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(CARPO)**

**Focus: Strengthening police capacities against serious crime in South-eastern
Europe**

Financial Investigations and Confiscation of Proceeds from Crime

Training Manual for Law Enforcement and Judiciary

Robert Golobinek

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Training Manual for Law Enforcement and
Judiciary

The CARPO project ("Development of reliable and functioning policing systems, and enhancing of combating main criminal activities and police co-operation") is a technical co-operation project jointly funded by the Council of Europe and the European Union. It has a duration of 30 months (March 2004 - September 2006) and it covers the following project areas: Albania, Bosnia and Herzegovina, Croatia, Kosovo, Montenegro, Serbia and "the former Yugoslav Republic of Macedonia".

The project consists in two modules, with the Council of Europe as the coordinator for module 1 (Tools against economic and organised crime) and the International Organisation for Migration as the coordinator for module 2 (Training in all matters related to trafficking in human beings, smuggling and illegal migration).

The Council of Europe is responsible for the implementation of the project, in partnership with Belgium, Finland, Hungary, Italy, Slovenia, Spain, Sweden and the International Organisation for Migration.

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I. GENERAL PART

1. INTRODUCTION

Targeting proceeds from crime is an efficient tool in the fight against serious and organised crime, where the main motive is to acquire benefit.

Under the concept of integrated financial investigation (from the suspicion of a criminal offence to the assets), financial investigation is conducted in parallel to criminal investigation in order to identify and trace material benefit acquired by (the concrete) criminal offence, to identify the property of the suspects or third persons from whom confiscation of proceeds is possible, and to secure final confiscation through the implementation of temporary measures (securing, seizing).

Globalisation of organised crime presents a threat to societies throughout the world. For this reason, the international community has focused its attention on the issue of confiscating proceeds from crime and introduced, through different legal instruments, minimal standards for efficient work and co-operation in this field.

Most countries have implemented the measures for the confiscation of proceeds from crime in integrated financial investigations and the measures for the prevention and prosecution of money laundering in their national legislation.

One of the aims of the CARDS Regional Police (CARPO) project "Strengthening police capacities against serious crime in South-eastern Europe" is to strengthen capacities for financial investigations aimed at the confiscation of proceeds from crime.

The South-Eastern European project areas involved in the CARPO project have all prepared an implementation strategy for financial investigations. Legal, institutional and operational elements necessary for the implementation of the concept of integrated financial investigations in practice were identified. In addition, shortcomings were exposed and short and long term actions foreseen. These implementation strategies were further integrated in a global regional strategy on tools against organised and economic crime with project area specific actions which was adopted at the high level meeting of Ministers of Interior and Senior officials held in Brijuni on 23 September 2005.

Despite certain shortcomings, all the project areas have the **legal basis** for confiscation of proceeds from crime, the main challenge remaining its implementation in practice.

Most of the project areas have identified the **lack of awareness**, knowledge and experience of the police, prosecutors and judges in this field as one of the primary reasons for inefficient confiscation of proceeds from crime and lack of financial investigations carried out in practice. Another explanation frequently put forward is the absence of **specialised units** or investigators who would be specialised in financial investigations.

The purpose of organising **specialised trainings** in financial investigations under the CARPO project is to provide the necessary knowledge and specialisation for practitioners who will later conduct integrated financial investigations/confiscation in practice. It is expected that trainees have a basic legal knowledge and practical experience in the field of investigating organised, economic and general crime. The training manual does not include the basic topics of civil law, company law, tax law etc. which are necessary for conducting the investigation of economic crime.

The CARPO training manual on Financial Investigations is **practically oriented** and consists of two parts: a **general one**¹ followed by a **specific part**² related to the particular situation of the project area.

The **general part** contains a comprehensive description, the elements of integrated financial investigations and the international standards applicable in the field of confiscation of proceeds from crime, financial investigations and international co-operation. In addition, there is a part dedicated to the question of the reversal of burden of proof.

The practical aspects of financial investigations depend on the national legislation. The efficiency of confiscation of proceeds from crime is related to powers, roles and co-operation between relevant services, exchange of information and access to data on property, rules on handling seized or confiscated property and other elements, which are specific to each project area.

The second part of the training manual which is **specific** to each project area has been prepared by national experts. It contains relevant legal provisions and practical specifics to each project area, in view of properly guiding financial investigations.

This training manual could also be used in basic educational programs in police academies and other forms of basic training in the field of combating organised and economic crime.

¹ The general part of the training manual has been elaborated by Mr. Robert GOLOBINEK (consultant, Slovenia).

² The specific part has been prepared in each project area by members of the working groups on financial investigations and other experts from relevant law enforcement bodies and prosecutor's services.

2. INTERNATIONAL STANDARDS

One of the main motives of serious and organised crime is financial gain. Organised criminal groups invest illegal profit in further illegal activities or use money laundering for its legalisation and infiltration in order to gain economic influence in the society. Confiscation of proceeds from crime is more and more recognised as an efficient tool in the fight against organised crime, as an imprisoned member or leader of a criminal organisation can usually be replaced and his imprisonment does not stop the criminal activities.

Confiscating proceeds from crime sets up the principle that nobody should benefit from crime; its purpose is not only preventive and punitive but also to protect the interests of the injured party.

Targeting proceeds from crime in the fight against corruption, organised crime, money laundering and other types of economic crime and in parallel conducting integrated financial investigation aiming to identify, seize and confiscate proceeds from crime have therefore to be part of each strategy of the fight against organised and serious crime.

The confiscation of proceeds from crime has numerous effects:

- preventive, as economic profit is the rationale of most criminal offences;
- it prevents the infiltration of illegal profits and corruption into the legal economy;
- it removes the instrument to commit future crimes;
- it helps to target the top management of a criminal organisation;
- it upholds the rule of law and the moral principle that nobody should benefit from crime.

The confiscation system and procedure can be divided into three phases:

1. Investigative phase, where proceeds from crime are identified and located and evidences on its/their owner(s) (and information on his/their property) collected - financial investigation. The result of the financial investigation can be a temporary measure (seizure) to secure later confiscation ordered by the court.
2. Judicial phase, where the defendant is convicted (or acquitted) and the decision on confiscation is final.
3. Disposal phase, where the property is actually confiscated and disposed by the State in line with the law, while taking into account international asset sharing.

In order to be effective in preventing and combating all kind of serious crime, it is necessary to focus on tracing, freezing, seizing and confiscating the proceeds from these crimes.

Different criminal legislation's can present a serious obstacle for an efficient and successful fight against international organised crime. Therefore it is necessary to adopt a number of legal measures which will allow to trace, freeze, seize and confiscate the proceeds from crime and enable international law enforcement and the judicial co-operation in criminal procedure.

The **United Nations (UN) Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances**³ established the obligation for the States to adopt the measures to enable confiscation of proceeds derived from **drug related** criminal offences or **property the value** of which corresponds to such proceeds and **measures** to identify, trace, and freeze or seize proceeds, property, instrumentalities for the purpose of eventual confiscation, including access to bank data. It also set the rules for **international co-operation**, recognition and execution of confiscation orders. The Convention also suggested to the States to consider introducing **reversed burden of proof regarding** the lawful origin of property in consistency with the principles of domestic laws.

³ United Nations Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances, Vienna, 19.12.1988.

The 1990 **Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime**⁴ (ETS 141) provided a basis for incrimination of money laundering and the standards for the confiscation of proceeds of any type of crime.

The scope of this training manual is to cover the confiscation of proceeds from crime, and not also the money laundering provisions, although sometimes the proceeds from crime could be subject of confiscation based on money laundering criminalisation. Moreover, the results of financial investigations can lead to the suspicion of criminal offence of money laundering.

The United Nations and European Union (EU) legal instruments which followed the Council of Europe Convention in this field brought some additional elements and development to the international standards. The **2000 UN Convention Against Transnational Organised Crime and its protocols**⁵ (UNTOC Convention) covers a number of other offences, such as participation in an organised criminal group for committing serious crime (crime punishable with at least up to 4 years), money laundering in relation to as wide a range of predicate offences as possible and corruption. Via the Protocols to the 2000 Convention, certain other offences in the areas of trafficking in persons (article 5 Protocol), smuggling of migrants and illicit manufacturing and trafficking in firearms are also included. The Convention deals with the confiscation in articles 12-14.

The **2003 UN Convention Against Corruption**⁶ contains similar provisions concerning corruption related offences.

The provision on confiscation is also in article 23 of the 1999 Council of Europe Criminal Law Convention on Corruption⁷ (ETS 173).

The EU has recognised that pursuit of financial gain is the major driving force behind organised crime. Based on the European Councils' conclusions related to organised crime (1996 in Dublin, 1997 in Amsterdam, 1998 in Vienna and 1999 in Tampere), action plans were prepared. The 1997 Council Action Plan to combat Organised Crime⁸ called for "well developed and wide ranging legislation in member states in the field of confiscation of the proceeds from crime and the laundering of such proceeds"⁹.

The 2000 Council Action plan "The prevention and control of organised crime: a European Union strategy for the beginning of the new millennium"¹⁰ deals with tracing, freezing and confiscating of proceeds from crime in chapter 2.7. Recommendation 17 concerns the consideration to establish specialised units. Recommendations 19, 20 and 21 concern the examination of the possible needs for instruments on the burden of proof for confiscation and confiscation regardless of the presence of the offender, to cover cases where the offender has died or absconded. These recommendations also demand that consideration should be given to whether an instrument on the sharing of confiscated assets among the Member States is compatible with the nature of judicial assistance and with legal traditions on judicial assistance in the Member States.

⁴ Convention on Laundering, Search, Seizure And Confiscation of the Proceeds From Crime, Strasbourg, ETS 141, 8.11.1990.

⁵ United Nations Convention Against Transnational Organized Crime, New York, 15.11.2000.

⁶ United Nations Convention Against Corruption, New York, 31.10.2003.

⁷ Criminal Law Convention on Corruption , ETS 173, Strasbourg, 27.1.1999.

⁸ Council Action Plan to Combat Organised Crime of 28.4.1997, OJ L 251, 15.8.1997.

⁹ See Political guideline 11 (paragraph 8) and recommendations in paragraph 26 and 28.

¹⁰ Council Action plan: The prevention and control of organised crime: a European Union strategy for the beginning of the new millenium OJ C 124, 3.5.2000.

End of 2003, the Council of Europe decided to update and widen its 1990 Convention to take into account the fact that not only could terrorism be financed through money laundering from criminal activity, but also through legitimate activities.

This revision process led to the 2005 **Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism**¹¹ which was adopted on 16 May 2005 at the Third Summit of Heads of State and Government of the Council of Europe in Warsaw. The Convention is not in force yet but open for signature and ratification by member States, as well as non member States. It is the first international treaty covering both the prevention and the control of money laundering and the financing of terrorism. The text addresses the fact that quick access to financial information or information on assets held by criminal organisations, including terrorist groups, is the key to successful preventive and repressive measures, and, ultimately, is the best way to stop them. It brings additional developments also to freezing and confiscation measures. When referring to its provisions it will be clearly stated.

The EU Council adopted on 22 July 2003 **the Framework Decision on the execution in the European Union of orders freezing property or evidence**. This instrument is based on a new approach adopted at the meeting of the European Council - the Heads of States and Governments of the EU States - in Tampere (Finland) in October 1999. The European Council decided that mutual recognition, as opposed to mutual assistance, should become the cornerstone in judicial co-operation between EU Member States. The European Arrest Warrant was the first instrument to be adopted following this approach. The freezing Framework Decision the second. The instrument covers both freezing of evidence and freezing of property with a view to its confiscation. There are some important differences as compared to the 1990 Council of Europe Convention. Firstly, there is no longer a system of making and receiving requests for mutual assistance involving a requesting and a requested State. Instead, there is a system where an issuing State issues a freezing order and transmits the freezing order to another State, the executing State. So it is not a matter of answering to a request coming from abroad, it is a matter of executing an order coming from abroad. Secondly, the scope for refusing to execute is restricted. Derogations are made to the principles of double criminality and double freezability. The list of grounds for refusal is short and exhaustive.

As a follow-up to the freezing text, Denmark proposed in 2002 a **draft Framework Decision on the application of the principle of mutual recognition to confiscation orders** (adopted on 24 February 2005). It is based on the same approach as the freezing text. So it is not about sending a request for confiscation, but about issuing a confiscation order and transmit it to another State for execution. Derogations have been made to the principles of double criminality.

¹¹ Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CETS 198, 16.5.2005.

2.1 DEFINITIONS

The international definitions in the field of financial investigations in regard to seizing and confiscation are important since the language of national legislation (and translation) may use different terms for the same meaning. For example freezing or seizure may mean the police measure seizure of instrumentalities or the court seizure order for proceeds of crime. In general, the language barrier is one of the main generic bottlenecks in the international cooperation. Translations of the requests for mutual legal assistance are not always in line with the (legal) terminology used in the requested state. Even the knowledge and material expertise of interpreters is not always sufficient. For that it is recommendable not to restrict yourself to the use of the definitions but also to explain what is exactly meant with that.

The 1990 Convention includes the following definitions:

- “**proceeds**” means any economic advantage, *derived from or obtained, directly or indirectly*¹², from criminal offences. It may consist of any property as defined below; - “**property**” includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property;
- “**instrumentalities**” means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;
- “**confiscation**” means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property.

The term “**freezing**” or “**seizure**” is described by the 2005 Council of Europe Convention and means temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

The term “**forfeiture**” could be used for a measure of confiscation in civil procedure, but also for the confiscation in a criminal procedure (the removal of direct advantage). The United States used the term of forfeiture for both the civil and the criminal confiscation. In the United Kingdom on the other hand, the terms confiscation and forfeiture has a different meaning.

The description of these terms is more or less similar to the ones included in the UN Convention (1988) and UNTOC Convention (2003) and EU legal instruments.

2.2 CONFISCATION MEASURES

The State has to adopt legislative and other measures to enable it to:

- confiscate instrumentalities;
- confiscate proceeds (economic advantage, derived from or obtained, directly or indirectly from criminal offences) and;
- confiscate property, the value of which corresponds to such proceeds.

It is important that not only **direct and indirect proceeds** from crime can be confiscated, but also legal property of corresponding value (**value confiscation**) when the actual proceeds cannot be confiscated¹³.

¹² The wording is added by the 2005 Convention and specifically covers also indirect proceeds from crime.

¹³ **Council Framework Decision** on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (2001/500/JHA), OJ L 182, 5.7.2001, **which**

The 2005 Convention¹⁴ precisely determined **the property** which freezing, seizure and confiscation measures should also encompass:

- the property into which the proceeds have been transformed or converted;
- the property acquired from legitimate sources, if proceeds have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds with legal property;
- the income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds.

States may declare that the confiscation provisions apply only to certain types of crime (offences punishable by more than one year of imprisonment, list of offences...) in ratification procedure.

Confiscation regimes

The implementation of international standards in national legislation depends on the legal model and tradition and other country specific circumstances, national legislation in Europe is therefore very diverse¹⁵. There are differences in the fundamental nature of legislation on confiscation with regard to criminal law, civil or administrative law. Confiscation regimes can be part of the sentencing procedure of the defendant. In that case, conviction is usually required. In some States, proceeds can be confiscated in civil forfeiture proceedings (mostly in common law based countries) independently or in parallel to related criminal proceedings. Differences can also be found in topics such as shifting the burden of proof with respect to the nature of the capital in question, in the requirement (mandatory or not) of a direct link between the criminal fact and the seizure of assets, or in the principle of calculation of profits (gross or net principle).

Differences can be compared in the legal character of confiscation, the standards of evidence and the range of confiscation¹⁶. Within the Continental legal systems, the **legal character of confiscation** in criminal proceedings is generally an incidental consequence or measure, only a few countries understand confiscation as a true sanction (France)¹⁷. In common law systems (and Italy), confiscation has mostly a preventive function and is understood as an in rem measure (USA and Ireland), but also for civil forfeiture a punitive character is recognized.

In many European countries **standards of evidence** are lightened. The link between the prosecuted criminal offence and the assets, which can be assessed illegal, can be loosened (Germany, Austria, The Netherlands). The prosecutor is not obliged to prove with the criminal standard the link between the prosecuted criminal offence and all the assets (which are presumed illegal). In such case, in

promotes the implementation of the 1990 Convention, in article 3 specifically promotes the value confiscation, with possible exemption when the value is below 4000 €.

¹⁴ Article 5.

¹⁵ See for example: Evaluation of laws and systems in FATF members dealing with asset confiscation and provisional measures, 21.7.1997, <http://www.fatf-gafi.org/dataoecd/32/48/34047135.pdf>.

¹⁶ Resumed from Michael Kilchling: Tracing, Seizing and Confiscating Proceeds from Corruption (and other illegal conduct) Within or Outside the criminal justice system, European Journal of Crime, Criminal Law and Criminal Justice, Volume 9, Issue 4, 2001.

¹⁷ The international legal instruments define confiscation as penalty or measure (1990 and 2005 Conventions, Council Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property).

addition to the proceeds from the prosecuted crime other assets can also be confiscated even if derived from other than adjudged offence (extended confiscation)¹⁸.

The full reversal burden of proof is implemented only in few European countries (mainly in Ireland, United Kingdom, Italy and Switzerland) under different conditions (membership of the criminal organisation; unjustified origin of assets of specific offenders; income of drug offender from past six years is presumed illegal....).

The **range of confiscation** usually does not stop at direct proceeds from crime, but also value confiscation as possible. In that case also legal property can be confiscated when direct proceeds can not be discovered.

Legal solutions alone do not guarantee efficient confiscation in practice. Some other aspects (organisational and operational) were evaluated in a research of the University of Trento (Transcrime) and Palermo¹⁹.

2.3 INVESTIGATIVE AND PROVISIONAL MEASURES

A well-developed financial investigative system is a precondition for a successful confiscation proceeding. In order to ensure a final confiscation, it is necessary to have efficient investigative and provisional measures to:

- identify;
- trace;
- freeze or seize rapidly property which is liable to confiscation in order to prevent any dealing in, transfer or disposal of such property and facilitate the confiscation later on.

Access of law enforcement to the information on property (land register, company register, tax data...) is necessary to identify and trace proceeds.

Access to bank data

Data on bank accounts can show money flow, persons involved and their relations and is an important source for the identification, tracing and freezing of the proceeds from crime (or funds in value of proceeds).

The courts or other competent authorities should have the power to order that bank, financial or commercial records be made available or be seized. Bank secrecy should not be an obstacle for such measure.

The 2005 Convention²⁰ specified in details also the measures to:

- determine whether a natural or legal person is a holder or beneficial owner of one or more accounts in any bank located in its territory and, if so obtain, of all the details of the identified accounts;
- obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more specified accounts, including the particulars of any sending or recipient account;

¹⁸ Germany has a concept of extended forfeiture whereby for certain offences the State can seek to forfeit property of the defendant or an accessory, which is not directly linked to a specific offence, but which is subject to a justifiable assumption that it was acquired for or from illegal activity.

¹⁹ The seizure and confiscation of the proceeds from crime in the European Union member states: what works and what does not and what is promising, Italian Ministry of Justice and University of Trento (Transcrime) and Palermo, 2001.

²⁰ Article 7.

- monitor, during a specified period, the banking operations that are being carried out through one or more identified accounts.

Banks may not disclose to the customer that such information was obtained or an investigation is being carried out.

Special investigative powers

Special investigative powers and techniques, such as undercover operations, secret observation, interception of telecommunications, access to computer systems and production and use of specific documents should be used for gathering of evidence and for the purpose of identification and tracing of proceeds.

Protection of third parties

Interested parties, affected by investigative or temporary measures or confiscation shall have effective legal remedies in order to preserve their rights²¹.

It is left to the national legislation to implement proper measures for the protection of the rights of third parties, including bona fide third parties.

In the EU framework, simultaneous asset investigation is being promoted.

Council Recommendation²² on simultaneous investigations recommended:

- To apply the investigation method in the fight against crime consisting of investigating on all fronts, right from the beginning, any activities connected with illicit drug trafficking and identifying the organisation's finances and assets.
- To encourage the setting up of permanent or temporary groups specialised in asset investigation, in order to promote a greater efficiency in the investigation method described²³.
- To reinforce or facilitate co-operation with persons responsible for public or private registers of ownership holding information on assets of any nature.
- To promote the creation of joint investigative teams and also to include Europol.

The Recommendation's backgrounds are the conclusions of the Tampere European Council on 15 and 16 October 1999 and the 2000 EU Action Plan to Combat Drugs.

It was also stated in the Recommendation that depriving criminal organisations of the profits obtained by illicit drug trafficking and seizing the drugs causes them serious damage. The fight against crime linked to organised drug trafficking is therefore more effective by the introduction and the use of the technique of **simultaneous investigation** with the purpose of 'uncovering' the assets of any nature belonging to criminals for the period required to establish the assets resulting from the investigation, which may or may not coincide with the conclusion of the drug-trafficking investigation. The final objectives are to ensure that the perpetrators are held accountable, to make good any damage caused and to compensate any victims where appropriate. Simultaneous investigation is more effective, since the competent authorities are able to decide to seize property of any kind resulting from a criminal activity and prevent its disposal. It can also lead to further evidence on the link with those involved with the crime, or revealing the involvement of other people in the drug-trafficking offence.

²¹ Article 5 of 1990 Convention and article 8 of 2005 Convention.

²² Council Recommendation of 25.4.2002 on improving investigation methods in the fight against organised crime linked to organised drug trafficking: simultaneous investigations into drug trafficking by criminal organisations and their finances/assets, OJ C 114, 15.5.2002.

²³ The creation of units, specially dedicated to the process of tracing, seizure and confiscation of assets derived from criminal offences, was promoted also by the 2000 Council action plan - millennium strategy (Recommendation 17).

Asset investigation is defined as the investigation technique enabling information in a series of files and databases (public or private) or other sources to be systematically analysed to identify such individual assets and financial rights and to attribute their ownership to specific natural or legal persons.

Since the essential basis for investigating assets are not only internal sources (such as the databases of law enforcement bodies) but also external ones whether public (with public access where relevant) or private (consultation by means of a court order), there is a need for a greater co-operation in expediting requests submitted by the competent law enforcement, court and tax authorities to the persons responsible for the various registers containing data on the ownership of assets of any nature held by the persons presumed to be involved in drug trafficking offences.

2.4 MANAGEMENT OF FROZEN OR SEIZED PROPERTY

The 2005 Convention determines also the obligation for States to ensure a proper management of frozen property.

Such measures should preserve the value of the property by prohibition of disposal, by storing, safe keeping, selling or managing frozen property. Measure depends on the nature of the property (money, shares, goods, vehicles, movables, company, immovable property etc.).

2.5 INTERNATIONAL CO-OPERATION

Cross border criminal activities demand also international co-operation during the investigation and proceeding aiming at the confiscation of instrumentalities and proceeds.

National legislation regarding the confiscation of proceeds from crime in Europe is very diverse. To allow an efficient exchange of information, assistance, recognition and execution of foreign requests and other forms of international co-operation common rules are needed and provided by international legal instruments. But also the proper implementation of these international rules into the national legislation (for example in the case of the EU Framework decisions) is of a high importance.

International co-operation should enable the investigative assistance to identify and trace property, obtain documents and to enforce provisional measures and confiscation of proceeds based on the **substantiated request** of a foreign State with the same priority as for the internal procedures.

The different forms of co-operation can be:

- investigative assistance;
- freezing-seizing assistance;
- confiscation assistance/asset sharing.

2.5.1 Investigative assistance

The purpose of investigative assistance is the identification and tracing of instrumentalities, proceeds and other property liable to confiscation based on a foreign request. Such assistance shall include any measure **providing and securing evidence** as to the existence, location or movement, nature, legal status or value of the property.

In case of such requests²⁴, the State has to be able to take the measures to:

Requests for information on bank accounts:

- determine whether a natural or legal person who is the subject of a criminal investigation holds or controls one or more accounts - provide the particulars of the identified accounts.

This provision may be extended to accounts held in non-bank financial institutions. Such extension may be made subject to the principle of reciprocity.

Requests for information on banking transactions:

- provide the particulars of specified bank accounts and of banking operations during a specified period;
- including the particulars of any sending or recipient account.

Requests for the monitoring of banking transactions:

- monitor banking operations during a specified period and communicate the results to the requesting state.

Spontaneous information

The State may without prior request and without prejudice to its own investigations or proceedings, forward to another State information on instrumentalities and proceeds if the information might assist the receiving State in initiating or carrying out investigations or proceedings or might lead to a request.

The possibility for informal assistance to provide and share information directly between law enforcement agencies is also very important²⁵. The basis for such co-operation may (apart from

²⁴ Resumed from the 2005 Convention.

national legislation) be bilateral agreements or via international organisations such as Interpol or informal organisations, such as CARIN.

Camden Assets Recovery Interagency Network (CARIN) is an informal international network and practical co-operative alliance of national 'experts' in the field of asset tracing, seizing and confiscation. It facilitates direct contacts with colleagues in other countries for exchange of information and experience in this field. EUROPOL plays a role as its Secretariat²⁶. Since CARIN is an informal network the membership is open not only to European member states but also to any other country.

2.5.2 Provisional measures (freezing/seizing)

At the request of another State which **has instituted criminal proceedings** or proceedings for the purpose of confiscation, a State shall take the provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request.

Before lifting any provisional measure a State shall give the requesting Party an opportunity to present its reasons in favor of continuing the measure.

Requested freezing measures shall be taken also in the case of a request for confiscation.

As mentioned in chapter 2, **the Council Framework Decision** on the execution in the European Union of orders freezing property or evidence²⁷ lays down the rules under which a member State shall recognise and execute in its territory a freezing order (for the purpose of securing evidence or subsequent confiscation of property) issued by a judicial authority of another member State in the framework of criminal proceedings. The principle of mutual recognition applies also to pre-trial orders. A freezing order, together with a standard form certificate, can be transmitted by a judicial authority **directly**²⁸ to the competent judicial authority, who shall recognise a freezing order (without any further formality being required²⁹) and take the necessary measures for its immediate execution³⁰. Member states should take necessary measures to implement the Framework decision before 2.8.2005. Despite the system of the framework decision looks promising and helpful in order to achieve a fast seizing/ freezing abroad seems there up till now (August 2006) no practical experience to be at all. The framework decision is experienced as too complex and too difficult with as a result a mass of paperwork. Another reason for not function of the regulation is that still not all the EU-memberstates has transformed it into domestic legislation.

²⁵ "Member States shall encourage direct contact between investigators, investigating magistrates and prosecutors of MS making appropriate use of available cooperation arrangements, to ensure that requests for assistance through formal channels are not made unnecessarily." is stated in article 4 of **Joint Action** of 3.12.1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (98/699/JHA), OJ L 333/1, 9.12.1998.

²⁶ For additional information you may contact: carin@europol.eu.int.

²⁷ Council Framework Decision on the execution in the European Union of orders freezing property or evidence (2003/577/JHA), O J L 196, 02.08.2003.

²⁸ Except for United Kingdom and Ireland (paragraph 2 of article 4).

²⁹ The cooperation presupposes confidence that the decisions to be recognised and enforced will always be taken in compliance with the principles of legality, subsidiarity and proportionality.

³⁰ Unless grounds for non-recognition, non-execution or postponement exist, provided for in article 7 and 8.

2.5.3. Confiscation assistance

Based on a request for confiscation concerning instrumentalities or proceeds, situated in its territory, a State shall:

- enforce a confiscation order made by a court of a requesting State or;
- submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it. In this case the State can use the confiscation proceedings under its own law.

Confiscation shall also apply to a requirement to pay a sum of money corresponding to the value of proceeds, if property is located in the requested State. If the payment is not obtained, the State can realise the claim on any property available for that purpose.

The provision in paragraph 5 of article 23 of the 2005 Convention also encourages the co-operation in case of request for execution of measures equivalent to confiscation leading to the deprivation of property which are not criminal sanctions (civil or other special procedure) if 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.

A request for confiscation does not affect the right of the requesting Party to enforce the confiscation order itself.

Asset-sharing

The 1990 Convention³¹ and the 1988 UN Convention as well left the question of disposal of confiscated property to the domestic law of requested State, unless the State agrees otherwise. This means in practice that the property confiscated stays in the requested state.

The 2005 Convention states that parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated property to the requesting State so that it can give compensation to the victims of the crime or return such property to their legitimate owners.

The Convention also foresees the rules for refusal and postponement of co-operation and protection of third party rights.

The 2003 UN Convention against corruption contains some interesting new provisions on disposal of assets. Under Article 57 of the Convention, the requested party has an obligation to return confiscated property to the requesting party in cases of embezzlement of public funds or of laundering of such funds and in cases where the requesting party reasonably establishes its prior ownership. Reasonable expenses may be deducted by the requested party.

The Framework Decision on the application of the principle of mutual recognition to confiscation orders provides in Article 14 provisions on disposal of assets. These imply that for confiscation of an amount of less than € 10,000,- goes to the executing State, whereas an amount of € 10,000,- of more is split 50/50 between the requesting and executing State.

3. INTERNATIONAL ORGANISATIONS

³¹ Article 15.

3.1 FATF

The FATF³² is an inter-governmental body with world wide membership whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing.

The FATF is a "policy-making body" created in 1989 working to generate the necessary political will to bring about legislative and regulatory reforms in these areas. The FATF has published the Forty recommendations on money laundering and Nine special recommendations on financing of terrorism in order to set the standards and to meet its objective. FATF has also produced the methodology for mutual evaluation process, which is used also by MONEYVAL.

Recommendation 3³³ of the FATF 40 Recommendations deals with measures for confiscation and encourages countries to consider confiscation measures 'without requiring a criminal conviction or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation'. Recommendations 27, 28 and 32 are dealing with institutional and other measures and statistics also related to confiscation of proceeds.

3.2 MONEYVAL

The Council of Europe Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures - MONEYVAL³⁴ (formerly PC-R-EV) - was established in 1997. This evaluation and peer pressure mechanism reviews the anti-money laundering measures (including confiscation measures) and measures to counter the financing of terrorism in Council of Europe member States (and Council of Europe applicants which apply to join the terms of reference) which are not members of the Financial Action Task Force (FATF). All the CARPO project areas are members of MONEYVAL.

MONEYVAL evaluates the compliance of its members with the relevant international anti-money laundering and countering terrorist financing standards, as contained in the recommendations of the FATF, including the Special Recommendations on Financing of Terrorism and Terrorist Acts and related Money Laundering, the 1998 United Nations Convention on illicit traffic in narcotic drugs and psychotropic substances, the United Nations Convention against Transnational Organised Crime, the relevant European Union Directives on the prevention of the use of the financial system for money laundering and the 1990 Convention on laundering, search, seizure and confiscation of the proceeds from crime, concluded within the Council of Europe.

³² http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html.

³³ Recommendation 3: Countries should adopt measures similar to those set forth in the Vienna and Palermo Conventions, including legislative measures, to enable their competent authorities to confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudicing the rights of bona fide third parties.

Such measures should include the authority to: (a) identify, trace and evaluate property which is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the State's ability to recover property that is subject to confiscation; and (d) take any appropriate investigative measures.

Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

³⁴ http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Combating_economic_crime/Money_laundering/.

The evaluation is conducted based on the common AML/CFT methodology, agreed between MONEYVAL and the IMF and the World Bank. In the evaluation reports the efficiency of the measures in place is evaluated and recommendations are made for the improvement.

3.3 GRECO

GRECO³⁵ is a committee of the Council of Europe which aims to improve its members' capacity to fight corruption by monitoring the compliance of States with their undertakings in this field. In this way, it will contribute to identifying deficiencies and insufficiencies of national mechanisms against corruption, and to prompting the necessary legislative, institutional and practical reforms in order to better prevent and combat corruption.

GRECO is responsible, in particular, for monitoring observance of the Guiding Principles for the Fight against Corruption and implementation of the international legal instruments adopted in pursuit of the Programme of Action against Corruption (PAC). So far three such instruments have been adopted, the Criminal Law Convention on corruption (ETS 173), opened for signature on 27 January 1999, the Civil Law Convention on corruption (ETS 174), adopted in September 1999, opened for signature on 4 November 1999 and Recommendation R (2000) 10 on codes of conduct for public officials, adopted on 11 May 2000.

Since the Criminal Law Convention on corruption also incorporates provisions concerning the confiscation of proceeds, GRECO monitors also this field. Its findings, conclusions and recommendations can be an important source of information on the deficiency of confiscation measures in a given country.

³⁵ <http://www.greco.coe.int/Default.htm>

4. REVERSAL OF BURDEN OF PROOF

The practice shows that proving the criminal origin of offender's property is in many cases very difficult or impossible.

Some of the project areas, participating in the CARPO project considered introducing the reversal of burden of proof in their legislation. Therefore some key elements will be described to assist countries in their understanding and decision on possible legal changes.

The UN Vienna³⁶ and the UNTOC Conventions³⁷ suggest that States may consider the possibility of requiring that an **offender demonstrates the lawful origin** of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is **consistent with the principles of their domestic law** and with the nature of the judicial and other proceedings.

Even if the burden of proof on the guilt of the offender still remains with the State in criminal procedure, such provision affects the basic right for a fair trial (presumption of innocence and use of presumptions in criminal procedure) and the right for a private property described in the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on human rights). The European Court of Human Rights developed jurisprudence and standards under which such legal possibility is in line with the Convention.

The **2005 Convention**³⁸ introduced the **obligation** for the states to adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law. But in line with the paragraph 4 of article 53 the State may declare a reservation to the use of this provision.

European Union Action plan: the prevention and control of organised crime: a European Union strategy for the beginning of the new millennium included the question of reversed burden of proof in the Recommendation 19³⁹.

Council Framework Decision⁴⁰ on Confiscation of Crime-Related Proceeds, Instrumentalities and Property defines an **obligation** for the member States to adopt necessary measures to enable **extended powers of confiscation**. Measures should be adopted by member States by 15.3.2007.

The Framework Decision describes three possibilities for extended confiscation of property (wholly or in part), which belongs to a person convicted of an offence committed in the framework of criminal

³⁶ Article 5, paragraph 4 of 1988 UN Convention:

Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.

³⁷ Article 12, paragraph 7 of the UNTOC Convention:

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

³⁸ Article 3, paragraph 4.

³⁹ Recommendation 19:

An examination should be made of the possible need for an instrument which, taking into account best practices operating in the member States and with due respect to fundamental legal principles, introduces the possibility of mitigating, under criminal, civil or fiscal law, as appropriate, the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime.

⁴⁰ **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.

organisation, offences related to drug trafficking, counterfeiting of euro, money laundering and predicate offences, illegal migration, trafficking in human beings etc.:

- where a court based on specific facts is fully convinced that the property is derived from **criminal activities** or **from similar criminal activities** of the convicted person during a period prior to conviction for the offence, which is deemed reasonable by the court in the circumstances of the particular case,
- where it is established that the **value of the property is disproportionate to the lawful income** of the convicted person and a court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person.

Such confiscation may also extend to:

- the property acquired by the closest relations of the person concerned and;
- the property transferred to a legal person in respect of which the person concerned — acting either alone or in conjunction with his closest relations — has a controlling influence.

Although the extended confiscation provisions are connected to the property belonging to a person convicted of an offence, paragraph 4 of article 3 leaves the possibility to member States to use procedures other than criminal procedure to deprive the perpetrator of the property in question.

Many European countries introduced some forms of reversed burden (or better, a division) of proof on the origin of the assets⁴¹. The discretionary power is held by the court. The government has to present some evidence to suggest that the asset may be criminally derived or that the defendant could not have acquired his assets taking into account his legitimate income. This can be limited to a certain period of time prior to the conviction and/or to certain types of (serious) crime. It is not necessary that the asset in question is directly linked to the crimes of which a person has been convicted.

Some countries use separate civil procedure to confiscate the proceeds of crime (Ireland, United Kingdom, United States).

4.1. RELATION TO THE HUMAN RIGHTS OBLIGATIONS

The issue of a lightened burden of proof as to the origin of suspected criminal proceeds, as opposed to the criminal standard of proof, is related to the standards of the European Convention on Human Rights⁴² (ECHR).

The use of statutory assumptions in order to divide the burden of proof between the public prosecutor and the defendant for the assessment and establishment of the confiscation penalty, especially when a person can be asked to explain himself about the origin of his assets in order to avoid their confiscation, might be in conflict with the following provisions in the ECHR:

- the right to a fair trial⁴³;
- the presumption of innocence⁴⁴;

⁴¹ For more details see: Reversal of burden of proof in confiscation of the proceeds of crime: a Council of Europe Best Practice Survey, Council of Europe, 2000.

⁴² Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 005, Council of Europe, Rome, 4.11.1950 and its additional protocols.

⁴³ Article 6.1: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)”.

- the protection of property⁴⁵.

The European Court on Human Rights (ECTHR) tested the consistency of the national legislations with ECHR in several cases. The conclusions from the jurisprudence are the following:

- the presumption of innocence is applicable to the criminal proceedings as a whole⁴⁶, including the establishment of a confiscation order as its part, and the respect of this presumption must be evaluated for the whole trial rather than for each phase separately;
- the use of presumptions of fact or of law is admissible within reasonable limits and should be in proportion with the relevance of the case (the proportionality principle) and maintain the rights of the defence (the principle of equality of arms)⁴⁷. The presumptions may never be irrefutable and the court must dispose of a margin of appreciation. Therefore a total reversal of the burden of proof or a general confiscation is not allowed;
- the right of non-self-incrimination, as a part of the right to a fair trial, is subject to a strict interpretation by the European Court of Human Rights (ECTHR), but is not absolute: when sufficient and precise charges and evidence are brought forward, the defendants' attitude not to respond to anything can be considered to be a supplementary indication of guilt⁴⁸. The statements obtained through administrative procedure, in which the suspect was bound to tell the truth are inadmissible in further criminal proceedings⁴⁹.
- the ECTHR gives an autonomous definition of the notions "penalty" and "measure", and the applicability of the ECHR depends upon such qualification⁵⁰. Relevant criteria are whether the measure is imposed following conviction for a criminal offence, what is the nature and purpose of the measure, its characterisation under national law, the procedures involved in the making and implementation of the measure, and its severity.

In the Phillips Case⁵¹, the ECTHR tested the compliance of some provisions of the United Kingdom 1994 Drug trafficking act related to confiscation of proceeds.

Phillips was sentenced to imprisonment for smuggling of cannabis and ordered to pay an amount of money that the court assessed he benefited from drug trafficking.

The investigation showed that Phillips had not declared a taxable source of income, although he was the registered owner of a house and several other assets, among which were five cars. He had previous convictions, but none in respect of a drug-related offence. It was assumed that Phillips had benefited from drug trafficking and the total benefit was evaluated. The defendant failed to bring forward credible elements to rebut the assumption that he had gained such an amount of money through the commission of drugs trafficking.

⁴⁴ Article 6.2: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

⁴⁵ Article 1 of first additional protocol ECHR: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (...)"

⁴⁶ Case Minelli vs. Switzerland, 25.3.1983.

⁴⁷ Case Salabiaku vs. France, 7.10.1988.

⁴⁸ Case Murray vs. UK, 8.2.1996.

⁴⁹ Case Saunders vs. UK, 17.12.1996.

⁵⁰ Case Welch vs. UK, 9.2.1995.

⁵¹ Case Phillips vs. UK, 5.7.2001.

The court had commented that, in seeking to displace the assumption and to counter the prosecutor's allegations, the defendant had failed to take obvious, ordinary and simple steps which would clearly have been taken if his account of the facts had been true.

Phillips alleged that the statutory assumption applied by the English court when calculating the amount of the confiscation order breached his **right to the presumption of innocence** under article 6 § 2 ECHR.

The ECTHR refused his allegation and stated that the statutory assumption was not applied in order to facilitate finding the applicant guilty of an offence, but instead to enable the national court to assess the amount at which the confiscation order should properly be fixed. The presumption of innocence is only relevant until a person is found guilty, but is not applicable during the following sentencing process unless in that process new charges would be brought against the defendant.

The ECTHR also refused to accept Phillip's allegation that his **right to a fair trial, including his right of non-self-incrimination**, was violated by the fact that he was called upon to explain himself on the origin of the assets he had disposed of during the last six years. The ECTHR concluded that the system according to which the assumptions were used contained sufficient safeguards for a fair trial. The principal safeguard was that the assumption made by the 1994 Act could have been rebutted if the applicant had shown, again on the balance of probabilities, that he had acquired the property other than through drug trafficking. The court also had a discretion not to apply the assumption if it considered that applying it would give rise to a serious risk of injustice.

Phillips also alleged that the confiscation penalty inflicted on him amounted to an interference with his **right to peaceful enjoyment of his possessions** and that Article 1 of Protocol No. 1 to the ECHR was therefore violated. The ECTHR answered that confiscation orders based upon the assumptions pursuant to the 1994 Act operate as a deterrent to those considering engaging in drug trafficking, and that they also aim to deprive a person of profits received from drug trafficking and to remove the value of the proceeds from possible future use in the drugs trade. Therefore the interference suffered by the defendant with the peaceful enjoyment of his possessions was not disproportionate and a reasonable relationship of proportionality between the means employed and the aim sought to be realised was met.

5. INTEGRATED FINANCIAL INVESTIGATION AND CONFISCATION OF PROCEEDS FROM CRIME

The financial investigation is a part which is conducted in parallel with the criminal investigation and is aimed at discovering the proceeds from crime, identifying the property that can be confiscated and temporary securing (seizing) this property to allow future final confiscation. While the goal of the criminal investigation is to detect a criminal offence and the perpetrator and to collect the evidence for the criminal procedure, the goal of the parallel financial investigation is to confiscate proceeds from crime. Therefore it is important that a financial investigation begins at an early stage of the criminal investigation, as the outcome of both can be important in achieving their respective goals. Successful detection and temporary seizure of property prevents its hiding and disposal and allows for an efficient final confiscation at the end of the criminal procedure.

The elements necessary for a successful financial investigation are as follows:

- Financial investigation has to be a standard procedure applied when investigating profit generating crime;
- Investigators have to be specialised in financial investigation;
- Close co-operation with investigators responsible for criminal investigation.

Elements of integrated parallel financial investigation will be described in details in the following chapters:

- Collection of evidence on the perpetrator and the criminal offence (as part of a criminal investigation);
- Determination of proceeds from crime (type and amount);
- Determination of property that can be confiscated (identification of persons, property liable to value confiscation or extended confiscation⁵²);
- Determination of the conditions for temporary measures (seizure/securing).

5.1 MEASURES (POWERS) AND SERVICES RESPONSIBLE FOR FINANCIAL INVESTIGATION AND CONFISCATION OF PROCEEDS FROM CRIME

Conditions for the measures⁵³ undertaken in the financial investigation and the role of responsible services in the pre-trial phase of the criminal procedure depend on the national legislation and judicial practice.

With respect to the international standards (see chapter 2) and the existing legislation in the countries that have ratified the relevant international conventions, the following elements can be exposed:

- Confiscation is possible for instrumentalities, for proceeds - property derived from or obtained directly or indirectly from criminal offences, and for "legal" property, corresponding to the value of proceeds from crime (value confiscation);
- Investigative measures enable the identification, tracing and temporary securing (seizure) of property that can be confiscated, including access to the bank data and use of special investigative powers.

The role and the powers of services in the pre-trial procedure are usually shared by the police (and other law enforcement agencies, i.e. financial police) and the prosecutor's office, which in general guides or directs the pre-trial investigation phase. The financial investigation is usually carried out by the police (specialised units in criminal police), rarely by the prosecutor (special unit BOOM in The Netherlands) or by a special multidisciplinary unit (like the Criminal Assets Bureau in Ireland).

The police conducts the financial investigation: they gather evidences on the criminal offence, the perpetrator and on the proceeds from crime. It can seize the instrumentalities (the property used to commit a criminal offence), the objects of the criminal offence and any evidences. As a result, the police can propose (to the public prosecutor) the temporary measure (seizure) of securing the property that can be confiscated. Where there are more law enforcement services responsible for the criminal and financial investigations, a clear separation of responsibilities and agreement on co-operation and exchange of information is needed.

The public prosecutor guides or directs the pre-trial investigation procedure and the financial investigation as its part. The intensity of co-operation (the extent to which the police inform the prosecutor and the latter's subsequent activities/orders) usually depends on the relations in practice. On the basis of police initiative, the prosecutor can propose investigative measures (house search, access to bank data, etc) to the (investigative) judge, as well as temporary measures to secure the final confiscation - seizure of the property. The prosecutor files an indictment and can propose the confiscation of proceeds during the trial.

During the pre-trial investigation procedure, the (investigative) judge allows investigative measures and seizure of proceeds from crime, based on the prosecutor's proposal. In some countries, the judge can also decide on such measures ex officio.

The court decides on the (final) confiscation in the criminal procedure.

⁵² In cases when the legislation allows extended confiscation and reversal of burden of proof.

⁵³ The legislation determines the conditions and standards of evidence for the measures in the framework of financial investigation and the responsible authority which decides on the measures and executes them.

Beside the legal provisions on responsibilities and roles, the actual relations (initiative, exchange of information, decision making) between the relevant services and institutions have to be taken into account as well.

Intensive co-operation is necessary for a quick and efficient access to data on property and for securing - seizing the property that can be confiscated. In demanding cases it may be useful to establish a task force with the participation of the prosecutor, criminal police and other services (i.e. tax service, the customs and, in the case of suspicion of money laundering, the office for the prevention of money laundering - the financial intelligence unit). In this way, a prompt exchange of information and data is ensured. Co-operation can also be intensified through regular meetings between the police and the prosecutor's office (strategic and operational) or by concluding agreements on co-operation between the police, the customs, tax service and/or any other relevant services.

Seizure of property as an urgent investigative measure requests close and direct co-operation between the police, the prosecutor and the (investigative) judge, who issues the seizure order. An agreement on a liaison judge at the district court, specialised for such orders, can greatly contribute to such co-operation.

The specialisation of criminal investigators and prosecutors is essential for financial investigations.

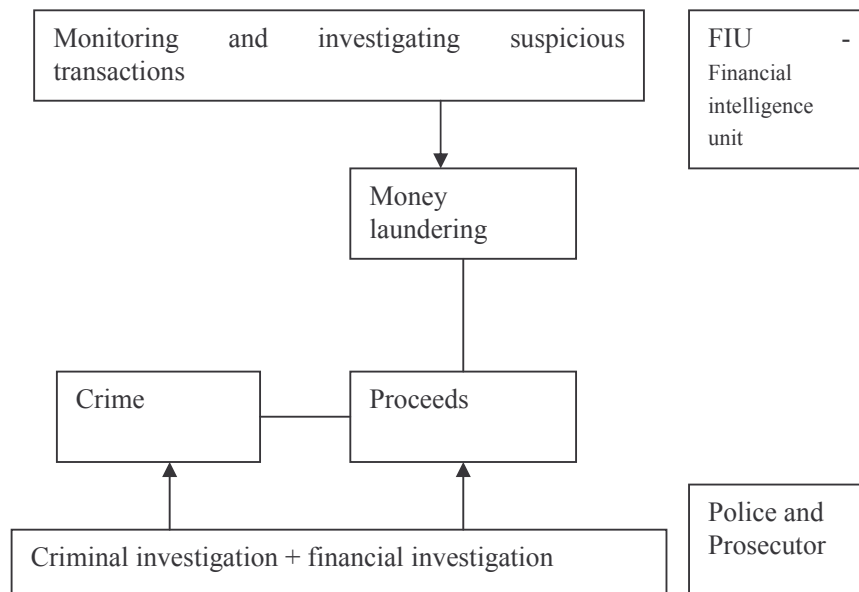
Organisational approaches may differ, from the establishment of specialised units for financial investigation in the police or prosecutor's office, to the establishment of a network of specialised and trained investigators who conduct financial investigations in the framework of their area of responsibilities. In addition, specialised training is also necessary for prosecutors and (investigative) judges.

5.2 PARALLEL FINANCIAL INVESTIGATION AND MONEY LAUNDERING

Measures for the prevention and detection of money laundering will not be covered by this manual, although their purpose is also targeting proceeds from crime. However, there are some differences and common points between such measures and a parallel financial investigation which will be described below.

The aim of a financial investigation is to identify, trace, seize and confiscate proceeds from crime in parallel to a criminal investigation of a criminal offence resulting in a material benefit. The aim of measures for the prevention and detection of money laundering, which are usually conducted by a special financial intelligence unit - FIU, is to monitor and analyse financial transactions and to discover the existence of typologies of money laundering. On the basis of a suspicious transaction, the link with the predicate criminal offence has to be established. Therefore through the supervision of (suspicious) transactions, their illegal origin is to be determined.

The difference can be presented by the following image⁵⁴:



In some cases, financial investigation may also lead to the suspicion of the criminal offence of money laundering. The cases when the FIU is going to be included in the investigation (with their power to access and analyse bank data and to freeze the bank account) will depend on the legal provisions, the existence of elements of the criminal offence of money laundering and other circumstances that may affect the prosecutor's decision.

5.3. ELEMENTS OF FINANCIAL INVESTIGATION

5.3.1 Detecting the perpetrator and the criminal offence (criminal investigation)

⁵⁴ Project PACO Proceeds, Council of Europe, 2001.

When investigating a criminal offence (organised, economic or classic crime) and gathering evidence on the elements of the criminal offence, the perpetrator and co-perpetrators, it is necessary to carry out a parallel financial investigation in cases when the criminal offence results in property benefit.

With regard to the fact that the purpose of a financial investigation is to enable the confiscation of proceeds, it has to be started at an early date enough to prevent eventual perpetrator's disposal of the property. The right time would therefore be after detecting the suspect(s) and before carrying out measures which inform the perpetrator about an investigation against him (e.g. house search). Financial investigation and analysis of transactions may extend the circle of suspects, and in gathering evidence it is also necessary to consider the aims of the financial investigation (e.g. in wire tapping, seizure of documents, etc.).

More detailed instructions on the conditions concerning the introduction of financial investigation can be issued by the police (or the prosecutor's office).

5.3.2 Establishing proceeds from crime

Proceeds can be an **element of a criminal offence** (especially in crimes against the property or in economic crimes). Moreover, direct proceeds constitute evidence of the criminal offence. By detecting proceeds resulting from a criminal offence (e.g. money as payment for drugs, stolen artistic painting or benefit from fraud) and investigating it, co-perpetrators or even organisers of the criminal offence can be detected, as well as third persons from whom proceeds can be confiscated.

Classically, proceeds resulting from the concrete criminal offence under investigation or for which the perpetrator has been convicted are the only property that can be confiscated. The connection between the specific criminal offence and the amount of (concealed) proceeds is relaxed to a certain extent in the case of the criminal offence of money laundering (when first, the amount of a suspicious transaction is identified). On the other hand, there are legal systems where extended confiscation is applied and reversed burden of proof regarding the origin of property. In addition to confiscating proceeds resulting from the concrete (proved) criminal offence, such systems enables the confiscation of additional property, which under specific conditions is assumed to result from a criminal offence.

If the **perpetrator** transfers the proceeds to another person who is aware that they result from a criminal offence, that person can be responsible as the concealer and the proceeds are confiscated. Moreover, it is also possible to confiscate property from third persons who obtained a property benefit (an object) for a non-market value and should or could have known that it might originate from a criminal offence and from perpetrator's close relatives. Proceeds have to be subject to confiscation even in case when they are transferred to a legal entity.

The ways to **establish the amount and type** of illegal proceeds are various. Sometimes, this is clear from the complaint by the injured person (e.g. theft, fraud, robbery). In such cases, an estimate of the damage can be helpful which, however, does not necessarily equal the illegal proceeds.

In organised crime, the amount and type of proceeds are also established through covert investigation measures, by wire tapping, covert tailing, undercover operations. For example, in gathering evidence on drug trafficking, it is established how many drugs have been sold, at what price and to whom. Based on such data, the assessment of the amount of proceeds is prepared. In economic criminal offences, the damage or illegal proceeds are established by the examination of business documents, also in collaboration with the tax service.

In establishing the proceeds, data on the financial transactions carried out by the suspect and other persons are also relevant. As a rule, access to bank data is only possible with a court order and is conditional upon a certain standard of evidence. Through the analysis of payments and money orders, the perpetrator's financial flow and other related persons are established. In analysing financial flows,

it is often necessary to obtain data from abroad. When current data on transactions on a specific bank account are relevant for the investigation, a monitoring order is an important measure, which also enables to immediately prevent a money order from being effected to another account, notably one abroad. In such cases, it is especially important to have good and fast co-operation with the court that issues such orders and the financial institution that implements them.

Both the direct proceeds and the **indirect proceeds** gained by a criminal offence or because of it (e.g. the perpetrator sells a stolen painting, for the money he buys securities, whose value on the stock market increases) are confiscated.

As a rule, **gross proceeds** are counted, without subtracting the costs the perpetrators has had in order to commit the criminal offence (e.g. remaking a vehicle for illegal transport across the State border).

The establishment of proceeds from a concrete criminal offence represents an important basis both for the implementation of temporary measures and for the final confiscation ordered by the court. Some penal procedural laws enable the court to decide on the amount of confiscated proceeds also **at its own discretion** when the amount cannot be accurately established. However, such a decision must be explained, proportionate and based on the findings and assessment of the financial investigation.

When the direct proceeds cannot be confiscated (e.g. a stolen vehicle), the (legal) property corresponding to such proceeds can be confiscated. In the case of a value based confiscation system is this not always a precondition. Freezing/seizing is in that system always possible on all the properties of the defendant.

5.3.3 Establishing property than can be confiscated

Criminal offenders usually hide or conceal direct proceeds from crime, as they constitute evidence. In addition to that, they also conceal their property. Namely, when direct proceeds from a criminal offence cannot be confiscated (found), confiscation of (legal) property corresponding to the value of illegal proceeds is possible. An important part of financial investigation is therefore to establish the property owned by the offender or the persons from whom property can be confiscated.

Money

Data on cash money can be obtained through information, interviews, a house search (hidden places, safes, key to a bank safe, etc.).

In order to obtain data on a bank account, a court order is usually necessary. Access to data as to which bank accounts the suspect has is also relevant.

Data on bank account holders can be found in the central records of the central bank, otherwise it is necessary to verify data with all the banks and financial institutions⁵⁵. Data on the account can also be obtained from income tax or tax returns, profit and loss statements, bank cards or bank statements of account, which can be found during a house search.

Frequent money orders from the bank account to another account (at a foreign bank) may also give rise to suspicion. In analysing bank data, attention also has to be placed on different money laundering techniques. But, although money is the type of property that is most easy to be temporarily secured and stored, other types of the suspect's property also need to be established.

Securities

Central records of the holders of securities are normally kept by the Clearing and Depository Company. The conditions to access such data depend on the national legislation.

Data on ownership of companies that do not list on the stock exchange are evident from the legal entities register (the court), the tax return or the profit and loss statement. The type of registration, data and records are governed by the legislation on companies and tax legislation.

Movable property

Records on vehicles are normally under the competence of the Ministry of the Interior. Attention should also be placed on vehicles that the suspect uses although they are not formally his property. The circumstances of such use should be investigated (leasing, formal ownership by a friend, a partner, etc.). As regards vessels and aircrafts, central records of their owners are normally kept.

Data on ownership of more valuable movable property (e.g. artistic paintings) can be obtained from the insurance companies that ensure such property.

In addition, possession and ownership of movable property can be established during a house search.

Real estate

The source of information is the land register. If the land register does not consist of up to date centrally computer kept records, obtaining data can be more difficult. If the land register is kept by local courts, data should be verified with those courts. Data on ownership can normally also be obtained from the tax service (real estate trade tax, real estate tax).

⁵⁵ Normally the effort should be made to discover the bank accounts of the suspect during the investigation. If this is not successful, it is an international standard that information on bank accounts of a criminal has to be provided (see art. 7 and 17. of the 2005 Convention and Chapters 2.3 and 2.5.1). In some countries the court practice does not allow for such circular query at the moment.

Property abroad

The offenders may also hide (have) their property abroad. Notably in the investigation of criminal offences committed by international crime groups, it is necessary to verify whether the offenders have any property abroad. In such case international police or prosecutors' co-operation is very important. A contact person at foreign police can advise as to what data on property can be obtained from public sources, through police co-operation or by a letter rogatory. Such information can make the acquisition of data considerably easier and faster. The Camden Asset Recovery Inter-Agency Network (CARIN), with EUROPOL as its Secretariat, is an example of such co-operation.

Data on a person's income and property can be obtained from the income tax return (natural persons) or the tax return or the profit and loss statement (companies). For this reason, a good co-operation with the tax service (and proper legal basis) is important in order to access their records.

Financial investigation can also reveal disproportion between the suspect's legal (reported) property and his actual property. This is relevant in legal systems where extended confiscation of proceeds is possible and where the offender has to prove the legal origin of property in order, otherwise the property may be confiscated.

In order to implement financial investigation, interdisciplinary knowledge and knowledge of a wide spectrum of legislation (civil, bank, tax, securities, and companies) is necessary. The existing records and access to data depend on the national legislation, and the above ways to establish property are listed only as an example. Financial investigation is facilitated and made quicker if the necessary records are in place, if they are kept up to date and if quick access to data is provided, which again implies a good co-operation with different institutions.

Being familiar with the rules regarding access to data and contact persons in institutions is therefore of great importance for financial investigators.

5.3.4 Temporary measures for securing the property

The purpose of temporary measures for securing property is to prevent disposal, transfer or hiding of proceeds or the offender's property and to enable final confiscation. The temporary measure for securing property is an essential result of the financial investigation, if legal conditions exist.

The measures are defined in the penal procedural legislation, which in some countries also refer to civil executive legislation (temporary orders).

Seizure

As regards seizing objects, police powers normally cover objects used to commit a criminal offence (instrumentalities), objects that resulted from a criminal offence, and evidence. The police can thus only seize the direct proceeds that have resulted from the criminal offence and the evidence (stolen vehicle, banknotes resulting from a bank robbery, etc.). **The police powers normally do not cover the seizing of legal property corresponding to the value of proceeds (value confiscation).**

Temporary securing order

Temporary securing order is issued by the (investigative) judge upon the proposal by the prosecutor's office (based on the report on financial investigation from the police). The proposal to issue a temporary securing order is given upon the conclusion of a financial (and classic) police investigation, together (or not) with the crime report, and before the institution of court proceedings, when the offender is informed about the evidence burdening him. **This is why it is important for the legislation to enable the issue of an order also during the pre-trial procedure.**

A proposal can also be given before the conclusion of a police investigation, if there is danger of disposal (e.g. the person wishes to send a money order abroad, intends to sell his property, etc.), although care should be taken that the investigation of the criminal offence and gathering of the necessary evidence are not jeopardised by this measure. Careful weighing is especially required in lengthy and more demanding investigations of organised crime.

The conditions, procedure and contents of a temporary securing order are governed by the national legislation. The proposal for temporary securing of property, which results from financial investigation, has to comprise all the necessary elements for the issue of an order.

Normally, the conditions for the issue of an order are as follows:

- probability (or a standard of evidence higher than grounds for suspicion) of the existence of a criminal offence and the resulting proceeds (the amount),
- danger of the offender's disposal of hiding or destroying the proceeds or making seizure impossible in some other way.

The proposal has to include the results of the financial investigation:

- findings and evidence in relation to the criminal offence and the perpetrator (this is normally part of the crime report),
- findings on the type and amount of the illegal proceeds,
- findings on the property that can be seized and proposal as to which property is to be secured and the persons it belongs to, indication as to whether any property has already been seized,
- grounds for the legal conditions for the issue of an order (standard of evidence, danger of disposal)⁵⁶.

⁵⁶ If the legislation allows extended confiscation of proceeds with a reversed burden of proof, additional elements are defined on the basis of which it can be deduced that the offender's property exceeding legally reported property within a certain period results from criminal offences.

Procedural rules

In some project areas participating in the CARPO project, the penal legislation regarding the conditions of ordering temporary measures instructs to apply the rules of the executive procedure.

Recently the procedural provisions of the Slovenian confiscation legislation were challenged at the Constitutional court. The Constitutional Court established its incompleteness and issued an order⁵⁷ repealing the provision of Article 502 of the Criminal Procedure Act stipulating that court decides on temporary securing **ex officio**. According to the Constitutional Court, the Criminal Procedure Act was not in line with the presumption of innocence and with the requirement that the prosecutor bears the burden of statement and proof. Furthermore, it is not in line with paragraph 1, Article 23 of the Constitution, stipulating the impartiality of judges. Article 109 of the Criminal Procedure Act was also repealed, as it did not permit appeal against the decision by the panel on confiscating proceeds (during the trial).

Furthermore, the Constitutional Court established that the provisions of the Criminal Procedure Act defining the conditions and procedure of ordering temporary measures of securing property, its duration and termination, were not in line with the Constitution. The reasons for this establishment were as follows:

- The standard of evidence and the degree of probability that a criminal offence resulting in illegal proceeds has been committed was not defined as the condition for ordering the temporary measure of securing property during the pre-trial procedure;
- The duration of the measure was not temporarily defined, which enabled excessive interference with the right to property;
- The absence of preceding contradictoriness in deciding upon the temporary measure had to be mitigated.

The above deficiencies were eliminated with the amendments to the Criminal Procedure Act⁵⁸.

⁵⁷ Order of the Slovenian Constitutional Court U-I-296 of 20. 5. 2004.

⁵⁸ Act Modifying and Amending the Criminal Procedure Act- ZKP-G, Off. Gaz. no. 101, 11.11.2005.

5.4 HANDLING THE SECURED PROPERTY

The order also contains the provisions on the way of securing the property and on dealing with the secured property. General provisions are governed by the national legislation, but normally the following is possible:

- interdiction to the bank to make certain payments from the bank account,
- interdiction to dispose of and transfer real estate – entry into the land register,
- seizure or interdiction to transfer a vehicle – entry into the registration certificate⁵⁹,
- seizure of movable property.

The measures are carried out by the competent services. The court (or in some countries the prosecutor) bears the responsibility for handling the secured property, although it can assign the task of seizing and storing to a specialised service (if such a service exists). Our opinion is that the solution providing the police to be responsible for handling and storing of the secured property is not the best one.

Depending on the legislation, the seized property may be sold to preserve its value (in case of perishable goods, cars). The money is then kept until the final decision. By a professional management of the seized properties (with the possibility of alienating the seized objects before the final court decision) it will be possible to reduce the cost of the storage to a minimum (and by that generate the largest possible profit).

Some countries have Confiscated Asset Funds from which law enforcement agencies can be financed or are intended for victims of criminal offences.

5.5 DATA ON FINANCIAL INVESTIGATIONS

Records with data on conducted financial investigations and on temporary secured property are necessary in order to keep track of and analyse the activities and to eliminate individual and systemic deficiencies. Furthermore, it is relevant to compare temporarily secured property with confiscated proceeds.

⁵⁹ The court decision on proper measure (seizure OR interdiction to transfer a vehicle) may depend on circumstances which follow the aim: to prevent disposal and to preserve the value of property for future confiscation. The seizure is most efficient in case of a criminal, but when the vehicle(s) are used for legal commercial activity, their seizure might prevent the company to conduct its legal activity. The balance between the aim of securing the property and its consequences has to be considered.

5.6 CONFISCATION OF PROCEEDS

Proceeds are confiscated with a judgement of conviction⁶⁰. The court decides on the confiscated amount and the type of confiscation.

In cases where the proceeds constitute an element of the criminal offence, the court must decide on the confiscation. The prosecutor proposes confiscation during the trial and if the court does not take a decision, this constitutes grounds for appeal. If the legislation allows it, the confiscation is also possible without a judgement of conviction, upon the conclusion of the criminal procedure (e.g. due to the defendant's death or the criminal offence becoming statute barred).

In any case, the confiscation of proceeds is possible if the property has been temporarily secured. Otherwise there have been numerous cases when at the end of the criminal procedure the perpetrator had no property left, as he had disposed of it or hidden it.

5.7 PROPERTY CLAIM BY AN INJURED PARTY

When it is possible to enforce a property claim due to the damages suffered through the criminal offence under the criminal procedure, such a claim has precedence over the confiscation of proceeds. The injured party can file the property claim at the same time as he files the complaint to the police concerning the criminal offence. The court has to decide on such a claim, except in cases when such decision-making would unproportionately prolong the criminal procedure, in which case the injured party is instructed to start a civil action. If the court decides on the claim, the confiscated proceeds are used to pay the damages first and the remainder of the illegal proceeds becomes part of the budget.

5.8 TAXATION OF CRIMINAL PROFITS

Within the financial investigation, the suspect's tax reports for the previous years are analysed. The financial investigation can reveal disproportion between the legal – reported property and the actual property of the suspect.

If extended confiscation or reversed burden of proof is not possible or when the criminal procedure has not resulted in the confiscation of proceeds (due to a lack of evidence, etc.), the important question is whether it is possible to tax the surplus of property. In such a case, the co-operation between the police and the tax service is very important. The inclusion of the tax service in this part of the financial investigation can contribute to a faster data exchange and ensure professional assistance by tax experts. If the criminal profit has not been confiscated within the criminal procedure, this can constitute the basis to tax the “surplus” of property of unknown (illegal) origin in a tax procedure. In coordinating and deciding between the criminal and tax procedure, it is necessary to take into account the probability of a successful criminal procedure and confiscation and statutes of limitation in a tax procedure.

⁶⁰ In some countries, judgement of conviction is not necessary for confiscation of proceeds but there is a special procedure in place (e.g. Ireland).

6. CONCLUSION

Integrated financial investigation is an **essential element** of the strategy of targeting proceeds from crime.

The criminal police and the prosecutor's office play the key role in the implementation of financial investigation in practice. The identification and tracing of proceeds from crime and securing the property for final confiscation is a demanding task which should be conducted in parallel with the investigation of the criminal offence generating material benefit. It requires intense co-operation between specialised police forces (and other law enforcement agencies) and the prosecutor, which is not always the case at present.

There is no other way to get the necessary experience than by **conducting financial investigations**. The first initiative will show many problems, shortcomings and open questions but will also bring the development of practice and expertise to a new stage.

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