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**Open-ended Intergovernmental  
Working Group on Asset Recovery**

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Item 3 of the provisional agenda\*

**Forum for advancing practical aspects of asset  
recovery, including challenges and good practices**

**Mutual recognition of non-conviction-based freezing orders  
and confiscation judgments**

**Note prepared by the Secretariat**

*Summary*

At its twelfth session, the Working Group, recommended that the Secretariat inter alia collect information on the practice of mutual recognition of non-conviction-based freezing orders and confiscation judgments.

This note aims to explore the various dimensions of the issue of mutual recognition of non-conviction-based freezing orders and confiscation judgments focusing on the concept of non-conviction-based confiscation, relevant information obtained from the Implementation Review Mechanism, as well as main challenges and good practices providing possible solutions.

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\* CAC/COSP/WG.2/2019/1.



## I. Introduction

1. At its twelfth session the Working Group recommended that the Secretariat *inter alia* collect information on the practice of mutual recognition of non-conviction-based freezing orders and confiscation judgments (paragraph 74 of document [CAC/COSP/WG.2/2018/6](#)).

2. The Secretariat has prepared the present note with the aim to explore this issue. The note focuses on the main features of the concept of non-conviction-based confiscation and freezing or seizure and explores practical issues relevant to the enforcement of such orders in requested jurisdictions. The note draws primarily on the information collected during the first and second cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (hereinafter, the Implementation Review Mechanism), the United Nations Office on Drugs and Crime (UNODC) report entitled *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*,<sup>1</sup> the information received in response to two notes verbales sent by the secretariat,<sup>2</sup> as well as the findings of various relevant tools and publications, in particular those developed by UNODC and the Stolen Asset Recovery (StAR) Initiative of UNODC and the World Bank.

## II. The concept of non-conviction-based confiscation and freezing or seizure – requirements of the Convention and relevant practice observed in the implementation reviews

3. The United Nations Convention against Corruption mandates the establishment of a basic regime for domestic freezing, seizure and confiscation of assets (article 3 1), which is a prerequisite for asset recovery. A domestic framework paves the ground for cooperation in confiscation matters, but it does not cover by itself issues arising from requests for confiscation from another State party. Under article 54, subparagraph 1 (c), in order to provide mutual legal assistance with respect to property acquired through or involved in the commission of an offence established in accordance with the Convention, States parties must, in accordance with their domestic law, consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases (hereinafter non-conviction-based (NCB) confiscation).

4. An interpretative note indicates that, in this context, the term “offender” might in appropriate cases be understood to include persons who may be title holders for the purpose of concealing the identity of the true owners of the property in question ([A/58/422/Add.1](#), para. 59).<sup>3</sup>

5. The implementation of this recommendation depends on the punitive or restorative character that each State party assigns to the concept of confiscation. While several States consider confiscation of proceeds of crime to be exclusively a punitive sanction, many others have also approached confiscation as a remedial, restorative sanction which under some circumstances applies as non-criminal or civil remedy.

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<sup>1</sup> The report analyses responses of 156 States reviewed during the first cycle of the Implementation Review Mechanism. Available at [www.unodc.org/unodc/en/corruption/tools\\_and\\_publications/state\\_of\\_uncac\\_implementation.html](http://www.unodc.org/unodc/en/corruption/tools_and_publications/state_of_uncac_implementation.html).

<sup>2</sup> The secretariat received responses from Algeria, Argentina, Armenia, Belarus, Colombia, Cyprus, Hungary, Iraq, Ireland, Kuwait, Mali, Mexico, Mongolia, North Macedonia, Norway, Panama, the Russian Federation, Saudi Arabia, Singapore, Switzerland, Tanzania, Ukraine and the United States of America.

<sup>3</sup> UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd revised ed. (Vienna, 2012), para. 752.

6. The European Court of Human Rights, for example, has delineated the criteria that portray a confiscation either as a penalty or as a civil remedy (European Human Rights Commission, No. 12386/1986 and European Court of Human Rights, Case of Phillips v. the United Kingdom of Great Britain and Northern Ireland, No. 41087/1998). Unlike confiscation in criminal proceedings, civil forfeiture laws do not require proof of illicit origin “beyond reasonable doubt”. Instead, they consider proof on a balance of probabilities or demand a high probability of illicit origin combined with the inability of the owner to prove the contrary.<sup>4</sup>

7. NCB confiscation can be particularly effective in divesting the corrupt of the proceeds of their crimes and restoring those funds to the victim State. While NCB confiscation should never be a substitute for criminal prosecution, in many instances (particularly in the context of the corruption of public officials), NCB confiscation may be the only tool available to recover the proceeds of those crimes and to exact justice. Because an NCB confiscation regime is not dependent on a criminal conviction, it can proceed regardless of death, flight, or any immunity the corrupt official might enjoy.<sup>5</sup>

8. An NCB confiscation regime can be established in both civil and common law jurisdictions. The main difference lies in the standard of proof that is required to enable confiscation. While in common law jurisdictions balance of probabilities or preponderance of the evidence is the acceptable standard of proof, civil law jurisdictions usually rely on beyond a reasonable doubt or intimately convinced standard.

9. NCB confiscation most often takes place in one of two ways. The first is confiscation within the context of criminal proceedings but without the need for a conviction or finding of guilt. In these situations, NCB confiscation laws are incorporated into existing criminal codes, as well as anti-money-laundering acts or drug laws, and are regarded as “criminal” proceedings to which the criminal procedural laws apply. The second means is confiscation outside criminal proceedings, such as in a civil or administrative proceeding. This is a separate proceeding that can occur independently of or in conjunction with any related criminal proceedings. In a number of jurisdictions, this means of confiscation is called “civil confiscation” or “civil forfeiture”.<sup>6</sup>

#### *Non-conviction-based freezing and seizure orders*

10. Under article 54, paragraph 2, of the Convention, the States parties are required, in accordance with their domestic law: (a) to take such measures as may be necessary to permit their competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State party that provides a reasonable basis for the requested State party to believe that there are sufficient grounds for taking such actions and *that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of article 54*.

11. Paragraph 1 (a) of article 54 requires each State party take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State party.

12. An interpretative note indicates that the term “sufficient grounds” used in paragraph 2 (a) of article 54 should be construed as a reference to a prima facie case in States whose legal systems employ this term ([A/58/422/Add.1](#), para. 60).

13. It is notable that the enforceability of foreign freezing or seizure orders, pursuant to the Convention, is linked to the anticipation of the eventual confiscation judgment

<sup>4</sup> UNODC, *Technical Guide to the United Nations Convention against Corruption* (Vienna, 2009), pp. 207–208.

<sup>5</sup> Theodore S. Greenberg and others, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (Washington, D.C., World Bank, 2009), p. 15.

<sup>6</sup> Kevin M. Stephenson and others, *Barriers to Asset Recovery an Analysis of the Key Barriers and Recommendations for Action* (Washington, D.C., World Bank, 2011), pp. 66–67.

to be issued by the courts of the requesting State. That means that *the freezing and seizure orders should be part of the same procedures as the eventual confiscation order* to be enforceable under the Convention, which suggests that similar requirements and challenges would be applicable to the enforcement of both foreign NCB confiscation judgments and relevant freezing or seizure orders.

*Lessons learned from the Implementation Review Mechanism*

14. The first Implementation Review cycle has witnessed the increasing appearance in States from all regions of NCB confiscation regimes (also called “in rem forfeiture” (an action asserting a proprietary claim over the assets), in contrast to the conviction-based “in personam forfeiture” (a claim against a person for a crime or breach of a legal duty)), with particular reference to provisions targeting persons unable to demonstrate the legal provenance of their assets and enabling the countries involved to achieve an effect similar to the one envisaged by the criminalization of illicit enrichment, irrespective of prosecution.<sup>7</sup>

15. Independently of this, however, and even more importantly, in many jurisdictions, non-conviction-based schemes have a decisive role in the confiscation of proceeds from corruption-related offences, notwithstanding their use in addressing unexplained wealth.

16. Non-conviction-based confiscation has been referenced as a good practice in the reviews of the countries that introduced and developed corresponding regimes. Significantly, legislation on unexplained wealth or introducing non-conviction-based confiscation was reported to be pending or under consideration in a number of further States and UNODC has been requested by several other States to assist in the drafting or review of such legislation. This illustrates the substantial dynamic of NCB as an innovative legislative approach to facilitate asset recovery. This mechanism is particularly useful in corruption cases as it is often difficult to gather sufficient evidence to secure a conviction, the evidentiary benefits being particularly relevant in those, mostly common-law, countries that have different standards of proof for criminal and civil matters. All the same, it is worth noting that non-conviction-based confiscation schemes, for all their advantages, are not necessarily a simpler alternative to criminal prosecution and that undertaking non-conviction-based investigations and litigation requires a significant investment in both resource capacity and training in new skills for investigators, lawyers and judges.

17. In a related, more limited version of a non-conviction-based process, confiscation is allowed when the penal procedure could not proceed (or was started but was suspended) owing to a number of reasons specified in law, for example, because the perpetrator lacked criminal capacity or was exempt from criminal liability; because he or she died, absconded, developed a long-term mental disorder or suffered another serious ailment; because an amnesty was given; or because the penal procedure was discontinued due to the statute of limitations. Similarly, a corporation may be subject to a forfeiture order, even if the individual committing the offence cannot be identified or cannot be convicted for some other reason.

18. Under the above scenarios, non-conviction-based confiscation may be imposed by the criminal court or a judicial council involved in the criminal investigation at the time the reason for suspending the procedure became apparent. Nonetheless, some States handle all the eventualities above under the same non-conviction-based confiscation scheme, in the context of civil proceedings. Both of these methods, which were also sometimes under certain circumstances commended as good practices by reviewers, are in line with Convention requirements under article 54, paragraph 1 (c).

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<sup>7</sup> United Nations Office on Drugs and Crime (UNODC), *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, 2nd ed. (Vienna, 2017), pp. 57–58 and pp. 129–130.

### III. Requirements of the Convention with regard to mutual enforcement of confiscation judgments and freezing and seizure orders

#### *Enforcement of foreign confiscation judgments*

19. Article 55, paragraph 1, mandates States parties to provide assistance “to the greatest extent possible” within their domestic legal system, when they receive a request from another State party having jurisdiction over an offence established in accordance with the Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of the Convention situated in its territory. In such instances, States parties must, *inter alia*, per subparagraph 1 (b) of article 55, submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of the Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State party.

20. Article 54, paragraph 1 (a), requires that States parties must take necessary measures to allow their competent authorities to give effect to an order of confiscation issued by a court of another State party *in accordance with their domestic law*. The purpose of this provision is to ensure that States parties have corresponding domestic mechanisms in their legislation allowing for the enforcement of foreign confiscation orders.

#### *Enforcement of foreign freezing and seizure orders*

21. In accordance with article 55, paragraph 2, upon a request made by another State party having jurisdiction over an offence established in accordance with the Convention, the requested State party is required to take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of the Convention *for the purpose of eventual confiscation to be ordered either by the requesting State party or, pursuant to a request under paragraph 1 of article 55, by the requested State party*.

22. Corresponding domestic measures enabling the implementation of the requirements of paragraph 2 of article 55 are required per subparagraph 2 (a) of article 54 that is discussed above, in paragraph 10 of this note.

23. With respect to paragraph 2 (a) of article 54, an interpretative note indicates that a State party may choose to establish procedures either for recognizing and enforcing a foreign freezing or seizure order or for using a foreign freezing or seizure order as the basis for seeking the issuance of its own freezing or seizure order. Reference to a freezing or seizure order in paragraph 2 (a) of article 54 should not be construed as requiring enforcement or recognition of a freezing or seizure order issued by an authority that does not have criminal jurisdiction (A/58/422/Add.1, para. 61).<sup>8</sup>

### IV. Challenges in and approaches to the enforcement of foreign NCB confiscation and freezing or seizure orders

24. Generally, several observations could be made regarding the challenges related to the enforcement of foreign non-conviction-based confiscation orders.

25. The most apparent challenge appears to relate to the cases where a country lacks its own non-conviction-based confiscation mechanism. As usually more stringent requirements apply to conviction-based confiscation orders including a higher burden

<sup>8</sup> UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd revised ed. (Vienna, 2012), para. 739.

of proof, it may be difficult for the countries that employ only conviction-based confiscation mechanisms to enforce requesting countries' non-conviction-based confiscation judgments and relevant freezing or seizure orders.

26. A natural solution to that could be the introduction of such a mechanism domestically. The reviews that have been already completed in the second cycle can provide some useful insights into this issue.

27. As of 20 May 2019, twenty executive summaries were finalized.<sup>9</sup> Based on the information contained in the completed summaries, fourteen States out of the twenty allowed some form of non-conviction-based confiscation in their legal systems and thus were in a better position to enforce foreign non-conviction-based confiscation judgments and freezing or seizure orders. One State out of the fourteen foresaw a non-conviction-based confiscation only with regard to a specific offence and was recommended to consider expanding its application to other corruption offences as well.

28. One State reported that it could enforce all types of foreign confiscation and restraining orders as long as they were in force in the foreign country, based on its mutual assistance in criminal matters act, regardless of whether the orders were conviction or non-conviction-based.

29. Five States out of the twenty did not have domestic non-conviction-based confiscation regimes in place and were issued corresponding recommendations to consider introducing them.

30. The Secretariat also received some relevant data in the responses to its information requests from the twenty-three States parties.

31. Ten States parties specifically indicated that they had domestic NCB confiscation regimes and would be able to enforce foreign NCB confiscation and freezing orders.

32. Only two States explicitly indicated that they would not be in a position to enforce foreign NCB freezing and confiscation orders due to the lack of NCB confiscation regimes in their domestic legislation.

33. The other States that provided responses made references to the generic provisions of their mutual legal assistance legislation without providing additional details on whether any special requirements would be applicable to the requests to enforce non-conviction-based confiscation or freezing orders.

34. However, even where NCB confiscation is accepted in a requested jurisdiction, international cooperation can be challenging because the systems vary significantly, both in the identification of the court (civil or criminal) as well as in the procedural and substantive elements, such as the standard of proof (balance of probabilities, beyond reasonable doubt, or intimate conviction). The NCB order is in rem in some jurisdictions (an action asserting a proprietary claim over the assets), but in personam in others (a claim against a person for a crime or breach of a legal duty). For in rem proceedings, the presence of property in the country is sufficient to establish jurisdiction to proceed with NCB confiscation. Some jurisdictions will pursue NCB confiscation only after criminal proceedings are abandoned or unsuccessful, while others pursue it in parallel to the related criminal proceeding.<sup>10</sup>

35. In that regard the distinction between the identification of the court (civil or criminal), as referred to in paragraph 9 above may be important in terms of States parties' obligations under the Convention. While the Convention generally requires cooperation in criminal matters, cooperation in civil and administrative matters is

<sup>9</sup> Australia, Bosnia and Herzegovina, Botswana, Burkina Faso, Cabo Verde, Indonesia, Ireland, Italy, Malaysia, Mauritius, Mexico, Morocco, Mozambique, Portugal, Saudi Arabia, Senegal, Sierra Leone, Solomon Islands, Sri Lanka and the United Kingdom.

<sup>10</sup> Kevin M. Stephenson and others, *Barriers to Asset Recovery an Analysis of the Key Barriers and Recommendations for Action* (Washington, D.C., World Bank, 2011), p. 67.

viewed as *an obligation to consider where appropriate and consistent with the States' domestic legal system* (article 43(1)).

36. This approach would imply that the States parties that introduced NCB confiscation and freezing or seizure mechanisms as part of their criminal proceedings have better chances of having their NCB confiscation or seizure order enforced, when submitting corresponding requests under the Convention, compared to those States that have them only as part of their civil or administrative proceedings.

37. In that regard, one State specifically reported in response to the information requests that it had experienced problems with executing its outgoing requests for the enforcement of NCB civil confiscation court judgment.

38. Additional models of enforcement of foreign NCB confiscation and freezing or seizure orders were reported by some States that provided responses to the requests for information.

39. One State explained that it would be able to enforce criminal NCB confiscation and restraining orders issued by other States parties based on the Convention with reference to its law on cooperation in criminal matters; while additional bilateral or multilateral treaties could be required as legal basis to enforce civil NCB confiscation orders. That State also indicated that it had a special procedure that would allow it to issue domestic civil NCB confiscation orders where the assets of the offender did not correspond to his or her official income.

40. Another State noted that NCB confiscation and freezing orders were enforced in its jurisdiction based on its mutual legal assistance in criminal matters act.

41. One State clarified that, based on its anti-money-laundering legislation, it would be able to enforce confiscation and restraint orders without conviction issued by a court within the framework of the procedure relating to a criminal offence on the basis of the Convention.

42. Another State reported that it was possible for the courts in its jurisdiction to decide in national proceedings on the confiscation of property or assets outside of criminal proceedings in a so-called separate forfeiture proceeding. The State's national law on mutual legal assistance in criminal matters mandated cooperation in criminal matters. Although non-conviction-based confiscation was not explicitly mentioned in that law, according to the established case law, such proceedings were to be considered, regardless of their qualification in the requesting State as proceedings in criminal matters. That approach enabled the authorities to provide assistance in the domestic execution of foreign NCB orders.

43. One State noted that it could enforce final confiscation or forfeiture orders entered by a foreign court based on a request pursuant to the Convention. It was also reported that the enforcement of a foreign court's restraining order based on civil judicial or non-conviction-based legal authority was also possible. Moreover, in some rare instances the State's prosecutors could seek a restraining order for a limited time from the domestic courts on behalf of a foreign country before a foreign defendant had been arrested or charged in order to ensure that the assets would not disappear.

44. Available information demonstrates that in practice the enforcement of foreign NCB confiscation and freezing or seizure orders is possible also by those States that do not have such mechanisms in their systems and even despite the fact that they could be part of civil proceedings. However, the relevant case law also shows that the ultimate decisions on those issues depended on the position taken by the domestic courts of the requested States.

45. In France, courts recognized and executed a foreign NCB confiscation order from Italy, *issued by a criminal court*, pursuant to the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, despite the fact that France did not have a system for NCB confiscation at that time (Cour de cassation, November 13, 2003, No. 3 03-80371, case Crisafulli). The court recognized the confiscation order because of two factors: first, the evidence

establishing that the property was the product of a criminal offence was sufficiently similar to that required for a criminal court judgment in France, thus likened to a criminal confiscation case. Second, the consequences on the property of the person were similar to a criminal penalty.<sup>11</sup>

46. In the United Kingdom, in case *re S-L (Restraint Order: External Confiscation Order) from 1996*, the English Court of Appeal considered whether an external confiscation order within the United Kingdom Drug Trafficking Offences Act 1986 included civil in rem proceedings. At that time, the English courts did not have the authority to make a civil in rem order. The proceedings had been initiated in the United States and classified as civil in rem because they were against the property itself, rather than against a person. In addition, there were no criminal proceedings against the claimant, nor did the United States have the intention to launch criminal proceedings – the claimant had not been arrested and was believed to be outside the reach of the United States. The British court focused on the substance rather than form in determining whether to recognize in rem confiscation. The fact that the United Kingdom legislative provisions were perceived to be criminal and not civil in nature did not preclude it from looking at the substantive effect of the in rem order, that was recognized to be in essence similar to the effect of in personam order. Accordingly, “proceedings against the defendant” were to be construed as including civil in rem proceedings according to the court’s decision.<sup>12</sup>

47. In *A \_\_\_ Company v. Federal Office of Justice* (United States) case the Supreme Court of Switzerland held that the name of the foreign proceeding (“civil” forfeiture) would not be determinative as to whether Switzerland could give assistance to the United States in an NCB asset confiscation case. In upholding Switzerland’s ability to freeze assets in response to the request, the Court held that there can be circumstances in which a forfeiture procedure could be likened to a case of “criminal character” even in the absence of criminal proceedings. In reaching its decision, the Court summarized the criminal and NCB confiscation proceedings in the United States, as well as the criminal confiscation system in Switzerland (*in rem*). The Court found that forfeiture measures in both systems are tools to fight against criminality, that is, to buttress the concept that “crime does not pay.” Both are in rem measures in which the guilt of the offender does not have to be examined. Furthermore, when the forfeiture procedure is undertaken independently of the criminal proceedings of the offender, the presumption of innocence cannot be invoked.<sup>13</sup>

48. These case examples underline the principle that when asked to assist in a criminal judiciary cooperation case, the authority of the requested State may look beyond the terminology used by the requesting State, and examine if the cooperation sought meets the legal requirements of its own domestic legal system.

## V. Conclusions and issues for further consideration

49. The main observations related to the issue of mutual enforcement of non-conviction-based confiscation and freezing or seizure orders can be summarized as follows.

50. Non-conviction-based confiscation has been getting a wider recognition among States parties with more States introducing NCB confiscation and restraint mechanisms in their domestic legal systems as part of criminal procedure, but also as part of civil or administrative procedure.

51. Main practical obstacles to the enforcement of foreign NCB confiscation and freezing or seizure orders relate to the absence of analogous mechanisms in the

<sup>11</sup> Jean-Pierre Brun and others, *Asset Recovery Handbook: A Guide for Practitioners* (Washington, D.C., 2011), p. 157.

<sup>12</sup> Theodore S. Greenberg and others, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (Washington, D.C., World Bank, 2009), pp. 149–150.

<sup>13</sup> *Ibid.*, pp. 115–116.

domestic legal systems of the requested States, as well as to significant differences, both in the identification of the court (civil or criminal) and in the procedural and substantive elements of NCB confiscation mechanisms in requesting and requested jurisdictions.

52. In particular, while the Convention generally requires cooperation in criminal matters, including by enforcing foreign confiscation and freezing or seizure orders, cooperation in civil and administrative matters is not mandatory, which poses a practical challenge where States would try to enforce their “civil” or “administrative” NCB confiscation order in a jurisdiction that follows the “criminal” NCB confiscation model.

53. Good practices have been identified in cases where requested States were able to interpret the essence and purpose of the proceedings underlined in mutual legal assistance requests for the enforcement of NCB confiscation judgments and freezing or seizure orders as widely as possible to create an analogy to its own domestic proceedings despite the differences in procedure and/or legal terminology.

54. Overall, with only a limited number of completed reviews and also only a limited number of States parties providing comprehensive responses to the information requests circulated by the secretariat, more information would be needed to be able to produce a more complete analysis of the issue.

55. The Working Group may wish to consider requesting the secretariat to continue its efforts, subject to the availability of resources, in gathering information on the practice of mutual recognition of non-conviction-based freezing orders and confiscation judgments, including through soliciting information from States parties, the conduct of an expert group meeting and/or organizing an expert panel at the fourteenth session of the Working Group.

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