COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Strasbourg, 15 November 2017

C198-COP9(2017)INF9

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)

Interpretative Notes

Directorate General Human Rights and Rule of Law – DGI

CONTENTS

Introduction **3**

Article 3 (Confiscation measures) **3**

Paragraph 4 (the reversal of the burden of proof) 3

Issue No. 1: "*an offender demonstrates the origin of alleged proceeds or other property liable to confiscation*" 5

Issue No. 2: what is a serious offence? 8

Issue No. 3: in which cases this provision cannot be assessed in the course of the monitoring procedure? 9

Issue No. 4: how to assess the effective implementation of this provision? 9

Article 25 (Confiscated property) **10**

Paragraph 2 (asset sharing) 10

Issue: how to assess the effective implementation of this provision? 10

Article 11 (Previous decisions) **13**

Other instruments 14

Issue: How to assess the implementation of this provision? 14

INTRODUCTION

At its eighth meeting, held in Strasbourg from 25 to 26 October 2016, the Conference of the Parties to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (COP to CETS n° 198) invited the Bureau to consider interpretative issues related to Article 3, paragraph 4, Article 11 and Article 25, paragraph 2, and report back at the next COP meeting. Consequently, the Secretariat prepared a draft document which was presented to the COP Bureau during its meeting held in June 2017. Based on comments made by the Bureau members, the document was revised. The findings presented in this document are expected to be further discussed during the 9th COP Plenary meeting.

ARTICLE 3 (CONFISCATION MEASURES)

Assessed criteria

3.1: Parties should ensure that confiscation apply to all categories of offences set out in the Appendix to the CETS No. 198.

3.2: Parties may provide for mandatory confiscation in respect of offences which are subject to the confiscation regime, in particular the offences of ML, drug trafficking, trafficking in human beings and any other serious offence.

3.3: Where not otherwise declared, Parties should ensure that in respect of a serious offence, an offender is required to demonstrate the origin of alleged proceeds or other property liable to confiscation to the extent that such requirement is consistent with the principles of its domestic law.

PARAGRAPH 4 (THE REVERSAL OF THE BURDEN OF PROOF)

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[1].

Explanatory Report

Paragraph 4 of Article 3 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. It should also be noted in this context that Article 53, par. 4 of this

[1] FATF Recommendation 4 also refers to this matter and calls *countries to consider adopting measures that allow such 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.*

Convention provides for the possibility to make a declaration concerning the provision of Article 3, par. 4.

This provision also cannot be interpreted as an obligation to introduce the reversal burden of proof in a criminal prosecution to find the defendant 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 defence. In the Phillips case the statutory assumption was not applied in order to facilitate finding the defendant 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.

Declarations and reservations under Article 53 paragraph 4

Article 3 paragraph 4 Reversal of the 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.
	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.
	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
	Turkey	Turkey 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 a defendant 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 a defendant 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.

ISSUE NO. 1: *"AN OFFENDER DEMONSTRATES THE ORIGIN OF ALLEGED PROCEEDS OR OTHER PROPERTY LIABLE TO CONFISCATION"*

Examples of good practices

BELGIAN CASE

In order to pronounce a conviction for money laundering the illegal origin of the proceeds has to be established as the objective element. As soon as credible and legal justification of proceeds' origin is not possible, they are considered as illegal. Consequently, the predicate offence does not need to be clearly identified. It is important to note that the origin of proceeds (being legally acquired or not) is to be established by the prosecutor in charge, who has to come up with **evidence that the proceeds might have been of illegal origin**. In such cases, the defendant also needs to provide a justification that the proceeds have a legal origin, otherwise they will be considered as illegal. This jurisprudence therefore does not directly imply a reversed burden of proof. Their judiciary also believes that, by applying the practice as stressed above, the principle of presumption of innocence has also been fully respected. Moreover, judges, when deciding if the origin of assets is legal or not, use both - **circumstantial and prima facie evidence, including also the factual circumstances**. Recently, the court reasoned that in cases where the origin of the property was unclear, and when the prosecution was unable to prove the illegal origin of assets, **silence of the accused** could also be "taken into consideration". It means that judges can draw conclusions from the silence of a defendant – in other words they are entitled to evaluate why and for which reasons the defendant does not try[2] to prove or offer evidence of legal origin of the assets concerned.

Application: in other words, once the prosecutor/accusation provided evidence that the proceeds might have been of illegal origin, the defendant needs to provide a credible justification that the proceeds have a legal origin. Such apportionment of the burden of proof is in line with Article 3 (4).

MALTESE CASE

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 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 DDO 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.

Application: whilst the overriding obligation to prove a case beyond reasonable doubt lies exclusively with 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

[2] Brussels Court of First Instance, El Hayek case, 29 June 2016 - "While it is manifestly incompatible with these rights to base a conviction exclusively or mainly on defendants' silence or their refusal to answer questions or give evidence, it is equally clear that these protected rights cannot and should not prevent defendants' silence from being taken into consideration in situations which undoubtedly call for an explanation from them, in order to determine how much weight should be ascribed to the prosecution case."

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 provisions 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**.

Another example of good practices might be provided by the United Kingdom, which applies the concept of "criminal lifestyle" in accordance with the Proceeds of Crime Act 2002 (further elaborated above, in the declaration made by the UK under Article 53 paragraph 4).

Guidelines

The application of the criminal policy of targeting the profit of crime and fight against organised crime from an economic perspective is one of the main objectives of this Convention. In its analysis of the Criminal Asset Recovery in the EU Survey 2010-2014[3], EUROPOL suggests that in the period analysed, 2.2% of the estimated proceeds of crime were provisionally seized or frozen, however only 1.1% of the criminal profits were finally confiscated at EU level. That means that around 50% of all provisionally seized/frozen assets are ultimately confiscated. EUROPOL also indicates that this percentage may be due to a loss in the value of assets during proceedings that often take too long, or due to difficulties in proving the illicit origin of assets and ensuring the final confiscation of the assets.

Article 3, par. 4 is intended to remedy this situation. The purpose of this paragraph is to establish specific criminal procedures with the aim of enhancing the fight against financial crime and improving the confiscation of the proceeds of crime. Parties should ensure that an offender is required to demonstrate the origin of alleged proceeds or other property liable to confiscation to the extent that such requirement is consistent with the principles of its domestic law.

Article 3 (4) does not require States Parties to reverse the burden of proof in a way that it would go against the fundamental principles of a fair trial, such as the principle of presumption of innocence or the right to remain silent and not to incriminate oneself.

The presumption of innocence[4]

Article 6 § 1 is applicable throughout the entirety of proceedings for the determination of any "criminal charge", including the sentencing process (for instance, confiscation proceedings enabling the national courts to assess the amount at which a confiscation order should be set, in *Phillips v. the United Kingdom*, § 39). However in the same case, it was stated that once an accused has properly been proved guilty, Article 6 § 2 (the presumption of innocence) can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning.

[3] European Police Office, 2016 – Criminal Asset Recovery in the EU, Survey of Statistical information 2010-2014 (*Does crime still pay?*) - https://www.europol.europa.eu/publications-documents/does-crime-still-pay

[4] http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

On the other hand, 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 is not absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention. For example, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence (*Salabiaku v. France*, § 27, concerning a presumption of criminal liability for smuggling inferred from possession of narcotics).

Right to remain silent and not to incriminate oneself[5]

The right to remain silent is not absolute (*John Murray v. the United Kingdom*, § 47). On one hand, a conviction must not be solely or mainly based on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the right to remain silent cannot prevent the accused's silence – in situations which clearly call for an explanation from him – from being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. It cannot therefore be said that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications.

Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the weight attached to such inferences by the national courts in their assessment of evidence and degree of compulsion inherent in the situation (*John Murray v. the United Kingdom*, § 47).

Principles of domestic laws

In addition, the implementation of Article 3 (4) must respect constitutional norms and principles of each Party's domestic law. Thus, different modalities may be adopted by the Parties to implement this provision.

Examples[6]

In the Netherlands, while respecting Article 6 § 2 of the ECHR, the law of 1993 on the confiscation of illegally obtained property admitted the reversal of the burden of proof. Persons convicted of a criminal offense, whose property is liable to confiscation, must prove their lawful origin. The opposite can also happen and there can be a real problem in implementing Article 3 (4) of the Convention. For example, in order to intensify the fight against corruption and organised crime, the Italian law of 1992 obliged the accused to prove the legitimate origin of certain goods. The Constitutional Court declared the provision unconstitutional. In such cases, Parties should try to realise an apportionment of the burden of proof in a subtle way that would make them fully compliant with constitutional norms.

Given the differences in the national law of States Parties, the case-law approach cannot be uniform. However, a minimum obligation should be imposed on States Parties.

As a reminder, this article only requires that the offender should demonstrate the origin of the alleged proceeds. In other words, the prosecution should not be required to demonstrate

[5] *Idem*
[6] Christine Lazerges, « *La présomption d'innocence en Europe* », Archives de politique criminelle 2004/1 (n° 26), p. 125-138.

the (illegal) origin of these proceeds, and therefore to identify precisely the predicate offence from which the proceeds originate.

The purpose of this article is primarily to ease the burden of proof on the prosecution in order to improve the countries' results in terms of confiscation of criminal assets. Thus, once the judge is firmly convinced that proceeds/property liable to confiscation originates from unlawful activities (or cannot originate from a lawful one), he should be able to require that the offender proves the legal origin of the alleged proceeds. To be firmly convinced, the judge should only require factual circumstances and/or other evidences (see the Belgian case above).

ISSUE NO. 2: WHAT IS A SERIOUS OFFENCE?

The definition of the notion of serious offence for the purpose of the implementation of this provision is left to the national laws of the Parties[7]. Nevertheless, from articles 3(2) and 9(4)(a)[8] it can be inferred that "serious offences" should at least include crimes exceeding the minimum level of penalties established therein. This element, indicated in the afore-mentioned articles, could therefore indicate a "good practice" or a "guidance" of what is expected to be considered as a serious offence.

In the view of improving legal and practical standardisation, it nevertheless may be useful to collect information related to the definition of a serious crime and of what it includes.

Examples

Romania: At the time of the evaluation (2012), Romanian authorities advised that Article 2 let b) of the Law 39/2003 on preventing and countering organized crime defines serious offences as crimes which are listed in the following categories:

1. Homicide, second degree murder, first degree murder;
2. Illegal deprivation of freedom,
3. Slavery;
4. Blackmail;
5. Offenses against patrimony, which have brought about particularly grave consequences;
6. Offenses regarding the trespassing of regulations regarding weapons and ammunition, explosive substances, nuclear substances or other radioactive substances;
7. Forgery of money or of other values;
8. Disclosure of economic secret, disloyal competition, trespassing of stipulations regarding import or export operations, embezzlement, trespassing of provisions regarding the import of toxic waste and residual matter;
9. Procurement;
10. Offences regarding games of chance;
11. Offenses regarding trafficking drugs or precursors;

[7] "When deciding on the range of offences to be covered in each of the categories contained in the Appendix, each Party may decide, in accordance with its domestic law, how it will define these offences and the nature of any particular elements of these offences that make them serious offences" (Explanatory report of the Convention, paragraph 310).

[8] *…'the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year.'*

12. Offenses regarding trafficking of persons and offenses connected with trafficking of persons;
13. Trafficking of migrants;
14. Money laundering;
15. Offenses of corruption, offenses assimilated to these, as well as offenses directly connected with offenses of corruption;
16. Smuggling;
17. Fraudulent bankruptcy;
18. Offenses committed through digital or communication systems and networks;
19. Traffic of human tissues or organs;
20. Any other offense for which the law stipulates the punishment of prison whose specific minimum is at least 5 years.

Armenia: At the time of the evaluation, Article 19 of its Criminal Code stated that:

"1. Crimes are categorized, by nature and degree of social danger, as not very grave, medium gravity, grave and particularly grave. 2. The wilful acts, for the committal of which this Code envisages maximal imprisonment of two years, or for which a punishment not related to imprisonment is envisaged, as well as acts committed through negligence, for which this Code envisages a punishment not exceeding three years of imprisonment, are considered not very grave crimes. 3. Medium-gravity crimes are those wilful acts for which this Code envisages a maximum punishment not exceeding five years of imprisonment, and the acts committed through negligence, for which this Code envisages a maximal punishment not exceeding ten years of imprisonment. 4. Grave crimes are those wilful acts for which this Code envisages a maximal punishment not exceeding ten years of imprisonment. 5. Particularly grave crimes are those wilful acts for which this Code envisages a maximal imprisonment for more than ten years or for life."

Under Article 190 of the CC, the basic form of ML is punished with a term of imprisonment between two and five years, qualifying it as a crime of medium gravity.

ISSUE NO. 3: IN WHICH CASES THIS PROVISION CANNOT BE ASSESSED IN THE COURSE OF THE MONITORING PROCEDURE?

The only cases where the implementation of this provision should not be challenged in the course of the monitoring procedure is when the State Party made a declaration or a reservation concerning the provision of Article 3, par. 4 or when the State Party proves that its Constitutional law does not allow the application of reversal burden of proof.

ISSUE NO. 4: HOW TO ASSESS THE EFFECTIVE IMPLEMENTATION OF THIS PROVISION?

In the course of the monitoring procedure, the State Party shall provide one or more cases, demonstrating the effective implementation of this provision. Given the fact that the position of case law in the legal hierarchy of legal standard-setting instruments differs from one jurisdiction to another, the evaluation team should take a special care as regards the stability and the scope/generalisation of the reasoning of the case(s) provided.

ARTICLE 25 (CONFISCATED PROPERTY)

Assessed Criteria

25.1: Parties should ensure that competent authorities, to the extent permitted by the domestic law, can give priority consideration to returning the confiscated property to the requesting Party so it can give compensation to the victims of the crime or return such property to their legitimate owners.

25.2: Parties may have measures, including agreements, arrangements or any other measures in place giving special consideration to sharing confiscated property with other Parties on a regular basis.

PARAGRAPH 2 (ASSET SHARING)

When acting on the request made by another Party in accordance with Articles 23 and 24 of this Convention, Parties shall, to the extent permitted by domestic law and if so requested, ***give priority consideration*** to returning the confiscated property to the requesting Party so that it can give compensation to the victims of crime or return such property to their legitimate owners.

Explanatory Report

It seems logical that if provisions in a convention are deemed necessary, such a provision should also relate to the method of distribution of the confiscated property. Therefore, the drafters of this Convention gave a first indication in paragraph 2 of Article 25, which provides that priority consideration should be given to returning the confiscated property to the requesting Party, in order to compensate the victims or return the property to the legitimate owner.

ISSUE: HOW TO ASSESS THE EFFECTIVE IMPLEMENTATION OF THIS PROVISION?

Survey analysis

Most of countries answered that they had neither any **agreements/arrangements**, nor relevant information available in this matter. One of the reasons for such practice possibly stands with the fact that up to now, such arrangements were discussed **on case by case basis without any framework agreement.** Nevertheless, one country reported that, in 2011, an agreement has been signed with another country (although this country is not a Party to CETS No. 198) as part of a request from the authorities of that country concerning a crime against public health. Two new agreements of similar nature were expected to be finalised soon. On the other hand, another state party replied that they have never had such agreement while their ministry of justice is **authorised to conclude ad hoc agreements** in this matter.

In general, some remarks can be highlighted. First it appears that improving communications within networks such as **CARIN** and using **AROs** to get useful information and contact details, would make the conclusion of framework agreements easier. For this purpose, it is important **to *clarify national legislation and practical operations related to confiscated***

property. Second, the EU is facilitating the direct execution of confiscation orders for proceeds of crime by establishing simplified procedures for recognition among **EU countries and rules for dividing confiscated property** between the country issuing the confiscation order and the one executing it.

Example of good practice - Excerpt from the assessment report of the COP on the Republic of Moldova

Moldova can give consideration to returning confiscated property to the requesting Party so that it can give compensation to the victims of the crime or return it to its legitimate owners, as envisaged under Article 25(2).

The Moldovan authorities have indicated that in practice, money and other values obtained through criminal actions or that were the targets of criminal actions, that have been withdrawn, seized, confiscated are returned as a priority to the victims of the crime and after that to the legal owners, to the state (depending on the case). If the victim of the crime is located in another state (in the requesting state), the person benefits of this right, and at the request of the contracting state, Moldovan authorities shall give priority to returning the confiscated property to the requesting Party.

There are several provisions in the domestic legislation which clarify the priority given for compensation to the victims of the crime. Article 219 paragraph 8 of the Criminal Procedure Code (CPC) provides that any claims by individuals and legal entities which have been damaged by an act shall prevail over the claims of the state against the perpetrator of the offence. Also Article 162 (4) of the CPC establishes as a priority the restitution to the owner of money and other valuables obtained through criminal actions or that were the targets of criminal actions. The domestic legislation does not make any distinction between a domestic or a foreign owner thus it may be assumed that in the hypothesis described by Article 162 (i.e. at the termination of a criminal case or when the case is settled in essence) the priority is given to returning the property to their legitimate owners.

In practice, the authorities have indicated that there have been cases when Moldovan criminal investigation bodies have executed requests aimed at giving priority to a requesting Party, by transmitting goods aimed to compensate victims of the crime.

Guidelines

The aim of this paragraph is to strengthen the cooperation between States Parties in order to compensate the victims of crime or return the confiscated property to their legitimate owners. It might also give to the Parties an additional (pecuniary) motivation for the exchange of information. At the very least, Article 25 (2) requires States to have in place any kind of measure to oblige the competent authorities, as a matter of priority, and where appropriate, to consider (*i.e. careful thought*) returning the confiscated property to the legitimate owner or to compensate the victim(s) of crime[9]. Furthermore, the article does not require States to have framework agreements with other States Parties. This is a possibility that has been given to them to decide about (in line with paragraph 3 of the same article). However, if such agreements are in place, the evaluation team should take them into account when assessing the implementation of this provision.

[9] It is important to underline here that the Parties are required to provide confiscated assets to the interested other Party(ies), so that they can compensate the victim(s). In other words, the assets are not provided directly to the victims in another Party, but the Party receiving the assets needs to have provisions and procedures in place to make sure that “repatriated” assets are destined to the victims.

EU member States

In accordance with the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, EU countries have rules for dividing confiscated property between them. For example, in the case of money, amounts of € 10 000 and more are divided 50-50 between the issuing and the executing States. When assessing Parties which are EU members, this should be taken into consideration.

However, co-operation with States Parties which are non-EU members should also be covered. Parties may decide to apply similar measures to them or define specific rules through memorandum of understanding or other agreements on international co-operation on seizure and confiscation. In the latter case, the evaluation team would need to analyse any element corroborating the fact that the country has the legal framework in place to give priority consideration to returning the confiscated property to the requesting Party. The nature of such elements should help to objectively judge their value:

- Multilateral or bilateral framework agreements/MoUs
- Legislative measures
- Any other measures and guidelines

Finally, the assessment of the effective implementation of this provision needs to be supported by case study, i.e. one or more case(s) of asset sharing or asset returning to compensate the victim/to the legitimate owner.

Non-EU member States

With regards to non EU member States, the following actions should be undertaken by the evaluation team:

1. To verify the possibility for the judge/or other competent authorities to restitute the confiscated property to the requesting Party so that it can give compensation to the victims of the crime or return such property to their legitimate owners; i.e. to verify the compliance of the criminal procedure with this provision.

2. To analyse any element corroborating the fact that the legal framework of the country allows giving priority consideration to returning the confiscated property to the requesting Party. As stated above, the nature of such elements should help to objectively judge their value (multilateral or bilateral framework agreements/MoUs, legislative measures, any other measures and guidelines).

3. As for the EU Member States, the assessment needs to be supported by case study evidence, i.e. one or more case(s) of asset sharing or case(s) where assets have been returned to compensate the victim/to their legitimate owner.

ARTICLE 11 (PREVIOUS DECISIONS)

Assessed criterion

11. When determining the penalty, Parties should have legislative and/or other measures as to provide for the possibility of taking into account final decisions against a natural or legal person taken in another Party in relation to offences established in accordance with the CETS No. 198.

Each Party shall adopt such legislative and other measures as may be necessary to provide for the possibility of taking into account, when determining the penalty, final decisions against a natural or legal person taken in another Party in relation to offences established in accordance with this Convention.

Explanatory Report

ML and FT are often carried out transnationally by criminal organisations whose members may have been tried and convicted in more than one country. At domestic level, many legal systems provide for a harsher penalty where someone has previous convictions.

The principle of international recidivism is established in a number of international legal instruments. Under Article 36(2)(iii) of the Single Convention of 30 March 1961 on Narcotic Drugs, for example, foreign convictions have to be taken into account for the purpose of establishing recidivism, subject to each Party's constitutional provisions, legal system and national law.

The fact remains that there is no harmonised notion at an international level of recidivism and that certain legislations do not contain such a notion. In addition, the fact that foreign judgments are not brought to the attention of judges constitutes an additional complication. Accordingly, Article 11 provides for the possibility to take into account final decisions taken by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts – like convictions by the domestic courts – will result in a harsher penalty. They may also provide that, under their general powers to assess the individual's circumstances in setting the sentence, courts should take convictions into account.

This provision does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts. It should nevertheless be noted that, under Article 13 of the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) of 20 April 1959, a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter.

OTHER INSTRUMENTS

European Convention on Mutual Assistance in Criminal Matters (ETS No. 30)

This Convention is of particular importance for the implementation of this article (see the Explanatory report, par. 113). Article 13 of this Convention allows Party's judicial authorities to request from another Party extracts from the case files and other information from the judicial records, if needed in a criminal matter. Moreover, under Article 22, each Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records. Therefore, when assessing Article 11, the ratification of this Convention should be taken into account.

European Union Law

Council Framework Decision 2008/675/JHA of 24 July 2008 *on taking into account convictions in the Member States of the European Union in the course of new criminal proceedings*

The purpose of this Framework Decision is to establish a minimum obligation for Member States to take into account convictions handed down in other Member States. However, this Framework Decision contains no obligation to take into account such previous convictions, for example, in cases where the information obtained under applicable instruments is not sufficient, where a national conviction would not have been possible regarding the act for which the previous conviction had been imposed or where the previously imposed sanction is unknown to the national legal system. This may cause technical issues in the implementation of the Article 11 of the Convention.

Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from criminal record between Member States

This Framework Decision contributes to achieving the goals provided for by measure 3 of the programme, which calls for the establishment of a standard form similar to the one drawn up for the Schengen bodies, translated into all the official languages of the Union, for criminal records requests. Its main aim is to improve the exchange of information on convictions and, where imposed and entered in the criminal records of the convicting Member State, on disqualifications arising from criminal conviction of citizens of the Union.

ISSUE: HOW TO ASSESS THE IMPLEMENTATION OF THIS PROVISION?

The effective implementation of this provision should not be assessed. As stated above, this provision does not place any positive obligation on courts or prosecution services to take steps to find out whether the persons being prosecuted have received final sentences from another Party's courts.

However, the national law of the assessed jurisdiction should allow such possibility. In other words, the legal framework (legal provision or jurisprudence) has to be in place, allowing the competent authorities (judges) to take into account in any manner (as an aggravated circumstances or other) final decisions taken in another Party. These "technical compliance" elements have to be considered in the assessment of article 11.

Examples of national implementing legislation[10]

ALBANIA

Article 10 of the Criminal Code: Validity of criminal decisions of foreign courts
The criminal decisions entered by foreign courts against the Albanian citizens establishing the commission of a criminal offence shall, unless provided for differently by bilateral or multilateral agreements, be valid in Albania within the scope of the Albanian law, even with regard to the following:

a) to the effect of qualifying the person having committed the criminal offence as recidivist;
b) for enforcing the decisions containing ancillary sanctions;
c) for implementing security measures;
d) for the recovery of damages or other civil law effects.

ARMENIA

Article 17 of the Criminal Code
1. The court ruling in a foreign country can be taken into account, provided the Armenian citizen, foreign citizen or a stateless person was convicted for a crime committed outside the Republic of Armenia, and again committed a crime in the Republic of Armenia.
2. In accordance with part 1 of this article, recidivism, un-served punishment or other legal consequences of a foreign court ruling are taken into account when qualifying the new crime, assigning punishment, and exempting from criminal liability or punishment.

FRANCE

Article 132-16-6 of the Criminal Code (modified in 2005)
Convictions handed down by the criminal courts of a Member State of the European Union shall be taken into account for recidivism purposes, in accordance with the rules laid down in this sub-section.

ITALY

Article 3 of the legislative decree n. 73 of 12 May 2016
Final decisions issued against natural persons by EU member States for different matters than those that are reviewed by the Court, can be taken into account by an Italian judge in order to determine the penalty, to decide whether there has been recidivism or other penal effect of the judgment or to declare whether the person is a habitual/professional offender, even in the absence of a formal procedure of recognition under the CPC. It can also be taken into account in the context of preliminary investigations and in the execution phase. To this end there is in place an automated exchange of information on the verdicts issued by EU member States called ECRIS.

MONTENEGRO

Article 42 of the Criminal Code
In Montenegro, while the legislation does not address the international recidivism explicitly, it stipulates in the CC (Art. 42) and the Law on Criminal Liability for Criminal Acts of Legal Entities (Art. 17-18), that courts should take into consideration any mitigating and aggravating circumstances when determining the sentence, including the offender's behavior

[10] It should be noted that not all these examples of national legislation can be considered as fully compliant with Article 11 of the Convention because of undue restrictions.

and whether the natural or legal person has re-offended.
For the purposes of the application of these provisions the CPC prescribes in Art. 289 that "Before the investigation is concluded, the State Prosecutor shall obtain … information on the accused person's previous convictions". In the cases where a cumulative sentence shall be applied, the State Prosecutor would request certified copies of the previous final judgments. The practice applied confirms that previous convictions are always "taken into consideration when a decision on the sentence is being taken".

MALTA

Article 49 of the Criminal Code
Maltese legislation explicitly addresses the international recidivism. Article 49 of the CC provides that a person is deemed to be a recidivist if, after being sentenced for any offence by a judgment, even when delivered by a foreign court, which has become *res judicata*, s/he commits another offence. The Maltese law does not require separate proceedings for the recognition of a foreign judgment as a precondition for establishing recidivism.

Such legislative measures should not contain undue restrictions, whether these are related to the membership of the States Parties to the EU, or any other grounds such as the origin, the citizenship of the convicted person or the place where the crime has been committed.

On another hand, such measures should not be too ambiguous in its wording and therefore be subject to broad interpretation.

> Example: "when imposing a penalty the court shall, inter alia, take into account of the characteristics and personal conditions of perpetrator, the way of life of the perpetrator prior to the commission of the offence[11]".

With such wording, it impossible for the judge to know whether or not he/she should take into account final decisions taken in another Party.

States Parties' answers may be accompanied by any other documentation that would support the findings of the assessment team such as case law studies, any measure regulating the information exchange with other States Parties on criminal records, or any information on how judges are informed in practice. However, such information shall not have the effect of negatively altering the findings of the assessment team on the compliance of the domestic legislation with the assessed provision.

[11] http://www.coe.int/t/dghl/monitoring/cop198/Reports/C198-COP(2013)RASS3_en_PL.pdf