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## **CONFERENCE OF THE PARTIES**

**Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)**

### **Thematic Monitoring Review of the Conference of the Parties to CETS No.198 on Article 3 (4), (“Confiscation measures”)<sup>1</sup>**

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<sup>1</sup> Examined and adopted by the Conference of the Parties to CETS No. 198 at its Extraordinary meeting, Strasbourg, 12 May 2021. Updated following the ratification by Lithuania (in 2021), receipt of inputs from the UK (in 2021) and the ratification by Estonia (2023).

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## Introduction

1. The Conference of the Parties (hereinafter: “the COP”), at its 9<sup>th</sup> meeting held in Strasbourg from 21 to 22 November 2017, decided to initiate the application of a horizontal thematic monitoring mechanism for an initial period of two years. The 11<sup>th</sup> meeting of the COP decided to prolong the application of a horizontal monitoring for the next five years (i.e. until 2024). Such review would look at the manner in which all States Parties implement selected provisions of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS no. 198, hereinafter: “the Warsaw Convention”). To that effect, the COP adopted a new Rule 19*bis* of the Rules of Procedures.
2. The COP Plenary at its 11<sup>th</sup> meeting examined and adopted the second thematic monitoring report, which dealt with Article 9(3) as well as with Article 14 of the Warsaw Convention. It decided that the third thematic monitoring would deal with Article 3, (4), Article 7 (2c) and Art. 19 (1) of the Warsaw Convention. The present study deals exclusively with Article 3(4).
3. Subsequently, in November 2019, a questionnaire was circulated to which the States Parties replied by the 14<sup>th</sup> of February 2020. The responses were subsequently analysed by the Rapporteurs, Ms Ewa Szwarska-Zabuska (Poland) and Ms Ana Boskovic (Montenegro) together with the COP Secretariat and the findings were presented at the COP 12<sup>th</sup> plenary meeting (27-28 October 2020). The discussion held during the plenary meeting brought up an issue of interpretation of a scope of ‘serious offence(s)’ within the meaning of this article of the Convention. Whereas several States Parties had different views than the rapporteurs with regard to the scope of application of the reversal of burden of proof, the 12<sup>th</sup> plenary decided to postpone the adoption of the report until this issue is resolved. Consequently, the COP Bureau decided to ask the scientific expert to revise the Interpretative Note on Article 3(4) and provide an interpretation of a scope of ‘serious offence(s)’. The revised Note would then be discussed and agreed by the plenary. Further to this decision, the revised Note was prepared and circulated to all States Parties in April 2021. Subsequently, the report was amended in line with the revised Interpretative Note and also made available to all States Parties in April 2021. Both documents were then discussed and adopted at the extraordinary plenary meeting of the COP held on 12 May 2021. The main findings drawn from these responses are set out in the summary section of the report.
4. This report seeks to establish the extent to which States Parties have legislative or other measures in place to provide the possibility for the burden of proof to be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation in serious offences. The definition of the notion of serious offence for the purpose of the implementation of this provision is left to the domestic law of the parties.
5. The report commences with laying out the scope of Article 3, (4) of the Warsaw Convention and the methodology applied for the review. It then draws conclusions on legislative provisions and their effective implementation and proposes recommendations. States Parties’ submissions are individually analysed and recommendations are made for the respective State Party when applicable. Their submissions are annexed to this report (Annex I).

## Scope of Article 3(4)

6. Article 3(4) addresses the reversal of burden of proof in respect of a serious offence as defined by national law in order to ensure that an offender is required to demonstrate the origin of alleged proceeds or other property liable to confiscation. The paragraph reads as follows: *“Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence 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”*
7. The application of the reversal of proof in Art.3(4) of the Convention intends to add value and increase the effectiveness of confiscations. In absence of such a provision the effectiveness of confiscation measures could be hampered by allegations of perpetrators that the property targeted by competent authorities for confiscation does not result from illicit activity and therefore is not a proceed of crime. In such cases a confiscation might be impossible if the illicit origin or a concrete criminal offence committed by the offender cannot be proven by the competent authorities.
8. With the reversal of burden of proof in place, it is up to the perpetrator to demonstrate the origin of the particular proceeds or other property liable to confiscation. Should this not be proven, the confiscation measures will be pursued, and the proceeds would then be confiscated. The reversal of proof puts the offender in a less favourable position in defending his rights.
9. The Explanatory Report to the Convention provides further interpretation in what Paragraph 4 of Article 3 aims at. It states that Art.3(4) requires Parties to provide the possibility for the burden of proof to be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation in serious offences. The definition of the notion of serious offence for the purpose of the implementation of this provision is left to the national law of the Parties. This possibility is however conditional to its compatibility with the national law of the Party concerned. The conclusion of the Party on this issue shall not be challenged in the course of the monitoring procedure.
10. The Explanatory Report also refers to relevant jurisprudence of the European Court on Human Rights (ECtHR) and states that Art.3(4) cannot be interpreted as an obligation to introduce the reversal of burden of proof in a criminal prosecution to find the offender guilty of an offence. In the case of *Phillips v. the United Kingdom* of 5 July 2001, the ECtHR *“considers that, in addition to being specifically mentioned in Article 6§2, a person’s right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him/her forms part of the general notion of a fair hearing under Article 6 §1. This right is not, however, absolute since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining the rights of the defense.”* In the Phillips case the statutory assumption was not applied in order to facilitate finding the offender guilty of a drug trafficking offence, but to enable the court to assess the amount at which a confiscation order should be properly fixed after a drug trafficking conviction. The ECtHR held that the use of statutory assumptions with proper safeguards (which it found to be in place), in such circumstances, did not violate the ECHR or Protocol No.1 to it.

11. It should be noted that a number of Parties to the Convention used the option provided in Art. 53(4) of the Warsaw Convention for non-application or application only under specific circumstances of Art.3(4). The Reservations and Declaration document<sup>2</sup>, which the COP Secretariat prepares prior to each plenary meeting, also discusses this issue and concludes that *'(only) one third or so of the countries (14 out of 35) do not – partly or fully – accept the principle of reversed burden of proof for confiscation purposes (i.e. Article 3, (4)). This may be seen as quite remarkable, if one looks back to the intensity of discussions on this matter in the last 15 years.'* Moreover, as emerges from the analysis below, even some countries that have issued such Declarations, have introduced legislative measures establishing a reversal of the burden of proof in confiscation procedures or otherwise adhered in practice to some extent to the principles of Art.3(4). Nevertheless, notwithstanding persistent reminders by the COP President and its Bureau to States Parties to reconsider their reservations and declarations with a view to lift them, no changes in this regard have been observed. Accordingly, this report might also serve as an incentive for State Parties to once again give proper consideration if their declarations on Article 3(4) are still in line with their policy objectives in the area of confiscation of proceeds of crime.

12. Declarations made under Article 53 paragraph 4:

**Article 3 (4) Reversal of burden of proof for confiscation (Non-application or only under specific circumstances)**

**Azerbaijan** - *In accordance with Article 53, paragraph 4, of the Convention, the Republic of Azerbaijan declares that it will not apply Article 3, paragraph 4, of this Convention.*

**Bulgaria** - *The Republic of Bulgaria declares that it shall not apply Article 3, paragraph 4, of this Convention.*

**Georgia** – *Georgia declares that the provisions of Article 3, paragraph 4, shall be applied only in relation to the civil procedures of confiscation, in conformity with the legislation in Georgia.*

**Germany** - *The Federal Republic of Germany declares that Article 3, paragraph 4, of the Convention shall not be applied.*

**Greece** - *The Hellenic Republic declares that it will not apply paragraph 4 of Article 3.*

**Italy** - *The Italian Republic declares that it will not apply Article 3, paragraph 4, of the Convention.*

**Republic of Moldova** - *The Republic of Moldova declares that the provisions of Article 3, paragraph 4, shall apply only partially, in conformity with the principles of the domestic law.*

**Poland** - *The Republic of Poland declares that Article 3, paragraph 4, shall not be applied.*

**Romania** - *The provisions of Article 3, paragraph 4 shall apply only partially, in conformity with the principles of the domestic law.*

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<sup>2</sup> See [https://cs.coe.int/team10/cop198-restricted/SiteAssets/SitePages/Reservations%20and%20declarations/C198-COP\(2019\)4\\_ResDecl\\_review\\_EN.pdf](https://cs.coe.int/team10/cop198-restricted/SiteAssets/SitePages/Reservations%20and%20declarations/C198-COP(2019)4_ResDecl_review_EN.pdf)

**Russian Federation** - Pursuant to Article 53, paragraph 4, of the Convention, the Russian Federation declares that it shall not apply Article 3, paragraph 4, of the Convention.

**Slovak Republic** - The Slovak Republic declares that it does not apply the right to require that, in respect of a serious offence or offences as defined by the national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation.

**Slovenia** - The Republic of Slovenia declares that it reserves the right not to apply Article 3, paragraph 4, of the Convention.

**Sweden** - Sweden reserves the right not to apply Article 3(4) with regard to confiscation.

**Türkiye**- Türkiye declares that Article 3, paragraph 4, of the Convention shall not be applied.

**Ukraine** - Ukraine declares that it will not apply paragraph 4 of Article 3 of the Convention.

**United Kingdom** - The United Kingdom declares that it will apply Article 3, paragraph 4, as follows, in accordance with the principles of domestic law:

*If an offender has been convicted of an offence listed in Schedule 2 to the Proceeds of Crime Act 2002 or has a stated pattern or history of offending as set out in that legislation, they are deemed to have a “criminal lifestyle”, and as such are subject to a confiscation regime which requires them to demonstrate the legitimate origin of their property, or have it become liable to confiscation. The court must assume that everything an offender holds, and had held, in the last six years, is the proceeds of crime and so must calculate the value of this property into the amount set on the confiscation order. The court must not make such an assumption however, if it is shown to be incorrect or there would be a serious risk of injustice.*

13. In many jurisdictions, the reversal of burden of proof has been interpreted as a measure contrary to the principles generally applied in criminal legislation, i.e. that seizure/confiscation measures can only be pursued in cases where it is proven by the authorities that a predicate offence is committed and the proceeds originate from a concrete illicit activity for which a conviction was obtained. The reversal of burden of proof under Art.3(4) gives a different prospect to a confiscation regime as it requires the offender to demonstrate the origin of assets. The application of Art.3(4) in a State Party should therefore be consistent with the principles of the respective Parties' domestic laws.
14. FATF Recommendation 4 also refers to this matter and calls countries *to consider* adopting measures that allow proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction-based confiscation), 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. In contrast to Rec. 4 of the FATF Methodology, Art.3(4) requires parties *to adopt* legislative or other measures and is not only to *consider* adopting such measures. In view of that, Art.3(4) – in case no declaration under Art. 53 (4) is made by the Party – provides for mandatory measures to be applied by a Party and thus goes beyond the FATF Rec.4.
15. In this respect, it should be noted that the overall performance of the global AML/CFT network in the confiscation area is currently not very satisfactory. In a recent, internal study by the FATF, the respective Immediate Outcome 8 (“*Proceeds and instrumentalities of crime are confiscated*”), at a global level, achieved only a comparatively modest level of effectiveness.

In particular, 65 % of the FATF countries which had been evaluated by May 2019, achieved a “low” (LE) or “moderate” (ME) level of effectiveness (see graphs below taken from the FATF Risks, Trends and Methods Group 2019 paper ‘*CROSS-BORDER CONVICTION-BASED ASSET RECOVERY*’). The ratings achieved by MONEYVAL countries are even less satisfactory - the percentage of those which achieved ‘moderate’ or ‘low’ effectiveness is higher – 90% of jurisdictions. Only two MONEYVAL jurisdictions evaluated<sup>3</sup> so far have achieved substantial effectiveness (SE) rating and none has achieved high effectiveness (HE).



16. Whereas it is recognised that Immediate Outcome 8 contains many aspects on confiscation and does not require countries to introduce the reversal of burden of proof (and thus one should be careful to draw general conclusions), an overview of the COP States Parties which have so far been evaluated by either the FATF or MONEYVAL reveals that States Parties which had implemented Article 3(4) of the Warsaw Convention, had overall performed better under this immediate outcome. Hence there appears to be an incentive for the application of Article 3(4) in national law for those States Parties which have not yet done so, in view of improving their overall performance on the effectiveness of their confiscation regimes.
17. It also needs to be noted that the confiscation measures under Art. 3(4) should only take place with respect of serious offences as defined by national law. The requirement of a serious offence is – as a rule – in general defined elsewhere in the legal criminal system of a State Party and applicable throughout criminal law. It constitutes an objective element of the severity of the offence, which justifies more severe punishment or other consequences in the Party’s legal system. The way the concrete offences are defined by States Parties within their criminal legislation remains their decision (see also paragraph 9 above).
18. The COP, at its 10<sup>th</sup> plenary in 2017, adopted the Interpretative Notes which, inter alia, discuss the good practices in applying Article 3(4). More precisely, the Notes indicate some good practices by jurisdictions evaluated by the COP up until 2017. Specific extracts on countries’ practices were emphasized. The Notes were revised in 2021 to better reflect the notion of a ‘serious offence’. The Note emphasises that the material scope of application of the provision in Article 3 (4), is based, inter alia, on a notion of “serious offence” which is referred to in the same paragraph but not included in the list of definitions in Article 2 of the Convention. This reference is separate, and therefore different in principle, from that of “categories of offences” in Article 3 (2), as subject to the general mandatory confiscation regime. In order to properly qualify the notion of “serious offence” for the purposes of Article 3 (4) it is important to

<sup>3</sup> This statistical data does not include two MONEYVAL members which evaluation process was carried out by the FATF which these jurisdictions are also members of FATF (Israel and the Russian Federation).

underscore that the confiscation mechanism based on the reversal of the burden of proof is more rigorous and stringent than the ordinary confiscation regime stipulated in Article 3 (1 and 2). The two may be considered to be in a relation of special to general. This explains the differences, under several important aspects, between the legal regimes respectively applicable under the Convention.

19. In fact, the Convention sets different requirements and scopes in relation to these two types of confiscation. Providing for an “ordinary” confiscation regime is mandatory, no exceptions or derogations are possible and it should be applied to a minimum set of offences as specifically listed in the Appendix to the Convention. The “reversed burden of proof” confiscation regime, on the other hand, can be declared as not applicable by Parties in its entirety (based on Article 53 (4)) or only applied “to the extent that such a requirement is consistent with the principles of its domestic law”. Article 3 (4,) therefore, provides for a particular scope for this type of confiscation: it does include a minimum set of mandatory offences (consistently with the option for the Parties to limit the application based on domestic legal principles), as is the case for the general confiscation under paragraphs 1 and par. 2, but is focused on a narrower scope of “a serious offence or offences” as defined by national law.
20. As a consequence, Parties are not bound under Art. 3 (4), by the categories of offences listed in the Annex to the Convention as a minimum that should be covered but can apply the special confiscation regime to one or more “serious offences”, “as defined by national law”.
21. Mindful of the aforementioned principles and guidance, the rapporteurs also considered the specific language used in the laws of several jurisdictions, details of which are further provided in the ‘Country Review’. In particular, legislation in some States Parties provides that the offender has to *render plausible* that the proceeds were of a legal origin rather than *demonstrating* this fact, the latter being the language used in the Convention. The rapporteurs examined this fact against the Explanatory Report, the Interpretative Note as well as the previous COP country specific report and concluded that this should not be considered as a deficiency. Therefore, *rendering plausible that the proceeds are legally obtained* is deemed to be in line with the requirements of Article 3(4) of the Convention.

## Methodology

22. The ‘Questionnaire for the Transversal Monitoring of States Parties’ Implementation of Article 3 (4) of the CETS No. 198’ (see Annex III) requested information on the following two questions concerning Article 3(4):
  - a) Are there legislative or other measures in place in respect of a serious offence or offences as defined by national law requiring an offender to demonstrate the origin of alleged proceeds or other property liable to confiscation (to the extent that such a requirement is consistent with the principles of domestic law)?
  - b) If your country has entered a declaration in respect of Article 3(4) under Article 53(4) a, b or c please provide the terms of the declaration made.
23. Delegations were asked to provide provisions of their domestic legislation dealing with these issues. In addition, they were encouraged to support their response with case studies or any other relevant information, including available statistics on the matter. The Rapporteurs and the COP Secretariat used previous country specific reports adopted by the



COP/MONEYVAL/FATF, the Explanatory Report and the revised Interpretative Notes to prepare the analysis of States Parties responses (see also paragraphs 13, 14, 16 and 18 above).

24. This horizontal review includes information on 38 COP States Parties. The replies provided by the State Parties in form of the Questionnaires sent to them were fully taken into account and the legal provisions of the domestic law quoted therein were analysed and used to support the conclusions on the implementation of reversal of burden of proof.

## Summary

25. The assessment on implementation and application of Article 3(4) reveals several general findings. State-specific conclusions are included in the respective analysis of each State Party's compliance under 'Country Review' chapter.
26. The questionnaire inquired whether or not the States Parties had adopted such legislative or other measures to allow for a reversal of burden of proof in case of serious offences. It also inquired whether or not the country has entered a declaration in respect of Art. 53 (4) a, b or c and to provide for the terms of the declaration made.
27. The following general observations can be made with regard to the 38 States Parties which have responded:

Sixteen States Parties (Azerbaijan, Bulgaria, Georgia, Germany, Greece, Italy, Poland, Republic of Moldova, Russian Federation, Slovak Republic, Romania, Slovenia, Sweden, Turkey, Ukraine, UK) made a declaration under Art. 53 (4) not to apply – fully or partially – Art. 3 (4) of the Convention. This notwithstanding, eight of these countries reported that they had measures in place to reverse the burden of proof. These States Parties are: Georgia, Germany, Italy, Poland, Russian Federation, Slovenia, Ukraine and UK.

Other than these, nineteen other countries (Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Estonia, France, Hungary, Latvia, Lithuania, Malta, Montenegro, the Netherlands, North Macedonia, Portugal and Serbia) apply Article 3(4). Although the analysis provided in the 'Country Review' chapter goes further into each State Party's application of Art.3(4), as a general conclusion, it can be stated that the scope of application of this paragraph differs significantly among these Parties. The majority of States Parties apply the reversal of burden of proof through so called extended confiscation<sup>4</sup> in criminal proceedings. Other States Parties which apply Art.3(4) do it through confiscation in civil proceedings (also known as confiscation *in rem*<sup>5</sup>). Whereas the Convention leaves it up to the Parties to apply the reversal of burden of proof the way they seem appropriate and in line with the fundamental principles of their national legislation, some limitations to full application of Art.3(4) among different Parties are observed. These limitations, for example, restrict the application of the reversal of burden of proof to cases when there is a risk that

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<sup>4</sup> Extended confiscation is a term used to reflect the ability to confiscate assets (in criminal proceedings) that go beyond the direct proceeds of a concrete criminal offence for which the defendant is prosecuted.

<sup>5</sup> Confiscation *in rem* takes place in a civil court. An *in rem* action should not require previous criminal conviction against an individual in order to confiscate his/her assets - prosecutors must only prove that the property in question derived from an illegal activity.

property may be lost, alienated or facilitated by criminal activity (Albania); or condition the confiscation in civil procedure by previous criminal conviction (Georgia).

Several States Parties also reported that their systems featured some elements of Art.3(4) – these are Republic of Moldova, Monaco, San Marino and Spain. Whereas the rapporteurs acknowledge that these Parties do include some aspects of reversal of burden of proof in their legislation/case law, yet the current legislative provisions or the jurisprudence presented do not implement this principle to a satisfactory extent. These Parties are, therefore, encouraged to implement the recommendations made (see under ‘Country Review’) and thus enable their jurisdictions to fully comply with Art.3(4).

## Effective implementation

28. Of those States Parties which transposed Article 3(4) (i.e. reversal of burden of proof principle) in their legislation, fourteen State Parties (Albania, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Georgia, Germany, Hungary, Latvia, Montenegro, the Netherlands, North Macedonia) informed the COP on application of this principle either through statistics (Albania and Montenegro) or case law (Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Estonia, Georgia, Germany, Hungary, Latvia, the Netherlands, North Macedonia). Some jurisdictions, although not having the reversal of burden of proof the way it is foreseen by Art.3(4), provided case law which explains how their confiscation regimes function in practice (Republic of Moldova, San Marino).

## Recommendations and follow-up

29. A number of general recommendations can be drawn from the summary findings above. States Parties are invited to follow-up and ensure proper implementation of these recommended actions. While country-specific recommendations are included in the individual country-analysis below, both the general and the country-specific recommendations should be considered when adopting legislative or other measures to further implement the provisions of the Warsaw Convention. States Parties should be invited to inform the COP at its future Plenaries (as decided by the COP) of any developments and measures taken regarding the issues addressed in this review.

30. With the aim to promote a harmonised approach across the COP States Parties, it is recommended to consider the following actions depending on States Parties’ level of application of Art.3(4):

- a) States Parties that declared that they would not, in full or in part, apply Art.3(4), are invited to give proper consideration whether their declarations are still needed (Azerbaijan, Bulgaria, Georgia, Germany, Greece, Italy, Poland, Republic of Moldova, Romania, Russian Federation, Slovak Republic, Slovenia, Sweden, Turkey, Ukraine and UK). In particular, the States Parties which, despite declarations made, apply Art. 4(3) either through the legislation or case law, are encouraged to consider withdrawing their declarations. In fact, these States Parties should not exclude such legislative measures to be established (by declarations made under Art. 53 (4) a, b or c) if the reversal of burden of proof has proven to be consistent with the principles of their domestic law (Georgia, Germany, Italy, Poland, Russian Federation, Slovenia and Ukraine).

- b) States Parties that have not made declarations and which still do not have reversal burden of proof provided for in their legislation (including where the highest judicial authorities confirmed that this principle cannot be applied through the existing laws), are invited to adopt legislative or other measures to establish a reversal of burden of proof for serious offences in line with Art.3(4) of the Warsaw Convention and to the extent which is consistent with the principles of domestic law ( Monaco, San Marino and Spain).
  - c) States Parties which introduced Art.3(4) through their legislation/case law, but still impose certain limitations in its applications, are invited to implement the specific recommended actions provided in the 'Country Review' chapter (Denmark, the Netherlands, Albania, Georgia);
31. In addition, and with the aim to improve the application of Article 3(4), States Parties which introduced Article 3(4) in their domestic legal systems are invited to consider:
- d) Developing case law and providing specific guidance to law enforcement/judiciary on national/international good practices in applying the principle of reversal of burden of proof; and
  - e) Raising awareness/tailoring and providing specific training to law enforcement and judiciary on implementation of reversal of burden of proof in practice.
32. States Parties are encouraged to implement the reversal of burden of proof using implementation tools appropriate to their domestic framework - respective legislative measures could be adopted/further aligned by amending the criminal and/or criminal procedure codes or any *lex specialis* which deals with confiscation matters. Non-legislative measures may focus on trainings for targeted audience, publication of specific guidance and examining good practice of jurisdictions which already applied Article 3(4).
33. Bearing in mind its long-standing practice to provide and then review the implementation of the recommended actions, the COP may decide to follow-up on the recommendations following from this analysis.

## Country review

### Albania

Albania was assessed by the COP in 2011. The report notes that *'broadly, confiscation and provisional measures appear to be well implemented. The Albanian authorities are encouraged to maintain detailed statistics and take measures to raise the effectiveness of the requirement set out in Article 3(4) of the CETS N° 198.'* Albania adopted the Law 10192, dated 03.12.2009 "On the Prevention and Punishment of Organized Crime, Trafficking, Corruption and Other Crimes through Preventive Measures against Property (also known as "Anti-mafia law") which introduced the reversal of burden of proof, The law reduced the standard of probability from the generally applicable standard of criminal proceedings. In a confiscation procedure the burden of proof concerning the acquisition of the assets in a lawful manner is on the person against whom the confiscation of assets is sought (Article 21). Reversed burden of proof applies to the designated category of offences covered by the mentioned law. It is also important to note that MONEYVAL 5<sup>th</sup> round MER also discusses the confiscation regime in the country stating that *'Albania has introduced both the traditional conviction-based confiscation regime under the CC together with the respective provisional measures in the CPC and, on the other hand, the relatively new non-conviction-based confiscation and provisional measures regime as provided for by the Anti-Mafia Law...The Anti-mafia Law, which was until recently (August 2017) limited to a set of organised and other serious criminal offences (including ML), extends the scope of the potential asset recovery by introducing reverse burden of proof and the application of civil legal standards. The two regimes provide a robust legal framework and an adequate legal basis for effective seizures and confiscation.'*

For the non-conviction based confiscation, the burden of proof rests initially with the prosecutor who must prove to the court (indictments, on which the reasonable suspicion is based) that:

- a) The person is involved in criminal activity;
- b) The person owns a disproportionate wealth or income in relation to the level of income or profits from a lawful activity declared and not claimed by him;
- c) There is a risk that property may be lost, alienated or facilitated by criminal activity;

If those conditions can be proven by prosecution, there is a reversal of the burden of proof and the offender has to prove the legitimate origin of the assets. The application of the law also extends under certain conditions to the property of relatives (spouse, children, ancestors, descendants, brothers, sisters, cohabitant). In short, relatives have the burden of proving that the assets are owned solely by them, obtained from legitimate sources and are not indirectly owned by the suspected persons.

Albania also informed the COP of a case discussed and decided by the Constitutional Court (Decision No. 4, dated 23.02.2011), which rejected a request to declare the reversal of the burden of proof as unconstitutional.

Albania provided statistics on sequestration and confiscation of property decided by courts between 2015 and 2019, showing about 22 confiscation cases in those years. It is, however, not clear how many of these cases include reversal of burden of proof. On the other hand, the MONEYVAL 2018 MER criticized Albania when discussing the effectiveness in applying the reversal of burden of proof stating that *'the actual scope of the 2017 amendments (and particularly what actual impact the application of the CPC rules instead of the civil procedure might have) still*

*appeared unclear to some practitioners during the on-site visit which calls for further efforts in training and awareness raising in this field.'*

### Conclusion/Recommendations

The Albanian legal system provides for a mechanism of the reversal of proof and derives at cases based on this.

However, the criterion "There is a risk that property may be lost, alienated or facilitated by criminal activity", which has to be proven by the prosecutor seems to limit the effectiveness of confiscations. Albanian authorities are recommended to consider abolishing or amending this criterion with a view to increase effectiveness.

### Armenia

The COP assessed Armenia in 2016. The assessment report concluded that the obligation to implement Art. 3 (4) remains. The report also determined that the argument raised by the Armenian authorities that the reversed burden of proof was contrary to the principle of the presumption of innocence as set out in the Constitution and the Criminal Procedure Code (CPC) should not hinder the implementation of Art. 3(4). The country had not made a declaration concerning the non-application of Article 3(4) upon ratification of CETS No 198,

The law "On Civil Forfeiture of Illegal Assets" was adopted by the Armenian Parliament on 16 April 2020. The law entered into force on 23 May 2020. Article 20 of the law provides that assets liable to confiscation must pass a process at the civil court. Furthermore, Article 22 of the Law establishes the principle that assets challenged before the court are of an illegal origin. In other words, the assets subject to forfeiture are deemed to be illegal, unless proven otherwise.

Under the newly adopted legislation the court may decide to forfeit the assets if the defendant does not prove the legal origin of the latter, based on the presumption referred in Article 22 of the law. Given that the law has entered into force May 2020 no case law is available at the moment. Whilst the rapporteurs find that Armenia now has a solid legal basis to implement Art.3(4) of the Convention, the application of the new legislation and developing of the case law will further demonstrate how the LEAs and judiciary interpret the afore-mentioned provisions.

### Conclusion/Recommendations

Armenia has taken legislative measures to implement Article 3(4) in its domestic legislation.

Armenian authorities should provide training to the LEAs and judiciary on application of the law "On Civil Forfeiture of Illegal Assets" and also develop case law and consider keeping statistics on cases which include the reversal of burden of proof/civil confiscation.

### Austria

Whilst Austria has not entered a declaration in respect of Article 3(4), the authorities in their responses to the Questionnaire, advised that the reversal of the burden of proof would not be considered consistent with the principles of domestic law. On the other hand, the Austrian Criminal Code provides for extended confiscation – relevant provision herewith states that if an offender fails to demonstrate the licit origin of assets that have been acquired in temporal connection with the commission of the offences of ML, criminal association or terrorist offences

or other serious offences, such assets have to be declared forfeited (§ 20b, paragraph 2 of the Criminal Code). This provision provides basis for application of Article 3(4). Little information was provided to further substantiate application of this legal provision. In addition, no case law illustrating successful confiscation in cases where offenders could not prove the legal origin of their proceeds were provided by the country.

#### Conclusion/ Recommendation

Based on the information provided by Austrian authorities, extended confiscation, as provided by the Austrian criminal legislation, sets up a possibility for the offender to prove the origin of the assets and thus allows for reversing of a burden of proof. No information provided on the application of extended confiscation in practice, making it impossible to conclude on its effectiveness.

#### **Azerbaijan**

There are no legislative or other measures in the Republic of Azerbaijan to require that, in cases of serious offences, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation.

In accordance with Article 53, paragraph 4 of the Warsaw Convention, the Republic of Azerbaijan declared that it will not apply Article 3 (4).

#### Conclusion/Recommendations

Republic of Azerbaijan declared that it will not apply Article 3, paragraph 4(4), of the Convention. It is recommended that Azerbaijan considers if it is still necessary to declare non-application of Art. 3(4). Accordingly, the authorities are invited to consider adopting legislative measures which would allow for the reversal of burden of proof.

#### **Belgium**

The 2016 COP assessment report on Belgium concluded that the Belgian legal system and the case law are consistent with Article 3(4) of the Convention. The Belgian Criminal Code (Article 43 taken in conjunction with Article 42) stipulates that the confiscation arrangements must be applied to all categories of offences. Relevant case law was also discussed in the 2016 report (Brussels Court of First Instance, El Hayek case of 29 June 2016) which was then approved by the ECtHR confirming that the application of the reversal of burden of proof by the local court was lawful. Other cases presented confirmed that the apportionment of the burden of proof established by the courts is such that, once the prosecution has produced serious and concrete evidence of the unlawful origin of the assets or property in question, it becomes the accused person's responsibility to supply convincing evidence of their lawful origin.

In their responses to the 2020 questionnaire, the authorities reiterated arguments discussed when the 2016 report was adopted: i) Article 43quater2 of the Belgian Criminal Code requires suspects to make it plausible that the origin of assets is lawful; ii) this provision establishes a division of burden of proof between prosecution and accused - it is for the prosecution to show that there is a significant difference between the financial value of assets obtained lawfully and that of assets obtained in practice, having regard to the accused person's income, when there is serious and concrete evidence that these assets are the proceeds of the offence of which he or she has been



convicted or of identical offences, and that the accused person has been unable to provide a plausible alternative explanation. In addition, quarter 3 of the same article states that the court may challenge the origin of the property of a convict acquired in last five years which appear not to be of a legal origin (so called 'extended confiscation'). De facto, the reversal of burden of proof is applied in these hearings too.

### Conclusion/Recommendations

The Belgian legal system provides for reversal of burden of proof. The case law presented and discussed when the 2016 COP assessment report was adopted confirm that Belgium legislation and the way it is applied in practice are consistent with Article 3(4) of the Convention.

The authorities are encouraged to continue developing case law and consider keeping statistics on cases which include the reversal of burden of proof.

### **Bosnia and Herzegovina**

Bosnia and Herzegovina (BiH) was assessed by the COP in 2015. The report concluded that, at both - entities' and state levels, the concept of extended confiscation was introduced which provides for a splitting of burden of proof between the judiciary and the perpetrator in relation to some offences. In such cases, if the prosecutor provided sufficient evidence to reasonably believe that the property was acquired by committing criminal offences, and if the perpetrator fails to prove that the property was acquired in a lawful manner, the court may issue a confiscation order.

In addition, the Criminal Code of BiH provides for a possibility to pursue the confiscation in civil proceedings – the CC of BiH states that “*In case the conditions laid down by law, for the forfeiture of proceeds, income, profit or other benefits from proceeds, in criminal proceedings, are not fulfilled, the request for forfeiture, of the same, may be filed in a civil procedure*”.

The authorities provided, in their responses to the 2020 questionnaire, numerous cases demonstrating the application of reversal of burden of proof. These cases concern application of 'extended confiscation' as provided by the law, by entities' and by state's courts. The judgements explicitly state that the confiscation was justified given that the perpetrator failed to prove the legal origin of the assets.

### Conclusion/Recommendations

Bosnia and Herzegovina applies the principle embedded in Article 3(4) of the Convention. The authorities are encouraged to continue developing case law and consider keeping statistics on cases which include the reversal of burden of proof.

### **Bulgaria**

Bulgaria has made a declaration under Art. 53 (4) of the Convention not to apply Art. 3(4). The authorities, in the responses provided, state that the Bulgarian Criminal Procedure Code requires the prosecution and the investigative bodies to prove the accusations as well as the illegal origin of assets. In cases which are actionable by a complaint of the victim – the burden of proof lies with the private complainant/plaintiff.

In 2018, Bulgarian Parliament adopted *the Law on Combating Corruption and Illegal Assets Forfeiture* establishing the Commission for Anti-Corruption and Illegal Assets Forfeiture

(CACIAF). The law regulates the civil forfeiture proceeding, which are carried out without a prejudice to eventual other criminal or administrative proceedings against the person under examination. Person whose property is challenged in line with the provisions of this law must prove the legitimate origin of the assets under scrutiny. This non-conviction based confiscation by way of civil proceedings targets the assets which are reasonably presumed to be the proceeds of unlawful conduct when criminal proceedings against a person have been brought or an administrative violation of at least € 25 000 has been committed. The definition of "unlawfully acquired assets" is based on a disproportion between the assets of a person and his/her net income which is in excess of BGN 150 000. An enforceable criminal conviction is not a pre-condition for the forfeiture of assets.

According to Article 108 of the law, the examination shall commence where a person has been accused of one of the criminal offences listed under this article, including the offences of money laundering (Art. 253 of the Criminal Code of the Republic of Bulgaria) and terrorism financing (Art. 108a, paragraph 2 of the Criminal Code).

### Conclusion/Recommendations

Bulgaria has made a declaration not to apply Art. 3 (4). Given that the country has taken steps to introduce the civil confiscation regime, which, although indirectly, introduces the reversal of the burden of proof, it is recommended to the authorities to consider if it is still necessary to keep the declaration. Accordingly, the authorities are invited to develop case law on implementation of the civil confiscation regime.

### Croatia

Croatia was assessed by the COP in 2013. The report reads as follows: *the Criminal Code regulates also the extended confiscation of pecuniary gain. In this case, if the perpetrator had or has property which is disproportionate with his/her incomes (this disproportion between the incomes and property shall be shown by the State Attorney's Office) it will be presumed that all the property of the perpetrator derives from criminal offences, unless the perpetrator makes it credible that its origin is legal (Article 78 CC). Thus, the burden of proof is divided between the state attorney and the perpetrator. In fact, when the State Attorney's Office proves that the property of the perpetrator is not proportionate with his/her incomes, the burden of proof of the credibility of legal origin of the property is transferred to the perpetrator. The entire property of the perpetrator is taken into consideration, the one s/he has and the one s/he has ever had and it is compared with his/her incomes in order to determine whether there is proportion between the property and incomes. Moreover, it is also envisaged the confiscation in cases of mixed legal and illegal acquisition of property. Pecuniary gain may be confiscated from a member of the family regardless the legal basis by which it is in his/her possession and regardless of whether s/he lives in the same household with the perpetrator. Pecuniary gain may be confiscated from the person who acquired pecuniary gain in good faith if s/he does not make credible that s/he has acquired it at a reasonable price.* In short, Art. 78 (2) of the CC puts the burden to make the legitimate origin plausible on the perpetrator. In addition, the report states that specific provisions related to provisional measures and confiscation are applicable in the context of the offences investigated by USKOK (special prosecutor's office for organized crime and corruption), both under the Criminal Code and the USKOK Act. The USKOK Act covers procedures for the mandatory seizure of instruments, income or assets resulting from the list of offences which fall within USKOK's competence (including the listed forms of ML offences and other serious offences

Taking into account the aforementioned provisions, it is concluded that Croatia applies Art.3(4).



### Conclusion/Recommendations

Croatia does have legislative measures in place for the reversal of burden of proof. A case example was presented to demonstrate how the relevant provisions are applied in practice. The authorities advised that the afore-mentioned provisions are frequently used by LEAs and prosecution (i.e., USKOK). The country is recommended to follow the development of case law and raise awareness among competent authorities on how the reversal burden of proof should be used.

### Cyprus

Cyprus Law on the Prevention and Suppression of Money Laundering and Activities provides specific provisions on confiscation (Article 7). Although the law does not specifically indicate that the accused should prove the legal origin of the assets concerned, it stipulates that the court may, *for the purpose of determining whether the accused has acquired proceeds from the commission of illegal activities or of a money laundering offence and of assessing the value of these proceeds, assume, unless the contrary is proved under the circumstances of a case, that- (a) any property acquired by the accused after committing the said illegal activities or the said money laundering offence or transferred into his name at any time during the last six years prior to the commencement of criminal proceedings against him, constitutes proceeds, payment or reward from the commission of illegal activities or of a money laundering offence; (b) any expenditure incurred by the accused during the above period was met out of proceeds of the accused from illegal activities or the commission of a money laundering offence or payments or rewards made to him in connection with illegal activities or of a money laundering offence committed by him.*

As a matter of fact, the law enables the court to enforce so called 'extended confiscation' and it is assumed that the only way to avoid such measure would be the action of the accused to prove the legal origin of the assets concerned. In addition, MONEYVAL 5th round MER (2019) also concludes that the country has 'a value-based confiscation regime, extended confiscation, presumptions which reverse the burden onto the offender, and also the provision for non-conviction based civil forfeiture in limited circumstances.'

The 2019 MONEYVAL MER, when discussing the AML/CFT law (which, as noted above, governs confiscation and consequently the reversal of burden of proof), confirms that the law applies an all crimes approach. Furthermore, under R.4 of the 2019 MER, it is stated that *Section 6 provides that where a court has convicted a person for a prescribed offence (defined in sections 1 and 3 as "laundering offences" and "predicate offences"), then before sentencing it shall proceed with an inquiry in order to determine whether the accused acquired any proceeds from the commission of illegal activities or a ML offence.*

The law imposes no specific limitation to confiscation of proceeds from any criminal offence.

Cyprus noted, in their responses that case law exists to confirm that the principle of reversal of burden of proof is applied but that it was not available in English.

### Conclusion/Recommendations

Cypriot legislation provides for the reversal of the burden of proof. It is recommended that Cyprus continues to develop case law and raise awareness among competent authorities on how this instrument should be used.

## Denmark

In their responses to the 2020 questionnaire, the Danish authorities referred to Section 76 (a) of the Danish Criminal Code, which states that the property owned by a person found guilty of a criminal act may, *inter alia*, become subject to confiscation in full or in part where:

1. the act is of such nature that it may generate substantial proceeds; and
2. the act is punishable by imprisonment for at least six years according to law or is contrary to the legislation on controlled substances.

Property acquired by the offender's wife or cohabitant as well as the property transferred to a legal entity may also be subject to confiscation under conditions specified by Section 76 a (2&3) of the law.

No confiscation can be ordered if the relevant person renders probable that the property was acquired lawfully or with lawfully acquired funds.

Danish authorities advised that the burden of proof falling on the offender *should not be interpreted too strictly*. This means that the offender is only required to render probable that the property was acquired lawfully before the burden of proof reverts to the prosecution. In addition, there is no legal definition of the term "probability of lawful acquisition". This is decided on a case-by-case basis. The authorities presented several cases in which the offenders failed to prove the legal origin of the assets, which then were confiscated by the court.

### Conclusion/Recommendations

Denmark's legislation indirectly provides for the reversal of the burden of proof. In other words, the confiscation cannot be executed if the offender demonstrates/renders probable that the property was acquired lawfully. As a consequence, in the event of such demonstration of probability (the concrete meaning of which is subject to the interpretation of the judiciary on a case-by-case basis), the authorities would have to prove that the proceeds were generated by illicit action. Therefore, it could be concluded that the reversal of burden of proof is, to some extent, transposed, in the Danish legislation, and that there are cases in practice where this principle was de facto applied. Danish authorities are invited to consider amending the legislation to better reflect the requirements of Article 3(4) of the Convention.

## Estonia

Estonia ratified CETS No.198 (hereinafter the Convention) in September 2022, and the latter entered into force in January 2023.

In relation to Article 3(4), Estonia declared that it is only applied to offences specifically provided for in its domestic law. The substance of this declaration is related to the fact that extended confiscation cannot be used for all types of crime, thus there is no 'all crimes approach' available for this specific confiscation mechanism. Only the offences listed in the Estonian criminal legislation could be pursued for the purposes of extended confiscation.

In their responses to the 2023 questionnaire, Estonia referred to its Penal Code (Chapter 7, article 83<sup>2</sup>), which provides for a mechanism to enable confiscation where the offender is required to demonstrate the lawful origin of the alleged proceeds or other property "*when the difference*

*between the legal income and financial situation, expenses or the living of the person or another fact gives reason to presume that the person has acquired the assets through the commission of the criminal offence or for account of these assets".* Such formulation allows for the possibility that the burden of proof is reversed from prosecution to offender regarding the lawful origin of alleged proceeds or other property liable to confiscation. The application of extended confiscation is limited to around sixty offences, including terrorist financing. The list of offence includes all those from the Appendix to the Convention, with the exception for forgery and counterfeiting and piracy of products.

### Effective implementation

Estonia provided case law illustrating successful confiscation in cases where, pursuant to Article 83<sup>2</sup>, offenders could not prove the legal origin of their proceeds. The country presented case examples illustrating extended confiscation amounting to a value of approximately 260 000 EUR (cash and platinum plates) in 2017, and 1,24 million EUR (cryptocurrency, bank accounts, jewelry and other luxury items, real estate, vehicles) in 2022.

### Conclusion/Recommendations

The Estonian legislation provides for a reversal of the burden of proof. The authorities are encouraged to take stock at regular intervals of the outcomes of application of this provision, and where appropriate take any additional non-legislative measures (training, specific guidance, etc.) to raise awareness and develop the competent authorities' knowledge on the practical aspects of implementing the reversal of the burden of proof and judicial practice.

## France

French authorities reported that their legislation, in principle, differentiates two 'categories' with regard to confiscation:

The first one applies if the minimum penalty for the predicate offence is one year or more, a confiscation is possible, but the origin of the property to be confiscated has, as a rule, to be proven by the state authorities (l'article 131-21 du code pénal (CP) '*..... pour toute infraction punie de plus d'un an d'emprisonnement*') The burden of proof in such cases lies with the authorities.

Secondly, in very serious cases, where the imprisonment is possible for 5 or more years or in enumerative serious cases like terrorist offences, (enlarged confiscation of assets) confiscation is facilitated by a reversal of the burden of proof (article 131-21 alinéa 5 CP and article 131-21 alinéa 6 CP).

Looking into these provisions, the rapporteurs are of the opinion that they provide for reversal of the burden of proof, albeit limitation imposed with regard to the category of offences it covers. On the other hand, the French authorities advised that the five-year threshold set by the fifth paragraph of Article 131-21 of the Penal Code is very often reached when offences punishable by three years' imprisonment feature aggravating circumstances.

No case examples and no statistics were provided by France on application of (articles 131-21 alinéa 5 and article 131-21 alinéa 6 of the Code Pénal).

### Conclusion/Recommendations

French legislation includes the reversal of burden of proof.

It is recommended that France develops case law and raises awareness among competent authorities on how this instrument should be used.

## Georgia

Georgian authorities advised that their legal system provides two mechanisms of property confiscation: i) confiscation in criminal proceedings (article 52 of the Criminal Code of Georgia) and ii) confiscation in civil procedures (Chapter XLIV<sup>1</sup> of the Civil Procedure Code).

Criminal procedures provide for the confiscation of instrumentalities and proceeds of crime (Article 52 of the Criminal Code of Georgia). In criminal proceedings the burden of proof of illegal or undocumented origin of the property lies with the authorities/prosecution.

As to the civil proceedings, in line with the Civil Procedure Code, confiscation is applicable when a person convicted for some specific crimes or his/her family member, close relative or associated persons allegedly own illegal or undocumented property. With regard to civil confiscation procedures, offenders or other persons who are in a possession of a property concerned, are required to demonstrate the origin of proceeds subject to confiscation. Thereby the burden of proof is reversed.

In civil confiscation proceedings in Georgia, the person has to be convicted in criminal proceedings for predicate offences. Although this might limit the effectiveness of the overall confiscations regime, the rapporteurs conclude that Georgian legislation provides for legislative measures under national law requiring an offender to demonstrate the origin of alleged proceeds and therefore fulfills the requirements of Art. 3(4) of the Convention.

This is supported by the fact that Georgia has made a declaration under Art. 53 (4) CETS, allowing the country to restrict the measures to the civil proceedings.

Georgia provided a case where an individual who was convicted in a criminal court could not, during the subsequent civil proceedings, prove the legal origin of the assets. The assets were therefore confiscated.

### Conclusion/Recommendations

Georgia has legislative measures in place under civil law providing for a reversal of the burden of proof. Since no statistics on amounts confiscated in civil proceedings were provided by Georgia, the report cannot assess to what extent these legislative measures were effectively applied.

In addition, and in order to extend the effectiveness the Georgian authorities are invited to consider applying civil confiscation in cases where no previous conviction was achieved. Depending on how effective civil confiscation is, the authorities are invited to develop case law and consider carrying out permanent training programmes for competent authorities on this matter.

## Germany

Germany made a declaration under Art. 53 (4) not to apply Art. 3 (4) of CETS.

This notwithstanding, there are legislative measures in place establishing a reversal of the burden of proof in confiscation procedure. The country enacted an „Act to Reform Asset Recovery under Criminal Law“, which entered into force in July 2017.

Section 76a (4) of the German Criminal Code (*Strafgesetzbuch – StGB*) allows the confiscation of assets which origin is suspicious (‘unclear origin’ as stipulated in the Code) without the need to prove that a specific criminal offence has been committed (so called ‘independent confiscation’ as per terminology of the Code). Pursuant to section 437 sentence 1 of the German Code of Criminal Procedure (*Strafprozessordnung – StPO*), it is sufficient if the court is satisfied with the facts presented by the prosecution that the assets originate from an unlawful act.

This unlawful act has neither to be prosecuted nor has the perpetrator to be sentenced to allow for confiscation. Proceeds which, as per court’s decision – originate from a criminal offence can be confiscated without having criminal proceedings for predicate offence.

As a matter of fact, the above-mentioned provisions and practice applied in such proceedings cause the burden of proof to be reversed, so that the person who is in possession of these assets is obliged to prove that they originate from/are lawful income. Generally, the person concerned cannot prevent the ordering of confiscation simply by remaining silent or pleading ignorance.

According to a judgement issued by the Federal Court of Justice however, there is a requirement that confiscation under section 76a (4) StGB may only be ordered if, at the time when the assets were seized, there was already a suspicion of a criminal offence listed under section 76a (4) sentence 3 StGB in conjunction with the fact that the assets were seized due to this suspicion. It is not sufficient if the public prosecution office only suspects that a crime has been committed (Federal Court of Justice, judgment of 18 September 2019 - 1 StR 320/18).

The independent confiscation of assets of unclear origin can be ordered according to Section 76a (4) of the German Criminal Code for the list of crimes listed in Section 76a (4) Nr. 1 – 8.

Germany provided a case example of a confiscation of cash (Euro250.000) at the border check point of Stuttgart airport. The person carrying the cash was not able to prove the legitimate origin of cash before the court, so the independent confiscation was ordered and executed.

### Conclusion/Recommendations

Although Germany has made a declaration not to apply Article 3(4) of the Convention, its legal framework provides for a so-called independent confiscation regime that, in case specific conditions are met, allows for reversal of burden of proof.

It is therefore recommended that Germany gives proper consideration if it is still necessary to keep the declaration. The authorities are also encouraged to continue to develop case law and present it to the COP (e.g. the rapporteurs and the COP Secretariat noted in the German press cases of confiscations of real estate in Berlin purchased by some well – known „criminal clans“, which might serve as suitable examples).

### **Greece**

Greece has made a declaration under Art. 53 (4) of the Convention that it will not apply paragraph 4 of Article 3. In line with the declaration made, there is no legal provision providing for the reversal of burden of proof.

This notwithstanding, Article 9 par. 3b of L. 3213/2003, makes an offence in cases of “*non-submission or submission of a false declaration of assets by an accused*” - these assets (non-declared) are then subject to confiscation “*through the judgment convicting the perpetrator, unless the latter proves their lawful origin.*”

#### Conclusion/Recommendations

Greece has not adopted the measures proposed in Article 3(4) in its domestic legislation, apart from one specific constellation on declaration of assets, which cannot be considered as sufficient for complying with Art.3(4) of the Convention. Greek authorities are therefore invited to consider if it is still necessary to keep the declaration. Accordingly, the authorities are invited to consider adopting legislative measures which would allow for the reversal of burden of proof.

### Hungary

Hungarian legislation, and more precisely Act C of 2012 on the Criminal Code provides the possibility for burden of proof to be reversed in cases of extended confiscation. Section 74/A (2) of the Criminal Code (CC) specifies those cases in which forfeiture of assets shall be ordered by the court – the assets concerned are those obtained by the perpetrator within a period of five years prior to the commencement of the criminal proceedings (i.e. proceedings which resulted in conviction against him/her/them) if such assets or the lifestyle of the perpetrator(s) are particularly disproportionate to the certified income and personal circumstances of the perpetrator, unless proven to the contrary.

According to Section 74/A (3) of CC, forfeiture of assets shall not be ordered if the perpetrator proves that the assets do not originate from a criminal offence. Section 74/A (1) of CC lists the criminal offences for which the extended confiscation has to be ordered. In addition, the authorities advised that Section 74/A (1) of the CC reverses the burden of proof regarding all assets obtained by the offender in the course of participating in a criminal organisation, thus having the reversed burden of proof available on a much wider range than what the list of offences under Section 74/A (2) provides.

Hungary also provided case law on application of the provisions on the reversal of proof which confirm that the afore-mentioned articles are applied in practice. The convictions, upon which the extended confiscation was requested and then executed, include drug dealing, tax fraud and human trafficking.

#### Conclusion/Recommendations

Hungary is applying the principle of reversal of the burden of proof.

### Italy

Italy made a reservation, deposited with the instrument of ratification, declaring that it will not apply Article 3, paragraph 4, of the Convention.

However, the authorities, in their responses to the 2020 questionnaire, provided arguments which confirm that a specific form of reversal of burden of proof exists in the country: Italian Anti-Mafia Legislation (Legislative Decree no. 159/2011) on prevention measures (“*misure di prevenzione patrimoniali*”) aims at confiscation of criminally derived assets and provides a system of rebuttable presumptions based on circumstantial evidence which are to be tendered by the prosecutor.



These measures (which are para-criminal, judicially controlled, but not in the context of a criminal trial) apply to those suspected (in Italian “indiziato”) who are a part of mafia style associations or have committed other serious crimes (such as terrorism), or were listed by the UN based on Security Council Resolution on targeted financial sanctions (i.e. freezing measures). It also allows the seizure (and eventually, confiscation, in case of lack of justification) of all the assets that appear to be disproportioned having regard to the declared income of the suspect(s) or to the economic activity performed by him/her/them.

The FATF MER on Italy, adopted in 2014 confirms the aforementioned – ‘anti-mafia measures’ are available in other contexts as well, including ML (when conducted on a “habitual” basis) and TF. The measures target the assets of persons who (i) *are linked to organised and non-organised crime; (ii) “habitually” conduct criminal activities (including ML), i.e., persons who, in light of their conducts(s) and standard(s) of living, appear to be living, even in part, on the proceeds of criminal activity; or (iii) are suspected of funding terror (including natural and legal persons designated by the UNSC)*. These measures, which can be applied independently from the prosecution do include, in particular, the confiscation per equivalent. The key prerequisite for their application is socially dangerous conduct of the subject/defendant (e.g., potential affiliation to a criminal organisation or involvement in certain serious crimes). The main benefit of this ‘preventive’ confiscation is the reversal of burden of proof. It is not necessary for the prosecution to prove that the suspect has committed an offense. It must only be established that the person is habitually engaged in criminal activities or whose assets or living style cannot be justified by legal income. A wide range of financial crimes can be pursued by these measures, such as theft, robbery, extortion, fraud, usury, third party ML or self-laundering, and tax offenses. The burden of proof on the disproportion between the value of the assets being available to the suspect and his or her legal incomes falls on the public prosecution. The burden of proof of the legal origin of such funds falls on the suspect. ‘Preventive’ confiscation may also be applied in instances where the suspect is deceased.

No practical cases were provided.

### Conclusion/Recommendations

Although Italy declared that it would not apply Article 3(4) of the Convention, specific legislation (so called ‘Anti-mafia law’) provide for application of the reversal of burden of proof. In view of the fact that Italy has a reversal of burden of proof embedded in its legislation, the country is invited to consider if it is still needed to keep the declaration made under art. 53 (4). Italy is also recommended to provide the COP with practical case law in this area.

### Latvia

Latvian legislation, and more precisely the Criminal Procedure Code (Section 126, Para 31), sets up the requirement to the offender to demonstrate the origin of alleged proceeds or other property liable to confiscation (the reversed burden of proof). Namely, the person involved in a criminal proceeding shall have a duty to prove the legal origin of the property under scrutiny.

In addition, the CC (Section 70, para 2&3) regulates the extended confiscation regime. In case the value of the property is not proportionate to the legitimate income of the person who has committed a crime, or is a member of an organised crime group, or has committed a crime connected with terrorism, or if such property was transferred to a third person, the extended confiscation should be ordered.

MONEYVAL mutual evaluation report (July 2018) provides a thorough analysis on reversed burden of proof under Immediate Outcome 8. It is stated therein that *'a recent amendment in June 2017 to the criminal legislation has introduced a shift of burden of proof for criminally-acquired property: if the value of a certain property is disproportionate to the person's income and the latter cannot give a legitimate explanation, that property can be considered criminally-acquired (and thus subject to confiscation) if the person has committed an economic crime, is member of an organised group or has links to terrorism. Prior to the change of legislation in cases of (most of) the economic crimes, the Latvian authorities had to prove that certain property is of criminal origin, except for cases prescribed by law (committed in an OCG etc.). The previous legislation had a negative impact on the confiscation of property in ML cases which were not committed in an organised group, as the prosecutors were obliged to prove the criminal origin of certain property. 202. Latvian law provides for the possibility of non-conviction-based confiscation. This is a procedure which can be separated from criminal proceedings if the transferal of a criminal case to a court is not possible in the near future or would cause substantial unjustified expenses (Sec.626 CPL), but there is sufficient evidence that assets previously seized amount to proceeds of crime. In this case, it is merely necessary to demonstrate that there are reasonable grounds to believe that the property concerned has been criminally acquired or is related to a criminal offence. The Constitutional Court of the Republic of Latvia has confirmed the constitutionality of this CPL provision with regard to non-conviction-based confiscation. Authorities stated during the onsite visit their opinion that non-conviction-based confiscation has an important preventive effect, clearly demonstrating that "crime does not pay off". If property is identified, in the vast majority of cases a decision to initiate separate non-conviction-based confiscation procedures is made.*

Latvia provided several cases which confirm the application of the afore-mentioned legislation.

### Conclusion/Recommendations

Latvian legislation provides for the reversal of the burden of proof, which is also applied in practice by its courts. The authorities are invited to continue to develop case law.

### **Lithuania**

Lithuanian legislation and more precisely, Article 72 of the Criminal Code, provides the possibility of burden of proof to be *revised* in the so called 'extended confiscation'. Extended confiscation of property shall be imposed if the property of the offender or part thereof is disproportionate to the his/her legitimate income, and where there are grounds for believing that the property has been obtained by criminal means. Extended confiscation of property shall be imposed provided that all of the following conditions are met:

- 1) the offender has been convicted of a less serious, serious or grave premeditated crime from which he obtained, or could have obtained, material gain;
- 2) the offender holds the property acquired during the commission of an act prohibited by the Criminal Code, after the commission thereof or within the period of five years prior to the commission thereof, whose value does not correspond to the offender's legitimate income, and the difference is greater than 250 minimum wages, or transfers such property to other persons within the period specified in this point;
- 3) *the offender fails, in the course of criminal proceedings, to provide proof of the legitimacy of acquisition of the property.*

No practical cases were provided together with the responses to the Questionnaire. On the other hand, MONEYVAL mutual evaluation report from 2018 stated that the application of extended



confiscation in Lithuania is rare. As a reason for this, the report states that the extended confiscation was closely linked to and became effective at the same time as the criminal offence of illicit enrichment (article 189 of the CC), whose constitutionality was challenged before the court. The matter was resolved in 2017. Prior to that, the application of Article 189 was held in abeyance, which had a chilling effect on the application of the extended confiscation, given their links.

In the responses to the Questionnaire, the authorities informed that the extended confiscation is set as a priority in the national long-term strategic plan. Furthermore, General Prosecutor issued various binding recommendations to implement the seizure and confiscation-related elements of this strategic plan.

### Conclusion/Recommendation

Lithuanian legislation provides for a reversal of burden of proofs. It is recommended that Lithuania develops case law and raise awareness among competent authorities how this instrument should be used in practice.

### Malta

The responses provided by Malta in 2020 questionnaire largely correspond to the findings of the COP 2014 assessment report on Malta. With regard to Art.3(4) it states that *‘the property of the person found guilty shall be deemed to be derived from money laundering or a relevant offence “unless proved to the contrary” (Article 3(5)(a) of Prevention of ML Act (PMLA) and 23B(1A) of the Criminal Code). The burden of showing the lawful origin of such property lies on the person charged or accused. The reversal of burden of proof is provided by Article 22(1C)(b) of Dangerous Drugs Ordinance and is applicable mutatis mutandis to money laundering and relevant offences by virtue of Article 3(3) of PMLA and Article 23C(2) of the Criminal Code.*

*According to the explanations provided by the authorities these provisions work in such a manner that whilst the overriding obligation to prove a case beyond reasonable doubt lies exclusively on the prosecution, once the prosecution has brought about the level of evidence to substantiate that there is no lawful explanation as to the possession or activities carried out on the monies/property/assets, it will be for the accused to bring forward that evidence to counteract and overturn the presumption which comes into being. Reversal of the onus means that the burden of proof only falls on the suspect/accused when the prosecution provides evidence that the suspect/accused has given no reasonable explanation showing that money, property or proceeds are not the proceeds of crime. No relevant jurisprudence has been provided by the Maltese authorities*

Under Article 7 Ch 373 of the Laws of Malta, the offender has the opportunity to prove the legal origin of the proceeds at Court and the onus of proving it lies with him:

*“7. (1) Where an order of forfeiture is made under article 3(5), the person found guilty and any other person having an interest may bring an action for a declaration that any or all of the movable or immovable property so forfeited is not profits or proceeds from the commission of an offence under article 3 or is otherwise involved in the offence of money laundering, nor property acquired or obtained, directly or indirectly, by or through any such profits or proceeds.” The MONEYVAL mutual evaluation report from 2019, with regard to this particular matter, notes that ‘as regards confiscated immovable goods, it appears that the judgments ordering their confiscation are systematically challenged before the civil courts. Applicants have been successful in having the civil courts reverse the confiscation, as it could not be established beyond the required certainty*

*under civil law that they constituted proceeds of crime. With the standard of proof being different in civil and in criminal courts (i.e. in the former only requiring the proof on the basis of probabilities), applicants frequently met the burden of proof even where the onus is on them to demonstrate the legitimacy of the assets.'*

Several case examples were presented by the authorities. These cases confirm the aforementioned statement made by the 2020 MONEYVAL MER.

### Conclusion/Recommendations

Malta has included the requirement for the reversal of the burden of proof into its legislation. The authorities are invited to further develop case law on application of a reversed burden of proof and carry out trainings on the application of the legislation.

### **Monaco**

Monaco ratified the Convention in 2019 and this is the first Horizontal Review the country is undergoing. In their responses to the 2020 questionnaire, Monaco referred to its Criminal Code - Article 218-1 which criminalises the laundering of proceeds of crime. The offence includes elements required by the relevant international standards, such as conversion or transfer of criminally gained property; concealing or disguising of such property's true origin, location, disposition, movement or ownership; and the acquisition, possession and use of the proceeds of crime.

When it concerns the reversal of burden of proof, the authorities put emphasis on article 218-4 of the Criminal Code which states that, "*the property, funds or income are presumed to be the direct proceed of crime as soon as the ML offence (as referred in article 218-1) is proven, and there is an absence of any justification on origin of this property or funds/income*". This article also refers to FT offence.

In the authorities' opinion this article create basis for reversal of burden of proof - if the illicit origin of assets is inferred, or is presumed, from objective factual circumstances, it will be up to the offender to demonstrate their legal origin. No case law was provided.

However, the rapporteurs cannot accept these arguments in the context of application of Art.3(4). This article requires Parties to provide for the possibility that the burden of proof is reversed from prosecution to offender regarding the lawful origin of alleged proceeds or other property liable to confiscation. Responses provided by Monaco rather refer to Article 9(6) of the Convention where, for purposes of ML offence, it is sufficient to prove that the property/assets originate from a predicate offence, without being necessary to establish precisely which offence. In other words, from the materials provided by Monaco in the 2020 questionnaire, it cannot be concluded that the country has a legislation in place which would require an offender to demonstrates the origin of alleged proceeds or other property liable to confiscation.

### Conclusion/Recommendations

Whilst the Monegasque authorities' interpretation of the ML offence suggests that the reversal of burden of proof is provided therein, the rapporteurs deem that the legislation, as it currently stands, does not include a mechanism which would require an offender to demonstrate the lawful origin of assets. Given that Monaco did not declare that it would not apply Art,3(4) of the

Convention, the authorities are recommended to establish the reversal of burden of proof in their legislation in line with this article of the Convention.

## Montenegro

Montenegro was assessed by the COP in 2014. Whilst the report notes that the country introduced a concept of extended confiscation (*'extended confiscation may therefore be ordered at the discretion of the judge if the offender has been convicted for committing one of the offences listed above. In such cases the offender must demonstrate the origin of alleged proceeds or other property liable to confiscation (reversed burden of proof)'*), the authorities, in their responses to the 2020 questionnaire, referred to the 2015 legislation, i.e. the Law on Seizure and Confiscation of Material Benefit Derived from Criminal Activity. This piece of legislation requires the offender to demonstrate the origin of alleged proceeds or other property liable to confiscation. This possibility exists only for set of serious criminal offences prescribed by the Law. In its article 2 it is stated that *"material benefit may be confiscated from the perpetrator where well-founded suspicion exists that such material benefit has been derived from criminal activities, whereby the perpetrator fails to make plausible the legal origin of such material benefit (extended confiscation) and if the perpetrator was convicted by a final judgment for a crime laid down in the Criminal Code of Montenegro...."* This applies to serious crimes which are listed in the Law.

Once the judgment becomes final and if the judgment declares the defendant guilty of the criminal offence referred to in the Law, the prosecutor shall file a motion, within a time period of one year, for confiscation of all material benefits which derived from the offence. The offender can only prevent this scenario if he/she proves, by means of authentic documents or otherwise, that the origin of property is lawful.

Montenegrin authorities also informed that they kept statistics on application of the Law, whereas no case law was presented.

### Conclusion/Recommendations

Montenegrin legislation provides for a reversal of burden of proof. It is recommended that Montenegro develops case law and raise awareness among competent authorities on how this instrument should be used in practice.

## The Netherlands

In the Netherlands, Articles 33a and 36e of the Criminal Code allow for the confiscation of proceeds of and instrumentalities used or intended to be used in the commission of criminal offenses.

Article 36e of the Criminal Code provides for special confiscation proceedings. These proceedings may result in an obligation to pay a sum of money/equivalent value of assets that represents illegally obtained profits or advantages (confiscation order). This is generally referred to as "special confiscation".

Confiscation measures pursuant to Article 33a and 36e are both conviction-based. Public prosecutor has the "burden of proof" that criminal offences generated illegal proceeds. This means that the public prosecutor must provide sufficient evidence in this regard. This evidence may also include the facts that the person concerned has no credible or verifiable counter - arguments. In such cases the offender would have *to make plausible* that his/her proceeds have

been obtained legally. This shift of burden of proof is based on the standard jurisprudence concerning the money laundering offence (Arts. 420bis, 420quater and 420bis CC).

Art. 36e(3) of the CC, furthermore, establishes that in certain cases, there is a legal assumption that proceeds or property do have a criminal origin. This assumption can be refuted by the offender. Refutation will in such cases occur *'on the balance of probabilities.'* The convicted person will have to demonstrate how he/she acquired his/her assets in a lawful manner.

All cases covered by Art. 36e of the CC require the offender to demonstrate a certain degree of plausibility that the proceeds originate from legitimate activities.

In line with Art. 36(3) of the CC, the balance of probabilities should take into account the legitimate activities as origin of the proceeds. This means that there is a discretionary decision of the judge to decide whether or not the confiscation in these cases should be executed.

The Netherlands have provided a case which was tried before the Amsterdam Court in 2017, where *"the offender could not justify the increase in assets coming from a legal source. Rather, the court in line with the Prosecutor believed that it is sufficiently plausible that the offender had received an increase of assets stemming from other offences, and which were therefore an illegal source of income"*.

### Conclusion/Recommendations

The legislation of the Netherlands provides for an assumption of legitimate origin of assets. The offender can prevent confiscation by making it plausible that the proceeds and other property liable for confiscation have legitimate origin. On the other hand, the practice in the Netherlands was commended by the Parliamentary Assembly of the Council of Europe when it concerns the practical application of reversal of the burden of proof even when the legislation does not provide the full regulation of this instrument. In particular, the PACE report and resolution of 26 March 2018 on *'Fighting organized crime by facilitating the confiscation of illegal assets'* suggests that the practice and case law in the Netherlands could serve as exemplary for other states which lacked legislative or other measures for the reversal of burden of proof.

This notwithstanding, the rapporteurs recommend the Netherlands to consider amending its legislation and directly refer to the requirements of Article 3(4) of the Convention. The authorities are also encouraged to continue to develop cases on the reversal of the burden of proof.

### **North Macedonia**

In North Macedonia the Criminal Procedure Code regulates the confiscation procedure and provides the provisions which require an offender to demonstrate the origin of alleged proceeds or other property liable to confiscation. In fact, the Code foresees extended confiscation in Article 533. The article states that *'the court shall provide for an extended forfeiture under the terms prescribed in the Criminal Code, if the offender cannot prove that he/she has lawfully acquired the assets or property within one year as of the day of the commencement of the main hearing.'*

During the one-year period following the completion of the main hearing for the predicate offence, the offender is given an opportunity to prove the legitimate origin of the proceeds or other assets liable to confiscation. Only if he/she can prove the legal acquisition of the proceeds or assets he /she can avoid them being confiscated by the state. As noted above, the extended confiscation provision also refers to the CC and terms prescribed therein. The North Macedonian authorities confirmed that all offences listed in the CC are liable for the extended confiscation.

The rapporteurs, having examined the relevant provisions, concluded that the extended confiscation in North Macedonia, whilst providing for a possibility for the offender to prove the origin of the assets and explicitly reversing the burden of proof, still reflect the requirements of Art.3(4).

This conclusion has also been reaffirmed by the case law presented by North Macedonia: the country introduced a case example illustrating the successful confiscation of an amount of approximately €5million from a group of criminals, in which the offenders could not prove the legal origin of their proceeds.

### Conclusion/Recommendations

The legislation in North Macedonia foresees a possibility for the offender to demonstrate that the assets liable to confiscation were of a legal origin.

In order to make the reversal of proof more effective, it is recommended that the country continues to develop case law and carry out specific training programme to LEAs and judiciary on application of reversal burden of proof.

### Poland

The Republic of Poland declared that Article 3, paragraph 4, should not be applied. However, in their 2020 responses to the questionnaire, the authorities informed the COP that the amendments to Chapter Va “Forfeiture and compensatory measures” of the Criminal Code entered into force in 2017, and introduced extended confiscation (Art.45 of the CC) §2 of Art.45 states that it is deemed that *the property which the perpetrator has taken possession of, or has acquired entitlement to, within a period of 5 years before committing a crime until the moment of passing of even a non-final sentence, constitutes a benefit derived from the commission of the crime, unless the perpetrator or another interested person proves otherwise.*

In parallel with the amendments to the CC, changes to the Criminal Procedure Code were introduced (March 2017). These changes introduced procedural rules for extended confiscation. The essence of the amendments to the CPC consists in extending the catalogue of crimes in relation to which extended confiscation may be ordered and in extending the period of application of the reversed burden of proof with regard to property acquired by the perpetrator.

Article 45 of the CC foresees that the extended confiscation is available for *ii) an offence from which a financial gain has been or could have been obtained, even if indirectly, and which is punishable by imprisonment for a maximum of not less than 5 years; ii) an offence from which a financial gain was or could be derived, even if indirectly, and which was committed in an organised group or association aimed at committing an offence; iii) the forfeiture concerns all possible types of offences. The only required circumstance distinguishing the offender's act from others is the actual achievement of a material benefit of significant value, directly or indirectly, from the committed crime.*

Overall, whilst the Polish legislation provides for a reversal of burden of, no case examples or statistics of the application of this instrument were provided to the COP. On the other hand, the authorities informed of a number of trainings held by the National School of Judiciary and Public Prosecutor's Office on application of reversal of burden of proof.

### Conclusion/Recommendations

Poland instituted the reversal of burden of proof into its legislation. In view of that, the Polish authorities have informed the COP of their intention to reconsider the declaration made under Art. 53 (4) in respect of Art.3(4).

The COP encourages Poland to initiate a formal procedure to derogate from the declaration made under Art. 53 (4) and to further develop, through the case law, the application of the reversal of proof.

### Portugal

Portuguese authorities, in their responses, referred to the Law 5/2002, which establishes measures to combat organised and economic-financial crime, as amended (lastly by Law 30/2017). It is a *lex specialis*, which creates a special legal framework for the collection of evidence, breach of professional secrecy and loss of property in favour of the State, in relation to a list of serious crimes that include terrorism, terrorist organizations, international terrorism and terrorism financing, money laundering, trafficking in weapons, corruption, drug trafficking, corruption, trading in influence, organizing prostitution, counterfeiting of currency and securities equivalent to currency, smuggling, trafficking in stolen vehicles and fraud.

This piece of legislation also introduced extended confiscation of assets in its Article 7 - in case of a conviction for a crime referred to in the list of crimes of article 1 of this law, it is presumed that the difference between the value of the defendant's assets and value of his/hers lawful income are proceeds of criminal activity.

The Public Prosecution Office determines, in the indictment, the amount due to be declared lost in favour of the State.

Article 7(3) provides that the presumption established in paragraph 1 of article 7 is rebutted if the defendant proves that the assets:

- a) *Result from income from lawful activity;*
- b) *They had been in the defendant's ownership for at least five years at the time of his/her status as defendant;*
- c) *They were acquired by the defendant with income obtained in the period referred to in the previous paragraph.*

The Portuguese authorities also advised that, in this *lex specialis*, the legislator chose to break with the Portuguese legal tradition and introduced a presumption *iuris tantum* – i.e. following the conviction for one of the crimes from the catalogue, the assets (i.e. their value) of the defendant - which are inconsistent with his lawful income - are presumed to be illicit. It is incumbent upon the defendant to rebut the presumption that these assets have no illegal origin, thereby establishing a reversal of the burden of proof.

In 2015, the Constitutional Court, in Judgment n. ° 392/2015, decided that the rules in articles 7 and 9, paragraphs 1, 2 and 3, of Law 5/2002, of 11 January, regarding the burden of proof on the underlying facts for the extended confiscation of assets in favour of the State are not unconstitutional.



The reversal of the burden of proof was also discussed in the 2017 FATF report on Portugal. The report underlined that the Portuguese authorities *'have, and use in practice, power to investigate suspicious discrepancies between the value of declared property and income against publicly displayed wealth. In most ongoing ML investigations, ARO is assigned to perform financial and asset investigations, with the aim of identifying assets of suspected persons and entities, as well as assets registered in their name dating back 5 years. Prosecutors can request the seizure of identified assets under this enlarged confiscation regime, whereby the suspected person and/or entity is subject to a reverse burden of proof (i.e. the owner has to establish the lawful origin of his/her funds and assets held). In order to conduct this work, ARO has direct access to the AT database, as well as the information held by the Institute of Registries and Notary (property, land) and the police.'*

### Conclusion/Recommendations

Portugal applies the reversal of the burden of proof through the extended confiscation as provided by Art.7 of the Law 5/2002 , as amended, which establishes measures to combat organized and economic-financial crime.. Authorities are encouraged to continue developing case law.

### Republic of Moldova

Republic of Moldova was assessed by the COP in 2014. The report notes the fact that the country made a declaration in respect of Art.3(4) stating that the provisions of Article 3 paragraph (4) shall apply only partially, in accordance with the principles of the domestic law. The report also acknowledged the developments in the country which led to introduction of an extended confiscation and concludes that *'given the limits posed by the Moldovan Constitution, this development is very much welcomed, considering that the application of the extended confiscation measures would allow an apportionment of burden of proof (though not a reversal of burden of proof).'*

The Constitution of the Republic of Moldova states that „No assets legally acquired may be confiscated. The legal nature of the acquirement of assets is presumed.”

As noted in the 2014 report, the Criminal Code was amended in February 2014 and two new articles were introduced – „Extended confiscation” and „Illicit enrichment”. Extended confiscation covers assets of the person who was convicted for serious offence. Serious offences are listed in the law through respective articles 158, 165, 206, 2081, 2082, 217–2174, 218–220, 236–240, 243, 248–253, 256, 2603, 2604, 279, 280, 283, 284, 290, 292, 302, 324–329, 3302, 332–3351 .

Extended confiscation shall be ordered if the following conditions are cumulatively met:

a) *the value of the assets acquired by the convicted person for 5 years prior and after committing the offence, up to the date of the adoption of the sentence, substantially exceeds the incomes lawfully acquired by the convicted person;*

b) *the court finds, on the basis of the evidence presented in the file, that the respective goods originate from criminal activities of the nature referred to in para (1).*

The Constitutional Court of the Republic discussed these provisions upon request of the Minister of Justice. The Constitutional Court's interpretation does not envisage the possibility of introduction of the reversal of proof or civil confiscation. As a result, it was considered that the extended confiscation would be the optimal solution, which would allow an apportionment of burden of proof.

Therefore, the Republic of Moldova, whilst incorporating some elements of Art.3(4) of the Convention, has not yet endorsed the principle of reversal burden of proof due to constitutional reasons. Clarification of this circumstance is provided for by the declaration made under Art. 53 (4) by the country.

The country has provided two cases in which the extended confiscation was executed. The cases concern the offences of ML and corruption.

### Conclusion/Recommendations

It is concluded that the Republic of Moldova – under the given constitutional conditions – is not in a position to establish a reversal of the burden of proof into its legal system. However, the country introduced ‘extended confiscation’ which, within the limits provided by the Constitution, aims at increasing the effectiveness of the confiscation regime in general.

It is, therefore, recommended that the country periodically reviews the effectiveness of the confiscation regime and examines the case law. Consequently, and based on the findings, the authorities are invited to consider whether the declaration made is still needed and whether the Constitution could accommodate introduction of the reversal of burden of proof.

### **Romania**

Romania was assessed by the COP in 2012. With regard to Art.3(4) the report states: *‘the reviewers note with interest the new provisions on extended confiscation, introduced earlier this year, which allow for an apportionment of burden of proof in certain situations. Romania has not, as a result of this, withdrawn its declaration by which it avails itself of the right to apply “partially” article 3 paragraph 4. The new provisions introduce an important mechanism which pursues a similar objective as article 3 paragraph 4 of the Convention and gets very close to it; the article in question leaves some freedom to the countries as to how to implement the reversed burden of proof for confiscation purposes and the fact that this new Romanian confiscation mechanism is applicable only in respect of the proceeds accumulated over the last 5 years and only in respect of certain offences (which are not necessarily the same as those in the Appendix to the Convention) is not in contradiction with the Convention. The reviewers look forward to the way in which this new confiscation mechanism will be applied in future.’*

It appears that in the meantime, i.e. after the COP report was adopted, practice and case law in Romania did not actually go in the direction the rapporteurs envisaged. The legislation, as interpreted by the case law confirms that the burden of proof stands with the prosecution, and that it is their responsibility to *‘gather evidence and take measures of inquiry both in favour and to the detriment of the suspect or offender, ex officio or upon request.’*

With regard to the extended confiscation, the Constitutional Court (Decision no. 356/2014) has taken into account the opinions expressed in a doctrine, i.e. *“relaxation”* of burden of proof in the case of extended confiscation - the Constitutional Court established that *“in the context of establishing that the presumption of the lawful acquisition of wealth is not an absolute presumption, the relative character of this presumption does not cause a reversal of burden of proof”*

### Conclusion/Recommendations



Romania does not have legislative or other measures in place to demonstrate the origin of alleged proceeds by the offender, which corresponds to the declaration made upon depositing the instruments of ratification with regard to Art.3(4). The burden of proof for all facts lies with the prosecutor.

Romania should consider lifting the declaration made under Art. 53 IV. Accordingly, the authorities are invited to consider adopting legislative measures which would allow for the reversal of burden of proof.

## Russian Federation

The Russian Federation, in line with Article 53 (4) of the Convention declared that it should not apply Article 3 (4) (paragraph 2 of the Federal Law No. 183-FZ on Ratification of the Convention of July 26, 2017).

Under the Russian criminal procedure legislation, the State is obliged to prove (before the court) that the proceeds subject to confiscation are illegal. It is the prosecution that is to rebut the arguments of the defence, provide comprehensive and convincing evidence proving its position. By contrast, the Russian Federation has measures for non-conviction-based confiscation related to some forms of corruption and to terrorism. This has also been noted in the 2019 FATF MER. Federal Law 230-FZ provides that unexplained wealth held by some public officials may be subject to forfeiture in civil proceedings initiated by prosecutors when the public official fails to confirm that his/her assets were legitimately acquired (Art. 17). In addition, *LEAs may investigate the origin of assets “possessed by the close relatives, relatives, and intimates of the persons who [have] committed a terrorist act where there are sufficient grounds to believe that the given property has been obtained as a result of terrorist activity and/or represents the income derived from such property” (Federal Law 35-FZ (2006), Art. 18(1.2)). Such property may be subject to forfeiture in civil proceedings initiated by prosecutors; the burden of proof is shifted to the person to prove lawful origin. An organisation associated with terrorism, on the rare occasion that it is legally registered (e.g., an NPO), also may have its property confiscated. This is done without a criminal conviction, upon a court’s decision to liquidate the organisation (Federal Law 35-FZ, Art. 24(3)).*

### Conclusion/Recommendations

Russian Federation has declared under Art. 53 (4) that it would not apply Art. 3 (4) of the Convention. On the other hand, Russia does have a system in place for the reversal of the burden of proof which is limited to specific offences – terrorism and some forms of corruption.

In view of this, it is recommended that the Russian Federation considers the necessity to keep the declaration. Accordingly, the authorities are invited to consider adopting legislative measures which would extend the application of the reversed burden of proof to all serious offences as defined by national legislation.

## San Marino

In line with what the authorities reported in their 2020 responses to the questionnaire, San Marino does not have a specific legislative provision in place which would require an offender to demonstrate the origin of alleged proceeds or other property liable to confiscation. However, the authorities advised that this principle is applied in practice and is well established through the case-law/jurisprudence.

The jurisprudence provided to the COP demonstrates that, although the initial burden of proof rests with the prosecution, the offender was in a position/expected to “...*demonstrate that things are different from the way they appear, by providing elements giving rise at least to a doubt in this regard.*”

In a case concerning a money laundering offence, the court concluded that ‘*since it is not absolutely necessary to identify the individual predicate offences... and since only the objective unlawfulness of the assets is to be considered for the purposes of the money laundering offence, the conclusion that the sum in question originates from a crime is certain, unless a convincing alternative explanation can be provided with a sufficient degree of reliability.*’ In the rapporteurs’ view, this particular statement rather discusses the nature of autonomous ML than a confirmation that the reversal of burden of proof was applied.

In the Decision of the European Court of Human Rights (ECtHR) *Camerini v. San Marino* (Application no. 21400/17). the applicant claimed that the burden of proof stands with prosecution and that in this particular case this principle was violated. In the applicants’ view, the San Marino court had not collected evidence as to the criminal origin of all the assets and had reversed the burden of proof to the defendant, thus violating the presumption of innocence.

The ECtHR observed that the applicant was provided with the possibility at both, first and second instance, to exculpate themselves and to submit evidence to prove the lawful origin of the money. In this respect, the Court noted that the applicant attempted this avenue, but the domestic courts found that he had not successfully rebutted the presumption. For these reasons, the complaint was rejected and considered as being manifestly ill-founded pursuant to Article 35 § 3 of the ECHR.

The rapporteurs acknowledge these facts and can only reaffirm the ECtHR position which indirectly confirms that, in this particular case, the San Marino court reversed the burden of proof by giving the defendant a possibility to prove the lawful origin of the assets concerned.

### Conclusion/Recommendations

San Marino has no specific legislative provision in place in respect of an offence which requires an offender to demonstrate the origin of alleged proceeds. However, some features (e.g. “*evidence was requested by the defendant to prove the lawful origin*”) of the jurisprudence show that there is an understanding by the judiciary that the principle entailing the burden of proof being at prosecutor’s side is not absolute.

This notwithstanding and given that San Marino did not make a declaration in respect of Art.3(4), the authorities are invited to introduce, in its legal system, the reversal of burden of proof in the confiscation procedures the way it is regulated by the said article of the Convention.

### **Serbia**

As noted in the responses submitted by the Serbian authorities, the Law on Seizure and Confiscation of the Proceeds from Crime (Asset Recovery Law) sets out the procedure for confiscation of assets (Articles 38-48).

It specifically provides for the reversal of burden of proof where a disproportion is found between the property owned by the offender and his/her income. The public prosecutor shall only provide evidence on the property owned by the offender and on his/her income. If the amount of offender’s

income and property owned by him/her is found disproportionate, the burden of proof that the property designated for confiscation is of lawful origin, is shifted to the offender. This goes for all serious offences under Serbian Law.

The reversal of burden of proof was also subject to analysis of the 2016 MONEYVAL mutual evaluation report. The report notes that: *'a specific confiscation regime is set out in the Law on Recovery, which is applicable with regard to particular offences listed in the law, as well as to offences where the proceeds exceed a threshold of 1.5 million RSD (approximately €12,245). In such cases, the Law on Recovery enables also the application of reversed burden of proof with regard to assets which appear disproportionate to the level of licit income.'*

No case examples and statistics on confiscations in the country were given.

### Conclusion/Recommendations

Serbia has legislative measures for serious offences in place in its Law on the Asset Recovery to reverse the burden of proof in case of confiscations.

Since no assessment of effectiveness could be made because neither statistics nor case examples were provided, the rapporteurs could only call on the authorities to consistently apply these provisions in practice and develop case law on this matter.

### **Slovak Republic**

In accordance with Article 53, (4), and Article 3, (4), the Slovak Republic declares that it does not apply the right to require that, in respect of a serious offence or offences as defined by the national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation.

In their responses to the 2020 questionnaire, the Slovak Republic authorities cited the Act on Proof of Origin of Property which requires the offender *to rebut the well-founded doubts about the legitimate origin of their assets or else the court decides that such property falls to the State*, as a piece of legislation that include some elements of reversal of burden of proof.

No cases of application of this Act or statistics were provided by Slovakia.

### Conclusion/Recommendations

The country has submitted a declaration under Art. 53 (4) not to apply Art. 3 (4).

The burden of proof for confiscated proceeds lies in Slovakia with the LEA/prosecution. The fact that the offender can defend himself by creating well founded doubts of the illicit origin is something different than proving that the assets are legally acquired. Therefore, it is recommended that the Slovak Republic considers if it is still necessary to keep the declaration. Accordingly, the authorities are invited to consider adopting legislative measures which would allow for the reversal of burden of proof.

### **Slovenia**

Although Slovenia has entered a declaration in respect of Article 3(4) under Article 53(4), the authorities argue that there are examples of reversed burden of proof in the criminal law with regard to conviction-based confiscation.

This primarily concerns Art. 75 of the Criminal Code which provides for the reversed burden of proof in cases when proceeds gained through, or resulting from a criminal offence, have been transferred to the offender's close relatives. Art.77c provides for a presumption of the gratuitous transfer (or transfer for value below actual value of the property) from the perpetrator (or his/her close relatives) to the connected companies. This is an *ex lege* presumption that can be refuted if proved by the interested party (reversed burden of proof that follows from the said presumption). The authorities also advised that the wording of the provision that '*the proceeds of crime or property shall not be seized from the company or entity referred to it if the company or entity proves that it has paid its actual value*' confirm that there is a reversed burden of proof in these cases.

The rapporteurs could only partially agree with this statement. In their view this provision only grants an opportunity to the offender to provide evidence in support to his defense to keep assets which are under scrutiny in a concrete case, but does not reverse the burden of proof.

On the other hand, the non-conviction-based confiscation has been established in Slovenia through the Confiscation of Assets of Illicit Origin Act in 2011. In these procedures, which are civil procedures carried out before the civil courts, the presumption is that the property stems from proceeds of crime if there is disproportionality between property and income of the suspect. The suspect is called to prove otherwise. Article 10 of this act provides a list of serious offences for which civil confiscation is available.

However, the 2017 MONEYVAL MER questions the effectiveness of application of Confiscation of Assets of Illicit Origin Act. The report notes that '*the civil confiscation has so far produced very limited results as almost all civil confiscation decisions were pending before the Constitutional Court of human rights/constitutional infringements.*'

No case examples or statistics were provided on application of civil confiscation.

### Conclusion/Recommendations

The criminal legislation in Slovenia, to some extent and in an indirect manner, provides some features of reversed burden of proof. However, these cases are restricted to specific constellations like the transfer of proceeds to close relatives or legal persons.

On the other hand, the country established the civil confiscation regime – in these cases the presumption is that the property stems from proceeds of crime if there is disproportionality between property and income of the suspect whilst the suspect is called to prove otherwise. In other words, the reversal of burden of proof is provided through the civil confiscation regime. In view of this, it is recommended that Slovenia considers if it is still necessary to keep the declaration. In addition, the country is invited to develop case law on application of the Confiscation of Assets of Illicit Origin Act.

### Spain

In Spain, as a general rule, the burden of proof lies with the LEA/prosecution, although there are legal constellations in which the offender may prove the legal origin of the proceeds or assets. The Organic Law 5/2010 and Organic Law 1/2015 (Amendments to the Criminal Code from 2010 and 2015) introduced a number of indicia and judicial presumptions intended to facilitate proof of the illicit origin of the property, effects or income which could be confiscated, unless proven otherwise.

According to the CC, property is deemed to have been obtained by criminal activity and is subject to confiscation: i) *if it is disproportionate in relation to the revenue lawfully obtained by persons who have been found guilty of terrorism offences or felonies committed within a criminal or terrorist organization/group; ii) even when no punishment is imposed because the person is exempted from criminal accountability or due to the statute of limitations, confiscation may still be ordered, provided that the unlawful status of the assets is proven.*

The Art. 127 bis of the Criminal Code covers the cases where, with well-founded objective indications, it is decided that certain goods or effects (here the Code does not refer to instruments) derive from previous criminal activity but their specific lawful origin is not proven. It needs to be noted that this provision applies to specific offences ('serious offences' as per the language of the Convention) listed in the CC.

The rapporteurs acknowledge the arguments put forward by the authorities and referred above. In view of that and whilst the Criminal Code asks for the proof of legal origin of the proceeds/assets liable to confiscation, the burden of proof according to the general CC principles lies with LEA/prosecution. Therefore, the reversal of burden of proof is not included in the Spanish legislation the way it is embedded in Art.3(4) of the Convention.

No cases of application or statistics were provided.

#### Conclusion/Recommendations

Whilst the Spanish legislation includes elements of non-conviction-based confiscation, it does not provide for a mechanism which would require the offender to demonstrate the lawful origin of assets. Given that Spain did not declare that it would not apply Art,3(4) of the Convention, the authorities are recommended to establish the reversal of burden of proof in their legislation in line with this article of the Convention.

#### **Sweden**

There are no legislative measures in place in respect of Article 3(4) of the Convention.

Sweden reserves the right not to apply Article 3(4) with regard to confiscation in line with Article 53(4.a).

#### Conclusion/Recommendations

It is recommended that Sweden considers if it is still necessary to keep the declaration. Accordingly, the authorities are invited to consider adopting legislative measures which would allow for the reversal of burden of proof.

#### **Turkey**

Türkiye declared, when depositing the instruments of ratification, that Article 3(4), of the Convention shall not be applied. Consequently, there are no legislative measures in place establishing a reversal of the burden of proof in respect of Article 3(4) of the Convention.

#### Conclusion/Recommendations

It is recommended that Türkiye considers if it is still necessary to keep the declaration. Accordingly, the authorities are invited to consider adopting legislative measures which would allow for the reversal of burden of proof.

## Ukraine

When depositing the instruments of ratification, Ukraine declared that it would not apply Article 3 (4) of the Convention.

The authorities, in their responses to the questionnaire, indicated that the burden of proof lies with the investigator, public prosecutor and, in cases specified by the CPC of Ukraine, on the victim (Article 92 of the CPC of Ukraine). Confiscation of property shall be established for grave and especially grave mercenary crimes, as well as for crimes against the foundation of national security of Ukraine and public security- regardless of their severity- and may be assigned only in cases specifically provided for in the Special Part of the Criminal Code.

The fact that the defendant has the right to bring forward facts showing that the proceeds or other property liable to confiscation was lawfully acquired does not change the requirement that, in the course of criminal proceedings, the burden of proof lies with LEAs/prosecutions. In addition, MONEYVAL 2017 mutual evaluation report on Ukraine arrives at a similar conclusion: „*there are no reverse onuses or assumptions as to the provenance of alleged assets that can be made by courts in the Ukrainian system* “.

The authorities also advised that in the course of civil proceedings according to Article 81 Para 2 and Article 116 Para 4 of the Civil Procedural Code of Ukraine, the plaintiff (prosecutor of the Specialized Anti-corruption Prosecutor's Office, and in cases stipulated by law, also upon the motion of prosecutor of the Prosecutor's General Office of Ukraine) is obliged to present in the claim the factual data confirming the connection of the assets with the person authorized to perform the functions of the state or local self-government and that the assets are unjustified, i.e. confirming availability of difference between the value of the assets and the legal income of such person. If at the court's opinion the proofs of the abovementioned facts are sufficient based on the evidence submitted by the plaintiff, the burden to refute the unjustifiedness of assets is placed upon the defendant.

### Conclusion/Recommendations

Although Ukraine declared that it would not apply Article 3(4) of the Convention, specific legislation (Article 290 of the Civil Procedural Code of Ukraine) provides some form for application of the reversal of burden of proof. However, no case studies neither no statistics on amounts confiscated in civil proceedings were provided by Ukraine. In view of the aforesaid, the country is invited to consider if it is still needed to keep the declaration made under art. 53 (4). In addition, the country is invited to develop or provide case law on application of Article 290 of the Civil Procedural Code of Ukraine.

## United Kingdom

United Kingdom declared that, in accordance with Article 53, paragraph 4 of the Convention, Article 3, paragraph 4 shall be applied in accordance with the principles of domestic law. This notwithstanding, there are legislative measures in place establishing a reversal of the burden of proofs. This procedure is regulated in the Proceeds of Crime Act 2002 (POCA).

Reversal of the burden of proof is introduced in the procedure of so called 'extended confiscation'. According to the Section 6 of POCA, the prosecutor shall make a confiscation request if the defendant is convicted for one of the listed offences (including ML offence) or is committed to the court for those offences. Then the court is obliged, acting upon the request of the prosecutor, to determine whether the defendant has a criminal lifestyle. Definition of a criminal lifestyle is provided in Section 75 of POCA, and explanatory notes further clarifies these legal provisions.<sup>6</sup> The criminal lifestyle regime is based on the principle that an offender who gives reasonable grounds to believe that he is living off crime should be required to account for his assets, and should have them confiscated to the extent that **he is unable to account for their lawful origin**. The criminal lifestyle tests, therefore, are designed to identify offenders who may be regarded as normally living off crime. Under section 75, a person has a criminal lifestyle if he satisfies one or more of the tests set out in that section: (i) the first test is that he is convicted of an offence specified in Schedule 2; (ii) the second test is that the defendant is convicted of an offence of any description, provided it was committed over a period of at least six months and he obtained not less than £5,000 from that offence and/or any others taken into consideration by the court on the same occasion; (iii) the third test is that the defendant is convicted of a combination of offences amounting to "a course of criminal activity".

In case of a criminal lifestyle, the court must assume that everything transferred to or obtained by a defendant, or any expenditure met by that defendant in the six years preceding the offending behaviour, is the proceeds of crime. The value of this property is further set in confiscation order, unless the defendant can prove the legitimate origin or there would be a serious risk of injustice if the assumption were to be made.

No case examples were provided on application of this regime, however the FATF Mutual Evaluation Report of UK<sup>7</sup> confirms that all types of confiscation introduced in the UK are effectively applied in practice. Conclusion/Recommendations

Whilst UK has made a declaration that Article 3(4) of the Convention shall be applied in accordance with the principles of domestic law, its legal framework provides for extended confiscation regime that allows for reversal of burden of proof to be applied. Therefore, it is recommended to the authorities to consider if it is still necessary to keep the declaration.

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<sup>6</sup> <https://www.legislation.gov.uk/ukpga/2002/29/notes/division/5/2/21/1?view=plain>

<sup>7</sup> [https://www.fatf-gafi.org/publications/?hf=10&b=0&q=UK&s=desc\(fatf\\_releasedate\)](https://www.fatf-gafi.org/publications/?hf=10&b=0&q=UK&s=desc(fatf_releasedate))