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### Asset recovery

## Challenges, good practices and lessons learned, and procedures allowing the confiscation of proceeds of corruption without a criminal conviction from States parties that have implemented such measures in accordance with article 54, paragraph 1 (c), of the Convention

### Note by the Secretariat

#### *Summary*

The present note has been prepared pursuant to resolution 8/9 of the Conference of the States Parties to the United Nations Convention against Corruption and is based on data collected and analysed by the secretariat. It provides background information on challenges, good practices and lessons learned, and procedures allowing the confiscation of proceeds of corruption without a criminal conviction from States parties that have implemented such measures in accordance with article 54, paragraph 1 (c), of the Convention. It also provides a summary of a thematic discussion on that topic at the meeting of the Open-ended Intergovernmental Working Group on Asset Recovery held in Vienna from 6 to 10 September 2021.

\* [CAC/COSP/2021/1](#).



## Introduction

1. In its resolution 8/9, paragraph 15, the Conference of the States Parties to the United Nations Convention against Corruption, inter alia, directed the Open-ended Intergovernmental Working Group on Asset Recovery to collect information on challenges, good practices and lessons learned, and procedures allowing the confiscation of proceeds of corruption without a criminal conviction from States parties that have implemented such measures in accordance with article 54, paragraph 1 (c), of the Convention. The Conference also directed the Working Group to report its findings on each of those matters to it at its next session, with the support of the secretariat.
2. In line with this mandate, the secretariat sent a note verbale inviting States parties to continue sharing information on challenges, good practices and lessons learned, and procedures allowing the confiscation of proceeds of corruption without a criminal conviction. The note verbale also contained a detailed questionnaire to which, as at 22 September 2021, 44 States parties had provided responses.<sup>1</sup>
3. Based on the feedback received from States and information from open sources and authoritative publications, the Secretariat prepared a note entitled “Procedures allowing the confiscation of proceeds of corruption without a criminal conviction” (CAC/COSP/WG.2/2021/4) as a background paper to a thematic discussion on the topic conducted at the meeting of the Open-ended Intergovernmental Working Group on Asset Recovery held in Vienna from 6 to 10 September 2021 (CAC/COSP/WG.2/2021/5), paras. 42–50).
4. The present document contains a condensed form of the analysis presented in document CAC/COSP/WG.2/2021/4 and includes a summary of the thematic discussion conducted by the Working Group.
5. In 2009, the Stolen Asset Recovery (StAR) Initiative of the United Nations Office on Drugs and Crime (UNODC) and the World Bank produced a study entitled *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction-Based Asset Forfeiture*. It is envisioned that the information contained in the present document could serve as a useful reference for future updates to that study.

## II. Terminology

### *Confiscation and property*

6. In article 2, paragraph (g), of the Convention against Corruption, “confiscation” is defined as “the permanent deprivation of property by order of a court or other competent authority”. The term “includes forfeiture where applicable”, although the latter is not expressly defined.<sup>2</sup> The concept of property finds a broad definition in article 2, paragraph (d), and includes “assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets”.

### *Non-conviction-based confiscation versus extended confiscation*

7. In article 54, paragraph 1 (c), reference is made to confiscation without a criminal conviction, thus not excluding the possibility that confiscation might be

<sup>1</sup> Albania, Australia, Austria, Bahamas, Bahrain, Bhutan, Bosnia and Herzegovina, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Canada, Chile, China, Croatia, Cuba, Czechia, Dominican Republic, France, Georgia, Germany, Indonesia, Kenya, Latvia, Lebanon, Malta, Mauritius, Mexico, Morocco, New Zealand, Nicaragua, Niger, Paraguay, Peru, Poland, Portugal, Qatar, Republic of Moldova, Saudi Arabia, Singapore, Slovenia, Switzerland, Tajikistan and Togo.

<sup>2</sup> For the purposes of the present document, confiscation and forfeiture are treated as synonyms, although they are not always used synonymously in national legal systems (with forfeiture sometimes referring to deprivation of property and confiscation to an order to pay a sum of money).

imposed when a person is charged with a crime but the criminal proceedings do not end in a conviction. While that provision refers to “cases in which the offender cannot be prosecuted”, it appears to include situations in which prosecution commences but cannot be brought to an end (e.g. when the accused dies or flees after having been charged). In other words, non-conviction-based confiscation is the measure imposed when no court has returned a verdict of guilt against the accused, and that is also the feature that distinguishes the concept from extended confiscation, in which confiscation can extend beyond the proceeds of the crime that is the object of the criminal proceedings, but only if the person is convicted.<sup>3</sup>

*Non-conviction-based confiscation versus temporary restraining, freezing or seizure measures*

8. Conviction-based measures can be preceded by provisional or temporary restraining, freezing or seizure orders that are adopted before a confiscation. For this reason, some countries (e.g. Czechia) treat them as cases of non-conviction-based confiscation. Generally, however, non-conviction-based confiscation measures are considered the final measures of property deprivation – that is, where property is confiscated, with its irrevocable loss for the holder. Interim measures taken within conviction-based confiscation proceedings do not fall under this category, as they must eventually be lifted if the offender is not convicted.

*Concept of “conviction”*

9. Some countries take “conviction” to mean a decision taken by a court after a trial, even if only in the first instance, whereas other countries define it as an irrevocable decision (covered by *res judicata*). The latter category of countries might therefore consider the confiscation measure issued after a conviction in the first instance as either a case of non-conviction-based confiscation or a case of provisional seizure preceding a conviction-based confiscation.

10. In Italy, for instance, it is possible to confiscate assets even within criminal proceedings when the crime is statute-barred, but only if the offender has been convicted in the first instance. On appeal, the higher courts can affirm that the case is statute-barred and confiscate the proceeds of the crime. Many consider this possibility as a case of non-conviction-based confiscation.

11. As for the second scenario, this is normally the case in countries that understand conviction as a final judgment that can no longer be appealed. It follows that in some countries (e.g. Canada), a confiscation measure imposed after a first conviction would be considered a case of freezing or seizure within criminal proceedings, insofar as the proceedings are still pending before appeal courts or supreme courts for review.

12. Common-law countries tend to consider all measures in which no conviction was imposed at any stage as non-conviction-based measures, whereas other jurisdictions (e.g. continental European countries and Canada) tend to interpret the concept of conviction on the basis of the *res judicata* concept. This terminological difference can play a role in the practical implementation of judicial cooperation.

*Actio in rem versus actio in personam*

13. It is sometimes the case that non-conviction-based confiscation is defined as an *actio in rem*, in that the proceedings are focused on the property and not on the liability of a person. Such a definition captures the essence of some national systems, in particular those based on the notion of civil confiscation of illicit assets.

<sup>3</sup> Johan Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Oxford, United Kingdom of Great Britain and Northern Ireland, Hart Publishing, 2017), p. 5.

### III. Models and nature of non-conviction-based confiscation mechanisms

#### *General remarks*

14. The large majority of countries that responded to the questionnaire have one or more provisions in their legislation that allow them to confiscate assets linked with crime without a conviction. Notwithstanding this general commonality, national systems appear to vary significantly.

#### *Different models*

15. Non-conviction-based models are classified in different ways. A 2019 report of the European Commission identifies four different models: (a) classic non-conviction-based confiscation (when confiscation is not possible on the basis of a final conviction); (b) extended confiscation; (c) *in rem* proceedings; and (d) the unexplained wealth model.<sup>4</sup> As mentioned above, however, extended confiscation should be addressed separately from non-conviction-based measures.

16. The first step in classification is to differentiate between two basic options, depending on whether countries have developed a system of non-conviction-based confiscation within the realm of criminal justice or outside of it.<sup>5</sup>

#### *Civil forfeiture and confiscation systems*

17. In some countries, it is explicitly stated that non-conviction-based confiscation is of a civil nature. This is often the case in common-law countries.<sup>6</sup>

18. The idea behind such systems is to acquire all property and/or assets linked to criminal activity, regardless of the liability (and prosecution) of an individual. They are often called *in rem* proceedings because they target the illegal item. When property is deemed suspicious, it is seized – or restrained – with the subsequent possibility for the right holders to protect their property rights before a court. If no claim is made, or if the claim is rejected, the property is confiscated. The system is termed “civil” because litigation on the origin of the property and on its lawful acquisition or possession is carried out according to the rules of civil procedure.<sup>7</sup>

#### *“Criminal” non-conviction-based models as alternatives to impossible prosecution or conviction*

19. Other systems prefer instead to adopt an approach whereby the non-conviction-based system remains more directly connected to the criminal proceedings for the predicate offence. Under these models, the non-conviction-based measure is

<sup>4</sup> European Commission, Commission staff working document: analysis of non-conviction based confiscation measures in the European Union, document SWD(2019) 1050 final. The classification based on four models is inspired by the non-conviction-based confiscation typologies guide developed by the European Union-funded Camden Asset Recovery Inter-Agency Network in 2015.

<sup>5</sup> This is also the approach taken by a recent report of the Council of Europe, in which a distinction is drawn between a criminal approach and a non-criminal approach to non-conviction-based confiscation: the report distinguishes “actions for recovery that are brought in connection with criminal proceedings but are not dependent on a criminal conviction and actions that are brought against the property itself independently of any criminal proceedings” (Bright Line Law, “The use of non-conviction based seizure and confiscation” (Strasbourg, Council of Europe, October 2020)).

<sup>6</sup> Ian Smith and Tim Owen, *Asset Recovery: Criminal Confiscation and Civil Recovery* (London, 2003); Stefan D. Cassella, “An overview of asset forfeiture in the United States”, in *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, Simon N.M. Young, ed. (Northampton, Massachusetts, United States of America, Edward Elgar Publishing, 2009), p. 24; and Stefan D. Cassella, “Nature and basic problems of non-conviction-based confiscation in the United States”, *Veredas do Direito*, vol. 16, No. 34 (May 2019), p. 43.

<sup>7</sup> It is worth noting that there is also a concept of “civil action” or “direct asset recovery”, which is addressed in article 53 of the Convention and is not identical to “civil forfeiture”.

conceived as an alternative to classic (conviction-based) confiscation when convicting the offender is impossible for reasons hindering the prosecution, or blocking an already commenced prosecution, or not allowing courts to return a guilty verdict (owing to the statute of limitations or other procedural limits).

20. In many countries, these non-conviction-based systems remain internal to the criminal justice system and are sometimes even embedded in the same criminal proceedings concerning the predicate offence. This is the case in Czechia and France in particular. The basic form of the alternative (criminal) non-conviction-based model is, in fact, one in which the measure is imposed in the same criminal proceedings aimed at the imposition of a punishment against the offender whenever such punishment is impossible (owing to death, flight, the statute of limitations, etc.). These “criminal” non-conviction-based models, in which non-conviction-based confiscation is mostly seen as an alternative to prosecution, usually follow the rules of criminal proceedings.

21. In some countries, non-conviction-based proceedings are construed as alternatives to an impossible prosecution or conviction, and they are regulated by the criminal codes. Although they are internal to the criminal justice system, they take the shape of more autonomous proceedings (e.g. in Germany and Switzerland). Although the proceedings are initiated by the public authorities competent for criminal matters before a court having criminal jurisdiction, the applicable rules can be the rules of civil procedure (e.g. in Germany, Slovenia and Switzerland). Moreover, non-conviction-based measures can be extended beyond cases where prosecution is impossible, to cases where prosecution has not yet commenced (e.g. in Switzerland).

#### *Hybrid models*

22. There are also non-conviction-based models that cannot be fully classified as criminal or civil proceedings, as they are neither completely independent nor completely detached from the underlying criminal justice system. Cuba and Italy, for instance, follow what could be termed an “administrative approach” to the recovery of unlawful assets that is independent of the enforcement of criminal law, although it remains partly connected to it.

23. Some of the variations described above under criminal models of non-conviction-based confiscation (see para. 21 above) could also fall into the category of hybrid models. Moreover, there are systems (e.g. in Latvia) in which non-conviction-based measures are possible not only when it is impossible to prosecute the offender, but also when the assets are deemed unlawful.

#### *Systems of disproportionate enrichment or unexplained wealth*

24. There is a further type of non-conviction-based model: a system of confiscation based on unexplained or unjustified wealth (or illicit enrichment), in which property is confiscated not because of an identified link with a criminal activity, but because the owner cannot justify the origin of the wealth. Some countries (e.g. Italy, and Cuba, Latvia and the Russian Federation in the case of public officials) have such a system in place, whether or not in combination with other non-conviction-based measures.

25. Within both groups (i.e. countries using civil confiscation models and those using criminal non-conviction-based models), there are countries that employ forms of presumptions related to a finding of disproportionate enrichment or unexplained wealth, whereby the authorities confiscate all assets for which no proof of legitimate origin or acquisition is given (e.g. Australia, Bahamas and Mexico; see paras. 84 and 85 below).

26. Systems based on unjustified enrichment can be either embedded within criminal proceedings or placed outside of them, as separate proceedings (e.g. in Colombia, Cuba and Italy), sometimes even of a civil nature (e.g. in the Republic of Moldova).

*Targeting property versus targeting individuals*

27. One major distinction between countries can be found in the way in which unlawful assets are identified. In some countries (e.g. Australia, Peru and the United States of America), this is done solely by looking at the relationship between the assets and the crime.

28. In other countries (e.g. France), where the judgment on the unlawfulness of the item is connected to the outcome of the criminal proceedings (e.g. the impossibility of conviction due to the statute of limitations, death or flight), it is more difficult to establish whether the measure is taken solely for the connection with a crime or also for its connection with an individual.

29. In other countries, non-conviction-based measures involve confiscating assets identified for their link with an individual (either dangerous, suspected or accused, or guilty of certain offences). This is the case, for instance, in anti-mafia legislation in Italy.

30. Systems based on excessive and/or unjustified wealth are somewhat of a hybrid in this regard. They target property, but they do not require a clear link between such property and a crime.

*Single or multiple regimes*

31. In some countries, there is a single regime of non-conviction-based confiscation, while in other countries, multiple regimes are used.

32. In Germany, for instance, it is possible under some provisions to confiscate all assets linked to a criminal activity, whereas another provision empowers authorities to confiscate all suspicious property, but only if it is presumably connected to specific offences.

33. In other countries, the difference between the regimes can be more fundamental. In Bosnia and Herzegovina, for example, there is a civil forfeiture mechanism in addition to a regime within criminal proceedings (with the possibility of confiscating assets when the offender cannot be prosecuted owing to illness, death or flight).

*Classification as penalty*

34. An important question is whether or not non-conviction-based measures can be classified as penalties.<sup>8</sup> The answer to that question affects the assessment of the measure's compliance with fundamental rights, and has an impact on the rules shaping the measure and on eventual asset recovery. It is important to look at all the features of the measure and, in particular, the following: whether it targets property solely for its connection with a crime or also for its link with an individual; whether it has a sweeping character or not; whether it can also be value-based; and what defences are available to interested parties for fighting the order.

## IV. Scope of non-conviction-based confiscation

*Scope of non-conviction-based confiscation in terms of article 54 of the Convention against Corruption*

35. Article 54 of the Convention against Corruption identifies conditions under which non-conviction-based confiscation could be applied: they are cases in which the offender cannot be prosecuted by reason of death, flight or absence, or "in other appropriate cases". The large majority of systems surveyed, however, seem to have adopted non-conviction-based measures that reach far beyond such conditions.

<sup>8</sup> John Petter Rui, "The civil asset forfeiture approach to organised crime: exploring the possibilities for an EU model", *Eucrim*, No. 4 (2011), pp. 153–161.

36. Only in a few countries that responded to the UNODC questionnaire does the scope of non-conviction-based confiscation remain confined to some of the basic scenarios mentioned in article 54. The federal legislation of Canada, for example, allows for non-conviction-based confiscation only in cases where a person has died or absconded, or is deemed to have absconded. China and Saudi Arabia limit their non-conviction-based measures to cases of flight and death, and Qatar to cases in which the offender is unknown or dead.

*Non-conviction-based confiscation of proceeds and types of offence*

37. A major distinction can be highlighted between countries with regard to the scope of non-conviction-based confiscation measures. In some countries (e.g. Australia, Bahamas, Italy, New Zealand and Slovenia), measures are limited to the proceeds of only some – normally serious – offences, whereas in other countries (e.g. Austria and Switzerland), confiscation can cover all proceeds of crime, regardless of the type of the offence from which they derive or to which they are connected. In systems with multiple regimes, both situations can be present.

38. When the scope of non-conviction-based confiscation is confined to serious offences, States employ different techniques and different standards to identify the nature of the relevant criminal activity, empowering the competent courts with more or less discretion. Some countries (e.g. Italy, Mexico and Slovenia) have identified lists of crimes, with direct reference to the articles of legislation in which the conduct is criminalized, whereas others refer to a general category of serious crimes (e.g. indictable offences in Australia and Canada). In some countries (e.g. Bahamas), in addition to the crimes identified by law, non-conviction-based confiscation can be further extended to “other risks” as prescribed by ministerial regulation.

39. In some countries (e.g. Australia), the law does not always require that the serious offence be “particularized”. Here a distinction is drawn between forfeiture orders for conduct constituting serious offences and forfeiture orders for property suspected of being proceeds of indictable offences.

40. In addition, in some States, the scope of the measure is determined not only with regard to the gravity of the crime. For example, in New Zealand, the concept of “significant criminal activity” is defined on the basis of the gravity of the offence or, alternatively, the amount of the (directly or indirectly acquired) proceeds at stake (above a certain threshold value).

*Objects subject to confiscation: res illicitae and beyond*

41. The exact scope of objects subject to confiscation without a conviction depends on the regime adopted by each country.

42. With regard to items connected to the crime, it is common to differentiate between instrumentalities and proceeds of crime (e.g. in directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union) and sometimes even a third category, namely, items that are products and/or objects of crime. This distinction sometimes has a bearing on the applicable rules, as some countries (e.g. Belgium, Germany and Italy) differentiate between instrumentalities and proceeds of crime in their legal regimes, with instrumentalities normally being subject to more stringent provisions. Other countries (e.g. United Kingdom of Great Britain and Northern Ireland) seem instead to construe confiscation around proceeds of crime and instrumentalities alike, treating them as part of a common, all-encompassing regime.

43. Most countries cover the property directly derived from a crime, as well as the benefits indirectly acquired from it.

44. One potentially problematic issue concerns the precise identification of benefits, including whether or not it is logical to deduce the direct income in non-conviction-based confiscation and how to calculate interests.

45. From the information provided in response to the questionnaire, it was not always clear whether the property that can be confiscated includes real estate, companies and factories. Some countries (e.g. Colombia and Italy) have long-standing experience in this regard, while others seem to have less.

*Value-based confiscation measures*

46. It is possible that proceeds of crime cannot be found. In such cases, other property, the value of which corresponds to that of the proceeds, should be available. In most of the countries that responded to the questionnaire, value-based measures are available.

47. Value-based measures are also relevant when suspicious or illicit assets are intermingled with other assets; explicit rules on the intermingling of illicit assets with lawful assets can be found (e.g. in Bhutan and Qatar).

48. In some countries (e.g. Singapore and Italy), a value-based measure can even be applied to property held by third parties when it is clear that it was given to the third party by the person against whom the measure has been issued.

49. Some countries (e.g. Canada) do not allow value-based measures. In other countries (e.g. Germany), they are available for some cases of confiscation of unlawfully obtained assets, but not for others (i.e. confiscation of suspicious property in the context of criminal proceedings for specific offences).

*Automatism or discretion: special conditions*

50. From the information provided in response to the questionnaire, it was not always clear whether the confiscation of proceeds of crime was mandatory or discretionary.

51. In some countries (e.g. Australia), forfeiture may not be imposed if the court finds that it is not in the public interest to do so.

## **V. Relationship with criminal proceedings**

*General*

52. As mentioned in paragraph 19 above, one distinguishing characteristic of non-conviction-based proceedings is whether they are embedded in criminal proceedings or set up outside of them. Given this basic difference, further variations are also possible.

*Autonomous non-conviction-based confiscation*

53. In the large majority of cases, non-conviction-based models are autonomous from the criminal proceedings aimed at establishing the guilt of a person. This is particularly the case in civil confiscation mechanisms, which can be started regardless of prosecutorial choices and regardless of whether criminal proceedings have commenced.

54. Criminal non-conviction-based models do not necessarily exclude some degree of autonomy from criminal proceedings. It may be possible for criminal justice authorities to initiate non-conviction-based proceedings separately from criminal proceedings for the predicate offence (e.g. in Germany).

55. There are, however, countries (e.g. France) with criminal non-conviction-based models in which the non-conviction-based measures are possible solely and exclusively within the framework of the criminal proceedings for assessing the guilt of the person.

*Overlapping and parallel proceedings*

56. A major distinction is whether non-conviction-based proceedings can or cannot overlap with criminal proceedings against the accused. In many countries (e.g. Italy and Slovenia), it is possible to have parallel proceedings, in particular where a civil confiscation mechanism is in place (e.g. in the Bahamas, New Zealand and the United Kingdom).

57. A different issue is whether countries with multiple regimes of non-conviction-based confiscation could start the proceedings in parallel, thus having multiple non-conviction-based proceedings against the same items. This seems to be the case in the Bahamas.

*Mutually exclusive versus subsidiary proceedings*

58. In some countries (e.g. Austria and Canada), the non-conviction-based procedure is autonomous, but it is possible only if the criminal proceedings have been aborted.

59. In other countries (e.g. Switzerland), non-conviction-based proceedings are autonomous but subsidiary in nature, meaning that they can be introduced only if no criminal proceedings are in progress (with exceptions made for cases in which the items could undergo devaluation).

*Mutual influence*

60. One problematic point is whether and to what extent the outcome of criminal proceedings can influence a non-conviction-based confiscation measure (e.g. when the accused has been acquitted of the predicate offence in criminal proceedings).

61. In some countries, the autonomy of the non-conviction-based confiscation would remain in place even if the person was acquitted of the offence (e.g. in Italy). This is because the difference in evidentiary standards (see para. 76 below) between non-conviction-based confiscation and judgments on guilt may lead to different outcomes.

62. In criminal non-conviction-based models, the acquittal of the accused would normally lead to the lifting of restraining measures unless the acquittal was in consequence of the application of statute of limitations rules (e.g. in France).

**VI. Procedural elements***Competence and judicial structure*

63. Nearly everywhere, non-conviction-based confiscation is imposed by a judicial body.

64. In “criminal” models, the competence for the decision often rests with the same court that has jurisdiction over the criminal proceedings for the predicate offence (e.g. in France), or in any case with a court that is competent in criminal matters (e.g. in Austria). In Australia, there are a few courts with “proceeds jurisdiction”, that is, jurisdiction in criminal matters combined with a dedicated competence for confiscation proceedings in certain circumstances.

65. Some countries (e.g. Slovenia) have chosen to centralize decisions on the confiscation of illegally obtained assets in one court.

*Initiative*

66. In a large number of countries (e.g. Austria and Bhutan), the initiative is taken by the attorney general or a public prosecutor. In some countries (e.g. New Zealand), the initiative rests with the police. In other countries (e.g. Italy), it is either for the prosecutor’s office or for the police, or sometimes highly specialized police corps, to take the initiative.

67. In other countries, a specialized agency is responsible for taking the initiative (e.g. the Counter-Corruption and Unlawfully Acquired Assets Forfeiture Commission in Bulgaria).

68. The profile of the authority competent to initiate proceedings (and its specialization) can affect practical implementation in many ways, since such authorities are normally also responsible for the tracing of assets and for estimating their value, and often for offering some evidence of their illegal or suspicious origin. This can raise problems of bias (e.g. in New Zealand; see para. 123 below).

#### *Specialization*

69. It should be clarified that specialization can be intended in different ways. First, it can entail the attribution of all non-conviction-based cases to a specific office, body or court. Second, it can mean that a specific office, body or court is solely responsible for (non-conviction-based) tracing and confiscation cases. Third, it can be based on the specific expertise, skills or training that the competent authorities have (e.g. knowledge of financial transactions).

70. Those dimensions can go hand in hand, but not necessarily. For instance, the centralization of the competence around a court (e.g. in Slovenia) or a single prosecutorial office does not necessarily mean that the office is specifically trained or that it possesses specific skills, in particular when the body or court is also competent for other matters.

71. Some countries (e.g. Bhutan, Canada, Czechia, France, New Zealand, Paraguay and Switzerland) have no specialized authorities in any of the senses described above. Only few countries (e.g. Malta) provide for specialization at the levels of both the initiative and the decision on non-conviction-based measures.

72. In some countries (e.g. Australia), specialization is at the level of the competent police forces.

73. In other countries (e.g. Austria, Malta and Singapore), specialized prosecutors handle non-conviction-based confiscation cases.

74. In Malta and Mexico, there are specialized judges for confiscation cases, whether they are conviction-based or not.

#### *Proof and standard of proof*

75. In the large majority of countries, proof of guilt is not necessary to confiscate assets without a criminal conviction. It is the link between the property and the offence that is considered essential. It is often sufficient to prove the existence of the crime and the existence of a link or connection between the assets and the crime. This is different in countries (e.g. France and Qatar) that follow the classic criminal non-conviction-based confiscation system, in which confiscation is possible only when prosecution or conviction for the crime was not. Sometimes, however, countries with civil confiscation systems (e.g. Singapore) require proof of guilt.

76. In countries (especially common-law countries) that use the civil confiscation model, the standard of proof is normally the balance of probabilities (e.g. in Australia, the Bahamas, Brunei Darussalam, Mauritius, New Zealand, Singapore, the United Kingdom and the United States), sometimes also referred to as a “preponderance of evidence” (e.g. in Bhutan).

77. Some uncertainties remain as to how exactly the standard is applied and whether the balance of probabilities is defined uniformly across countries. Some countries (e.g. Bahamas) clarify that the balance of probabilities still requires that the decision be taken beyond reasonable grounds, although it is unclear whether that represents a higher standard of proof. In other countries (e.g. United Kingdom), it is discussed whether the balance of probabilities standard is flexible and whether it could be a slightly higher standard in non-conviction-based cases than in ordinary cases (i.e. an “enhanced civil standard of proof”).

78. Elsewhere (e.g. Austria and Czechia), confiscation can be imposed only following the traditional standard of evidence applicable to criminal cases.

79. In Switzerland, the standard of proof is the same as that employed in criminal proceedings, although confiscation measures are independent and autonomous in nature. The national law follows the standard of *intime conviction* (i.e. personal conviction of the court after considering all the evidence). Such a standard is ultimately very similar to the “beyond any reasonable doubt” rule.

80. Although the balance of probabilities standard normally corresponds to the civil confiscation model, while the “beyond any reasonable doubt” standard is more consonant with criminal non-conviction-based systems, this bilateral correspondence is not automatic. In Germany, for instance, the standard of proof is the “beyond any reasonable doubt” rule, although non-conviction-based proceedings are considered to be civil in nature and follow the rules of civil procedure.

#### *Burden of proof*

81. The burden of proof rests most often with the public authorities initiating the procedure.

82. In some countries, however, the burden of proof could be placed on the interested party. In Malta and Mexico, for instance, it is for the intervener to establish an ownership interest in the property and his or her bona fides.

83. Moreover, the employment of rebuttable presumptions can ultimately lead to requiring the interested party to prove that the property was not connected to a crime or that it was legitimately acquired.

#### *Presumptions*

84. Legal systems often allow the use of rebuttable presumptions. A recurrent example is the employment of presumptions concerning the illicit origin of excessive unexplained wealth (e.g. in Australia and Singapore). The employment of such presumptions brings the national non-conviction-based confiscation system closer to the model of illicit or excessive enrichment (see para. 25 above).

85. In Mexico, there are presumptions of the lawful origin of assets (e.g. when a person offers evidence of acquisition before the crime, or when a person proves that all taxes and contribution relating to property, or bona fide possession, were paid).

#### *Types of evidence*

86. The major distinction in this regard is clearly between recourse to evidentiary rules typical of civil proceedings and the application of rules of criminal proceedings. In some countries (e.g. Italy), there can be hybrid solutions between the two legal frameworks.

87. Although the legal framework for the collection of evidence can be that of civil proceedings or criminal proceedings, no significant limitation on the use of evidence was reported under either framework.

#### *Protection of third parties*

88. The protection of bona fide third parties is normally granted in non-conviction-based confiscation proceedings.

89. In civil asset recovery mechanisms, third parties are “interested parties”, that is, those who aim to quash the confiscation order by showing their lawful title to the property.

## VII. Provisional measures

90. “Freezing” or “seizure” is defined in article 2, paragraph (f), of the Convention as a provisional or temporary measure that prohibits the transfer, conversion, disposition or movement of property and/or allows public authorities to assume temporary custody or control of it “on the basis of an order issued by a court or other competent authority”. In some countries, such measures are known as restraining orders, or temporary restraining orders.

91. As mentioned above (see para. 8), the exact scope of non-conviction-based freezing or seizure measures can be affected by the concept of criminal conviction.

92. The freezing or seizure measures that are relevant for the purposes of the present document are only those provisional measures aimed at ensuring the later enforceability of non-conviction-based confiscation measures, with the exception of provisional measures taken in the context of criminal proceedings for the decision on guilt. Nonetheless, it is sometimes difficult, or even impossible, to draw a clear distinction between the two. This is particularly the case when the non-conviction-based confiscation measure can be taken in the same criminal proceedings aimed at establishing the guilt of a person (e.g. in France). For countries with systems in which non-conviction-based measures exist outside of criminal proceedings, a separate system of provisional restraining measures may exist. However, even in those countries (e.g. Italy), such measures could at times overlap with seizure orders or freezing orders issued within criminal proceedings, at least when non-conviction-based proceedings can run parallel to criminal proceedings.

93. The large majority of responses point to the possibility of imposing freezing measures or seizure measures as forms of provisional restraints with a view to non-conviction-based confiscation. It is, in fact, often the case that a non-conviction-based confiscation measure is preceded by a provisional restraining order (e.g. in Australia and Italy). Provisional measures are not possible in only a few States (e.g. Bhutan).

94. Sometimes the standard of proof required for provisional measures is lower than for confiscation measures, which could increase concerns regarding fundamental rights.

## VIII. Statute of limitations

95. The responses received did not always provide a clear picture as to whether the statute of limitations period applicable to non-conviction-based confiscation is the same or more limited in comparison with cases of conviction-based confiscation.

96. In this context, different options may be applied: in some countries (e.g. Austria), the statute of limitations for non-conviction-based confiscation is equivalent to that of the underlying offence, while in other countries (e.g. Czechia, Latvia and Switzerland), the statute of limitations for non-conviction-based confiscation is the same as that for conviction-based confiscation.

97. In other countries (e.g. Germany), the two statutes of limitations are clearly distinguished, and the statute of limitations for non-conviction-based measures is normally longer than for conviction-based confiscation. Some countries (e.g. Australia and Bhutan) have no statute of limitations for non-conviction-based measures.

## IX. Use of confiscated proceeds

98. A few countries (e.g. Singapore) have no specific rule concerning the allocation of confiscated funds. Often (e.g. in Germany, Indonesia and Mauritius), the confiscated items are first to be used for the compensation of victims. Sometimes

(e.g. in Czechia, France and Mexico), that is complemented by the assignment of a percentage of the confiscated value to a general fund for the protection of victims.

99. In some countries, assets are transferred to dedicated public accounts or funds.

100. Some countries (e.g. Australia, France, Italy, Mauritius and Mexico) have specialized central offices that manage confiscated assets, while others do not have a centralized hub and leave it to the courts and/or prosecutors (e.g. Canada) or delegated third parties (e.g. New Zealand).

101. There can also be specific rules concerning the management of companies and factories, with profits being entrusted to the State (e.g. in Colombia and Italy).

## **X. International cooperation**

102. Some countries explicitly stated that they did not or could not enforce non-conviction-based confiscation orders from foreign countries. In some countries (e.g. Albania, Chile and Dominican Republic), that is the plain consequence of the fact that national law does not recognize the possibility of any non-conviction-based measures. Cooperation with regard to non-conviction-based measures may be possible on an exceptional basis even if the national system does not internally allow for non-conviction-based measures (e.g. in Togo).

103. Sometimes the refusal of cooperation with regard to non-conviction-based measures does not correspond to an absence of national non-conviction-based measures. Bhutan and Canada, for example, provide for cooperation with foreign orders only with regard to conviction-based confiscation.

104. Overall, a large majority of countries provide for the possibility of cooperation with regard to non-conviction-based measures. In some countries, however, the legal basis does not seem to be very clear or detailed. In France, for instance, cooperation in non-conviction-based measures is possible, but the legal basis rests on the decision of the Court of Cassation.

105. Where the possibility of taking non-conviction-based measures for national cases is limited, this can sometimes reflect on the scope of cooperation, which may be limited to the cases of non-conviction-based confiscation provided for under domestic law (e.g. in Czechia). Similarly, in other countries (e.g. Australia), cooperation is limited to non-conviction-based confiscation for serious offences (and may be subject to authorization by the attorney general or another competent authority).

106. Within the European Union, cooperation in the field of confiscation orders follows the principle of mutual recognition and is now governed by regulation 2018/1805 of the European Parliament and of the Council on the mutual recognition of freezing orders and confiscation orders, which does not exclude cooperation in cases of confiscation without a conviction. In fact, a confiscation order is defined as “a final penalty or measure, imposed by a court following proceedings in relation to a criminal offence”, hence not necessarily requiring a conviction. However, forms of civil asset recovery that are completely detached from criminal proceedings do not fall under this cooperation scheme. Moreover, some of the grounds for refusal provided for in the regulation could allow Member States to refuse cooperation, in particular with regard to the protection of the rights of the affected persons in the executing State.

### *Cooperation with regard to value-based measures*

107. In the majority of countries, when cooperation with regard to the enforcement of non-conviction-based confiscation is possible, it is also possible with regard to value-based measures.

108. For countries that do not allow for cooperation with regard to non-conviction-based measures, cooperation with regard to value-based confiscation is not possible.

*Conditions*

109. In almost all countries, it appears that a formal mutual legal assistance request is necessary.

110. Pursuant to an explicit reservation to the Convention, Canada allows cooperation only with regard to orders issued by a court with criminal jurisdiction.

111. In some countries (e.g. Austria), the person concerned has the right to be heard before a measure is executed. In Australia, the relevant Act preserves the interests in property of bona fide third parties claiming an interest in the property. Section 34C of the Mutual Assistance in Criminal Matters Act 1987 sets out a process allowing an application by an affected third party to a court to determine that person's legitimate interest in property that is the subject of a foreign forfeiture order.

*Dual criminality*

112. The large majority of countries (including Bhutan, Canada and Switzerland) require dual criminality.

113. It should be observed that the depth of assessment of dual criminality is not fully clear. If the requirement is applied rigorously, it would require that non-conviction-based confiscation measures be adopted with regard to a clearly identified offence. Moreover, the question remains as to whether dual criminality is established in reference to the existence of the crime alone or also to the liability of the offender.

114. Another problematic point is whether dual criminality can be interpreted simply with reference to the underlying predicate offence (i.e. the facts would also constitute a crime in the requested country) or whether it can instead be interpreted in a stronger manner, by which the facts must not only constitute a punishable crime but should also fall under those offences for which the measure could be imposed internally (e.g. an indictable offence in Canada).

*Cooperation on provisional measures*

115. The refusal of cooperation with regard to provisional measures is often the consequence of a more general unavailability to enforce non-conviction-based confiscation measures *tout court* (e.g. in Bhutan and Canada). As mentioned above, however, the opposite can also happen, and countries might be more open to giving recognition to provisional restraining, freezing or seizure measures, at least when those measures are imposed by authorities with jurisdiction in criminal matters, as those measures do not require a conviction (e.g. in Albania and, to a lesser extent, in Chile).

## **XI. Challenges**

116. Many countries responded that they had not experienced challenges or discussions concerning the implementation of non-conviction-based confiscation measures. However, in many countries (e.g. Bahamas), that is the consequence of the limited number of practical applications with which the countries have been confronted.

117. One persistent general challenge remains the babel of terminology, which could lead to major misunderstandings.

*Protection of fundamental rights*

118. Few reasons for the non-introduction of non-conviction-based measures were provided. The strongest reasons against introducing non-conviction-based measures seem to be connected with concerns regarding the protection of fundamental rights.

119. Most countries, including Australia, Bulgaria, Czechia, Germany and Slovenia, highlighted issues with regard to compliance with fundamental rights. In many

countries (e.g. Australia and Germany), the issues were litigated before higher national courts and eventually overcome.

#### *Presumption of innocence*

120. The concerns voiced are often related to the presumption of innocence (e.g. in Singapore). This is the case to the extent that non-conviction-based measures are qualified as penalties being applied to non-convicted persons. Such a conclusion is easier to reach for cases in which the property is confiscated because of the link with an individual rather than its inherent connection with a crime. Cases of confiscation of unexplained wealth could raise similar concerns. When the measure is taken after an assessment of the connection between the wealth and a crime, especially with a higher standard of proof, it becomes more difficult to find a violation of the presumption of innocence. In the case of Singapore, the concerns were countered by the argument that the burden of proof rests with the prosecutor, who is to prove the illegal criminal activity.

#### *Fair trial guarantees and defence rights*

121. Another problem often highlighted is the risk of inadequate protection of fair trial guarantees and defence rights (e.g. in Australia). This point is sometimes raised in connection with the presumption of innocence, to argue that a person is forced to prove his or her innocence in order to have an order quashed. The point is sometimes also raised separately because the procedure for non-conviction-based measures is simpler and less formalistic and involves lower standards of proof than a criminal trial.

#### *Property rights*

122. Another problem highlighted is the risk of excessive – or disproportionate – restriction of property rights. The problem of compliance with constitutional protections regarding the acquisition of property on just terms was raised in Australia, for example. This is particularly the case when non-conviction-based measures are construed around the possession of unexplained wealth, or when presumptions are in place that bring about a similar result. The principle of proportionality in the restriction of property rights should, in any case, always be applicable, so as to avoid excessive restrictions.

#### *Unfettered discretion and police bias*

123. Issues of compliance with fundamental rights can also be tied with problems of excessive – unfettered – judicial discretion on the part of the public authorities involved (e.g. in Australia). New Zealand highlighted the problems of discretion with regard to the role of the police. In particular, there were concerns about the risk that the police could act with bias and abuse its powers when instituting proceedings and offering evidence, despite the fact that the order could only be issued by a court. The Dominican Republic voiced concerns with regard to possible abuse of non-conviction-based measures at the political level.

#### *Ne bis in idem (double jeopardy)*

124. Some States (e.g. Australia) also mentioned the problem of non-conviction-based measures covering substantially the same allegations of previously decided criminal matter cases (*ne bis in idem*). It is a particularly challenging issue in that it depends on the qualification and shape given to the non-conviction-based measure. If the measure can be equated to a penalty, the fact that the person has been previously acquitted or convicted of the same allegations represents a major legal problem, as a second prosecution should normally be impermissible. If the measure is instead geared more towards the prevention of crime and the protection of public security, the *ne bis in idem* obstacle could be overcome. Even if the offender has already been convicted, it would appear legitimate to forfeit all assets related to, or derived from,

the crime in order to remove all consequences of the offence, and all incentives for engaging in criminal actions.

#### *Other issues*

125. Some countries (e.g. Indonesia and Republic of Moldova) noted that their legislation was not comprehensive. Such vagueness affects the practical implementation of measures at the national level and in cross-border cases.

126. Some countries (e.g. Canada) have experienced challenges concerning the internal division of powers (between provincial and federal laws), in particular when the different levels of government employ different forfeiture systems (i.e. criminal versus civil models).

127. Another problematic issue that remains is whether tax offences should also be included in the list of predicate offences.

128. States have not mentioned specific problems with regard to the application of the dual criminality clause. Streamlining this requirement across States may well contribute to reducing friction in cooperation cases.

129. A point rarely mentioned in the responses concerns the tracing of assets when enforcing foreign confiscation orders. If the foreign non-conviction-based confiscation order identifies the assets with precision, enforcement is indeed swifter. Such precise identification is, however, not always possible.

## **XII. Good practices**

#### *Non-conviction-based confiscation in general*

130. The responses received did not provide a very comprehensive picture of what effectively works in practice.

131. Some good practices could be inferred *a contrario* from the challenges highlighted. The concerns with regard to compliance with fundamental rights should be taken seriously and could lead to shaping the rules in ways that minimize the friction with rights.

132. Comprehensive national legislation regulating the mechanisms and application of non-conviction-based confiscation, including for the purposes of international cooperation, would certainly be helpful.

133. A first good practice could be to avoid allowing non-conviction-based measures to have excessive sweeping effects. The introduction of a hardship clause, such as the one used in New Zealand, could limit such excessive effects.

134. Generally, it can be observed that there are still some national applications where the unlawfulness of property is identified more with regard to its link with an individual than on the basis of its connection with a criminal act. Emphasizing the focus on the unlawfulness of the property can help to reduce concerns related to the presumption of innocence. If the property is targeted for its criminal nature, and not for being in the possession of a potentially criminal individual, there is less room for arguing that the non-conviction-based confiscation is, in essence, a penalty.

135. Specialization of prosecuting authorities and the existence of effective powers for tracing unlawful assets help to increase the effectiveness of non-conviction-based measures.

136. In terms of the breadth of measures, tying measures to certain specific offences might lead to problematic applications in the case of changes in legal classifications. In this respect, it would seem to be a good practice to extend the scope of the application of non-conviction-based measures to the broadest possible list of offences. It also seems to be a good practice to establish the scope of the measure not

just with regard to the type of offences, but also with regard to the amount of unlawful assets (e.g. in New Zealand).

137. The existence of centralized authorities for managing funds helps to ensure that confiscated proceeds can be put to maximum use for public and social purposes.

*Non-conviction-based cooperation*

138. Given the potential friction lurking behind the control of dual criminality, it is a good practice to clarify the national interpretation of the concept. In this regard, ideally, dual criminality should be construed so as to mean that the predicate offence is also criminalized in the requested country (regardless of internal categorizations and severity). It is also a good practice to consider dual criminality as an optional ground for refusal.

139. A good practice in non-conviction-based cooperation would be to explicitly provide not only for the enforcement of the foreign order, but also for the possibility of starting domestic non-conviction-based proceedings on the basis of the foreign order.

### **XIII. Discussion by the Open-ended Intergovernmental Working Group on Asset Recovery at its meeting held in Vienna from 6 to 10 September 2021**

140. The secretariat presented the analysis referred above for the attention of the Open-ended Intergovernmental Working Group on Asset Recovery at its meeting held in Vienna from 6 to 10 September 2021 ([CAC/COSP/WG.2/2021/4](#)) and organized a thematic panel discussion on the topic. Presentations were made by panellists from Colombia, New Zealand, the Russian Federation and Singapore.

141. In the discussion, speakers referred to their jurisdictions' mechanisms and procedures for non-conviction-based confiscation, highlighted the need to address gaps in asset recovery and noted relevant challenges and risks and the importance of developing new tools to counter those challenges ([CAC/COSP/WG.2/2021/5](#), paras. 42–50).

### **XIV. Conclusions and next steps**

142. While non-conviction-based confiscation may be an effective tool for asset recovery in complex transnational corruption cases, the analysis provided above demonstrates that it remains a highly technical area in which many countries still lack practical experience; moreover, UNODC received responses to its questionnaire from only 44 States parties.

143. In that regard, the Conference may wish to consider which challenges and good practices highlighted in the present document might deserve further consideration.

144. The Conference may also wish to consider finding ways to further harmonize legal approaches and the terminology used in the context of non-conviction-based confiscation.

145. The Conference may further wish to consider finding ways to enhance the effectiveness of the enforcement of foreign non-conviction-based confiscation orders. One particularly relevant question might be how to find an optimal way for cooperation in non-conviction-based measures that form part of “civil models”, given that the Convention requires cooperation in criminal matters, while cooperation in civil and administrative matters is non-mandatory (article 43 of the Convention).

146. In the light of the above, and with the understanding that the information analysed for the purposes of the present document will be used in further analysis in the update of the StAR Initiative study entitled *A Good Practices Guide for Non-Conviction-Based Asset Forfeiture*, the Conference may wish to consider providing guidance to UNODC on further work related to procedures allowing the confiscation of proceeds of corruption without a criminal conviction, including on whether additional requests for information on this topic should be circulated to States parties.

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