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and Norwegian Public Institutions, Local and Regional Authorities**

Project to strengthen anti-corruption and anti-money laundering systems in the Czech Republic

**Comparative Analysis of
Czech Asset Recovery legislative framework with international standards and
legislation of select countries**

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Abbreviations

ACAMOL CZ	Project to strengthen anti-corruption and anti-money laundering systems in the Czech Republic
AML/CFT	Anti-money Laundering/Counter Financing of Terrorism
CC	Criminal Code
CoE	Council of Europe
CPC	Criminal Procedure Code
FATF	Financial Action Task Force
GBP	Pound Sterling
IJCCM	International Judicial Cooperation in Criminal Matters
IMF	International Monetary Fund
NCB	Non-Conviction Based (Confiscation)
OECD	Organisation for Economic Co-operation and Development
POCA	Proceeds of Crime Act (UK, 2009)
RHG	Rechtshilfegesetz (Legal Assistance Act)
UK	United Kingdom
UNCAC	United Nations Convention Against Corruption
UNTOC	United Nations Convention Against Transnational Organized Crime
VAT	Value Added Tax

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1 INTRODUCTION

This report analyzes the Czech asset recovery legislation in light of applicable international standards as well as relevant legislation in force in Austria, Germany and the United Kingdom. The study was commissioned by the Council of Europe (CoE) and the Financial Analytical Unit of the Ministry of Finance of the Czech Republic under the Project to Strengthen the Anti-Corruption and Anti-Money Laundering Systems in the Czech Republic (ACAMOL CZ).

The Czech legal framework for asset recovery comprises of provisions in the Criminal Code (CC); the Criminal Procedure Code (CPC); Act No. 418/2011 on Criminal Liability of Legal Person and Proceedings against them; Act No. 279/2003 on Execution of Securing the Property and Things in Criminal Proceedings; Act No. 104/2013 on International Judicial Cooperation in Criminal Matters (IJCCM); and Act No. 253/2008 on Selected Measures against Legalization of Proceeds of Crime and Financing of Terrorism (AML/CFT Law).

Relevant international standards on asset recovery are set out in the United Nations Convention Against Corruption (UNCAC), the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention); the United Nations Convention Against Transnational Organized Crime (UNTOC), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime (Warsaw Convention), and the European Directive 2014/42/EU of the European Parliament on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union (the Directive).

Asset recovery efforts in most cases follow the same scheme: as a first step, intelligence and evidence is collected to determine whether a specific crime generated illicit proceeds, where those proceeds are located and the value thereof. This phase typically involves the gathering of evidence and tracing of assets by law enforcement officers in close cooperation with or under the supervision of prosecutorial authorities. Law enforcement powers and investigative techniques such as electronic surveillance, searches and seizures, production orders, account monitoring orders etc. are deployed, some of which may require judicial authorization. Access to information held by financial institutions and designated non-financial businesses and professions such as lawyers and accountants is crucial. The term “financial investigation” is used in this report to refer to all types of investigative measures taken by a country during this initial stage of asset recovery. Financial investigations may but do not have to form part of a traditional criminal investigation that is aimed at establishing evidence of a criminal act. Often it is only after a criminal case has been proven that a financial investigation is carried out specifically to determine the location, amounts and types of benefits the perpetrator obtained as a result of his criminal conduct.

Next, efforts will be made to secure the assets identified for a final confiscation later on. To that effect, legal powers to restrain or seize assets need to be in place and systems to manage seized assets also need to be available to ensure that the value of the secured assets is maintained.

As a third step, a confiscation order is obtained, either based on a conviction for a criminal offense or, where legal permissible, through a non-conviction based confiscation order. Confiscation orders may be either issued against specific property or allow for the confiscation of a determined value.

All of the described steps may involve also foreign jurisdictions – evidence allowing for the tracing of assets or even the assets themselves may be located abroad. As a result, seizing and confiscation orders need to be implemented in the foreign jurisdiction and the confiscated assets be returned. International cooperation in criminal matters is thus an important aspect of any asset recovery framework.

This report analyzes the extent to which the Czech legislative framework facilitates all steps of asset recovery as outlined above and determines the appropriateness of the legal framework both in light of the task to be accomplished and the requirements under relevant international standards. Comparison with the legal provisions in place in Austria, Germany and the UK are added to illustrate alternative approaches.

2 EXECUTIVE SUMMARY

The Czech asset recovery legal framework is generally comprehensive and implements most requirements under relevant international standards. The relevant legal acts have been significantly revised over the years to address shortcomings identified by international experts and through mutual evaluation procedures, such as for example by the Council of Europe's Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL). Another set of amendments is currently in the draft stages and is expected to be entering into force in early 2016.

The main legal provisions relevant to asset recovery are set out in the Criminal Code, the Criminal Procedure Code, the International Judicial Cooperation in Criminal Matters Act, the Act on Execution of Securing the Property and Things in Criminal Proceedings; and the Act on Criminal Liability of Legal Persons and Proceedings against Them. In sum, the relevant provisions address all stages of asset recovery – including identifying, tracing and locating proceeds, provisional and confiscation measures, asset management arrangements as well as international cooperation.

The various types of law enforcement powers available under Czech criminal procedures are comprehensive and generally seem adequate to successfully identify and trace property in the context of a classic criminal investigation. Questions remain however on the availability of these powers in cases where the criminal conduct has already been established and the financial investigations is carried out to identify and trace proceeds of crime; or where the goal of the financial investigation is to establish facts that have no direct connection with the material and mental elements that must be proven to establish the underlying criminal conduct. Possible scope limitations also remain in cases where a foreign request for assistance in asset recovery efforts is made in the context of a stand-alone financial investigation, as is permitted for example under Dutch law. **It is recommended that the authorities review the CPC and amend the relevant legal provisions to clearly grant law enforcement authorities all the necessary powers to identify, trace and locate proceeds of crime and other assets subject to confiscation, whether in the context of a classic crimes investigation or as part of a parallel or subsequent financial investigation.**

The provisional measures available cover all types of property as required under international standards but suffer from some shortcomings. Seizing powers as drafted under the CPC do not sufficiently address the risk of dissipation of tangible assets or allow for an application ex parte, and all seizing provisions do not clearly extend in scope to the seizure of indirect proceeds, or proceeds that were converted or transformed into other property, commingled with legitimate property or that constitute income from proceeds of crime.

The Czech approach to asset management reflects a general interest to manage the seized property to the extent possible and provide it for the sale thereof in the above described circumstances. The costs associated with asset management efforts are however born out of state budget and thus by taxpayer's money, rather than from the seized property itself. Even if the law did provide for asset management costs to be covered through the seized property, the powers granted to the asset manager are limited and as a result may inhibit the manager in his ability to manage property in a way that the value thereof is increased or revenue is created.

The Czech confiscation provisions are largely in line with international standards. The confiscation of proceeds and instrumentalities of crime is possible in the context of any conviction for a criminal offense, including the offenses covered under the scope of the UNTOC, Warsaw Convention, UNCAC, Vienna Convention or the Directive, and apply to assets of any kind, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such assets. The law does not however clearly extend the main confiscation provisions also to indirect and intermingled proceeds, as well as to income generated from direct, indirect or commingled proceeds.

The extension of the Czech confiscation system to proceeds held by third parties is a positive development and the legal provisions are adequate to ensure that confiscation measures can be applied against property held by third parties in the context of a conviction for the widest possible range of criminal offenses. Czech law also permits for asset recovery efforts to extend to property held by or in the name of legal entities as required under international law.

Czech law also meets the minimum standards under international law with regards to non-conviction based confiscation (NCB) but the relevant provisions are restrictive in the sense that NCB based confiscation is still the exception to the rule.

The Czech Republic may grant assistance in and has mechanisms in place to implement foreign criminal confiscation orders, whether conviction or non-conviction based.

3 RECOMMENDATIONS

Recommendation 1: The authorities, as a matter of urgency, should grant law enforcement authorities all the necessary powers to identify, trace and locate proceeds of crime and other assets subject to confiscation, including in the context of a stand-alone financial investigation.

Recommendation 2: The Czech seizing provisions under the CPC relating to tangible property should be amended to clearly allow for an application *ex parte* and without prior notice to the concerned party; and to expressly permit the seizure of indirect proceeds, or proceeds that were converted or transformed into other property, commingled with legitimate property or that constitute income from proceeds of crime.

Recommendation 3: The funding arrangement for asset management efforts should be revisited and consider be given to cover such costs from revenues from seized assets rather than the state budget. To facilitate this change in approach, the powers granted to the asset manager need to be expanded to allow for a business minded and thus revenue generating asset management approach.

Recommendation 4: The Czech confiscation provisions should be amended to clearly extend also to intermingled and indirect proceeds and to cover also income or other benefits derived from direct, converted or intermingled proceeds.

Recommendation 5: While NCB systems are not yet a requirement under international standards, they are very useful tools to effectively recover proceeds of crime and it may be advisable for the authorities to consider whether a more refined and permissive NCB based confiscation system could be useful to further supplement and enhance the effectiveness of the Czech asset recovery efforts.

4 TRACING AND RECOVERING ASSETS

Law enforcement powers available in the Czech Republic are set out in the CPC. The main investigative powers are search of premises and related seizing warrants (Sections 83 and 83a); interception and opening of consignments, replacing them and keeping them under surveillance (Section 86 to 87b); intercepting and recording telecommunication operations (Sections 88 and 88a). In addition, information obtained through certain intelligence operations, such as controlled delivery (Section 158c); surveillance of persons and things, including by electronic means (Section 158d); and undercover operations (Section 158e) may be utilized as evidence in criminal cases if they were authorized by the prosecution and do not conflict with confidentiality and privacy rights of the affected person. In addition, Section 8 provides for powers to obtain information on bank accounts, commercial records, information about securities and tax information. Section 39 (1)(a) of the AML Act further provides that law enforcement may request information from the FIU, including any confidential information that the FIU may have.

4.1 Investigative powers and access to financial information

The UNTOC (Article 12 (2), UNCAC (Article 31 (2)), Vienna Convention (Article 5 (2) and Warsaw Convention (Article 4) require State Parties to adopt such measures that might be necessary to enable the identification, tracing and freezing or seizure of any item that might be proceeds (or equivalent value) or instrumentalities of crime, for the purpose of eventual confiscation. In essence they require that law enforcement powers are available not only to determine specific criminal elements and the relevant offender, but also to identify and trace the proceeds of any crime (or property of equivalent value) to allow for the subsequent enforcement of a confiscation order. As part of these powers, Articles 31 (7) of the UNCAC, Article 12 (6) of the UNTOC and Article 7 Warsaw Convention specifically require that State Parties shall empower their courts or other competent authorities to order that bank, financial and commercial records are or would be made available whereby banking secrecy may not be invoked.

Recommendation 30 of the Financial Action Task Force (FATF) international standards on Anti-Money Laundering and Combating Terrorism Financing (AML/CFT), as updated in 2012, and the Directive stipulate the relevant requirements in even greater detail. Recommendation 30 of the FATF standard provides that countries shall have all the necessary powers to effectively carry out financial investigations, a term which is defined as “enquiries into the financial affairs related to a criminal activity”. Recommendation 30 further provides that financial investigations may be carried out either “alongside or in the context of a traditional criminal investigation”. The Operational Issues – Financial Investigations Guidance that was issued by the FATF to assist countries in implementing the requirements under Recommendation 30 further states that financial investigations are “one of the core elements of the FATFs operational and law enforcement Recommendations” and that law enforcement investigations should be either authorized to pursue a financial investigation in parallel to any investigation into proceeds generating criminal acts, or be able to refer the case to another designated agency to follow up with such an investigation.¹ While the guidance document highlights the interlinkage between classic criminal and financial investigations and for financial investigators to work in close association with or integrated within classic investigations into criminal conduct, the paper emphasizes

¹FATF Report Operational Issues – Financial Investigations Guidance, June 2012, available at <http://www.fatf-gafi.org>

the needs to consider these two types of investigations as conceptually different, with each having a different focus and one not necessarily being dependent on the other. For example, a suspicious transaction report provided to the FIU may warrant a financial investigation but may not provide sufficient information to warrant an investigation into specific criminal conduct. Another example where the scope of the two cases would deviate is where a criminal offense was successfully established based on relevant evidence but the financial investigation is still ongoing because there are grounds to believe that additional assets are located somewhere and should be subject to confiscation.

The Directive in Article 9 also reflects the fact that financial investigations may be carried out autonomously from the investigation for the underlying criminal conduct and requires that Member States take the necessary measures to enable the detection and tracing of property subject to confiscation even after a final confiscation order has been issued, thus also in cases where the investigation for the criminal conduct may already have been completed. This approach is also reflected in laws of some other countries, for example the Netherlands provides that a financial investigation associated with a specific crime may go on up to two years until after a criminal conviction has been issued.

While international conventions generally give countries discretion to determine exactly what law enforcement powers are considered “necessary” in a specific country context to ensure that assets subject to confiscation can be effectively traced, identified and secured, the relevant powers required to do so must clearly be available not only in situations where a financial investigation is carried out as part of and at the same time as a classic investigation into criminal conduct, but also where a financial investigation is either carried out after a criminal investigation or where the financial investigation is targeting information and evidence that is not qualified or appropriate as evidence for the criminal case, in other words where application of a particular law enforcement power is not aimed at establishing facts relevant to the criminal conduct in a specific case but, for example, aimed simply at identifying or locating proceeds of crime.

In the Czech Republic law enforcement powers under the CPC are still closely tied to the criminal conduct itself and based on the letter of the law do not seem to be available to facilitate asset recovery efforts in the context of a financial investigation that goes beyond the scope of the criminal investigation or is carried out in parallel or subsequent to the criminal investigation. Law enforcement powers are drafted in a way that they reason based on which they are applied are, eventually, aimed at identifying evidence relevant to the criminal proceeding rather than the assets or the flow of proceeds of crime.

For example, Section 82 (1) CPC permits issuance of a search warrant if there is a reasonable suspicion that a person or thing important for criminal proceedings is present in the premise. The term “thing” is defined in the Civil Code to include also documents, data and all other records that may constitute criminal evidence. Such a warrant could thus also be issued for example in cases where there is reasonable suspicion that property tracking documents (but not the traced property itself) is located at a specific location. An order to open consignments, shipments and telegrams under Section 86 and 87b may be issued only if this is “necessary [...] for the clarification of facts relevant to criminal proceedings in a specific case” and replacement of the consignment or its monitored delivery may be ordered only if items in the consignment are illegal or subject to special permission, or are instrumentalities or proceeds of crime. There is no reference to these powers being available also to trace proceeds of crime, for example, in cases where the consignment or shipment or telegram is suspected to include evidence that may assist

in tracing the proceeds of a specific crime. Similarly, the interception and recording of telecommunications is available only in cases where it can be reasonably assumed that such a measure will identify “facts relevant to the criminal proceedings”. In cases where, for example, the crime itself has already been established and the measure is required to assist in identifying, tracing and locating assets that are the proceeds of this crime, it is not clear that an order for the interception and recording of telecommunications could be issued. Investigative techniques such as the controlled delivery of items; undercover operations and surveillance of persons are available only for the purpose of “obtain[ing] the fact relevant to criminal proceedings.” Again the language excludes instances in which the measures would be required to identify and trace proceeds of crime as opposed to establishing specific criminal conduct.

Section 8 (2) of the CPC provides for access to information held by financial institutions, either in form of a production order or temporary account monitoring order, if “the criminal proceedings require a proper investigation of the circumstances suggesting that a criminal offence has been committed or to assess the circumstances of the accused during court proceedings or for the enforcement of a decision”. Section 8 (1) of the CPC provides for the issuance of production orders in general, including in relation to commercial records as required under international standards. The language of this provision does not allow for a conclusion that the relevant powers would be available in the context of a parallel or subsequent financial investigation that is aimed at recovering assets.

While the authorities stated that in practice the question whether proceeds were generated from crime, their location and value are in all cases considered to be facts important for criminal proceedings and, accordingly, that all the mentioned powers would be available to look into these elements, it still seems that as a general underlying requirement there needs to be an investigation for criminal conduct. Once sufficient evidence of the crime itself has been established it is not clearly permitted that law enforcement powers would be available to conduct a financial investigation simply and exclusively for the purpose of identifying and locating proceeds and instrumentalities of crime, and to ensure that seizing and confiscation orders can be issued and enforced. Similar scope restrictions seem to apply where the criminal investigation is carried out in parallel to the financial investigation, but the latter is focused on elements that are not relevant for establishing the mental and material elements of the underlying crime.

In comparison to the Czech legal provisions, the UK’s Proceeds of Crime Act 2009 in Chapter III sets out wide provisions expressly allowing for the issuance of production orders; search and seizure warrants; disclosure orders; customer information orders; and account monitoring orders in the context of stand-alone “confiscation investigations”, a term defined in Section 341 of the POCA (Proceeds of Crime Act) as “an investigations into whether a person has benefited from his criminal conduct or the extent or whereabouts of the benefit from his criminal conduct”. Austria and Germany have less comprehensive legal provisions than the UK but still make a number of powers available specifically to facilitate investigations into the flow and location of proceeds of crime. For example, Article 132 of the Austrian CPC permits undercover operations to secure assets or property that is suspected to be proceeds of crime or subject to confiscation. Article 116 of the Austrian CPC furthermore provides that law enforcement authorities may compel banks to provide information on bank accounts or banking transactions if this may assist in determining items or property subject to confiscation. In Germany the relevant legal provisions are less explicit but from the Financial Action Task Force Mutual Evaluation Report of Germany at para 278 it seems that all types of investigative powers set out in the German CPC are

available also in the context of financial investigations.² These powers include searches, telephone interceptions, and undercover operations.

4.2 International Aspects

During the early stages of asset recovery international aspects may come into play in one of two ways: a foreign jurisdiction may seek assistance from the Czech Republic in obtaining evidence related to the identification and location of assets; or the Czech Republic in the context of a domestic case may seek assistance from another country in collecting evidence relating to the flow of proceeds of crime. All types of international cooperation (incoming and outgoing) are regulated under the Act on International Judicial Cooperation in Criminal Matters (IJCCM).

The UNTOC (Article 18 (3g), UNCAC (Articles 46 (3g and j) and 55 (2)), Vienna Convention (Article 7 (2g) and Warsaw Convention in Section 2 require State Parties to grant each other investigative assistance aimed at the identification and tracing of proceeds of crime or property liable to confiscation. UNCAC in Article 55 (2) requires Member States to “take measures to identify, trace and freeze or seize proceeds of crime [...] for the purpose of eventual confiscation to be ordered either by the requesting or requested State Party.”

Pursuant to Section 47 of the IJCCM the Czech Republic may grant assistance to foreign countries in the collection of criminal evidence. Czech law enforcement authorities may carry out searches, interception, opening and monitoring of consignments and replacing their content, and interception and recording of telecommunications upon foreign request provided dual criminality is met. Pursuant to Section 54 IJCCM all types of measures that would be available under the CPC in the context of a domestic criminal case may be taken upon foreign request. The limitations outlined above with regards to the Czech law enforcement powers therefore apply equally in the case of a foreign request. Where a foreign request relates to assistance in locating and tracing assets pursuant to a stand-alone financial investigation as opposed to identifying evidence for specific criminal wrongdoing, it is not clear that the powers under CPC would be available.

The UK’s Crime (International Cooperation) Act 2003 in Chapters 2 and 4 regulates the mutual provision of evidence (incoming and outgoing), including assistance in tracing assets through seizing of evidence, customer information or account information orders, or information regarding banking transactions. Austria and Germany’s International Cooperation Laws permit any types of measures to be either requested from or provide to another country that could be taken in the context of a domestic proceeding. Accordingly, the various powers described above could also be utilized to facilitate a request for cooperation in asset recovery received from abroad.

² 2010 FATF/OECD and IMF Mutual Evaluation Report of Germany available at: <http://www.fatf-gafi.org/>.

5 SECURING THE ASSETS

Once assets have been located and it has been established that they may become subject to confiscation, either because they are proceeds or instrumentalities of crime or assets equivalent in value to proceeds, they need to be secured to avoid dissipation. Legal powers to restrain or seize assets therefore need to be in place. In addition, countries also need to manage the seized assets in a way that the value of the assets is maintained until either a confiscation order is issued or the seized assets can be returned to their rightful owner.

5.1 Seizing of Assets

The UNTOC (Article 12 (2), UNCAC (Article 31 (2)), Vienna Convention (Article 5 (2), Warsaw Convention (Article 4) and Directive (Article 7) require State Parties to adopt such measures as may be necessary to enable the freezing or seizure of any item that may be proceeds or instrumentalities of crime, for the purpose of eventual confiscation; and that seizing provisions can also be applied against proceeds of crime converted or transformed into other property or that were intermingled with legitimate property, and income or other benefits derived from proceeds of crime, including converted or transformed property or intermingled property. The term “proceeds of crime” is defined in the various Conventions to cover “any property derived from or obtained, directly or indirectly, through the commission of a criminal offense” and “property” means “assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.”

The Czech CPC provides for “impoundage of” and an “obligation to release” various types of assets and property in Sections 78 (obligation to release property); 79 (seizure of property), 79a (impoundage of funds in a bank account), 79c (impoundage of booked securities); 79d (impoundage of real estate); 79e (impoundage of intangible property) and 79f (impoundage of replacement value). The cited provisions allow for the transfer into possession of the state of assets and property if there is the suspicion, that these assets or property represent proceeds or instrumentalities of crime and, where this is not possible, of property equivalent in value. The seizing measures under the CPC apply to both “tangible property” and “intangible property”, terms that are defined under Article 496 Civil Code to cover assets of every kind, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such assets. However a range of scope limitations and legal issues exist as follows:

First, Sections 78 and 79 CPC do not grant criminal authorities the power to seize but are drafted in a way that they impose an obligation on the person holding tangible property to submit relevant property to the court when prompted to do so. A failure to do so may result in the property being removed from them through a court order. International best practice is for seizing orders to be issued and implemented *ex parte* and without prior notice to the party concerned. The rationale behind this practice is that criminals will want to avoid their assets and property from getting seized and possibly confiscated later on. To the extent possible such measures should thus be taken without giving the affected persons prior notice so as to not give an opportunity for the assets or property to disappear. The provisions in the Czech Republic do not make amend for this concept. By initially putting the legal obligation on the person holding tangible property to submit the same to competent authorities, the door is wide open for suspects to ensure that assets are no longer available to satisfy a seizing order issued later on. The authorities stated that in

practice seizing orders would be implemented in a way that the outlined time gap does not give the affected person time to arrange the dissipation of the property subject to seizure. Conceptually, however, it would still be important to ensure that seizing orders are to be issued ex parte in all cases, in line with international requirements. Sections 79a -79f do not suffer from these same shortcomings as they are drafted to grant criminal authorities the power to impose relevant funds or property if the facts of a case indicate that the relevant funds or property are instrumentalities or proceeds of crime. The rightful owner of the relevant funds or property is to be informed of the measure only after the seizure.

Secondly, Sections 78 and 79 CPC both are applicable with respect to “tangible property important to the criminal proceedings” but the term is not defined anywhere in the law. The 2011 Fourth MONEYVAL Assessment Report of the Czech Republic at para 190 suggests that in practice the term is interpreted widely to cover “intended and actual instrumentalities as well as proceeds of a crime and other items that constitute evidence and the authorities confirmed that legal theory and case law have clarified the meaning of the term to be in line with international standards.³ In the absence of a clear legal definition, however, it seems that this view may be open to a legal challenge, particularly in light of the fact that Sections 79a – 79f are clearly defined in scope to apply in relation to funds or property that is instrumentalities or proceeds of crime.

Lastly, while Sections 78 to 79f CPC expressly extend in scope to tangible property, funds and financial resources held in bank accounts, securities, real estate, any form of intangible property, or the replacement value of any such assets or property in case the original assets or property cannot be seized or impounded, the provisions do not clearly extend to indirect proceeds or proceeds that were converted or transformed into other property or intermingled with legitimate property, or to income or other benefits derived from proceeds of crime or converted or transformed proceeds or intermingled property. While the authorities consider that the term “proceeds” is understood both in legal theory and in relevant cases to cover also indirect, commingled and converted proceeds, it would be advisable for the law to clearly cover all these points.

The UK’s system for seizing orders is slightly different from the Czech Republic’s as the UK does not enforce seizures against specific property that is suspected to be the proceeds or instrumentalities of crime, but computes the benefit the accused is assumed to have received as a result of his criminal conduct and then secures any property available up to the computed value. The POCA provides for two types of provisional measures: First, restraint orders which may be issued for all or certain recoverable property held by a specific person at the time the order is made or anytime thereafter, and which has the effect of prohibiting that person from dealing with the relevant property; and secondly an order of arrestment of movable recoverable property that is also subject to a restraint order, and which appoints an administrator to take possession of and manage the relevant property. “Property” is defined to include all property, wherever situated, including money, all forms of real or personal property, and things in action and other intangible or incorporeal property, and any legal or equitable interest or right or power in property. Property is considered “recoverable” up to the amount equal to the accused’s benefit from the criminal conduct in question and pursuant to Sections 304 to 307 includes anything from property obtained directly or indirectly through unlawful conduct, converted proceeds, proceeds mixed with legitimate property and profits accruing in respect of any such property or any legitimate property

³ https://www.coe.int/t/dghl/monitoring/moneyval/Countries/Czech_en.asp.

equivalent in value to such proceeds or profits. Procedurally, the court determines the benefit the accused has obtained through the crime and then may issue a seizing order against any recoverable property to ensure that the value of the benefit can be recovered later on. In addition, instrumentalities of crime are seized under regular criminal procedures.

Austria and Germany have a similar approach to seizure and confiscation as the Czech Republic and provide in the first instance for the seizure of the actual proceeds or instrumentalities of crime and, where those are not available, of any other property that can be utilized to later on satisfy a confiscation order. Articles 110 and 115 of Austria's CPC provide for the seizure of any moveable or immovable property that is suspected to either be direct or indirect or converted proceeds of crime, including income or other benefits derived from such proceeds, or of property or assets that are equivalent in value to such proceeds; and against instrumentalities used or intended to be used in the commission of a crime. Section 111b of Germany's CPC permits for the seizing of movable and immovable property that is suspected to have been received from or in connection with an unlawful act. Section 73 clarifies that anything derived from the benefit obtained, or acquired by way of sale of the benefit or as a replacement for its destruction, damage or forcible loss, or in case confiscation of such proceeds is not possible, a sum of money which corresponds to the value of what was obtained shall be seized. The term "property" is defined broadly in both countries to include all types of tangible and intangible, corporeal and incorporeal, moveable and immovable property, including legal documents or instrument evidencing title to or interest in such assets. Article 110 (4) of the Austrian CPC and Article 33 of the German CPC both provide that seizing measures may be applied *ex parte* in cases where prior notice would create a risk of dissipation of the assets or property.

5.2 Managing seized assets

Once assets and property have been secured, it needs to be managed in a way that its value can be maintained or even increased. Seizing measures are inherently temporary in nature – they stay in place only until a conviction is issued and the property confiscated and forfeited to the State; or until a person is acquitted and the property can be returned to the rightful owner. In either case any diminishment in the property's value after the time of its seizure that result from inappropriate management expose the state to claims for compensation and may result in confiscation orders not being able to be satisfied up to their full value.

Of the various Conventions only the UNCAC and Warsaw Conventions address this issue and in a rather generic manner by prescribing that each state party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the proper management of frozen or seized property (Article 31 (3) UNCAC and Article 6 Warsaw Convention). The Directive in Article 10 also requires Member State to take the necessary measures, for example by establishing centralized offices, a set of specialized offices or equivalent mechanisms, to ensure the adequate management of property frozen with a view to possible subsequent confiscation. The Directive specifically provides that Member States shall have the possibility to sell or transfer property where necessary, or to allow for confiscated property to be used for public interest or social purposes.

Generally speaking there is a great level of variety amongst countries in the way they deal with seized assets. Some countries aim to manage seized assets to the extent possible, and sell them only if the benefits of managing them are by far outweighed by the associated costs or difficulties. Other countries sell seized items as a matter of routine and opt for their management only in exceptional cases. The Czech approach to asset management seems to lie somewhere in between these two possible extremes.

In the Czech Republic, Act No. 279/2003 on Execution of Securing the Property and Things in Criminal Proceedings was amended in June 2015 and in Sections 8a to 12 deals with the administration of seized property. Asset management procedures in the Czech Republic provide for a mix of freezing (property remains in possession of the rightful owner) and seizing measures (property is transferred into management of the state), dependent on the property concerned. Real estate property for example is secured by way of registering the measure with the real estate register. While the rightful owner is still entitled to use the property, he/she may not sell or encumber it as a result of the impoundage order. In contrast, movable things and business shares associated with management rights, for example, are seized upon issuance of an impoundage order. Pursuant to the Act, an administrator appointed by the court of first instance or by the prosecution or police as part of the criminal proceeding is mandated under the law to undertake any act necessary to prevent unreasonable decline in value of seized property or its reduction, or to ensure its expected increase. In relation to movable property, the administrator is under an obligation to duly protect the property, care for its preservation and protect it against any damage, destruction, loss, theft or misuse. For immovable things, the administrator is required to ensure that debtors fulfill their obligations in relation to the seized property, that rights are exercised and enforced in a timely manner, and that the expiration of associated rights is prevented and rights for the compensation of damages and for surrendering objects of unjust enrichment are evoked in a timely manner. In all instances the asset manager is also subject to comprehensive record keeping obligations.

Act 279/2003 grants the administrator the power to “perform all necessary acts” in relation to the property, Section 10 (5) limits the powers of the administrators and prohibits him from entering into any contract that would lease the property, transfer ownership title to the property, create a lien or encumber the property. The leeway granted to the administrator in making business and profit oriented decisions are limited and reflect a very low tolerance to financial risks. As a result, the Czech Republic’s approach to asset management is aimed mostly at maintaining the value of seized property but may not be appropriate to allow for revenue to be generated from seized assets, which in turn could then be available to cover the associated costs. Pursuant to international best practices, asset managers must be given the necessary legal powers to manage seized assets prudently, including the power to pay all necessary costs, expenses and disbursements connected with the seized assets or their management; to buy and sell seized or restrained assets in form of shares, securities or other investments; to operate a business, including to employ or terminate employment of people, hire a business manager, and many any decision necessary to prudently manage that business etc.⁴

The sale of seized property is possible only based on express agreement by the accused. When the value of the property is quickly decreasing despite its due administration, for example in the case of motor vehicles and electronic devices, or the administration of property is associated with disproportionate costs or difficulties, the administrator may propose to the court a sale of the property even without consent of

⁴ See *Asset Recovery Handbook – A Guide for Practitioners 2011*, page 93, published by the Stolen Asset Recovery Initiative.

the accused. New Sections 9/2, 10a and 10b now also specifically provide for the appointment of an insolvency administrator in relation to business entities or shares are seized.

Previously, Section 11 of Act No. 279/2003 stipulated that the costs necessary for managing seized property are to be covered by the accused out of revenues and additions from the seized property. As part of the last legal amendment, however, this provision was removed and law enforcement budget are not utilized to cover asset management costs.

In the UK qualified “management receivers” manage seized property in a business and profit oriented manner and may carry on trade or business and incur capital expenditures in respect of the seized property. If for example a business is seized the managing receiver may make provision for a person qualified in managing companies to continue operating the business until a final decision has been made in the case. In contrast to the Czech framework, the UK framework grants wide ranging powers to the manager to take any steps necessary to maintain the business, including to enter into contracts as needed and encumber or otherwise legally oblige the entity. Overall there seems to be a clear preference for the management of seized assets over their sale. Where there is no risk of dissipation, the court will attempt to avoid a seizure of assets and limit the order to result in a restraining of the relevant property, so as to allow the defendant to continue managing and using it. In cases where a seizure takes place, the outlined approach generally favors the management of those assets over their sale. The fee of the management receiver is typically paid from the assets that are being managed.

Germany is generally more like to sell rather than manage seized assets. Article 111l of the CPC allows for the sale of seized assets in relation to objects subject to deterioration or substantial reduction of value, or if their preservation, care of maintenance would result in “disproportionate costs or difficulties”. Austria goes even further and provides in Article 115c in connection with Article 377 of the CPC that the sale of seized property is mandatory if the property cannot be stored for more than one year without losing value, or if such storage would be associated with costs. Seized assets that would require management to maintain the value thereof, including cars, businesses, apartments, are thus sold in all instances and the proceeds of the sale be set aside either to satisfy a confiscation order later on or be returned to the owners of the seized property.

The Czech approach to asset management seems to incorporate elements of both the systems in place in the UK, Austria and Germany. Unlike in Austria and Germany, the Czech provisions reflect a general interest to manage the seized property to the extent possible and provide for the sale thereof in the above described circumstances. On the other hand, the powers granted to the manager of the property are much more limited than those provided for under UK law, and the ability of the manager to increase the value of the property or to create revenue seem much more limited. While it is commendable that the Czech Republic aims to preserve the defendant’s property to allow him to continue the ordinary course of his life in case he is found to be innocent, this should not be at the costs of the taxpayer’s money. The costs associated with the management of seized assets can and oftentimes are significant and it may be prudent and desirable to ensure that such costs are paid from revenues and additions from the seized assets rather than from the state budget. The recommended change in approach of funding of the asset management function would however have to go hand in hand with an expansion of the powers available to the asset manager so as to allow him to administer the assets in a way that they not only maintain but increase their value and generate revenue.

5.3 International Aspects

In some instances it may be the case that assets are available for confiscation but are located abroad. Equally, a foreign jurisdiction may discover that assets subject to confiscation in that country may be located in the Czech Republic. The foreign authority may already have obtained a seizing order in its country, and request that the Czech Republic enforces this order domestically, or the foreign jurisdiction may request that the Czech Republic issue a seizing order under domestic laws based on evidence provided by the foreign country.

Article 13 (2) UNTOC, Article 5 (4)(b) Vienna Convention, Section 3 Warsaw Convention and Article 52 (2) UNCAC require countries to assist one another in freezing and seizing of proceeds and instrumentalities of crime for the purpose of securing them for confiscation, whereby the UNCAC provision is the most comprehensive and requires Member States to “take such measures as may be necessary to permit this competent authorities to freeze or seize property upon a freezing or seizing order issued by a court or competent authority of a requesting State that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation” or “the such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation.”

Article 47 (2)(a) of the IJCCM stipulates that the Czech Republic may provide mutual legal assistance (MLA) in criminal matters to foreign authorities, including assistance in impounding property located in the country. Council Framework Decision 2003/577/JHA of July 2003 on the Execution on the European Union of Orders Freezing Property or Evidence was implemented in the Czech Republic through Chapter III of the IJCCM, which deals specifically with assistance in implementing Czech seizing orders in other EU member states or seizing orders issued by other EU member states in the Czech Republic for the purpose of securing a confiscation order later on.

For requests by the Czech Republic to another EU Member State, Article 229 (1) IJCCM prescribes that a domestic freezing order must first be obtained and a standard certificate form must be attached to this order. In the context of such an order to another EU Member State, the Czech court that issued the freezing order may directly transmit the order to the competent judicial authority in the requested State for execution, together with translated certificate on a standard form annexed to the Council Framework Decision 2003/577/JHA.

For assistance to be granted to another EU Member State, Articles 232 and 233 IJCCM require that a freezing order issued by a judicial authority and for securing execution of the order is received (together with the certificate). Other EU member states orders in criminal cases can and will be recognized and directly implemented in the Czech Republic except in cases where the preconditions set out in Article 233 (4) are not met, such as the lack of dual criminality, exemption of the relevant assets from confiscation or forfeiture under domestic law, an immunity or privilege under the law of the Czech Republic would make execution impossible or the principle of double jeopardy would be violated.

Recognition and implementation of freezing orders received by other EU Member States may also be refused if form requirements are not met.

Where assistance in seizing of assets is requested by any foreign country but a foreign seizing order has not yet been issued, it seems the Czech authorities could assist but would have to initiate criminal proceedings domestically to be able to rely on relevant criminal procedures.

The UK's POCA in Sections 74, 222 makes provisions for the UK being able to request a foreign country to assist in securing assets subject to confiscation either based on a final confiscation order issued by a UK court, or in case there is not confiscation order yet but a criminal investigation has been started in the UK, there is reasonable cause to believe that the alleged offense has benefitted from his criminal conduct, and the prosecutor believes that realizable property (whether proceeds or not) is situated in the requested country. On the incoming side, the POCA 2002 (External Requests and Order) Order 2005 permits the granting of assistance to any country in seizing recoverable assets in the UK in anticipation of a confiscation order to be issued abroad. Assistance may be granted if the requesting country can demonstrate that recoverable property is located in the UK, a criminal investigation has been started in the requesting country with regards to an offence, and there is reasonable cause to believe that the alleged offender has benefitted from his criminal conduct. If the Crown Court is satisfied that these conditions are met, it will issue a restraint or seizing order in relation to the property identified in the external request. The Criminal Justice (International Cooperation) Act 1990 (Enforcement of Overseas Forfeiture Orders) Order 2005 complements the Order under the POCA by allowing for assistance in restraining or seizing instrumentalities in the UK upon foreign request subject to the same conditions as set out under the POCA.

Austria's Rechtshilfegesetz (RHG) more or less reflects the Czech Republic's and allows for assistance in seizing of assets only based on a foreign seizing order or on the basis of criminal proceedings initiated domestically.

Germany's RHG goes further than the Czech IJCCM and Austrian RHG as it permits not only enforcement of foreign seizing orders (Article 66 (2)(1)) but also allows for the seizing of assets upon foreign request and in the absence of a domestic case if the foreign competent authority submits a declaration, stating that the legal requirements for confiscation are met in the foreign country and that confiscation would have been ordered if the assets were located in that foreign country (Articles 66 (2)(2) and 67).

6 CONFISCATION

Ultimately the identification, tracing, seizing and managing of seized assets all serve but one goal - to ensure that a confiscation order can be issued and satisfied in the course of court proceedings at a later point. The international community differentiates between conviction based confiscation procedures, which provide for the issuance of confiscation orders based on and in the context of a conviction for a criminal offense, or non-conviction based confiscation orders (NCB orders) which may be embedded either in civil law or criminal law procedures. Confiscation frameworks can be further categorized depending on whether they target identified property, such as instrumentalities used or direct proceeds of a criminal offense or any property up to the value of the benefit obtained through the commission of a crime. The former approach is referred to as “property based confiscation”, the latter as “value based confiscation”.

6.1 Conviction Based Confiscation

International standards require that countries, at a minimum, have in place mechanisms to confiscate proceeds and instrumentalities based on a conviction for any criminal offense. The Directive in Articles 4 stipulates that Member States shall take the necessary measures to enable as part of a conviction the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to instrumentalities or proceeds. Article 5 further requires that for convictions of an offense punishable with imprisonment for four years or more, confiscation can also be extended to property that belongs to the convict and in relation to which the court is satisfied that it is derived from any criminal conduct. The Conventions are somewhat less specific but require that countries adopt such measures as may be necessary to enable the confiscation of proceeds derived from offenses within the scope of the relevant Convention, or property the value of which corresponds to such proceeds, and of any instrumentalities used or intended to be used in the commission of such an offense. The relevant provisions are Article 5 of the Vienna Convention; Article 12 UNTOC; Article 31 UNCAC; and Article 3 Warsaw Convention.

With regards to the property subject to confiscation, all Conventions in the above cited Articles as well as the Directive in Article 2 require that confiscation provisions expressly apply to any property that constitutes direct or indirect proceeds, including proceeds transformed or converted in part or in full into other property; to proceeds intermingled with property acquired from legitimate sources up to the assessed value of the intermingled proceeds; to income or other benefits derived from proceeds or property into which proceeds have been transformed or converted, or from intermingled property. The term “property” is defined widely to include property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property. The scope of the confiscation provisions apply regardless of whether the described property is held by the defendant or a third party whereby bona fide third party rights must be protected. The Directive in Article 6 expressly requires that Member States take the necessary measures to enable the confiscation of proceeds, or other property corresponding in value to proceeds, which were transferred to or acquired by a third party from a suspect of accused person in cases where the third party either knew or should have known that the purpose of the transfer or acquisition was to avoid confiscation.

The Warsaw Convention in Article 3 (4) mandates that countries reverse the burden of proof in relation to serious offenses and require the offender to demonstrate the legal origin of alleged proceeds or other property liable to confiscation, rather than to require the prosecution to demonstrate the illicit nature thereof.⁵ All other Conventions merely state that “state parties may consider” introducing such a reversed burden of proof in relation to confiscation based confiscation.

Relevant international standards require that countries adopt as a concept the criminal liability of legal entities. As a consequence also the conviction based confiscation needs to be applicable to any legal person convicted of a criminal offense. This is to ensure that property held in the name of a company may be subject to confiscation as well.

6.1.1 Scope

The Czech confiscation provisions are set out in Sections 70 and 71 of the CC for confiscation of proceeds and instrumentalities in possession of the suspect and Sections 101 and 102 for confiscation of assets and property held by third parties.

Sections 70 and 71 of the CC are the main provisions relating to confiscation of proceeds and instrumentalities of crime and stipulate that confiscation is a mandatory and conviction based measure available in the context of a conviction for any criminal act under Czech law. The provisions can thus be applied in the context of any economic or proceeds generating crime, including fraud, money laundering, procurement fraud, VAT fraud, trafficking in weapons, trafficking in narcotics and psychotropic substances, corruption and bribery and human trafficking.

Confiscation under Section 70 is generally property based and can be satisfied only against property that was either used to or intended for use in the commission of a criminal act, or is direct proceeds of crime or was acquired, even if partially, with direct proceeds of crime. Section 70 permits confiscation only of things belonging to the offender. While the authorities stated that in practice Section 70 could be applied to also confiscate indirect, commingled and revenues generated from proceeds of crime, the language of Section 70 seems to be limited to permit only confiscation of direct or converted proceeds. The term “thing” is defined in the Civil Code to include assets of every kind, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such assets.

In exceptional circumstances, Section 71 of the CC permits also a value based confiscation against any other property owned by the defendant. Where property subject to confiscation under Section 70 was destroyed, damaged or otherwise disvalued, alienated, rendered useless, removed, consumed, or otherwise renders confiscation impossible, or if the offender obstructs the execution of confiscation, the court may confiscate property equivalent in value to criminally obtained benefit. The CC does not provide for a reversed burden of proof. It is thus up to the prosecution to establish that particular property is proceeds or instrumentalities of crime; or represents a benefit obtained through the commission of crime.

The UK’s confiscation framework as set out in the POCA also applies to any offenses in proceedings before the Crown Court and may be applied even to confiscate property received as a result of an offense other than the one for which the conviction was obtained. In all criminal proceedings, the Court either upon request by the prosecution or if it believes it is appropriate for it to do so, must determine whether

⁵ The Czech Republic has not yet ratified the Warsaw Convention.

the defendant has benefitted from the particular criminal conduct in question or leads a criminal lifestyle. If so, the court must determine the value of the relevant criminal benefit and issue a confiscation order for an equal amount. While the procedures are criminal in nature, the determination as to whether and how much is to be confiscated is made on a lower evidentiary threshold of balance of probabilities. UK confiscation orders are thus always value based.

The benefit received from a specific criminal offense is determined taking into account any direct or indirect benefit received through or as a result of commission of the crime for which the conviction was handed down. In addition to the specific benefit obtained, the court may also confiscate any property that is determined to have been obtained through the defendant's criminal lifestyle – thus through any offense other than the one for which a conviction was obtained. A defendant will be deemed to have a criminal lifestyle if he benefitted with at least 5.000 GBP and the conviction was obtained for a “lifestyle offenses” specifically listed in Schedule 2 of the POCA, such as for example drug, arms or human trafficking, money laundering, blackmailing or counterfeiting; it is an offense committed over a period of at least 6 months and generated a benefit; or the benefit was obtained through a range of offenses for which the defendant was convicted. In calculating a criminal lifestyle, the court will take into account any property transferred to or expenditures incurred by the defendant within six years prior to the commencement of the criminal proceedings but also any property held by the defendant at any time after the date of the conviction. Once a criminal lifestyle has been determined to exist, the burden of proof for establishing the legitimate source of property and assets shifts to the defendant.

Like the UK, Austria's criminal code also provides for the confiscation of proceeds that were obtained as a result of or in connection with and of instrumentalities used or intended to be used in the commission of any criminal offense (Articles 20 and 26 CC) whereby confiscation is prescribed as a mandatory sanction that extends in scope also to converted proceeds or benefits obtained from proceeds of crime. If assets subject to confiscation were not secured through seizing measures, the court is required to issue the confiscation order against a monetary value that corresponds to the value of the illicit proceeds.

Germany's confiscation provisions are set out in Sections 73 to 76 of the Criminal Code and apply to instrumentalities used or intended to be used in (Section 74) or proceeds acquire from or in order to commit any unlawful act (Section 73). Both provisions are conviction based and apply to all criminal offenses under German law. Confiscation can be ordered not in relation to direct proceeds but also to any benefits derived from the proceeds, as well as converted proceeds or anything received as a replacement for or as a surrogate right for proceeds. As in the case of Austria, confiscation of assets pursuant to Section 73 of Germany's Criminal Code is a mandatory measure. Pursuant to Sections 73a and 74c CC, if forfeiture of a particular property is not possible the court shall order confiscation of a sum of money equivalent in value to the property in question.

Based on the outlined provisions it seems that the Czech confiscation provisions are broadly in line with international standards and reflect many of the elements also enshrined in the legal provisions in place in the UK, Austria and Germany. The confiscation of proceeds and instrumentalities of crime is possible in the context of any conviction for a criminal offense, including the offenses covered under the scope of the UNTOC, Warsaw Convention, UNCAC, Vienna Convention or the Directive, and apply to assets of any kind, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such assets. The law should however be strengthened by clearly applying

the confiscation provisions under Section 70 also to indirect and intermingled proceeds, as well as to income generated from direct, indirect or commingled proceeds. A reversal of the burden of proof is not required under international standards but may be considered by the Czech authorities in light of international best practices and the clear provisions set out in the Warsaw Convention.

6.1.2 Property held by third parties

As a general principle, confiscation in the Czech Republic is defined as a sanction that is applicable only to things belonging to the offender. Article 101 of the Czech CC however permits the confiscation also as a protective measure in relation to property that belongs to a third party but was obtained through or as a reward of a criminal act or was acquired, even if only partially, for a thing that was obtained by a criminal offence or as a reward for it, or which was acquired by a person other than the offender, even if only partially, for a thing, that was acquired, even if only partially, by the offender for a thing obtained by a criminal offence or as a reward for it. Equivalent value confiscation of third party property is possible under Section 102 CC if the property subject to confiscation is no longer available. Third party confiscation under Section 101 is available if a conviction for a criminal act was obtained and in respect of asset and property that belong to a person other than the offender and is either proceeds of crime; was acquired by a third party with direct or converted proceeds of crime. The two types of confiscation measures – punitive confiscation under Section 70 and protective confiscation under Section 101 - do not depend on each other and may be issued in parallel.

In comparison to the Czech Republic Austria's and Germany's confiscation measures can be issued against anybody holding targeted property – the outlined provisions relating to confiscation of proceeds and instrumentalities apply regardless of who is holding or owning targeted property at the time the order is issued. In the UK confiscation orders relating to proceeds generally always are targeting property and assets of the defendant as they are value based and can thus be satisfied against any property, not only direct or indirect, converted or intermingled proceeds or income from proceeds. Confiscation orders relating to instrumentalities may be issued against whoever is in possession of it, including third parties.

6.1.3 Legal entities

Act 418/2011 on Criminal Liability of Legal Persons and Proceedings against them makes the Criminal Code and Criminal Procedure Code applicable to legal persons. Legal entities can thus be convicted of a criminal offense in the Czech Republic. Sections 15, 19 and 26 expressly provides that both confiscation pursuant to Section 70-72 and third party confiscation pursuant to Sections 101 – 104 as well as seizing measures pursuant to Sections 78 to 79f can be imposed against the property and assets of a legal entity.

Like the Czech Republic, the UK and Austria recognize criminal liability of legal entities and allow for confiscation and seizing measures to be applied against property of legal entities as well. Germany does not generally recognize the concept of criminal liability of legal entities. In case a legal entity benefits from a criminal act carried out by a natural person, the legal entity could be subject to an administrative fine in the relevant amount. Given the difference between the enforcement of confiscation orders and fines, however, it seems that the latter cannot be considered equivalent in terms of its functions and effects as a confiscation order.

6.2 Non-Conviction Based Confiscation

NCB procedures are typically property-based action against the assets themselves, not against the person in possession of or owning the assets. Accordingly, an NCB confiscation order usually requires proof that assets are proceeds or instrumentalities of crime. NCB confiscation procedures may be embedded in the Criminal Process, as so called in rem proceedings that do not require a criminal conviction, or as part of civil proceedings with application of a lower evidentiary threshold for establishing that assets are proceeds or instrumentalities of crime, usually based on a test of “balance of probabilities” or “preponderance of the evidence”. In some jurisdictions NCB procedures become available only after the criminal process has been exhausted or was unsuccessful, in others the two systems may be invoked in parallel. NCB confiscation can be highly useful in situations where the criminal avenue is not available, for example because the defendant has died, fled or is immune from prosecution; the owner of the assets of interest is unknown; or a criminal conviction cannot be obtained because there is insufficient evidence. NCB confiscation may also be very helpful in complex investigations where assets need to be secured and confiscated before a criminal charge can be brought.

Non-conviction based confiscation systems increasingly become available under national laws to support and/or complement criminal asset recovery frameworks. While most international standards recommend but do not require such NCB procedures to be available domestically, Article 4 (2) of the Directive, sets out an express requirement for the availability of NCB confiscation in cases where criminal proceedings have been initiated but a criminal conviction and thus a conviction based confiscation is not possible due to the illness of the accused or suspect, or because the suspect or accused absconded.

Czech law does not provide for separate NCB asset recovery procedures but relies mainly on the conviction based confiscation mechanisms outlined under Section 4.1. In certain circumstances, however, Sections 101 and 102 permit the issuance of a confiscation order even in the absence of a criminal conviction if the offender cannot be prosecuted or sentenced or his punishment has been waived or if the thing threatens the safety of persons or property or society, or if there is a risk that it will be used to commit a crime. In addition, NCB confiscation orders can be issued in relation to property held by third parties as discussed in great detail under 6.1.2. above.

The systems in place in the UK, Austria and Germany are more permissive. The UK in particular has a long standing history in applying NCB confiscation procedures as the POCA in Part 5 provides for a parallel avenue for confiscating proceeds of crime based on civil procedures. Under the civil process, property which is or represents property obtained through unlawful conduct can be forfeited in civil proceedings without there being a need to initiate criminal proceedings or obtaining a criminal conviction. Civil recovery is available if the criminal prosecution has considered and either failed or otherwise was not in a position to successfully obtain a full criminal confiscation. Under the civil process, the competent authorities need to prove before the court that property was obtained through unlawful conduct whereby it is not necessary to establish exactly which type of conduct. The scope of the procedures extends to all types of property just like the criminal process, including interest in such property. To secure property for a civil forfeiture order, the POCA also provides for provisional measures in form of an interim or restriction order. The standard of proof for all aspects of the civil asset recovery process is “a balance of probabilities”.

Austria also provides for a NCB based confiscation process but does so as part of criminal rather than civil procedures. Pursuant to Article 445 of the Criminal Procedure Code, confiscation orders can be issued also in the absence of a criminal conviction where there are sufficient grounds to believe that the requirements for confiscation are met but a confiscation order cannot be obtained as part of a criminal prosecution. Wherever a prosecution of an individual or legal entity is no longer an option, the prosecution can thus opt to initiate proceedings *in rem*, and against the property in question. Such forfeiture orders are issued by a court at the request of the Public Prosecutor, and can be directed both against individuals and legal entities.

German law does not generally provide for the forfeiture or confiscation of property without a conviction of any person. In certain limited circumstances, however, namely when the prosecution of the offense is barred by the statute of limitations or for other reasons of law no person may be prosecuted or convicted (*i.e.* when the person cannot be found), a confiscation order may be issued in the absence of a conviction provided the requirements for confiscation are met. Such orders may not, however, be issued in the absence of a request or authorization to prosecute or foreign request to implement such an order.

6.3 International Aspects

As discussed under Section 3.3. of this report, asset recovery procedures oftentimes have involve international aspects as assets subject to confiscation in a domestic proceeding may be located abroad or because a foreign jurisdiction may request assistance from the Czech authorities in confiscating and repatriating assets that are located in the Czech Republic. In the latter case, the foreign authority may already have obtained a confiscation order domestically and request that the Czech Republic enforces this order or the foreign jurisdiction may request that the Czech Republic issue a confiscation order under domestic laws based on evidence provided by the foreign country.

Article 13 (1) UNTOC, Article 5 (4)(a) Vienna Convention, Section 23 Warsaw Convention and Article 52 (1) UNCAC all require countries to assist one another in confiscating proceeds and instrumentalities of crime situated in its territory. The Conventions provide that countries may grant such assistance either by (a) giving effect to an order of confiscation issued by the requesting country; or (2) in cases where the requested country has jurisdiction, to order the confiscation of relevant property by adjudication of an offense of money laundering or such other offense as may be within its jurisdiction or by other procedures authorized under its domestic law. In other words, where a country cannot directly implement a confiscation order issued by a foreign court it shall institute domestic proceedings, if possible, and confiscate the assets based on a domestic order. The Conventions furthermore make provisions for the sharing of assets that were confiscated based on a foreign request. While older Conventions such as the Vienna Convention and UNTOC provide for the sharing of assets, Article 57 UNCAC required the “return of confiscated property” whereby any expenses incurred by the requested country as part of the assistance may be deducted. In addition, in the context of mutual legal assistance the UNCAC in Article 54 (1)(c) requires that countries can assist with the implementation of foreign NCB confiscation orders and associated provisional measures at a minimum in cases where the offender cannot be prosecuted by reason of death, flight or absence or in cases where the perpetrator is unknown. The requirement applies to all countries, including those that do not provide for NCB confiscation procedures under their domestic laws.

The IJCCM in Chapter IV and VII (only for EU Member States) regulate in great detail the recognition and execution of foreign confiscation or forfeiture decisions. Sections 118 and 278 (1) provide the legal basis for Czech authorities to assist in executing final decisions issued by another country in the context of criminal proceedings and imposing punitive or protective confiscation measures in relation to proceeds of crime or property equivalent in value, or of instrumentalities used or intended to be used in the commission of a criminal offense. Foreign EU confiscation orders can be recognized and directly enforced in the Czech Republic pursuant to Section 279 IJCCM if the person against whom the decision was issued is a resident of, or in the case of a legal entity has its registered office in the Czech Republic or any property subject to confiscation is located here. The recognition of the confiscation order will be refused if some of the reasons set in Section 274 (1) – for example the lack of dual criminality, the immunity of the person concerned, the property can not to be found. For all other countries, Section 120 requires that for recognition of the decision of others than EU-member states preconditions such as dual criminality, reciprocity and due process requirements are met and a formal mutual legal assistance request was received. Once a request is received, the file will be transferred to the competent court who will decide whether the conditions for recognition of the decision as stipulated in the IJCCM are met, that no grounds for refusal exist and relevant form requirements are met. Furthermore, foreign orders can only be executed if a confiscation in relation to the property could be ordered pursuant to domestic law – in other words, if the relevant conduct is covered under the scope of Section 70, 71, 101 or 102. If the relevant requirements are met, the court will recognize and order implementation of the confiscation decision. If the requirements are not met, the case will be closed and the foreign authority be notified accordingly. The Czech authorities stated that domestic proceedings would be instituted only if there is sufficient evidence available in to conduct a criminal investigation domestically.

For EU confiscation orders, Section 290 of the IJCCM provides for the sharing of property confiscated based on a foreign request. In all other cases, Section 135 provides that the Czech authorities may enter into an asset sharing agreement.

Foreign NCB orders issued by another EU Member States in the context of criminal procedures can be implemented in the Czech Republic pursuant to Sections 118 – 120; and 278 IJCCM provided a corresponding order could be implemented under Section 101 (1) and 102 of the Czech CPC.

Austria's RHG permits the recognition and enforcement of foreign confiscation orders pursuant to Section 64 if dual criminality is met, the statute of limitations has not expired and a confiscation order in relation to the property could be but has not been made pursuant to Austrian law. It is furthermore required that recoverable property is located in Austria and the affected person had a right to be heard. Contrary to the requirements of the Conventions, Section 64 (7) provides that assets and property confiscated based on foreign request are forfeited to become property of Austria. The RHG expressly applied Article 64 to any decision made in the context of a foreign criminal proceeding resulting in the forfeiture of property – thus covering also criminal NCB orders.

The German RHG is more encompassing and provides in Section 48 that as a general principle Chapter IV of the law permits the provision of assistance in implementing any foreign orders issued in the context of criminal procedures or confiscation orders issued by any competent foreign court, including non-criminal ones, provided the order is based on unlawful conduct. The German RHG thus permits the

granting of assistance with the implementation not only of foreign conviction or NCB confiscation orders issued pursuant to criminal but also of NCB confiscation orders issued pursuant to civil procedures. In all cases, execution of foreign orders is permitted if the foreign order is final, that the confiscation order could also be issued under German law in relation to the conduct in question. The German court may enforce the foreign order against property equivalent in value to the property indicated in the foreign order if either the foreign state so requests or the requirements for equivalent value confiscation pursuant to Section 76 of the CPC are met. Property confiscated based on foreign request may be shared based pursuant to Section 56b of the RHG.

The UK's POCA 2002 (External Requests and Order) Order 2005 permits the granting of assistance to any country in implementing foreign confiscation orders issued in the requesting country either in connection with criminal investigations and proceedings or based on civil recovery. Foreign conviction based confiscation orders may be registered and implemented in the UK if the foreign order is final, and authorized the confiscation of property that is not subject to a criminal charge under UK law. Foreign civil forfeiture orders may be implemented in the UK based on Part 5 of the POCA 2002 (External Request and Orders)(Amendment) Order 2013 if the court determines that any property or sum of money which is specified in it is recoverable property.

7 CONCLUSIONS

With regards to investigative powers and access to financial information, the IJCCM regulates international cooperation in the context of evidence gathering for the purpose of criminal investigations. Given the limitations of the various powers in the CPC as outlined above, namely that relevant court orders for such measures will generally be issued only to facilitate an investigation of the crime but not associated flows of proceeds, it is questionable to what extent the Czech Republic could facilitate a foreign financial investigation. Section 42 of the IJCCM further specifies that evidence obtained from a foreign authority may be used in domestic criminal proceedings if that evidence was obtained in compliance with the law of the foreign state or the Czech Republic.

The various types of law enforcement powers available under Czech criminal procedures are comprehensive and generally seem to be adequate to successfully identify and trace property in the context of a classic criminal investigation. Questions remain however on the availability of these powers in cases where the criminal conduct has already been established and the financial investigations is carried out purely to identify and trace proceeds of crime; or where the goal of the financial investigation is to establish facts that have no connection with the material and mental elements that must be proven to establish the criminal conduct. Possible scope limitations also remain in cases where a foreign request for assistance in asset recovery efforts is made in the context of a stand-alone financial investigation, as is permitted for example under Dutch law. It is recommended that the authorities review the CPC and amend the relevant legal provisions to clearly grant law enforcement authorities all the necessary powers to identify, trace and locate proceeds of crime and other assets subject to confiscation, whether in the context of a classic crimes investigation or as part of a parallel or subsequent financial investigation.

Czech criminal seizing provisions suffer from some shortcoming which limits its ability to secure assets for final confiscation, including in cases where such measures are requested by a foreign country. Seizing powers as drafted under the CPC do not sufficiently address the risk of dissipation of tangible assets or allow for an application *ex parte*, or clearly permit the seizure of indirect proceeds, or proceeds that were converted or transformed into other property, commingled with legitimate property or that constitute income from proceeds of crime. It also is advisable for the Czech Republic to further refine its asset management strategy, to consider whether asset management costs should be covered by the seized property rather than the state budget, and to grant asset managers all the necessary powers to manage the property in a way that it can generate revenue.

The extension of the Czech confiscation system to proceeds held by third parties is a positive development and the legal provisions are adequate to ensure that confiscation measures can be applied against property held by third parties in the context of a conviction for the widest possible range of criminal offenses. In conclusion, Czech law seems to be in line with the international standard on confiscation and permit asset recovery efforts to extend to property held by or in the name of legal entities as well. Non-conviction based confiscation is possible in some limited circumstances but as a general principled, NCB confiscation is still the exception to the rule. While NCB systems are not yet a requirement under international standards they are very useful tools to effectively recover proceeds of crime and it may be advisable for the authorities to consider whether a more refined and permissive NCB based confiscation system could be useful to further supplement and enhance the effectiveness of the Czech asset recovery efforts. The legal provisions in place in the Czech Republic provide for mechanisms

to assist in the implementation of foreign, criminal conviction and NCB based confiscation orders. While not required under international standards, the authorities may want to consider the usefulness of adopting a mechanism (similar to that set out in the UK and Germany) that would allow for the provision of assistance also in implementing foreign civil NCB confiscation order