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**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**

Procedures allowing the confiscation of proceeds of corruption without a criminal conviction

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, for discussion at the fifteenth meeting of the Open-ended Intergovernmental Working Group on Asset Recovery.

* [CAC/COSP/WG.2/2021/1](#).



I. Introduction

1. The United Nations Convention against Corruption establishes measures with a view to improving cooperation in the field of asset recovery. In this context, under article 54, paragraph 1 (c), of the Convention, States parties are required to consider the possibility of allowing non-conviction-based confiscation, that is, the confiscation of property without a criminal conviction.
2. The importance and practical usefulness of procedures allowing the confiscation of proceeds of corruption without a criminal conviction has often been discussed in the meetings of the Open-ended Intergovernmental Working Group on Asset Recovery, and non-conviction-based confiscation has also been highlighted as a good practice within the framework of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (see, e.g., [CAC/COSP/IRG/2021/7](#)).
3. 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*, which highlighted that non-conviction-based asset forfeiture is a critical tool for recovering the proceeds and instrumentalities of corruption, in particular in cases where the proceeds are transferred abroad.
4. In its resolution 8/9, entitled “Strengthening asset recovery to support the 2030 Agenda for Sustainable Development”, the Conference of the States Parties to the United Nations Convention against Corruption directed the Working Group to, inter alia, 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.
5. The present note has been prepared using information from open sources and authoritative publications. Additional information was provided by 43 States parties¹ in response to the 2021 UNODC questionnaire on non-conviction-based confiscation, which was attached to a note verbale circulated by the Secretariat in February 2021. The extent of the information provided varied; some States provided comprehensive responses, while others provided specific information describing non-conviction-based confiscation mechanisms that existed in their jurisdictions, reported on challenges that they had faced and made suggestions regarding good practices in non-conviction-based confiscation, as discussed below.
6. It is envisioned that the information contained in the present note could serve as a useful reference for the discussions of the Working Group, as well as future updates to the StAR Initiative study on non-conviction-based confiscation.

II. Terminology

7. For the sake of greater clarity, a few terminological points should be addressed at the outset.

Confiscation and property

8. In article 2 (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

¹ Albania, Australia, Austria, Bahamas, Bahrain, Bhutan, Bosnia and Herzegovina, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Canada, Chile, 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.

expressly defined.² The concept of property finds a broad definition in article 2 (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”. Article 31 contains detailed requirements for States parties on enabling confiscation in their jurisdictions.

Non-conviction-based confiscation versus extended confiscation

9. A distinction is to be drawn between extended confiscation and non-conviction-based confiscation. In article 54, paragraph 1 (c), reference is made to confiscation “without a criminal conviction”, thus not excluding the possibility that confiscation might be 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 (as it happens 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.³

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

10. Conviction-based measures can be preceded by provisional or temporary restraining, freezing or seizure orders. Owing to their preventative and provisional nature, such measures are adopted before a confiscation. For this reason, some countries (e.g., Czechia) treat them as cases of non-conviction-based confiscation. It is, however, an accepted convention that such measures are the final measures of property deprivation – that is, where property is forfeited with an irrevocable loss of property for the holder – which do not require a conviction. 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 (unless they are converted into other forfeiture measures).

Concept of “conviction”

11. 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 either as a case of non-conviction-based confiscation or as a case of provisional forfeiture (i.e., a freezing or seizure measure) preceding a conviction-based confiscation.

12. In Italy, for instance, it is possible to forfeit 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 forfeit the proceeds of the crime. Many in Italy regard this possibility as a case of non-conviction-based confiscation.

13. As for the second scenario (confiscation after conviction in first instance treated as a temporary measure), this is normally the case in all countries that understand conviction as a final judgment that can no longer be appealed. It follows that in some countries, a confiscation measure imposed after a first conviction would be

² 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).

³ Johan Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Oxford, United Kingdom, Hart Publishing, 2017), p. 5.

considered a case of freezing or seizure within criminal proceedings, at least insofar as the proceedings are still pending before appeal courts or supreme courts for review (e.g., in Canada).

14. It appears that common law countries tend to consider all measures in which no conviction was imposed at any stage as non-conviction-based measures, whereas several 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 does not always surface neatly, but it can play a role in the practical implementation of judicial cooperation.

Actio in rem versus actio in personam

15. 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 on its unlawfulness or suspiciousness, 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 that is typical of common law. It is important to note, however, that article 54 of the Convention does not exclude the possibility that property could be confiscated in consequence of its link with an individual, as it happens in some countries.

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

General remarks

16. 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 even without a conviction. Notwithstanding this general commonality, national systems appear to vary significantly.

Different models

17. Non-conviction-based models are classified in different ways. For example, a recent illustration of possible different non-conviction-based confiscation models is contained in a 2019 report of the European Commission in which four different models are identified: (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.⁴ As mentioned above, however, extended confiscation should be addressed separately from non-conviction-based measures.

18. 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.⁵ Although this distinction is not to be overly emphasized, it remains relevant, also with regard to the applicable framework of fundamental rights.

⁴ 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.

⁵ 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” (n.p., Council of Europe, October 2020)).

Civil forfeiture/confiscation systems

19. 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, where the model of civil asset forfeiture corresponds to a traditional archetype of that legal culture.⁶ The popularity of “civil systems” of non-conviction-based confiscation is, however, also growing fast outside the realm of common law countries.

20. 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. The authorities give adequate public information about the seizure of suspicious property, thereby allowing the (alleged) holders of property rights to initiate a procedure aimed at protecting their rights. If no claim is made, or if the claim is rejected, the property is forfeited. 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.⁷

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

21. 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 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).

22. The provision in the Convention against Corruption seems to refer more directly to this type of non-conviction-based confiscation as an alternative to classic confiscation, although it does not exclude a broader approach in which confiscation is established as a fully autonomous measure, regardless of the outcome of the criminal process.

23. In many countries, these non-conviction-based systems remain internal to the criminal justice system, sometimes even embedded in the same criminal proceedings concerning the predicate offence. This is particularly the case in France and Czechia and to some extent in Canada (with regard to its federal legislation). 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 a blocked, aborted or not yet commenced prosecution, usually follow the rules of criminal proceedings.

24. 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. However, 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

⁶ 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, Edward Elgar Publishing, 2009), p. 24; 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.

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

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

25. 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.

26. Some of the variations described above under criminal models of non-conviction-based confiscation (see para. 24) could also fall into the category of hybrid models. Moreover, there are systems 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 (e.g., in Latvia).

Systems of disproportionate enrichment (or unexplained wealth)

27. There is a further type of non-conviction-based model: a system of confiscation based on unexplained or unjustified wealth (or illicit enrichment) is one 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, in particular in cases where such wealth appears to be disproportionate to the income of the owner. Some countries have such a system in place (e.g., in Italy, and in Cuba and Latvia, but only for public officials), whether or not in combination with other non-conviction-based measures. This mechanism is also offered for consideration to States parties in article 31, paragraph 8, of the Convention against Corruption. In addition, the Convention contains a separate article on illicit enrichment (art. 20) that may also lead to the confiscation of illicit proceeds.

28. The same result can also be achieved at the evidentiary level. 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 forfeit all assets for which no proof of legitimate origin or acquisition is given (e.g., Australia, Bahamas and Mexico; see paras. 88 and 90 below).

29. Systems based on unjustified enrichment can either be embedded within criminal proceedings (thus more closely resembling the criminal non-conviction-based model) or instead be placed outside of them, as separate proceedings (e.g., in Colombia, Italy and Cuba), sometimes even of a civil nature (e.g., in the Republic of Moldova).

Targeting property versus targeting individuals

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

31. In other cases (e.g., in 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.

32. In still other cases, 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 Italian anti-mafia legislation, under which forfeiture targets the assets of a person who is suspected of being involved in mafia crimes, corruption or other serious crimes, or is suspected of conducting a dishonest living.

33. Systems based on excessive and/or unjustified wealth (or employing similar presumptions) 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

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

35. 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 forfeit all suspicious property, but only if it is presumably connected to specific offences.

36. In other cases, the difference between the regimes can be more fundamental. In Italy, for example, in addition to a fully-fledged non-conviction-based confiscation system outside of criminal proceedings, there is also a narrower possibility of issuing a confiscation measure within criminal proceedings when the accused is acquitted on appeal. Likewise, in Bosnia and Herzegovina, 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). Cuba also appears to employ different regimes (i.e., administrative and judicial).

37. It can be observed that where the applicable regime of non-conviction-based measures applies indiscriminately to property acquired unlawfully, it is normally less necessary to develop different regimes and conditions. Nevertheless, nothing rules out the possibility of introducing overlapping mechanisms with a view to ensuring greater efficiency in the recovery of unlawful assets.

Classification as penalty

38. An important question is whether or not non-conviction-based measures can be classified as penalties.⁸ The answer to that question affects the assessment of the measure's compliance with fundamental rights, and it certainly has an impact on the rules shaping the measure and on eventual asset recovery. It is worth noting that civil confiscation mechanisms can also be qualified as penalties, just as measures issued within criminal proceedings are not necessarily to be labelled as penalties. 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 vis-à-vis article 54 of the Convention against Corruption

39. Article 54 of the Convention against Corruption identifies a minimum common denominator for cases of non-conviction-based confiscation: 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 cases.

⁸ 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.

40. 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. For instance, this is the case in the federal legislation of Canada, which allows for non-conviction-based forfeiture only in cases where a person has died or absconded, or is deemed to have absconded (although several provincial laws of Canada have introduced forms of civil confiscation that have also withstood constitutional challenges). Likewise, Saudi Arabia seems to limit its non-conviction-based measures to the cases of flight and death, and Qatar to cases in which the offender is unknown or died.

41. In general, States that use “civil confiscation” and “unexplained wealth” models have more far-reaching provisions than States with (criminal) non-conviction-based models based around the impossibility of prosecuting or convicting the offender.

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

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

43. 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 have identified lists of crimes, with direct reference to the articles of legislation (e.g., criminal code) in which the conduct is criminalized (e.g., Italy, Mexico and Slovenia), whereas others refer to a general category of serious crimes (e.g., indictable offences in Australia and Canada). In some countries, in addition to the crimes identified by law, non-conviction-based confiscation can be further extended to “other risks” as prescribed by ministerial regulation (e.g., in the Bahamas).

44. 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.

45. 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 (punishable by a maximum term of imprisonment of five years or more) 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

46. The exact scope of objects subject to confiscation without a conviction depends on the regime adopted by each country. When countries adopt systems addressing unexplained wealth, forfeiture can extend beyond the proceeds of crime.

47. 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 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 differentiate between instrumentalities and proceeds of crime in their legal regimes (e.g., Italy, Germany and Belgium), with instrumentalities normally being subject to more stringent provisions. Other countries

seem instead to construe confiscation around proceeds of crime and instrumentalities alike, treating them as part of a common, all-encompassing regime (e.g., in the United Kingdom of Great Britain and Northern Ireland).

48. It appears that most countries cover the property directly derived from a crime, as well as the benefits indirectly acquired from it, which is in line with the approach stipulated in articles 2 (e) and 31 of the Convention.

49. 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.

50. From the information provided in response to the note verbale, 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 or even none.

Value-based confiscation measures

51. 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 for confiscation in line with article 31, paragraph 1 (a), of the Convention. In most of the countries that responded to the note verbale, value-based measures are available.

52. 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, for instance, in Bhutan and Qatar.

53. In some cases (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.

54. Some countries (e.g., Canada) do not allow value-based measures. In other cases (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

55. From the information provided in response to the questionnaire, it was not always clear whether, and on what conditions, the confiscation of proceeds of crime was mandatory or discretionary.

56. 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

57. It was mentioned that 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 (e.g., non-conviction-based proceedings can be available both within and outside criminal proceedings). The relationship with criminal proceedings is therefore an important aspect of every non-conviction-based system.

Autonomous non-conviction-based confiscation

58. 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.

59. 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).

60. There are, however, countries with criminal non-conviction-based models (e.g., France) 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

61. 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 Australia, the Bahamas, New Zealand and the United Kingdom). In Australia, however, it is possible for the courts to stay the non-conviction-based proceedings carried out in parallel to criminal proceedings.

62. 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, for instance, in the Bahamas.

Mutually exclusive versus subsidiary proceedings

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

64. 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

65. One problematic point is whether and to what extent the outcome of criminal proceedings can influence a non-conviction-based confiscation measure. This is particularly relevant when the accused has been acquitted of the predicate offence in criminal proceedings.

66. In some countries, the autonomy is so extreme that 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. 81 below) between non-conviction-based confiscation and judgments on guilt may lead to different outcomes.

67. 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

68. Nearly everywhere, non-conviction-based confiscation is imposed by a judicial body. The profile of the judge and the court depends on the different machinery of justice in place in different countries. It also depends on the structure and nature of the proceedings.

69. In “criminal” non-conviction-based 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.

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

Initiative

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

72. 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).

73. 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. 130 below). The profile of the authority competent for initiating proceedings can also reveal the relationship between non-conviction-based measures and the more general enforcement of criminal law.

Specialization

74. 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, specialization can mean that a specific office, body or court is solely responsible for (non-conviction-based) tracing and confiscation cases (i.e., exclusive competence). A third dimension of specialization is based on the specific expertise, skills or training that the competent authorities have (e.g., knowledge of financial transactions).

75. 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 (although it will develop specific knowledge through experience), in particular when the body or court is also competent for other matters.

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

77. In some countries, specialization is at the level of the competent police forces. In Australia, for instance, the Criminal Assets Confiscation Task Force is a multi-agency task force led by the Australian Federal Police and composed of expert litigators, federal agents and financial investigators, as well as forensic accountants specializing in asset confiscation. The task force undertakes the vast majority of proceeds of crime investigations and litigation at the federal level.

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

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

80. When present, specialization normally refers to all confiscation cases and not to non-conviction-based confiscation alone.

Proof and standard of proof

81. In the large majority of cases, 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 that follow the classic criminal non-conviction-based confiscation system, in which forfeiture is possible only when prosecution or conviction for the crime was not (e.g., in France and Qatar). Sometimes, however, countries with civil confiscation systems require proof of guilt (e.g., Singapore).

82. 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, the United Kingdom, the United States and Singapore), sometimes also referred to as a “preponderance of evidence” (e.g., in Bhutan).

83. Some uncertainties remain as to how exactly the standard is applied and whether the balance of probabilities is defined uniformly across countries. Some countries, for instance, clarify that the balance of probabilities still requires that the decision be taken beyond reasonable grounds (e.g., in the Bahamas), although it is unclear whether that represents a higher standard of proof. In other countries (e.g., the 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”).

84. Elsewhere, confiscation can be imposed only following the traditional standard of evidence applicable to criminal cases (e.g., in Austria and Czechia). Canada also requires finding beyond any reasonable doubt that the property constitutes proceeds of crime or offence-related property.

85. 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.

86. Although it is true that 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 or inevitable. 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

87. The burden of proof rests most often with the public authorities initiating the procedure, that is, either the police or the prosecution service, depending on the case (e.g., in Czechia).

88. In some cases, however, it is not excluded that the burden of proof could be placed on the interested party. In Australia, for instance, there is no requirement for the responsible authority to demonstrate that property constitutes proceeds or instrumentalities of crime, and the onus falls on the suspect or interested party to demonstrate the lawful origin and use of their property. In Malta and Mexico, it is for the intervener to establish an ownership interest in the property and his or her *bona fides*, with even more stringent requirements for cases of money-laundering.

89. Moreover, the employment of rebuttable presumptions can ultimately lead to the same result, namely, requiring the interested party (or third party) to prove that the property was not connected to a crime or that it was legitimately acquired.

Presumptions

90. 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. 27 above). Sometimes the presumptions are applicable only with regard to specific crimes (e.g., criminal organization in Switzerland).

91. 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

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

93. 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. The use of hearsay evidence is allowed almost everywhere. One exception seems to be Malta, where hearsay evidence is not allowed.

Protection of third parties

94. Although it is not always mentioned, the protection of bona fide third parties is normally granted. It is, however, important to clarify that the concept of third parties is more directly applicable to systems that are based on the identification of an offender, which is mostly the case in criminal non-conviction-based models.

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

VII. Provisional measures

96. “Freezing” or “seizure” is defined in article 2 (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 (temporary) restraining orders.

97. As mentioned above in the notes on terminology (see para. 10), the exact scope of non-conviction-based freezing or seizure measures can be affected by the concept of criminal conviction endorsed by each country.

98. It should be further clarified that 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

systems based on civil confiscation or, more generally, where non-conviction-based measures exist outside of criminal proceedings, a separate system of provisional restraining measures may exist. Even in those countries, however, 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 (e.g., in Italy).

99. 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., in Bhutan, where the explanation given is connected to the fact that non-conviction-based measures are normally imposed when the crimes are already being adjudicated).

100. It is sometimes the case that 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

101. The responses regarding the statute of limitations 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. Some replies were focused on the statute of limitations for the underlying offence, although it remained unclear whether the statute of limitations for the criminal punishment (i.e., prosecution and/or conviction) of the underlying offence was the same as for the non-conviction-based confiscation measure.

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

103. 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.

104. A distinction is sometimes drawn depending on the type of forfeited items (e.g., in Mexico, where there is a statute of limitations for items bound for unlawful destinations and no statute of limitations for goods of unlawful origin).

IX. Use of confiscated proceeds

105. Only few countries have no specific rule concerning the allocation of confiscated funds (e.g., Singapore). It is often the case that the forfeited items are first to be used for the compensation of victims (e.g., in Germany, Indonesia and Mauritius). Sometimes that is complemented by the assignment of a percentage of the confiscated value to a general fund for the protection of victims (e.g., in Czechia, France and Mexico).

106. In some cases, assets are transferred to dedicated public accounts or funds. Those funds can be used only for the specific purpose of supporting the fight against criminal activities (e.g., in Latvia and Switzerland), or for specific social or cultural purposes (e.g., in Austria), or both (e.g., in Australia, France and Mexico).

107. Some countries have (specialized) central offices that manage confiscated assets (e.g., Australia, France, Mauritius, Mexico and Italy), while others do not have a centralized hub and leave it to the courts and/or prosecutors (e.g., in Canada) or delegated third parties (e.g., “official assignees” in New Zealand). Often those bodies have powers to manage and alienate assets, although the responses do not clarify the extent (and the efficacy and shortcomings) of the national rules.

108. 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

109. Some countries explicitly stated that they did not or could not enforce non-conviction-based confiscation orders from foreign countries. In some cases, that is the plain consequence of the fact that national law does not recognize the possibility of any non-conviction-based measures. Albania, Chile and the Dominican Republic cannot enforce foreign orders because their systems do not allow non-conviction-based measures. In Latvia, national law permits the confiscation of excessive and unjustified wealth only in the case of public officials. 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).

110. 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.

111. 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.

112. 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 cases (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).

113. Within the European Union, cooperation in the field of confiscation orders follows the principle of mutual recognition and is now governed by Regulation (EU) 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. Outside of this specific mutual recognition regime, cooperation remains possible under the classic rules for mutual legal assistance, although those rules are not always suited for non-conviction-based regimes.

Cooperation on value-based measures

114. In the majority of cases, when cooperation in the enforcement of non-conviction-based confiscation is possible, then it is also possible with regard to value-based measures.

115. It follows logically from the points above that, for countries that do not allow for cooperation on non-conviction-based measures, cooperation in value-based confiscation is not possible.

Conditions

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

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

118. 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 (or other forfeitable assets) 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

119. The large majority of countries (e.g., Bhutan, Canada and Switzerland) require dual criminality, although sometimes it is only a discretionary ground for refusal (e.g., in Australia).

120. 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. However, as observed above, in some countries the possibility of non-conviction-based confiscation is not always specifically connected to a clearly identified crime (e.g., systems based on unexplained excessive wealth). Moreover, the question remains whether dual criminality is established in reference to the existence of the crime alone or also to the liability of the offender, although the latter option would seem less correct and not in line with the logic of non-conviction-based confiscation.

121. 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

122. 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

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

124. One persistent general challenge remains the babel of terminology, which could lead to major misunderstandings (e.g., considering all cases of freezing of assets to be non-conviction-based measures; see paras. 10–11 above).

Protection of fundamental rights

125. As the large majority of responding countries employ non-conviction-based confiscation mechanisms, not many reasons for the non-introduction of non-conviction-based measures were adduced. However, the strongest reasons against introducing non-conviction-based measures seem to be connected with concerns regarding the protection of fundamental rights.

126. Most countries, including Australia, Bulgaria, Czechia, Germany and Slovenia, highlighted issues with regard to compliance with fundamental rights. In many cases, the issues were litigated before higher national courts and eventually overcome (e.g., in Australia and Germany), with the courts ultimately confirming the constitutionality of non-conviction-based measures and their compliance with fundamental rights.

Presumption of innocence

127. 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 – which recur in some countries (see above) – in which the property is forfeited because of the link with an individual rather than its inherent connection with a crime. Cases of forfeiture 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 – and by the fact that a confiscation order cannot simply be issued on the grounds that the subject cannot explain the origins of his or her wealth.

Fair trial guarantees and defence rights

128. 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

129. 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. In particular, this concern was voiced in the statement that non-conviction-based measures can have a sweeping character. 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. In some countries, provisions are in place to exclude hardship (e.g., in New Zealand). 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

130. 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). One country (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. Those concerns seem to have dissolved in the light of the practical implementation of the mechanisms. 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)

131. 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*). This issue also surfaces in Regulation (EU) 2018/1805. 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 States mentioned that cooperation would not be possible if criminal proceedings for the predicate offence were under way in their country (e.g., in Czechia).

Other issues

132. Some countries (e.g., Indonesia and the 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.

133. 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).

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

135. States have not mentioned specific problems with regard to the application of the dual criminality clause. Given the different approaches that some countries seem to take on this front, streamlining this requirement across States may well contribute to reducing friction in cooperation cases.

136. 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

137. The responses received did not provide a very comprehensive picture of what effectively works in practice. While it is clear that some countries have little or no experience in the practical application of non-conviction-based measures (e.g., Bahamas and Bhutan), it is more difficult to identify best practices.

138. 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.

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

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

141. In general terms, 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 overcome – or at least 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.

142. Specialization of prosecuting authorities helps to increase the effectiveness of non-conviction-based measures. Another essential element for increasing the effectiveness of these measures is the existence of effective powers for tracing unlawful assets.

143. 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. This should not necessarily imply that non-conviction-based confiscation should be possible for even the pettiest or slightest 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 (as is the case in New Zealand).

144. 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

145. 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 that context, the provisions of article 43, paragraph 2, and article 46, paragraph 9, on addressing possible obstacles posed by a strict application of dual criminality in international cooperation under the Convention are to be taken into account. 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, as is the case, for instance, in Australia and New Zealand.

146. 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. Conclusions and next steps

147. 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 43 States parties.

148. In that regard, the Working Group may want to consider which challenges and good practices highlighted in the present document might deserve further consideration.

149. States parties may also want to consider finding ways to further harmonize legal approaches and the terminology used in the context of non-conviction-based confiscation.

150. States parties may also want to consider finding ways to enhance the effectiveness of 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).

151. 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 study entitled *A Good Practices Guide for Non-Conviction-Based Asset Forfeiture*, the Working Group may want 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.
