been gained in this respect.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Pursuant to Section 367 of the Code on Penal Procedure all objects seized in criminal proceedings belonging to the victim have to be restituted as soon as the sentence has become final. The victim may also demand that restitution is provided from forfeited proceeds.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

Most problems relate to practical issues, therefore priority should be given to the exchange and discussion of practical cases and problems.

## AZERBAIJAN

1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. asset sharing?

(Please specify)

Since the European Convention on Mutual Legal Assistance in Criminal Matters and its Additional Protocols do not classify crimes and provide wide legal assistance, we believe that these abovementioned international instruments can be used as the reference point.

2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

(Please specify)

Article 3.10 (scope of application) of the Law of the Republic of Azerbaijan on Legal Assistance in Criminal Matters concerns the matters of determination of proceeds and property from crime, as well as the means used for commitment of crime.

3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:

- f. search and seizure of proceeds of crime?
- g. confiscation of proceeds of crime?
- h. management of seized and confiscated assets?
- i. returning the assets for victims?
- j. asset sharing?

(Please specify)

The Republic of Azerbaijan is not party to the Warsaw Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. However, internal procedures are being carried out in the Republic of Azerbaijan for the purpose of joining that document.

#### 4. Introduction

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a

request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- k. search and seizure of proceeds of crime?
- l. confiscation of proceeds of crime?
- m. management of seized and confiscated assets?
- n. returning the assets for the victims?
- o. asset sharing?

**(Please specify)**

Article 99-1 of the Criminal Code of the Republic of Azerbaijan envisages special confiscation:

*99-1.1. Criminal-legal measure in a form of special confiscation represents the enforced and uncompensated taking of following property in favor of the government:*

*99-1.1.1. instruments and means used by convicted person for committing a crime (excluding instruments and mean that should be returned to the legal owner);*

*99-1.1.2. funds or other property obtained by convicted person in a criminal way, as well as incomes received on the account of these funds or other property (with the exception of monetary funds or other property and the profits received from them, which shall be returned to the legal owner);*

*99-1.1.3. other property or its respective part, into which, by the conclusion of civil-legal transactions or otherwise fully or partially were converted illegally obtained funds or other property;*

*99-1.1.4. the property stipulated or used for financing of terrorism, armed formations or groups not stipulated by the legislation , organized groups or criminal communities (criminal organizations);*

*99-1.2. The court decides the issue of the availability or absence of property which is subject to confiscation, stipulated by article 99-1 .1 of the present Code, regarding each criminal case. Special confiscation May, be applied to both physical and legal persons.*

*99-1.3. Property stipulated under the article 99-1 .1 of the present Code, that had been alienated or transferred in any manner to other persons from the side of convicted person, to be confiscated in case, if the person who acquired this property, knew or should have known about obtaining of property by illegal means and accepted it.*

*Article 99-2. Confiscation on the cost of the property*

If the property subject to confiscation stipulated for by the Articles 99-1.1.2-99-1.1.4 of the Code cannot be confiscated in the state's favor because of its use, disposal or other reasons, then the other property owned by the convict in an amount of the value of this property is confiscated.

5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.

Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:

- f. Search and seizure of proceeds of crime?
- g. confiscation of proceeds of crime?
- h. management of seized and confiscated assets?
- i. returning the assets for the victims?
- j. asset sharing?

(Please specify)

The relevant issue is envisaged in Article 99-1.3 of the Criminal Code of the Republic of Azerbaijan.

*99-1.3. Property stipulated under the article 99-1 .1 of the present Code, that had been alienated or transferred in any manner to other persons from the side of convicted person, to be confiscated in case, if the person who acquired this property, knew or should have known about obtaining of property by illegal means and accepted it.*

6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:

- e. search and seizure of proceeds of crime?
- f. confiscation of proceeds of crime?
- g. returning the assets for the victims?
- h. asset sharing?

(Please specify)

Requests for legal assistance are not declined based on the absence of a bilateral or multilateral agreement between the Requesting Party and the Republic of Azerbaijan. Thus, in accordance with Article 2.2 of the Law of the Republic of Azerbaijan "on Mutual Legal Assistance in Criminal Matters", in case of absence of a relevant agreement between Azerbaijan and the requesting foreign state the provisions of this Law are applied. Also, Article 3.10 (scope of application) of the Law stipulates the issues of determination of proceeds and property from crime, as well as the means used for commitment of crime.

7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.

Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

N/A

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

In accordance with Article 99-1.2 of the Criminal Code of the Republic of Azerbaijan the court decides the issue of the availability or absence of property which is subject to confiscation, stipulated by article 99-1 .1 of the present Code, regarding each criminal case. Special confiscation may be applied to both physical and legal persons.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

N/A

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

These rules and procedures are stipulated in Article 99-3 of the Criminal Code of the Republic of Azerbaijan.

*99-3.1. In deciding the confiscation issue harm caused by the offense to the rightful owner of the property has to be repaid first of all.*

*99-3.2. If a person that committed a crime has no other assets to secure repayment of harm other than the confiscated property, the harm caused to the rightful owner of the property as a result of the crime has to be repaid at the expense of the confiscated property, and then the rest of the property is excepted in the state's favor.*



## BELGIUM

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

**a. search and seizure of proceeds of crime?**

No

**b. confiscation of proceeds of crime?**

No

**c. asset sharing?**

No

(Please specify)

ETS n° 30 – and both Additional Protocols - is a 'traditional' MLA-instrument that applies only to the 'seizure' and the transmission of evidence. As such only the object(s) of crime are targeted and not the proceeds of crime. In my view the Convention perfectly allows to request and to obtain evidence about, e.g. the location of proceeds, but not the seizure or the confiscation of those proceeds.

As to the request for evidence that may be used to locate proceeds, such as bank accounts, there is of course a (potential) overlap with the 'search' (of proceeds) portion of ETS n° 141, since that specific instrument is wholly dedicated to proceeds of crime and covers all aspects of – chronologically – the location (search), the (provisional) seizure or freezing, the execution, i.e. the confiscation or forfeiture and finally the eventual sharing of the confiscated assets or proceeds of crime.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

**a. search and seizure of proceeds of crime?**

**b. confiscation of proceeds of crime?**

**c. management of seized and confiscated assets?**

**d. returning the assets for victims?**

**e. asset sharing?**

In all, ETS n° 141 or any other (UN) instrument dedicated or containing provisions to search, seize, confiscate and share proceeds of crime are much less used than 'evidence' related instruments. The proceeds approach of the fight against crime, including even terrorism offences, is largely underdeveloped and, I am afraid, even victim of a certain level of lack of interest. To some extent, the inherent complexity of this portion of the fight against serious and organised crime and terrorism is both unsettling and discouraging. Arresting a (fugitive) suspect or wiretapping his or her telephone conversations is indeed much easier than finding, seizing and confiscating his or her criminal assets. Money moves faster than people or a smoking gun and it is much easier to hide behind legal constructions that are incomprehensible to any layman, i.e. to anyone who is not a very highly specialized lawyer or banker.

The classic MLA-approach that is the very foundation of ETS n° 141 is hardly fit for today's needs for cooperation in the field of finding, seizing and confiscating criminal proceeds. By the time the request is written, the money to be searched or seized is gone.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

**(Please specify)**

CETS n° 198 is rarely used since CETS N° 141 provides for a sufficient basis for the search, seizure, confiscation (end possibly the sharing) of proceeds of crime, regardless of the alleged proven origin of the proceeds.

#### **4. Introduction**

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

Value based confiscation is one of the types of confiscation that is provided for by Belgian criminal law. Consequently, Belgium is capable to search, seize and confiscate illegal proceeds on a value-basis, conversely, such requests are made to other States.

**5. Several member States recognize the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?

- d. **returning the assets for the victims?**
- e. **asset sharing?**

Insofar the straw-man is properly identified, specified and linked to the money laundering process / the individuals behind the laundering construction(s), assets can be searched (usually the identification of fronts is part of the search for the proceeds that are linked to the suspects that generated the proceeds and had them laundered via other individuals).

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. **search and seizure of proceeds of crime?**
- b. **confiscation of proceeds of crime?**
- c. **returning the assets for the victims?**
- d. **asset sharing?**

**(Please specify)**

Apart from search of proceeds – which can be requested or conversely performed under the more general MLA umbrella, the seizure, confiscation and the sharing of assets requires a treaty basis. Under ‘Treaty basis’, also a subsidiary basis must be understood such as UNTOC.

Returning assets to victims can be an entirely different type of cooperation: under MLA it is perfectly possible to return e.g. the stolen television sets. These are primarily the object of the offence, i.e. (aggravated) theft and to a second degree also assets. The same goes for the money that was defrauded from the victims, although one may qualify the money rather as criminal proceeds that just the mere object of the offence (fraud), even more so since fraud cases tend to comprise money laundering as well: the defrauded money is usually transferred through various bank accounts and (shell) companies as well.

Even though seizure or confiscation – solely – for the benefit of the victims is hardly mentioned in the available instruments, including those dedicated to traditional MLA, in practise methods were found to effectively compensate the victims. In some cases a civil forfeiture was applied to allow a certain return of money to compensate the victim.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Belgian still only provides for confiscation as a penalty, i.e. a pecuniary sanction that is imposed by the criminal court convicting and sentencing the persons (also legal persons) for the offences they have committed. NCB is, for the time being, non-existent in Belgian law.

EU-instruments however may well offer a solution by recognizing the judicial measure that qualifies as NCB in accordance with the law of the ‘emitting’ MS. Since mutual recognition overcomes (or rather tries to ignore) the differences between the MS systems, the mere legal fact that a judicial authority decided to confiscate proceeds without a preceding criminal conviction, and then issues a confiscation certificate on the basis of the NCB order, requires the executing MS to entertain the certificate if all conditions are fulfilled and no ground for refusal applies. France recently did execute an Italian confiscation certificate, although the Italian confiscation order was essentially and NCB confiscation order on the basis of specific anti-mafia legislation that allows proceeds of alleged mafia members to be confiscated. In this case, the asset was a villa located in the better parts of the south of France.

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

MLA allows to provide any evidence on assets located in Belgium, the fact that those assets are or would be subjected to a foreign NCB confiscation, is irrelevant.

The seizure stage is in my also not problematic, since seizure is a provisional measure and has as such no effect on the future type of confiscation procedure.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Legal persons are criminally liable under Belgian criminal law, consequently legal persons can be subjected to sanctions such as confiscation and the preceding seizure of proceeds etc.

However, criminal liability of legal persons remains a matter for the judiciary. If a seizure order would originate from another authority than an authority that would qualify as a judicial authority, issues may rise as to the application of criminal seizure and confiscation.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

There should be no legal exclusion of 'virtual seizure & confiscation. More information to follow after consulting our cybercrime specialist.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Victims can be civil parties to any criminal procedure, both during the pre-trial and the trial stages. This specific legal position allows victims to be a party to the criminal proceedings, which also implies a reinforced position in terms of being allocated moral and material compensations, as such it is possible to divert part of shared confiscated assets (abroad) for the benefit of the victims.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

The instruments in the field are as such still relevant although an update to more types of transnational seizure and confiscations are lacking. Also the current instruments do not contain a possibility to seize & confiscate (just) for the benefit of victims.

The main problem lies in the respective domestic legal framework than appear to impose too much formalities for the execution of foreign request, esp. for the seizure of illegal proceeds and esp. the confiscation of illegal proceeds.

Main problems are:

1. The necessity in some systems to provide evidence of the *predicate offence(s)* having generated the illegal proceeds that were laundered, while in other states money laundering is an autonomous offence.
2. Confiscation is still a 'sentence', imposed by a judge or court. This means that the execution of confiscation orders or decisions remains a primary type of cooperation, i.e. cooperation that requires double criminality *in concreto* just like any request for the transfer of the execution of sentences. Another negative consequence is that non conviction based types of confiscation cannot be executed.

**BULGARIA**

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

The European Convention on Mutual Assistance in Criminal Matters and its additional protocols concern specific forms of mutual assistance therefore they are not suited to give rise and to serve as basis for any of the fields cited above.

Nevertheless the Convention and the protocols are instruments suited very well to serve the demands of the judicial authorities and could be successfully used in cases that could give rise to search and seizure of proceeds of crime or/and confiscation of such assets.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

The CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime is in force for the Republic of Bulgaria and its national legislation is in conformity with the requirements of the Convention. Therefore it is possible to co-operate in any of the fields above. It should be noted that in cases of asset sharing and asset return an agreement is necessary between the Requesting and the Requested party, otherwise the national legislation applies.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism is in force for the Republic of Bulgaria and its national legislation is in conformity with the requirements of the Convention. Therefore it is possible to co-operate in any of the fields above. It should be noted that in cases of asset sharing and asset return it is necessary an agreement between the Requesting and the Requested party to be made, otherwise our national legislation applies.

**4. Introduction**

**A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in**

both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question:** Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:

- f. search and seizure of proceeds of crime?
- g. confiscation of proceeds of crime?
- h. management of seized and confiscated assets?
- i. returning the assets for the victims?
- j. asset sharing?

There is no value – based confiscation equivalent in Bulgaria – ACT ON DEPRIVATION IN FAVOUR OF THE STATE OF ILLEGALLY ACQUIRED PROPERTY (suppl. SG. 22/24 Mar 2015):

*Section III.  
Subject of Deprivation*

*Art. 62. Under this act illegally acquired property shall be deprived of in favour of the state.*

*Art. 63. (1) Where it is not possible a differentiated property under Art. 62 to be deprived of, its money equivalence, calculated at market price at the moment the deprivation claim is made, shall be deprived.*

*(2) The property under Art. 62 shall include:*

- 1. the personal property of the checked person;*
- 2. the property, acquired generally by the two spouses or by the persons in factual cohabitation;*
- 3. the property of children, who have not reached full age, and*
- 4. the property of the spouse of the checked person, notwithstanding of the chosen regime of property relations between the spouses;*
- 5. the property of the person, with which the checked person is in factual cohabitation.*

*Art. 64. The deals, realized with illegally acquired property shall be invalid in relation to the state and shall be subject to deprivation, where they are:*

- 1. free deals with natural or legal persons;*
- 2. paid deals with third persons, if they have known or could suppose that the property has been illegally acquired or they have acquired the property in view to covering its illegal origin or the real rights, related to it.*

*Art. 65. Subject to deprivation shall be also the illegally acquired property, which the person has transferred during the checked period to a spouse, to a person, with whom he/she is in factual cohabitation, to a former spouse, to relatives on direct line with not restriction of the grades, to relatives on indirect line – to fourth grade including and to in-laws – to second grade including.*

*Art. 66. (1) Subject to deprivation shall be property, which the checked person has transferred or has contributed as non-money or money deposit to the capital of a legal person, if the persons, who manage or control the legal person have known or from the circumstances may suppose that the property has been illegally acquired*

*(2) Subject to deprivation shall also be illegally acquired property from a legal person, who is controlled by the checked persons or the related with him/her persons independently or jointly.*

*(3) The property shall be deprived of also if the legal person is assignee.*

*Art. 67. Subject to deprivation shall also be property, which has been acquired by a third person on the account of the checked person, in order to avoid deprivation or to hide its origin or the real rights over it.*

*Art. 68. Until proving the opposite, for movable items and money means of the checked person shall be considered those, found with him/her, in his/her house or in other own or hired premises, vehicles, cash boxes or safes.*

*Art. 69. (1) The illegally acquired property shall be evaluated on its real value at the moment of its acquiring or expropriation.*

*(2) If it is found that the price, indicated in the document for ownership is not the real negotiated price or in the property document there is no price, the property shall be evaluated at the moment of its acquiring or expropriation, as follows:*

- 1. the immovable property and the limited property rights over them – on market value,*
- 2. the foreign currency and ores and white metals – on the central rate of the BNB;*
- 3. securities – on the market value;*
- 4. the vehicles – on the market value;*
- 5. the remaining movable items and rights – on the market value;*
- 6. undertakings or share participation in trade companies or cooperation – on the market value, and where it cannot be defined – on accountancy data.*

*Art. 70. In the cases, where the illegally acquired property has been partially or totally reformed in other property, subject to deprivation shall be the reformed property.*

*Art. 71. Illegally acquired property shall be deprived of also from inheritors or successors to the amount, received by them.*

*Art. 72. In case that the property is not available or has been expropriated, its money equivalence shall be deprived of.*

*Art. 73. (declared unconstitutional in its part "15- year prescription" CCD No 13/2012 – SG 82/12) (1) (amend. – SG 103/12) The state rights under this act shall be paid with the expiry of 10-year prescription.*

*(2) The prescription starts to run from the date of acquiring the property.*

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for the victims?**
- e. asset sharing?**

The competent Bulgarian Authority - CIAF could execute a request, concerning "Straw man", but only if there is a well explained and evident connection between the convicted person and the Straw man. The Commission is entitled to act against third persons but only if they knew or it was impossible not to know that the property which they have acquired has an illegal origin. It is foreseen that property that has been transferred to relatives or third persons can also be subject of forfeiture. Those persons shall have the possibility to prove at court that they didn't know about the illicit origin of the acquired property.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**



- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

There is a possibility for Bulgaria to co-operate with other States on the basis of reciprocity. Such requests should be addressed to the Ministry of Justice as it is within the powers of the Minister of Justice to declare reciprocity with another State. It should be noted that the declaration is issued on a case by case basis.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

Mutual legal assistance (MLA) is within the powers of the Prosecutor's Office. Following the receipt through the Prosecutor's Office of a request concerning seizure/confiscation procedures the Commission may provide the requested information regarding all the phases of the Non Conviction Based (NCB) proceedings. There is no difference if it concerns criminal or civil confiscation.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

CIAF could execute a request and provide assistance, related to the liability of legal entities, but only if there is a well explained and evident connection.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

Bulgarian authorities cannot provide assistance in relation to seizure/confiscation of virtual currencies.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

The possibility to compensate the victims of crime is established in Chapter 7a of the Act on Forfeiture in Favour of The State of Illegally Acquired Property. The law provides that up to the cost of the property, deprived by an enforced decision, the state shall enter into and shall pay the acknowledged in a court procedure monetary liabilities to the victims of the offence, covered by the list of offences to which the law applies.

Such compensation is possible if an international treaty to which Bulgaria is party provides for as well as on the basis of reciprocity (on a case by case basis).

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

We consider the instruments cited above to form a very good base for cooperation in the field of search, seizure and confiscation of proceeds of crime.

## CROATIA

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

Request for mutual legal assistance submitted according to the provisions of stated Convention, will be executed with regard to the search and seizure and confiscation of proceeds of crime. With respect to the asset sharing, we find that MLA 1959 Convention has wide provisions and leaves enough space for applying domestic law also.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141)**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

Republic of Croatia will apply provisions of stated Convention in all above stated cases. With regard to the management of seized and confiscated assets, returning the assets for victims and assets sharing, we find that Convention leaves opportunity for applying domestic provisions and mutual agreement between parties.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

In our experience, some difficulties can accrue in respect of non-conviction based confiscation in civil procedures, since our domestic law does not have provisions that could cover such situations. Also, speaking of management, there were cases where the issue of expenses arises. Those expenses can be very high, and Requesting state in some cases had stated its opinion, that it is not obliged to cover those expenses.

#### **4. Introduction**

**A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.**

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

In all above stated cases, in relation to the value-based confiscation system, the request for such measures can be submitted.

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

There is a provision in our domestic law that allows such confiscation, if it is a matter of criminal offence of corruption and organized crime. The condition is that there is certain degree of probability that asset that is requested to be searched or confiscated, derives from crime.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

We are in a possibility to cooperate in all stated, with a condition that executing such request would not be contrary to the public order, that a person had a possibility to participate in the proceedings that led to this decision and under the condition of reciprocity.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Based on domestic law, the Republic of Croatia is in a possibility to execute such request if it is part of criminal procedure. The condition is, an issued order for such confiscation, issued by the competent judicial authority of an Requesting state. That condition is in accordance with our declaration declared on the Convention on Mutual Legal Assistance in Criminal Matters.

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?

- e. returning the assets for the victims?
- f. asset sharing?

Our law makes a difference not with regard to the stage of a proceedings, but to the purpose of collected evidence (whether it is collected as an information or as evidence to be used in criminal proceedings). In the information gathering phase, we prefer communication between police authorities.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

It is. In domestic law the legal basis for such execution is law that proscribes the possibility of criminal proceedings against legal persons.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

There is no practice yet.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

In domestic law, such procedure is a part of civil proceedings, but a condition for such proceedings is an existence of a criminal sentence.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).** No.

**CYPRUS**

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

**(Please specify)**

The European Convention on Mutual Assistance in Criminal Matters may be used for (a), that is, the search and seizure of property, as provided for in Article 5 of the Convention.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**(Please specify)**

The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime as the basis for co-operation, provides the possibility for the search and seizure of proceeds of crime and the confiscation of proceeds of crime. Assets sharing is also possible following the provisions of Article 15 of the Convention and the relevant domestic legislation which is the Prevention and Suppression of Money Laundering Laws of 2007-2014, as well as the management of seized and confiscated assets.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**(Please specify)**

When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, measures can be taken regarding the search and seizure of proceeds of crime, the confiscation of proceeds of crime, the Management of frozen or confiscated assets, according to the provisions of the national domestic legislation. Asset sharing is also possible, based on the provisions of national domestic legislation and returning the assets to victims is possible as a matter of practice on a case by case basis.

From our experience, a problematic area in the application of both AML Conventions following a request for freezing/seizure of assets, is feedback. Provisional measures are taken upon the request of another State party to secure assets for the purposes of future confiscation and as a result provisional freezing measures are taken in the requested state. However in many instances considerable time elapses without any information to be provided by the requesting state as to the stage of the case. As a result, assets may remain frozen for years without any substantial progress or information. This practice poses a great problem and places the executing state in a risk to be held liable for damages.

#### **4. Introduction**

**A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.**

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

We do not face any problems in implementing a request grounded on the value-based confiscation system because we also follow a value-based confiscation system and the competences mentioned in question 2 and 3 can be exercised in such a case.

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

Third parties' assets can be subject to freezing and may be affected by confiscation measures e.g. receivers of unlawful gifts.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

(Please specify)

Cyprus is in a position to cooperate with other States on the basis of reciprocity and in the absence of a treaty. Specifically, with regards to points (a) to (d) we never had such experience.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

Some limited assistance may be possible regarding the use of evidential material, gathered following the execution of a Mutual Legal Assistance Request, using as a basis paragraph (5) of Article 23 of the Convention of 2005, but not as far as seizure or confiscation measures are concerned.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Legal entities are also covered under the domestic AML/CFT Legislation in the same way as the natural persons are covered.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

We have had no experience until now in relation to virtual currencies and the possible implementation of the existing legislation in this area.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

No method available other than through a confiscation decision.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**



## CZECH REPUBLIC

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

The Czech Republic uses the Convention with additional protocols for many years without particular problems. According to Art 3 of the Convention the requested Party shall execute any letters rogatory relating to a criminal matter in the manner provided for by its law. The national law of the Czech Republic contains provisions concerning search and seizure of proceeds of crime and their confiscation and asset sharing.

If it is a requirement of requested state, our authority (a prosecutor in a pre-trial proceedings or a court) can issue a decision about a seizure even if it shall be executed on the territory of the requested state.

The problem that Czech Republic authorities has met vis-a-vis some Council of Europe states is that they refuse to execute Czech requests without a decision of the Czech court. However, courts have no competence to decide about a seizure in pre-trial proceedings. Courts are authorised to decide about a complaint of a person against a prosecutor's decision about seizure.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**If there is evidence that the particular property is proceeds of crime, there are usually no problems with a seizure and confiscation. The problems that occasionally occur are related to:**

- the fact that states have different provisions concerning so called extended confiscation,
- assets that was found cannot be sometimes return to victims because there are bona fide parties,
- there are no specific rules for asset sharing within the Council of Europe – Czech Republic practical experience is very limited in this area. We had only cases of asset sharing with the EU Member states based on the EU legislation and with the USA based on the bilateral treaty.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

The Convention has not been ratified by the Czech Republic yet.

#### 4. Introduction

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

Czech Republic can comply with the request in a framework of the Czech criminal law. There is a possibility of confiscation of Equivalent Value (according to Section 71 of the Czech Criminal Code):

##### *Section 71*

- (1) *If an offender, to whom a thing or other asset value that could be confiscated according to Section 70 Sub-section (1) or (2), destroys, damages or otherwise disvalues, alienates, renders useless, removes or utilizes, particularly consumes or otherwise circumvents confiscation of such thing or other asset value, or if he/she obstructs the execution of punishment of forfeiture of a thing or other asset value prior the court could decide on confiscation, the court may decide confiscation of equivalent value up to a value not exceeding the value of such thing or other asset value. The value of a thing or other asset value, whose confiscation may be ordered by a court, shall be determined upon a professional statement or expert opinion.*
- (2) *If the thing or other asset value is, even in part, destroyed, damaged or otherwise disvalued or removed, the court may impose confiscation of equivalent value along with confiscation of other asset value as specified in Section 70 (1).*
- (3) *The confiscated equivalent value shall devolve on the state.*

As far as a seizure of equivalent value, we can use Section 79f of the Czech Criminal Procedural Code:

##### *Section 79f*

*If it is not possible to achieve the surrender or removal of property (Section 78 and 79), or if it is not possible to seize financial means in an account (Section 79a and 79b), booked securities (Section 79c), real estate (Section 79d) or other asset values (Section 79e) that are intended for committing a criminal offence or that have been used to commit a criminal offence, or that are proceeds of a criminal activity, an equivalent value corresponding to their value, even partially, may be seized in their stead; therein will be proceeded according to the relevant provisions regulating their surrender, removal or seizure (Section 78 through 79e).*

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. **Search and seizure of proceeds of crime?**
- b. **confiscation of proceeds of crime?**
- c. **management of seized and confiscated assets?**
- d. **returning the assets for the victims?**
- e. **asset sharing?**

Anyone, who possesses proceeds of crime, has an obligation to render it to authorities active in criminal proceedings (police, a prosecutor, a court).

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. **search and seizure of proceeds of crime?**
- b. **confiscation of proceeds of crime?**
- c. **returning the assets for the victims?**
- d. **asset sharing?**

The Czech Republic can co-operate with other States on the basis of reciprocity in all of the above mentioned options of cooperation.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. **the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding**
- b. **seizure of proceeds of crime?**
- c. **confiscation of proceeds of crime?**
- d. **management of seized and confiscated assets?**
- e. **returning the assets for the victims?**
- f. **asset sharing?**

The Czech Republic cannot provide legal assistance for purposes of civil forfeiture since there is no legal framework for such a confiscation. The Czech Republic applies only NCB in the framework of criminal proceedings according to Sections 101 and 102 of the Czech Criminal Code:

Section 101 Forfeiture of a Thing or Other Property Value

(1) Unless a sentence of confiscation of a thing or other asset value under Section 70 (1) is imposed, the court may order that such thing or other asset value shall be seized,

- a) if it belongs to an offender who cannot be prosecuted or sentenced,
- b) if it belongs to an offender whose punishment has been waived by the court, or
- c) if it endangers safety of persons or property, eventually safety of society, or if there is a threat that it shall be used to commit a crime.

(2) If conditions under Sub-section (1) are not met, the court may impose seizure of a thing or other asset value only if it is, even indirectly, proceeds of crime, especially if

- a) the thing or other asset value was obtained through criminal act or as a reward for such an act and it does not belong to the offender;
- b) the thing or other property value was acquired, even partially, by a person other than the offender for other thing or asset value that was obtained through criminal act or as a reward for such an act, if the value of the thing or other asset value acquired through such a criminal act or as a reward for such an act is not insignificant in relation to the value of the acquired thing or other asset value; or
- c) the thing or other asset value was acquired, even partially, by a person other than the offender for other thing or asset value which the offender, even partially, acquired for a thing or other asset value that was obtained through a criminal act or as a reward for such act, if the value of the thing or other asset value

obtained through such a criminal act or as a reward for such an act is not insignificant in relation to the value of the acquired thing or other asset value.

(3) If the offender or other person unlawfully or contrary to another legal regulation possesses a thing or other asset value referred to in Sub-section (1) or (3), in relation to which is possible to impose forfeiture of a thing or other asset value, the court shall always impose this protective measure.

(4) Instead of imposing forfeiture of a thing or other asset value, the court may impose an obligation

a) to modify the thing or other asset value in such a way to it could not be used for a purpose dangerous to society;

b) to remove a certain devise;

c) to remove a marking or make alterations to it; or

d) to restrict disposition with such thing or other asset value;

and determine a reasonable time therefor.

(5) If the obligation referred to in Sub-section (4) is not fulfilled within the stated time, the court shall decide on forfeiture of the thing or other asset value. 47

#### Section 102 Forfeiture of Substitute Value

If a person, to whom a thing or other property value that could be forfeited according to Section 101 (1) or (2) belongs, prior to ordering the forfeiture, destroys, damages or otherwise disvalues, alienates, renders unusable, removes or utilizes, partially consumes or otherwise circumvents forfeiture of such a thing or other asset value, or if he/she obstructs the execution of the sentence of forfeiture of a thing or other asset value by conduct contrary to the prohibition imposed under Section 70 (4), eventually if he/she obstructs forfeiture of a thing or other asset value by conduct contrary to the prohibition imposed under Section 104 (2), the court may order forfeiture of a substitute value up to a value not exceeding the value of such thing or other asset value. The value of a thing or other asset value, forfeiture of which may be ordered by court shall be determined by an elaborate professional opinion or by an expert opinion.

#### **8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

The Czech Republic can provide legal assistance only in criminal proceedings related to the liability of legal entities. The assistance cannot be provided for civil and administrative proceedings related to the liability of legal entities.

#### **9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

There is a possibility to seize and confiscate bitcoins and other virtual currencies. Czech Republic had the first case in practice in August 2015. The seizure was done according to Sections 79e of the Czech Criminal Procedural Code:

#### Section 79e Seizure of Other Asset Values

(1) If the ascertained facts indicate that assets values other than those referred to in Sections 78 to 79d are intended for committing a criminal offence, or that they were used for committing a criminal offence, or are the proceeds of a criminal activity, the presiding judge and in pre-trial proceedings the public prosecutor or the Police authority may decide to seize such other asset values. The Police authority needs to have a previous consent of the public prosecutor for issuing such a decision. The previous consent of the public prosecutor is not necessary in urgent matters that cannot be delayed. In such a case, the Police authority is obligated to present its decision within 48 hours to the public prosecutor, who will either grant it or repeal it. A complaint is admissible against the decision to seize other asset values.

(2) The resolution on seizure of other asset values prohibits their owner from disposing with the asset values referred to in the resolution, and from transferring the asset values to another or mortgaging them after the resolution is issued. The resolution on seizure of other asset values may also restrict further exercise of rights related to the seized asset values, if it is necessary for the purposes of the seizure. In addition, the owner of other asset values will be obliged to advise the presiding judge and in pre-trial proceedings the public

prosecutor, but who has the right of first refusal or any other rights to the asset value within 15 days from the announcement of the resolution, with the instruction that otherwise the owner of the asset value will be liable for any damage caused. The resolution on seizure of other asset values will bid their owner to present all documents necessary to exercise certain rights to the seized asset values, with a caution about the consequences of failing to comply with such a bidding within the prescribed time limit (Section 66 and 79). These documents will be listed and deposited in the custody of the court.

(3) The authority involved in criminal proceedings that decided on the seizure according to sub-section (1) will also notify the debtors of the owner of the other asset value and instruct them to place the performance of the debt into the custody of the court or to a place designated by the authority involved in criminal proceedings referred to in sub-section (1), instead of performing to the owner of the other asset value. Upon deposition of the performance of the debt into the custody of the court or to a designated place, the debtor has fulfilled his obligation to the extent of the provided performance. The debtor will be notified about the resolution to seize other asset value prior to its owner.

(4) The authority involved in criminal proceedings that decided on the seizure in accordance with sub-section (1) will immediately inform the authority, which pursuant to a special legal regulation keeps records of owners or holders of the other asset values that were seized, and the local office of the Office for representation of the State in property affairs, in the district of which has the owner of the other asset value his permanent or other residence, about this decision without undue delay; if the owner of the other asset value has his residence abroad, they will notify the local office of the Office for representation of the State in property affairs, in the district of which are the other asset values located. At the same time, the competent authority involved in criminal proceedings will bid these authorities to immediately inform it if they find that the other asset values are being disposed with in a way that threatens to thwart or obstruct the purpose of the seizure.

(5) If transfer or establishing of rights to the seized other asset value require an entry in a register maintained pursuant to a special legal regulation, such entry may, after the notification according to sub-section (4), be performed only with a previous consent of the authority that decided on the seizure according to sub-section (1). The other asset value subject to the decision on seizure may be disposed with within the frame of enforcement of decision only after a previous consent of the presiding judge and in the pre-trial proceeding of the public prosecutor; this does not apply if the enforcement is performed in order to satisfy a claim of the State.

(6) Rights of third parties to seized other asset values may be exercised according to a special legal regulation.

(7) Repeal or restriction of seizure of other asset values will be governed by Section 79d (7) and (8).

(8) The procedure on administration of seized other asset values will be governed by a special legal regulation.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Apart from a return of an item to a victim (an aggrieved person) as a legitimate owner, Czech Republic has a possibility to seize assets of an accused person for purposes to secure claims of aggrieved persons according to Sections 47 – 49 of the Czech Criminal Procedural Code. The damages is a civil claim, however a court can decide about it within the criminal proceedings in the Czech Republic – seizure is done according to Sections 47 – 49 of the Czech Criminal Procedural Code, however the decision of a court about damages that was done in criminal proceedings (according to sections 228 - 229 of the Czech Criminal Procedural Code) is executed subsequently according to provisions of civil law.

Securing Claims of Aggrieved Persons  
Section 47

(1) If there is a reasonable concern that satisfaction of the claim of the aggrieved person for compensation of the damage or non-material harm caused by a criminal offence, or for surrender of unjust enrichment obtained through a criminal offence, will be obstructed or impaired, the claim may be secured on the property of the defendant up to the probable amount of damage or non-material harm, or up to the probable extent of unjust enrichment.

(2) The securing referred to in sub-section (1) will be decided on by the court upon a motion of the public prosecutor or the aggrieved person, and in the pre-trial proceedings by the public prosecutor upon a motion of the aggrieved person. In pre-trial proceedings may the public prosecutor decide to secure the claim even without the motion of the aggrieved person, if it is required to protect his interests, especially if there is a risk of delay.

(3) If the aggrieved person is aware that the accused owns real estate or any movable assets located outside their place of permanent or another residence, he will state where such property is located, if possible as early as in the motion to secure the claim for compensation of the damage or non-material harm or surrender of unjust enrichment.

(4) The court and in pre-trial proceedings the public prosecutor will prohibit the accused person from disposing with the property referred to in the resolution on securing or which will be listed in the course of execution of such a decision; it will also prohibit the accused person from transferring the property to someone else or mortgaging it after the resolution is made, and order him to inform the court whether who has the right first buy or another right to the property within 15 days from the declaration of the resolution, with the instruction that otherwise the defendant is liable for any damage caused.

(5) A claim that cannot be asserted in criminal proceedings cannot be secured. Things that cannot be affected by execution of a court decision under the civil law regulations cannot be used to secure a claim. Financial benefits of social welfare, material necessity benefits, and concerning social support benefits, the housing benefit and state social care benefit paid to the accused person according to a special Act as a lump-sum cannot be used for securing a claim, and neither are

a) claims of the accused person for remuneration arising from employment or a similar relationship,

b) claims of the accused for maintenance payments,

c) claims for the payment of sickness benefits and pension insurance, and

d) state social support benefits, which are not paid as a lump-sum

up to the amount of the sum of total monthly housing costs stipulated by special legal regulations proved by the accused and the subsistence minimum stipulated by special legal regulation for the accused person and the persons, whose education and maintenance is the accused person responsible for, unless they have own sources of income.

(6) As long as the seizure remains in effect, all legal acts of the accused concerning the seized property, with the exception of acts aimed at preventing imminent damage, will be ineffective.

(7) The property of the accused person subject to the decision on the securing referred to in sub-section (1) and (2) may be disposed with within the frame of execution of a decision only with a prior consent of the court and in pre-trial proceedings the public prosecutor.

(8) Rights of third parties to the seized property may be applied under special legal regulation.

(9) The aggrieved person must always be notified about the securing of his claim along with the reasons, for which may the seizure according to Section 48 (1) be cancelled.

(10) Execution of the decision on securing a claim of the aggrieved person and the procedure in administration of the seized property is stipulated by a special legal regulation.

#### Section 47a

(1) The court and in pre-trial proceedings the public prosecutor will waive the execution of acts of seizure or will revoke the seizure, if the accused person or another person with his consent deposits a monetary guarantee on the account of the court at a banking institution in the amount corresponding to the probable claim of the aggrieved person for compensation of damage or non-material harm, or surrender of unjust enrichment; the other person must be aware of the merits of the indictment and of the facts that led or could lead to the seizure. If the monetary guarantee was lower, the court and in pre-trial proceedings the public prosecutor will perform the acts of seizure on the property of the accused person in the extent, in which the probable claim of the aggrieved person for compensation of damage or non-material harm or for surrender of unjust enrichment is not secured by the monetary guarantee.

(2) The court and in pre-trial proceedings the public prosecutor will revoke or restrict the monetary guarantee pursuant to sub-section (1), if the grounds for securing the claim of the aggrieved person have ceased to exist or if it is clear that the claim for compensation of damage or non-material harm or for surrender of unjust enrichment cannot be awarded to the aggrieved person in criminal proceedings or if it is considerably lower.

(3) Unless the court decides otherwise, the monetary guarantee pursuant to sub-section (1) will remain in effect until the full force and effect of the convicting judgment. If the claim of the aggrieved person for

compensation of damage or non-material harm or surrender of unjust enrichment is awarded by such a judgment, the court will pay it from the monetary guarantee.

(4) A complaint is admissible against the decision according to sub-section (1) and (2), which has a dilatory effect.

#### Section 48

(1) The court and in pre-trial proceedings the public prosecutor will revoke the seizure,  
 a) if the reason for which it was ordered expired,  
 b) if the criminal prosecution is finally and effectively discontinued or terminated by a judgment of acquittal, or  
 c) if two months have passed since the judgment convicting the defendant came into full force and effect, or since the day the resolution, by which the case was transferred to another authority, came into full force and effect.

(2) The seizure must be restricted, if it becomes apparent that it not necessary in the extent in which it was ordered. If the seizure affected property belonging to someone else than the defendant, it will be excluded from it.

#### Section 49

A complaint is admissible against the decision pursuant to Section 47 and 48 which has a dilatory effect, if it concerns revocation of the seizure, its restriction or exclusion therefrom.

#### Section 228

(1) If the court sentences the defendant for a criminal offence, by which he caused another person material damage or other non-material harm, or who was unjustifiably enriched himself at the expense of the aggrieved person, it will impose upon them an obligation in the judgement to compensate in monetary terms the damage or non-material harm to the victim or to surrender any unjust enrichment, provided that the claim was asserted on time (Section 43 (3)), unless this Code stipulates otherwise; unless a legal obstacle prevents it, the court will always impose the obligation on the defendant to pay damages or to surrender unjust enrichment, if the amount of the damage caused or the extent of the unjust enrichment forms a part of the description of the act referred to in the verdict of the judgment, by which the defendant was found guilty and provided that the damages in such amount have not yet been paid or the unjust enrichment has not yet been surrendered to this extent.

(2) The verdict on the obligation of the defendant to compensate for damages or non-material damages in money or for the surrender of any unjust enrichment, must accurately indicate the person entitled to the claim that they were awarded. In justified cases, the court may declare that an obligation must be fulfilled in instalments; the amount and terms of repayment will also be determined by them.

(3) The verdict of the judgment on monetary performance may be expressed in a foreign currency upon a petition of the aggrieved person, if it is not contrary to the circumstances of the case, and  
 a) the damage was caused on financial resources in a foreign currency or to property purchased for such financial resources, or  
 b) the defendant or the victim is a foreign person.

(4) If the court sentences the defendant for a felony to an unconditional prison sentence and grants the aggrieved person, at least in part, his claim for monetary compensation of damage or non-material harm or the surrender of unjust enrichment, it will instruct the aggrieved person on the possibility to request a notification about holding of a public session on the conditional release from a prison sentence. The aggrieved person will file the request at the court that has decided in the first instance.

#### Section 229

(1) If, there are no grounds for imposing an obligation to pay monetary compensation of damage or non-material harm, or for the surrender of unjust enrichment on the basis of the results of evidentiary procedure, or if further evidence would be necessary for any decision on the obligation to pay monetary compensation of damage or non-material harm, or for the surrender of unjust enrichment, which would significantly delay the criminal proceedings, the court will refer the aggrieved person to proceedings in civil matters or to proceedings before another competent authority.

(2) The court will also refer the aggrieved person to proceedings in civil matters or to proceedings before another competent authority with the rest of their claim, if for any reason it grants his claim only in part.

(3) If the court acquits the defendant of the charges, they will always refer the aggrieved person with his claim for monetary compensation of damage or non-material harm or for the surrender of unjust enrichment to proceedings in civil matters or to proceedings before another competent authority.

Czech Republic can use these provisions also in favour of international legal assistance in criminal matters. However, there was no case in practice. The problem is that the recognition and execution of the decision of court about damages can be done according to legal framework for international cooperation in civil matters.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

The Council of Europe states should respect in greater extent the law of requesting states concerning authorities that are competent to decide about a seizure in pre-trial proceedings, as those competent authorities may differ according to the national law of the respective states.

Czech Republic proposes consideration of adopting at least general rules for asset sharing.



## FINLAND

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. asset sharing?

Yes, since the above measures are not excluded from the scope of application of the Convention. Article 1.2 refers to enforcement of verdicts which we understand to encompass only sentences passed on an individual for an offence. Hence, any court judgment relating to confiscation would be included in the scope of application of the Convention.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

All the above measures are covered in our law with a view to cooperation under ETS 141.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

See the above.

#### **4. Introduction**

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

Value-based confiscation is a regular tool at our disposal. Same rules apply as in object-based confiscation.

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

No, if the property has been transferred to a third party.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

Yes.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Yes.

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime?**

**If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Assistance in criminal proceedings is possible under the same rules that apply to natural persons.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

No idea, really.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

There are no provisions in our law to that effect.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**



## FRANCE (TRANSLATION)

1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. asset sharing?

(Please specify)

Under Article 2.a of the Convention of 20 April 1959, assistance to a Council of Europe member State could be refused if the request related to a fiscal offence. The aim of subsequent conventions was to foster mutual legal assistance to combat fiscal fraud and economic and financial crime. Consequently, the first additional protocol of 17 March 1978 overruled the former principle and the fact that a request related to a fiscal offence could no longer be a legitimate ground for refusal unless a declaration to the contrary was made. Some states such as Switzerland and Luxembourg have made declarations to this effect.

d. Search and seizure of proceeds of crime?

Only the Protocol of 16 October 2001 to the Convention of 29 May 2000, opened for signature by the member states of the European Union, requires States Parties to be in a position to identify bank accounts held by a person.

- e. confiscation of proceeds of crime? Extended confiscation is not possible
- f. asset sharing? No provision is made for sharing.

2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

(Please specify)

The French agency for the recovery and management of seized and confiscated assets (AGRASC) is not responsible for the management of all seized assets. A distinction has to be made in this respect between its mandatory tasks and its optional tasks.

The AGRASC's tasks include:

- Centralised management of all money seized during criminal proceedings (mandatory task)
- The implementation of decisions to dispose of assets before judgment (mandatory task): This is a procedure whereby the AGRASC is given movable assets for disposal which it is no longer necessary to keep in order to establish the truth **and** which it is impossible to return (because the owner cannot be identified **or** he or she does not claim the object after being given notice thereof) or which have to be confiscated under the law, where continued seizure would be liable to reduce the value of the asset. Where proceedings are discontinued or the accused is discharged or acquitted or if a confiscation order is not ultimately issued, the proceeds from the sale of the seized asset will be returned to the owner on request.

- The management, on court order, of certain complex assets (optional task).
  - f. Returning the assets to victims?

The proceeds of confiscations become the property of the state and hence are paid into the general state budget, except where the confiscation is ordered for drug trafficking offences in which case the sums are paid to the Interministerial Anti-Drug and Addiction Task Force, MILDECA, (narcotics support fund, Article 706-161 of the Code of Criminal Procedure (CPP)).

Law No. 2014-1353 of 13 November 2014 strengthening anti-terrorist measures has moreover added a clause to Article 706-161 of the CPP providing that the agency may also pay to the state contributions for the purpose of funding measures to combat crime.

With regard to life insurance contracts, it should be pointed out that Law No. 2013-1117 of 6 December 2013 on measures to combat tax fraud and major economic and financial crime brought an end to some uncertainty as to what happened to such contracts in the event of a final confiscation order by adding a provision to the Insurance Code, the Mutual Insurance Code and the Social Security Code to the effect that final confiscation orders issued by criminal courts automatically render life insurance contracts void and entail the confiscated funds being transferred to the state (Articles L.160-9 of the Insurance Code, L. 223-29 of the Mutual Insurance Code and L. 932-23-2 of the Social Security Code). It makes no difference if the court rules on an offence punished under the Customs Code or any other text or the confiscated sums were initially seized by the customs authorities. Once criminal proceedings are brought following a customs operation, the attachment of the sums in question can be regarded as criminal seizure and once the final decision is taken to confiscate them this is carried out by the AGRASC as it has sole authority to carry out confiscation orders relating to sums of money.

#### Compensation for victims

Improving seizure and confiscation procedures also means providing for better compensation of the victims of offences. Under Article 706-164 of the CPP, anyone joining proceedings as a civil party who is awarded damages in a final decision together with costs for the proceedings and cannot be compensated through the CIVI (Commission for the Compensation of Victims of Offences) or the SARVI (Collection assistance service for victims of offences) may ask the AGRASC to ensure that these sums are paid to him or her as a matter of priority out of the assets of his or her debtor against whom a final confiscation order has been issued.

Since the Law of 2 January 2014 authorising the government to simplify the activities of companies and make them more secure, this text has also covered legal persons claiming damages.

To enable the AGRASC to perform this task, courts therefore must transmit, ideally in electronic form, a certified copy of decisions awarding damages to civil parties in cases which have given rise to the transfer of cash or their assets to the agency (this copy must be sent to the agency anyway to inform it about what has happened to the seized assets). In all other cases, the agency will question courts as soon as it has been contacted by a civil party claiming damages.

The agency is also expected to work with the Department for Access to the Law and Justice and Victim Support (SADJAV), the Guarantee Fund for Victims of Terrorism and other Offences (FGTI) and the National Institute for Victim Support and Mediation (INAVEM) to investigate the best operational arrangements to fulfil its role vis-à-vis victims and civil parties.

Penalties for action undertaken to prevent the enforcement of confiscation orders (Article 434-41 of the Criminal Code)

Under Article 434-41 of the Criminal Code, as amended by Law No. 2013-1117 of 6 December 2013, a penalty of two years' imprisonment and a fine of €30,000 applies to the destruction, misappropriation or attempt to destroy or misappropriate or to the refusal to hand over any tangible or intangible asset to which a confiscation order applies.

The aim of this provision is to facilitate the enforcement of confiscation orders, particularly with regard to immovable assets.

### **e) asset sharing?**

In principle, the destination of confiscated assets is decided on by the requested state in accordance with its national law. Under Article 15 of the Strasbourg Convention any property confiscated by the requested Party must be disposed of by that Party in accordance with its domestic law, unless otherwise agreed by the Parties concerned.

Nonetheless, a request may be made to this state (via the AGRASC or the Ministry of Justice) for the confiscated property or funds to be shared.

The disposal of assets confiscated pursuant to a foreign decision is regulated by the applicable multilateral or bilateral agreements or, if there is no such agreement, by the provisions of Article 713-40 of the Code of Criminal Procedure, which establishes the principle that the enforcement of a foreign confiscation order entails the transfer to the French State of the confiscated assets, unless otherwise agreed with the requesting state.

Law No. 2012-409 of 27 March 2012 has however limited the scope of this principle for sums of money by providing that these and the proceeds of the sale of confiscated property, after deduction of the costs of enforcement, must be allocated to the French state when this amount is lower than €10 000 and allocated on a fifty/fifty basis to the French state and the requesting state in all other cases. This law has therefore extended to countries outside the European Union the principle of asset sharing deriving from the Framework Decision of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

The provisions of the Code of Criminal Procedure are, however, intended to be applied only if there is no international convention which stipulates otherwise or no agreement on asset sharing between France and the requesting state. Furthermore, exceptions may be made to the rules set out in Article 713-40 of the Code of Criminal Procedure through the negotiation of an ad hoc asset sharing agreement between France and the requesting state, providing for a different allocation scale.

Subject to the overriding discretion of the Courts and the consent of both states, it does not seem entirely necessary for a formal agreement to be drawn up when the requesting authorities request 50% of the confiscated sums in accordance with the allocation scale provided for by the law. Since Article 713-36 of the Code of Criminal Procedure states that Article 713-40 applies only where there is no agreement, it can be inferred that an asset sharing agreement is necessary only if the parties wish to depart from the 50/50 rule.

In the absence of any specific provisions in Article 713-40 of the Code of Criminal Procedure, the implementation of such an agreement, where it is between central government authorities, necessitates submitting the case to the Directorate of Criminal Affairs and Pardons at the earliest possible juncture.

It is preferable to forward to the AGRASC for information, the criminal court judgment ordering the enforcement of the foreign confiscation of sums of money on French territory, so that the seized and confiscated sums can be directly transferred by the banks concerned to the *Caisse des dépôts et consignations* once the AGRASC has forwarded the relevant bank identification details, even if the judgment stipulates that the banks should release these sums to the agency.

### **Which authority is empowered to draw up an asset sharing agreement?**

Where the parties have agreed to a sharing arrangement that departs from the rules set out in Articles 713-32 and 713-40 of the Code of Criminal Procedure, the arrangement takes the form of a sharing or restitution agreement.

However, where the asset sharing is carried out under the conditions provided for by these texts, there is little point in concluding such an agreement. If the sharing arrangement relates to funds or

assets held in France, the share owing to the foreign state is paid to it by the AGRASC by means of a transfer to a previously designated account.

Where the asset sharing relates to funds or assets held abroad, the payment is carried out by means of a transfer to the account of the AGRASC, which then sees to it that the amount is passed on, either to the general state budget or to the MILDECA depending on the nature of the offences dealt with in the proceedings.

Under Article 706-160 of the Code of Criminal Procedure, the AGRASC may share out the proceeds of sales in accordance with any request for mutual aid or co-operation from a foreign judicial authority.

The AGRASC therefore intervenes in asset sharing procedures only when funds or the net asset value of property entrusted to it are redistributed, either in advance, in other words at a stage prior to the trial or at the time of the trial (Article 484-1 CPP) or at the same time as the enforcement of the confiscation order pursuant to Article 707-1 of the Code of Criminal Procedure. This mainly relates therefore to assets seized in France at the request of foreign states.

In other cases, particularly those relating to the sharing of assets confiscated at the request of a French court on the territory of a foreign state, the authority empowered to make decisions on asset sharing is the Ministry of Justice. In such cases the agreement is drawn up by the Office for International Mutual Assistance in Criminal Affairs (BEPI) and signed by the Director of Criminal Affairs and Pardons.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

(Please specify)

#### **4. Introduction**

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

(Please specify)



Because the Conventions require there to be a link between the assets and the offence which is punishable under these instruments, the scope of seizures and hence confiscations is more restricted than in national or in EU law.

The Law of 9 July 2010 set out the procedure that applies to the enforcement in France of seizures ordered by a judicial authority in a foreign state which is not an EU member (Articles 694-10 to 694-14 of the Code of Criminal Procedure).

By virtue of the principle of the precedence of international standards over domestic law deriving from Article 55 of the Constitution, the provisions of the above law on mutual assistance for the purpose of the seizure of the proceeds of an offence with a view to their ultimate confiscation shall apply only on a subsidiary level, where no international convention is applicable, irrespective of whether the conventions in question were adopted before or after the entry into force of the law concerned.

The Law of 6 December 2013 extended the scope of these provisions to align it precisely with the perimeters of passive confiscation.

Article 694-10 of the Code of Criminal Procedure, as amended by the Law of 6 December 2013, outlines the scope of requests for seizure from foreign authorities not bound to France by a specific international convention in this field.

\* The law covers only seizures carried out “with a view to subsequent confiscation”. However, the provisions do apply to all measures to freeze assets or evidence.

\* Seizable assets include movable and immovable assets “regardless of their nature”.

\* Since the enactment of the Law of 6 December 2013, besides the simple or value-based seizures initially covered by the text (assets have to constitute “the direct or indirect proceeds of the offence or any asset whose value is equivalent to that of the proceeds of the offence”), seizures of the instrument and subject matter of the offence have been added, the relevant reference being to “assets used or intended for use when committing the offence”.

*Two conclusions must be drawn from this:*

– this article must be interpreted broadly and be taken to apply also, prior to the request for seizure, to any request for mutual assistance relating to the investigation and identification of the subject matter of the offence, its proceeds or the instrument used or intended to be used to commit the offence.

– “extended seizures” and especially “general seizures” of property or assets not directly or indirectly connected with the offence are not in any case possible in France at the request of the authorities of non-EU states unless provided for specifically in an international convention.

Law No. 2010-768 of 9 July 2010 on facilitating seizure and confiscation in criminal affairs has recast the provisions on mutual assistance in the field of seizure and confiscation with EU non-member states by codifying Laws No. 90-1010 of 14 November 1990 and 96-392 of 13 May 1996 and extending their scope to cover all international conventions including provisions on the cross-border enforcement of confiscation orders.

In point of fact, the aforementioned laws of 14 November 1990 and 13 May 1996 (which have now been repealed) were enacted in order to implement, respectively, the 1990 Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs. The legislation adopted on this occasion was supposed, however, to be given general effect so that France could be brought into line with the new instruments it had ratified, particularly the Palermo Convention of 2000 and the Merida Convention of 2003.

Article 14 of the Law of 9 July 2010 therefore incorporated into the Code of Criminal Procedure Articles 713-36 to 713-41 on the enforcement of confiscation orders issued by foreign authorities.

All of Chapter III on “International co-operation for the purpose of enforcing confiscation orders” is a summary of the two laws incorporating the provisions on criminal seizure.

These new provisions are designed to be applied to foreign requests for mutual assistance for the purposes of confiscation based on the principle of reciprocity or any relevant convention to which France is a party.

With regard to the latter case, however, it should be noted that pursuant to the principle of the precedence of treaties over laws, Articles 713-36 to 713-41 apply only on a subsidiary level, "*in the absence of an international convention providing otherwise*" (Article 713-36 of the Code of Criminal Procedure).

There are bilateral or multilateral treaty instruments signed by France which provide that requests for mutual assistance for purposes of confiscation can relate to the instruments, proceeds or the value of the proceeds of offences.

As to requests based on the principle of reciprocity, Article 713-36 of the Code of Criminal Procedure provides that confiscation orders may relate to "movable or immovable assets, regardless of their nature, which were used or it was intended to use to commit an offence or appear to be the direct or indirect proceeds thereof or to any asset whose value is equivalent to that of the proceeds of the offence".

It follows therefore both from the relevant treaty instruments and from domestic law that only "simple" confiscation orders relating to the instruments, the proceeds or the equivalent value to the proceeds of offences may be enforced in France, whereas extended or general confiscation measures may not.

In this connection it is essential for requesting foreign authorities to include in their requests for mutual assistance evidence that the assets to which the request for confiscation relates are the instrument or the proceeds of a criminal offence

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

For simple confiscations, the definitions in French law are as follows:

- If the asset is the instrument of the offence, it may be confiscated – and hence seized – if it is the property of the convicted person or if, subject to the rights of the bona fide owner, the convicted person may freely dispose of it  
(Article 131-21, paragraph 2, of the Criminal Code)

*See, in particular, judgment No. 13-81.874 of the Criminal Division of the Court of Cassation of 15 January 2014, dismissing an appeal against a judgment ordering the confiscation of a vehicle used to commit road traffic offences, belonging to a company which the Court of Cassation found in its final decision not to be the bona fide owner.*

The assets may be of any type, movable or immovable or individually or jointly owned.

- If the asset is the subject-matter or the direct or indirect proceeds of the offence, it may always be confiscated – and hence seized – in whoever’s possession it is found (Article 131-21, paragraph 3, of the Criminal Code), except where it can be returned to the victim (in which case it must be).

If the proceeds of the offence have been combined with funds from a legal source for the acquisition of one or more assets, the confiscation may apply only to these assets up to the estimated value of these proceeds.

*The French courts have found, with regard to the seizure of a building belonging to a company managed in turn by the accused persons, that confiscation is not restricted to the assets owned by the persons investigated but extends to all the assets which were the subject matter or the direct or indirect proceeds of the offence (judgment No. 11-87.143 of the Criminal Division of the Court of Cassation of 4 September 2012).*

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

**(Please specify)**

Yes; see the answers to the previous questions.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

The various systems for the confiscation of criminal assets throughout the world can be grouped into two main categories based on two distinct approaches, which some states apply in combination and others separately:

- the first is criminal confiscation, which is based on the conviction and sentencing of the perpetrator of an offence, whose assets are then confiscated by way of a punishment, in which case the action is directed against the person himself or herself.
- the second is non-conviction-based confiscation (sometimes wrongly referred to as “civil confiscation”), which is directed against the assets themselves and not against the persons concerned. In such cases, the decision to confiscate depends on it being demonstrated that the assets in question are the proceeds of illegal activity regardless of any criminal proceedings brought or not against the perpetrator of the offence.

In common-law systems, the choice of one or other of these procedures depends in particular on the amount of evidence required. Non-conviction-based confiscation also makes it possible to confiscate

assets in situations where criminal proceedings cannot be brought for reasons such as the death of the perpetrator.

In France, the only type of confiscation which exists for the time being is criminal confiscation, which presupposes a conviction and amounts to an additional penalty.

The Criminal Division of the Court of Cassation has nonetheless had occasion to approve the enforcement in France of a decision of a "civil" nature given in a foreign court.

The case submitted to the Court related to a decision of the Milan Court ordering the confiscation as a preventive measure of a building in France on the ground that there was sufficient evidence that it had been purchased and restored with the proceeds of a criminal offence. Separate criminal proceedings had been brought against the owner.

The Italian judicial authorities requested the enforcement of this decision in France on the basis of the Strasbourg Convention of 8 November 1990 and in acceding to this decision, the trial judges found that the requirements of the Law of 13 May 1996, which gives effect to the 1996 Convention, had been satisfied on the following grounds:

- firstly, the decision to which the request for enforcement related was final and enforceable and its enforcement would not breach public order;
- secondly, the asset to be confiscated was likely to have been confiscated under similar circumstances under French law.

The Court of Cassation, while recognising the "preventive" nature of the judgment, upheld this interpretation, considering that since French law provided for confiscation in cases of money laundering and the penalty of confiscation of the proceeds of an offence, the Italian decision should be enforced because the French system comprised confiscation measures which would be ordered in "similar circumstances".

In so doing, the Court authorised the enforcement in France of a confiscation order from a foreign court in non-criminal proceedings, considering that the legal impact of the decision on the defendant's property could be interpreted in domestic law as criminal confiscation.

The sole requirement therefore is that the evidence that the assets in question are the proceeds of an offence is considered sufficient for the confiscation order to equate to a decision in a criminal case.

This case-law was confirmed by a judgment of the Civil Division of the Court of Cassation of 4 June 2009.

It opens up interesting prospects for co-operation between France and those countries which authorise this kind of penalty.

On the basis of this case-law, it is possible to arrange for assets to be seized by an investigating judge or confiscated by a criminal court on the basis of a request for mutual assistance with a seizure or confiscation ordered by a foreign judicial authority in the context of a non-conviction-based confiscation procedure.

It is preferable nonetheless to ascertain, prior to the enforcement of such requests, why it was decided to take the route of a non-conviction-based procedure and whether the criteria set by the Court of Cassation have been fulfilled in French law.

It should also be stated that common-law countries are used to transmitting requests for mutual assistance calling for the enforcement or notification of their own civil seizure or confiscation orders. These requests should be regarded as making it necessary to issue fresh national seizure or confiscation orders in a criminal law context.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Law No. 2010-768 of 9 July 2010 added confiscation to the list of additional penalties to which the legal persons listed in Article 131-39 of the Criminal Code are liable.

Consequently, if the text defining an offence provides that the additional penalties described in Article 131-39 of the Criminal Code must be applied to legal persons, they are liable to confiscation under the conditions and according to the procedures provided for in Article 131-21.

This provision can prove particularly useful when accused persons make use of shell companies when setting up fraudulent operations. The investigation and prosecution of a legal person makes it possible to confiscate (and hence to seize beforehand) assets of which the intermediate or shell body is the legal owner, particularly when it is difficult to establish that the accused could freely dispose of the asset or assets or that the accused able to freely dispose of the asset or assets cannot be identified, located or contacted.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

Under the relevant treaty instruments and domestic law, all seizure or confiscation orders relating to the instruments, proceeds or equivalent value of the proceeds of offences may be enforced in France.

As to requests based on reciprocity, Article 713-36 of the French Code of Criminal Procedure provides that confiscation can relate to movable or immovable assets regardless of their nature and to any asset of an equivalent value to the proceeds of the offence.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Article 12 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 8 November 2001 provides as follows:

Article 12 – Restitution

1. At the request of the requesting Party and without prejudice to the rights of bona fide third parties, the requested Party may place articles obtained by criminal means at the disposal of the requesting Party with a view to their return to their rightful owners.
2. In applying Articles 3 and 6 of the Convention, the requested Party may waive the return of articles either before or after handing them over to the requesting Party if the restitution of such articles to the rightful owner may be facilitated thereby. The rights of bona fide third parties shall not be affected.
3. In the event of a waiver before handing over the articles to the requesting Party, the requested Party shall exercise no security right or other right of recourse under tax or customs legislation in respect of these articles.
4. A waiver as referred to in paragraph 2 shall be without prejudice to the right of the requested Party to collect taxes or duties from the rightful owner.

With regard to fraudulent bank transfers, of which France has been a particular victim in the last three years, requested countries are always asked to return the sums concerned as soon as they are seized, in other words without waiting for the confiscation and without subtracting 50%, the argument

being that the seizure is carried out in order to return the funds immediately to the victims, which is what the AGRASC, the government agency, does as soon as it receives the sums.

France does not have any experience as a requested state, however, as it has never been the recipient of assets deriving from such judicially confirmed fraudulent practices. If, however, we were ever asked to seize sums and to transfer them for restitution to the victim without confiscation, we would respond positively. Seizures can be carried out with a view to confiscation and also, in French law, with a view to restitution to the victims or even, since the enactment of Article 706-164 of the Code of Criminal Procedure, to compensation (anyone joining proceedings as a civil party who is awarded damages in a final judgment to compensate for losses incurred as the result of a criminal offence and for his or her legal costs but has not received any compensation ... may request that the AGRASC ensure that these sums are paid to him or her as a matter of priority out of the assets of his or her debtor against whom a final confiscation order has been issued).

This is the rationale of seizures. A seizure may be used for confiscation or restitution to victims – this is moreover the tenor of the first sentence of Article 131-21, paragraph 3 (“[confiscation] also relates to all assets which are the subject matter or the direct or indirect proceeds of the offence, except for assets that can be returned to the victim”).

Both the spirit of these texts and the legitimate desire for reciprocity argue in favour of seizure and immediate restitution of the assets to the requesting state for them to be returned to the victim without confiscation and without keeping 50%.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

The subject matter of offences is not expressly covered by the Convention of 8 November 1990 although it may be included within “other property liable to confiscation” and the Second Additional Protocol talks of articles obtained by criminal means.

Similarly, no provision is made for extended confiscation despite the fact that some states have a national system which would make it possible to enforce these types of request for mutual assistance. States which did not wish to enforce such requests could make a declaration to that effect.

## GEORGIA

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. Search and seizure of proceeds of crime?**
- b. Confiscation of proceeds of crime?**
- c. Asset sharing?**

Georgia considers the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of search and seizure of proceeds of crimes.

As to the confiscation of proceeds of crime and asset sharing, there are no specific provisions on this matter in the Convention or in its protocols; however in Article 1 §1 of the Convention there is a general obligation for the Contracting Parties to undertake to afford each other the widest measure of mutual assistance. The above-mentioned obligation provides certain ground for cooperation in those two areas.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation the possibilities in Georgia are search and seizure of proceeds of crime, confiscation of proceeds of crime and management of seized and confiscated assets.

According to Article 15 of the Convention any property confiscated by the requested Party shall be disposed of by that Party in accordance with its domestic law, unless otherwise agreed by the Parties concerned. Respectively, the Convention does not impose obligation for assets sharing; however, if there is an agreement between the Parties, the convention provides possibility for such sharing.

In Georgia the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) would not be sufficient instrument for sharing assets.

According the International Cooperation in criminal Matters Act of Georgia, one of the legal bases for international cooperation is an *ad hoc* agreement which can be concluded between Georgia and interested country. Respectively, based on the *ad hoc* agreement, on case-by-case basis, sharing of assets may occur.

There is no possibility in Georgia, to return the assets for victims based on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141). In this case the mechanism that can be used is a conclusion of an *ad hoc* agreement.

No legal or practical difficulties have been encountered in relation to the implementation of the Convention.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**(Please specify)**

When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation Georgia has the possibility to carry out search and seizure of proceeds of crime, confiscate proceeds of crime and manage seized and confiscated assets.

Returning the assets for victims and asset sharing will not be possible solely on the basis of the Convention. In those cases, the conclusion of *ad hoc* agreement will be necessary.

No legal or practical difficulties have been encountered in relation to the implementation of the convention.

#### **4. Introduction**

**A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.**

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for the victims?**
- e. asset sharing?**

According to the legislation of Georgia, the legitimate assets of the convicted person which are equivalent to the proceeds from crime are subject to confiscation. Respectively, for the purpose of value based confiscation, the legislation of Georgia does not require to prove that assets in question have been obtained directly from the criminal offence.

Respectively, the competences mentioned in questions 2 and 3 can be exercised in the case of a request grounded on the value-based confiscation system. The said rule applies in relation to all activities listed in the question.



**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for the victims?**
- e. asset sharing?**

According to the legislation of Georgia, assets which belong *de facto* to the accused/convicted person, but are legally considered as belonging to a third person (Straw man) are also subject to confiscation.

The requests to carry out the above-listed activities in relation to the said assets can be executed to the same extent as described earlier in relation to other type of property.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. returning the assets for the victims?**
- d. asset sharing?**

The principle of reciprocity is provided in the International Cooperation in Criminal Matters Act of Georgia as ground for cooperation in the absence of treaty, except the cases when cooperation is related to the enforcement of judgment and extradition. Stemming from this, requests on search and seizure of proceeds of crime can be executed based on the reciprocity.

Requests related to the activities listed in subparagraphs b, c and d cannot be executed on the basis of reciprocity. In those cases, there will be a need for an *ad hoc* agreement.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding**
- b. seizure of proceeds of crime?**
- c. confiscation of proceeds of crime?**
- d. management of seized and confiscated assets?**
- e. returning the assets for the victims?**
- f. asset sharing?**

Georgia is able to provide mutual legal assistance with respect to all listed activities, to the extent that is compatible with the scope of civil confiscation system of Georgia.

The legal ground for the provision of such assistance is the Law of Georgia on Private International Law, which authorises Supreme Court of Georgia to receive and arrange the enforcement of such request.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Since 22 August 2006 the legislation of Georgia provides for the corporate liability. The provisions that are applicable to requests related to natural persons are equally applicable to requests related to legal entities. Respectively, Georgia can provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

The legislation of Georgia provides for the broad definition of property, which could be subject to confiscation. The said definition of property covers virtual currencies such as bitcoins. Respectively, Georgia is in a position to provide assistance in relation to seizure and confiscation of the said types of property.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

In domestic criminal and civil proceedings the legislation of Georgia does not make distinction between the victims who are Georgian citizens and the victims who are citizens of other countries. All of them have equal rights. Respectively, if foreign victims are identified in internal proceedings, Georgia is in a position to provide restitution to them.

According to the legislation of Georgia, the restitution to victims can be provided on the basis of the court decision. Respectively, if victims are not participants of domestic proceedings, Georgia will not be in a position to provide assistance, independently from a confiscation decision.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

At the current moment there are no such proposals.

## GERMANY

1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:

a. search and seizure of proceeds of crime?

Yes

b. confiscation of proceeds of crime?

Yes

c. asset sharing?

No, but there is a sufficient basis in other multilateral conventions and in the national law.

(Please specify)

2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:

a. search and seizure of proceeds of crime?

Requests to search and seize proceeds can be complied. Provisional measures are counted among in order to ensure property which is liable to confiscation.

b. confiscation of proceeds of crime?

Requests concerning the confiscation of proceeds derived from or obtained from criminal offences can be complied. The confiscation of the property into which the proceeds have been transformed or converted is possible.

c. management of seized and confiscated assets?

Relating to search and seizure the authorities shall ensure the proper management of frozen or seized property. They have to safeguard this property against becoming worse or getting lost by appropriate measures of storage and maintenance.

d. returning the assets for victims?

In principle, asset recovery should not endanger the settlement of claims which victims are entitled to. In order to enable and supply legal assistance, the treasury compensates victims for sentential claims pursuant to the relevant provisions, if the victims have lost their chance on the property of the perpetrator.

e. asset sharing?

In the framework of co-operation an agreement can be made by the authorities of the involved states to share the receipt of the confiscated assets (as well as in particular cases).

3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:

a. search and seizure of proceeds of crime?

b. confiscation of proceeds of crime?

c. management of seized and confiscated assets?

d. returning the assets for victims?

**e. asset sharing?**

Germany has not ratified this convention yet. Therefore no experience was gained in international co-operation, based on the convention CETS 198.

**4. Introduction**

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

**a. search and seizure of proceeds of crime?**

Requests concerning search and seizure proceeds of the perpetrator can be complied, based on a confiscation order consisting of a requirement to pay a sum of money.

**b. confiscation of proceeds of crime?**

Requests grounded on the value-based confiscation can be complied by confiscating property of the perpetrator. If payment is not obtained, the claim will be realized through other property available for that purpose.

**c. management of seized and confiscated assets?**

No specifics

**d. returning the assets for the victims?**

No specifics

**e. asset sharing?**

No specifics

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

**a. Search and seizure of proceeds of crime?****b. confiscation of proceeds of crime?****c. management of seized and confiscated assets?****d. returning the assets for the victims?****e. asset sharing?**

Access to assets of uninvolved third parties may be ordered under section 73 (3) and (4) of the German Criminal Code (Strafgesetzbuch, StGB). Section 73 (3) StGB requires that the perpetrator or participant acted for a third person and that the third person acquired something thereby. Section 73 (4) requires that the object belonging to the third person was furnished by the third person to support the act or with knowledge of the

circumstances of the act, but that the perpetrator did not become its owner because of the nullity of the transaction by which ownership was transferred.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

Yes, according to the provisions of the national law, in particular the Act on international cooperation in criminal matters.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

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

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

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

As Civil forfeiture is actually not known in German law, mutual legal assistance cannot be granted at the moment.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Germany establishes the liability of legal persons, including liability for criminal offences, under the Administrative Offences Act (hereinafter, "OWiG"). Pursuant to section 30 OWiG, the liability of legal persons is triggered where any "responsible person" (which includes a broad range of senior managerial stakeholders and not only an authorized representative or manager), acting for the management of the entity commits i) a criminal offence, or ii) an administrative offence including a violation of supervisory duties which either violates duties of the legal entity, or by which the legal entity gained or was supposed to gain a "profit". In other words: Germany enables corporations to be imputed with offences i) by senior managers, and, ii) with offences by lower level personnel which result from a failure by a senior corporate figure to faithfully discharge his/her duties of supervision.

Under sections 30 and 130 OWiG, where a person in a leadership position commits a crime or commits the administrative offence of breach of supervisory duties, by failing to take the measures necessary to prevent the commission of a crime by a lower level employee, the maximum amount of the administrative fine incurred by the legal person is 10 million Euros.

Section 17(4) OWiG provides that the administrative fine ordered against a legal person must exceed the financial benefit gained from the underlying offence. An administrative fine has two components, a punitive one and a confiscatory one (the fine in respect of the benefit, also referred to as "skimming-off of profits"). If the financial benefit is higher than the statutory maximum fine (i.e. 10 million Euros), the total amount of the administrative fine must include an amount equal to the benefit gained (the confiscatory component of the fine), and be increased by an amount that may be a maximum of 10 million Euros (the punitive component of the fine).

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

German law considers bitcoins to be objects which are subject to confiscation within the meaning of section 73 (1), first sentence, StGB. Pursuant to section 111b (1) in conjunction with section 111c of the German Code of Criminal Procedure (Strafprozessordnung, StPO), they may be seized in order to secure confiscation by court order. The Federal Court of Justice has not yet issued a final-instance ruling on this issue; however, an appeal on points of law is currently pending before that court, which will clarify this question (and others).

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

- a) Establishment of a database operated by and accessible through a central office, comprised of bank data that may be provided to another state upon request, as an essential step before submitting a request for disclosure of bank information and "freezing" of bank accounts.
- b) Getting more states to accede to and become involved in international networks for asset recovery (e.g. CARIN), expanding personal contacts.

## HUNGARY

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. asset sharing?

As regards Hungary the Convention is an appropriate instrument concerning a. and b.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

According to national experts, they didn't encounter requests for mutual legal assistance in which the mentioned two Conventions were referred to. Also when being the Requesting Party experts prepare their requests referring to more general Conventions.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

Hungary didn't encounter any problems regarding this Convention.

#### **4. Introduction**

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?

- d. returning the assets for the victims?
- e. asset sharing?

In accordance with the Hungarian criminal law system search and of the proceeds of crime may be ordered. It also possible to order the confiscation of proceeds of crime in case in is not in the property of the accused person.

Furthermore, particular rules apply to the offenses committed in criminal organization, also to drug trafficking and human trafficking since there is a presumption that assets acquired during the continuation of such crimes are considered to have guilty origin.

**5. Several member States recognize the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

It is possible to execute such requests, it depends on the question of evidence. In case it is proved that the accused is the actual owner.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

The answer is no regarding a) and b).

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

According to Hungarian national law, Hungary is unable to provide mutual legal assistance for the purpose of non-conviction based confiscation. The Hungarian Criminal Code is completely unfamiliar with this legal instrument.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of**



**proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

In theory the answer is yes, nevertheless we never encountered such requests, so there is no practice.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

See our answer to Question 8. In case the virtual currency could be seized if it was an account it would be possible.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Yes, it is possible.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

According to Hungarian practitioners in the international cooperation there are very few cases when we receive requests from non EU states for mutual legal assistance where asset insurance is asked from the Hungarian authorities and even these cases the MLA Convention is applicable. In the practice all requests refer to the MLA Convention, also in cases where ETS no.141 and CETS no.198 could be referred to. Nevertheless in our point view these special instruments for international cooperation are very effective since they provide smoother procedural rules.

**ICELAND**

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

The European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its protocols are important tools for mutual legal assistance in criminal matters and Iceland considers the Convention and its protocols to be in general appropriate tools regarding point a and b. Regarding point c on asset sharing the Convention does not mention it, however asset sharing can be arranged in Iceland based on national legislation.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**(Please specify)**

The Convention (ETS No. 141) has been ratified in Iceland and national legislation is in conformity with the requirements of the Convention. Therefore it is possible to co-operate according to point a to e. Icelandic prosecutors have good practice of using the Convention in the cases which have occurred.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**(Please specify)**

Iceland has not ratified the Convention (CETS No. 198). Iceland can though, in most cases, provide mutual legal assistance based on national legislation, irrespective of a treaty.

**4. Introduction**

**A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all**

assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

The Icelandic General Penal Code has both value based and object based confiscation system, and therefore Iceland is capable to handle requests based on a value-based confiscation system for different types of assistance as is mentioned above.

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

According to Icelandic criminal law it is possible to execute such a request if the property has been transferred to a third party after the commission of the offence and if the third party was aware of the connection between the gains or items and the offence or has demonstrated gross negligence in that regard. See Article 69 d, paragraph 4 of the Penal Code:

**Art. 69 d**

Confiscation according to Article 69 may be directed at any person who has derived gains from an offence.

Confiscation according to the first and second paragraphs of Article 69a may be directed at the person who has committed the offence and any person for whom he or she worked.

Liens on items that are confiscated may only be lifted in accordance with the decision of a court in cases where the lien-holder is not in good faith.

If any of the persons named in the first and second paragraphs takes measures, after the commission of the offence, regarding ownership or lien rights on gains or items that are to be confiscated, the gains or items may be confiscated from a third party if he or she was aware of the connection between the gains or items and the offence or has demonstrated gross negligence in that regard. The same shall apply in the case of a gift.

Confiscation may not be effected if the person concerned is deceased, except in the case of confiscation under Article 69.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?

- c. returning the assets for the victims?
- d. asset sharing?

**(Please specify)**

Yes, Icelandic legislation does not require a treaty, therefore Iceland can co-operate with other States which Iceland does not have a treaty with on the basis of reciprocity.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Non-conviction based confiscation is not provided for in Icelandic legislation.

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Under Icelandic law a confiscation order can be directed against a legal person under certain circumstances in **criminal proceedings**, see Article 69 b, paragraph 3 of the Penal Code:

**Art. 69 b**

Items of value belonging to an individual who has been convicted of an offence may be confiscated, in part or in their entirety, when:

- 1. the offence is of a nature to entail substantial gains and
- 2. it is punishable by at least 6 year's imprisonment.

Subject to the same conditions as are stated in the first paragraph, items of value acquired by the current or former spouse of the offender, or by his/her cohabiting partner, may be confiscated, in part or in their entirety, unless:

- 1. the items of value were acquired more than 5 years prior to the commission of the offence or
- 2. the individuals in question were not married or cohabiting at the time when the items of value were acquired.

Subject to the same conditions as are stated in the first paragraph, items of value that have come into the possession of a legal person in which the individual in question, alone or together with his or her closest relations, is in a controlling position, may be confiscated, in part or in their entirety. The same applies if a substantial part of the revenues of the legal person are channeled to the individual in question. However, confiscation shall not be permitted if the items of value were acquired by the legal person more than 5 years prior to the commission of the offence.

If the person in question demonstrates that the items of value were acquired in a lawful manner, they shall not be confiscated.

Instead of the confiscation of items as provided for in the first, second and third paragraphs, a sum of money partly or fully equivalent to them may be confiscated.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

Yes, Iceland can provide assistance in procedures related to virtual currencies. In the so-called Silk road case the Icelandic Metropolitan Police assisted the Federal Bureau of Investigation of the United States in seizing a large amount of Bitcoins.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Victims of a crime are not party of criminal proceedings in Iceland, but can raise a claim for compensation for a crime during criminal proceedings, and as such they can have a legal representative during the trial.

In Article 69 e of the Penal Code, it is specially pointed out that the value of confiscated items can be used to pay a compensation claim from the victim of the crime. See below:

**Art. 69 e**

If any person suffers loss or damage when the offence is committed, it may be determined in the judgment that the value of the items confiscated is to be used to pay a compensation claim from the person concerned.

Where the person convicted of the offence pays compensation to the offended party in such a case following the delivery of the judgment, then the amount to be confiscated shall be correspondingly reduced.

**Art. 69 g**

That which is confiscated shall be the possession of the Treasury unless other provisions are expressly made in law. This shall not apply, however, when the equivalent value is used to pay a compensation claim by a person who suffered loss or injury when the offence was committed (cf. Article 69 e).

The ministry may decide that that which is confiscated is to be divided between the Icelandic state and another state or states. When such a decision is taken, it shall be based on consideration including the expenses resulting from the case in the various states, whether loss or damage was suffered there due to the case and the provenance of the items of value confiscated. Division under this paragraph may not result in reductions of compensation payments to injured parties.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

It would be useful to have some guidelines on asset – sharing between States.

## ITALY

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

ETS n. 30 seems to target more the taking of evidence (corpus delicti) for criminal proceedings, rather than the proceeds of crime.

Consequently, sub a), where proceeds of crime correspond to evidence (corpus delicti) no problems arise. Where the subjects of the search and seizure do not correspond to the corpus delicti, problems arise.

sub b), problems arise quite frequently, as confiscation is not aimed at taking evidence.

sub c) the convention is not an appropriate instrument.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

Italy ratified Convention (ETS no. 141), and is in a position to provide assistance, with no major problems, in all the activities specified (a), b), c), d), by means of delivery to the requesting State which submitted the relevant request, and e), in terms of article 15 of the Convention).

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

Italy did not ratify the said convention.

#### **4. Introduction**

**A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of**

these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order may then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

In this case as well, as in reply to question no. 2, Italy is in a position to provide assistance with no major problems, in all the activities specified in (a), b), c), d), through delivery to the requesting State which submitted the relevant request, and e), in terms of Article 15 of the Convention).

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong de facto to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

Seizure and confiscation against fictitious owners of assets belonging de facto to third persons are provided for by Italian law. In this case as well, as in reply to question no. 2, Italy is in a position to provide assistance with no major problems, in all the activities specified in (a), b), c), d), through delivery to the requesting State which submitted the relevant request, and e), in terms of Article 15 of the Convention).

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

No. Only on the basis of an international agreement, can Italy provide assistance in the aforementioned matters, within the limits above specified.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

Where provided for under international agreements (such as the case of article 13 of the UN Convention against transnational organised crime, signed in New York in 2000), Italy, contemplating the so-called NCB confiscations, may provide assistance within the limits set out in the said agreements.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Criminal liability for legal entities is provided for under Italian law. Therefore, within the limits set out in the international agreements contemplating it (once again Article 13 of the UN Convention against transnational crime signed in New York in 2000), assistance may be provided.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

The question is excessively generic (what is meant by procedures related to virtual currencies?) to enable a detailed answer. However, it is worth noting that, to date, no requests for assistance in the matter of virtual currencies were submitted and that the relevant seizure and confiscation would require the physical availability of the virtual currency in Italy.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Victims were returned assets obtained by criminal means (i.e.: works of art, cars and so on) irrespective of the relevant a confiscation orders, upon the conditions and within the limits set out in the Conventions (i.e.. ETS N. 030, ETS. N. 141) ratified by Italy.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**



**LATVIA**

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. asset sharing?

**(Please specify)**

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

**(Please specify)**

The mentioned Convention is used as basis for the international cooperation, similarly like special Convention on the legal assistance. We have encountered no practical problems in relation with application of the mentioned provisions.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

**(Please specify)**

The mentioned Convention is used as basis for the international cooperation, similarly like special Convention on the legal assistance. We have encountered no practical problems in relation with application of the mentioned provisions.

**4. Introduction**

**A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the**

**value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.**

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for the victims?**
- e. asset sharing?**

**(Please specify)**

Reply is "Yes". The Section 358(2) of the Criminal Procedure Law provides for that "If criminally acquired property has been alienated, destroyed, or hidden, and the confiscation of such property is not possible, other property, and financial resources, at the value of the property to be confiscated may be subjected to confiscation or recovery."

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for the victims?**
- e. asset sharing?**

**(Please specify)**

Reply is "Yes" provided that direct relation is found. The Section 358(3) of the Criminal Procedure Law of Latvia provides for that "If an accused does not have property that may be subjected to the confiscation, the following may be confiscated: 1) property that the accused person has alienated to a third person after the committing of the criminal offence and without corresponding consideration; 2) the property of the spouse of the accused person, if separate ownership of the property of the spouses was not specified during a time period of the last three years before the commencement of the criminal offence; 3) the property of another person, if the accused has a common (undivided) household with such person."

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. returning the assets for the victims?**

**d. asset sharing?****(Please specify)**

Reply is "Yes". In absence of the treaty the cooperation on the basis of reciprocity principle is possible.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Reply is "No". It is not possible in civil and administrative proceedings.

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding**
- b. seizure of proceeds of crime?**
- c. confiscation of proceeds of crime?**
- d. management of seized and confiscated assets?**
- e. returning the assets for the victims?**
- f. asset sharing?**

It is provided for by the Chapter 59 of the Criminal Procedure Law of Latvia.

**Chapter 59****Proceedings regarding Criminally Acquired Property****Section 626. Reasons for Initiating Proceedings regarding Criminally Acquired Property**

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

1) the totality of evidence provides a basis for believing that the property that has been seized or upon which an arrest has been imposed is of a criminal (connected with a criminal offence) origin;

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

**Section 627. Decision to Initiate Proceedings regarding Criminally Acquired Property**

(1) If the conditions referred to in Section 626 of this Law exist, a person directing the proceedings shall take a decision to initiate proceedings regarding criminally acquired property and transfer the criminal matter regarding the criminally acquired property to a court.

(2) A person directing the proceedings shall indicate the following in a decision:

1) the materials that have been separated from the criminal matter regarding a criminal offence currently in investigation into the case regarding criminally acquired property;

2) the persons that are connected with the concrete property;

3) the actions with the criminally acquired property that he or she proposes.

(3) A decision and the materials attached to such decision shall be sent to a district (city) court.

### **Section 628. Informing of Persons connected with Property**

A person directing the proceedings shall immediately send a copy of the decision referred to in Section 627 of this Law to a suspect or accused and the person by whom property has been seized or an attachment has been imposed on property, if such persons exist in the relevant criminal proceedings, or to another person who has the right to concrete property, concurrently indicating the right to.

1) participate in proceedings regarding criminally acquired property personally or through the intermediation of a defence counsel or representative;

2) express his or her attitude in court, orally or in writing, toward the taken decision;

submit applications to the court.

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

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

1) determine the time and place of the court session;

2) summon the necessary persons to the court session.

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

(3) The person directing the proceedings who has taken a decision, a public prosecutor, if a decision has been taken by an investigator, and the persons referred to in Section 628 of this Law and summoned to the court shall participate in a court session.

(4) A court session shall hear a person directing the proceedings, a public prosecutor, and other summoned persons, and examine the submitted evidence.

### **Section 630. Court Decision regarding Criminally Acquired Property**

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

1) whether the property is connected with a criminal offence;

2) whether there is information regarding the owner or lawful possessor of the property;

3) whether a person has lawful rights to the property;

4) actions with the criminally acquired property.

(2) If a court finds that the connection of property with a criminal offence has not been proven, such court shall take a decision to terminate proceedings regarding the criminally acquired property and indicate in such decision subsequent actions with the relevant property.

### **Section 631. Court Decision regarding an Appeal Criminally Acquired Property**

A court decision shall be subject to appeal in a court of appellate instance in accordance with general procedures.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of**

**proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

It is possible only within the frameworks of the criminal procedure.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

If from a foreign state is received legal assistance request with demand to impose the arrest.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

It is possible only according to the procedures laid down by the Chapter 59 of the Criminal Procedure Law (see reply No.7). No unified praxis is established.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

Reply is "No".

**REPUBLIC OF MOLDOVA**

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

**(Please specify)**

Considering the provisions of art. 5 of the European Convention on Mutual Assistance in Criminal Matters and the Explanatory report, we find this convention an appropriate tool for cooperation in the fields of search and seizure of proceeds of crime.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**(Please specify)**

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**(Please specify)**

**(for points 2 and 3)**

According to national legislation of Republic of Moldova we can proceed to:

**a. search and seizure of proceeds of crime.**

Seizure of goods is applied to ensure compensation for damage caused by the offense, civil action or possible special confiscation or extended confiscation of goods or various assets used to commit the crime or resulting from crime.

Goods may be seized by a criminal investigative body or by the court only if the evidence collected supports the justified assumption that the suspect/accused/defendant or other persons keeping the goods subject to seizure may conceal damage or dispose them.

Goods must be seized based on an order of a criminal investigative body and the authorization of an investigative judge or, as the case may be, on a court ruling. The prosecutor shall ex officio or at the request of a civil party address to the investigative judge a motion accompanied by the order of the criminal investigation body on the sequestration of goods. The investigative judge

shall authorize in a resolution the sequestration of goods while the court shall decide on the requests of the civil party or of any other party, provided there is sufficient evidence to support the circumstances above mentioned.

Goods Subject to seizure:

The goods of the suspect/accused/defendant, and of the civilly liable party may be subject to seizure in cases provided for in the law irrespective of the nature of the goods and of the person keeping them.

The goods of enterprises, institutions and organization except for the share of collective property that was illegally obtained and that may be separated without prejudicing their economic activity may not be subject to seizure.

**b. confiscation of proceeds of crime.**

Special confiscation is the forced and free transfer to the state of property or goods used in the commission of a crime or that resulted from crimes. If the goods used in the commission of a crime or that resulted from crimes no longer exist or cannot be found, their monetary equivalent shall be confiscated.

The following goods may be subject to special seizure:

a) goods resulting from an act set in the Criminal Code of Republic of Moldova, as well as other revenues that accrue from these goods, except for goods and revenues subject to return to their legal owners;

b) goods used or intended for use in the commission of a crime, if they belong to the criminal;

c) goods provided to determine the commission of a crime or to pay the criminal;

d) goods obtained through the commission of a crime, if they are not to be returned to the injured person or not intended for his/her compensation;

e) goods possessed contrary to legal provisions;

f) goods converted or transformed, partially or integrally, from goods resulting from crimes and from revenues accrued from such goods;

g) goods used or intended for financing terrorism.

If the goods resulting or obtained through the commission of a crime and revenues accrued from such goods are added to the illegally obtained goods, subject to confiscation shall be the part of such goods or their equivalent value to the value of goods resulting or obtained from the commission of the crime and of the revenues accrued from such goods.

Special confiscation shall be applied to persons who commit acts set in Criminal Code of Republic of Moldova. Special confiscation may also be applied to goods specified above, which, however, belong to other persons who accepted them knowing about their illegal origin.

Special confiscation may be applied even in cases when a criminal punishment is not set for the criminal.

Special confiscation can't be applied for crimes committed through a press agency or any other type of mass media.

**Extended confiscation.**

(1) Subject to confiscation may be and other goods than those mentioned above, if the person is convicted of offenses under Articles 158, 165, 206, 208/1, 2082, 217-217/4, 218-220, 236-240, 243,

248-253, 256, 2603, 260/4, 279, 280, 283, 284, 290, 292, 302, 324-329, 3302, 332-335/1 and if the offense was committed for purposes of profit.

(2) Extended confiscation is ordered if the following conditions are met:

a) the value of goods purchased by the convicted person for 5 years before and after committing the crime, until the adoption of the sentence, substantially exceeds the income of the acquired assets;

b) the court finds, based on the evidence in the file that those assets derived from criminal activity as those provided in par. (1).

(3) At the application of par. (2) will be taken in consideration and the value of the assets transferred by the sentenced person or by a third person to a family member, legal entities over which the convicted person having control or other persons who knew or had to know about the illicit acquisition of assets.

(4) In distinguishing between legal income and the value of acquired assets will be taken into account the value of their assets at the date of acquisition and expenses incurred by the convicted person, including persons referred to in paragraph (3).

(5) If goods that must be confiscated haven't been found, or were merged with property acquired from legal sources, in their place shall be confiscated money and goods covering their value.

(6) Also can be confiscated the goods and the money obtained from use of confiscated goods, including goods which have been transformed or converted proceeds of criminal activities, and income derived from such property or consideration.

(7) Confiscation cannot exceed the value of acquired property in the period provided under par. (2) letter a) that going beyond the legal income level of the convicted person.

### **c. management of seized and confiscated assets**

(1) Seized goods, as a rule, shall be taken, except for real property and large objects.

(2) Precious metals, precious stones and articles thereof; foreign currency; securities and bonds shall be transmitted for storage to the State Depository of Valuables in the line with the set procedure; monetary amounts shall be deposited into the deposit account of the court competent to try the respective criminal case; other objects seized shall be sealed and kept by the criminal investigative body that moved that the goods be seized, or shall be transmitted for storage to a representative of the executive authority of the local public administration.

(3) Unsealed seized goods shall be sealed and left for storage by the owner or possessor or an adult member of his/her family who receives an explanation of the liability provided in art. 251 of the Criminal Code for the appropriation, alienation, substitution or concealment of these goods and who signs the written receipt.

### **d. returning the assets for victims**

Returning the assets for victims it's not provided directly, but in accordance with art. 202 and art. 203 para. (2) from the Criminal Procedure Code of Republic of Moldova, seizure can be carried out and to ensure compensation for the damage to the victims caused by the offense.

### **e. asset sharing**

Asset sharing is not provided directly, but according with art. 113 from the Law nr. 371 "International Assistance in Criminal Matters", the confiscated objects on the basis of a decision of foreign judicial instance, belong to the Republic of Moldova but on demand of the other state, they can be transferred if they are of special interest for it and if there is a reciprocity guarantee.



#### 4. Introduction

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

(Please specify)

Yes. According to art. 106 paragraph (1) of the Criminal Code of Republic of Moldova, in case if the goods used in the commission of a crime or that resulted from crimes no longer exist or cannot be found, their monetary equivalent shall be seized.

5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.

Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

(Please specify)

Basically yes. According to art. 106 paragraph (3) of Criminal Code of Republic of Moldova, special confiscation may also be applied to goods which, however, belong to other persons who accepted them knowing about their illegal origin.

6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

(Please specify)

Basically yes. We would execute a request for legal assistance based on reciprocity when it complies with the legislation of the Republic of Moldova.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

No. The legislation of the Republic of Moldova does not provide such a possibility.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

No. The legislation of the Republic of Moldova does not provide such a possibility.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

No. The legislation of the Republic of Moldova does not provide such a possibility.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

We have no such provisions in the legislation of the Republic of Moldova.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

We have no proposals so far.

## NETHERLANDS

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

**a. search and seizure of proceeds of crime?**

Yes, we see treaty ETS No. 30 as a basis for search and seizure of proceeds of crime. However, the request for search and seizure of proceeds of crime would have to be based on treaty ETS 141 or ETS 198, considering that the aim of such seizure is confiscation. Confiscation is provided for in ETS 141 or ETS 198 and not in ETS 30. The Netherlands can execute a request for (prejudgment) seizure, on condition that:

- from the request it is evident that a warrant for seizure is issued by the requesting authority or would have been issued if the relevant objects themselves would be present within its territory;
- seizure in accordance with Dutch law is permitted;
- there are well-founded reasons for the expectation that the requesting State will submit a request to take charge of and to enforce the confiscation sanction. This must be evident from the mutual legal assistance treaty request.

The Netherlands requires a treaty basis for taking charge of criminal judgments (Section 2 of the Enforcement of Criminal Judgments (Transfer) Act [*WOTS*]). Serving as a basis includes the European Convention on the International Validity of Criminal Judgments (*EVIG*), ETS 141, ETS 198, etc. Furthermore, a prejudgment seizure is only possible when a country has the intention to transfer the confiscation order to us based on a treaty.

**b. confiscation of proceeds of crime?** No. Confiscation is provided for in ETS 141 and ETS 198.

**c. asset sharing?** In principle, the Netherlands does not require a treaty basis for this. The Netherlands does not consider ETS 30 as a basis for asset sharing. ETS 141 or ETS 198 does contain a rule for asset sharing.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

**a. search and seizure of proceeds of crime?**

In the investigative stage, when there is no confiscation order as yet, a request can be submitted on the basis of this treaty for information about the existence, location, extent and value of assets present in the Netherlands. Witnesses can be heard, telephone conversations can be monitored, etc. In Dutch law this is based on Title X of the Code of Criminal Procedure that provides for the application of such competences at a foreign authority's request.

A prejudgment seizure can also be imposed on assets (all corporeal property and property rights according to Section 94a subsection (5) of the Code of Criminal Procedure) that are present in the Netherlands, if the following conditions are complied with: a. the requesting State itself would also be in a position to seize assets if these assets were present in its own State; b. seizure in accordance with Dutch law is permitted; and c. there are well-founded reasons for the expectation that the requesting State will request enforcement of the final confiscation order at a later stage.

In order to determine what the proceeds of crime are and what has become of such proceeds, a criminal financial investigation (hereafter referred to as CFI) can be initiated on the basis of Section 13 of the Enforcement of Criminal Judgments (Transfer) Act. The requesting State does not need to request a CFI, the Dutch public prosecutor can decide independently to institute such a CFI as a result of a request for mutual legal assistance based on a treaty. A CFI provides the public prosecutor

and investigating officers with additional competences. At the request of the public prosecutor the examining magistrate can give the public prosecutor permission/authorisation for a CFI. On the basis of the obtained authorisation the public prosecutor can independently impose a prejudgment seizure. A condition for the CFI is that the offences of which the person in the requesting State is suspected would also give cause in the Netherlands to institute such a CFI. During the CFI, seizure could take place on behalf of the foreign authority if it appears from the request that the foreign authority intends to submit the final decision for an object-based confiscation or value-based confiscation to the Netherlands for the take-over and enforcement of the irrevocable decision ordering confiscation.

The Netherlands (primarily) has a system of value-based confiscation, whereby prejudgment seizure can be imposed on all of the suspect's assets. Irrespective of whether this asset is derived as a result of crime or that the asset has been obtained legally.

The last opportunity to seize goods is to demonstrate the illegally obtained benefits.

Important is that assets (bank accounts, cash ) and documents can be seized to investigate the provenance research and to establish whether this is achieved from criminal activities. Once the investigation is completed a subsequent decision will be taken by the Public Prosecutor. To avoid the need to return the seized goods, the prosecutor may be authorized by the judge and prejudgment seize these assets.

Article 94a of the Code of Criminal Procedure provides the possibility of the prejudgment seizure of those assets.

Condition is that it must be suspected or convicted of a crime for which a fine of the fifth category (€ 78,000) can be imposed. Objects can then be taken to retain the right to impose an obligation to pay a sum of money to the State to confiscation of illegally obtained benefits. (see Section 94a in the annex).

The Netherlands, for that matter, also has the option to take over the procedure that provides for the confiscation of assets from another country (Section 552y subsection (2) of the Code of Criminal Procedure). If criminal proceedings have already been instituted in the foreign country and judgment has already been passed there in respect of the punishable offences, the foreign authority can request a transfer of the confiscation procedure. In the context of such confiscation procedure a CFI can also be initiated or other actions can be carried out to trace assets (Section 552y of the Code of Criminal Procedure). There must be cause to assume that in respect of the suspect there are assets present in the Netherlands to which the confiscation can be applied. This procedure, for that matter, can also be initiated without being based on a treaty.

#### Section 552y Code of Criminal Procedure

1. Our Minister of Security and Justice shall refuse a request from a foreign authority for the institution of criminal proceedings right away, if it is immediately apparent that

a. the request pertains to a foreign national who has his permanent place of residence or abode outside the Netherlands;

b. the offence for which criminal proceedings are requested

1°. is not punishable under Dutch law;

2°. is of a political nature or relates to a criminal offence of a political nature;

3°. is a military offence;

c. the right to institute criminal proceedings for the offence for which prosecution is requested is precluded by lapse of the period of limitation under Dutch law or the law of the state which transmitted the request;

d. the request for the institution of criminal proceedings is intended to harm the person to whom it pertains on account of his religious, ideological or political beliefs, or his nationality, his race or his ethnic group;

e. criminal prosecution in the Netherlands would be in violation of the provisions of section 68 of the Criminal Code.

2. The condition, referred to in subsection (1, opening lines ) and (a) shall not apply if the request pertains to criminal proceedings for the purpose of special confiscation of unlawfully obtained gains as referred to in Part IIIb of Book IV.

On the basis of Dutch law, no proof is required of a link between the punishable offence and the asset. Neither for an investigation, nor for a confiscation.

**b. confiscation of proceeds of crime?**

The law also allows for enforcing a foreign judgment which entails the obligation to pay a sum of money to the State in order to deprive a person of illegally obtained profits.

The Netherlands can take over judgments on value-based confiscation as well as object-based confiscation, Section 31a of the Enforcement of Criminal Judgments (Transfer) Act. If so requested by the foreign authority, on the transfer of a decision ordering confiscation from abroad, the Dutch court can order an object-based confiscation instead of a value-based confiscation.

The applicable procedure is the 'transposition' of the foreign confiscation sanction into a Dutch confiscation sanction. The court will be less inclined to pursue an adaptation of the pecuniary sanction to the current criteria in the Netherlands than for prison sentences. Partial enforcement of the request for take-over is also possible. An appeal in cassation can be brought against the decision. (Section 32 of the Enforcement of Criminal Judgments (Transfer) Act.

**c. management of seized and confiscated assets?**

mention premature sell off. Outgoing and incoming, this can be a problem (loss of value).

In our legal system the seizure of goods is the task of the investigators, the public prosecutor decides on the destination of the seized goods (that's the legal decision) and takes a decision on the management. The management of seized and confiscated movable goods takes place by Domains Movable Goods, part of the Ministry of Finance. The management of the non movable goods takes place in the National Authority of seized and confiscated goods, part of the National Public Prosecution Service for Serious Fraud, Environmental Crime and Asset Confiscation. The prosecution office therefore has an important coordinating role in this playing field. In order to give substance to it there has been a sharply intensified cooperation between the Public Prosecution Service (OM), the Police, and Domains in recent years. That has been led to the introduction of the Seizure Portal in 2014. In this registration system all investigative services have to register all movable goods, the public prosecutor's office takes in the portal a subsequent decision, and that decision Domains executes. This creates fast on which goods were seized and where the goods are located. The costs of management of movable seized and confiscated goods have been reduced from € 23 mln to € 9 mln a year by introducing this central registration system and a stricter application of the rules since 2009. Based on a foreign request in which for example was asked to seize a car, the Dutch public prosecutor will contact the foreign authorities to ask if they agree with the selling of the car before a final confiscation order is imposed. This is possible on the basis of section 117 of the Dutch Code of Criminal Procedure (see section 117).

**d. returning the assets for victims?**

Based on a request for confiscation the Netherlands has the possibility to decide that all the assets have to be returned to the victims. The Netherlands thinks that it is very important that victims will be compensated first.

**e. asset sharing?**

See question 1, therefore possible on the basis of ETS 141.

**(Please specify)**

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

Remark: The Netherlands has already complied with the obligations arising from the treaty, so the treaty has no consequences in practice for Dutch criminal law.

The same procedure applies as for 2). Agreed, on the basis of treaties 141 and 198, the Netherlands can comply with foreign requests for search, seizure and confiscation of proceeds of crime. The answers to the following questions are the same as the answers to the abovementioned questions.

**a. search and seizure of proceeds of crime? The same answer as for 2)**

- b. **confiscation of proceeds of crime?** The same answer as for 2)
- c. **management of seized and confiscated assets?**
- d. **returning the assets for victims?**
- e. **asset sharing?** See question 1, therefore possible on the basis of ETS 141.

#### 4. Introduction

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

The Netherlands provides for both object-based confiscation and value-based confiscation. There is therefore no distinction in the Netherlands. The same answer as for 2) and 3).

- a. **search and seizure of proceeds of crime?** Yes to all. See specific conditions, but these are comparable to questions 1a and 2a. It must be established whether those involved have assets in the Netherlands.
- b. **confiscation of proceeds of crime?**
- c. **management of seized and confiscated assets?**
- d. **returning the assets for the victims?**
- e. **asset sharing?** This is also possible under the same conditions.

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. **Search and seizure of proceeds of crime?**  
Yes. Seizure of objects belonging to a third person is possible according to Dutch law. This seizure is possible if: i. there is enough evidence that the objects have become owned in full or in part by the other person with the manifest purpose of hampering or hindering the selling off of those objects; and ii. the other person knew this or could have had a reasonable suspicion.
- b. **confiscation of proceeds of crime?**  
Yes, ditto
- c. **management of seized and confiscated assets?** Also in the case of seizure of objects registered in the name of a third person, it is possible in the Netherlands to sell off the objects prematurely. The person whose asset has been seized always has the right to submit a complaint to the court about the seizure.
- d. **returning the assets for the victims?** Ditto, as answered previously.
- e. **asset sharing?** See above.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. **search and seizure of proceeds of crime?** no
- b. **confiscation of proceeds of crime?** no
- c. **returning the assets for the victims?** no
- d. **asset sharing?** no

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

In the Netherlands jurisdiction “in rem” is unknown. Confiscation in national cases is only possible if it concerns a judgment for punishable offences. Section 13c of the Transfer of Enforcement of Criminal Judgments (Transfer) Act, however, does provide the option on the grounds of this law, to transfer seized assets for countries who do undertake actions in rem. The description of ‘confiscation’ in ETS Warsaw has a broad definition on the basis of which cooperation can take place in procedures regarding punishable offences. Cooperation is possible, depending on the circumstances of a case.

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. **the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding?** The Netherlands will assess each case individually whether legal assistance can be granted. The foreign country proceedings in any case must involve a procedure in connection with punishable offences.
- b. **seizure of proceeds of crime?** Section 13c of the Enforcement of Criminal Judgments (Transfer) Act.
- c. **confiscation of proceeds of crime?** Section 13c of the Enforcement of Criminal Judgments (Transfer) Act.
- d. **management of seized and confiscated assets?** Yes, in case of proceedings in connection with punishable offences.
- e. **returning the assets for the victims?** Yes, in case of proceedings in connection with punishable offences.
- f. **asset sharing?** Yes, Section 13c of the Enforcement of Criminal Judgments (Transfer) Act.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Yes, the Netherlands is able to provide assistance in criminal proceedings related to the liability of legal entities based on the existing Conventions. The existing treaties, including ETS Warsaw, provides for international cooperation where it concerns proceedings in connection with one or more punishable offences. Whether foreign civil and administrative proceedings comply with that description will have to be assessed in each case individually.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

Yes, conditions and possible obstacles.

By its judgment of 31 January 2012 the criminal division of the SC in the RuneScape judgment, *Dutch case law* 2012, 536 with commentary from Keijzer, judgment was passed about the nature of virtual cases. The key question was whether an amulet that merely existed virtually could be stolen. The opinion of the Supreme Court was that an amulet and mask in the online game of RuneScape could be deemed as a ‘good’ and could therefore be stolen. The Public Prosecution Service has subsequently (under criminal law) seized Bitcoins.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

For the Netherlands it is of vital importance that victims can be compensated. The existing framework under treaty law, however, does not seem to provide for confiscation which is specially geared towards restitution to victims. The Netherlands can only implement a confiscation at the request of a foreign authority, if the request is based on a treaty.

The treaties do provide for seizure for the purpose of confiscation. In the case that a foreign authority imposes a decision ordering confiscation and the foreign authority requests the entire proceeds to be transferred on behalf of victims, then the Netherlands can cooperate with that.

On the grounds of Dutch law there is an option to impose seizure of objects which can serve as recovery for a compensation order imposed later by the court. A compensation order involves the obligation to pay a sum of money to the State for and on behalf of the victim or the surviving relatives of the victim. Section 36f of the Penal Code offers the option to impose a compensation order. This Section reads:

1. Persons sentenced to a punishment for a criminal offence according to a decision by the court or who have an order or obligation imposed against them as meant in Section 37, or on sentencing by the court of law account has been kept of a criminal offence of which notification is made in the summons that it has been admitted by the suspect, and brought to the attention of the court, or alternatively on whom a punishment order has been imposed, can be obliged to pay a sum of money to the State for and on behalf of the victim or his/her surviving relatives pursuant to Section 51f (2) of the Code of Criminal Procedure. The State immediately pays the amount received to the victim or his/her surviving relatives pursuant to Section 51f (2) of the Code of Criminal Procedure.
2. The order can be imposed if and in so far as the suspect is liable for damages caused by the criminal offence to the victim in accordance with civil law.
3. The order can be imposed in conjunction with other orders.
4. Payments made by the sentenced person to the State, extend in the first instance to compliance with the order and then to compliance with the imposed fine.
5. Sections 24a and 24b subsections (1) to (4), shall apply accordingly, on the understanding that the increase of the amount by virtue of the order is paid into the public funds of the State.
6. Payments made by the sentenced person to the State, will be used in the first instance for compliance with the order and then for compliance with increases pursuant to subsection (5).
7. If the person sentenced for a criminal offence has not or has not fully complied with the obligations imposed in the sentence or order within eight months after the day that the sentencing or order has become final, the State shall pay out the remaining amount to the victim who is not a legal person. By order in council it can be determined that this payment during a period still to be determined in this order in council can be limited to victims of violent and sex offences. By order in council it can also be determined that maximum amounts to be paid are set at € 5,000 or more on the understanding that this maximum limit does not apply for payments to victims of a violent or sex offence. The State recovers the paid out amount, as well as effective increases pursuant to subsection (4), from the sentenced person.
8. Sections 24c and 77I subsections (2) to (6), shall apply accordingly, on the understanding that imposing the alternative imprisonment or alternative juvenile detention does not remove the obligation by virtue of the order for compensation of damages suffered by the victim.

**Section 36f**

1. A person who is convicted of a criminal offence by judgment or where in the imposition of the punishment the court takes into account a criminal offence which, as is stated in the summons, the defendant admitted and is brought to the knowledge of the court, or against whom a punishment order is issued, may be ordered to pay the State a sum of money for the benefit of the victim or his surviving relatives within the meaning of section 51f(2) of the Code of Criminal Procedure. The State shall promptly pay the amount received to the victim or his surviving relatives within the meaning of section 51f(2) of the Code of Criminal Procedure.



2. The court may impose the measure if and insofar as the defendant is liable to the victim under civil law for the damage or loss caused by the criminal offence.
3. The measure may be imposed in conjunction with punishments and other measures.
4. Sections 24a and 24b(1) to (4) inclusive shall apply mutatis mutandis, on the understanding that the increase in the amount due under the measure shall be payable to the State.
5. Payments made by the convicted offender to the State shall first serve to pay the amount due under the measure and subsequently to pay the increases due under subsection (4).
6. If the offender convicted of a serious offence has not complied in full or in part with his obligation within eight months after the day on which the judgment or appeal judgment, in which the measure referred to in subsection (1) was imposed, becomes final, the State shall pay the remaining amount to the victim not being a legal person. It may be stipulated by Governmental Decree that only victims of violent and sexual offences shall be eligible for this payment for a period of time to be set in this Governmental Decree. It may also be stipulated by Governmental Decree that the amounts to be paid out shall be subject to an upper limit of € 5,000 or more, on the understanding that this upper limit shall not apply to payments made to victims of violent or sexual offences. The State shall recover the amount paid out and the increases due under subsection (4) from the convicted offender.
7. Sections 24c and 77l (2) to (6) inclusive shall apply mutatis mutandis, on the understanding that enforcement of the default detention or default juvenile detention shall not cancel the obligation to pay compensation to the victim under the compensation measure.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing?**

The current treaties do not provide for the option to impose seizure or confiscation especially for and on behalf of victims. As indicated above, the courts in the Netherlands (aside from a decision ordering confiscation) can impose a compensation order. A compensation order involves the obligation to pay a certain sum of money to the State for and on behalf of the victim or the surviving relatives of the victim. At this point in time there is no basis under treaty law for the transfer of the enforcement of a Dutch compensation order to the foreign country. We would welcome it if the existing instruments could be extended with the option to search for assets, the imposing of seizures and the confiscation of objects especially for restitution to victims.

It is also possible to impose a prejudgment seizure on behalf of victims and to this end Section 94a of the Code of Criminal Procedure has been amended. In that respect, the question remains whether the Netherlands can impose a prejudgment seizure for a victim on the basis of a foreign request. Such a seizure serves as a recovery of a compensation order and on the basis of existing treaties it is not possible to request the take-over and enforcement of a compensation order. Confiscation, after all, is understood to be the forfeiture and confiscation order and not the compensation order.

**Article 36e of the Dutch Penal Code:**

1. *On application by the Public Prosecutor's Office, an obligation to pay a sum of money to the State may be imposed, by separate judicial decision, upon the person convicted for a criminal offense to deprive that person of the unlawfully obtained gains.*
2. *The obligation may be imposed upon the person specified in section 1 who has obtained gains by means of or derived from the said criminal offense or similar offenses for which a fine of the fifth category may be imposed, and where there is sufficient evidence that they have been committed by him.*
3. *On application by the Public Prosecutor's Office, an obligation to pay a sum of money to the State may be imposed, by separate judicial decision, upon a person who has been convicted for a serious offense for which a fine of the fifth category may be imposed, and against whom, as a person accused of said serious offense, a criminal financial investigation has been instituted in order to deprive that person of unlawfully obtained gains, where in view of such investigation it is established that other criminal offenses also have resulted in the convicted person unlawfully obtaining gain in any way.*
4. *The judge shall set the amount at which the unlawfully obtained gains are to be assessed. Such gains include the saving of costs. The value of objects the judge considers to constitute*

*unlawfully obtained gains may be assessed at their market value at the time of the judicial decision or, where there is a need for recovery, by referring to the proceeds of sale by public auction. The judge may set an amount that is lower than the estimated gains. At the request of the defendant or the convicted person, giving reasons, and if the current and reasonably expected future financial capacity of the defendant or convicted person will not be sufficient to pay the amount to be paid, the judge can take this into account when setting the amount to be paid. If no such a request is made, the judge can apply this authorisation ex officio or at the request of the Public Prosecutor's Office.*

5. *The term "objects" is to be taken to mean all corporeal property and all property rights.*
6. *In determining the amount at which the unlawfully obtained gains are assessed, court-awarded claims of injured third parties will be deducted.*
7. *In imposing the measure, the obligations, imposed by prior decisions, to pay a sum of money to derive the person of the unlawfully obtained gains shall be taken into account.*
8. *Committal for failure to comply with a judicial order can be ordered by the judge up to a maximum of three years, with application of Article 577c of the Dutch Code of Criminal Procedure, and is deemed a measure.*

### **Section 94a of the Code of Criminal Procedure**

1. In the event of a suspicion of a crime for which a fine of the fifth category may be imposed, objects may be seized as a protective measure in the context of recovery of the fine to be imposed for the crime.
2. In the event of suspicion of or conviction for a crime for which a fine of the fifth category may be imposed, objects may be seized as a protective measure in the context of recovery of the obligation to be imposed as a result of that crime, for payment of a sum of money to the State in respect of confiscation of the proceeds of crime.
3. In the event of a suspicion of a crime for which a fine of the fourth category may be imposed, objects may be seized as a protective measure in the context of recovery of a measure to be imposed for the crime as meant in Section 36f of the Penal Code.
4. Objects which belong to a person other than the person on whom the fine can be imposed, in cases referred to in subsection (1), or the person from whom the proceeds of crime can be seized, in cases referred to in subsection (2), or the person in cases referred to in subsection (3) on whom the measure can be imposed as meant in Section 36f of the Penal Code, can be seized if there are sufficient indications that these objects are owned wholly or in part by said other person with the manifest purpose of hampering or hindering the selling off of the objects, and the other person knew this or should reasonably have known this.
5. In cases referred to in subsection (4), other objects belonging to the person involved can also be seized, up to the maximum value of the objects referred to in subsection (4).
6. The term "objects" is to be taken to mean all corporeal property and all property rights.

### **Section 117 of the Dutch Code of Criminal Procedure**

1. The seized objects may be sold, destroyed, relinquished or used for a purpose other than the investigation only with authorisation.
2. The Public Prosecution Service may grant the authorisation referred to in subsection (1) in regard of objects
  - a. which are not suitable for storage;
  - b. whose custody costs are not in reasonable proportion to their value;
  - c. which are replaceable and whose equivalent value can be easily determined.
 Seized objects, which are of such nature that their uncontrolled possession is in violation of the law or contrary to the public interest, shall only be granted authorisation for destruction.
3. The authorisation referred to in subsection (1) shall be directed to the custodian or to the civil servant who has possession of the objects pending their transportation to the custodian. The person to whom the authorisation is directed shall ensure that the value of the object is set at the price it would have reasonably fetched if sold at that time.
4. If the seized objects are sold for a profit with the authorisation of the Public Prosecution Service, the proceeds obtained shall continue to be subject to seizure, without prejudice to the provisions of section 116.

5. If within six weeks the Public Prosecution Service fails to take a decision on the custodian's written request to grant him the authorisation referred to in subsection (1), the custodian shall be authorised to take action in accordance with subsection (1)

**NORWAY**

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

**(Please specify)**

In general, Norway considers the European Convention on Mutual Assistance in Criminal Matters and its protocols to be important legal tools for mutual assistance in criminal matters. We also consider the Convention to be an appropriate instrument in the fields of search, seizure and confiscation.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

According to Norwegian prosecutors, the two conventions (ETS 30 and ETS 141) are often used together. In general Norway is able to cooperate and contribute regarding measures mentioned in question 3 letter a. to e, within its national system.

- a. search and seizure of proceeds of crime and b. confiscation of proceeds of crime?**

For out-going requests, the most practical challenge is to identify the assets from crime. If there is no detailed information of where to find the assets, it is often a challenge to request investigative steps without being on a "fishing expedition".

For incoming requests, the Norwegian legal basis may be used to the same extent as in domestic cases. The requesting country should provide sufficient material/evidence and legal material to enable Norwegian authorities to assess the legal basis and possibilities for the requested measures being executed in Norway, e.g. that the offence is criminalised and that reasonable grounds for suspicion are established.

- b. Confiscation of proceeds of crime**

See answer under letter a.

- c. management of seized and confiscated assets?**

In Norway there is no central office for management of confiscated assets. This is handled by the police on a case to case basis.

- d. returning the assets for victims?**

This is a frequently used practice in Norway, and does normally not cause any problems.

- e. asset sharing?**

Norway has limited experience with asset sharing, cf article 15 of the Convention, but has the necessary domestic legal tools to enter into such agreements.

**(Please specify)**

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

**(Please specify)**

Norway has not ratified this Convention. However, please note that for most requests, Norway may provide assistance irrespective of the existence or applicability of a treaty.

#### **4. Introduction**

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

According to the Extradition Act section 24, coercive measures may be used in the same manner as in cases of offences of a similar nature when prosecuted in Norway.

The Norwegian legislation operate with both the value-based and the object basis confiscation system. Thus, we may carry out requests based on the value-based confiscation system for the different types of assistance mentioned.

The requesting country should provide sufficient material to enable Norwegian authorities to assess the legal basis and possibilities for the requested measures being executed in Norway.

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

Yes, assets which *de facto* belongs to the accused/convicted person may be seized and confiscated, regardless of the formal ownership, provided that it is proven that the assets *de facto* belongs to the accused/convicted person. In such cases we may carry out requests for assistance.

The principles of the present legislation will also follow in the new Norwegian criminal code, the Penal Code of 20. May 2005 No. 28, section 72, which will enter into force on 1. October 2015.

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

(Please specify)

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

(Please specify)

Yes, Norwegian legislation does not require a treaty basis, and as a main rule we may co-operate with other States with regards to the different types of assistance mentioned above.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

The Norwegian legislation has no specific reference to the above measures, and a foreign request would have to be considered on a case to case basis.

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Regarding assistance in criminal matters, legal entities are subject to criminal liability according to the Penal Code of 22.05.1902 No. 10 sections 48 a and 48 b and, for crime committed after 1. October 2015, the Penal Code of 20.05.2005 No. 28 sections 27 and 28. Legal entities are subjects to seizure/confiscation of proceeds of crime on the same conditions as persons who are charged/convicted. Norway may assist other States when requested in conducting

seizure/confiscation on the same conditions as apply in domestic cases according to the Extradition Act of 13.06.1975 No. 39 section 24 first paragraph.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

Norway has the legal tools to provide other states with assistance in relation to seizure and confiscation of virtual currencies. This must be done in compliance with the framework of the Norwegian Criminal Procedure Act, chapter 16. The National Criminal Investigation Service possesses the necessary technical abilities to seize and confiscate virtual currencies in "virtual wallets" of people suspected of crimes and possible third parties.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Norway has the legal basis to transfer seized or confiscated goods to a foreign state for the purpose of returning it to the rightful owner. Similarly, it may be determined that objects which have been temporarily handed over to the foreign state shall be relinquished.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

It could be useful to have guidelines/model agreements on asset sharing. Or perhaps it should be considered to have a protocol on asset sharing? Such an instrument could e.g. regulate the sharing of the assets and the priority of liability for compensation for victims.

**PORTUGAL (TRANSLATION)**

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime? Yes.**
- b. confiscation of proceeds of crime? No.**
- c. asset sharing? No.**

**(Please specify)**

The positive answer to the first question is linked to the scope of Portuguese domestic law, which allows for the seizure both of evidence and of the instruments of a crime and its proceeds. The negative response to questions b. and c. stems from the fact that the enforcement in Portugal of a confiscation order issued by a foreign judicial authority requires a preliminary recognition procedure (an exequatur) to be completed, and this procedure clearly falls outside the scope of the Convention on Mutual Assistance. As to the third scenario, we do not believe that the Convention can be interpreted so broadly.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime? No.**
- b. confiscation of proceeds of crime? No.**
- c. management of seized and confiscated assets? No.**
- d. returning the assets to victims? No.**
- e. asset sharing? Yes.**

**(Please specify)**

The obstacles listed do not stem directly from the application of the Convention but rather from the lack of practical experience owing to the very hesitant use of this instrument. Furthermore, the speed with which money is transferred is difficult to reconcile with a conventional co-operation procedure via an international rogatory commission applying one of the relevant instruments. As to asset sharing, we have very little experience. A first case is nearing completion but it will not be based on this instrument.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**(Please specify)**

This instrument has very rarely been used so a lack of significant experience makes it impossible to draw conclusions.



#### 4. Introduction

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

Portuguese law allows for value-based confiscation (Law 5/2002) so the preventive or preliminary measures referred to in a., b. and c. are possible, as is returning assets to victims. The same applies to asset sharing. However, there may be certain difficulties where it comes to the decisions of the courts, where a certain amount of resistance can be discerned.

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

It will always be possible to enforce a request concerning one of these measures provided that the link between the "straw man" and the laundering offence has been well established and the person concerned has been properly identified.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

**(Please specify)**

Yes. Portuguese legislation in general does not rule out the possibility of co-operation if there is no instrument or treaty unless a specific law provides otherwise. There is no specific law on these matters so co-operation seems to us to be possible. However, there are certain instruments which might compensate for the need for a treaty such as the UN conventions against corruption and organised crime.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

No, it would be problematic for Portugal to enforce non-conviction-based decisions as the law provides that it is only on the basis of a criminal conviction that such decisions can be taken. Therefore seizure or confiscation must always be preceded by a criminal conviction and it is at this level that the problem arises.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Under the Portuguese legal system, legal entities may be criminally liable, meaning that co-operation is possible under the same conditions as for individuals.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

We see no reason to create a different system for bitcoins. However, factors linked to the inflexibility of criminal procedures are all the more palpable in such cases.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

The restitution of assets obtained by criminal means presents no difficulties in Portuguese criminal proceedings. There is no obstacle and no need for a different system to that which has been set up for the proceeds of crime.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

There are no instruments providing a basis for co-operation with regard to NCBC. Without such an instrument Portugal will be unable to co-operate when the request is based on an NCBC.

**ROMANIA**

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

Although the scope of its application is extensive (non-specific offences) and it has been quite successful, it does apply only to search and seizure for the purposes of securing evidence. However, it might be used in the context of the asset-tracing investigation.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

The scope of the ETS 141 application covers money laundering. Consequently, states are allowed to make declarations/reservations to specific Articles, e.g. that money laundering offence applies only to categories of offence or listed offences (predicate offences). Types of assistance currently offered by ETS 141 do not include c) and d).

Therefore, when using ETS 141, as a requesting state, scope of its application (including types of assistance) and declaration/reservation made by the requested state are both foreseen, especially when double criminality is required. Difficulties encountered when acting from this perspective (only exemplificative): lack of acknowledge, lack of communication, delay in replying or executing the requests especially those involving investigative assistance.

When acting as a requested state, Romania applies Article 14, paragraph 2, only subject to the constitutional principles and the basic concepts of the Romanian legal system.

Types of assistance mentioned at a) b) and e) are covered in the Romanian legislation on international judicial cooperation in criminal matters (Law no. 302/2004 as amended by Law 300/2013). It should be noted that Romania has domestic legal provisions in relation to returning or sharing confiscated property to a requesting State both in relation to EU (Article 265 of Law no. 302/2004) and non EU MS (Article 140 of Law 302/2004). In relation to non-EU member State agreement is concluded by the Ministry of Justice.

At the national level, management of the seized and confiscated assets is foreseen by the Romanian Criminal Procedure Code (Article 252 indent 1 - 3), and also by other legal instruments (e.g. Government Ordinance 14/2007) envisaging different options of disposal: destruction, transfer to NGOs, local authorities and other state institutions (including for social purposes), and sale.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

**(Please specify)**

The scope of the ETS 198 application covers money laundering and financing of terrorism, and it was ratified/acceded by only 26 (including Romania) states. Comments made in respect to Question 3 are to be followed.

#### **4. Introduction**

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

Romanian criminal legislation allows for value confiscation under certain conditions: Article 112 (3) and (5), and Article 112 indent 1 (5) of the Romanian Criminal Code.

Under Article 112 (3) the following assets 1) assets that were used in any way, or intended to be used to commit a fact provided by criminal law; (2) assets used immediately after the commission of the fact to ensure the perpetrator's escape or the retention of use or proceeds obtained, *could not be confiscated* if they do not belong to the offender and the third party did not know the purpose of their use (acting in good faith). In such case, the law provides for the value confiscation.

Under Article 112(5), the system of value confiscation is also applicable when assets subject to *special confiscation*<sup>147</sup> are not found. In addition, the system of value confiscation is applicable when assets which are subject to *extended confiscation* in accordance with the Article 112 indent 1 of the Criminal Code are not found.

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<sup>147</sup> Article 112 (1) b) assets that were used in any way, or intended to be used to commit a fact set forth by criminal law, if they belong to the offender or to another person who knew the purpose of their use (excepting the case of offenses committed by using the press); c) assets used immediately after the commission of the fact to ensure the perpetrator's escape or the retention of use or proceeds obtained, if they belong to the offender or to another person who knew the purpose of their use; d) assets given to bring about the commission of a fact set forth by criminal law or to reward the perpetrator; e) assets acquired by committing any fact provided by criminal law, unless returned to the victim and to the extent they are not used to indemnify the victim;

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for the victims?**
- e. asset sharing?**

Confiscation from third parties is also foreseen in the Romanian legislation: Article 112 (1) b) and c) and (3) of the Romanian Criminal Code.

To be applicable, it is required the fulfilment of the following prerequisite:

- specific types of assets: (1) assets that were used in any way, or intended to be used to commit a fact provided by criminal law; (2) assets used immediately after the commission of the fact to ensure the perpetrator's escape or the retention of use or proceeds obtained, if they belong to the offender or to another person who knew the purpose of their use.
- the third party did know the purpose of its use (not acting in good faith)

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. returning the assets for the victims?**
- d. asset sharing?**

Yes. This possibility is foreseen by Article 140 (1) of the Law 302/2004 on international judicial cooperation in criminal matters.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, relate to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please s) and (5) of the Romanian Criminal Code specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding**
- b. seizure of proceeds of crime?**
- c. confiscation of proceeds of crime?**
- d. management of seized and confiscated assets?**
- e. returning the assets for the victims?**
- f. asset sharing?**

According to Article 140 of the Law 302/2004 on international judicial cooperation in criminal matters the recognition and enforcement of the foreign confiscation orders issued by third States shall take place according to the treaty signed by Romania and the foreign requesting State or, if such treaty does not exist, according to this Law, as well as according to the Romanian Code of Criminal Procedure, under the requirement of reciprocity. The recognition and enforcement of the foreign decision ordering similar measures to confiscation, which, according to the Romanian law, are not criminal penalties/sanctions, may be ordered only if:

- a) The measures result in the final dispossession of those assets; b) The measures were ordered by a competent judicial authority of the issuing State related to one or several criminal acts; c) The assets are related products or instruments.

When there are reasonable suspicions regarding the occurrence of a concrete danger concerning the concealment, destruction, alienation or removal of the assets subject to confiscation (similar measures to confiscation), the court may impose, ex officio or upon the request of the issuing State or of the prosecutor, the measure of preservation, ordering the seizure of the movable or immovable assets in view of confiscation.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Yes, based on the Bilateral or EU/regional legal instruments or the national law, subject to reciprocity.

**9. Is your State in a position to provide assistance in procedures related to *virtual currencies such as bitcoins*, especially as regards seizure and confiscation?**

Generally, when it comes to seizure and confiscation, the Criminal Code law does not distinguish between traditional money, electronic money and virtual money.

Up to know we did not identify any national case to request or assist other states in relation to this topic.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Yes.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

No.

**SLOVAK REPUBLIC**

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS no. 30) and its additional protocols as appropriate instruments for cooperation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

We do not consider those instruments as appropriate for cooperation in the mentioned fields. For instance, the European Convention does not define "proceeds of crime", it only mentions seizure and handing over a thing. We are convinced that Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (Strasbourg, 8 November 1990, hereinafter referred to as Strasbourg Convention) and the CE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism (Warsaw 16 May 2005, hereinafter referred to as Warsaw Convention) have been adopted exactly due to the fact that seizure of proceeds of crime and subsequent confiscation thereof have not been covered by the convention. Seizure of proceeds is temporary institute to secure proceeds of crime. If we even admitted the possibility of application of the said convention and protocols thereto, conditions are missing as regards further procedure as well as regulation of responsibility for subsequent actions made by countries involved; those conditions are clearly regulated in both Strasbourg and Warsaw conventions. It is predominantly for those reasons that we do not consider the European Convention ETS 30 and protocols thereto as sufficient legal basis for procedure stated in par. a) to c).

That is to say that seizure of proceeds anticipates subsequent confiscation or returning for a victim within proceedings to compensate damages caused. Neither the convention nor protocols thereto are not sufficient basis for confiscation of the proceeds or, as the case may be, for returning them to victims (note: returning proceeds to victims is not regulated neither by the Strasbourg nor Warsaw Convention; on CE level, it is not regulated at all). Under SK legal order, the confiscation comes into question only after recognition of a foreign decision/judgment; furthermore, the SK legal order requires fulfillment of several conditions for such a procedure. One of them is existence of an international agreement including possibility or obligation to recognize or enforce judgments but, the convention and protocols thereto do not include such a provision. For this reason, pursuant to an agreement, seizure of proceeds in anticipation of subsequent confiscation is impossible according to mentioned convention and protocols thereto.

The European Convention and its protocols can be considered as applicable legal instruments to hand over things obtained by criminal activity to requesting contractual party in order to return them to entitled owners. Thus, in principle, seizure of a thing and handing it over with the aim to return it back to entitled owners is in accordance with the mentioned convention.

As result of the above, we do not deem the European Convention ETS 30 as appropriate instrument of mutual cooperation even in the field of assets/proceeds sharing.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (EETS No. 141) as a basis for cooperation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of the seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**



**a. Search and Seizure of proceeds of crime:**

The Slovak Republic is contractual party to mentioned convention. The convention represents sufficient basis for search and seizure of proceeds of crime. But, there are some practical problems in this area related with dual criminality especially as regards tax crime.

**b. Confiscation of proceeds:**

The convention is sufficient basis for confiscation of proceeds of crime; in SK it is implemented after recognition of a foreign judgment by a Court. But this procedure is possible only if there is an international agreement and also under further conditions especially dual criminality and the fact that a judgment to be recognized was rendered in the country of origin within proceedings according to article 6 of the Convention on Protection of Human Rights and Fundamental Freedoms (right to fair trial), and ne bis in idem condition. Furthermore, it is required that the criminal act in question should not be an offence of political or military nature and that service/enforcement of a sentence imposed is not statute-barred in the Slovak Republic etc.

**c. Management of Seized and Confiscated Assets:**

Due to absence of respective provision of the convention, the management of seized assets is regulated by national legislation. If a decision was made to confiscate assets, they are subject to State ownership/are owned by the state unless contractual parties agree otherwise in accordance with the Article 15 of the convention.

There is still one problem resulting from application practice owing to absence of both the Asset Management Office and Asset Recovery Office.

**d. Returning the Assets for Victims:**

The convention does not include a provision under which a State could proceed while returning assets to victims. For this reason the Slovak Republic has not applied such procedure. Furthermore, current national legal regulation does not permit trans-border returning assets directly for victims on the basis of a request for legal assistance and/or confiscation. But, regardless of their nationality, an injured party can put forward their claim within Slovak civil proceedings.

**e. Asset Sharing:**

We have not any experience as regards asset sharing so far.

We would like to point out the fact that as regards to cooperation under Warsaw Convention (not concerned with this question), it defines more detailed rules, but in both cases, there is the condition of mutual agreement of contractual parties ad hoc (unless contractual parties agree otherwise).

**3. When using the CE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) as a basis for cooperation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify as regards to:**

- a. **search and seizure of proceeds of crime?**
- b. **confiscation of proceeds of crime?**
- c. **management of seized and confiscated assets?**
- d. **returning assets for victims?**
- e. **asset sharing?**

**a. Search and Seizure of Proceeds of Crime:**

Slovak Republic is contractual party to said convention. The convention is sufficient basis for search and seizure of proceeds of crime. But practical application thereof is questionable in the cases where there are grounds for refusal (as mentioned above, e.g. dual criminality principle). If in the stage of request for seizure of assets it is manifest that e.g. dual criminality condition is not met in relation to subsequent confiscation, there is a question whether seizure is possible to implement. In our view, contractual country has no obligation to enforce seizure under those conditions because it is not clear which party would bear a possible responsibility for a damage caused. Whilst, regarding to seizure, dual criminality is considered only on abstract level, in case of confiscation, this condition is considered in concreto because it is necessary to recognize and enforce a foreign judgment on confiscation.

**b. Confiscation of Proceeds of Crime:**

The convention is sufficient basis for confiscation of proceeds of crime. In SK conditions, it is applied on the basis of proceedings to recognize a foreign property decision/judgment that means that under fulfillment of conditions specified in answer 2 b) (contractual reciprocity, dual criminality, ne bis in idem etc.).

**c. Management of seized and confiscated assets:**

Management of assets is regulated by national legislation since relevant provision of the convention is missing. But this is problematic area because separate legal regulation on management of seized property is missing so far. Preparation of respective legislation was expected to start in 2016 within the framework of transposition of the EP and Council Directive on Freezing and Confiscation of Proceeds of Crime in the European Union.

As mentioned above, there is the problem of missing Asset Management Office and Asset Recovery Office.

**d. Returning Assets for Victims:**

The convention does not include any provision under which the Slovak Republic as requested country could proceed to return assets for victims. Provision of the Article 25 mentioned only returning of confiscated property to a requesting party that subsequently returns it to a victim. However, any contractual regulation on possibility to return assets **directly** for victims is still missing.

**e. Asset Sharing** – please see answer 2 e).

**4. Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify as regards to:**

- a. **search and seizure of proceeds of crime?**
- b. **confiscation of proceeds of crime?**
- c. **management of seized and confiscated assets?**
- d. **returning the assets for the victims?**

**e. asset sharing?**

**a. Search and Seizure of Proceeds of Crime:**

On the basis of an application/request it is possible to search for potential proceeds of crime in the conditions of the Slovak Republic.

The request for seizure of proceeds of crime should include precise description of a property originating from crime or equivalent and accurate determination of alternative/substitute value. It is also necessary for the requesting country to state that it requests for or will request for seizure in anticipation of confiscation.

**b. Confiscation of Proceeds of Crime:**

Confiscation can be enforced upon recognition by competent court of the Slovak Republic of a foreign judgment imposing confiscation. Within these proceedings, the Slovak court is bound by description of body of crime in the same extent like in the foreign judgment of the country of origin that is to be recognized and enforced.

**c. Management of Seized and Confiscated Assets:**

Management of assets is identical regardless of whether a seized thing was obtained by crime or it is counter value thereof. Confiscated assets become State property unless a court decided otherwise on the basis of a promulgated international treaty by which the Slovak Republic is bound.

**d. Returning Assets for the Victims:**

Please see answer 2 d).

**e. Asset Sharing:**

In our view, this procedure is possible upon application of Warsaw Convention, but we also refer to facts mentioned in answer 3 e).

**5. Several member States recognize the possibility of seizure and confiscation of assets which belong de facto to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify as regards to:**

- a. Search and seizure of proceeds of crime?**
- b. Confiscation of proceeds of crime?**
- c. Management of Seized and Confiscated Assets?**
- d. Returning the Assets for the victims?**
- e. Asset Sharing?**

**a. Search and Seizure of Proceeds of Crime:**

On the basis of a request, we can search for potential proceeds of crime regardless of nature of ownership.

Regarding seizure – yes – first of all it is necessary to examine whether it is proceeds of crime, whether movable property or real estate, financial means held on bank account, or in foreign bank branch, securities or any other property located in the Slovak territory, was designed to commit crime, was used to commit crime or is proceeds of crime and forfeiture (criminal sanction) or confiscation (protective measure) is presumed pursuant to Section 551, par. 1 of the Code of Criminal Procedure.

As regards confiscation, management of seized and confiscated assets, returning the assets to the victims and asset sharing please see above answers concerning the topic in question.

**6. Is your State in a position to cooperate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning assets for the victims?
- d. asset sharing?

a. **Search and Seizure of Proceeds of Crime,**

b. **Confiscation of Proceeds of Crime:**

No, because these are proceedings to recognize and enforce a foreign judgment concerning a property. The Slovak Code of Criminal Procedure explicitly requires that there should be international treaty including possibility or obligation to recognize or enforce foreign judgments.

c. **Returning Assets for Victims,**

d. **Asset Sharing.**

As regards to par. a), c) and d) it is necessary to explain that the Slovak Code of Criminal Procedure includes the possibility to proceed on the basis of reciprocity principle but practical application and efficient execution of this provision is problematic in the conditions of the Slovak Republic. Especially cases under c) and d) are rather administrative proceedings impossible to subsume in the Code of Criminal Procedure.

It can be stated in general, that mutual cooperation in these fields is impossible without international contractual basis.

**7. Is your State in a position to provide mutual legal assistance for the purposes of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information gathering phase, during which criminal information is often requested for use within NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?

- e. **returning the assets for the victims?**
- f. **asset sharing?**

- a. **Information gathering phase during which criminal information is often requested for use within NCB proceeding:**

Pursuant to SK requirements, it is always necessary to prove link to criminal proceedings. This does not affect Police cooperation or competencies of the Financial Intelligence Unit which is the central national unit in the area of prevention and detection of legalization of proceeds from crime and financing of terrorism.

- b. **Seizure of Proceeds of Crime:**

Pursuant to national legislation, seizure of proceeds anticipates subsequent confiscation which is impossible unless judgment/conviction is rendered.

- c. **Confiscation of proceeds,**
- d. **Management of seized and confiscated assets,**
- e. **Returning assets for victims,**
- f. **Asset sharing:**

Cooperation in these fields is regulated by Warsaw Convention, Article 23(5): "The Parties shall cooperate to the widest extent possible under their domestic law with those Parties which request the execution of measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions, in so far as such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offence, provided that it has been established that the property constitutes proceeds or other property in the meaning of Article 5 of this Convention." But granting legal assistance or enforcing confiscation is always necessary to be considered state/decided ad hoc.

- 8. Is your State in a position to provide assistance in civil, criminal and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

SK is able to provide legal assistance within criminal proceedings related to liability of legal entities for the purpose of seizure or confiscation of the proceeds. The procedure requires conditions to be fulfilled as follows (pursuant to Section 551, Code of Criminal Procedure):

"Section 551

Seizure of Property

(1) Pursuant to conditions defined in an international treaty, and upon foreign authority's request and on the basis of prosecutor's motion, the Court may decide to preliminarily seize movable property, real estate, financial means on bank account or in foreign bank branch, securities or any other property in the territory of the Slovak Republic, which is designated to commit crime, was used to commit crime or is proceed of crime and the criminal forfeiture or confiscation thereof is anticipated. Provisions of the Section 95, par. 3, 4 and 6 and Section 96, par. 3 and 5 shall apply adequately.

(2) The decision mentioned in par. (1) is to be made by a District Court in the jurisdiction of which the property is located.

(3) If a matter is urgent, prosecutor may issue order under par. (1), his order must be approved by a competent judge (par. 2) within 48 hours otherwise it is void/not valid.

(4) District Court shall cancel the preliminary seizure upon that foreign authority's request which requested for it or on the basis of conditions stated in an international treaty. District Court may cancel preliminary seizure also in case that a State concerned failed to request for enforcement of foreign property decision concerning property seized."

As regards enforcement of a decision with regard to legal entities, the procedure is as follows:

#### Section 521a

##### Enforcement of a foreign decision concerning a legal entity

(1) Motion to enforce foreign decision (Section 515, par. 4) is submitted to a court by the Ministry of Justice. The court shall decide in public hearing. The court shall examine whether the enforcement of a foreign decision is contrary to interests protected by the provision of the section 481. If no problem is found out, it shall decide to enforce the foreign decision upon prosecutor's motion; otherwise it shall dismiss the motion.

(2) District Court in the jurisdiction of which the legal entity's property is located, is competent to issue a decision pursuant to par. 1. If there is a conflict of jurisdictions, the District Court that was submitted the motion from the Ministry of Justice.

(3) Prosecutor, Ministry of Justice and a participating person can file a complaint against the decision under par. 1. The complaint shall have suspensive effect.

(4) After the validity of the decision under par. 3, the provisions of this Act on enforcement of protective measures on confiscation of property/money shall apply adequately.

As regards this provision, it is necessary to draw the attention to the fact that this provision shall be deleted from the Code of Criminal Procedure due to effectiveness of the new Act on Liability of Legal Entities as from the 1<sup>st</sup> July 2016.

#### Section 515

##### Foreign Decision

(1) Decision in criminal matter rendered by other state's court (hereinafter "foreign decision") with the aim to impose a penalty, may be enforced in the Slovak Republic only upon recognition thereof by a Slovak court.

(4) In the Slovak Republic, foreign decision regarding legal entity can be enforced only if it imposed financial sanction or confiscation of property. Recognition by Slovak court is not necessary if so provided by a separate regulation or an international treaty.

The par. 4 shall be deleted due to effectiveness of the new Act on Liability of Legal Entities as from 1<sup>st</sup> July 2016. It can be stated in general, that the new Act will significantly widen possibilities of recognition of foreign decisions as well as possibilities of granting legal assistance.

**9. Is your State to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

Slovak Republic has no practical experience in this field. Currently it is examining its own legal regulation, considers preparation of a manual for LEAs and making use of the experience of the EU countries for this purpose.

It means that pursuant to the Slovak Code of Criminal Procedure, it is possible to provide legal assistance within proceedings in virtual currencies matters, but we do not have any practical experience so far. Theoretically we are able to seize virtual currency, but some sort of virtual purse should be created in future in order to enable transfer of virtual currency thereto.

**10. Is your state in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instruments used as legal basis. If not, please specify the legal obstacles.**

It is possible to provide thing to a requesting country but only for the purpose of returning it to entitled owner.

This fact relies on the Article 12 of the Second Additional Protocol which is possible to apply also in case of victims if they are entitled owners.

This procedure is possible also on non-contractual basis.

Conditions are defined in the Section 550, Criminal Code:

Section 550

Handing over a thing

- (1) Seizure of a thing and handing over thereof can be made upon a request of a foreign authority.
- (2) Requested authority can suspend handing over of a thing if a thing is necessary for Slovak LEAs within criminal proceedings.
- (3) Requested country shall request for returning of a thing handed over. Requested country can renounce this right or can approve that a thing is returned directly to the owner.
- (4) These provisions shall apply adequately to handing over a thing seized from a person to be extradited. If possible, the thing shall be handed over together with a person.

As regards seizure of property (if confiscation is anticipated) the conditions of the Section 551, Code of Criminal Procedure as well as international treaty shall be fulfilled cumulatively.

Section 551

Seizure of Property

- (1) Upon conditions of an international treaty, upon request of a foreign authority and upon prosecutor's motion, the court can preliminarily seize movable property, real estate, money on bank

account, or in foreign branch, securities or any other property in the Slovak Republic which is designated to commit crime, was used to commit crime or is proceeds of crime and confiscation or seizure thereof is anticipated.

In this context, there is the issue of money on bank account. Since it is the claim towards a or dispose of them since neither prosecutor nor judge has right of disposal. According to the provision of the Section 95 of the Code of Criminal Procedure, there is only the possibility for prosecutor/court to the money on the bank account and the possibility to cancel the seizure. Prosecutor/court actually can only restrict or exclude the holder's right of disposal. Thus, seizure is based on prohibition to dispose of the money within the limit of the seizure. Neither prosecutor nor judge can order/instruct a bank regarding any handling/treatment of money on bank account. The purpose of seizure is temporary restriction or exclusion of an entitled person to dispose of the money.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international cooperation in the field of search, seizure and confiscation of the proceeds of crime, including the management of the seized and confiscated property and asset sharing? Please specify your proposal and the instruments concerned.**

First of all it is necessary to remind that the Warsaw Convention has solved several issues. For this reason, the first step to improve the situation should be ratification thereof by maximum number of contractual parties. Within the scope of the activity of the Committee of Contractual Parties to the Convention it is necessary to solve practical issues regarding international judicial cooperation. In this context, it would be appropriate to cooperate with the Council of Europe Committee PC-OC. Furthermore, it would be appropriate to deal with the issue of cooperation regarding seizure of bitcoins and other virtual currencies (as proceeds of crime), because in these cases, there is no regulation (including legal nature of bitcoins because virtual currency has the character of a thing not currency, or because the value thereof is changing rather quickly etc.)



## SLOVENIA

1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:

- a. search and seizure of proceeds of crime? Yes
- b. confiscation of proceeds of crime? Yes
- c. asset sharing? Yes

(Please specify)

2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime? No
- b. confiscation of proceeds of crime? No
- c. management of seized and confiscated assets? No
- d. returning the assets for victims? No
- e. asset sharing? No

(Please specify)

3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime? No
- b. confiscation of proceeds of crime? No
- c. management of seized and confiscated assets? No
- d. returning the assets for victims? No
- e. asset sharing? No

(Please specify)

#### 4. Introduction

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime? Yes
- b. confiscation of proceeds of crime? Yes
- c. management of seized and confiscated assets? Yes
- d. returning the assets for the victims? Yes

**e. asset sharing? Yes**

(Please specify)

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime? Yes**
- b. confiscation of proceeds of crime? Yes**
- c. management of seized and confiscated assets? Yes**
- d. returning the assets for the victims? Yes**
- e. asset sharing? Yes**

(Please specify)

The cooperation with competent authorities of the European Union States is conducted under provisions of the Co-operation in Criminal Matters with the member states of the European Union act (implementing among others the Council Framework Decision **2003/577/JHA** of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 02/08/2003, p. 0045), and the Council Framework Decision **2005/212/JHA** of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property (**OJ L 068, 15/03/2005, p. 0049**), mutual legal assistance with other states is conducted under provisions of conventions or the Criminal Procedure Act.

*AD a. and b.***"Method of Confiscation of Property****Article 75**

(1) Money, valuables and any other property benefit gained through or owing to the committing of a criminal offence shall be confiscated from the perpetrator or recipient (hereinafter, the recipient); if confiscation cannot be carried out, property equivalent to the property benefit shall be confiscated from them.

(2) When the property benefit or property equivalent to the property benefit cannot be confiscated from the perpetrator or other recipient, he shall be obliged to pay a sum of money equivalent to this property benefit. In justified instances, the court may allow the sum of money equivalent to the property benefit to be paid by instalments, whereby the period of payment may not exceed two years.

(3) Property benefit gained through or owing to the committing of a criminal offence may also be confiscated from persons, to which it was transferred free of charge or for a sum of money that does not correspond to its actual value, if such persons knew or could have known that this property had been gained through or owing to the committing of a criminal offence.

(4) When a property benefit gained through or owing to the committing of a criminal offence has been transferred to close relatives of the perpetrator of the criminal offence (relations from Article 224 of this Penal Code) or when, for reason of the prevention of confiscation of property benefits under paragraph 1 of this Article, any other property has been transferred to such persons, this property shall be confiscated from them unless they can demonstrate that they paid its actual value.

(5) If proceeds of crime have been acquired by several persons acting together, their respective proportions of proceeds shall be confiscated; if these proportions cannot be precisely determined, they shall be determined by the court after consideration of all circumstances of the case."

*AD c.***"Article 506.a**

(1) The court, which ordered the storage of confiscated objects or the provisional securing of a request for the confiscation of proceeds or property in the value of the proceeds, shall proceed with

particular speed in such instances. It shall act as a good manager with respect to the confiscated objects and property serving as provisional security, as well as to objects and property given as bail (Articles 196 to 199).

(2) If the storage of the confiscated objects or the provisional securing of a request from the preceding paragraph involves disproportionate costs or if the value of the property or the objects is decreasing, the court may order that such property or objects be sold, destroyed or donated for the public benefit. Prior to taking a decision on this, the court must obtain the opinion of the owner of the property or objects. If the owner is not known or it is not possible to service the owner with the summons to give an opinion, the court shall post the summons on the bulletin board of the court and after eight days, it shall be deemed that the service has taken place. If the owner does not give an opinion within eight days after the service of the summons, it shall be deemed that he has consented to the property or objects being sold, destroyed or donated.

(3) Relevant state bodies, organisations with public authorisation, executors and financial organisations shall take care of the storage of the confiscated objects and bail and of the provisional securing of requests referred to in the first paragraph of this Article.

(4) The procedure for managing confiscated objects and property and bails referred to in the first paragraph of this Article shall be prescribed by the Government of the Republic of Slovenia.

AD d.

### **”Protection of the Injured Party**

#### **Article 76**

(1) If the injured party has been awarded his claim for damages in a criminal proceeding by the court, the latter shall order the confiscation of property only insofar as such property exceeds the adjudicated claim of the injured party.

(2) The injured party, which has been committed in a criminal proceeding by the court to bring its claim for the recovery of damages in a civil action, may satisfy its claim from the value of the confiscated property, provided that it brings a civil claim within six months from the final judgement, directing it to bring a civil action, and under the condition that it claims settlement from the value of the confiscated property within three months from the final judgement awarding its claim.

(3) Any injured party, which has not brought its claim for compensation in the form of damages in the course of a criminal proceeding, may satisfy its claim from the value of the confiscated property, provided that it brings a civil action for the adjudication of its claim within three months from the day it became aware of the ruling confiscating the property and at the latest within two years from the final judgement, and with the further proviso that it claims settlement from the value of the confiscated property within three months from the final judgement awarding its claim.”

### **CLAIMS FOR INDEMNIFICATION**

#### **“Article 100**

(1) Claims for indemnification arising out of the commission of a criminal offence shall upon a motion by rightful claimants be dealt with in criminal procedure, provided that the determination of those claims does not significantly protract the procedure.

(2) A claim for indemnification may consist of a demand for compensation for damage, the recovery of property or the cancellation of a legal transaction.

#### **Article 101**

The motion for the assertion of an indemnification claim in criminal procedure may be made by the person entitled to assert such claim in a civil action.

.....

#### **Article 499**

(1) Proceeds gained through the commission of a criminal offence or by reason of the commission thereof shall be determined in criminal proceedings *ex officio*.

(2) The court and other agencies conducting the proceedings shall be bound to gather evidence and inquire into circumstances material to the determination of proceeds.

(3) If the injured party has filed an indemnification claim to recover the objects acquired by the commission of a criminal offence or to receive the monetary equivalent thereof, the proceeds shall only be determined for that part which exceeds the indemnification claim.”

AD e.

**“Revenue obtained by confiscation  
Article 216**

(1) An amount of money obtained by confiscation, which does not exceed EUR 10,000, or the equivalent amount in another currency is considered in its entirety revenue of the budget of the Republic of Slovenia. An amount of money, which exceeds EUR 10,000, shall be distributed in such a manner as to allocate one half to the budget of the Republic of Slovenia and the other half to the ordering State.

(2) Objects and property other than money shall be disposed of in one of the following ways, to be decided by a national court:

1. sold in accordance with the law of the Republic of Slovenia; in this case, the proceeds of the sale shall be disposed of in accordance with the preceding paragraph;

2. transferred to a competent authority of the ordering State; if the confiscation order covers an amount of money, the objects or property may only be transferred to the ordering State when that State has given consent;

3. disposed of in another way in accordance with the law of the Republic of Slovenia if apply the preceding items cannot be applied.

(3) The preceding two paragraphs apply only if not agreed otherwise with the ordering State.”

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

**a. search and seizure of proceeds of crime? Yes**

**b. confiscation of proceeds of crime? Yes**

**c. returning the assets for the victims? Yes**

**d. asset sharing? Yes**

(Please specify)

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Since May 2012 competent authorities of the Republic of Slovenia apply the **Forfeiture of assets of illegal origin act**, which implements the non-conviction based asset forfeiture. This law determines also the international cooperation for the purposes of the procedure for NCB, as follows:

**“VIII. INTERNATIONAL COOPERATION**

**General provision**

**Article 48**

(1) International cooperation for the purposes of this Act shall be carried out in accordance with international agreements or the European Union’s legal acts which are directly applicable in the Republic of Slovenia. If there are no such instruments or they do not resolve any open issues, international cooperation shall be carried out in accordance with the provisions of this Act.

(2) International cooperation within the meaning of the provisions of this Act shall include the provision of assistance in the identification, temporary security or forfeiture of assets of illegal origin.

(3) A request for international cooperation involving assistance in searching for assets of illegal origin abroad shall be compiled by the prosecutor’s office leading the financial investigation procedure, whereas after the filing of a lawsuit for the forfeiture of assets of illegal origin, such a request shall be compiled by the SDT RS.

(4) The body responsible for international cooperation in relation to the forfeiture of assets of illegal origin abroad shall be the Office of the State Prosecutor General of the Republic of Slovenia.

(5) The powers of the State Prosecutor's Office and/or the court regarding international cooperation in the search for or temporary security of assets of illegal origin in Slovenia shall be determined in accordance with the regulations governing international legal assistance in criminal matters.

(6) The court responsible for international cooperation in relation to the forfeiture of assets of illegal origin in Slovenia shall be Ljubljana District Court."

### **Terms and conditions**

#### **Article 49**

Assistance to the competent authority of a foreign country shall be provided under the following terms and conditions:

1. the requested measure shall not be contrary to the fundamental principles of internal legal order;
2. the implementation of the requested measures shall not harm the sovereignty, legal order or other interests of the Republic of Slovenia;
3. the standards of fair trial shall be applied to asset forfeiture proceedings conducted in a foreign country.

### **"Transmission of requests for international cooperation**

#### **Article 50**

Unless international agreements or the European Union's legal acts which are directly applicable in the Republic of Slovenia determine otherwise, the requests of national and foreign authorities shall be transmitted through diplomatic channels."

### **The contents of the request**

#### **Article 51**

(1) Unless international agreements or the European Union's legal acts which are directly applicable in the Republic of Slovenia determine otherwise, a request for international cooperation shall include the following:

1. the name of the body requesting cooperation;
2. data on the person to whom the request relates (full name, date and place of birth, nationality and place of residence) and data on the company and its registered office in the case of a legal entity;
3. data on the assets for which cooperation is requested and their relationship to the person referred to in the preceding point;
4. specific measures to be carried out and the legal framework of the host country as the basis for the exercise of its powers.

(2) In addition to the data referred to in the preceding paragraph, a request for the temporary security of assets of illegal origin shall also specify the circumstances that give rise to valid reasons for a suspicion that the assets are of illegal origin and that pre-trial or trial proceedings have been launched for a listed criminal offence or that a person has been convicted of such criminal offence. The request shall be accompanied by the documents, applications and decisions that gave rise to such circumstances.

(3) A request for the enforcement of a valid court decision to forfeit assets of illegal origin abroad shall be accompanied by a copy of the valid court decision.

### **Procedure**

#### **Article 52**

(1) The state prosecutor's office shall verify compliance with all terms and conditions under this Act upon receipt of a request to do so. If the request lacks all the necessary details, the competent authority of a foreign country shall be invited to provide the missing components within a time limit of no less than three months; otherwise, the request shall be rejected.

(2) If the existence and whereabouts of the assets of the person for whom temporary security has been requested need to be determined in order to grant a request, the state prosecutor shall act in accordance with the financial investigation provisions of this Act.

(3) If the granting of the request is subject to the performance of a procedural act which, under this Act, falls within the competence of the court on the state prosecutor's proposal, the request shall be referred to the Specialised State Prosecutor's Office of the Republic of Slovenia. The proposed measure shall be decided on by Ljubljana District Court.

### **Temporary security of forfeiture of assets of illegal origin**

#### **Article 53**

(1) The court shall either grant or reject the request of the competent authority of a foreign country for temporary security for the forfeiture of assets of illegal origin.

(2) The provisions of this Act shall apply, *mutatis mutandis*, to the decision-making procedure on the request and provision of temporary security.

(3) Temporary security for the forfeiture of assets shall be in force until the valid conclusion of criminal proceedings in the host country or until the conclusion of the proceedings for the forfeiture of assets of illegal origin.

(4) If the proceedings referred to in paragraph (2) of this Article are not completed within two years of the date of the temporary security decision, the temporary security shall be cancelled. The court shall notify the competent body of a foreign country of its intention to return the assets within six months of the expiry of the aforementioned deadline. The court may exceptionally extend the security by no more than two years, provided that the competent authority of a foreign country submits additional evidence. The costs of temporary security of assets shall be borne by the host country.

### **Implementation of the provision on the forfeiture of assets of illegal origin in Republic of Slovenia**

#### **Article 54**

(1) Assets of illegal origin shall be forfeited in the Republic of Slovenia when the competent authority of a foreign country submits to the court a final decision on the forfeiture of assets of illegal origin in its respective country.

(2) The provisions of the act governing the recognition and enforcement of foreign court decisions in civil matters shall apply to the recognition and enforcement procedure, unless determined otherwise by international agreements or the European Union's legal acts which are directly applicable in the Republic of Slovenia.

(3) Forfeited assets of illegal origin shall be treated in accordance with the provisions of this Act, unless determined otherwise by international agreements or the European Union's legal acts which are directly applicable in the Republic of Slovenia."

### **Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding? Yes**
- b. seizure of proceeds of crime? Yes**
- c. confiscation of proceeds of crime? Yes**
- d. management of seized and confiscated assets? Yes**
- e. returning the assets for the victims?**

The Forfeiture of Assets of Illegal Origin Act determines NCB in civil procedure and does not deal with questions of guilt and therefore nor with victims. On the other hand the law protects the "bona fide" beneficiaries, as follows:

#### **"Protection of beneficiaries**

##### **Article 30**

(1) The forfeiture of assets of illegal origin shall have no impact on the rights to this property enjoyed by third parties unless, during the acquisition of such rights, they were aware or should have been aware of the illegal origin of the assets in question.

(2) The court shall verify *ex officio* whether the proceedings involve all third parties who have been identified and whose rights or legal benefits, for which no final judicial decision has yet been made, could be affected by the court's decision. The court shall invite the third parties not involved in the proceedings to submit a statement on entering into the proceedings in accordance with the act governing civil proceedings and a statement on co-defendants and the participation of other persons in the proceedings within one month of receipt of the invitation and shall draw the attention of such third parties to the legal consequences referred to in Article 32 of this Act and the right referred to in paragraph (4) of Article 33 of this Act.

(3) Under the circumstances defined by KZ-1 for the protection of injured parties in the forfeiture of proceeds of crime or proceeds associated with crime, the injured party exercising a claim for indemnification against a Suspect, an Accused Person, a Convicted Person or a Testator in criminal

proceedings for a listed criminal offence shall also be deemed a third party referred to in the preceding paragraphs.

(4) In accordance with the provisions of the preceding paragraphs, third party rights to forfeited assets which are established in civil proceedings and which do not preclude the forfeiture of assets of illegal origin shall be exercised in accordance with paragraph (4) of Article 33 of this Act.

### **Announcement of the commencement of the proceedings**

#### **Article 31**

(1) Immediately upon receipt of the lawsuit for the forfeiture of assets of illegal origin, the court shall notify the unknown third parties referred to in paragraph (1) of Article 30 of the commencement of the forfeiture proceedings.

(2) The notification referred to in the preceding paragraph shall include the following:

1. data on the court conducting the proceedings, the reference number of the case and the assets that are the subject of the proceedings;
2. personal name and address of the natural person and/or the name and registered office of the legal entity as defendant,
3. the operative part of the decision on temporary security for the forfeiture and temporary forfeiture of assets;
4. a call on third parties to submit a statement on the co-defendants and other persons involved in the proceedings within three months of the announcement;
5. a reminder of the legal consequences referred to in Article 32 of this Act and an instruction regarding the right referred to in paragraph (5) of Article 33 of this Act;
6. the date of publication of the announcement.

(3) The announcement shall be published in Uradni list Republike Slovenije and posted on the notice board at the court; however, it may be ordered that the announcement be made through other media as well.

### **The consequences of missing the deadline**

#### **Article 32**

(1) If the persons referred to in Article 30 or 31 of this Act fail to meet the deadline for the submission of a statement on entering into the proceedings, they shall lose this right as well as the right relating to the property whose origin has been found to be illegal, and the right to challenge the civil effects of a valid court decision on their rights or legal benefits that have not yet been validly decided.

(2) The legal consequences referred to in the preceding paragraph shall not be effective if a judgment is issued before the expiry of the deadline for the submission of a statement on entering into the proceedings.”

- f. asset sharing? YES, if international agreements or the European Union’s legal acts which are directly applicable in the Republic of Slovenia so determine.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles. YES**

#### **”Liability of Legal Persons for Criminal Offences**

##### **Article 42**

(1) Criminal liability shall be imposed on a legal person for criminal offences, which the perpetrator commits in his name, on his behalf or in his favour, providing that the statute, which regulates liability of legal persons for criminal offences, determines that the legal person is liable for the criminal offence in question.

(2) Criminal liability of legal persons shall not exclude liability of natural persons as perpetrators, instigators or aides in the same criminal offence.

(3) The law, which regulates liability of legal persons for criminal offences, shall determine the conditions for criminal liability of legal persons, sentences, admonitory sanctions or safety measures, and legal consequences of the conviction for legal persons.”

Based on the above-stated provision of the Criminal Code, the **Liability of legal persons for criminal offences act** was put into force in 1999. This law does not regulate international cooperation; therefore, in accordance with its Article 42 (“Unless otherwise specified in this Act the

provisions of the Criminal Procedure Act shall, *mutatis mutandis*, apply in criminal proceedings against a legal person even if proceedings are only being brought against a legal person.") the provisions of international agreements or the European Union's legal acts which are directly applicable in the Republic of Slovenia or the provisions of the Criminal Procedure Act on mutual legal assistance are relevant.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation? Yes**

**"Abuse of non-cash means of payment**

**Article 246**

(1) Whoever, by the abuse of a cheque, credit or debit card, or any other non-cash means of payment that he is entitled to use, obliges the bank or other issuer, in contravention of the agreement on the use of this means, to pay the amount which he knows is not covered by funds in his account, thereby acquiring a property benefit, shall be sentenced to up to two years in prison.

(2) If a major property benefit has been gained through the offence referred to in the preceding paragraph, the perpetrator shall be sentenced to up to five years in prison.

(3) If a substantial property benefit has been gained through the offence referred to in paragraph 1 of this Article, the perpetrator shall be sentenced to between one and eight years in prison.

(4) The prosecution of the offence under paragraph 1 of this Article shall be initiated upon the motion."

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned). No**



## SWEDEN

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

1 a

No, not particularly.

If the requested country's domestic legislation does not provide sufficient legal basis to provide the assistance sought it ought to be possible to find a legal basis in the 1959 Convention for at least some measures concerning search and seizures of proceeds of crime. Obviously, confiscation and seizure of proceeds of crimes was not as prioritised in 1959 as it is now. Furthermore, value-based confiscation, NCB-confiscation or virtual currencies etc. did not exist or were at least not wide spread.

It could therefore be argued (by an unhelpful jurisdiction) that the 1959 Convention was only intended to encompass search and seizure of proceeds of crime in cash or in the form of an object if the reason for the seizure is the foreseen forfeiture of these assets in their capacity as the direct gain of crime.

Our conclusion is thus that the 1959 Convention is not a very useful tool in the fields of search and seizure of proceeds of crime, confiscation of proceeds of crime and asset sharing.

These matters are not mentioned in the Convention or its additional protocol. The same considerations as stated above applies here as well

1 b

No, not particularly.

These matters are not mentioned in the Convention or its additional protocol. The same considerations as stated above applies here as well

1 c

No, not with regards to a request for confiscation at the request of another State. However asset sharing can be arranged with regards to a Swedish decision on confiscation.

These matters are not mentioned in the Convention or its additional protocol. The same considerations as stated above applies here as well

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

2 a-e

The Convention was ratified last fall and we have limited or no practical experience with it. In our capacity as requested state the same considerations as set forth above applies.

With regards to the opposite situation (requesting state) in theory the arguments made above also applies with the exception that this convention does contains provisions that actually could be used as a legal basis to both provide and demand assistance within the fields in question.

One problem that exists in this area is the lack of opportunity to secure funds for the execution of a decision on damages.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

3 a-e

There are possibilities under Swedish law to co-operate, however we have limited or no practical experience with the convention.

#### **4. Introduction**

**A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.**

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

4 a-c and e

Yes, a value-based confiscation order can be made under Swedish law.

4 d

No, under Swedish law confiscated assets accrue to the State.

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

A confiscation order can only be directed against the owner of the assets. It is up to the prosecutor to prove that the person subject to the confiscation order in fact owns the property. If it can be proven that a person owns certain property it does not matter that another person is registered as owner. The owner does not necessarily have to be the same person as the offender as third party confiscation is allowed under Swedish law (see Chapter 36 Section 5 of the Penal Code).

#### *Section 5*

*Forfeiture of property or its worth in consequence of crime as provided in Sections 1 and 2–4 may, unless otherwise stated, be exacted of:*

- a) the offender or an accomplice in the crime,*
- b) the person whose position was occupied by the offender or an accomplice,*
- c) the person who profited from the crime or the entrepreneur described in Section 4,*
- d) any person who after the crime acquired the property through the division of jointly held marital property, or through inheritance, will or gift, or who after the crime acquired the property in some other manner and, in so doing, knew or had reasonable grounds to suspect that the property was connected with the crime.*

*If the property did not belong to any of the persons in the categories a)-c) in the first paragraph, it may not be declared forfeited. Property that according to Section 1 c shall be regarded as proceeds of crime may be declared forfeited if the property, which the forfeited property has replaced, belonged to any of the categories a)-c) in the first paragraph.*

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

6 a-b and d

Yes.

6 d

No, under Swedish law confiscated assets accrue to the State.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

7 a-f

Under Swedish law, confiscation is considered as a special legal consequence of a crime. This means that confiscation without connection to a criminal conviction is generally not allowed. However, if a sanction no longer can be imposed because of e.g. the death of the offender, proceeds or instrumentalities of a crime may under limited circumstances be confiscated (see Section 14 below) without a criminal conviction (it is still necessary to fully establish that a crime has been committed). It is also possible under some limited circumstances to confiscate objects that can be used to commit crimes without a criminal conviction (see Section 3 below).

### Section 3

*Forfeiture may also be decided on in cases other than those described in Section 2 in respect of objects which:*

1. *by reason of their special nature and other circumstances, give rise to a fear that they may be put to criminal use,*
2. *are intended for use as a weapon in a crime against human life or health and which have been discovered in circumstances which give rise to a fear that they would be put to such use, or*
3. *are intended for use as an auxiliary aid in a crime entailing damage to property and have been discovered in circumstances which clearly give rise to a fear that they would be put to such use.*

### Section 14

*If a sanction can no longer be imposed because of the death of the offender or for other cause, property may be declared forfeited or a corporate fine imposed by reason of the crime or a measure be prescribed to avert misuse only if, in proceedings pertaining thereto, a summons has been served within five years from the time when the crime was committed. In such a case the prosecutor may institute proceedings only if called for in the public interest.*

*In a case falling under the present description the provisions of Chapter 35, Section 3 shall be correspondingly applicable.*

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Under Swedish law a confiscation order can be directed against a legal person if the legal person has derived financial advantages as a result of a crime committed in the course of its business (see Chapter 36, Sections 4 and 5 of the Swedish Penal Code below). Such confiscation orders are decided in criminal proceedings.

### Section 4

*If, as a result of a crime committed in the course of business, the entrepreneur has derived financial advantages, the value thereof shall be declared forfeited, even if this is not so provided for in Section 1 or 2 or otherwise specially provided for.*

*The provisions of the first paragraph shall not apply if forfeiture is unreasonable. In assessing whether such is the case, consideration shall be given inter alia to whether there is reason to believe that*

*some other obligation to pay a sum corresponding to the financial gain derived from the crime will be imposed upon the entrepreneur or will be otherwise discharged by him.*

*If proof of what is to be declared forfeited cannot, or can only with difficulty, be presented, the value may be estimated to be an amount that is reasonable in view of the circumstances.*

#### Section 5

*Forfeiture of property or its worth in consequence of crime as provided in Sections 1 and 2–4 may, unless otherwise stated, be exacted of:*

- a) the offender or an accomplice in the crime,*
- b) the person whose position was occupied by the offender or an accomplice,*
- c) the person who profited from the crime or the entrepreneur described in Section 4,*
- d) any person who after the crime acquired the property through the division of jointly held marital property, or through inheritance, will or gift, or who after the crime acquired the property in some other manner and, in so doing, knew or had reasonable grounds to suspect that the property was connected with the crime.*

*If the property did not belong to any of the persons in the categories a)-c) in the first paragraph, it may not be declared forfeited. Property that according to Section 1 c shall be regarded as proceeds of crime may be declared forfeited if the property, which the forfeited property has replaced, belonged to any of the categories a)-c) in the first paragraph.*

#### **9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

Yes, in theory. We have yet to receive such a request. There are examples where a Swedish court has confiscated virtual wallets for bitcoin, and it should be possible to confiscate the equivalent value of a bitcoin in Swedish krona. However, there are some issues left to resolve with regards to confiscation of virtual currencies, e.g. the procedure itself.

#### **10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

A State or an individual, who is the victim of a crime, can initiate civil action in Swedish courts to establish title to or ownership of property acquired through the commission of the crime. A Swedish court can also order those who have committed a crime to pay compensation or damages to another State or individual that has been harmed by the crime.

If it is specifically prescribed, foreign private law judgments or decisions can also be enforced in Sweden. Specific provisions on recognition and enforceability of such judgments and decisions can be found in for example The EU Brussels I-regulation and the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

#### **11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

No, not at this time.

**SWITZERLAND (TRANSLATION)**

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

**(Please specify)**

Convention ETS No. 30 and Additional Protocol ETS No. 182 lay the foundations for judicial co-operation in the area of searching for evidence but they do not contain any provisions on seizure, confiscation or asset freezing. Consequently, they do not seem to us to be appropriate instruments in these fields.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**(Please specify)**

The Federal Law on International Mutual Assistance in Criminal Matters (EIMP) provides the legal basis in Switzerland for international co-operation. Furthermore, where treaty law does not specifically provide for a certain type of co-operation, this does not prevent Switzerland from arranging for it under its domestic law provisions (EIMP). Established case-law allows for the application of domestic law when it seems more likely to foster co-operation than treaty law (the favourability principle).

It provides for the measures referred to in letters a – d. As to asset sharing, this is regulated by the Federal Law on the Sharing of Confiscated Assets (LVPC).

It should be noted that Swiss law goes further than Convention ETS No. 141 in that it also provides for the return of assets (Article 74a EIMP) and asset sharing (LVPC).

The main difficulty lies in obtaining an adequate statement of the facts from foreign authorities to make the link between the facts under investigation abroad and the assets located in Switzerland (the proceeds of the crime) and subsequently in obtaining a foreign confiscation order describing the unlawful origin and allocation of the funds.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**(Please specify)**

Switzerland is not a party to this Convention.

#### **4. Introduction**

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

In Swiss law there must be a clear link between the facts under investigation and the funds in Switzerland, which is inherent to the concept of criminal proceeds. A value-based confiscation system fails to take this link into account, evoking the idea of a debt. In Swiss law if the "proceeds" no longer exist, payment of a compensatory claim may be ordered. Mutual assistance may be provided in connection with such claims.

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

Owing to the due diligence rules covering banks, the beneficial owners of assets held by third parties (shell or front companies) can be identified. Provided that the legal requirements with regard to mutual assistance are satisfied, these assets may be subject to mutual assistance measures such as those described above.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. returning the assets for the victims?**
- d. asset sharing?**

**(Please specify)**

Yes; see answer to question 2. Article 8 of the Federal Law on International Mutual Assistance in Criminal Matters (EIMP) lays the foundations for a reciprocal arrangement. This law contains appropriate provisions to carry out the seizure (Article 18 EIMP), the remittance of assets (Article 74a EIMP) and enforcement of foreign decisions (Article 94 et seq. EIMP).

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding**
- b. seizure of proceeds of crime?**
- c. confiscation of proceeds of crime?**
- d. management of seized and confiscated assets?**
- e. returning the assets for the victims?**
- f. asset sharing?**

In Swiss law, even if, in principle, orders for the confiscation or return of assets are connected with a criminal conviction and are issued against the perpetrator of an offence, they may also be unconnected with any criminal conviction. In all cases, such confiscation presupposes that all the objective and subjective features of an offence obtain and that there is a link between the offence and the assets to be confiscated. For a confiscation of this sort to take place abroad, Switzerland may grant mutual assistance. It may also grant mutual assistance for foreign civil forfeiture proceedings (where there is a link between the offence and the assets) connected with a criminal case.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Under Swiss law, undertakings may be criminally liable, even, in some cases, irrespective of the criminal liability of any natural persons (Article 102 of the Swiss Criminal Code). Where, in particular, there is dual criminality and a clear link between the offence and the funds in Switzerland, Switzerland may grant mutual assistance.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

Switzerland does not have any experience of mutual assistance in the context of procedures relating to virtual currencies.



**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Yes, Switzerland, can provide assistance for the purposes of restitution or confiscation independently of a confiscation order if it is highly probable that the assets located in Switzerland are of unlawful origin.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

Establish the principle of reciprocity in relation to restitution. Ideally, include in a binding instrument compulsory co-operation requirements in the field of seizure and confiscation of assets (a standard model for applications for mutual assistance common to States Parties with both common law and civil law systems, limiting the possibility of refusing to co-operate as much as possible).

**TURKEY**

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

**(Please specify)**

This Convention provides effective and sufficient opportunities for search and seizure. In addition, the following issues decreased the efficiency of the Convention:

- The differences resulting from legal culture such as requesting from the suspect/accused to prove that the proceeds of crime is legal by inverting the burden of proof concerning the offences of money laundering in different legal systems, requesting the confiscation of not only the proceeds of crime but also the assets not resulting from the offence, not providing sufficient evidence accompanied with the request
- Following the seizure, the fact that the requesting State does not usually inform the requested State concerning the investigation/prosecution situation and requested State cannot control the proportionality of the measure because of long lasting proceedings,
- The uncertainty concerning which party will undertake the losses occurred and the compensation to be paid because of revealing that these measures have been undue if implemented,
- Because the states are not parties to all of the additional protocols of the Convention, being obliged to implement some other international regulations, such as United Nations Conventions, when considering the requests.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

- Inability to provide relation between the values of the assets requested to be seized and the offence claimed to have been committed,
- Even though it is accepted in Turkish law as an exceptional method to liquidate the value of seized assets without a finalized judgment or manage during the trials by the State authorities, requiring a significant number of the requests to implement these measures,
- Experiencing disruptions to provide information concerning judicial process carried out in the requesting State after the assets are seized,
- The uncertainty concerning how to share the economic value which has been liquidated.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**

- c. management of seized and confiscated assets?
- d. returning the assets for victims?
- e. asset sharing?

(Please specify)

Our Country is not party to this Convention.

#### 4. Introduction

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

In our legal system, there is no value-based confiscation.

5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Strawman.

Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

Pursuant to Turkish law, it is possible at all times to confiscate property used for committing an offence, or proceeds of an offence, in possession of third parties not acting in good faith.

6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

(Please specify)

In theory, it is possible to enforce such requests only in virtue of the principle of reciprocity in the event that the requesting State gives the guarantee that such requests of our country will be enforce, the requested legal assistance is not contrary to Turkish public order, the enforcement of the request complies with our legislation, the central authorities agree in advance on the commitment of the requesting State for the cases of compensation which may be experienced if the measure occurs to be undue and on how the assets will be liquidated.

In addition, if such a request is received, enforceability of the request is considered within the scope of the conditions of each concrete fact.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

In our legal system, confiscation must be based on a court judgment. Confiscation is regulated under the Turkish Criminal Code and the subject matter of confiscation is the material/goods used in commission of a deliberate offence or provided in commission of an offence or those acquired from an offence.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Turkish Criminal Code and other laws which includes criminal provisions accepts the criminal liability both real persona and legal persons. Article 60 of Turkish Criminal Code, as general rule on this issue, is as follows:

*“Security Precaution For The Legal Entities*

*ARTICLE 60-(1) In case of conviction of a crime through participation of the organs or representatives of a legal entity subject to special law and operating under the license granted by a public institution or misuse of authorization conferred upon by this license, the court may decide cancellation of this license.*

*(2) The provisions relating to confiscation are applied also for the legal entities involved in commission of offense.*

*(3) In cases where application of the provisions of the afore subsections is likely to create heavier consequences, the judge may refrain from imposition of such precautions.*

*(4) The provisions of this article are applicable for the cases specifically defined by the law.”*

*Our legislation, in addition to this general provision, governs separately the security measures which can be implemented concerning legal persons with regard to many offences. If such regulations are available, these are implemented, if not available, it is possible to implement article 60 of Turkish Criminal Code.*

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

According to Turkish law, it is possible to confiscate anything with monetary value or economic value which may be requested to be confiscated then or the property in the nature of evidence. Therefore there is not any obstacle to implement such measures concerning economic values in virtual nature such as "bitcoin" if the other procedural rules are fulfilled.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

It was possible, in accordance with our legislation, until 2005 to initiate cases of compensation together with criminal case and to rule on compensation of the losses of the victim while sentencing the accused. New Turkish Criminal Code which entered into force after this date separates criminal case and any claim and case intending to compensate the losses of the victim. Therefore it is not possible to execute such requests which only bear "compensation or restitution" nature.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

No.

## UKRAINE

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

The European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols are the appropriate instruments for co-operation in the fields of search and seizure of proceeds of crime (a). Taking into consideration the provisions of the national legislation of Ukraine, the application of the Convention with a view to the confiscation of the proceeds of crime (b) is possible for the purpose of enforcement of the foreign courts judgements on the Ukrainian territory, which envisages the confiscation of the said proceeds. Also the national legislation of Ukraine does not provides for legal procedure for asset sharing.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

The provisions of the Criminal Procedure Code of Ukraine regulating the procedure for carrying out the pre-trial investigation and court consideration of criminal proceedings, provides for the opportunities of carrying out the procedural actions aimed at search and seizure of proceeds from crime (a). According to the national legislation of Ukraine, the confiscation of the proceeds from crime (b) and returning the assets for victims (d) are rendered possible by the court decision which became effective. Also returning the assets for victims (d) is rendered possible by the court decision upon the results of consideration of civil lawsuit.

The legal procedures for management of seized and confiscated assets (c) and asset sharing (e) are not envisaged by the national legislation of Ukraine.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

The implementation of measures aimed at search and seizure of proceeds of crime (a) is possible within the limits of the national legislation of Ukraine. The confiscation of the proceeds from crime (b) and returning the assets for victims (d), in accordance with the national legislation of Ukraine, is rendered possible by the court decision which became effective. Also returning the assets for victims (d) is rendered possible by the court decision upon the results of consideration of civil lawsuit.

The procedures for management of seized and confiscated (c) and asset sharing (e) are not envisaged by the national legislation of Ukraine.

There is also a special procedure for seizure of assets which are connected with the terrorism financing and related to the financial operations which were stopped by the decision made in pursuance of the UN Security Council resolution, as well as the procedure for lifting the seizure of such assets and granting access thereto.

The above procedure is regulated by the following Laws:

*Article 11-1 of the Law of Ukraine On Fight against Terrorism. Stopping of any financial operations with the assets which are connected with terrorism financing and related to the financial operations stopped by the decision made in pursuance of the UN Security Council resolution, as well as the seizure of such assets.*

*A financial operation, the participant or beneficiary of which is a person who was included to the list of those connected to terrorism or against whom international sanctions were imposed, shall be stopped pursuant to the Law of Ukraine On Prevention and Counteraction to Legalisation (Laundering) of Proceeds of Crime, or Terrorism Financing.*

*Where the subjects directly conducting the fight against terrorism and/or are engaged in the fight against terrorism detect any financial operations or assets of the persons who were included to the list of those connected with terrorism or with respect of whom international sanctions were imposed, such subjects shall immediately report to the Security Service of Ukraine on any detected financial operations of terrorist assets.*

*Seizure of terrorist-related assets which are linked to financial operations stopped by the decision made in pursuance of the UN Security Council resolution, as well as lifting the seizure of such assets, shall be conducted by the court.*

*Article 183-4 of the Code of Administrative Court Procedure of Ukraine. The peculiarities of proceedings in the cases upon request of the Security Service of Ukraine for seizure of assets which are connected with terrorism financing and related to the financial operations stopped by the decision made in pursuance of the UN Security Council resolution, lifting the seizure of such assets and granting access thereto.*

*1. The court procedure in the cases relating to the seizure of assets which are connected with terrorism financing and related to the financial operations stopped by the decision made in pursuance of the UN Security Council resolution, lifting the seizure of such assets and granting access thereto shall be conducted under the administrative lawsuit of the Head of the Security Service of Ukraine and his Deputy.*

*2. Administrative lawsuit shall be filed with court of first instance in accordance with the judicial jurisdiction established by this Code, in writing, and shall contain:*

- 1) name of the administrative court;*
- 2) name, postal address and contact number of the plaintiff;*
- 3) reasons to file the lawsuit, circumstances confirmed by evidence and claims of the plaintiff.*
- 4) list of enclosed documents and other materials;*

5) signature of authorized person of the authority which should be affixed by the seal.

3. In case where the requirements of Paragraph 2 of this Article are violated, the court shall notify the plaintiff thereof and shall determine the time limit for removal of shortcomings.

The failure to fulfill the requirements of the court within the time limit it established thereof shall entail the returning of the lawsuit to the plaintiff and enclosures thereof.

The returning of a lawsuit shall not be an obstacle to its re-filing with the court upon the removal of shortcomings which accounted for such filing.

4. The court shall by its decision deny to the acceptance of the lawsuit where a demand which is not provided for by Paragraph 1 of this Article is claimed. The denial to accept the lawsuit renders impossible the plaintiff's re-filing of the same lawsuit.

5. The ruling on the merits of the claimed demands shall be rendered by the court not later than the next working day from the day of receipt of the lawsuit, which shall be considered in the closed court session with participation of the plaintiff only. The owner of the assets which are connected with the terrorism financing and related to the financial operations which were stopped by the decision made in pursuance of the UN Security Council resolution, with respect to which the seizure is lifted or imposed, or with respect to which the access is granted, shall not be notified of the consideration of the case by the court.

6. The ruling shall contain:

- 1) date such ruling was rendered on;
- 2) name of the court and the judge's second name and initials;
- 3) motives and conclusion of the court on the merits of the claimed demands with references made to the Law;
- 4) procedure for carrying out the actions envisaged by the ruling.

7. The decision to deny the acceptance of the lawsuit may be appealed against. The court of appeal shall during three days from the day of the receipt of the appellate claim verify the legality of the decision of the court of first instance and shall render a decision on the merits.

8. The effective court decisions on the seizure of assets which are connected with the terrorism financing and related to the financial operations which were stopped by the decision made in pursuance of the UN Security Council resolution, or on the lifting of seizure from such assets and granting access thereto, shall be final and shall have immediate effect.

#### 4. Introduction

A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.

**Question:** Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?



**d. returning the assets for the victims?**  
**e. asset sharing?**

The provisions of the Criminal Procedure Code of Ukraine which governs the procedure for conducting the pre-trial investigations and court hearings in criminal proceedings envisage procedural actions aimed at the search and seizure of proceeds of crime (a). At the same time the Ukrainian legislation does not limit the possibility of taking such steps in case the request for mutual legal assistance is based on the value-based confiscation system.

The confiscation of proceeds of crime (b) and returning the assets for the victims (d) pursuant to the Ukrainian national legislation is possible based on the final and binding court judgment. Additionally, returning the assets for the victims (d) is possible based on the court decision following the consideration of a civil lawsuit.

Following are the provisions of the Ukrainian legislation governing the general procedure for recognition and enforcing judgments of courts of foreign states in the territory of Ukraine.

*Article 602. Grounds and procedure for enforcement of judgments of courts of foreign states*

*1. A sentence delivered by a court of a foreign state may be recognised and enforced in the territory of Ukraine in cases and in the scope prescribed in the international treaty of Ukraine to which the Verkhovna Rada of Ukraine has given its consent to be bound by.*

*2. In absence of an international treaty, provisions of this Chapter may be applied in deciding on an issue of the transfer of a sentenced person for further serving of punishment.*

*3. Request on execution of foreign state's court sentence, except a request to transfer a sentenced, person, shall be considered by the Ministry of Justice of Ukraine within thirty days after receipt of the request. If the request and additional materials has been received in a foreign language, this time limit shall be extended to three months.*

*4. When considering a request for the enforcement of a sentence delivered by a foreign court in accordance with part three of this Article, the Ministry of Justice of Ukraine shall determine whether grounds for granting request for the enforcement of a sentence exist under the appropriate international treaty of Ukraine. For this purpose, the Ministry of Justice of Ukraine may demand and obtain the necessary materials and information in Ukraine or from the competent authority of the foreign state concerned.*

*5. Having established that the request for recognition and enforcement is consistent with the provisions of the international treaty of Ukraine, the Ministry of Justice of Ukraine shall forward request for recognition and enforcement of the sentence of the court of foreign State to a court of first instance and transfer the obtained materials thereto.*

*6. If the request is refused, the Ministry of justice of Ukraine shall inform the requesting foreign authority thereon, with explanation of reasons for refusal.*

*7. Sentences delivered in absentia, i.e. without participation of the person concerned in criminal proceedings, by courts of foreign states, except when the sentenced person was served a copy of the sentence and given the possibility to challenge the sentence, shall not be enforced in Ukraine. A request for execution of a sentence imposed by a foreign court may be refused if such execution contradicts any obligations of Ukraine under her international treaties.*

*8. The issue of recognition and enforcement of a sentence delivered by a court of foreign State in part of a civil claim shall be disposed as prescribed in the Code of Civil Procedure of Ukraine.*

*9. In cases provided for by the international treaty of Ukraine to which the Verkhovna Rada of Ukraine has given its consent to be bound by, if a sentence of foreign court decreed a punishment in the form of imprisonment, the Ministry of Justice of Ukraine shall send a certified copy of the request*

as specified in this Article, to a public prosecutor to request an investigating judge to impose a restraint measure until the execution of the sentence of a foreign court is decided.

Legal procedures for management of seized and confiscated assets (c) and asset sharing (e) are absent from the national legislation of Ukraine.

**5. Several member States recognise the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for the victims?**
- e. asset sharing?**

The provisions of the Criminal Procedure Code of Ukraine which governs the procedure for conducting the pre-trial investigations and court hearings in criminal proceedings envisage procedural actions aimed at the search and seizure of proceeds of crime (a).

At the same time the seizure of proceeds of crime (a) is executed based on the decision by a Ukrainian court, which can be taken given the circumstances provided for by the Ukrainian legislation. Legal grounds for seizure of assets pursuant to the Ukrainian legislation are laid out in the following legal norm:

*Article 170. Grounds for seizure of property*

*1. Seizure of property means temporary deprivation of the suspect, accused person or persons who are civilly liable by law for the damage caused through actions of the suspect, accused person or an insane person who has committed a socially dangerous act, of the possibility to dispose of certain property by a ruling of the investigating judge or court, until revocation of such seizure of property, according to the procedure established by this Code. Pursuant to the requirements of this Code, seizure of property may also envisage the prohibition for person whose property has been seized or another person holding property, to dispose in any way of such property and to use it.*

*2. Investigating judge or court during trial shall order the seizure of property of the suspect, accused in the form of objects if there are sufficient grounds for the belief that such objects meet the criteria specified in paragraph two of Article 167 of this Code. Furthermore, where a civil action is granted, the court on a motion of the public prosecutor or civil plaintiff may decide on seizure of property for the purpose of securing the civil claim pending validity date of the decision, unless such measures have not been taken before.*

*3. Seizure may be ordered against movable and immovable property, intellectual property rights, money in any currency in cash or non-cash form, securities, corporate rights which are owned by the suspect, accused or other person who are civilly liable by law for the damage caused through actions of the suspect, accused person or an insane person who has committed a socially dangerous act and stay with him or with other physical or legal persons to secure possible confiscation of property or civil action.*

*4. Ban on use of property as well as ban of disposal of such property may be applied only in cases where non-application thereof may entail disappearance, loss of or damage to the property concerned, or other consequences that may obstruct criminal proceedings.*

*5. Ban on use of living quarters where any persons reside on legitimate grounds is prohibited.*

The confiscation of proceeds of crime (b) and returning the assets for the victims (d) pursuant to the Ukrainian national legislation is possible based on the final and binding court judgment. Additionally, returning the assets for the victims (d) is possible based on the court decision following the consideration of a civil lawsuit.

Legal procedures for management of seized and confiscated assets (c) and asset sharing (e) are absent from the national legislation of Ukraine.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. returning the assets for the victims?**
- d. asset sharing?**

The national Ukrainian legislation (the Criminal Procedure Code of Ukraine) envisages the possibility of providing legal assistance in the criminal proceedings on the basis of reciprocity if the written guarantee is given by the requesting state to accept and consider a Ukrainian request under the same terms in the future.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

The national Ukrainian legislation (the Criminal Procedure Code of Ukraine) envisages the possibility of providing legal assistance in the criminal proceedings to foreign states by conducting any procedural actions envisaged by the said Code or an International Agreement of Ukraine.

The provisions of the said Code envisage the possibility of seizing the property and assets which may originate from crime at the stage of pre-trial investigation as security for a civil claim in the criminal proceedings or property confiscation in accordance with a court judgment.

**Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:**

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding**
- b. seizure of proceeds of crime?**
- c. confiscation of proceeds of crime?**
- d. management of seized and confiscated assets?**
- e. returning the assets for the victims?**
- f. asset sharing?**

The national Ukrainian legislation (the Criminal Procedure Code of Ukraine) envisages the possibility of providing legal assistance in the criminal proceedings to foreign states by conducting any procedural actions envisaged by the said Code or an International Agreement of Ukraine.

Specifically the prosecution can gather evidence at the stage of pre-trial investigation by conducting detective actions and covert detective actions, by requesting and obtaining objects, documents, information, expert opinions, audit findings, inspection certificates from bodies of public authority and local government, enterprises, institutions, organisations, officials and private individuals (a); initiate seizure of proceeds of crime (b).

The confiscation of proceeds of crime (c) and returning the assets for the victims (e) pursuant to the Ukrainian national legislation is possible based on the final and binding court judgment. Additionally, returning the assets for the victims (d) is possible based on the court decision following the consideration of a civil lawsuit.

Legal procedures for management of seized and confiscated assets (d) and asset sharing (f) are absent from the national legislation of Ukraine.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

The national Ukrainian legislation (the Criminal Code of Ukraine and the Civil Code of Ukraine) envisages the possibility of criminal and civil liability for legal entities.

In view of the above legal grounds exist in Ukraine to seize and confiscate the proceeds of crime from legal entities and to provide mutual legal assistance in criminal proceedings of the said category. Additionally, assistance regarding seizure and recovery of assets from a legal entity is possible within the scope of assistance in civil matters.

The possibility of holding legal entities liable for administrative offences is not provided for by the national legislation.

The key international legal tools for such actions in criminal investigations are the European Convention on Mutual Assistance in Criminal Matters (ETS No. 030), Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) etc.

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

According to the Ukrainian legislation the National Bank of Ukraine is the central authority for the state monetary policy.

For instance, the National Bank of Ukraine specified in its letter dated 10.11.2014 that "virtual currencies/crypto-currencies" shall be regarded as surrogate money, that is not backed by real value and cannot be used as means of payment by individuals or legal entities in Ukraine, because it is contrary to the provisions of Ukrainian legislation.

There is no statutory regulation of the procedures for circulation and use of “virtual currencies/crypto-currencies” in Ukraine.

In view of the above, legal assistance in proceedings regarding virtual currencies is possible when it involves conducting procedural actions in the territory of Ukraine unrelated to seizure or confiscation thereof.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Pursuant to the Criminal Procedure Code of Ukraine the issue of restitution of damages done to the victim of the crime shall be decided by the court through hearing and passing a decision in a civil lawsuit within the criminal proceedings.

Therefore, taking measures aimed at the restitution to the victim of assets obtained by criminal means is possible with a final and binding decision by a competent court of a foreign jurisdiction at hand.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

There are no proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime. There are also no proposals to amend and/or facilitate the application of Council of Europe instruments for including the management of seized and confiscated property and asset sharing, because the said procedures are absent from the Ukrainian legislation.

In addition to our response from the 31st of August, 2015 on the Questionnaire on international cooperation on seizure and confiscation (questions № 2,3,4,5) I would like to clarify one more issue about the peculiarities of Ukrainian national legislation.

Criminal Procedure Code of Ukraine contains provisions which in part allow to manage the arrested and confiscated assets (article 568).

Thus, pursuant to the part 1 of the abovementioned article upon the request for international legal assistance, appropriate authorities of Ukraine shall conduct procedural actions to detect and arrest assets, money and valuables obtained as proceeds from crime, as well as assets that belongs to suspects, accused or sentenced persons. When arresting these assets, measures shall be taken necessary to its preservation until court takes a decision in respect of such assets, and the requesting Party shall be informed thereon.

But there is no any detailed order of management or preservation of the arrested assets prescribed by the CPC.

**UNITED KINGDOM**

**1. Do you consider the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its additional protocols as appropriate instruments for co-operation in the fields of:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. asset sharing?**

**(Please specify)**

The UK does not require a treaty basis to provide assistance relating to proceeds of crime and asset sharing.

There are frustrations from law enforcement agencies about the timeliness and complicated nature of the mutual legal assistance (MLA) process in general.

The existing arrangements work well with many countries but not others. It is imperative that there is a streamlined system (not necessarily MLA) for international cooperation to identify assets, for example, firstly the supply systems for goods and, secondly, trace the benefits. Law enforcement agencies wonder if a specific provision could be made relating to assistance in asset tracing.

**2. When using the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?**
- b. confiscation of proceeds of crime?**
- c. management of seized and confiscated assets?**
- d. returning the assets for victims?**
- e. asset sharing?**

**(Please specify)**

The UK does not require a treaty basis to provide assistance relating to proceeds of crime and asset sharing.

The Proceeds of Crime Act 2002 ("POCA") sets out the UK legislative scheme for the recovery of the proceeds of crime. This includes a value-based confiscation order following any criminal conviction. There are other means of recovering the proceeds of crime which do not require a conviction, namely civil recovery, cash seizure and taxation powers.

UK legislation also provides for a number of financial investigative powers, namely production orders, search and seizure warrants, disclosure orders, customer information orders and account monitoring orders. There are also powers that allow for the "restraint" or "freezing" of assets to prevent dissipation of assets prior to orders being made. All these powers are also available to assist overseas countries in their cases where evidence and property is located in the UK.

We have not encountered any legal or practical difficulties which directly relate to this Convention in relation to criminal confiscation; although the number of requests is low.

However, the position of seeking assistance in non-conviction based confiscation (known as civil recovery in the UK) has raised certain issues as some partners have difficulties recognising the concept and whether the Convention provides for this.

There are difficulties in this time of diminishing resources, agencies can find it more difficult to provide assistance. Capacity rather than capability is an issue, in particular the lower values and impact the

crime. There is also frustration that the modern financial world is able to transfer money instantaneously, but formal mutual legal assistance is an onerous and slow process. There are also difficulties where there is intelligence suggesting a subject has a presence in a jurisdiction but specific financial or asset details are unknown – it makes it difficult/impossible to frame a request under the Convention.

In respect of returning assets to victims, the primary purpose of a request under the Convention must be related to the proceeds of crime. If the purpose of a request for assistance is for the return of assets to victims, the UK does not apply the Convention. A side effect of providing assistance in the recovery of the proceeds of crime may be the return of assets to victims; and the UK is happy to provide cooperation in such cases.

**3. When using the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No.198) as a basis for co-operation, what are the possibilities within your national system? Have you encountered any legal or practical difficulties? Please specify your answer as regards to:**

- f. search and seizure of proceeds of crime?
- g. confiscation of proceeds of crime?
- h. management of seized and confiscated assets?
- i. returning the assets for victims?
- j. asset sharing?

**(Please specify)**

The UK does not require a treaty basis to provide assistance relating to proceeds of crime and asset sharing. Note that this Convention has only entered into force for the UK on 1 August 2015.

The UK are aware of the advantages that this Convention will provide including making it easier to obtain compliance by other States when making MLA requests request. However, without further experience the UK is unable to provide any further details.

#### **4. Introduction**

**A problem frequently observed in the case of seizure and/or the transfer of execution of a confiscation order is that member States are not always able to ensure the implementation of a request grounded on a so-called value-based confiscation system. This system is described in both conventions as a system with which it is possible to co-operate besides the so-called object basis confiscation system. In both systems, a criminal conviction is necessary. In the value-based confiscation system, the criminal profits are calculated. Ultimately, on the basis of these calculations, the judge imposes an obligation to pay an amount of money which is equivalent to the criminal profits acquired. The confiscation order can then be executed on all assets belonging to the convicted person. In this regard, it is not required to prove that these assets have been obtained directly from the criminal offence.**

**Question: Could the competences mentioned in question 2 and 3 be exercised in the case of a request grounded on the value-based confiscation system? Please specify your answer as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

Yes.

The UK operates a value based confiscation system, but domestic legislation provides that assistance in both property-based and value-based confiscation orders is possible.

In the UK a confiscation order does not provide for the confiscation of particular property, but rather orders the defendant to pay a set amount out of whatever resources are available to him or her. The defendant is given a set time to pay the order after which he or she is liable for interest and may be subject to a default sentence for failing to pay.

Domestic law provides for restraint orders, which prevent a person subject to a criminal investigation or criminal proceedings dealing with any realisable property to prevent the dissipation of assets that may be subject to a confiscation order. The concept of realisable property can be made against any of a defendant's property (legitimate or illegitimate) that can be used to pay towards the value of a confiscation order. Domestic law also allows for the appointment of a receiver to manage restrained assets or to enforce a confiscation order.

The lack of identifying actual assets against which a restraint order or confiscation order can be enforced can cause difficulties in providing timely and focused assistance. It can be difficult to provide powers to seize and sell specific assets.

**5. Several member States recognize the possibility of seizure and confiscation of assets which belong *de facto* to the accused/convicted person but are legally considered as belonging to a third person, mostly the so-called Straw man.**

**Do you have the possibility to execute such a request? If not, for which reasons, and if yes, under which conditions? Please specify your answer as regards to:**

- a. Search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. management of seized and confiscated assets?
- d. returning the assets for the victims?
- e. asset sharing?

**(Please specify)**

As the UK operates a value-based system, the identification of particular property is not required and so this issue is not a barrier. In calculating the benefit of crime, the value of assets that have been passed to others can be calculated into the amount set on the confiscation order. This matter is referred to as a "tainted gift". The defendant makes a gift if he transfers assets to another for significantly less consideration than its value at the time he obtained it.

Execution of requests is a matter of application of resources on a case by case basis. This may depend on the proposed value and assessed risk and potential criminality of the subject.

**6. Is your State in a position to co-operate with other States on the basis of reciprocity and in the absence of a treaty as regards to:**

- a. search and seizure of proceeds of crime?
- b. confiscation of proceeds of crime?
- c. returning the assets for the victims?
- d. asset sharing?

**(Please specify)**

The UK does not require a treaty basis to provide assistance relating to proceeds of crime and asset sharing.

**7. Is your State in a position to provide mutual legal assistance for the purpose of, or, related to non-conviction based confiscation and other measures (for instance civil forfeiture)? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**



Can you in particular provide the requested information regarding the following phases of the Non Conviction Based (NCB) proceeding:

- a. the information-gathering phase, during which criminal information is often requested for use within a NCB proceeding
- b. seizure of proceeds of crime?
- c. confiscation of proceeds of crime?
- d. management of seized and confiscated assets?
- e. returning the assets for the victims?
- f. asset sharing?

Yes, the UK is able to provide MLA for the purpose of, or, related to non-conviction based confiscation. Domestic legislation provide for investigative, freezing and recovery assistance to overseas countries. The UK court has to be satisfied, on the balance of probabilities that the identified property was obtained as a result of crime.

**8. Is your State in a position to provide assistance in criminal, civil and administrative proceedings related to the liability of legal entities for the purpose of seizure or confiscation of proceeds of crime? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Yes. References to person in UK law includes a body of persons corporate or incorporate (see the Interpretation Act 1978)

**9. Is your State in a position to provide assistance in procedures related to virtual currencies such as bitcoins, especially as regards seizure and confiscation?**

The UK would conduct proceedings based on the value of the bitcoins, i.e. the courts would specify a confiscation order on the defendant which would reflect the value of the bitcoin. The UK can also restrain virtual currencies depending on the nature of how they are held.

**10. Is your State in a position to provide assistance, independently from a confiscation decision, for the purpose of restitution to the victim of assets obtained by criminal means? If so, please specify the conditions and the instrument(s) used as a legal basis. If not, please specify the legal obstacles.**

Domestic law makes it clear that, where there is both a confiscation order and a compensation order, and the defendant does not have the means to pay both, monies collected under the confiscation order should be used first to settle any outstanding compensation to victims. Compensation orders are made under other legislation.

**11. Do you have any proposals to amend and/or facilitate the application of Council of Europe instruments for international co-operation in the field of search, seizure and confiscation of proceeds of crime, including the management of seized and confiscated property and asset sharing? (Please specify your proposal and the instrument(s) concerned).**

None at present.

**ANDORRE (ORIGINAL FRENCH)**

- 2. Estimez-vous que la Convention européenne d'entraide judiciaire en matière pénale (STE n° 30) et ses protocoles additionnels sont des instruments adaptés à la coopération dans les domaines suivants :**

- a. **dépistage et saisie des produits du crime ?**
- b. **confiscation des produits du crime ?**
- c. **partage des avoirs ?**

Pour ce qui est de la Principauté d'Andorre, la réponse est affirmative en ce qui concerne le dépistage et la saisie des produits du crime uniquement.

- 3. En appliquant la Convention relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime (STE n° 141) comme base de la coopération, quelles sont les modalités d'application au sein de votre système national ? Avez-vous rencontré des difficultés juridiques ou pratiques ? Veuillez préciser votre réponse en ce qui concerne :**

- a. **le dépistage et la saisie des produits du crime ?**
- b. **la confiscation des produits du crime ?**
- c. **la gestion des avoirs saisis et confisqués ?**
- d. **restitution des avoirs aux victimes ?**
- e. **le partage des avoirs ?**

Cette convention s'applique effectivement pour ce qui est du dépistage et saisie des produits du crime, ainsi que pour la confiscation. En revanche, elle n'est pas applicable en matière de gestion et restitution des avoirs confisqués, ni pour le partage.

En effet, la législation andorrane et en particulier l'article 39 de la Loi de coopération pénale internationale et de lutte contre le blanchiment d'argent ou de valeurs produit de la délinquance internationale et contre le financement du terrorisme (LCPI), prévoit que les confiscations s'effectuent toujours au profit de l'État andorran, sauf si une convention ou accord international en prévoyaient autrement.

- 4. En appliquant la Convention relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime et au financement du terrorisme (STCE n°198) comme base de la coopération, quelles sont les modalités d'application au sein de votre système national ? Avez-vous rencontré des difficultés juridiques ou pratiques ? Veuillez préciser votre réponse en ce qui concerne :**

- a. **le dépistage et la saisie des produits du crime ?**
- b. **la confiscation des produits du crime ?**
- c. **la gestion des avoirs saisis et confisqués ?**
- d. **la restitution des avoirs aux victimes ?**
- e. **le partage des avoirs ?**

L'Andorre n'a pas signé cette convention.

- 5. Introduction**

Les Etats membres rencontrent souvent un problème dans la saisie et/ou le transfert de l'exécution de l'ordre de confiscation, ils ne sont pas toujours en mesure de s'assurer de l'exécution de la requête établie sur le système de confiscation fondé sur la « valeur ». Dans les deux conventions, ce système est décrit comme permettant une possible coopération à côté du système de confiscation fondé sur les « biens » . Dans les deux systèmes, une condamnation pénale est nécessaire. Dans le système de confiscation fondé sur la « valeur », les profits illicites sont estimés. A la fin, sur la base de ces estimations, le juge impose une obligation de payer une somme équivalente aux profits acquis par l'activité criminelle. L'ordre de confiscation peut ensuite être exécuté sur tous les avoirs appartenant à la personne condamnée. A cet égard, il n'est pas nécessaire de prouver que ces avoirs ont été directement obtenus par les actes délictueux.

**Question : Les compétences mentionnées à la question 2 et 3 peuvent-elle être exercées dans le cas d'une requête établie sur le système de confiscation fondé sur la « valeur » ? Veuillez préciser votre réponse en ce qui concerne :**

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?
- d. la restitution des avoirs aux victimes ?
- e. le partage des avoirs ?

En effet, a), b), c) et d) sont possibles. Cela est prévu expressément dans les articles 70 du Code Pénal, 116 du Code de Procédure Pénale et 38 de la Loi de coopération pénale internationale et de lutte contre le blanchiment d'argent ou de valeurs produit de la délinquance internationale et contre le financement du terrorisme (LCPI).

Cependant, le partage n'est, en principe, pas possible puisque notre loi nationale prévoit que la confiscation des avoirs se fasse toujours en bénéfice de l'État andorran, sauf si une convention ou accord international en prévoyaient autrement.

Ainsi, en vertu de l'article 2 de l'Accord signé entre le gouvernement de l'Andorre et le gouvernement des États-Unis d'Amérique relatif à la répartition des avoirs, instruments et produits du délit (BOPA du 5 juin 2013, <https://www.bopa.ad/bopa/025026/Pagines/7F0F2.aspx> ), celui-ci doit permettre « à toutes les parties distribuer les avoirs qui auront été confisqués en relation avec les délits ».

**6. Plusieurs Etats membres reconnaissent la possibilité d'une saisie et d'une confiscation des avoirs qui appartiennent de facto à la personne accusée/condamnée mais qui légalement appartiennent à une tierce personne, la plupart du temps à des « hommes de paille ».**

**Avez-vous la possibilité d'exécuter une telle requête ? Si non, pour quelles raisons ? Si oui, sous quelles conditions ? Veuillez préciser votre réponse en ce qui concerne :**

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?
- d. la restitution des avoirs aux victimes ?
- e. le partage des avoirs ?

Comme précédemment, a), b), c) et d) sont possibles et prévus dans l'article 70.3 du Code Pénal, mais pas le partage des avoirs (voir article 39 LCPI), à exception de l'Accord signé entre les gouvernements de l'Andorre et des États-Unis d'Amérique.

**7. Votre Etat est-il en position de coopérer avec d'autres Etats sur la base de la réciprocité et en l'absence d'un traité dans les domaines suivants :**

- a. dépistage et saisie des produits du crime ?**
- b. confiscation des produits du crime ?**
- c. restitution des avoirs aux victimes ?**
- d. partage des avoirs ?**

Effectivement, le dépistage, confiscation et restitution sont possibles puisque prévus dans notre loi nationale (LCPI) mais pas le partage (article 39 LCPI), à exception de l'Accord signé entre les gouvernements de l'Andorre et des États-Unis d'Amérique.

**8. Votre Etat est-il en position d'apporter une entraide judiciaire aux fins ou dans le cadre de mesures de confiscation ou autres non fondées sur une condamnation (par exemple une confiscation civile) ? Si oui, veuillez préciser les conditions et instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.**

**Pouvez-vous, en particulier, fournir l'information requise en ce qui concerne les étapes d'une procédure judiciaire non fondée sur une condamnation ? :**

- a. l'étape de collecte de données, durant laquelle l'information pénale est souvent requise à des fins d'une procédure judiciaire non fondée sur une condamnation**
- b. saisie des produits du crime ?**
- c. confiscation des produits du crime ?**
- d. gestions des avoirs saisis et confisqués ?**
- e. restitution des avoirs aux victimes ?**
- f. partage des avoirs ?**

L'Andorre n'est pas en mesure d'apporter d'entraide judiciaire dans le cadre de mesures non fondées sur une condamnation pénale.

**9. Votre Etat est-il en position d'apporter une assistance dans le cadre de procédures pénales, civiles ou administratives liées à la responsabilité des personnes morales aux fins de la saisie ou de la confiscation des produits du crime ? Si oui, veuillez préciser les conditions et instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.**

La réponse est affirmative, puisque prévue dans notre loi nationale et en particulier dans l'article 71 du Code Pénal.

**10. Votre Etat est-il en position d'apporter une assistance dans le cadre de procédures liées à des monnaies virtuelles comme le « bitcoin », notamment en matière de saisie et de confiscation ?**

Effectivement, ce serait possible puisque le concept de « produit du crime » est très large et peut donc englober la monnaie virtuelle.

- 11. Votre Etat est-il en position d'apporter une assistance, indépendamment d'une décision de confiscation, aux fins de restituer à la victime des avoirs obtenus par des moyens illicites ? Si oui, veuillez préciser les conditions et les instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.**

Oui. La voie serait que la victime présente, devant la Salle Civile du Tribunal Supérieur d'Andorre, une demande d'exequatur pour obtenir que la décision de confiscation soit exécutoire en Andorre (articles 19 de la Loi Qualifiée de la Justice et 47 à 51 de la Loi Transitoire de Procédures Judiciaires).

- 12. Avez-vous des propositions à faire pour modifier et/ou faciliter l'application des instruments du Conseil de l'Europe dans le domaine de la coopération internationale en matière de dépistage, de saisie et de confiscation des produits du crime, y compris la gestion des biens saisis et confisqués et le partage des avoirs ? (Veuillez préciser votre proposition ainsi que le ou les instrument(s) concerné(s).)**

Non.

## FRANCE (ORIGINAL FRENCH)

### 1. Estimez-vous que la Convention européenne d'entraide judiciaire en matière pénale (STE n° 30) et ses protocoles additionnels sont des instruments adaptés à la coopération dans les domaines suivants :

Entre Etats membres du Conseil de l'Europe, le caractère fiscal de l'infraction qui a donné lieu à la demande d'entraide est un motif facultatif de refus pour tous les Etats : article 2.a de la Convention du 20 avril 1959. Les conventions ultérieures ont eu pour objectif de favoriser l'entraide judiciaire en matière de lutte contre la fraude fiscale et la délinquance économique et financière. Le premier protocole additionnel du 17 mars 1978 a ainsi renversé le principe, le caractère fiscal de l'infraction n'est pas un motif de refus sauf déclaration contraire. Quelques Etats comme la Suisse et le Luxembourg ont fait cette déclaration.

#### a. dépistage et saisie des produits du crime ?

Seul le protocole du 16 octobre 2001 additionnel à la Convention du 29 mai 2000, ouvert à la signature des Etats membres de l'Union européenne fait obligation aux Etats parties d'être en mesure de dépister les comptes bancaires dont la personne est titulaire.

b. **confiscation des produits du crime ?** La confiscation élargie n'est pas possible

c. **partage des avoirs ?** Le partage n'est pas prévu.

(Veuillez préciser)

### 2. En appliquant la Convention relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime (STE n° 141) comme base de la coopération, quelles sont les modalités d'application au sein de votre système national ? Avez-vous rencontré des difficultés juridiques ou pratiques ? Veuillez préciser votre réponse en ce qui concerne :

a. **le dépistage et la saisie des produits du crime ?**

b. **la confiscation des produits du crime ?**

c. **la gestion des avoirs saisis et confisqués ?**

L'AGRASC n'est pas compétente pour gérer l'ensemble des biens saisis : il faut à ce titre distinguer ses missions impératives de ses missions facultatives.

L'Agence de Gestion et de Recouvrement des Avoirs Saisis et Confisqués a notamment pour missions :

- **La gestion centralisée de toutes les sommes d'argent saisies lors des procédures pénales** (mission impérative)
- **La mise en œuvre des décisions d'aliénation des biens avant jugement** (mission impérative) : Il s'agit d'une procédure consistant à confier à l'AGRASC, aux fins d'aliénation, les biens meubles dont la conservation n'est plus nécessaire à la manifestation de la vérité **et** dont la restitution s'avère impossible (parce que le propriétaire ne peut être identifié **ou** qu'il ne réclame pas l'objet après mise en demeure) ou dont la confiscation est prévue par la loi, lorsque le maintien de la saisie serait de nature à diminuer la valeur du bien. En cas de classement sans suite, de non-lieu, de relaxe ou d'acquittement ou si la peine de confiscation n'est pas *in fine* prononcée, si le propriétaire du bien saisi en fait la demande, il se verra restituer le produit de la vente du bien saisi.
- **La gestion, sur mandat judiciaire, de certains biens complexes** (mission facultative).

#### d. restitution des avoirs aux victimes ?

**Le produit des confiscations devient propriété de l'Etat et à ce titre est versé au budget général de l'Etat**, sauf lorsque la peine de confiscation est ordonnée pour des faits de trafic de stupéfiants, auquel cas les sommes sont versés à la **MILDECA (fonds de concours stupéfiants, article 706-161 CPP)**.

La loi n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme a par ailleurs **complété l'article 706-161 CPP pour prévoir que l'agence peut également verser à l'Etat des contributions destinées au financement de la lutte contre la délinquance et la criminalité.**

S'agissant des contrats d'assurance-vie, il convient de rappeler que la loi n°2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière a mis fin à une incertitude concernant leur sort en cas de confiscation définitive, en insérant dans le code des assurances, le code de la mutualité et le code de la sécurité sociale une disposition prévoyant que la décision définitive de confiscation prononcée par une juridiction pénale entraîne de plein droit la résolution judiciaire du contrat d'assurance-vie et le transfert des fonds confisqués à l'Etat (articles L.160-9 du code des assurances, L. 223-29 du code de la mutualité et L. 932-23-2 du code de la sécurité sociale). Il est **indifférent** que la juridiction judiciaire se soit prononcée sur une infraction réprimée par le code des douanes ou par tout autre texte ou **que les sommes confisquées aient initialement été saisies par l'administration des douanes**. En effet, dès lors qu'une procédure pénale a été initiée à la suite d'une opération douanière, l'appréhension des sommes **s'analyse en une saisie pénale et leur confiscation prononcée in fine est donc exécutée par l'AGRASC** en raison de sa compétence exclusive pour exécuter l'ensemble des décisions de confiscations portant sur des sommes d'argent.

#### L'indemnisation des victimes

Développer la pratique des saisies et confiscations c'est aussi permettre une meilleure indemnisation des victimes de l'infraction. En application de **l'article 706-164 du code de procédure pénale**, toute personne constituée partie civile, qui bénéficie d'une décision définitive lui accordant des dommages-intérêts ainsi que des frais au titre de la procédure, et dont l'indemnisation par la CIVI ou le SARVI est impossible, peut obtenir de l'AGRASC que ces sommes lui soient payées prioritairement sur les biens de son débiteur dont la confiscation a été décidée de manière définitive.

Ce texte bénéficie aux parties civiles personnes morales depuis la loi du 2 janvier 2014 habilitant le Gouvernement à simplifier et sécuriser la vie des entreprises.

Pour permettre à l'AGRASC de remplir cette mission, les juridictions doivent donc transmettre, idéalement par voie dématérialisée, la copie certifiée conforme des décisions accordant des dommages-intérêts à la partie civile dans les affaires ayant donné lieu à transfert de numéraires ou de biens à l'agence (cette copie devant de toute façon être transmise à l'agence pour l'informer du sort des biens saisis). Dans tous les autres cas, l'agence interrogera les juridictions dès qu'elle sera saisie par une partie civile réclamant une indemnisation.

L'agence se rapprochera du SADJAV, du Fonds de garantie des victimes des actes de terrorisme et d'autres infractions (FGTI) et de l'INAVEM pour envisager les modalités opérationnelles permettant de remplir au mieux son rôle auprès des victimes et des parties civiles.

#### **La sanction des agissements tendant à empêcher l'exécution de la peine de confiscation (article 434-41 du code pénal)**

**L'article 434-41 du code pénal**, modifié par la loi n° 2013-1117 du 6 décembre 2013, réprime de **deux ans d'emprisonnement et de 30 000 euros d'amende** le fait de **détruire, détourner ou tenter de détruire ou de détourner** ainsi que le fait de **refuser de remettre tout bien, corporel ou incorporel, ayant fait l'objet d'une décision de confiscation.**

Cette disposition a pour objet de faciliter l'exécution des décisions de confiscation, particulièrement en matière immobilière.

#### **e) le partage des avoirs ?**

**Le sort des biens confisqués est, en principe, déterminé par l'Etat requis, conformément à son droit national. Ainsi l'article 15 de la Convention de Strasbourg dispose que La partie requise dispose selon son droit interne de tous les biens confisqués par elle, sauf s'il en est convenu autrement par les Parties concernées.**

Pour autant, le partage des biens ou des sommes confisqués peut être sollicité auprès de cet Etat (via l'AGRASC ou le ministère de la Justice ).

Le sort des biens confisqués en exécution d'une décision étrangère est réglé par les conventions multilatérales ou bilatérales applicables ou, en l'absence de convention, par les dispositions de l'article 713-40 du code de procédure pénale. Cette dernière disposition pose le principe selon lequel l'exécution d'une décision de confiscation étrangère entraîne transfert à l'Etat français de la propriété des biens confisqués, sauf s'il en est convenu autrement avec l'Etat requérant.

La loi n°2012-409 du 27 mars 2012 a cependant tempéré la portée de ce principe pour les sommes d'argent en prévoyant que celles-ci et le produit de la vente des biens confisqués, déduction faite des frais d'exécution, sont dévolus à l'Etat français lorsque ce montant est inférieur à 10.000 € et dévolus pour moitié à l'Etat français et pour moitié à l'Etat requérant dans les autres cas. Cette loi a donc étendu en dehors de l'Union européenne le principe de partage des sommes résultant de la décision-cadre du 6 octobre 2006 relative à l'application du principe de reconnaissance mutuelle aux décisions de confiscation.

Les dispositions du code de procédure pénale n'ont cependant vocation à s'appliquer qu'en l'absence de convention internationale en stipulant autrement ou d'accord de partage entre la France et l'Etat requérant. En outre, il peut être dérogé aux règles énoncées à l'article 713-40 du code de procédure pénale par la conclusion d'un accord de partage ad hoc entre la France et l'Etat requérant qui prévoirait une clé de répartition différente.

Sous réserve de l'appréciation souveraine des juridictions, et de l'accord des deux Etats, la formalisation et la rédaction d'un accord ne paraît pas s'imposer lorsque les autorités requérantes sollicitent 50% des sommes confisquées, soit la clé de répartition prévue par la loi. Dans la mesure où l'article 713-36 du code de procédure pénale énonce que les dispositions de l'article 713-40 du code de procédure pénale ne sont applicables qu'en l'absence de convention, il est possible d'en déduire qu'une convention de partage n'est nécessaire que si l'on souhaite déroger à la règle du partage par moitié.

En l'absence de dispositions particulières de l'article 713-40 du code de procédure pénale, la mise en oeuvre d'un tel accord impliquera une saisine, le plus en amont possible de la DACG s'agissant d'un accord entre autorités centrales.

Il est préférable de communiquer à l'AGRASC pour information, le jugement du tribunal correctionnel ordonnant l'exécution de la confiscation étrangère de sommes d'argent sur le territoire français pour que les sommes d'argent saisies et confisquées soient directement virées par les banques à la Caisse des dépôts et consignations, après transmission par l'AGRASC de son relevé d'identité bancaire, et ce même si le jugement enjoint aux banques de se libérer de ces sommes auprès de l'agence.

#### **Quelle est l'autorité compétente pour rédiger un accord de partage ?**

Lorsque les parties sont convenues d'un partage fait en dérogation aux règles posées par les articles 713-32 et 713-40 du code de procédure pénale, l'arrangement est matérialisé par une convention de partage ou de restitution.



En effet, lorsque le partage est réalisé dans les conditions prévues par ces textes, la conclusion d'une telle convention ne présente pas d'intérêt. Si le partage porte sur des fonds ou valeurs détenus en France, la part revenant à l'Etat étranger lui est versée par l'AGRASC par le moyen d'un virement au crédit d'un compte préalablement désigné.

Lorsque le partage porte sur des fonds ou valeurs détenus à l'étranger, le paiement est réalisé par le moyen d'un virement au crédit du compte de l'AGRASC qui en assure ensuite le reversement, soit au budget général de l'Etat, soit à la MILDECA selon la nature des infractions retenues dans la poursuite.

L'article 706-160 du même code dispose que l'Agence peut procéder à la répartition du produit de la vente en exécution de toute demande d'entraide ou de coopération émanant d'une autorité judiciaire étrangère.

L'Agence n'interviendra donc dans les procédures de partage que lorsqu'il s'agira de distribuer des fonds ou la valeur liquidative de biens qui lui auront été confiés, soit préalablement, c'est-à-dire dans la phase préalable au procès ou au moment du procès (art. 484-1 CPP) soit au moment même de l'exécution de la confiscation en application de l'article 707-1 du code de procédure pénale. Il s'agira donc principalement de biens saisis sur le territoire national à la requête d'Etats étrangers.

Dans les autres cas, et notamment s'agissant du partage de biens confisqués à la demande d'une juridiction française sur le territoire d'un Etat étranger, l'autorité compétente pour décider du partage sera le ministère de la Justice. La convention sera alors rédigée par le BEPI et signée par le directeur des affaires criminelles et des grâces.

**(Veuillez préciser)**

**3. En appliquant la Convention relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime et au financement du terrorisme (STCE n°198) comme base de la coopération, quelles sont les modalités d'application au sein de votre système national ? Avez-vous rencontré des difficultés juridiques ou pratiques ? Veuillez préciser votre réponse en ce qui concerne :**

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?
- d. la restitution des avoirs aux victimes ?
- e. le partage des avoirs ?

**(Veuillez préciser)**

#### **4. Introduction**

**Les Etats membres rencontrent souvent un problème dans la saisie et/ou le transfert de l'exécution de l'ordre de confiscation, ils ne sont pas toujours en mesure de s'assurer de l'exécution de la requête établie sur le système de confiscation fondé sur la « valeur ». Dans les deux conventions, ce système est décrit comme permettant une possible coopération à côté du système de confiscation fondé sur les « biens ». Dans les deux systèmes, une condamnation pénale est nécessaire. Dans le système de confiscation fondé sur la « valeur », les profits illicites sont estimés. A la fin, sur la base de ces estimations, le juge impose une obligation de payer une somme équivalente aux profits acquis par l'activité criminelle. L'ordre de confiscation peut ensuite être exécuté sur tous les avoirs appartenant à la personne condamnée. A cet égard, il n'est pas nécessaire de prouver que ces avoirs ont été directement obtenus par les actes délictueux.**

**Question : Les compétences mentionnées à la question 2 et 3 peuvent-elle être exercées dans le cas d'une requête établie sur le système de confiscation fondé sur la « valeur » ? Veuillez préciser votre réponse en ce qui concerne :**

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?
- d. la restitution des avoirs aux victimes ?
- e. le partage des avoirs ?

**(Veuillez préciser)**

Il résulte de cette exigence du lien entre les biens et l'infraction dont la répression est visée par ces Conventions que le domaine des saisies, et partant, des confiscations, est plus restreint qu'en droit national ou de l'Union européenne.

La loi du 9 juillet 2010 a défini la procédure applicable à l'exécution en France de saisies ordonnées par une autorité judiciaire étrangère non membre de l'Union européenne (articles 694-10 à 694-14 du code de procédure pénale).

Ces dispositions consacrées à l'entraide aux fins de saisie des produits d'une infraction en vue de leur confiscation ultérieure s'appliquent à titre subsidiaire, lorsqu'aucune convention internationale n'est applicable, qu'elle soit antérieure ou postérieure à l'entrée en vigueur de cette loi et ce, en vertu du principe de

primauté des normes internationales sur le droit interne découlant de l'article 55 de la Constitution.

La loi du 6 décembre 2013 en a étendu le champ d'application pour le mettre en parfaite adéquation avec le périmètre de la confiscation passive.

**L'article 694-10 du code de procédure pénale, modifié par la loi du 6 décembre 2013**, définit le champ d'application des demandes de saisies émanant d'autorités étrangères non liées à la France par une convention internationale spécifique en la matière.

\* Seules sont visées les saisies « en vue de leur confiscation ultérieure ». Néanmoins, les dispositions s'appliquent à toutes les mesures de gel de biens ou d'éléments de preuve ;

\* Les biens pouvant faire l'objet d'une saisie peuvent être des biens meubles, immeubles « quelle qu'en soit la nature » ;

\* **Depuis la loi du 6 décembre 2013, outre les saisies simples et les saisies en valeur initialement visées par le texte** (les biens doivent constituer « le produit direct ou indirect de l'infraction ainsi que tout bien dont la valeur correspond au produit de cette infraction), les saisies de **l'instrument et de l'objet de l'infraction** ont été

ajoutées : « biens ayant servi ou qui étaient destinés à commettre l'infraction ».

*Deux conséquences doivent être déduites :*

– cet article doit être interprété largement comme s'appliquant également, en amont de la demande de saisie, à toute demande d'entraide portant sur la recherche et l'identification de l'objet de l'infraction, de son produit ou de la chose ayant servi ou destinée à la commettre.

– **« les saisies élargies » et a fortiori « les saisies générales » du patrimoine, de biens qui ne sont pas en lien direct ou indirect avec l'infraction, ne sont en tout état de cause pas possibles en France à la demande des autorités étrangères hors Union européenne, en l'absence de convention internationale le prévoyant spécifiquement.**

La loi n°2010-768 du 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale a refondu les dispositions relatives à l'entraide en matière de saisie et de confiscation avec les Etats non-membres de l'Union européenne en codifiant les lois n°90-1010 du 14 novembre 1990 et 96-392 du 13 mai 1996 et en étendant leur portée à toutes les conventions internationales qui comportent des stipulations relatives à l'exécution transfrontalière de décisions de confiscation.

En effet, les lois précitées du 14 novembre 1990 et du 13 mai 1996 (à présent abrogées) avaient été votées afin de permettre la mise en oeuvre, respectivement, de la Convention de Strasbourg de 1990 relative au blanchiment, au dépistage, à la saisie et la confiscation des produits du crime et de la Convention de Vienne de 1988 sur les stupéfiants précitées. Les dispositions législatives adoptées à cette occasion devaient néanmoins être généralisées pour permettre à la France de se mettre en conformité avec les instruments nouveaux qu'elle avait ratifiés et, en particulier, la Convention de Palerme de 2000 et la Convention de Mérida de 2003.

L'article 14 de la loi du 9 juillet 2010 a donc introduit dans le code de procédure pénale les articles 713-36 à 713-41 relatifs à l'exécution des décisions de confiscation prononcées par les autorités étrangères.

Tout le chapitre III « De la coopération internationale aux fins d'exécution des décisions de confiscation » est une synthèse des deux lois intégrant les dispositions relatives à la saisie pénale.

Ces nouvelles dispositions ont vocation à s'appliquer aux demandes d'entraide étrangères aux fins de confiscation fondées sur le principe de réciprocité ou sur une convention à laquelle la France serait partie.

S'agissant de ce dernier cas, il convient cependant de relever qu'en application du principe de supériorité des traités sur les lois, les articles 713-36 à 713-41 ne s'appliquent que de manière subsidiaire, « *en l'absence de Convention internationale en disposant autrement* » (article 713-36 du code de procédure pénale).

Les instruments conventionnels bilatéraux ou multilatéraux ratifiés par la France prévoient que les demandes d'entraide aux fins de confiscation peuvent viser les instruments, les produits ou la valeur des produits des infractions.

S'agissant des demandes fondées sur le principe de réciprocité, l'article 713-36 du code de procédure pénale dispose que la confiscation peut porter sur les « *biens meubles ou immeubles, quelle qu'en soit la nature, ayant servi ou qui étaient destinés à commettre l'infraction ou qui paraissent en être le produit direct ou indirect ainsi que de tout bien dont la valeur correspond au produit de cette infraction* ».

**Il résulte dès lors tant des instruments conventionnels que des dispositions de droit interne que seules peuvent donner lieu à exécution en France les confiscations « simples » portant sur les instruments, produits ou valeur des produits des infractions, à l'exclusion des mesures de confiscation élargie ou générale.**

Il est à cet égard essentiel que l'autorité étrangère requérante expose dans sa demande d'entraide les éléments permettant de considérer que les biens dont la confiscation est sollicitée constituent soit l'instrument, soit le produit d'une infraction pénale.

**5. Plusieurs Etats membres reconnaissent la possibilité d'une saisie et d'une confiscation des avoirs qui appartiennent de facto à la personne accusée/condamnée mais qui légalement appartiennent à une tierce personne, la plupart du temps à des « hommes de paille ».**

**Avez-vous la possibilité d'exécuter une telle requête ? Si non, pour quelles raisons ? Si oui, sous quelles conditions ? Veuillez préciser votre réponse en ce qui concerne :**

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?
- d. la restitution des avoirs aux victimes ?
- e. le partage des avoirs ?

Pour les confiscations simples, les définitions en droit français sont les suivantes :

- **Le bien est l'instrument de l'infraction** : il peut être confisqué – et donc saisi – dès lors qu'il est la propriété du condamné ou, sous réserve des droits du propriétaire de bonne foi, que celui-ci en a la libre disposition

(article 131-21 alinéa 2 du code pénal)

*Voir notamment Crim. 15 janvier 2014, n°13-81.874, rejetant le pourvoi formé contre un arrêt ayant ordonné la confiscation d'un véhicule ayant servi à commettre des infractions routières et appartenant à une société dont la cour a apprécié souverainement qu'elle n'est pas propriétaire de bonne foi.*

Il peut s'agir de biens de toute nature, meubles ou immeubles, divis ou indivis.

- **Le bien est l'objet ou le produit direct ou indirect de l'infraction** : il peut toujours être confisqué – et donc saisi – en quelques mains qu'il se trouve (article 131-21 alinéa 3 du code pénal), sauf s'il est susceptible de restitution à la victime, (auquel cas le bien doit être restitué à cette dernière).

Si le produit de l'infraction a été mêlé à des fonds d'origine licite pour l'acquisition d'un ou plusieurs biens, la confiscation peut ne porter sur ces biens qu'à concurrence de la valeur estimée de ce produit.

*La jurisprudence a énoncé, s'agissant de la saisie d'un immeuble appartenant à une société dont les personnes poursuivies avaient été successivement les gérants, que la confiscation n'est pas limitée aux biens dont les personnes visées par l'enquête sont propriétaires, mais s'étend à tous les biens qui sont l'objet ou le produit direct ou indirect de l'infraction (Crim. 4 septembre 2012, n° 11-87.143).*

**6. Votre Etat est-il en position de coopérer avec d'autres Etats sur la base de la réciprocité et en l'absence d'un traité dans les domaines suivants :**

Oui, cf les réponses aux question précédentes.

- a. dépistage et saisie des produits du crime ?
- b. confiscation des produits du crime ?
- c. restitution des avoirs aux victimes ?
- d. partage des avoirs ?

(Veuillez préciser)

**7. Votre Etat est-il en position d'apporter une entraide judiciaire aux fins ou dans le cadre de mesures de confiscation ou autres non fondées sur une condamnation (par exemple une confiscation civile) ? Si oui, veuillez préciser les conditions et instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.**

**Pouvez-vous, en particulier, fournir l'information requise en ce qui concerne les étapes d'une procédure judiciaire non fondée sur une condamnation ? :**

- a. l'étape de collecte de données, durant laquelle l'information pénale est souvent requise à des fins d'une procédure judiciaire non fondée sur une condamnation
- b. saisie des produits du crime ?
- c. confiscation des produits du crime ?
- d. gestions des avoirs saisis et confisqués ?
- e. restitution des avoirs aux victimes ?
- f. partage des avoirs ?

Les différents systèmes de confiscation des avoirs criminels à travers le monde peuvent être rassemblés en deux grandes catégories, reposant sur deux approches distinctes, prévues de manière alternative ou cumulative par les différents Etats :

- la première approche est la confiscation pénale, qui repose sur la déclaration de culpabilité et la condamnation de l'auteur d'une infraction, dont les biens sont confisqués à titre de peine : l'action est alors dirigée contre la personne elle-même.

- la seconde approche est la confiscation en l'absence de condamnation pénale (« *non conviction based confiscation* », improprement appelée « confiscation civile »), qui est dirigée contre les biens eux-mêmes et non contre les personnes : la confiscation repose alors sur la démonstration que les biens sont le produit d'une activité illicite, indépendamment des poursuites engagées, ou non, à l'encontre de l'auteur de l'infraction.

Dans les systèmes anglo-saxons, le choix de l'une ou l'autre de ces procédures repose notamment sur le niveau de preuve requis. Le recours à la confiscation en l'absence de condamnation pénale permet en outre la confiscation des avoirs dans des situations où les poursuites pénales ne peuvent pas être engagées, pour des motifs tels que le décès de l'auteur de l'infraction.

En France, seule existe pour lors la confiscation pénale, qui suppose une déclaration de culpabilité et constitue une peine complémentaire.

La chambre criminelle de la Cour de Cassation<sup>91</sup> a tout de même eu l'occasion d'entériner l'exécution sur le territoire national d'une décision de nature « civile » prononcée par une juridiction étrangère.

Le cas soumis à l'appréciation de la Cour concernait une décision d'un tribunal de Milan prononçant, à titre préventif, la confiscation d'un immeuble en France au motif que les indices étaient suffisants pour établir qu'il avait été acquis et restauré grâce au produit d'une infraction. Le propriétaire faisait pour sa part l'objet d'une procédure pénale distincte.

Les autorités judiciaires italiennes avaient sollicité, sur le fondement de la convention de Strasbourg du 8 novembre 1990<sup>92</sup>, l'exécution sur le territoire national de cette décision et pour faire droit à cette demande, les juges du fond avaient constaté que les conditions de la loi du 13 mai 1996<sup>93</sup>, qui donnent effet

à la convention de 1996, étaient remplies, à savoir :

- d'une part que la décision dont l'exécution était demandée était définitive, exécutoire et que son exécution ne portait pas atteinte à l'ordre public ;
- d'autre part que le bien confisqué était susceptible de l'être dans des circonstances analogues selon la loi française.

La Cour de cassation, tout en reconnaissant le caractère « préventif » du jugement, a confirmé cette analyse, estimant que dès lors que la loi française prévoyait la confiscation en matière de blanchiment et la peine de confiscation de la chose produit de l'infraction, la décision italienne devait être mise à exécution aux motifs que le système français connaît des mesures de confiscation qui seraient ordonnées dans des « circonstances analogues ».

Ce faisant, la Cour a autorisé l'exécution sur le territoire national d'une confiscation émanant d'une juridiction étrangère, même non pénale, dans la mesure où les conséquences juridiques de la décision sur le patrimoine de la personne mise en cause pouvaient s'analyser en droit interne comme une confiscation pénale.

La seule condition est donc que les indices permettant d'établir que le bien en cause est le produit d'une infraction soient considérés comme suffisants pour s'apparenter à une décision de nature pénale.

Cette jurisprudence a été confirmée par un arrêt de la chambre civile de la Cour de cassation du 4 juin 2009<sup>94</sup>.

Elle ouvre d'intéressantes perspectives de coopération entre la France et les pays qui autorisent ce type de sanction.

Ainsi, sur le fondement de cette jurisprudence, il est possible de faire réaliser une saisie par un juge d'instruction ou une confiscation par le tribunal correctionnel, sur le fondement d'une demande d'entraide visant une saisie ou une confiscation décidée par une autorité judiciaire étrangère dans le cadre de la confiscation civile.

Il est néanmoins préférable de s'assurer, préalablement à l'exécution de cette demande, des raisons qui ont entraîné le choix de la voie de la confiscation civile et de ce que les critères définis par la Cour de cassation sont bien remplis en droit français.

Par ailleurs, il convient de signaler que les pays de droit anglo-saxon ont pour habitude de transmettre des demandes d'entraide sollicitant la mise à exécution ou la notification de leur propres décisions de saisie ou de confiscation civile. Il convient de considérer ces demandes comme nécessitant de prendre de nouvelles décisions nationales de saisie ou de confiscation dans un cadre pénal.

**8. Votre Etat est-il en position d'apporter une assistance dans le cadre de procédures pénales, civiles ou administratives liées à la responsabilité des personnes morales aux fins de la saisie ou de la confiscation des produits du crime ? Si oui, veuillez préciser les conditions et instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.**

La peine de confiscation a été ajoutée par la loi n° 2010-768 du 9 juillet 2010 à la liste des peines complémentaires encourues par les personnes morales énoncée par l'article 131-39 du code pénal.

En conséquence, dès lors que le texte d'incrimination prévoit l'application aux personnes morales des peines complémentaires prévues par l'article 131-39 du code pénal, la peine de confiscation est encourue par ces dernières dans les conditions et selon les modalités prévues à l'article 131-21.

Cette disposition peut s'avérer particulièrement utile lorsque les mis en cause ont recours à l'interposition de sociétés dans l'élaboration de leurs montages frauduleux. La mise en examen et la poursuite de la personne morale permettent ainsi de confisquer (et donc de saisir préalablement) les biens dont la structure intermédiaire est juridiquement propriétaire, notamment lorsqu'il est complexe d'établir que tel mis en cause en avait la libre disposition ou lorsque le mis en cause qui en a la libre disposition n'a pas été identifié, localisé ou interpellé.

**9. Votre Etat est-il en position d'apporter une assistance dans le cadre de procédures liées à des monnaies virtuelles comme le « bitcoin », notamment en matière de saisie et de confiscation ?**

Il résulte des instruments conventionnels et des dispositions de droit interne que peuvent donner lieu à exécution en France les saisies et confiscations portant sur les instruments produits ou valeurs des produits des infractions.

S'agissant des demandes fondées sur la réciprocité ; l'article 713-36 du code de procédure pénale français dispose que la confiscation peut porter sur les biens meubles ou immeubles, quelle qu'en soit la nature...ainsi que de tout bien dont la valeur correspond au produit de cette infraction.

**10. Votre Etat est-il en position d'apporter une assistance, indépendamment d'une décision de confiscation, aux fins de restituer à la victime des avoirs obtenus par des moyens illicites ? Si oui, veuillez préciser les conditions et les instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.**

L'article 12 du Deuxième Protocole additionnel à la Convention européenne d'entraide judiciaire en matière pénale du 8 novembre 2001 dispose : Article 12 – Restitution

1 La Partie requise peut, sur demande de la Partie requérante et sans préjudice des droits des tiers de bonne foi, mettre des objets obtenus par des moyens illicites à la disposition de la Partie requérante en vue de leur restitution à leur propriétaire légitime.

2 Dans le cadre de l'application des articles 3 et 6 de la Convention, la Partie requise peut renoncer, soit avant, soit après leur remise à la Partie requérante, au renvoi des objets qui ont été remis à la Partie requérante si cela peut favoriser la restitution de ces objets à leur propriétaire légitime. Les droits des tiers de bonne foi ne sont pas affectés.

3 Au cas où la Partie requise renonce au renvoi des objets avant leur remise à la Partie requérante, elle ne fait valoir aucun droit de gage ni aucun autre droit de recours découlant de la législation fiscale ou douanière sur ces objets.

4 Une renonciation conformément au paragraphe 2 n'affecte pas le droit de la Partie requise de percevoir auprès du propriétaire légitime des taxes ou droits de douane.

La France demande toujours en matière de faux virements dont elle est particulièrement victime depuis trois ans, aux pays requis de renvoyer les sommes dès leur saisie, et donc sans attendre la confiscation et sans prendre 50 %, en leur expliquant que cette saisie est faite pour restitution immédiate aux victimes, ce que notre agence l'AGRASC fait dès réception des sommes.

La France n'a en revanche aucune expérience en tant qu'État requis, puisqu'elle n'est jamais bénéficiaire d'escroqueries au jugement. Si jamais, toutefois, il nous était demandé de saisir des sommes et de les transférer pour restitution à la victime, sans confiscation, la réponse serait positive : une saisie peut être faite dans une optique de confiscation, mais également, en droit français, dans une optique de restitution aux victimes, voire d'indemnisation depuis l'édiction de l'article 706-164 du code de procédure pénale ( toute personne qui s'étant constituée partie civile a bénéficié d'une décision définitive lui accordant des dommages-intérêts en réparation du préjudice qu'elle a subi du fait d'une infraction pénale ainsi que les frais de justice et qui n'a pas obtenu une indemnisation ...peut obtenir de l'AGRASC que ces sommes lui soient payées prioritairement sur les biens de son débiteur dont la confiscation a été décidée par décision définitive ».

C'est la logique de la saisie : une saisie peut servir à confisquer ou à restituer à la victime (c'est d'ailleurs le sens de la première phrase de l'article 131-21 alinéa 3 (« [la confiscation] porte également sur tous les biens qui sont l'objet ou le produit direct ou indirect de l'infraction, à l'exception des biens susceptibles de restitution à la victime »)

Tant l'esprit des textes que le légitime souci de réciprocité plaident pour une saisie et une restitution immédiate à l'État requérant pour restitution à la victime, sans confiscation et sans conserver 50 %.

**11. Avez-vous des propositions à faire pour modifier et/ou faciliter l'application des instruments du Conseil de l'Europe dans le domaine de la coopération internationale en matière de dépistage, de saisie et de confiscation des produits du crime, y compris la gestion des biens saisis et confisqués et le partage des avoirs ? (Veuillez préciser votre proposition ainsi que le ou les instrument(s) concerné(s).)**

L'objet de l'infraction n'est pas expressément visé dans la Convention du 8 novembre 1990 même s'il peut être compris sous le vocable « autres biens susceptibles de confiscation » et si le deuxième protocole additionnel évoque les objets détenus par des moyens illicites.

De même, elle ne permet pas de confiscation élargie alors même que certains Etats disposent d'un système national qui permettrait l'exécution de ces demandes d'entraide. Les Etats qui ne souhaiteraient pas exécuter de telles demandes pourraient faire une déclaration.

**PORTUGAL (ORIGINAL FRENCH)**

**4. Estimez-vous que la Convention européenne d'entraide judiciaire en matière pénale (STE n° 30) et ses protocoles additionnels sont des instruments adaptés à la coopération dans les domaines suivants :**

- a. **dépistage et saisie des produits du crime ? Oui.**
- b. **confiscation des produits du crime ? Non.**
- c. **partage des avoirs ? Non.**

**(Veuillez préciser)**

La réponse positive à la première question est liée à la largeur de la loi interne portugaise qui permet que soient saisis non seulement les preuves mais aussi les instruments du crime et ses produits; la négative en ce qui concerne les questions b. et c. s'explique parce que l'exécution d'une décision de confiscation prise par une autorité judiciaire étrangère, au Portugal, implique qu'une procédure préalable de reconnaissance (exequatur) soit complétée, procédure qui est clairement hors du champ d'application de la Convention sur l'Entraide Judiciaire. En ce qui concerne la troisième hypothèse on ne croit pas que la Convention puisse être interprétée de façon aussi ample.

**5. En appliquant la Convention relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime (STE n° 141) comme base de la coopération, quelles sont les modalités d'application au sein de votre système national ? Avez-vous rencontré des difficultés juridiques ou pratiques ? Veuillez préciser votre réponse en ce qui concerne :**

- a. **le dépistage et la saisie des produits du crime ? Non.**
- b. **la confiscation des produits du crime ? Non.**
- c. **la gestion des avoirs saisis et confisqués ? Non.**
- d. **restitution des avoirs aux victimes ? Non.**
- e. **le partage des avoirs ? Oui.**

**(Veuillez préciser)**

Les obstacles listés ne dérivent pas directement de l'application de la Convention mais plutôt du manque d'expériences pratiques, due l'utilisation très timide de cet instrument. Aussi, la rapidité du transfèrement d'argent est difficilement compatible avec une procédure de coopération classique, via CRI, par application d'un ou de l'autre instrument. En ce qui concerne le partage des avoirs il y a très peu d'expériences ; une première situation est en train d'être menée à bout mais elle ne sera pas basée sur cet instrument.

**6. En appliquant la Convention relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime et au financement du terrorisme (STCE n°198) comme base de la coopération, quelles sont les modalités d'application au sein de votre système national ? Avez-vous rencontré des difficultés juridiques ou pratiques ? Veuillez préciser votre réponse en ce qui concerne :**

- a. **le dépistage et la saisie des produits du crime ?**
- b. **la confiscation des produits du crime ?**
- c. **la gestion des avoirs saisis et confisqués ?**
- d. **la restitution des avoirs aux victimes ?**
- e. **le partage des avoirs ?**

**(Veuillez préciser)**



Cet instrument est d'application absolument limitée donc un manque d'expériences significatives ne nous permet pas d'extraire des conclusions.

## 7. Introduction

Les Etats membres rencontrent souvent un problème dans la saisie et/ou le transfert de l'exécution de l'ordre de confiscation, ils ne sont pas toujours en mesure de s'assurer de l'exécution de la requête établie sur le système de confiscation fondé sur la « valeur ». Dans les deux conventions, ce système est décrit comme permettant une possible coopération à côté du système de confiscation fondé sur les « biens ». Dans les deux systèmes, une condamnation pénale est nécessaire. Dans le système de confiscation fondé sur la « valeur », les profits illicites sont estimés. A la fin, sur la base de ces estimations, le juge impose une obligation de payer une somme équivalente aux profits acquis par l'activité criminelle. L'ordre de confiscation peut ensuite être exécuté sur tous les avoirs appartenant à la personne condamnée. A cet égard, il n'est pas nécessaire de prouver que ces avoirs ont été directement obtenus par les actes délictueux.

**Question : Les compétences mentionnées à la question 2 et 3 peuvent-elle être exercées dans le cas d'une requête établie sur le système de confiscation fondé sur la « valeur » ? Veuillez préciser votre réponse en ce qui concerne :**

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?
- d. la restitution des avoirs aux victimes ?
- e. le partage des avoirs ?

**(Veuillez préciser)**

La loi portugaise admet le système de confiscation sur la valeur (Loi 5/2002) ; donc les mesures préventives ou préalables a), b) et c) sont possibles aussi comme la restitution des avoirs aux victimes ; la même logique s'applique pour le partage des avoirs. Pourtant il pourra y avoir des difficultés à niveau jurisprudence où une certaine résistance peut être identifiée.

- 8. Plusieurs Etats membres reconnaissent la possibilité d'une saisie et d'une confiscation des avoirs qui appartiennent de facto à la personne accusée/condamnée mais qui légalement appartiennent à une tierce personne, la plupart du temps à des « hommes de paille ».**

**Avez-vous la possibilité d'exécuter une telle requête ? Si non, pour quelles raisons ? Si oui, sous quelles conditions ? Veuillez préciser votre réponse en ce qui concerne :**

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?
- d. la restitution des avoirs aux victimes ?
- e. le partage des avoirs ?

**(Veuillez préciser)**

Il sera toujours possible d'exécuter une demande concernant une de ces mesures dès que le lien entre « l'homme de paille » et le crime de blanchiment soie bien décrit et la personne bien identifiée.

**9. Votre Etat est-il en position de coopérer avec d'autres Etats sur la base de la réciprocité et en l'absence d'un traité dans les domaines suivants :**

- a. **dépistage et saisie des produits du crime ?**
- b. **confiscation des produits du crime ?**
- c. **restitution des avoirs aux victimes ?**
- d. **partage des avoirs ?**

**(Veuillez préciser)**

Oui. La loi portugaise n'exclut pas la possibilité de coopération en absence d'instrument ou traité sauf si elle-même ne le permet pas. Ce n'est pas le cas pour ces questions, donc il nous parait possible. Pourtant on peut nombrer certains instruments qui pourront compenser le besoin d'une base conventionnelle tels que les Conventions ONU contre la Corruption ou la Criminalité Organisée.

**10. Votre Etat est-il en position d'apporter une entraide judiciaire aux fins ou dans le cadre de mesures de confiscation ou autres non fondées sur une condamnation (par exemple une confiscation civile) ? Si oui, veuillez préciser les conditions et instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.**

Non, le Portugal aura des problèmes en ce qui concerne l'exécution de décisions non basées sur des convictions parce que la loi prévoit seulement qu'une décision pareille soit utilisé comme fondement pour des résultats qui ne doivent être obtenus que via une décision de nature criminelle. Donc la perte ou confiscation suivra une décision de condamnation de nature criminelle; c'est à ce niveau que des problèmes de difficile solution sont identifiés.

**Pouvez-vous, en particulier, fournir l'information requise en ce qui concerne les étapes d'une procédure judiciaire non fondée sur une condamnation ? :**

- a. **l'étape de collecte de données, durant laquelle l'information pénale est souvent requise à des fins d'une procédure judiciaire non fondée sur une condamnation**
- b. **saisie des produits du crime ?**
- c. **confiscation des produits du crime ?**
- d. **gestions des avoirs saisis et confisqués ?**
- e. **restitution des avoirs aux victimes ?**
- f. **partage des avoirs ?**

**11. Votre Etat est-il en position d'apporter une assistance dans le cadre de procédures pénales, civiles ou administratives liées à la responsabilité des personnes morales aux fins de la saisie ou de la confiscation des produits du crime ? Si oui, veuillez préciser les conditions et instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.**

Le système portugais prévoit la responsabilité criminelle des personnes morales; donc la coopération s'avère possible dans les mêmes conditions que pour les personnes physiques.

**12. Votre Etat est-il en position d'apporter une assistance dans le cadre de procédures liées à des monnaies virtuelles comme le « bitcoin », notamment en matière de saisie et de confiscation ?**

On n'identifie pas des raisons pour créer un régime différent pour les bitcoins ; pourtant le raisons liées à la raideur des procédures criminelles se montrent ici encore plus fortes.

- 13. Votre Etat est-il en position d'apporter une assistance, indépendamment d'une décision de confiscation, aux fins de restituer à la victime des avoirs obtenus par des moyens illicites ? Si oui, veuillez préciser les conditions et les instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.**

La restitution des avoirs, obtenus par des moyens illicites, à la victime est pacifique dans la procédure pénale portugaise ; on n'identifie aucun obstacle ni on aura besoin d'un système différent de celui qui est en place pour les produits du crime.

- 14. Avez-vous des propositions à faire pour modifier et/ou faciliter l'application des instruments du Conseil de l'Europe dans le domaine de la coopération internationale en matière de dépistage, de saisie et de confiscation des produits du crime, y compris la gestion des biens saisis et confisqués et le partage des avoirs ? (Veuillez préciser votre proposition ainsi que le ou les instrument(s) concerné(s).)**

Il n'y a pas d'instrument qui identifie une base pour la coopération en ce qui concerne NCBC. Sans un instrument pareil le Portugal ne pourra pas coopérer quand la demande se fonde sur une NCBC.

**SUISSE (ORIGINAL FRENCH)**

1. **Estimez-vous que la Convention européenne d'entraide judiciaire en matière pénale (STE n°30) et ses protocoles additionnels sont des instruments adaptés à la coopération dans les domaines suivants :**

- a. **dépistage et saisie des produits du crime ?**
- b. **confiscation des produits du crime ?**
- c. **partage des avoirs ?**

La Convention STE n°30/le Protocole additionnel STE n°182 posent les bases de la coopération judiciaire en matière de dépistage (moyens de preuve). Ces instruments ne prévoient par contre aucune disposition en matière de saisie, confiscation ou encore de partage des avoirs. Par conséquent, ils ne nous semblent pas être des instruments suffisants en la matière.

2. **En appliquant la Convention relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime (STE n°141) comme base de la coopération, quelles sont les modalités d'application au sein de votre système national ? Avez-vous rencontré des difficultés juridiques ou pratiques ? Veuillez préciser votre réponse en ce qui concerne :**

- a. **le dépistage et la saisie des produits du crime ?**
- b. **la confiscation des produits du crime ?**
- c. **la gestion des avoirs saisis et confisqués ?**
- d. **restitution des avoirs aux victimes ?**
- e. **le partage des avoirs ?**

La Loi fédérale sur l'entraide internationale en matière pénale (EIMP) constitue la base légale suisse en matière de coopération internationale. Par ailleurs, lorsque le droit conventionnel ne prévoit pas expressément un certain mode de collaboration, cela n'empêche pas la Suisse de l'accorder en vertu des dispositions de son droit interne (EIMP). La jurisprudence constante permet en effet l'application du droit interne lorsque celui-ci apparaît plus favorable (principe de faveur) à la coopération que le droit conventionnel.

Elle prévoit les mesures figurant sous lettre a – d. Quant au partage des avoirs, il est régi par la Loi fédérale sur le partage des valeurs patrimoniales confisquées (LVPC).

Il convient de relever que le droit suisse va plus loin que la Convention STE n°141 dans le sens où il prévoit également, contrairement à ladite Convention, la restitution des fonds (art. 74a EIMP) et le partage des avoirs (LVPC).

La difficulté principale réside dans l'obtention des autorités étrangères d'un état de faits suffisant pour faire le lien entre les faits sous enquête à l'étranger avec les fonds situés en Suisse (produits du crime), et, par la suite, d'obtenir une décision de confiscation étrangère établissant l'origine illicite des fonds et leur attribution.

3. **En appliquant la Convention relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime et au financement du terrorisme (STCE n°198) comme base de la coopération, quelles sont les modalités d'application au sein de votre**

**système national ? Avez-vous rencontré des difficultés juridiques ou pratiques ? Veuillez préciser votre réponse en ce qui concerne :**

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?
- d. la restitution des avoirs aux victimes ?
- e. le partage des avoirs ?

La Suisse n'est pas partie à la Convention.

#### **4. Introduction**

**Les Etats membres rencontrent souvent un problème dans la saisie et/ou le transfert de l'exécution de l'ordre de confiscation, ils ne sont pas toujours en mesure de s'assurer de l'exécution de la requête établie sur le système de confiscation fondé sur la « valeur ». Dans les deux conventions, ce système est décrit comme permettant une possible coopération à côté du système de confiscation fondé sur les « biens » . Dans les deux systèmes, une condamnation pénale est nécessaire. Dans le système de confiscation fondé sur la « valeur », les profits illicites sont estimés. A la fin, sur la base de ces estimations, le juge impose une obligation de payer une somme équivalente aux profits acquis par l'activité criminelle. L'ordre de confiscation peut ensuite être exécuté sur tous les avoirs appartenant à la personne condamnée. A cet égard, il n'est pas nécessaire de prouver que ces avoirs ont été directement obtenus par les actes délictueux.**

**Question : Les compétences mentionnées à la question 2 et 3 peuvent-elle être exercées dans le cas d'une requête établie sur le système de confiscation fondé sur la « valeur » ? Veuillez préciser votre réponse en ce qui concerne :**

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?
- d. la restitution des avoirs aux victimes ?
- e. le partage des avoirs ?

En droit suisse, le lien entre les faits sous enquête et les fonds en Suisse, inhérent à la notion de produit, doit exister. Une confiscation fondée sur la valeur ne tient pas compte de ce lien, le système fondé sur la valeur renvoie à la notion de créance. En droit suisse, si le « produit » n'existe plus, le paiement d'une créance compensatrice peut être ordonné. L'entraide s'agissant d'une telle créance peut être accordée.

#### **5. Plusieurs Etats membres reconnaissent la possibilité d'une saisie et d'une confiscation des avoirs qui appartiennent de facto à la personne accusée/condamnée mais qui légalement appartiennent à une tierce personne, la plupart du temps à des « hommes de paille ».**

**Avez-vous la possibilité d'exécuter une telle requête ? Si non, pour quelles raisons ? Si oui, sous quelles conditions ? Veuillez préciser votre réponse en ce qui concerne :**

- a. le dépistage et la saisie des produits du crime ?
- b. la confiscation des produits du crime ?
- c. la gestion des avoirs saisis et confisqués ?

- d. la restitution des avoirs aux victimes ?**
- e. le partage des avoirs ?**

Grâce aux obligations de diligence des banques, les ayants droits économiques de valeurs détenues par de tierces personnes (sociétés écran) sont identifiables. Dans la mesure où les exigences légales en matière d'entraide sont remplies, ces valeurs peuvent faire l'objet de mesures d'entraide telles que celles figurant ci-dessus.

- 6. Votre Etat est-il en position de coopérer avec d'autres Etats sur la base de la réciprocité et en l'absence d'un traité dans les domaines suivants :**

- a. dépistage et saisie des produits du crime ?**
- b. confiscation des produits du crime ?**
- c. restitution des avoirs aux victimes ?**
- d. partage des avoirs ?**

Oui, cf. chiffre 2. L'article 8 de la Loi fédérale sur l'entraide internationale en matière pénale (EIMP) pose la base de la réciprocité. Cette loi contient les dispositions idoines pour procéder à la saisie (art 18 EIMP) et à la remise de valeurs (art 74a EIMP). L'exécution de décisions étrangères (art 94 ss EIMP).

- 7. Votre Etat est-il en position d'apporter une entraide judiciaire aux fins ou dans le cadre de mesures de confiscation ou autres non fondées sur une condamnation (par exemple une confiscation civile) ? Si oui, veuillez préciser les conditions et instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.**

**Pouvez-vous, en particulier, fournir l'information requise en ce qui concerne les étapes d'une procédure judiciaire non fondée sur une condamnation ? :**

- a. l'étape de collecte de données, durant laquelle l'information pénale est souvent requise à des fins d'une procédure judiciaire non fondée sur une condamnation**
- b. saisie des produits du crime ?**
- c. confiscation des produits du crime ?**
- d. gestions des avoirs saisis et confisqués ?**
- e. restitution des avoirs aux victimes ?**
- f. partage des avoirs ?**

En droit suisse, même si en principe elle est corollaire à une condamnation pénale et est prononcée dans le cadre de la poursuite pénale conduite contre l'auteur de l'infraction, la décision de confiscation ou de restitution à l'ayant droit peut aussi être indépendante de toute condamnation pénale. Dans tous les cas, cette confiscation suppose réunis les éléments constitutifs objectifs et subjectifs d'une infraction et un lien entre celle-ci et les valeurs à confisquer. Pour une telle confiscation à l'étranger, la Suisse pourrait accorder l'entraide. Elle pourrait aussi accorder l'entraide pour une confiscation civile étrangère connexe (lien entre infraction et valeurs) à une procédure pénale.

- 8. Votre Etat est-il en position d'apporter une assistance dans le cadre de procédures pénales, civiles ou administratives liées à la responsabilité des personnes morales aux fins de la saisie ou de la confiscation des produits du crime ? Si oui, veuillez préciser les conditions et instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.**

Le droit suisse prévoit la punissabilité de l'entreprise, même, dans certains cas, indépendamment de la punissabilité d'une personne physique (art. 102 Code pénal suisse). Entre autres conditions, lorsqu'il y a double incrimination et qu'il existe un lien entre l'infraction et les fonds en Suisse, l'entraide peut être accordée par la Suisse.

**9. Votre Etat est-il en position d'apporter une assistance dans le cadre de procédures liées à des monnaies virtuelles comme le « bitcoin », notamment en matière de saisie et de confiscation ?**

La Suisse n'a pas d'expérience concernant l'entraide dans le cadre de procédures liées à des monnaies virtuelles.

**10. Votre Etat est-il en position d'apporter une assistance, indépendamment d'une décision de confiscation, aux fins de restituer à la victime des avoirs obtenus par des moyens illicites ? Si oui, veuillez préciser les conditions et les instrument(s) utilisés comme base juridique. Si non, veuillez indiquer les obstacles juridiques.**

Oui, la Suisse peut accorder l'entraide aux fins de restitution ou en vue de confiscation indépendamment d'une décision de confiscation, si la provenance illicite des valeurs sises en Suisse est hautement vraisemblable.

**11. Avez-vous des propositions à faire pour modifier et/ou faciliter l'application des instruments du Conseil de l'Europe dans le domaine de la coopération internationale en matière de dépistage, de saisie et de confiscation des produits du crime, y compris la gestion des biens saisis et confisqués et le partage des avoirs ? (Veuillez préciser votre proposition ainsi que le ou les instrument(s) concerné(s).)**

Faire figurer le principe de la réciprocité en matière de restitution. Idéalement établir dans un instrument contraignant des standards de coopération obligatoires en matière de saisie et remise de valeurs (modèle de demande d'entraide commun aux Etats parties, de droit civil et de droit anglo-saxon, en limitant le plus possible les possibilités de refus de coopération).