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

Vienna, 11-12 September 2014

**Reported outcome of the expert group meeting on the
management, use and disposal of frozen, seized and
confiscated assets, held in Reggio Calabria, Italy, from
2 to 4 April 2014**

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Management, use and disposal of frozen, seized and confiscated assets

(1) Background to the initiative

Organized crime groups today, including Mafias, constitute a transnational problem and a threat to security, especially in poor and conflict-ridden countries. Crime is fuelling corruption, infiltrating business and politics, and hindering development. It is also undermining governance by empowering those who operate outside the law.

Corruption, coercion and white collar collaborators (in the private and public sectors) ease the activities of transnational criminal organizations, including Mafias, so lowering the risks for the members of these organizations of being investigated, arrested and prosecuted, while the effective logistics they provide increases their profits. This model has made transnational crime one of the world's most sophisticated and profitable businesses.

Consequently, transnational criminal organizations, including Mafias, have amassed vast wealth, which is often manifested in real assets and businesses. Such assets are often held in jurisdictions away from where the groups are located, and beyond the jurisdictional reach of law enforcement agencies in the host country. This necessitates the development of strategies and operational practices to trace, identify and then freeze, seize and confiscate such assets. Once this is achieved, policies and practices to manage frozen and seized assets are necessary while action is taken to ultimately confiscate and, where appropriate, return the assets to their rightful point of origin.

The issue of asset tracing, forfeiture and recovery, particularly in the area of recovery of the proceeds of corruption, has been previously examined and well covered in most of its aspects by a number of initiatives, most notably by the joint United Nations Office on Drugs and Crime-World Bank Stolen Asset Recovery (StAR) Initiative.¹

One aspect of this topic that has been less well reviewed is the management, use and disposal of criminally derived and stolen assets at the practical/practitioner level. This has two dimensions: the management, use and disposal of assets at the domestic level; and the management use and repatriation or sharing of assets where more than one jurisdiction is involved and which requires international cooperation and assistance.

In early 2014, the Region of Calabria started to work with the United Nations Office on Drugs and Crime (UNODC) in the field of management, use and disposal of seized and confiscated assets. This initiative, jointly undertaken by UNODC and the Region of Calabria, is timely and can add significant value to the work already undertaken in this important area, as it seeks to focus on securing insight into and gaining experience from jurisdictions where it is perhaps more common than others. The ultimate goal is the identification of good practices with a view to developing relevant tools and guidelines on the issue of administration of seized assets.

Italy, and in particular, the “Agenzia Nazionale per l’Amministrazione e la Destinazione dei Beni Sequestrati e Confiscati alla Criminalita’ Organizzata”, based in the Region of Calabria, as well as the Region of Calabria itself, have significant experience in the area of identifying, seizing and confiscating assets amassed by criminal groups, particularly Mafia-based criminal organizations. This has included cooperation with other jurisdictions where assets are held outside the jurisdiction of Italy.

UNODC acts as the guardian of the United Nations Convention against Corruption (UNCAC) and the Secretariat of the Conference of the States Parties to UNCAC. The Working Group on Asset Recovery established by the

¹ Stolen Asset Recovery — A Good Practices Guide for Non-Conviction Based Asset Forfeiture (2009); Asset Recovery Handbook — A Guide for Practitioners (2011); Stolen Asset Recovery — Management of Returned Assets: Policy Considerations (2009).

Conference in its Resolution 1/4 requested the Secretariat to take a number of actions in the fields of developing cumulative knowledge, supporting the creation of trust and confidence and technical assistance, in particular capacity-building. The Conference of the States Parties in its resolution 5/3 on “Facilitating international cooperation in asset recovery”, inter alia, “encourages States parties and UNODC to share experience on the management, use and disposal of frozen, seized and confiscated assets, and to identify best practices as necessary, building upon existing resources that address the administration of seized assets, and to consider developing non-binding guidelines on this issue”.

(2) The Italian context

Mafia, along with pizza, is almost certainly the best-known Italian word in the world. It was known and used throughout the Palermo neighbourhoods well before it was recognized at an official level. Its first public utterance in 1862 in the context of a theatrical performance in Palermo proved so successful that the term instantly replaced its older and better-known antecedent: camorra. Camorra was a Neapolitan term used to refer to the criminal organization that operated in Naples, a city that at the time had the largest population in Italy and the second largest in Europe. Camorra also referred to the practice of extortion — the request of protection money (pizzo). It therefore incorporated the notion of “criminal organization”, as well as the activity the organization itself pursued.

The first record of the word Mafia in official documents dates back to 1865, shortly after the formation of the Kingdom of Italy. By that time, the criminal practice had become firmly established through all the Italian political regimes, notably the liberal and fascist ones up until the formation of the Italian Republic.

Today, the term Mafia is used not only in Italy, but also internationally, to refer to — and define — local criminal groups with a solid internal structure and an appetite for violence. The word Mafia crossed the Italian borders long ago and permanently infiltrated the common and official language of many other countries. It is arguably a term that has left no border uncrossed. The Mafia has certainly become a successful phenomenon — an original product that replicated and established itself in various areas of the world, although in different modalities.

The Mafia has its genesis in Sicily, the Italian island rich in history, artistic beauty and unique landscapes, and a crossroads of cultures and trades. The Mafia sprung out of agricultural areas where vast portions of land were dominated by large properties. The Mafia has been present in the urban context of Palermo since the city’s early years. Its economy, at the time of Italy’s unification, was flourishing due to the cultivation of vegetables and citrus groves in an area of the town and beyond, also known as “Golden Valley” from the 14th century onwards.

Mafia affiliates had to take a particular oath, one that bound them for life. A few categories of people were banned — magistrates, armed forces and those with a tarnished family honour: tarnishes that had not been washed away with blood, that is. It was an elite organization, not a mass one.

Since its emergence, the Mafia has displayed a pronounced proclivity for violence and intimidation, with a view to instilling fear or even outright terror among its targets. At the same time it proved able to effectively control its operating territory, the people who lived in it and the economic pursuits therein, eventually establishing rules, conduct restrictions, cultural precepts and consensus-seeking tactics, and passing them down to the next generation.

The Mafia, strange as it may seem, never used violence to attack the State and its representatives. It used it to build its reputation and partake in the management of power, becoming a part of the local elites.

The Mafiosi (a term describing members of the Mafia) have never been merely violent and cruel. Even before resorting to violence, they engaged in corruption. Corruption has been, since the dawn of the mafia, the facilitator of violence. This is why the Mafiosi have always exhibited remarkable mediation and consensus-seeking skills,

and why they have strived to advance socially and become part of the local power structure. They were never a mere manifestation of the subordinate classes, because they have always been a unique blend of representatives from both subordinate and dominant classes.

Other than Sicily, the phenomenon of the Mafia also manifested itself in Campania, where it was called camorra, and in Calabria, where it went by a variety of names until the term “ndrangheta” proved more popular than others. The Mafia is a phenomenon of significant historical duration, and its development has undergone various stages over time, adapting to social and economic events on a local and international scale.

One of the prominent phases of growth in illegal and criminal activities coincides with the post-World War II period, when the Mafiosi began trafficking in foreign cigarettes at first, later turning their attention to the more profitable market of illegal psychotropic drugs: heroin and cocaine.

The effects of illegal trafficking in cigarettes and drugs were seriously underestimated. Nobody could predict the destructive, devastating impact on young people and families, the death toll or the significant economic opportunities such trafficking, especially in drugs, could generate.

This so-called “golden age” laid the foundations for future trafficking and created the necessary conditions to build a network among criminal organizations of various kinds, both Mafia-type and non-Mafia-type. The Mafias decided to join forces in their business operations, since it was now necessary — and more convenient — to opt for a shared management and build a common network of contacts by combining their individual resources.

The entrance of the Mafias in these new criminal markets led to very serious consequences. These can be summarized as follows:

- ✓ The Mafiosi, until then bound to operate within their regions of origin, took to working abroad along the routes where they trafficked cigarettes and drugs; commodities and people were now able to move together;
- ✓ The Mafiosi shared interests and negotiated with different criminal groups in foreign countries. Italian Mafiosi and foreign criminals established long-term, stable relationships and commercial agreements that only deteriorated in very few instances, as is shown by the fact that there were never any wars between them. A stable peace treaty among the Mafias characterized their relationships over the past few decades, and nothing suggests that this will change in the foreseeable future. What the Mafias have in common is their need and intention to do business, not their desire to prevail over one another. Modern-day Mafiosi expand their organizations through money, not with an army;
- ✓ They became more corrupt, which proved very useful to overcome barriers between countries and customs. Money paid to individuals in strategic positions allowed the Mafioso to move goods freely from one country to another;
- ✓ They expanded their business to the regions of Central and Northern Italy, which had no previous knowledge of the Mafia phenomenon, while at the same time branching out into other European countries (France, Spain, Germany, Portugal, the United Kingdom and the Netherlands, to name a few) and beyond Europe into the United States, Australia, Canada, and Latin America;
- ✓ Their trafficking activities allowed the Mafiosi to amass remarkable sums of money, though exact values have always been difficult to estimate. The authorities tasked with tracing and calculating these sums generally provide contrasting data, but they all stress the magnitude of the generated wealth.

The Mafia, though present in the territory since the unification of Italy in 1861, struggled to be recognized as such in official legislation. Italian legislators, for a long time, pursued the Mafia through article 416 of the Italian

Penal Code, which punished conspiracies between three or more people. This article, however, proved ineffective to interrupt or delay the expansion of the Mafia.

Amending the Italian legislation turned out to be a very difficult task, although many people — common citizens, magistrates, intellectuals and business people alike — were requesting revisions to the law, as an ever-evolving, pervasive Mafia continued expanding, seizing new economic opportunities and altering the competitive landscape of large areas of the economy. The murder in 1980 of the Governor of Sicily, Piersanti Mattarella, initiated the “season of prominent murders”, a series of eminent victims who fell prey to the Mafia.

Italy’s legislation was only amended in 1982, after the killings of Italian Communist Party Member of Parliament Pio La Torre and Carabinieri General Carlo Alberto Dalla Chiesa. The latter, known for his struggle against terrorism, had been appointed Prefect of Palermo and sent to the Sicilian capital following La Torre’s murder.

With the promulgation of Law No. 646 of 13 September 1982, the Parliament of the Italian Republic approved the introduction of article 416 bis in the second part of the criminal code, which regulates offences against the public order. This law instituted the crime of Mafia-type conspiracy and paved the way for the seizure and forfeiture of assets owned by the Mafia. The law also led to the creation of the position of High Commissioner for the Fight against the Mafia.

Between 1982 and 1992, Mafia-related and prominent murders became increasingly atrocious. A brutal Mafia war broke out and culminated in Totò Riina’s rise to power along with his clan, the Corleonesi, who were named after their city of origin, a fairly large village in the province of Palermo. During this decade, the Sicilian Mafia killed business people who refused to pay protection money, common citizens who did not want to submit to their domination, Carabinieri, police officers, magistrates, politicians, and journalists. Thousands of killings occurred in Calabria and Campania, where bloody internal wars within Mafia organizations had broken out for control of the organization itself, the territory or its criminal affairs. Thousands of Italian people were abducted and held prisoner for long periods of time — sometimes over a year — before being released following the payment of a ransom. It was an extremely long and difficult phase, characterized by an absurd amount of violence. The bloodshed was unprecedented, even in the long history of the Mafia.

These circumstances led many to believe that the Mafia was invincible and that the State had lost control over the situation. The peak of brutality came in 1992, with the massacres of Capaci and Via D’Amelio,² which resulted in the deaths of magistrates Giovanni Falcone and Paolo Borsellino alongside the men and women who formed their security details.

Following these tragedies and the ensuing worldwide resonance, Italian civil society and the State reacted. Legislative and organizational measures were taken in order to reform the State’s internal structure and respond firmly to the Mafia’s attacks. Within a few years (between 1991 and 1992), significant anti-Mafia norms were approved in the wake of the political climate of the moment.

Before his death, magistrate Falcone had contributed significantly to defining some laws approved in 1991 and 1992, since he had taken office as Direct General of Judicial Affairs at the Ministry of Justice at the time, after leaving Palermo.

In those years, some noteworthy measures were taken. The most important being:

- ✓ Law No. 221 of 1991, regarding the disbandment of city councils infiltrated by the Mafia, was adopted. This was an important law, since it affected the relationship of organized crime with the political sphere and the institutions;

² The massacres of Capaci and Via D’Amelio were two targeted bombings that took place in Palermo claiming the lives of anti-mafia magistrates Paolo Borsellino and Giovanni Falcone in 1992.

- ✓ Law No. 410 of 1991 was promulgated, which instituted the Anti-Mafia Investigative Directorate (DIA). The rationale behind the law was the creation of an entity that could operate on a global scale and specialize in the fight against Mafia-type criminality. This was an ambitious plan, and one of its objectives was to rectify some flaws of the past system, whereby rivalry between different divisions of the armed forces had led to quarrels or misunderstandings that ended up interfering with the investigations (sometimes even irreversibly). Prior to the adoption of the law, each department of the armed forces had its own operational unit to fight the Mafia: the State Police had the Central Operative System (SCO), the Carabinieri had the Special Operations Group (ROS), and the Finance Police had the Organized Crime Investigation Group (GICO). The Anti-Mafia Investigations Directorate (DIA) was tasked with coordinating the intelligence activities on the Mafia, as well as investigating the phenomenon as a whole, both in Italy and internationally;
- ✓ Law No.197 of 1991, also known as the anti-money laundering law, was adopted;
- ✓ Law No.8 of 1992 instituted the National Anti-Mafia Directorate (DNA). This important agency was created to coordinate, at a national level, the activity of 26 district-level anti-Mafia directorates (DDA), with a view to allowing prosecutors to operate outside of their own jurisdictions. This had become necessary after the structure and tactics of Mafia organizations had changed significantly. For this reason, the 26 DDAs (as opposed to the 146 prosecutors assigned to their relative jurisdictions) were tasked with conducting the investigations. The expansion and impact of the mafia's influence on a national and international scale required some form of coordination in investigations which, in turn, focused on an ever-changing phenomenon and aimed at pursuing individuals who could move freely and easily around the world;
- ✓ Law No. 172 of 1992, the so-called anti-racketeering and anti-usury law, was adopted;
- ✓ Law No. 356 of 1992 incorporated article 41 bis into the penal system regulations and allowed for the application of strict penal measures against Mafia bosses. This measure allowed the Ministry of Justice to suspend, for a limited period of time and on serious grounds related to public order and safety, all rules on fair treatment of the most prominent and dangerous inmates who were related to Mafia-type organizations. This law, which sparked much controversy both in Italy and abroad, was necessary because the Mafiosi, although imprisoned, were still able to issue orders to their clans from prison.

With the creation of DIA and DNA, armed forces and magistrates could rely on new and better tools to render their investigations more effective.

Between 1991 and 1992, new laws were introduced to enhance the coordination among armed forces corps and to improve the effectiveness of investigations conducted by magistrates. Italy, since then, has been a model both in Europe and internationally, thanks to the modern and effective set of norms it adopted in the fight against organized crime. Its legislation, institutions and the country itself became an inspiration to those who were faced with similar problems in their own countries and were seeking the best and most effective tools to counter organized crime.

More laws were adopted in the years that followed. Law No. 44 of 1999 set up a solidarity fund for crime victims and instituted the position of Commissioner for the Coordination of Anti-Racket and Anti-Usury Initiatives, and Law No. 512 of 1999 established a support fund for victims of the Mafia.

A significant change was the decision to consider disrupting the Mafia's capital accumulation processes, so as to target the Mafia's main motives of existence and their social prestige. The idea that pursuing the Mafia's properties and capital was the best way to undermine their operations and activities, thus leading to their ultimate defeat, matured and received the backing of the majority of the population.

The assets, once taken from the Mafia, were to be used for social programmes, since it was important to promote the idea that the wealth that had been accumulated through violence, homicide, illegal and criminal activities should be given back to society.

This was important from a practical point of view because it weakened criminal organizations by depriving them of capital, business interests and real estate. It visibly restored the principle of legality, because it was an example of how the criminal way of life led to sanctions and the loss of all profits that had been accumulated through illegal methods and because it could create job opportunities for local young people and the possibility of using the acquired real estate for social, cultural or safety purposes, such as the construction of police force headquarters, schools, libraries or cultural centres.

A very important step in defining an aggressive policy against the Mafia's wealth was the approval of Law No. 109 on 7 March 1996, which at its core addressed the issue of managing and distributing assets seized and confiscated from the Mafia. The law was approved by a unanimous vote of Parliament, following a speedy legislative process that was necessitated by an early discussion of the draft law following the dissolution of the House of Parliament by decree. The law's approval had been preceded by social activism, which had pushed for a law that could reverse a situation that was deemed intolerable, especially after the 1992 massacres. At the head of the social activism was the Association Libera, led by Don Luigi Ciotti, which collected over one million signatures for a petition requesting that the law be approved quickly.

Law 109/96 set a number of operations in motion which were carried out with no centralized management structure. A decree by the Ministry for Finance of 3 February 1999, created the Permanent Observatory for Seized Assets, which concerned various ministries: Finance, Domestic Affairs, Justice, Industry, Commerce and Manufacture, Labour, Treasury, Budget and Economic Planning, Defence (Carabinieri Corps), as well as the Attorney General, the National Anti-Mafia Prosecutor, the National Labour and Economic Council, the National Municipal Assembly, and Libera.

The Observatory quickly proved to be inadequate when faced with the management of the law's after effects, so that on 28 July 1999, a Decree of the President of the Republic, published in the Official Gazette on 1 September 1999, appointed the Government's temporary commissioner for the management and allocation of assets forfeited from illegal organizations. One of the commissioner's main duties was ensuring coordination between all the jurisdictions involved in the allocation and management of forfeited assets, as well as handling relations between the jurisdictions and association as put forward in the new law.

After three commissioners took office, on 23 December 2003, the Council of Ministers suppressed the position of temporary commissioner and created the State Land Administration Agency. As a result, from 1 January 2004, the Agency, which became a public economic authority, experienced a significant increase in its powers.

Finally, Legislative Decree number 4 of 4 February 2010, which with some modifications became Law No. 50 on 31 March 2013, the National Agency for the management and allocation of assets forfeited from organized crime was established with offices in Reggio Calabria.

(3) First expert group meeting on the management, use and disposal of frozen, seized and confiscated assets, hosted by the Region of Calabria, from 2 to 4 April 2014, in Reggio Calabria, Italy

In the context of the joint initiative by UNODC and the Region of Calabria, a first Expert Group Meeting took place from 2 to 4 April 2014 in Reggio Calabria, Italy, involving approximately 80 experts from approximately 35 countries, agencies and organizations with experience and expertise in the area of the management, use and disposal of frozen, seized and confiscated assets. The meeting provided a platform for dialogue among practitioners involved in the tracing and seizing of assets, managing assets post-seizure, as well as experts and

practitioners in the areas of disposal of assets, the use by governments of seized assets and international cooperation in the management of seized assets. Three parallel focus groups were held during the meeting to advance the work and thinking of the international community in the areas of: (i) international cooperation in identifying, seizing and confiscating criminal assets, particularly those of Mafia-based criminal organization; (ii) domestic management, use and disposal of seized and confiscated assets; and (iii) management of returned assets in asset recovery cases.

Focus Group 1: International cooperation in identifying, seizing and confiscating criminal assets, particularly those of Mafia-based criminal organizations

Background

At the end of the last century, the internal structure of criminal organizations changed dramatically along with the economic and financial patterns of a world that had just entered the era of globalization. Illicit trafficking in cigarettes and drugs set in motion the process of creating new criminal structures. At the same time, the global geopolitical situation changed and the schemes of criminal organizations were altered accordingly.

The fragmentation and subsequent creation of new countries after the dissolution of the Union of Soviet Socialist Republics (USSR) and the Socialist Federal Republic of Yugoslavia led to the fall of barriers allowing criminals to move freely in both directions and creating a criminal market that would have been impossible to even conceive of beforehand, simply because some of these areas of the world map had been previously inaccessible.

European criminal groups gained access to the vastness of the East, whereas eastern criminal groups were now able to act in the previously unreachable, richer European territories and to establish bonds with European-based Mafias and other criminal organizations. Organized crime enjoyed a boundless criminal space. Borders between countries could now be easily crossed, especially due to well-networked corrupt systems.

New criminal groups, such as the Serbian and Montenegrin Mafias, emerged and started operating in conjunction with Colombian cartels supplying smaller criminal entities based in Germany, Austria, Spain, the United Kingdom and Italy. Other groups appeared in Russia, Romania, Ukraine, Moldova, and Albania. These are an addition to more traditional Mafias such as the Chinese Triads, the Japanese Yakuza, the Colombian cartels of Medellin, Cali, Pereira and Costa. Mexican and Nigerian groups also developed greatly; the expansion of Bolivian and Peruvian groupings is also noteworthy.

Relationships and rackets were established and intensified with those at the borders who - in exchange for money - were willing to turn a blind eye to the illegal transit of goods. Corruption facilitated the cross-border circulation of illegal merchandise.

Organized crime has diversified and multiplied. Today, criminals engage in a variety of illicit activities ranging from human trafficking or the international arms trade, to doing business with nuclear, radioactive, industrial and toxic waste, often taking advantage of weak or corrupt authorities and regimes. In this day and age, no boundaries can restrain this activity. Criminals travel comfortably across the globe in search of new merchandise to sell and hence they have been able to amass an enormous amount of illicit capital that is now at the heart of illegal economies.

Illicit activities often have a common characteristic: the same offence is committed in multiple countries or the activity is planned in one country and put into action in another. Globally, for instance, illegal goods are manufactured in a certain location and then sold in a distant market, maybe even on another continent altogether, after having been channelled through a number of countries, the so-called transit countries. Regionally, for

example, the free circulation of people and capital within the European Union has favoured criminal organizations, which are now able to act without having to undergo in-depth inspections.

Criminal groups of a given country operate increasingly in conjunction with criminal entities of other jurisdictions and act across national boundaries. Globalization has affected the dynamics of organized crime on a global level: organized crime has not failed to catch up with the modern society, always adapting to new challenges that have been posed.

Part of the money gained through illegal trafficking returns to and is re-invested in the country where the goods were manufactured. Another part, probably the largest, is destined for tax havens or is laundered in the countries where the merchandise is finally sold. Where the illicit capital is allocated varies. In general, money tends to flow to countries where national legislation does not allow for a swift scrutiny of the criminal nature of the money and for subsequent forfeiture.

In addition, those who oversaw the production and sale of illegal and criminal goods have managed to infiltrate the white collared world, national and international professional launderers, criminals who are able to move vast sums of money without leaving a trace, thereby concealing great wealth. Many criminals, directly and dangerously involved in this business, have been arrested and sentenced. The flow of capital, however, has hardly ever been interrupted as the money was handled by only a few people whose identities were undisclosed to the majority of small-scale criminals and only known to the heads of criminal or Mafia families, who were tasked with managing or concealing capital.

Against this background, going after illegal and criminal proceeds is today an imperative for all countries. The benefits of disrupting the flows of criminal proceeds are numerous: (1) to protect a country's economy; (2) to safeguard a country's standards of economic and social development; and (3) to work towards eradicating a global phenomenon that is undermining the economic foundations of modern democracies in a number of ways.

In this regard, a recent directive approved by the European Parliament and the Council of the European Union, brings about some significant innovations. EU Member States will now be able to overcome the problems that generally arise when suspects transfer their properties to another individual hoping to avoid seizure and forfeiture. Seizure at the expense of third parties will be allowed under the new directive if lack of good faith can be demonstrated. Furthermore, EU Member States are urged to grant the possibility of taking urgent measures regarding orders of seizure. This is an especially important measure when there is a genuine risk that the person under investigation is expected to try concealing his or her assets. Finally, the directive includes measures regarding mutual acknowledgement and assistance, which are ultimately aimed at harmonizing European legislation. Harmonized EU legislation will eventually facilitate cooperation among its Member States. This is still to be intended as general guidance, since the directive has no direct effect on the Framework Decision 2006/783/GAI which regulates the mutual acknowledgement of orders of seizure and forfeiture within the European Union and is still not fully put into practice by its Member States.³

Non-conviction based forfeiture is certainly a useful tool, but it is difficult to put into practice even within the EU itself when one of the cooperating States does not acknowledge it. The recent EU Directive was approved without the participation of the United Kingdom and Denmark. A Guide⁴ by the Stolen Asset Recovery (StAR) Initiative (jointly undertaken by UNODC and the World Bank) highlights the ways in which misappropriation and corruption, especially in poor countries, represent a serious obstacle to the proper use of public funds that should

³ Directive 2014/.../EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (PE-CONS 121/13).

⁴ StAR Initiative (UNODC — World Bank), A Good Practices Guide for Non-conviction Based Asset Forfeiture, 2009.

be designated to the growth and development of a country. The advantage of non-conviction based forfeiture is that it allows for the forfeiture of assets even when a criminal proceeding cannot be started.

Non-conviction based (NCB) asset forfeiture is a critical tool for recovering the proceeds and instrumentalities of corruption, particularly in cases where the proceeds are transferred abroad. A procedure that provides for the seizure and forfeiture of stolen assets without the need for a criminal conviction, NCB asset forfeiture can be essential when the wrongdoer is dead, has fled the jurisdiction, or is immune from prosecution. The Guide proposes several basic notions on non-conviction based forfeiture.

Non-conviction based forfeiture is acknowledged in different countries, such as the US, South Africa, Ireland, Albania, Colombia, Liechtenstein, Switzerland, Slovenia, and Thailand. At an international level, despite the abundance of documents and conventions concerned with the issue of forfeiture, UNCAC is the first tool to explicitly allow NCB asset forfeiture, particularly in cases of death, flight, or other cases. Article 54(1)(c) of UNCAC requires all States parties to consider forfeiting the proceeds of crime without a conviction. UNCAC does not focus in a single legal tradition or suggest that fundamental differences can impede implementation. Instead, it proposes NCB asset forfeiture as a tool for all jurisdictions to consider in the fight against corruption, a tool that transcends the differences between systems.

Other acts also mention this form of forfeiture, but States parties are never bound to abide by them in any way. Such acts are the FATF Forty Recommendations, the EU Framework Decision 2005/212/GAI and the recent EU Directive along with the G8 Best Practices.

Discussion

The purpose of Focus Group 1 was to discuss international cooperation in identifying, seizing and confiscating criminal assets, particularly those of Mafia-based criminal organizations. The session focussed on a step-by-step analysis of the issues that arise out of the identification, seizure and confiscation of assets.

Participants noted that in the context of international cooperation, it is crucial to use the correct terminology, as experiences have shown that the use of certain terms can lead to confusion, delay and even the refusal of mutual legal assistance requests. This confusion derives in the main from differences in terminology between civil law and common law jurisdictions.

The discussions highlighted that consistency in legislation between different countries is crucial and that the ultimate aim has to be the mutual recognition of seizure and confiscation orders. Countries should not only have the authority to enforce foreign provisional orders, but also to enforce foreign confiscation orders, and should enact legislation that maximizes the enforceability of their judgments in foreign jurisdictions. The inability to recognize and enforce foreign confiscation and restraint orders is a major hindrance in international cooperation. According to article 57(3) (a) and 55(1) (b) of UNCAC, the mandatory return obligation arises upon the execution of the requesting jurisdiction's final confiscation/forfeiture judgment in the requested jurisdiction. Hence, it is necessary for jurisdictions to have both: (a) the capacity to obtain a confiscation/forfeiture judgment against property located beyond its borders when it is the requesting country; and (b) the capacity to enforce a confiscation/forfeiture judgment of another country when it is the requested country.

In this context, it was recommended that jurisdictions which do not have domestic non-conviction-based (NCB) legislation should consider introducing legislation to enable recognition of foreign NCB judgments in an UNCAC and UNTOC context. In a step to harmonize legislation, two elements should be considered: (a) encourage passing legislation to integrate NCB in the legal systems; and (b) acknowledge that some jurisdictions will not adopt NCB. However, the recognition of foreign orders is key: all states should find ways to allow accepting NCB issued by foreign countries. In an attempt to foster cooperation between NCB and non-NCB jurisdictions,

NCB judgements should be enforceable in jurisdictions which do not have NCB. It was noted that CARIN is in the process of identifying four different NCB typologies based on one factual matrix to clarify the issues created by the typologies so as to enhance understanding and facilitate the recognition and enforcement based on the respective NCB typology. The discussion acknowledged that it was a matter for individual jurisdictions to choose whether to incorporate NCB or not.

While the Italian solution regarding NCB was found particularly useful and NCB was also widely recognized as being of use, the remedy has attracted constitutional, human rights and abuse arguments. The human rights arguments are not restricted to individuals (the European Court of Human Rights treats companies as individuals). However, what the Italian solution proposed was not in any way some form of expropriation of private property without safeguards; the whole premise of the Italian system is that there are more than sufficient safeguards in place. The discussion centred around the fact that the majority of cases in the European Court of Human Rights were held not to violate human rights. Accordingly, States fearing the abuse of NCB should be reassured that no property or money is taken away without due process. The rights of any company or individual to the property subject to proceedings are properly determined and fair representation is guaranteed. The Australian experience also demonstrates that a lot of concerns surrounding NCB are misplaced/wrong. It was underlined that the object of NCB is the seizure of assets as representing proceeds of unlawful conduct and this should not be conflated with the determination of the guilt of an individual and any consequent punitive deprivation of that individual's liberty. Participants agreed that there is a need to publicise (i) the arguments that have been put forward to challenge "NCB orders" and the manner in which these have been resolved by the Courts and (ii) the nature of the legal issues that pertain to whether or not NCB may or can infringe constitutional rights.

The participants also entered into a discussion on MLA (mutual legal assistance) requests and the transmission of non-evidentially admissible information. It was highlighted that some important information can be obtained more quickly and with fewer formalities through direct contact with counterpart law enforcement agencies and FIU's, or from liaison magistrates or law enforcement attachés posted locally or regionally. This informal assistance may lead to a more rapid identification of assets; confirm the nature of the assistance required and, even more importantly, provide the proper foundation for a MLA request. As an example, Nigeria's Ibori case demonstrated that an informal approach to asset tracing is useful allowing for a direct contact between requesting and requested state which can then be built upon to facilitate the MLA process.

The importance of exchanging information was highlighted by the successful example of the platform that was created for operational information sharing in asset tracing investigation related to Tunisian ex-President Ben Ali and family members. A contact point was designated in each country to complete the database. In the case of Belgium, each piece of information was inserted after gaining a permission of the magistrate to ensure the piece of information was legal and could be transmitted. The discussion also turned to the very first 24 hours. While it was debated how to actually define the first 24 hours, it was clear that the initial hours are crucial in terms of the alert phase (the State has difficulty, demonstrations/riots in the streets, leader has fled country) and the immediate need to tackle the freezing of the assets, identify and trace respective properties and ill-gotten gains. It was emphasized that in these situations investigators must act immediately to collect evidence, locate and seize the money. In this context, it is vital for a proper exchange of information between Financial Intelligence Units (FIUs) to take place. The aim is to trace bank accounts in the name of the suspects and to identify the ultimate beneficiary of accounts and structures. However, it was pointed out that FIU's do not all have the same powers. A FIU has to have the authorization to ask for further details on information provided by the financial institutions (by way of Suspicious Transaction Report (STR)). Furthermore, FIU's should have the power to disclose information to be able to start "legal action", which in turn helps to reach the goal of collecting evidence.

Participants pointed out that if there is no effective exchange of information between jurisdictions and the ability to use this information in the requested jurisdiction, this will lead to problems in prosecution (and/or asset recovery). If an FIU does not have the power to pass on pieces of information to its own competent authorities, for investigation and prosecution purposes, then the international mechanisms will not work effectively. The Egmont Group may have already sought to address this but this forum should be taking all steps possible to follow it up. It was recommended that FIU's should at least have the power to obtain information from financial or designated non-financial institutions and professionals engaged in the movements of funds through corporate vehicles or structures.

The important principle was to facilitate and secure the exchange of information while respecting domestic legislation. In this context, it was suggested that a road map could be elaborated explaining what to do in the first 24 and 48 hours in terms of the general alert phase or "the emergency phase", the investigative phase with a view to locating and freezing the suspected criminal assets, and finally the phase of effective repatriation of the property to the requesting State. The road map should include the measures available in the short- and long-term, starting from tracing and identification to passing the information through secure channels, followed by requests for MLA which then lead to evidence provided to courts. It was reiterated that a strong political will and legislative framework is key to success.

The capacity of the authorities of the requesting State (investigators and prosecutors) as those trying to build the case for asset recovery overseas was identified as crucial; so too was the need to have local expertise. Technical assistance is needed to help victim States increase their capacity to trace assets and make requests to pursue stolen assets. In this context, informal (regional) networks were identified as useful in increasing the chances to build trust and relationships. These networks provide individuals with the expertise within their own jurisdiction who can help identify which platforms and secure channels could or should be used within the first 24/48 hours of encountering regime changes. The key is to identify the individual(s), who has/have an appreciation of the domestic situation and is/are willing to engage in information exchange and can advise others on the correct legal channels. Several participants noted the strength of an informal network (such as CARIN, RRAG, ARINSA, ARIN-AP and the Global Focal Point Initiative established by INTERPOL and StAR) as being the point of contacts. While a piece of information transmitted from an informal network (or a formal network such as the Egmont Group) cannot be used in proceedings, the importance is the contact among professionals.

While the advantage of informal information exchange was highlighted, some participants pointed out that although information gathered informally is often obtained quickly, the information can seldom be used as evidence for use in criminal processes and confiscation proceedings. Such information tends to be most useful for verifying facts and obtaining background information in support of a MLA request. On the other hand, through the use of a MLA request, information obtained is admissible in judicial proceedings and enables enforcement of orders. However, difficulties encountered in formal MLA processes include the time taken and some complex requirements that are often difficult, if not impossible, to adhere to without material assistance from the requested jurisdiction. Nigeria's experience has shown that good results can, however, be achieved starting with the informal channels to establish direct contact which can then be beneficial when preparing a MLA request in terms of getting the requisite support/knowledge to meet the legal requirements in the requested State.

This discussion was put in context by the case of Ben Ali where initially there was no exchange of information internationally on the different jurisdictions approached and involved. In this case, Ben Ali and his relatives got hold of state institutions acting like a Mafia-type organization and passing laws to protect personal assets. Accordingly, the first step was to identify the assets and then to link them to a specific offence. This case underlined the importance of FIU's as key partners in initiating a case and conducting an investigation where they are able to provide intelligence reports to local law enforcement or prosecutors and, where appropriate, FIU's could also provide intelligence reports to foreign FIU's bilaterally. In the case of Ben Ali, the exchange of

information between FIU's proved to be vital as it led to the persons who belonged to Ben Ali's clan. Indonesia faced similar problems to those encountered by Tunisia in the sense that Suharto issued decrees benefitting his cronies and the dependence on the political will of the new government to investigate to any illegal aspects. Guernsey (Suharto) and Jersey's (Nigeria) experience flagged the fact that when one is dealing with fraud or corruption committed by senior politicians and statesmen, even if removed from office, they do not necessarily lose influence within their country. This residual political influence often leads to a certain reluctance to provide full assistance to develop criminal or asset recovery cases in other jurisdictions.

In this context, several participants underlined the importance of the ability to have a procedure to confiscate/forfeit even if trial collapses for whatever reason. The new Directive on the freezing and confiscation of proceeds of crime in the European Union was mentioned as an instrument which facilitates the confiscation of criminal assets within EU Member States. Even where individual countries do not foresee the possibility of NCB, the Directive allows for temporary freezes in cases where a criminal conviction is not possible because the suspect is ill or is a fugitive. The aim of the Directive is to harmonise European legislation to facilitate cooperation between Member States. The UK, the US, Ireland and Australia were discussed as examples of countries that go further than the EU Directive in that they cater for action against assets irrespective of the existence of any possible proceedings against the person.

The new EU Directive can also be regarded as recognition of the Italian experience. Criminal organizations such as the Mafia have been a great source of human tragedy and grave economic loss in Italy. In order to deprive the Mafia of the significant financial assets they have amassed, Italy has developed a very sophisticated system. Italian law incorporates a highly evolved and wide-ranging confiscation framework that combines three approaches:

(a) a traditional conviction-based confiscation method: Italian law allows the seizure and confiscation of property derived from criminal activity at the conclusion of a proceeding;

(b) confiscation through the alleviation of the burden of proof where a person has been convicted: this is based on the alleviation of the burden of proof where convicted persons cannot justify the origin of their assets. Once the relationship between the assets (compared to legal income) and the convicted person of serious and organized crimes has been established, the judicial authority can be requested to proceed with a confiscation order;

(c) a preventive system of confiscation against persons who are deemed "dangerous for society" (confisca di prevenzione): a preventive system of confiscation for assets in possession not only of persons belonging to Mafia-type organizations, but also persons with tendencies to illegal behaviour and frequent perpetrators of common crime.

It is apparent that the experience acquired by Italy in dealing with the specific problems of the Mafia has led the country through a process whereby they have sought to identify effective mechanisms for dealing with the problems they were confronted with. The Group thought it worth considering the experiences acquired by any one jurisdiction (which has had to address acute forms of particular criminality) with a view to analysing whether or not the processes or the solutions identified in those countries (such as Italy) can be adapted to different situations that exist in other jurisdictions where they have different types of organized crime groups. Participants also highlighted that when dealing with the flows of money, what one is looking at is how monies are introduced into other jurisdictions. Organized groups have different business models and use different avenues to come into or use various jurisdictions. One way of seeking to address this is for the expertise acquired within countries such as Italy to be communicated to international partners so they can look at and analyse the way in which their systems are or may be abused/targeted by criminals. While law enforcement agencies can already exchange opinions and experiences about how these groups are operating with a view to stop the illegal activity, the Group

recommended developing a policy paper to look at this financial aspect to see how one jurisdiction can use the expertise acquired to give information to other jurisdictions to allow them to understand what steps they might be able to take to mitigate or prevent avenues that are being used in this context.

Another point touched upon by the Group was that tightening anti-money laundering (AML) frameworks can possibly strengthen asset recovery processes in ways that have not yet been thought about. There will be jurisdictions where NCB is not acceptable. This, however, does not mean that there are no other remedies that might not achieve the same or similar objectives. At a technical level, the way in which transactions are looked at by competent authorities, the obligation to file STRs and the definition of a money-laundering offence can be a powerful weapon not only in a penal context, but also a civil one. If a financial institution develops a suspicion that money received is proceeds of crime this might not only give rise to an offence of money-laundering but could also possibly give rise to a civil remedy (e.g. claims to a constructive trust in some common law systems). In some circumstances, the existence of the civil claim may also cause financial institutions to think twice before giving effect to a transaction.

Recommendations

1. Model/guidance on article 58 of UNCAC; to empower FIU's to disseminate information received to the competent authorities and to proactively request information from financial or designated non-financial institutions and professionals;
2. A policy paper that analyses different tracing or freezing mechanisms and their interaction with the asset recovery process designed to secure the judicial restraint and confiscation/forfeiture of assets [in terms of the process by which frozen assets are adjudged to be the proceeds of criminality];
3. A policy paper analysing the functions of central authorities to explore any disconnects between informal exchanges of information and formal processes designed to secure evidential admissibility of the same information in the requesting jurisdictions and to explore the scope for aligning the two with a view to reducing delay and speeding up the formal process with particular regard to existing workstreams which are already being undertaken pursuant to COSP resolution 5/3;
4. A policy paper analysing national legislative models which have confronted particular challenges (such as organized crime, corruption, terrorism) and how those jurisdictions have adapted or designed their systems accordingly (Italy, Ireland, the US) with a view to identifying good practices. For instance, communicating domestic knowledge and expertise to international partners to enable the international partners to analyse and understand how their systems may be abused by these groups so that they can then act upon it;
5. A factsheet on current jurisprudence on NCB cases, burdens of proof and international cooperation to establish the validity of any human rights and constitutional barriers to introducing NCB legislation;
6. A recommendation that jurisdictions which do not have domestic NCB legislation should consider introducing legislation to enable recognition of foreign NCB judgments in an UNCAC and UNTOC context.

Focus Group 2: Domestic management, use and disposal of seized and confiscated assets

Background

Among the many consequences of globalisation is the speed at which illicit capital travels around the globe and infiltrate a nation's finances and economy. Criminals are taking advantage of the globalization of the world economy by transferring funds quickly across international borders. The social consequences of allowing these

groups to launder money can be disastrous. Money-laundering can erode a nation's economy by changing the demand for cash, making interest and exchange rates more volatile, and by causing high inflation in countries where criminals are doing business. Most disturbing of all, money-laundering fuels corruption and organized crime. A UNODC study⁵ estimates that less than 1% of the laundered capital is seized on a global level. Hence, there is an enormous quantity of “dirty money” which is circulating without anyone being able to stop the flow.

The capital in motion derives from a number of criminal activities. It is not always easy to differentiate between Mafia, drug trafficking and corruption proceeds, and sometimes these are even derived from completely different criminal activities. One thing these proceeds have in common is that they are acquired through illicit means.

Taking the proceeds of crimes from corrupt public officials, traffickers and organized crime groups is one of the best ways to stop criminals in their tracks. However, rapid developments in financial information, technology and communication allow money to move anywhere in the world with speed and ease. The opportunities to conceal criminal proceeds are so numerous that State authorities struggle to trace and disrupt the illicit flows.

Taking criminal assets away from criminal organizations is a complex task. Such assets can take the form of money that is transferred through financial channels as well as various types of real estate (houses, flats, whole blocks, hotels, clubs, restaurants, etc.) or farms and agricultural companies. The process leading to the recovery of such assets is structured in several steps that are generally completed over long periods of time: (1) tracing and identification of the assets; (2) seizure; (3) confiscation; and (4) management following confiscation.

An obstacle that can significantly slow the process down might originate from the fact that the assets are often located in a different country to the one where the crime was committed and the fact that the laws of the involved States hardly ever coincide to an extent that allows for the swift issuing of a freezing order. In this respect, several challenges can occur: (1) the identification of ways that are able to speed up the process of confiscation; (2) the repatriation of assets that were taken away from the country where the crime was originally committed; and (3) the disposal of estates and properties that are located in different countries to the benefit of those where the crimes were originally committed.

As far as the end-use of confiscated assets is concerned, experiences vary greatly from country to country. Several options can be explored: (1) harmonization of the approaches to the identification of assets; (2) ensuring the return to the country entitled to the assets; and (3) managing the assets following their confiscation.

The Italian expertise in the field of confiscation and social re-use of assets is the oldest and best structured. This is due to the efforts made by the Italian State and the tools it has set up over the years (the last of which was the Agency for Seized and Confiscated Assets), as well as the commitment of civil society (such as the Italian non-governmental organization Libera) which, in turn, advocated the approval of the law on the use of confiscated assets and then started managing such assets.

Libera can demonstrate significant expertise in this field, more than any other non-governmental organization. Among its numerous projects, the one called “Libera Terra” stands out, as it is aimed at “revamping beautiful yet problematic territories, starting with a social and productive recovery of assets that were taken away from the Mafias in order to manufacture high-quality products through environment- and people-friendly policies⁶”. The products of Libera Terra — wine, oil, vegetables, pasta, oranges, and fruit juice — are all sold in Italy. The fact that land that once belonged to the Mafia now yields products that are consumed by the everyday Italian citizen is both remarkable and educational.

⁵ UNODC, *Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes*, 2011.

⁶ Libera, *Bilancio sociale*, 2012.

“The mission of the “Liberia Terra” project starts from the assets that were confiscated from the Mafias. It returns dignity to territories characterized by a strong Mafioso influence through the set-up of autonomous, self-sufficient, long-lasting cooperative companies. These companies create jobs as well as a positive income, and they put forward the idea of a virtuous economic system that is based on legality, justice, fair trade and the use of completely natural raw materials”.⁷ It is noteworthy how every year hundreds of young people from all over Italy visit these fields, work the land, partake in formative experiences and learn how hard (though still feasible) it is to manage assets that were taken away from the Mafia.

According to Libera, “the best way to return value and dignity to confiscated assets is to create credible and self-sustainable organizations. The only viable option consists in producing high-quality products through high-quality procedures, relationships, and management. This can make this experience stand out for its trustworthiness. It is an experience of great social importance, and it aims to show how a fair, sustainable economy can be a concrete, truthful and serious response to the need for the development and self-determination of territories.”⁸

Another cooperative that operates under the influence of Libera is La Valle del Marro, founded in 2004 by a group of young entrepreneurs from the Gioia Tauro Valley. It stems from the cooperation of two associations: Libera itself, promoting the social use of assets confiscated from the Mafia, and the Policoro Project, which advocates the formation of a new labour culture.

“Being assigned these confiscated agricultural lands pursuant to law 109 of 1996, seeing as they were part of the unavailable assets of the City Council, was not easy at first. Their relative sections of the land registry were not open to public consultation. Secondly, the Mafia had infiltrated various City Councils that owned the lands — as a matter of fact, said Councils were to be disbanded and defaulted shortly afterwards. The first lands we were eventually granted on a free-of-charge basis were located in the community of Gioia Tauro, Oppido Mamertina and Rosarno. They were 14 hectares worth of citrus groves and 11 of olive trees — the rest lay fallow”.⁹ Following on from this, the cooperative cultivated other seized lands in the community of Rizziconi, Oppido and Varapodio. These lands were productive and in good condition, and did not need extraordinary interventions. The products currently being marketed are a multi-award winning extra-virgin olive oil, shredded eggplants in olive oil, a chili pesto that received very positive national reviews, black and green olive pesto, oranges and clementines. All products are certified as biological in accordance with the conditions of the CCPB of Bologna. These products have also been exhibited internationally, for instance at the Biofach Fair in Nuremberg, Germany, the international fair for biological foods.

The production of exclusively biological food is the real life philosophy of the cooperative. “It is a remarkable fact that, in the past, 4 African migrants were offered grant-assisted jobs at our company. They belonged to the army of “invisible harvesters” — they were victims of exploitation and vexation at the hands of the Mafia at first, only to become the target of the shameful manhunt that ensued from the happenings of Rosarno. But then they discovered another Calabria — one that welcomes foreigners and helps them integrate by making them the main advocates of its struggle for development and change”.¹⁰

The young entrepreneurs had to deal with several Mafia attacks that resulted in agricultural machinery being destroyed and hundreds of trees being cut down. However, they never gave in. On the contrary, they pressed charges and the responsible Mafiosi were convicted.

⁷ Libera, Bilancio sociale, 2012.

⁸ Libera, Bilancio sociale, 2012.

⁹ Valle del Marro — Libera Terra, Società cooperativa sociale, 2014.

¹⁰ Valle del Marro — Libera Terra, Società cooperativa sociale, 2014.

Among good practice standards, the Development and Legality Consortium is worth mentioning, which includes the towns of Altofonte, Camporeale, Corleone, Monreale, Piana degli Albanesi, Roccamena, San Cipirello and San Giuseppe Jato. This has been a pioneer experience in the reutilization of assets seized from the Mafia which, for fourteen years now, is taking place in Sicily (province of Palermo), and which has achieved results which make it a top tier management model with regards to public assets seized from organized crime.

This experience is important because local authorities involved chose to use an association structure, the Consortium of Municipalities, which has independent decision powers and legal standing. Behind this decision was the will of the mayors who — although from different political parties — wanted to stand up to “cosa nostra” so as to re-establish a legal framework in a territory with historic Mafia roots, supporting development through the efficient use of its wealth.

Fourteen years later, with public resources taken away from Mafia bosses, there are the conditions for development and young people in the area enjoy an entrepreneurial culture. About 700 hectares previously belonging to the Mafia have been restored and are back in production, rural constructions have been transformed into agricultural structures, horse breeding facilities, vineyards, and social centres have all been re-integrated into the legal economy.

According to data provided by the Agency for Seized and Repossessed Assets, as of 7 January 2013, there are 12,946 seized assets. Out of these, 11,238 are real estate and 1,708 are companies. 74% are located in Sicily, 14.8% in Campania, 13.99% in Calabria, 8.7% in Puglia, and 19.9% in the rest of Italy.¹¹

Libera has calculated that out of the 11,238 real estate assets, 3,808 are apartments, 2,245 land plots, 1,209 general venues, 963 garages, 415 villas, 202 warehouses. In Sicily, the number of confiscated assets was 4,892, 1,650 in Calabria, 1,571 in Campania, and 995 in Puglia. Assets allocated and assigned to official and social use amounted to 5,859 (5,099 to municipalities, 760 to the State for security, aid or other reasons), while 907 have not yet been transferred to the assigned entity. The number of assets which were not under management anymore amounted to 477, due to the repossession being annulled or to a mortgage being executed.¹²

The Agency was not able to allocate 3,995 assets. Out of these, 1,666 are blocked due to bank pledges. The other 1,376 which are not being put to use are mostly unfit for habitation or in need of structural refurbishment. Out of the 1,708 seized companies, 623 are in Sicily, 347 in Campania, 161 in Calabria and 131 in Puglia. About half are in the trading (471), construction (477) and hospitality and food services sectors (173); significantly, 92 companies were operating in the agricultural sector. Out of the 1,708 companies seized in Italy, 497 are not active, while 1,211 are still being managed by the national agency. 497 inactive companies have been deleted from the public registries and liquidated. In 14 instances the seizure has been annulled. In another 45 cases the companies were sold to privates. Out of the 1,211 still under management, 393 are yet to be allocated, 342 are being liquidated, 198 are under bankruptcy procedures and 189 have requested to be written off the public registries.¹³

The Italian experience, due to the history of the Mafia and the traditional conflict with the State, can serve as an inspiration for the harmonization of legislation and an encouragement for international cooperation among those States that believe in taking away the proceeds of crimes from corrupt public officials, traffickers and organized crime groups as one of the best ways to stop criminals in their tracks.

The essential features of the Italian normative framework can be summarized as follows: (1) preventive confiscation, which is non-penal in nature; (2) the separation of preventive confiscation from ongoing or

¹¹ Agenzia per i beni sequestrati e confiscati [Agency for seized and forfeited assets], *Relazione*, 2012.

¹² Libera, *Le mafie restituiscono il maltolto*, 2014.

¹³ Libera, *Le mafie restituiscono il maltolto*, 2014.

conviction-based criminal trials; (3) the reversal of the burden of proof principle, whereby the recipient of preventive measures — who is always strongly suspected to belong to a Mafia-type organization — must provide proof of the licit origin of his/her assets; (4) the social re-use of assets; and (5) the National Agency as a tool for the management and destination of seized and confiscated assets.

The National Anti-Mafia Directorate (DNA) has drawn up a document¹⁴ reporting some critical functionality issues within the European Union as far as the application of patrimonial prevention measures is concerned due to the lack of similar norms in the legislation of other countries and potential conflicts with further reaching protections of “third party interests” in other jurisdictions.

With regard to this last point, the difference lies in the fact that, in the Italian legislation, it is sufficient to show that the asset to confiscate is “available to the recipient of the preventive measure, whereas in other countries the lack of good faith of said recipient must be proven prior to taking action, which is in contrast with the principle of burden of proof inversion”.¹⁵

Problems in adopting the Italian model mostly arise from the fact that some countries, such as Greece and Germany, require a clear link with an ongoing criminal proceeding. Also the United Nations Convention against Corruption (UNCAC) only calls on States Parties to consider the introduction of non-conviction based forfeiture (Art. 54 para 1 (c)). From the Italian point of view, failure to adopt this model results in serious limitations to the possibility of taking away illicit funds from criminal groups, including Mafias, in a timely manner.

Discussion

Estimating the value of criminal and stolen assets

The Group initially focused on identifying data on and approaches to estimating the overall criminal economy and thus determining the assets potentially available for seizure and confiscation.

It turned out that in most countries, there was only very limited data available and in most cases it was not being produced by a single government source, but by a variety of ministries, agencies, international organizations and non-state actors.

Integrated databases for the management of seized and confiscated assets

Several experts reported on specific database systems that had been developed in their respective countries allowing for the registration of location and value of individual assets from the initial seizure until final disposal. In several cases, these databases made it possible for multiple agencies to enter the respective asset into the database upon seizure and then to keep track of it throughout the judicial process (e.g. the US, Colombia, Brazil, Mexico), including ensuring that crucial steps for their maintenance were being undertaken.

Another advantage of some of these databases appeared to be that they allowed for the macro analysis of seizure and confiscation related data over time, such as overall volume of assets seized and confiscated by geographical location and nature of the assets (e.g. Colombia).

At the same time, several participants reported on challenges in maintaining such databases in terms of consistency, reliability and accuracy of data entry. Particular difficulties seem to relate to the evaluation of the

¹⁴ Direzione Nazionale Antimafia [National Anti-Mafia Directorate], L'esecuzione delle misure di prevenzione patrimoniale negli stati UE: quadro attuale e prospettive di breve e medio termine, 2012.

¹⁵ Direzione Nazionale Antimafia [National Anti-Mafia Directorate], L'esecuzione delle misure di prevenzione patrimoniale negli stati UE: quadro attuale e prospettive di breve e medio termine, 2012.

value of individual non-monetary, in particular, commercial assets. Where such evaluations are being carried out by the seizing law enforcement agency, experts reported that sometimes there was a lack of expertise to evaluate such assets, leading more frequently than not to over-estimates of respective values. Where countries were engaging either internal or external commercial assessors for that purpose, assets were often not evaluated in a timely fashion and the related costs were significant.

Flexibility of tools for the disposal of seized assets

Most of the participants reported that legislation in their countries allowed varying degrees of flexibility in the disposal of seized assets (e.g. The Netherlands, Belgium, Brazil, Romania, the US, Nigeria, Mexico, Indonesia), e.g.:

- ✓ when assets were not suitable for storage;
- ✓ when they were perishable;
- ✓ when they would lose value quickly;
- ✓ when the asset (and its storage) posed a public risk (e.g. flammable goods);
- ✓ when the management of the asset was overly complex or costly;
- ✓ when the asset had been abandoned;
- ✓ when they constituted an instrumentality for the offence;
- ✓ after a predetermined time that the asset had been under seizure; and
- ✓ when the sale would be in the objective “interest” of the suspect.

While several countries allowed the sale of seized assets either directly by the seizing agency and/or upon judicial authorization, most countries’ legislation allowed the sale of seized assets with the consent of the suspect.

In some countries, these possibilities existed not only for moveable assets, but under certain, often more restricted conditions, also for real estate and/or commercial assets.

Some countries that did not provide for the early sale of seized assets, allowed for certain types of assets to be used by the state authorities pending prosecution and confiscation.

Several countries avoided taking possession of the real estate property, but rather had created the power to restrain/block the sale of such assets.

Moreover, experts described diverse approaches and mechanisms created for the management of commercial assets, including through the appointment of receivers/administrators, the seizure of bank accounts, through imposing surety in the form of a bank guarantee provided by the suspected owner, or in the case of holdings, by posing the tainted part of the business under the administration of the legitimate part of the company.

Several countries provide for a type of disposal aimed at the “social re-use” of confiscated assets. This happens, in particular, in countries confronting Mafia-type organized crime, where approaches have been developed seeking to compensate the communities and social groups, which have disproportionately suffered from the presence of such types of organized crime. In these cases, the general policy objectives applying to the management and disposal of all seized and confiscated assets (e.g. efficiency, cost-effectiveness, transparency), are complemented by considerations such as ensuring that:

- ✓ the assets either stolen from the public or accrued through various forms of organized crime activity at the cost of the public are being re-dedicated to the benefit of the public;
- ✓ the “culture of legality”, the state and its institutions are seen to prevail.

The definition of what constitutes “social” re-use appears wide and diverse across countries. Some of the uses include:

- ✓ providing grants or assets to NGOs for socially viable programs;
- ✓ providing assets to law enforcement agencies, or to the AMO itself; and
- ✓ providing assets and “start-up costs” to economically viable initiatives that create employment opportunity and contribute to overall economic growth of otherwise poor communities.

Some countries (the US, Israel) reported on the use of special asset recovery funds financed from the revenue of past disposal of seized or confiscated assets to cover the costs of the management, particularly of commercial assets. While in other countries, the costs of the management of the receiver/administrator were covered from the later disposal of the respective asset, or where the asset had to be returned, the costs were imposed on the original suspect.

Experts also emphasized the importance of proper pre-seizure planning to assess the options and economic viability of various seizure and confiscation actions.

Given the importance of an effective and efficient management and disposal of assets, the issue of a proper training for asset managers should be given due consideration.

Bona fide third party interests

All countries provided for the protection of bona fide third parties.

Dedicated Asset Management Offices — Good practices in managing assets pending judicial proceedings

Several countries have created specialized asset management offices (AMOs), either within existing public sector structures or as self-standing agencies (Mexico, Colombia, Italy, Brazil, Albania, Canada, the US, Nigeria, The Netherlands). However, they seem to have rather diverse mandates, functions, sizes and institutional structures.

Many maintain storage structures for the direct administration of seized moveable assets, while others rely on a combination of their own storage facilities as well as private storage providers.

Similarly for real estate, while some AMOs undertake the supervision and control through their own officers, others use private sector service providers for that purpose.

Some AMOs have their officers work directly as part of the relevant law enforcement units responsible for the tracing and seizure of illicit assets, others become only involved after the seizure of the respective assets (e.g. Canada). Many have created different units specializing in the administration of specific types of assets, such as real estate, luxurious goods, commercial assets, etc. Not all AMOs are also responsible for the disposal of assets. In particular, where countries have a centralized public entity responsible for the sale of state assets, AMOs are relying on these structures, rather than building up their own structures.

Several experts elaborated on the benefits of developing plans for the management of assets in the pre-seizure phase with a view, for example, to determining the economic risks and implications of the seizure of certain assets, and lining up the necessary skill sets, as well as budget required to manage the asset effectively.

Several AMOs reported positive experiences in using the internet to enhance transparency, efficiency, and cost-effectiveness of the disposal of seized and confiscated assets. In particular, using online auctions has helped some agencies to dispose of assets much faster and in a more cost effective manner while at the same time enhancing transparency of the process.

Several experts reported having encountered significant challenges in disposing of seized assets at a pace commensurate with newly seized assets. As a result, there is an incremental backlog of undisposed assets creating an increasing and costly administrative burden on the state.

Recommendations

1. Good Practice Guide/Study on Database Systems to Track, Monitor and Analyse Seized and Confiscated Assets: Most countries appear to face challenges in the collection and analysis of macro data on seized and confiscated assets, thus the Group might wish to consider to further assess existing national database systems for the collection, tracking and analysis of data relating to asset recovery, possibly with a view to developing a good practice collection and/or model for such databases;
2. Good Practice Guide/Study on the Legal Framework for the Disposal of Seized (and Confiscated) Assets: Powers to dispose of assets during the seizure phase create various advantages, including lowering the administrative burden, costs, as well as the risks related to the management of assets. Countries have established very diverse legal conditions and administrative mechanisms to address this issue, so it might be beneficial to conduct a more in depth study on the good practices and lessons learned in the management and disposal of seized assets;
3. Good Practice Guide for the Management of Seized and Confiscated Assets: The management of seized and confiscated assets by the state creates multiple policy and practical challenges. Countries have been tackling these through very diverse approaches and with varying levels of success. A best practice guide and/or practitioners' handbook in this field might, therefore, help those directly tasked with developing policy frameworks as well as the management of such assets in learning from these experiences and avoiding and/or managing some of the risks and liabilities involved.
4. Training programme for managers of seized and confiscated assets;
5. The Asset Recovery Working Group and/or the existing global or regional asset recovery networks should consider dedicating future meetings to provide an opportunity for practitioners to share experiences, knowledge and tools relevant to the management of seized and confiscated assets;
6. Collect existing studies, tools and materials on asset management and make them available through the UNODC website;
7. Case Study/ies on the Social Reuse of Confiscated Assets: Some countries have developed the concept of the social reuse of confiscated assets, particularly from organized crime. A study (or country specific cases studies) could be undertaken within the framework of the project with a view to informing the international community.

Focus Group 3: Management of returned assets in asset recovery cases

Background

Not all assets that have been confiscated, or are in the process of being confiscated, were taken away from the Mafia. A study produced by the joint UNODC/World Bank Stolen Asset Recovery (StAR) Initiative¹⁶ focuses on the recovery of assets acquired through corruption (including misappropriation), not on assets acquired through illicit activities pursued by organized crime. The examples used for the study focus on cases that involve former heads of government. The study is based on the legal framework of UNCAC. It requires at the outset the effective planning of asset return — an operation that involves many individuals in the participating countries (in judicial authorities, Ministries of Foreign Affairs, etc.).

The study suggests that a convenient destination be chosen, specifically one that allows capitalizing on the repatriated capitals while operating in as much transparency as possible.

According to the study, there are four possible measures that can be adopted to manage the funds, and benefits and disadvantages are illustrated for each of these: (1) country systems: ordinary channels through the public financial management systems; (2) enhanced country systems: enhanced channels building on the ordinary system, which adjustments to make the more agile and transparent; (3) autonomous funds that are designated for specific programmes with clear public reporting and accountability requirements; and (4) assignment of the management to Non-Governmental Organizations (NGOs).

The study of the StAR Initiative completes its analysis by proposing a possible structure for the decision-making process that can help national authorities to choose one system over another. The Public Expenditure and Financial Accountability (PEFA) Performance Measurement Framework (PFM) is an important tool in this context, as it can be used to assess the performance of public financial management systems and therefore can help to find a solution for transparent management and effective and efficient use of funds. The study finally outlines a set of criteria to be used when choosing the most appropriate system for a specific situation.

The issue of confiscated assets is also addressed, among others, by the G8 Best Practices for the Administration of Seized Assets (2005) and the FATF Best Practices on Confiscation — Recommendations 3 and 38 (2012). It is interesting to note that the FATF mentions the possibility of destroying confiscated assets that cannot be sold or reused.

A study¹⁷ carried out by the Organization of American States (OAS) highlights the existence of two main models: (1) entities with extended functions, ranging from the search of potential assets to their identification, seizure, forfeiture, management, coordination, destination, etc.; and (2) entities tasked with the mere management of assets. The second category includes management systems that operate in Honduras, Colombia, the Dominican Republic, Costa Rica, Mexico, Bolivia, Ecuador, and Peru.

The OAS study analyses the systems for the management of seized and confiscated assets. Among the possible scenarios, the case of anti-economical maintenance of the asset is taken into account and various sale systems are also discussed, with a list of different methods that can be used (auctioning, direct sale, etc.).

Another section of interest addresses the management of companies, whereby three main models are identified: (1) direct management by the entity officially charged with the task; (2) the appointment of an external manager

¹⁶ StAR Initiative (UNODC — World Bank), *Management of Returned Assets: Policy Considerations*, 2009.

¹⁷ OAS, *Asset Management Systems in Latin America and Best Practices Document on Management of Seized and Forfeited Assets*, 2011.

by the entity officially charged with the task; and (3) the appointment of an external manager by the agency that confiscated the company.

Another Guide¹⁸ by the StAR Initiative calls attention to a few positive cases of good practice in various countries. Switzerland has good practices related to non-conviction based forfeiture. The United Kingdom can rely on both criminal and non-conviction based forfeiture. In the event that it is not possible for a foreign country to obtain the cooperation of the United Kingdom in any of these two instances, such country can still start a civil proceeding and attempt to recover the assets through a non-criminal trial (if the asset is or has been in connection with the jurisdiction of the United Kingdom).

In Ireland, following the escalation of organized crime in the 1980s and 1990s, a set of norms was approved. This set included: (1) non-conviction based forfeiture; (2) independent agencies for the forfeiture of assets; and (3) the application of tax evasion law to the process of asset recovery.

The case of Kuwait shows how corruption proceeds can be recovered through a policy of public distribution that recognized the cost of the operation and, at the same time, underlined the importance of undertaking it and completing it so as to improve the image of the country.

In Thailand the problem of money-laundering led to the set-up of an anti-money laundering office (AMLO) that was tasked with tracking down and seizing illicit assets. Within the AMLO, the Office for the Management of Seized Assets Pending Forfeiture was created.

In the case of Colombia, the governmental agencies realized that there were aspects of the long and complex process of forfeiture (tracing, seizure, forfeiture, management) that should be transferred to specific and specialized administrative authorities, instead of being carried out by judicial authorities which, in turn, would be burdened with unnecessary tasks.

The situation in Italy is characterized by critical functionality challenges. Prefect Giuseppe Caruso, former Head of the National Agency for the Management and Destination of Seized and Confiscated Assets, denounced before the Parliamentary Anti-Mafia Commission that many confiscated companies did not manage to be successful and went insolvent in a short time.

Another critical issue concerns the judicial administrators of confiscated assets — accountants, lawyers, experts and consultants — who are tasked with managing the assets before their final forfeiture. It has been observed that, due to the lengthy delays until the final disposal, these judiciary administrators treat the assets as their own property and manage them accordingly. Some of them even received excessive compensation for the services they provided.¹⁹

In Italy, there is an ongoing debate on the role of the Agency and on the need to make changes to avoid the perishing or bankruptcy of confiscated assets. Such debate has involved civil society organizations, the National Anti-Mafia Directorate²⁰ and the Garofoli Commission²¹ created by the Italian Government headed by Letta. It is an ongoing discussion that concerns the future of the Agency, amendments to the law, the shortening of time periods between seizure and forfeiture, the correct management of assets and the possibility that said assets be sold under certain conditions.

¹⁸ StAR Initiative (UNODC — World Bank), *A Good Practices Guide for Non-conviction Based Asset Forfeiture*, 2009.

¹⁹ Commissione parlamentare antimafia [Parliamentary Anti-Mafia Commission], *Audizione del Direttore dell'Agencia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata*, Giuseppe Caruso, 5 February 2014.

²⁰ Direzione Nazionale Antimafia [National Anti-Mafia Directorate], *Relazione annuale*, 2013.

²¹ Garofoli, *Per una moderna politica antimafia*, 2014.

Discussion

There was no discussion about the principle of return and everyone agreed that stolen funds should go back to the country of origin. The preamble and provisions of the United Nations Convention against Corruption (UNCAC) are clear in that the purpose of the Convention is to remedy the damage done by corruption, especially through asset recovery. The United Nations Convention against Transnational Organized Crime (UNTOC) subscribes to asset sharing and the restitution to victims.

With regard to specific arrangements for return, the Group discussed a range of methodologies such as the use of a country system (through the public financial management system), an “enhanced” country system, an autonomous fund (designed for specific programmes and clear public reporting) and finally the assignment of monitoring to NGOs. While authorities in the requesting State had to choose one system over the others, it was regarded as crucial to find a methodology which will take into account expectations in both requesting and requested countries. Generally, and depending on who the victim of the crime is, returned stolen money should benefit the development of the country for the purpose of the general public. In line with article 57 of the Convention, entering in an agreement cannot be a condition for the return, but in many cases is the result of a dialogue between requesting and requested State acknowledging the mutual interest.

The Group noted that the system that the requesting country will finally choose needed to take into account a set of criteria, for example, the amount of money and/or the political and economic situation of the country. However, there was no “one -size-fits-all” solution. While the scale of the amount involved called for different solutions, the overall consideration should be that assets should serve a public purpose and restitution for those who had originally suffered from the underlying crime. The Group suggested two knowledge products which would include also an analysis of the role of settlements between requesting and requested States in this regard.

The Group discussed that primary consideration should be given to the general principle that funds should be used for the restitution of victims — taking into account the regulations in UNTOC and UNCAC. It was considered paramount to clearly identify the crime and its specific victim. For example in the Sani Abacha case, the Nigerian nation as a whole was considered the victim, while in another Nigerian case, the State of Bayesa was the entity from which assets were stolen and had to be returned to. Victims can also be individuals or groups of countries. The Group felt that more discussion was needed on the exact definition of victims of crimes to whom assets should be returned. It seemed that individuals and the broader public could possibly be victims of both organized crime (individuals killed or extorted, families torn apart, communities damaged) and corruption (individuals economically damaged, communities or whole societies deprived of assets). It was discussed whether certain areas could be identified that lent itself to public interest spending (education, health, etc.), or whether certain areas should be discouraged (law enforcement, defence). Rather than concluding this discussion with a “one-size-fits-all” guideline, it was felt that more work should be done to clearly define the victims of crime.

The role of international organizations as honest brokers in the dialogue process should be further explored.

Speakers exchanged experiences and practices regarding the monitoring of returned assets from the perspective of requesting and requested country. In the Sani Abacha case (Nigeria), an arrangement in cooperation with the World Bank was set up to monitor the use of the returned funds, as part of an agreement with the requested State (Switzerland). Nigeria reported it was also in the process of setting up a monitoring committee for assets confiscated through NCB forfeiture at the national level, which would also be responsible for internationally returned assets, so that in future cases returned assets could be spent according to national plans and policies. To the extent possible, country systems should be used, especially because separate monitoring mechanisms are expensive (Switzerland, Egypt). In another case, it was part of a settlement that the development cooperation agency of the requested country could assist in the monitoring of the funds programmed through the education budget of the requesting State (Tanzania/UK). In one case, a jurisdiction (Jersey) had returned assets without any

specific agreement on the funds and a representative of this jurisdiction later had an opportunity to meet with civil society organizations of the country of origin (Nigeria, at the margins of the Fourth session of the Conference of the States Parties to the United Nations Convention against Corruption in Marrakech in October 2011), who could, based on this information, press for information on the use of the funds in their own country.

In any arrangement, the publicity and transparency was considered specifically important, especially to avoid repeated loss of the assets or the perception thereof. One of the lessons learnt was that public expectations in the requesting State had to be carefully managed and that multi-stakeholder approaches have worked well in this regard. Another lesson learnt was that the expectations of the requested State had to be taken into account. Early discussions even before confiscation would be beneficial, taking into account strategic considerations especially with regard to the right of the defence to be notified about such discussions.

One speaker reported on the experience of her country (Switzerland) in a setting in which the countries agreed that the funds be returned through the channel of technical assistance projects. One criterion used for the determination of the use of funds was the identification of the victims, which resulted in a designation for public use of the population as a whole. Further criteria that were applied were the expertise of the implementing agency, the visibility of the project, a good success rate, a low corruption risk, a good structure for monitoring, and considerations that the project must be additional to existing development projects.

The Group discussed the benefits of establishing a mechanism to monitor the use of the funds, by way of the country sending a positive message to its own people. However, there were no clear guidelines about the monitoring process after the return by the country of origin.

Recommendations

1. Guidelines for countries to which assets are returned: General policy considerations on the monitoring, use, identification of beneficiaries and victims (individuals/role of institutions) in light of the type of the crime.
2. Policy study/survey on experience with consultation processes between requesting and requested States: Lessons learnt how to enter into a constructive relationship in the course of asset recovery cases.