



## THE MANAGEMENT AND DISPOSAL OF CONFISCATED CRIMINAL ASSETS IN THE EU MEMBER STATES

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The disposal of confiscated assets has been so far a neglected topic at the European level, despite its extreme importance for the effectiveness of the overall confiscation system. However, problems occurring at this final stage of the procedure may nullify the efforts previously made by police forces and judicial authorities.

As highlighted in the recent accompanying document to the Proposal for a Directive of the European Parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union,<sup>1</sup> “the existing EU legislation does not contain provisions on the disposal of assets”. Even though there are no binding provisions at EU level on the reuse of confiscated assets, there has been an increasing attention towards the topic at the EU level over the past five years in several documents.

The growing interest towards the management and disposal of confiscated assets culminated in the adoption of the *Directive 2014/42/EU of the European Parliament and of the Council of 3 April*

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<sup>1</sup> European Commission, *Commission Staff Working Paper, Accompanying document to the Proposal for a Directive of the European Parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union, Impact Assessment*, COM(2012) 85 final, Brussels.

### MAIN CONCLUSIONS

- *Disposal of confiscated assets has been a neglected topic at European level, despite its importance for the effectiveness of the overall confiscation system.*
- *The increasing attention towards disposal of confiscated assets at the EU level in the last years resulted in addressing these issues for the first time in the recently adopted Directive 2014/42/EU on the freezing and confiscation of proceeds of crime in the European Union*
- *Practically in all MSs sale is the main disposal option. Still, most MSs have also introduced various forms of reuse of the assets, via their transfer to public institutions or to civil society organisations.*
- *Social reuse is the only form of disposal that guarantees the visibility of confiscated assets among citizens, since what stems from crime is explicitly given back to society.*
- *Despite the variety of existing disposal arrangements, all MSs face challenges in the disposal phase – stemming from the judicial phase, related to coordination between stakeholders and various factors hampering timely and effective sale or transfer of property (e.g. mortgage liens, legal disputes over property rights, unfavorable market conditions)*
- *Given the abundance of disparate disposal arrangements in the MSs, it is difficult to draw a simple list of recommendations. However the identified best practices could serve as possible steps for improvement.*

2014 on the freezing and confiscation of proceeds of crime in the European Union<sup>2</sup>. The directive for the first time introduced provisions for management and disposal of frozen and confiscated property and invited MSs to "consider taking measures allowing confiscated property to be used for public interest or social purposes". It also specifies that such measures may inter alia comprise earmarking property for law enforcement and crime prevention projects, as well as for other projects of public interest and social utility.

Furthermore a number of non-binding EU policy documents also call for more effective management of the frozen and confiscated assets, as well as for recognition and promotion of existing practices on institutional and social reuse of criminal proceeds. Among these documents, the following should be noted: the *Commission Communication on the proceeds of organised crime (2008)*; the *Stockholm Programme (2009)*; the *Justice and Home Affairs Council Conclusions on confiscation and asset recovery (2010)*; the *2010 Commission Communication on a EU Internal Security Strategy (COM (2010) 673 final)*; the *2011 European Parliament Report on organised crime in the European Union (2010/2309(INI))*.

## Existing legal framework on management and disposal of confiscated assets in the EU MSs

The vast majority of MSs do have criminal confiscation only. Just in about 7 MSs (Bulgaria, Greece, Ireland, Italy, Romania, Slovakia, Slovenia, UK) it is possible to confiscate proceeds outside criminal proceedings too. Furthermore property based confiscation seem to be the rule, although several countries favour value based confiscation

(Cyprus, Finland, The Netherlands, United Kingdom, Sweden). Regardless of the adopted approach on confiscation, all MSs face a variety of problems related to the management and disposal of the seized and confiscated assets, which is also a result of the divergent approaches adopted by the different MSs.

### Provisions to promote effective management of seized assets

In all but four MSs (Denmark, Lithuania, Luxembourg, Malta) there are legal provisions on the management of seized assets aimed at optimizing their value/minimizing their deterioration. Where these provisions lack, this is often felt by practitioners as a relevant gap (e.g. Denmark, Luxembourg).

Still, notwithstanding these provisions, a vast array of problems arises. First, these regulations sometimes have a limited scope of application (e.g. Ireland), or are limited to certain asset typologies, as it happens in Belgium, where real estate is not covered by regulations and only movable seized assets can be sold to avoid storage cost and deterioration. In some countries administrators of seized assets are excessively expensive (e.g. United Kingdom), so that often the costs of management receivers outweigh what is recovered. Or they are not always competent, as in Italy, where, in addition to this courts in different regions take different approaches; in some regions (e.g. Calabria), notwithstanding a legal framework encouraging active administration, a passive administration is promoted (conservation). In Greece, similarly, seized assets are just stored and not used at all. A recurrent problem is the bad conditions of seized assets: for example, in Estonia seized assets are frequently unusable or soiled.

<sup>2</sup> OJ, L 127, vol. 57, 29.4.2014, p. 39,

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Also, asset registration systems are not always properly working, as in the Netherlands, where registration of seized assets is not always up to date or complete, and this hampers their timely and successful management. Effective management might be hampered, as in Portugal, by a scant sensitivity toward the importance of the management of seized assets among prosecutors and judges, and well as by a lack of sufficient means to properly take care of the assets. Or by the delay interim measures are adopted with (e.g. Romania).

### Existing disposal options

Practically in all MSs sale is the main disposal option. To a large extent this is due to the fact that all MSs regard the disposal of confiscated assets as instrumental primarily for compensation of the victims of crime and on a second place for the consolidation of the state's budget.

Still, most MSs have introduced, almost never as first choice, though, different forms of reuse of the assets, via their transfer to public institutions (with different incentivisation schemes) or to society/NGOs social reuse. Italy is a notable exception, as it applies direct reuse of confiscated assets through transfer of property as a leading principle.

Apart from sale and transfer of property destruction is the third most commonly applied option, although only for certain items (e.g. drugs, excise products) or under certain conditions (assets are unusable or depreciated).

### Institutional building arrangements

In the vast majority of the MSs there is not a specialised approach to the disposal of confiscated assets, i.e. there is not a unique entity exclusively charged with the task at the national level. Therefore, in most MSs a confiscation order is basically executed as any other penalty, with the involvement of a variety of criminal

justice actors, which may comprise a key central authority charged with the collection of tax duties or (e.g. the Federal Service for Public Finances in Belgium, the National Revenue Agency in Bulgaria, the National Agency for Fiscal Administration in Romania), the management of public property (Office of Government Representation in Property Affairs in Czech Republic) or the enforcement of criminal and administrative penalties (e.g. the Legal Register Center in Finland, the Land Registration and Estates Department in Luxembourg, the Registry of the Courts of Criminal Judicature in Malta, the Public Prosecution Service in the Netherlands, the Enforcement Authority in Sweden). On the other hand, many MSs rely on more decentralised systems, where the tasks related to management of seized assets, disposal and final destination of the assets are distributed among several institutions or managed on local level by the court.

There seems to be, however, a trend towards the specialisation of asset disposal activities. This resulted in the establishment, for the time being still in a minority of the MSs, of a dedicated agency handling the issue, often in conjunction with asset management issues. The degree of specialisation varies (in some instances a unique dedicated body in tasked with all disposal activities; in other cases not with all of them, but still with a vast array and plays a key coordination role). The countries that have adopted such an approach are France (AGRASC)<sup>3</sup>, Italy (ANBSC)<sup>4</sup> and Cyprus (MOKAS)<sup>5</sup>.

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<sup>3</sup> Agence de gestion et de recouvrement des avoirs saisis et confisqués.

<sup>4</sup> Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata.

<sup>5</sup> The Unit for Combating Money Laundering.

## Key challenges in the disposal process

EU MSs encounter various challenges in the disposal process.

### Challenges related to court proceedings

Judicial trial and court decision for confiscation always precede the disposal phase, so many of the challenges related to the disposal of the confiscated assets originate in court proceedings. For instance, in some countries where value confiscation is applied as a leading principle (Cyprus, Netherlands) a common problem is that the previously restrained assets are insufficient to cover the amount to be collected under the confiscation order and is highly problematic to recover additional assets.

Another common problem is with final confiscation orders, which are unclear, incomplete or provide insufficient or outdated information on the assets to be disposed of (Belgium, France, Netherlands). Parallel and often uncoordinated proceedings on assets due to third party claims (e.g. bankruptcy or matrimonial proceedings) also hamper the disposal process (Belgium, Hungary, Italy, United Kingdom).

In Luxembourg the lack of dedicated centralised register on restraint measures (i.e. the attachment of property is only indicated in the court records) sometimes leads to assets remaining frozen even after the court has issued the final confiscation order.

The excessive length of the court proceedings is also a big issue, as in most countries a final criminal conviction is obligatory for the execution of the confiscation order, which often leads to depreciation or deterioration of the assets (Bulgaria, Greece, Hungary).

### Challenges related to interagency communication and cooperation

Problems with interagency communication and cooperation are among the often cited critical factors hampering disposal. In some MSs this leads to excessive length of the disposal proceedings. Some of the countries report communication problems related to timely and proper notification of the relevant asset management office (Belgium, Bulgaria, Finland), whereas others point out instances of lack of cooperation between the institutions involved (Greece, Italy, Slovenia). In this regard a minority of MSs (Cyprus, France, Italy), as seen, have set up a dedicated agency handling the issue, often in conjunction with asset management, so as to at least partly overcome the challenges related to poor communication and coordination between institutions in relation to the management and disposal processes.

In MSs relying, as discussed above, on more decentralised systems (i.e. where the tasks related to management of seized assets, disposal and final destination of the assets are distributed among several institutions or managed on local level by the court), this decentralised approach for management and disposal functions well in some countries (Denmark, Estonia, Germany, Ireland, Lithuania, Poland, Portugal, Spain, United Kingdom), while others identify it as problematic due to communication and cooperation problems between the parties involved (Greece, Hungary, Slovenia).

Notwithstanding the importance to confiscate and dispose of assets within a reasonable time, so as to reduce the risk of value loss and depreciation, in most of the MSs there are not legal provisions disciplining the timing of the disposal phase. Even in countries, which have introduced such provisions (Greece, Hungary, Lithuania, the Netherlands, Romania and the United Kingdom) there are

problems related to the excessive length of the phase.

### **Challenges related to sale of property**

Since public sale is the predominantly applied disposal option by all MSs, the majority of problem areas reported as hampering successful disposal of confiscated assets are related to public sales.

Most cumbersome appear to be cases related to the sale of to immovable property such as real estate and land. Many MSs report that there are plenty of cases, where the confiscated real estate has mortgage liens or is subject to other executive procedures, which leads to related claims by bona fide third parties (Belgium, Bulgaria, Cyprus, Portugal, United Kingdom). Aggravating factor is when the value of the mortgage is higher than the real market value of the property. The contraction of the real estate market during the economic downturn that started in 2008 has turned the sale of such properties really problematic because of the lack interest in the properties (Bulgaria, Greece), as well as because their sale bears more costs than the actually expected returns (Bulgaria, Cyprus).

Similar problems arise with properties under instalment sale agreements (Portugal), properties under shared ownership (Belgium, Bulgaria, Portugal, Slovenia), unlawfully occupied or with unsolved issues with tenant owner's rights (Belgium, Sweden). Certain types of immovable properties are also reported as more difficult to sell - e.g. high value real estate (Portugal). Industrial and agricultural properties also appear problematic to dispose, since it is difficult to keep them operating and guarantee occupational levels (Spain). The reputation of the previous owner is reported as another detrimental factor for potential buyers of real estate, especially when he has organised crime background (Bulgaria, Denmark, France). A specific problem reported by Portugal concerns the possibility of the public officer or a

private seller charged by the court with the selling of the property to attempt obtaining illicit private profit from the deal. Furthermore, some countries report that many of the problems related to the sale of confiscated property stem from the incomprehensive or outdate legal framework (Bulgaria, Greece, Luxembourg, Poland).

Financial assets (e.g. shares, stocks and bonds) and companies often pose challenges for disposal too. Usually such assets are a package of rights and obligations that the state does not have any interest to keep, but are difficult to evaluate and sell (Czech Republic). Small family businesses or shares of such businesses rarely attract interest and unless someone from the other family members decides to redeem these shares, they are practically unsalable (Denmark). Problems also arise in relation to concurring bankruptcy proceedings against such confiscated companies (Cyprus, Italy).

The challenges related to the sale of the moveable assets markedly differ from all of the described above. Main critical factors are often related to rapid deterioration, considerable value depreciation and disproportionate storage costs, which are often exacerbated by the prolonged judicial trials. With a few exceptions (Denmark, Lithuania, Luxembourg, Malta) MSs have tried to mitigate these issues through the adoption of provisions providing for preliminary sales of such frozen or seized goods prior to the issuance of the confiscation order and keeping the proceeds in an interest bearing account instead. Still in many countries these provisions have limited scope or are rarely applied. More complicated is the issue with the counterfeited goods, whereas the infringement of intellectual property rights precludes such goods from selling and makes it quite cumbersome to dispose of them in some other way than destruction. Furthermore, problems arise when such assets were not seized

before the decision for confiscation and hence have to be located in order to arrange their sale (Belgium, Netherlands, Spain).

Value based confiscation arrangements coupled with timely and effective restraint orders seem to perform better, when dealing with complicated cases related to disposal of real property. However, it should be noted that value confiscation does not take into account the risks for criminals to recover their possession over the confiscated property.

## **Institutional and social reuse of confiscated assets**

The analysis shows that most MSs have introduced forms of reuse of the assets that involve either public institutions (*institutional reuse*, via incentivisation schemes) or society/NGOs (*social reuse*). The former option, as noted, seems to be more frequent than the latter.

What distinguishes social reuse of confiscated assets from the traditional transfer of confiscated assets to the State budget (which is still the main disposal option within the EU) is the visibility of confiscated assets among citizens that it guarantees. Even in the context of traditional forms of reuse assets are, broadly speaking, used for public purposes (since they become part of the State budget); still, they are mixed up with any other public resource, so that citizens cannot link their subsequent public or social reuse to the original nature of confiscated assets.

Currently there have been established two models of social reuse in the EU: 1) direct reuse of confiscated assets for social purposes and 2) reuse of the proceeds of the confiscated assets via specialised funds/programs that invest these proceeds for fighting drug trafficking or crime prevention. Significant experiences of direct reuse of confiscated

criminal assets for social purposes have been introduced in the following MSs: Italy and Belgium (Flemish region). The model for reuse of the proceeds of the confiscated assets via specialised funds/programs exists in the following EU countries: France, Spain, Luxembourg, UK (Scotland), Romania.

Current social reuse experiences have many advantages. What stems from crime is openly given back to society (especially in *schemes for direct reuse for social purposes*), thus spreading an important cultural message that promotes the so called 'social fight' against organised crime. Still, these social purposes often conflict, in everyday life, with economic efficiency. In general, *incentivisation schemes* are easier to manage than social reuse schemes, since it is generally easier to handle money than property itself.

## **Challenges related to transfer and reuse of property**

Reuse of assets, especially when it comes to vehicles and electronic equipment could be very efficient alternative to public sales, however reuse of property just like public sales is also not insured against various challenges.

In fact many of the problem areas are same as the ones related to public sales - mortgage liens and third party claims to the property, which have to be settled or otherwise transferred to the final beneficiaries (Italy); rapid deterioration or bad condition of the assets, which makes them unattractive for reuse or implies additional costs for restoration (Italy); infringement of property rights in cases with counterfeited goods, which precludes gratuitous transfer or in any case necessitates removal of branding that could also be costly (Hungary, Lithuania).

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A specific problem that arises with the reuse of property as a disposal option in some countries is the identification of possible beneficiaries of the assets (Bulgaria, Estonia). The lack of dedicated centralised database complicates the access to information of the potential beneficiaries. Another critical factor is the quality of information provided by the relevant authorities to the potential beneficiaries about the items available for reuse. The lack of proper description and photo of the items, condition of the item or indication on the time of confiscation complicates the informed decision for the beneficiaries on whether to apply for the available assets (Hungary).

Italy also reports problems in terms of delayed notification about the confiscation orders to ANBSC, lack of cooperation among ANBSC and the competent state and local authorities, uncertainties in legislation in regards to certain competences of ANBSC.

### Conclusions and recommendations

The comparative analysis of the existing legislation and practices on management and disposal of confiscated criminal assets across the EU MSs reveals abundance of quite disparate arrangements for handling such property adopted by the different countries. Being the conclusive phase of the confiscation process, disposal arrangements are to a large extent pre-determined by the adopted legal framework on confiscation. Furthermore important role play factors such as existing the levels of organised crime, institutional traditions and larger socio-economic setting. Although, certain similarities between MSs such as preference of public sale over transfer of property as disposal option also exist, it is hard to outline a simple set of overarching

recommendations for improvement of the management and disposal phase in EU as whole.

However, based on the overall analysis, several best practices have been identified regarding management and disposal of confiscated assets. These could be considered as possible recommendations to tackle certain deficiencies or improve the efficiency of the existing disposal regimes in the different countries, taking into account national needs and peculiarities.

#### Best practice regarding the management of seized assets

In France, in order to ensure efficient use of available resources, AGRASC does not administer seized complex assets implying too high administration costs, exploiting the possibility offered since 2010 by the Code of Criminal Procedure, that disciplines seizure of property without dispossession and therefore makes it possible to leave seized assets in the custody of the owner, who must bear maintenance costs.

#### Best practice regarding properties with mortgages

In Sweden, if the value of the real estate does not cover both the mortgage and the cost of the sale, no freezing measure is imposed.

#### Best practice in terms of institutional building arrangements

In Italy, France and Cyprus centralised and dedicated authorities to handle the disposal of confiscated assets exist.

#### Best practice in terms of interagency cooperation

In Sweden the Justice Department recently issued an order for closer cooperation between the police,

Economic Crimes Bureau and the Prosecution Service, which resulted in the establishment of the National Function for Proceeds of Crime, intended to act as advisor to the different authorities.

### **Best practice in terms of sale of confiscated assets at Internet auctions**

Good practices in terms of sale of moveable assets can be found in Belgium, Germany and the United Kingdom, where confiscated goods are offered at internet auctions, as a way to achieve better value for money and timelier disposal.

### **Best practice in terms of centralised management & sale of confiscated real estate**

In Belgium, after the final confiscation order, the Federal Public Service Finance takes over the management of the confiscated real estate. A special central office, named FINDOMIMMO, has recently been created to ensure a better and more efficient management of all real estate, property of the Belgian State. The office prepares property for sale, and when the property is ready FINDOMIMMO gives a sale order to the competent real estate committee, specialised in the sale of real estate.

### **Best practice to coordinate criminal and non-criminal proceedings involving third parties**

In the United Kingdom there are some local arrangements where matrimonial issues are held in the same court as asset disposal. These arrangements, although yet not consistent and subject to further improvement, are a promising approach for dealing with perplexed legal disputes around the assets to be recovered.

### **Best practice to involve citizens in the social fight against organised crime - social reuse (Italy)**

Social reuse is the only form of disposal that guarantees the visibility of confiscated assets among citizens, since what stems from crime is explicitly given back to society. It therefore spreads an important cultural message that promotes the involvement of citizens in the so called 'social fight' against organised crime.

### **Best practice to promote the identification of asset beneficiaries**

Estonian Tax and Customs Board and the General Directorate of Public Finance in Romania are a good example for effective promotion of assets available for social reuse and identification of possible beneficiaries for the confiscated assets. Both authorities maintain publicly accessible lists of goods available for social reuse purposes on Internet and eligible beneficiaries can submit applications for these.

### **Best practice in terms of disposal monitoring to avoid that criminals buy their assets back**

The Antimafia Code in Italy envisages that when - based on reports by citizens or information held at Prefettura - it emerges that confiscated assets have been re-acquired by the criminal, then the act that assigned the assets is revoked.



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