



# **Crime should not pay**

Iceland and the International Developments  
of Criminal Assets Recovery

Arnar Jensson

**Final Thesis for MA Degree in International Affairs**

**School of Social Sciences**



**HÁSKÓLI ÍSLANDS**

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ARNAR JENSSON

Final Thesis for MA Degree in International Affairs

Instructor: Professor Ómar Hlynur Kristmundsson

University of Iceland, School of Social Sciences

Department of Political Science

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“There can be no prevention, confidence in the rule of law  
and criminal justice processes,  
proper and efficient governance, official integrity  
or a widespread sense of justice,  
and faith that corrupt practices never pay,  
unless the fruits of the crime are taken away  
from the perpetrators  
and returned to the rightful parties.”<sup>1</sup>

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<sup>1</sup> The Legislative Guide to the 2003 UN Convention against Corruption.

## Summary

This study concludes that present circumstances related to the collapse of the three largest Icelandic banks in fall of 2008 and the fact that around 90 criminal investigations are ongoing against many of their directors, managers and largest shareholders call for extraordinary measures to be implemented. The most powerful legal instrument to retrieve the vast sums allegedly transferred out of these banks before their collapse is non-conviction based confiscation under civil legal procedures. This modern instrument is the centrepiece of a new, progressive assets recovery model for Iceland, recommended in the final chapter of this paper.

Globalization has not only abolished barriers of communication, opened up global markets and interconnected gateways but also birthed new criminal opportunities. With ever increasing profits, serious international crime has made it possible for the leaders to distance themselves from the actual criminal acts, rendering a conviction nearly unattainable. In recent years most state authorities and international organizations have realized that traditional approach of pursuing criminal sanctions against serious, international crime has failed because of the immense proceeds it generates. The new international approach has been called “proceeds of crime strategy” or “assets recovery strategy” where illegal revenues and assets of the alleged offenders are directly targeted.

Iceland has been slow to react on these international developments. Comparison between measures taken in Iceland and EU, Ireland and Norway reveals that Iceland is far behind these countries. Firstly, Iceland has neither governmental nor law enforcement policy in this area, resulting in de-motivating effects through the administration and the law enforcement. Secondly, Icelandic authorities need to strengthen the legal framework considerably, both domestic legal provisions and cooperation agreements on mutual assistance and orders for seizures, freezing and confiscation of criminal assets. Thirdly, Iceland does not have a designated Assets Recovery Office as all neighbour states and fourthly, knowledge and experience within the law enforcement and judicial system of international assets recovery is scarce and fragmented.

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## Introduction

A new global strategy surfaced in the 1980s, commonly referred to as the “age of proceeds of crime“.<sup>2</sup> It originated in the USA, where the law enforcement efforts to tackle the cocaine barons from Columbia and other S-American states were failing mainly because of the immense revenues the drug business generated. The enormous financial profits of drug trafficking created the ability to penetrate and corrupt the legitimate sphere and introduce “dirty money” into the legal system<sup>3</sup>. The vast profits also created the possibility for the heads of the organized criminal groups to distance themselves from the trafficking and delivering of the drugs and therefore stay in the shadow of their wealth, to insulate themselves from detection and arrest by the use of intermediaries. „The proceeds of crime became the very means by which the bastions of organized crime could be created and sustained.“<sup>4</sup>

To meet this growing legal and social problem USA launched the so-called “War on drugs“ that spread quickly around the western world and ignited a new era in the fight against organized crime, a new criminal justice strategy aimed at taking away the profits of crime rather than punishing the individuals who have allegedly committed the crimes.<sup>5</sup> Accordingly, the traditional approach to crime control based solely on the arrest and imprisonment of the criminal offenders was deemed inadequate to combat the criminal behaviour of the accumulated wealth.<sup>6</sup> The “age of proceeds of crime“ which emerged in the 1980s was characterized by the realization that monetary gain is one of the most important incentives for engaging in serious crime and provides capital necessary to commit further offences and infiltrate and corrupt the legitimate economy.

It is noteworthy that the recognition of this reality is indeed not recent. The most famous example is of course the successful prosecution of Al Capone for tax evasion precisely because law enforcement could not prove his predicate crimes as he was too rich and too well

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<sup>2</sup> Gallant (2005). Page 1.

<sup>3</sup> Vettori (2006). Introduction, xi.

<sup>4</sup> Smellie (2004). Introduction.

<sup>5</sup> Stessens (2008). Page 12.

<sup>6</sup> Vettori (2006). Page 2.



organized. But the “moral of the Al Capone case is that the only way to put “Mr Bigs“ out of business is to confiscate their proceeds of crime.”<sup>7</sup>

In the wake of the collapse of the Icelandic three main banks, Kaupping, Landsbanki and Glitnir, in the fall of 2008, the government established an office of a Special Prosecutor to investigate alleged criminal offences related to the collapse, prosecute possible perpetrators and take provisional measures to retrieve proceeds of those offences. When this paper was written the Special Prosecutor had already launched at least eighty criminal investigations some of which concern vast financial sums. By August 2011 freezing or seizures of criminal proceeds had only been made in three cases. Two of them were made in Iceland but one freezing request of considerable financial amounts was executed in Luxembourg on the basis of request made by the Special Prosecutor.<sup>8</sup>

The Icelandic public’s demand to retrieve the alleged profits from those responsible for the collapse seems to be shared with politicians, who have publicly stated their frustration over no proceeds or asset seizures. Even the Icelandic Prime Minister and Minister of Finance have openly expressed their impatience.<sup>9</sup> The Icelandic public, the media and the politicians have frequently asked the questions: Why are there so few seizures or freezing of proceeds of the alleged offences? Is it because the Icelandic legal and/or administrative framework does not allow for it or are there some other explanations for these facts?

This paper is a comparative work-based dissertation<sup>10</sup> of the global, European and Icelandic developments in the area of proceeds of crime confiscation. Attempts will be made to describe the main components of the political and legal steps behind the so-called “proceeds of crime strategy“. The status and developments in Iceland will also be examined with regard to and in comparison with the EU countries, Ireland and Norway. In conclusion, recommendations will be presented regarding a new criminal assets recovery model for Iceland.

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<sup>7</sup> Smellie (2004). Introduction.

<sup>8</sup> ‘Um 60 mál í virkri rannsókn’. *Mbl.is*. 13 October 2010.  
<[http://mbl.is/mm/frettir/innlent/2010/10/13/um\\_60\\_mal\\_i\\_virkri\\_rannsokn](http://mbl.is/mm/frettir/innlent/2010/10/13/um_60_mal_i_virkri_rannsokn)>.

Information regarding number of criminal investigations and number of freezing/seizures are from the Office of the Special Prosecutor in August 2011. The office could or would not give information concerning amounts.

<sup>9</sup> ‘Skatturinn fær að kyrrsetja eingnir.’ *Mbl.is*. 7 August 2009. Interview with Johanna Sigurdardottir, Icelandic Prime Minister.  
<[http://www.mbl.is/mm/frettir/innlent/2009/08/07/skatturinn\\_faer\\_ad\\_kyrrsetja\\_eignir/?ref=fphelst](http://www.mbl.is/mm/frettir/innlent/2009/08/07/skatturinn_faer_ad_kyrrsetja_eignir/?ref=fphelst)>.

<sup>10</sup> Hart (2005). Pages 128-139.

The first chapter describes some of the theories and main drivers behind the changes that led to the first international and regional conventions on proceeds of crime confiscation and money laundering. Some theories in criminology which are useful in explaining the incentive for serious financial crime and possible prevention measures, will be explored as well in chapter one.

The second chapter examines the multi-side concept of criminal assets recovery and explains the main elements of the recovery process followed by a close study of some of the legal aspects of confiscation. In recent years, international and regional organizations have increasingly encouraged states to adopt non-conviction based confiscation and even allow for confiscation measures under civil court proceedings. Therefore the paper will explore the difference between non-conviction based confiscation and traditional criminal confiscation in a separate sub-chapter. The second chapter also briefly touches on the main debates and human rights issues regarding some of the legal provisions taken so far.

In the third chapter three basic United Nations Conventions on money laundering and proceeds of crime confiscation will be examined. From International Affairs' point of view the measures taken by the G-7 and G-8 are very interesting and for that reason a separate sub-chapters 3.4 is dedicated to G-7/8 and the intergovernmental body Financial Action Task Force that was created by the G-7 in 1989, distinctively to orchestrate and implement "soft law" recommendations globally. A brief description is also given regarding three International Mutual Legal Assistance Treaties as all international legal assistance requests are based on such international legal instruments. That chapter looks into Iceland's status with regard to these treaties.

The European developments are studied in chapter four. Firstly, two Council of Europe's legally binding conventions are examined followed by a brief introduction of several EU legal instruments. These instruments have been issued by the EU Council of Ministers, the EU Commission and the EU Parliament with the aim to coordinate the EU strategy on money laundering and criminal assets recovery. They are to lay the foundation for domestic legislations and administrative structures in this field, throughout the EU member states. As clear from chapters 4.1 to 4.4 the EU legal patchwork is sometimes complex and overlapping, which is the very reason for the EU Commission announcing in 2008 that a complete recasting of the EU legal instruments will be issued before the end of 2011. The Commission

specifically stated that the new legal framework will go a step further in providing legal means to retrieve proceeds derived from crime.

When preparing and planning this study, the author explored and evaluated structures and operational systems of different European states in order to find circumstances and examples that could be recommended as best practices for Iceland. It soon became evident that the Irish Criminal Assets Bureau bears a significantly interesting status in this regard. The Bureau has gained international recognition for its professional approach and very positive results. Therefore the Irish Criminal Assets system is examined thoroughly in a separate chapter five.

Chapter six briefly describes the criminal assets recovery provisions and structures in Denmark but a specialized unit for assets tracing was established in 2007 within the office of the State Prosecutor for Serious Economic Crime. The same chapter explores in more depth the Norwegian assets recovery legal provisions and administrative structures. Norway has the same status as Iceland with regard to the European Union and therefore a close examination of the National Economic Crime Unit and its sub-unit, Assets Tracing Group, will be conducted. The Norwegian government's strategy for the law enforcement and the prosecution authorities in the field of criminal assets recovery will also be explained.

Iceland's developments and status regarding legal and administrative measures in the area of money laundering and criminal assets recovery will be studied in chapter seven and chapter eight describes the comparison between Iceland and the EU, Ireland and Norway in the same fields. That leads to the two concluding chapters of this paper, firstly the conclusions that are presented in chapter nine where three emerging international models of criminal assets recovery measures are revealed and Iceland mirrored in those three models. Detailed recommendations for a new and proactive strategy in Iceland for criminal assets recovery are finally presented in the tenth and closing chapter.

## **Purpose of this Study**

This paper is an International Affairs study within Political and Social science. Although some attention will be given to different international and domestic legal instruments, this is not a legal study.

The main purpose of the study is to explore and analyze whether the Icelandic authorities have followed the international political and legal developments in the area of criminal assets recovery and assess if the Icelandic state has equivalent legal tools to the EU member states, Ireland and Norway for seizing, freezing and confiscating criminal proceeds and return them back to their rightful owners.

The second main purpose is to identify gaps in the Icelandic legislation and administrative structures compared to the EU member states, Ireland and Norway and present suggestions for improvement, not least in light of the Icelandic bank collapse and the numerous, ongoing criminal investigations derived there from.

The third main purpose is to examine the circumstances and the rationale for the global and European developments in this field over the last 20-25 years and to analyze the main decisions and conventions that have shaped domestic structures in this area, especially in North-Western Europe and Iceland.

## **Research Questions**

1. Does Iceland have sufficient legal and administrative tools to retrieve illegally gained assets and return them to their rightful owners?
  - 1.1. Does Iceland have equivalent tools to the EU member states, Ireland or Norway?
  - 1.2. Are there presently justifiable grounds to apply extraordinary measures to extend such tools for Iceland?

# 1 Theories and Drivers

There are several interconnected theories and moral principles that contribute to the drivers and the rationalization of the developing criminal assets recovery strategy which, late in the 1980s, crystallized in international conventions and domestic legislations regarding proceeds of crime confiscation and criminalizing money laundering.

Firstly, imprisonment and fines fail to deter when the potential rewards are substantial. The enormity of revenues derived from some crimes diminishes the deterrence capacity of traditional criminal sanctions. “Applying the business analogy, criminal sanctions become a cost of doing business, an expense that is easily absorbed by the revenues“<sup>11</sup>.

Secondly, by using the process of money laundering, huge proceeds are filtered through the legal financial system, deposited in financial institutions, transferred to foreign destinations and transformed into different products or assets. This threatens the public confidence in financial institutions and can cause losses to the shareholders and depositors.<sup>12</sup>

The third factor is closely related to the second one and involves the pollution of the legal economy, politics and the judicial system by ill-gotten gains, known as corruption. Money laundering often requires a highly technical know-how and access to politicians, key bank officials and accountants, which provokes economic crime and corruption.<sup>13</sup> Criminals with substantial financial resources use their wealth to infiltrate law enforcement, the financial sector and others affecting their operations. Even states have been perverted by revenues from crime.<sup>14</sup> But corruption is not always a by-product of criminal proceeds. In many instances it is even unclear whether criminal revenues cause corruption or whether political and economical conditions create a social climate that is ripe for corruptive exploitation.<sup>15</sup>

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<sup>11</sup> Gallant (2005). Page 3.

<sup>12</sup> Gallant (2005). Page 4.

<sup>13</sup> Stessens (2008). Page 12.

<sup>14</sup> Well known examples are in Columbia and Mexico where leaders of the drugs cartels control the infrastructures of large areas in the country.

<sup>15</sup> Gallant (2005). Page 5.

Fourthly is the phenomenon “organized crime“. Originally equated with the Mafia groups in Italy and with American criminal syndicates, organized crime was associated with profitable criminal ventures, such as drug trafficking, arms dealing and pornography. Because of the huge wealth added to the unlawful nature of its businesses, the secrecy, anonymity and underground structures, law enforcement authorities had extreme difficulties in reaching the leaders of the criminal groups and dissolve their operations.<sup>16</sup> When multiple parties engage in the business it acquires structure and continuity that is independent of the acts of individual participants. The removal of individual agents through imprisonment has little impact on the business “and the rest of the pack remains viable“.<sup>17</sup>

That fact is related to the fifth, and most recent element behind the modern criminal assets recovery strategy, namely terrorism<sup>18</sup>. While the “proceeds of crime era“ that was conceived in USA in the 1980s was largely born of concern with criminal revenues and the underlying crime that produces those revenues, the fifth factor is “the connection amongst and between crimes, that the proceeds of one illegal activity facilitate the commission of another.“<sup>19</sup> Terrorism evokes a connection between criminal proceeds and the ideologically-driven crimes rather than profit-oriented crime.

The sixth aspect and probably the strongest of all the theories relating to the rationalization of targeting proceeds of crime is simply the fundamental moral principle that criminals should not be allowed to profit from their crimes or in other words that “crimes should not pay.”<sup>20</sup> This is in accordance to the centuries-old legal principle *maxim ex turpi causa non oritur actio*: “No one can rely upon an illegal title to property.”<sup>21</sup>

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<sup>16</sup> Gallant (2005). Page 5.

<sup>17</sup> Gallant (2005). Page 5-6.

<sup>18</sup> On the connections between money laundering and terrorism see *FATF's Interpretative Note to Special Recommendation II: Criminalizing the financing of terrorism and associated money laundering* on <http://www.fatf-gafi.org/dataoecd/45/19/34863009.PDF>.

<sup>19</sup> Gallant (2005). Page 6.

<sup>20</sup> Naylor (2004). Page 269. This principle is the main argument behind measures presented in the EU Commission's newest strategy on Proceeds of Crime. See *Proceeds of Organized Crime. Ensuring that Crime does not pay* (2008).

<sup>21</sup> Smellie (2004). Page 10. See also Levi and Osofsky (1995). Page 12.

## 1.1 Theories from Criminology

This study supports the Neo-classical views that emerged in criminology in the 1970s, namely the Routine Activity Theory and the Rational Choice Theory which are two of three pillars of the so-called Opportunity Theories in criminology.<sup>22</sup> Several researches suggest a connection between opportunities for offending, the environmental conditions, and the rational calculation of costs, benefits and success, which in turn make the offender ready to engage in criminal acts;<sup>23</sup> in other words between opportunities, environment and motivation. The Routine Activity Theory, first presented in 1979, assumes that three minimal elements must be present for a crime to occur: A likely offender, a suitable target and the absence of a capable guardian.<sup>24</sup> In addition, four elements influence the risk of a crime to be committed:

1. Value. Offenders are only interested in targets that present value of some kind.
2. Inertia. Refers to the offender's trouble of committing, for example simply the weight of an item targeted for theft.
3. Visibility. Refers to the exposure of the target.
4. Access to places, persons or circumstances.

Although the Routine Activity Theory's approach begins with ideas about the minimal elements of crime and activity patterns, it ends up emphasizing changes in processes, organizations and technologies on a national scale.<sup>25</sup>

The Rational Choice Theory, second pillar of the Opportunity Theories, first presented in 1986,<sup>26</sup> focuses on the offender's decision-making and is in fact originated from the economics theory that people strive for maximum pleasure at a minimum cost.<sup>27</sup> Its main

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<sup>22</sup> Vito et al. (2007). Pages 66-74.

See also: Clarke (no date). Page 7.

See also Felson and Clarke (1998). Pages 4-8.

Note that one other theory, Crime Pattern Theory, contributes also to the Opportunity Theories but will not be covered here.

<sup>23</sup> Cohen and Felson (1979). Cornish and Clark (1986). Baker and Wolfer (2003). All in Avdija, A. S. (2008). Page 1.

<sup>24</sup> Felson and Clarke (1998). Page 5.

<sup>25</sup> Cohen and Felson (1979). Pages 588-608.

<sup>26</sup> Cornish and Clarke (1986).

<sup>27</sup> *Organized Crime Prevention in the Netherlands. Exposing the Effectiveness of Preventive Measures.* (2006). Page 2.

assumption is that offending is a purposive behaviour, designed to benefit in some way. Offenders have goals when they commit crimes, albeit often short sighted, and they take both benefits and risks into account. Rational Choice theorists in criminology are quite down to earth, trying to see the world from the offender's perspective. They ask questions directly related to the thinking process of the offender: What is he/she seeking when committing the crime? How does he/she weigh risks and rewards? How does he/she decide to commit a particular crime?

These two theories have been helpful in developing preventive measures in different crime areas, not least financial and economic. Ronald V. Clarke, who first presented the Rational Choice Theory, has developed sixteen different ways to reduce opportunities for crime, four of which are in perfect sync with the subject of this research paper:

- To increase the perceived difficulty of crime.
- To increase the perceived risk of crime.
- To reduce the anticipated rewards of crime.
- To remove excuses for crime.<sup>28</sup>

It is quite obvious how the Rational Choice Theory can support key elements of the assets recovery strategy and it can also be a useful tool in building preventive measures.

## **1.2 Background Events and Circumstances**

Added to the above, some additional incidents and circumstances in Europe also paved the way for the new strategy specifically aimed at proceeds of crime. Two of them are mentioned here. Firstly, publications of several reports in the 1980s, many of which underlined the failure of the law enforcement to tackle the growing threat from organized criminal groups, stressed the need for changes in existing legislation and law enforcement approach.<sup>29</sup> Secondly, high-profile cases in Europe connected to organized criminal groups or revealing the incompetence of the legislation to confiscate criminal profits put the fight against organized crime high on the political agenda.<sup>30</sup> One such case that had a significant

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<sup>28</sup> Clarke (no date). Page 10.

<sup>29</sup> Vettori (2006). Page 7.

<sup>30</sup> Vettori (2006). Page 7.

In Italy the PM La Torre presented a bill of law in the Italian Parliament in 1980, aimed at depriving criminal organizations of their illegal revenues. He was murdered in 1982 by the Italian Mafia. Same year another public



influence in the development of legal instruments for proceeds of crime was the UK *R v. Ruthbertson* (1980) where the Bristol Crown Court had confiscated £750.000 that had been directly linked to the drug trafficking of the offender. However the money had to be released “with considerable regret”<sup>31</sup> by the House of Lords, which recognized that the legal confiscation powers were not to be used for the proceeds of the crime but merely by the instruments of the crime itself. This case drastically demonstrated the inadequacy of the limited confiscation powers and a clear need for legal amendments in the UK.

Until 1980s the prevailing attitude of the criminal justice systems around the world was to allow offenders to enjoy the fruits of their crimes. When an offence had resulted in damages of any kind the victim could institute a civil case for claiming compensation.<sup>32</sup> The instruments or the subject of the crime could be confiscated but the traditional criminal justice system did not provide for the confiscation of the proceeds from the crime.<sup>33</sup> It was this gap that became painfully clear in the UK case briefly mentioned above and it was indeed England that was one of the first countries to take legislative action by empowering the courts in criminal case proceedings to confiscate proceeds of drug trafficking.<sup>34</sup>

Even though different domestic and regional factors are important for analyzing and assessing the rationale for the new global strategy of proceed of crime confiscation, the single most important driver probably came from international organizations and international law.<sup>35</sup> The need for a global harmonization stems largely from the fact that crimes creating significant revenues have gained increased global character. While the drug business and other types of organized crime ignore national boundaries, globalization encourages the mobility of capital, commodities, people and services in favour of the organized crime business. Shortcomings in international, unitary measures and international cooperation were very much in favour of the criminal cartels which quickly learned to maximize their utility of globalization.

An understanding of the importance of an international, unitary approach increased through the 1980s and 1990s as more and more countries realized that they would never be

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servant, General Dalla Chiesa, who had been sent to Sicily to tackle the Mafia, was also murdered. Both were very high-profile cases in the international press and the political arena that contributed to the legal developments ahead.

<sup>31</sup> Gallant (2005). Page 33.

<sup>32</sup> Stessens (2008). Page 4.

<sup>33</sup> Stessens (2008). Page 4-5.

<sup>34</sup> UK *Drug Trafficking Act* of 1986, later replaced by the UK *Drug Trafficking Act* of 1994.

<sup>35</sup> Vettori (2006). Page 7-8. See also Gallant (2000). Page 7. See also Bell (2007). Page 24.

able to cope with the international serious crime without an international cooperation and redefined criminal legislation. “Global regimes, harmonized through international law allow countermeasures to replicate the global character of the conduct they seek to suppress.”<sup>36</sup> We shall therefore take a closer look at the international measures in the coming chapters but first we will examine the key components of the new international emerging strategy.

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<sup>36</sup> Gallant (2005). Page 7

## 2 Money Laundering, Assets Recovery and Confiscation

Three interlinked concepts became the centrepieces of international legal instruments targeting the financial side of crime, emerging from the 1980s: Money laundering, criminal assets recovery and confiscation. As this research paper focuses mainly on the assets recovery process it will not give in-depth analysis on money laundering. Even so, it is necessary to briefly address the subject as money laundering and assets recovery are in some aspects different sides of the same coin.

Money laundering refers to the process of concealing the origins of revenues linked to criminal activity.<sup>37</sup> Techniques practiced have evolved from rather elementary methods like “smurfing”<sup>38</sup> to complex and sophisticated financial transactions involving financial institutions such as banks, exchange houses and stock markets. The aim is to transform the illegal revenues into usable assets or negotiable instruments with the three-fold purpose to give the dirty funds a semblance of lawful origins, to make the revenues more mobile and to protect assets from seizure and confiscation.<sup>39</sup> One of the pillars of the international proceeds of crime strategy is therefore the criminalization of money laundering, by making acts exclusively concerned with the financial element of the crime liable as the predicate crime itself.

Under previous international as well as most domestic law, illegal drugs trading or prohibit arms trafficking were criminal offences. Criminal liability on the other hand did not attach to the act of concealing any revenues thereof.<sup>40</sup> This began to change in 1988 with the Vienna Convention when the first steps of criminalizing money laundering were taken.

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<sup>37</sup> Gallant (2005). Page 11.

<sup>38</sup> The method of cutting the cash into small amounts and use several persons (‘smurfs’) to deposit small amount to avoid suspicion, has been called “smurfing”.

<sup>39</sup> Gallant (2005). Page 13.

<sup>40</sup> Gallant (2005). Page 13.

## 2.1 Assets Recovery

When reviewing the literature and different legal documents, it has to be said that the terminology related to the process of retrieving proceeds from crime can be quite confusing. Some legal documents use the concept “proceeds of crime” whereas others prefer using “criminal assets” and still others refer to “illegal properties”. Some scholars use the term “illegal profits” and others call it “ill gotten gains”. This paper refers to all of these concepts by the term “proceeds of crime” defined by the 2000 UN Convention against Transnational Organized Crime as: “Any property derived from or obtained, directly or indirectly, through the commission of an offence.”<sup>41</sup>

In recent years scholars and legal documents increasingly use the term “asset recovery” or “assets recovery”. The 2003 UN Convention against Corruption was the first international legal instrument to specifically cover the whole process of identifying, tracing, freezing or seizing, confiscating and returning proceeds of corruption to its rightful owners. The convention calls this comprehensive process “assets recovery”.<sup>42</sup> Later legal texts of the Council of Europe<sup>43</sup> and the EU build on this and extend the term for recovering proceeds from all types of crime. This paper refers to the “assets recovery” definition in the EU Council Decision from 2007 on Asset Recovery Offices<sup>44</sup> simply as the whole process of recovering illicit property and proceeds from all crimes and returning it to their rightful owners.<sup>45</sup> Criminal assets recovery therefore includes the intelligence gathering and formal investigations for tracing and identifying assets in any form that are not only direct proceeds from crime but also related in any way to the offender. Secondly, assets recovery covers the process of preliminary legal actions of freezing or seizing assets in any form for the purpose of securing the proceeds that could be subject to further confiscation, from being disbursed or transferred. The third part of the assets recovery is the confiscation process (see next chapter).

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<sup>41</sup> *United Nations Convention against Transnational Organized Crime* (2000 Palermo Convention). Annex 1, article 2, page 5.

<sup>42</sup> *Legislative guide for the implementation of the United Nations Convention against Corruption*. Chapter on Asset recovery, page 3-5.

<sup>43</sup> *Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime and on the Financing of Terrorism* (2005 Warsaw Convention).

<sup>44</sup> *Council Decision 2007/845/JHA of 6 December 2007, concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime*. Page 1.

<sup>45</sup> See also *Communication from the Commission to the European Parliament and the Council. The EU Internal Security Strategy in Action: Five steps towards a more secure Europe*. Objective 1, Action 3, page 6.

The last step of the process is the returning of the assets to its rightful owners that can be claimants, the state or victims of the offences. Figure one below shows all the main components of criminal asset recovery process as defined in this paper.

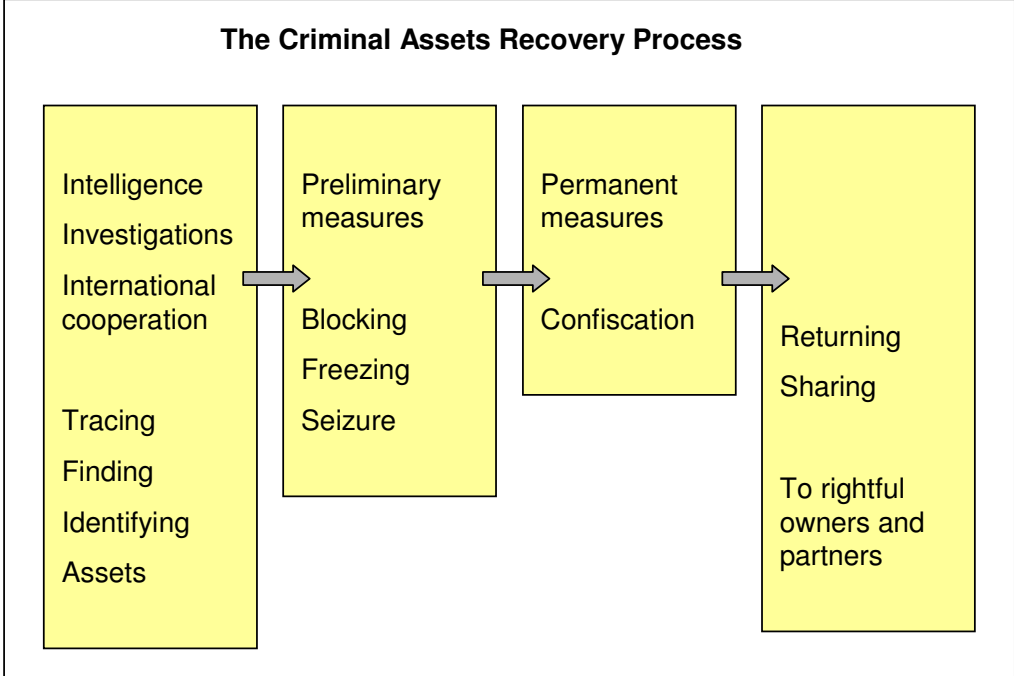


Figure 1: The main components of the criminal asset recovery process.<sup>46</sup>

Some definitions of assets recovery include “assets management” which is the process of keeping, storing or managing the assets before they are confiscated and/or returned. This paper only touches on assets management and does not include that step in its definition of assets recovery.

**2.2 Confiscation**

Confiscation is a complex, multifaceted concept from legal, social and moral perspectives. The literature is full of different definitions, classifications and models of the phenomenon, even international agreements and treaties differ in their definitions.<sup>47</sup> In studying the concept of confiscation we can firstly distinguish between modern type of confiscation which relates to fruit of the crime from older and more traditional terms that

<sup>46</sup> The figure is the author’s simplified visualization of the content of this chapter.

<sup>47</sup> See for example different definitions of confiscation in Article 1(f) of the 1988 UN Vienna Convention (deprivation) and in Article 1(d) of the UN Money Laundering Convention (penalty).

relate to the instrumentalities or the subject of crime.<sup>48</sup> These types are defined according to the relation between the property at stake and the acts for which confiscation is being pronounced. Instrumentalities confiscation concerns the instruments used in committing the crime (e.g. gun or knife used to murder). Subject confiscation relates to the goods subject to the criminal behaviour (e.g. falsified passport or a credit card) but the modern confiscation, and the one we will specifically examine here, relates to the proceeds of crime or the financial gains obtained through criminal activities.<sup>49</sup>

Secondly, we can distinguish between two models of confiscation, namely object confiscation and value confiscation. The former is directed “blindly“ at objects, directly linked to the predicate offence, transferring the property title to the state without paying attention to who is the actual possessor of the property at that time.<sup>50</sup> The object confiscation is usually independent from any possible property rights established in relation to the property, only the relation to the offence matters. One of the harmful disadvantages of object confiscation is indeed the suffering rights of *bona fide* third parties. Some justice systems have therefore softened the sharpness of object confiscations to meet these rights in different ways.<sup>51</sup> Another model, value confiscation, where sums of money equal to the value of the proceeds of crime are confiscated, represents a much more attractive alternative and has been introduced in addition to or even as the regular surrogate for object confiscation.<sup>52</sup> Unlike object confiscation, value confiscation can be enforced on property which has been legally obtained and has no connection with the offence itself. When it is not possible to determine the amount of the value of the proceeds of crime the sum can usually be assessed.<sup>53</sup> These attributes of value confiscation are therefore directly linked with the underlying principle that crime should never pay.

The third way of studying the concept of confiscation is to examine the confiscation proceedings of either *in personam* proceedings or *in rem* proceedings.<sup>54</sup> *In personam* is enacted as a sanction that follows a person’s criminal conviction for the commission of a

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<sup>48</sup> Stessens (2008). Page 29.

<sup>49</sup> Stessens (2008). Page 30.

<sup>50</sup> Stessens (2008). Pages 32-33.

<sup>51</sup> See Article 59 of the Swiss Penal Code and Article 33 of the Dutch Penal Code.

<sup>52</sup> Vettori (2006). Page 8.

<sup>53</sup> Stessens (2008). Page 36.

<sup>54</sup> Cassella (2008). Pages 1-2. See also Vettor (2006). Page 8-10.

profit generating crime. This type of confiscation is also named criminal confiscation or conviction based confiscation, conducted against the offenders in criminal proceedings. In *in rem* proceedings the procedures are not directed against the person but the property itself or the proceeds of crime; not a part of the criminal procedure but a separate legal action and therefore not conditioned by the defendant's conviction. These *in rem* practices are usually called civil confiscations or non-conviction based confiscations.<sup>55</sup> Next chapter takes a closer look at the difference between those two concepts.

### **2.3 Criminal and Non-conviction based Confiscation**

A clear distinction is made in most legal systems in the world between criminal and civil cases, generally using separate courts, different procedures and different evidential rules. The traditional view is that crimes are public wrongs and that the criminal law addresses those who harm society through morally culpable acts so that punishment may be imposed and potential offenders may thereby be deterred from committing similar offences. Criminal proceedings are therefore officially designated ceremonies of guilt designation.<sup>56</sup> Civil law on the other hand is generally designated to provide for remedies, either requiring a return to the way things were before or a remedy to compensate an injured party for harm done to him.<sup>57</sup>

Because of the growing proceeds from serious crime in recent decades, a new element was added to the traditional criminal process of arrests, indictments, convictions and imprisonments; namely confiscation of the proceeds. "However, the impact of this confiscation element has been limited by the necessity to obtain sufficient evidence to obtain a criminal conviction as a prerequisite for confiscatory action."<sup>58</sup> The representative of the government must first establish guilt "beyond reasonable doubt" but in civil proceedings the threshold of proof is lower or "on the balance of probabilities".<sup>59</sup>

As will be examined further when the international and European conventions and decisions will be covered, international and regional organizations have in recent years increasingly encouraged national legislators to amend their law and use non-conviction based

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<sup>55</sup> Vettori (2006). Pages 8-11. See also Stessens (2000). Pages 37-39.

<sup>56</sup> Kennedy (2004). Page 1.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid. Page 2.

<sup>59</sup> Vettori (2006). Page 9.

confiscation and civil proceedings as it certainly is a much more powerful legal tool to reach the underlying aim of stripping criminals of the proceeds of their crime.<sup>60</sup> This legal tool has been adopted in many countries around the world from the mid 1980s but so far only four EU states have fully supplemented their confiscation system with the new civil confiscation powers, Greece, Ireland, Italy and the UK.<sup>61</sup> Nevertheless, a research conducted recently reveals that 17 states in Europe can confiscate proceeds of crime without a previous conviction of the offender. This refers to different circumstances for example if the suspected offender is deceased or for other reasons missing.<sup>62</sup>

The non-conviction based confiscation by civil standards of proof offers several attractive advantages from the law enforcement and prosecution point of view. Firstly, as noted before, the standard of proof is lowered “down” to the civil standards of “balance of probabilities” which is the 50/50 assessment of the judge. Secondly the proceedings can be a separate action from the criminal proceedings and therefore be filed before, during or after the criminal case. Thirdly, non-conviction based confiscation applies both to civil and common law jurisdictions.<sup>63</sup> Fourthly, a non-conviction based confiscation case can be filed even if a criminal conviction is unattainable, which is very useful in a variety of contexts such as if the offender is deceased, if he/she is immune from criminal prosecution, or if the violator has been acquitted of the underlying criminal offence due to lack of evidence or failure of meeting the burden of proof.<sup>64</sup> Last but not least, the non-conviction based confiscation under civil proceedings is the only retroactive confiscation instrument this study could reveal and can therefore be used for events preceding the legislative implementation.

The developments towards a non-conviction based confiscation reflect the centrality of the global efforts to tackle the financial element of crime.

The peaceful enjoyment of the proceeds of crime damages public confidence in the rule of law and provides harmful role models, which has led to a recognition that

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<sup>60</sup> *UN Convention against Corruption*, Article 54(1)(c).

See also Financial Action Task Force: *Forty Recommendations*, Recommendation 3.

See also *EU Council Framework Decision 2005/212/JHS*, Article 3.

See also *G-8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets*, paragraph 26.

<sup>61</sup> Greenberg et. al. (2009). Pages 22-23. See also Vettori (2006). Page 9.

<sup>62</sup> Gowitzke Thomas (2010).

<sup>63</sup> Greenberg et. al. (2009). Pages 16-18.

<sup>64</sup> *Ibid.* Pages 14-15.



the traditional criminal confiscation may be unacceptably inadequate and ineffective.<sup>65</sup>

The ongoing evolution is indeed reflecting that international organizations as well as increasing number of national legislators

have taken a clear stance on the matter, namely the position that the public interest accruing from the protection of society against particularly aggressive forms of criminality well justifies some restrictions on due process protections.<sup>66</sup>

If the Icelandic authorities want to implement an effective legal tool for retrieving assets allegedly transferred illegally out of the Icelandic banks prior to the collapse, non-conviction based confiscation under civil proceedings would be the only one available. This study therefore supports the implementation of this legal instrument by the Icelandic authorities, as will be presented in the closing chapter on recommendations.

## **2.4 Criticism and Human Right Issues**

Confiscation of the proceeds of crime can be very profitable for the government and in some USA states it is considered a source of funding of the costs of the law enforcement. This has been severely criticized as “profit oriented approach of criminal justice“, which many have found unacceptable.<sup>67</sup> Some scholars have pointed out that it is fundamentally wrong to investigate and prosecute by focusing on the financial profits that will accrue to the government. Another important aspect is that this view can influence how law enforcement officers perform their duties or prioritize their activities. Some law enforcement agencies in the USA have become dependent on their “income“ from confiscated proceeds.<sup>68</sup>

This criticism is rooted in the assumption that proceeds of crime strategy is an intermediate goal which is necessary before attaining the final goal of reducing serious crime.

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<sup>65</sup> Kennedy (2004). Page 3.

<sup>66</sup> Vettori (2006). Page 10.

<sup>67</sup> Stessens (2008). Page 56.

<sup>68</sup> Stessens (2008). Page 58.

The danger is that authorities could begin to consider the seizure or freezing of assets as a primary goal, resulting in a biased enforcement of justice.<sup>69</sup>

A very important side of the evolution of the legal and administrative steps taken in the field of money laundering and proceeds of crime confiscations is the human rights issue. As mainly a legal debate, it will not be covered in depth in this report but most of recent steps have been much debated and challenged in domestic courts and the European Court of Human Rights, rendering it necessary to touch on that subject.

The two most controversial provisions have undoubtedly been the reversal of the burden of proof and the non-conviction based civil court proceedings in confiscation matters. Both have repeatedly been challenged as some legal experts argue that these violate two basic constitutional rights; that every man has the right to a fair trial<sup>70</sup> (civil proceedings) and the privilege of the property right<sup>71</sup> (reversal of the burden of proof). This has spurred a very complex legal debate where the key dispute concerns private rights versus public interests and punitive versus preventive actions. As noted before, this paper will not cover this debate but reference is made to the academic literature that examines it in detail.<sup>72</sup> All documentation reviewed for this study suggest that none of the legal provisions of the UN, the CoE or the EU legal instruments integrated in European legislations have been found violating any constitutional human rights. This has been the result of numerous court conclusions, both domestically and by the European Court of Human Rights.<sup>73</sup>

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<sup>69</sup> Stessens (2008). Pages 420-425.

<sup>70</sup> Article 6 of the *European Convention of Human Rights*.

<sup>71</sup> Article 1 of the *First Protocol of the European Convention of Human Rights*.

<sup>72</sup> Galland (2005). Page 120+. See also Stessens (2008). Page 60+.

<sup>73</sup> See European Committee of Crime Problems. (2000). *Reversal of the burden of proof in confiscation of the proceeds of crime: a Council of Europe Best Practice Survey*. Chapter 2. Page 8 and on.

See also FATF (2010). *Best Practices* (Recommendations 3 and 38). Pages 7 and 8.

See also Stessens (2008). Chapter on Human rights limitations to the confiscation sanctions. Page 60 and on.

See also Allridge (2003). Page 226.

See also Galland (2005). Chapter 7 on Criminal Money, Civil Proceeding.

See also Kennedy (2004). Pages 8-23.

See also Kennedy (2006), pages 132-163, where Kennedy introduces guidelines for legislators and policymakers on issues to be considered when designing a non-conviction based confiscation by civil proceeding (civil forfeiture as he calls it).

### **3 International Conventions and Political Measures**

Even though different domestic and regional factors are important for analyzing and assessing the rationale for the new global asset recovery strategy, the single most important driver is probably international organizations and international law.<sup>74</sup> The goal of the proceeds of crime strategy, presented in the international legal instruments from the late 1980s was clear: To create a global regime to tackle illegal revenues of crime.

#### **3.1 The 1988/1990 UN Vienna Convention.**

The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (henceforth the Vienna Convention) entered into force in 1990. This convention was in fact the first international legal instrument to address and emphasize the law enforcement aspects of fight against illegal drugs and the financial aspects of the illegal business, by criminalizing money laundering and transfer of illicit proceeds of drug trafficking.<sup>75</sup> The 1988 UN convention was not only a global instrument but by adopting the convention the UN called on states to strengthen a multi-layered approach with regional, sub-regional and domestic instruments to enforce the aims of the convention.<sup>76</sup>

The Vienna Convention addressed the growing law enforcement problem of linking criminals with their criminal proceeds in a very radical manner by defining money laundering and criminalizing it, thus linking criminal liability to acts exclusively concerned with the financial element of crime.<sup>77</sup>

Another significant and extremely drastic step taken by the Vienna Convention concerns banks and financial institutions, obliging the global banking system to relax its secrecy rules in the interest of money laundering prevention. The criminal earnings placed in anonymous accounts could not be traced to their real owners because of confidentiality rules which

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<sup>74</sup> Vettori (2006). Page 7-8. See also Gallant (2000). Page 7. See also Bell (2007). Page 24.

<sup>75</sup> Stessens (2008). Page 11.

<sup>76</sup> *Vienna Convention*. Introduction, page 9 and Article 2, page 12.

<sup>77</sup> Gallant (2006). Page 13.

prevented bankers from disclosing the identity of the real clients and the nature of their affairs. Article 5 of the Vienna Convention imposes active obligations on banks and other financial institutions that process financial transactions to be fully able to identify their clients and maintain records of their financial activities. Secrecy rules for private persons had to give in for general public interests.

The Vienna Convention defines key concepts of international drug control; money laundering, confiscation and provisional measures of confiscation<sup>78</sup> and thus sets the foundation for domestic legal implementations of those concepts. Criminal proceeds are defined very broadly and capture any money or assets derived from drug crimes, any property exchanged or traded for that purpose, any proceeds intermingled with properties acquired from legitimate sources and any income derived from investments of the proceeds.<sup>79</sup>

Finally, the convention puts forward a very radical suggestion that all states consider to reverse the burden of proof in confiscation proceedings regarding the origin of alleged drugs proceeds. This departure from the principal legal rule in criminal cases that the accused is innocent until proven guilty was and still is a controversial topic and therefore it was a remarkably progressive suggestion in 1988. But, it clearly “explains the centrality of confiscation to global efforts to tackle the financial elements of crime.”<sup>80</sup>

### **3.2 The 2000/2003 UN Palermo Convention**

The United Nations Convention against Transnational Organized Crime (henceforth the Palermo Convention) was adopted in 2000 and entered into force in 2003. The Convention represents a major step forward in the fight against transnational organized crime and signifies the recognition of the seriousness of problems posed by it, as well as the need to foster and enhance close international cooperation in order to tackle those problems. States that ratify this legal instrument commit themselves to taking a series of measures, including the creation of domestic criminal offences in particular areas, the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation and the

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<sup>78</sup> Provisional measures are temporal seizure and freezing of assets.

<sup>79</sup> *Vienna Convention*. Article 1 (p) and (q) and Article 5 (6) (a), (b) and (c).

<sup>80</sup> Gallant (2005). Page 17.

promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.<sup>81</sup>

The basic difference between the 1988 Vienna Convention and the 2000 Palermo Convention is that the former one applies only for drug related offences but the Palermo Convention to all serious crime. According to the convention's definition of an organized criminal group, its aim by committing serious crime, is to obtain direct or indirect financial or other material benefit. Thus, it does not include groups like terrorists that do not seek financial or other material benefit but have purely political and/or social motives.<sup>82</sup>

The Palermo Convention is yet another response of the international community to the increased seriousness of the profit making activities of serious international crime. Its key aim is to be a preventive as well as a reactive legal tool, enlarging the number of states that take effective measures and strengthen cross-boarder links between countries.<sup>83</sup>

The convention, much like the 1988 Vienna Convention and the 1990 Council of Europe's Strasbourg Convention, recommends that states consider the possibility of lowering or reversing the burden of proof so that the offender must demonstrate the lawful origin of his or her assets.<sup>84</sup> The Legislative Guide to the Palermo Convention goes further and invites states to consider non-conviction based confiscation, under civil court procedures.<sup>85</sup>

Confiscation and provisional measures of freezing or seizure are outlined in details in the convention and states are required to adopt measures to the greatest extent possible within its legal system to enable value confiscation, object confiscation, extended confiscation and instrumentalities or subjects of offences.<sup>86</sup> States are encouraged to share confiscated assets with requesting states if the assets are confiscated abroad "so that it can give compensation to victims or return the proceeds to the legitimate owners."<sup>87</sup>

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<sup>81</sup> UNODC (2003). *The United Nations Convention against Transnational Organized Crime*. Explanatory Notes.

<sup>82</sup> UNODC. (2003). *Legislative Guide for the Implementation of The United Nations Convention against Transnational Organized Crime*. Page 13.

<sup>83</sup> Ibid. Aims of the Convention and its Protocols. Pages xvi-xviii.

<sup>84</sup> *The United Nations Convention against Transnational Organized Crime*. Article 12 (7).

<sup>85</sup> *Legislative Guide for the Implementation of The United Nations Convention against Transnational Organized Crime*. Explanatory notes to article 12. Pages 150-151.

<sup>86</sup> See Attachment 1 regarding terminology and definitions.

<sup>87</sup> *Legislative Guide for the Implementation of The United Nations Convention against Transnational Organized Crime*. Explanatory notes to article 14. Page 152.

### 3.3 The 2003/2005 UN Convention against Corruption

UN 2003 Convention against Corruption (henceforth the UN CAC) was adopted in 2003 and entered into force in 2005. The Convention obliges states to criminalize corruption but goes beyond previous legal instruments, criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and laundering of the proceeds of corruption. Offences committed in support of corruption, including money-laundering and obstructing justice are also addressed, as well as freezing and confiscation of proceeds from corruption. Assets tracing and sharing of confiscated assets between affected bodies is one of the basic principles of the convention. The Convention not only deals with public officials but also problematic areas of private-sector corruption.<sup>88</sup>

Several provisions in chapter V of the convention set forth procedures and conditions for asset recovery, including facilitating civil and administrative actions (art. 53), recognizing and taking action on the basis of foreign confiscation orders (arts. 54 and 55) and returning property to requesting states or to legitimate owners and compensating victims (art. 57). Provisions on returning assets to the rightful owners departs from earlier treaties, such as the UN Palermo Convention, under which the confiscating state has ownership of the proceeds.<sup>89</sup>

The UN CAC mandates the establishment of basic domestic legal and administrative regimes for tracing, recovering and confiscation of assets, which is a prerequisite for international cooperation and the return of assets.<sup>90</sup> It also sets forth procedures and detailed guidance for international cooperation and obligations in support of international cooperation “to the greatest extent possible”<sup>91</sup>, either by recognizing and enforcing a foreign freezing or seizure orders (direct enforcement), or by bringing an application before the domestic courts on the basis of information provided by another State party (indirect enforcement).<sup>92</sup> The UN strongly recommends states to allow for direct enforcement in their domestic legislation as it

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<sup>88</sup> *UN Convention against Corruption*. Convention highlights. See also Chapter 5 on Asset recovery, especially article 51 and 57.

<sup>89</sup> Article 14, paragraph 1, of the UN Palermo Convention leaves the return or other disposal of confiscated assets to the discretion of the confiscating State.

<sup>90</sup> *UN Convention against Corruption*. Article 31.

<sup>91</sup> *UN Convention against Corruption*. Article 55.

<sup>92</sup> *Legislative guide for the implementation of the UN Convention against Corruption*. Pages 242 and 253.

is less expensive, much less resource intensive, speedier, more effective and efficient than an indirect approach.<sup>93</sup>

One of the most crucial parts of the UN CAC is the provision regarding return and disposal of assets to its prior legitimate owners which is the fundamental principle of assets recovery and a chief purpose of the UN CAC.<sup>94</sup>

There can be no prevention, confidence in the rule of law and criminal justice processes, proper and efficient governance, official integrity or a widespread sense of justice and faith that corrupt practices never pay, unless the fruits of the crime are taken away from the perpetrators and returned to the rightful parties.<sup>95</sup>

The Legislative Guide for the implementation of UN CAC underlines that for this principal reason states are required to amend their domestic law as necessary.

### **3.4 G-7/8 and the Financial Action Task Force**

The Financial Action Task Force (henceforth FATF) was established by the G-7 Paris Summit in 1989. Discussing and recognizing the threat posed to the banking system and other financial institutions, the G-7 Heads of State or Government and the President of the EC convened the FATF from the G-7 member states, the EC and eight other countries. Thus, the FATF is an intergovernmental, policy-making body which works to generate the necessary political will to bring about national legislative and regulatory reforms to combat money laundering and terrorist financing. The FATF neither holds a defined constitution nor unlimited lifespan but its mission is periodically reviewed. Its current mandate is until 2012.<sup>96</sup>

From start the FATF was given the responsibility of examining money laundering techniques and trends, reviewing the actions already taken at a national and international level, and setting out the measures that still needed to be taken. Already in April 1990 FATF issued a report containing a set of *Forty Recommendations* where a plan of action is presented to fight money laundering. These were revised in 1996 and again in 2003. In the wake of 9/11 the FATF issued the *Eight Special Recommendations* on issues related to terrorist financing.

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<sup>93</sup> Ibid. Page 255.

<sup>94</sup> Ibid. See article 57.

<sup>95</sup> *Legislative guide for the implementation of the UN Convention against Corruption*. Page 262.

<sup>96</sup> See FATF website: <http://www.fatf-gafi.org>.

In 2004 FATF published a ninth special recommendation to further strengthen the international standards for combating money laundering and terrorism financing, known as *Forty-plus-nine Recommendations*.<sup>97</sup>

The number of FATF members has from 1989 increased from 16 to 36. In addition there are 5 regional organizations as associated members, each containing a list of numerous bodies. Finally there are 24 international bodies and non-governmental organizations that have an observer status at FATF. These include European Central Bank, International Monetary Fund, Interpol, Europol, Organization of American States, United Nations Office of Drug and Crime, World Bank and World Customs Organization.<sup>98</sup>

Most of the recent international conventions, treaties and decisions cite and refer to the FATF standards, although the FATF is not based on a convention or a legally rooted instrument. The legally non-binding *Forty-plus-nine Recommendations* have shaped international legal standards and domestic legislations around the globe, an impressive example of the creation and development of international *soft law*, “legally, non-binding commitments from which legal consequences flow.”<sup>99</sup> It is interesting to compare the effects and compliance of states to the UN, CoE and EU anti-money laundering, legally binding conventions to the FATF legally non-binding recommendations. States have reacted and complied much quicker with the FATF recommendations than the legally binding instruments and it was not until the FATF launched its recommendations that anti-money laundering international regime really began to emerge.

The fact that the politically powerful G-7, and later G-8, created and empowered the FATF is surely an important factor in its success. G7/8 have shown a strong consensus and strongly backed the FATF financially. The Loss Avoidance Theory can be used to explain this phenomenon: States choose *soft law* “when the marginal cost in terms of the expected loss from violations exceed the marginal benefits in terms of deterred violations.”<sup>100</sup> Here, the costs may come in a variety of forms, one being reputation which is a valued asset for states.

The G7/8 equipped the FATF with a powerful enforcement tool already in 1999, namely the strategy of “name and shame” non-cooperative countries and territories (henceforth

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<sup>97</sup> Ibid.

<sup>98</sup> See Members & Observers of the FATF website on <http://www.fatf-gafi.org>.

<sup>99</sup> Guzman and Meyer (2009). Page 44.

<sup>100</sup> Ibid. Page 7-8.



NCCTs) compliance with the *40 Recommendations* by publishing a list of all NCCTs. According to Recommendation 21 the financial institutions of the member states of the FATF are warned against business relationships and transactions with NCCTs, which has proved to be a very effective enforcement stick. In the beginning a total of 23 countries were listed as NCCTs but the last two, Nigeria and Myanmar, were de-listed in 2006.<sup>101</sup>

It is without doubt that political and economic strength of the G7/8 has been the main motor paving the way forward for the FATF success in recent years. In 1998 the G7/8 leaders supported the suggestions of FATF for the need to build a global anti-money laundering network. For that purpose they committed to the establishment of Financial Intelligence Units (henceforth FIUs) in all states as a single point of contact for a global cooperation in anti-money laundering matters (see further in next chapter on Financial Intelligence Units).

An international regime can be defined as “sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations.”<sup>102</sup> Although legally non-binding, the G7/8 have created an international regime concerning anti-money laundering and asset confiscation standards through the FATF. These commonly accepted standards have become international *soft law* that since have developed globally into domestic *hard law*.

### **3.5 Financial Intelligence Units - FIUs**

Although Financial Intelligence Units differ slightly between countries the core function of the FIUs is one of a centralized office in each country that receives reports concerning suspicious financial transactions which domestic financial institutions are legally obliged to issue when suspicion arises that a certain transactions or dealings could be related to criminal acts. These transaction reports are commonly known as Suspicious Transaction Reports or STRs. After receiving these STRs the FIU evaluates and processes them and forwards to the appropriate law enforcement authority for further investigation or operation.<sup>103</sup>

Recognizing the benefits inherent in the development of a FIU network, a group of FIU representatives met at the Egmont Arenberg Palace in Brussels in 1995 and agreed to

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<sup>101</sup> In 2000 15 countries were listed and 8 in 2001. Since then no countries have been listed. See text on recommendation 21 on <http://www.fatf-gafi.org>.

<sup>102</sup> Krasner (1983). In Rudich (2005). Page 19.

<sup>103</sup> Egmont Group website: <http://www.egmontgroup.org>.

See also *Financial Intelligence Units: An Overview*. Page 32. IMF (2004).

establish an informal group for the stimulation of international co-operation. Now known as the Egmont Group of Financial Intelligence Units, these representatives meet annually to improve cooperation, especially in the areas of information exchange, training and sharing of expertise.<sup>104</sup> The goal of the Egmont Group is to provide a worldwide forum for FIUs to improve cooperation in the fight against money laundering and financing of terrorism. Today FIUs from 121 states are members of the informal Egmont Group.

Both the UN Palermo Convention and the UN Corruption Convention encourage states to establish domestic FIUs and participate in the international FIU anti-money laundering network.<sup>105</sup> The FATF *Forty-plus-nine Recommendations* also set the standard that countries should establish FIUs with the three core functions of collecting, analyzing and disseminating information regarding money laundering and financing of terrorism. No international anti-money laundering norms or standards impose roles or powers on FIU apart from the three core functions. FIUs in some countries have been granted power by law to temporarily block particular suspicious financial transactions, both of its own initiative but also by request of a foreign FIU. In at least two instances FIUs have been granted extended powers to temporarily freeze and seize assets but in general the tasks and powers of the far majority of FIUs are limited to the above three core functions.<sup>106</sup>

The FIUs in the Nordic countries are all positioned within the police or the prosecution authorities, under or closely related to the National Economic Crime Investigations Units, alongside national Assets Recovery Offices.<sup>107</sup> In all Nordic countries the FIU tasks are limited to the three core functions addressed above. Blocking transactions, freezing, seizure or confiscation of assets are the tasks of AROs or other law enforcement/judicial bodies.<sup>108</sup>

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<sup>104</sup> Ibid. See also: *Egmont Group Annual Report 2009-2010* retrievable from the same website.

<sup>105</sup> *UN Palermo Convention*, Article 7 and UN Convention against Corruption, Article 14.

<sup>106</sup> International Monetary Fund (2004). *Financial Intelligence Units: An Overview*. Page 74-76.

<sup>107</sup> See further in chapter 4.4 on Asset Recovery Offices and chapter 6 on Nordic countries.

The Danish FIU is in the office of the State Prosecutor for Serious Economic Crime, Money Laundering Secretariat.

The Finnish FIU is under the National Police Bureau of Investigations.

The Norwegian FIU is under the National Authority for Investigation and Prosecution of Economic Crime, Money Laundering Unit.

The Swedish FIU is under the National Criminal Intelligence Service, Financial Unit.

This information is retrieved from the Egmont Group website: <http://www.egmontgroup.org>.

<sup>108</sup> See chapter 4.4 in this paper on Asset Recovery Offices and also chapter 4.5.2 on the CARIN network.

## 4 European Developments

### 4.1 Mutual Legal Assistance Instruments

When requesting assistance in criminal matters a state must refer to an international legal instrument that allows for such a request. If no such instrument is available the requested state is not obliged to act upon the request.

The European Convention on Mutual Assistance in Criminal Matters from 1959 (usually called the 1959 MLAT) instructs European states to provide mutual assistance in all general areas of criminal matters and has been the most common legal instrument in use since its ratification in 1962.<sup>109</sup> The Icelandic Parliament ratified the 1959 MLAT in 1984.

The 1959 MLAT instructs states to send and receive legal requests via their ministries of Justice or equivalent ministries but does not allow law enforcement or prosecution authorities in cooperative countries to have direct contact except in extraordinary cases. Many practitioners within law enforcement and prosecution have complained about this condition, stating that it complicates and slows down processes, which has often resulted in failure to succeed. Although a large step forward in international criminal and legal assistance, the 1959 MLAT became increasingly outdated as crime areas and patterns evolved dramatically in the 1980s and 1990s.

The EU consequently adopted a new and updated MLAT in 2000, based on the older 1959 CoE MLAT.<sup>110</sup> The 2000 MLAT provisions are identified as constituting a development of the Schengen legal framework (henceforth Schengen aquis) and therefore applicable to Norway and Iceland.<sup>111</sup> This new legal instrument includes a range of new provisions to meet

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<sup>109</sup> *European Convention on Mutual Assistance in Criminal Matters* from 20 April 1959 entered into force on 12 June 1962. See Council of Europe's website: [www.coe.int](http://www.coe.int).

<sup>110</sup> *Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union*.

<sup>111</sup> The Treaty of Amsterdam, which entered into force in 1999, integrated the Schengen legal framework (the Schengen aquis) into the EU framework. After Iceland and Norway signed an agreement with the EU in 1999 on the association of these two countries to the application of the Schengen aquis, all further legal instruments that fall under the Schengen legal framework are also applicable to these two countries.

See also the *Explanatory Report to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*. Introduction. Page 3.

the international developments and to simplify and speed up the mutual assistance process. The convention for example allows prosecution or judicial authorities to directly send and receive request, not only via traditional letters but also via e-mail. It also allows videoconference interviews between countries, joint international investigation teams, controlled deliveries<sup>112</sup>, covert/secret investigations, interceptions of telecommunications between countries etc.

However, as the 2000 MLAT did not cover financial and banking matters a new protocol to the 2000 MLAT was adopted by the EU Council in 2001, which also falls under the Schengen aquis.<sup>113</sup> This new protocol, usually referred to as the 2001 Protocol, solely covers mutual legal assistance regarding banking issues and information on financial matters and is set up to strengthen the legal instruments in identifying, tracing and recovering proceeds of criminal activities. It also instructs countries to obtain, by request, information on all bank accounts possessed by a suspect under investigation in the requesting state, if the suspected offence could result in at least four years imprisonment in the requesting state and two years in the requested state.<sup>114</sup> It provides clear instructions regarding the forwarding of information on bank transactions and monitoring of financial transactions. The 2001 Protocol specifically instructs that a state can not invoke banking secrecy rules as grounds for declining cooperation.<sup>115</sup>

The Icelandic Parliament accepted the 2000 Convention and the 2001 Protocol by law in 2006 but for unknown reasons the ratification was not announced to the EU Commission until September 2010. The Commission still has not signed the ratified agreement as required, so the 2000 Convention and the 2001 Protocol are still both inactive for Iceland and Norway.<sup>116</sup> Icelandic law enforcement and prosecution authorities therefore still have to use the old fashioned 1959 MLAT in all their requests for legal assistance in criminal matters. This has

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<sup>112</sup> Under strict conditions, most states are allowed by there domestic legislations to conduct Controlled Delivery which is the surveillance of drug deliveries out of or through one country to a destination country, with the aim of arresting the real owners and the head persons on the receiving end.

<sup>113</sup> *Protocol of 16 October 2001 to the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.*

<sup>114</sup> *Ibid.* Article 1.3.

<sup>115</sup> *Ibid.* Article 7.

<sup>116</sup> See *Law no 71 of 14 June 2006.* (Iceland). Information on the announcement and ratification process was received from officials in the Icelandic Ministry of Interior.

also been the case for the Special Prosecutor in cases related to the Icelandic bank collapse<sup>117</sup> but the 2001 Protocol, specially designed for banking and financial issues, would undeniably have strengthened and opened up new possibilities for the Special Prosecutor.

## 4.2 The 1990/1993 Strasbourg Convention

The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (henceforth the Strasbourg Convention) was signed in 1990 and entered into force in 1993. The convention has been ratified by all 47 Council of Europe states and Australia and is thus legally binding for all the Council of Europe states, and thereby also Iceland.<sup>118</sup>

The basic underlying principle of the Strasbourg Convention is clearly defined in the preamble of the convention which states that the fight against serious crime has become an increasingly international problem and calls for the use of modern and effective methods on an international scale. One of these modern methods consists of depriving criminals of proceeds of their crime.<sup>119</sup>

The Convention outlines the following main purpose:

1. Facilitate international co-operation as regards investigative assistance, search, seizure and confiscation of the proceeds from all types of crimes which can generate profits.
2. Strengthen the already existing legal instruments regarding execution of legal request from other countries in the area of searching and tracing criminally acquired assets.
3. Provide a complete set of rules, covering all stages of the procedures of confiscation and allow for a flexible and effective mechanism of co-operation.
4. Provide an instrument obliging states to adopt efficient measures in their national legislation to combat serious crime and confiscate the criminal proceeds. The purpose was not to harmonize the national legislations but to ensure that European states were able to co-operate more effectively.<sup>120</sup>

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<sup>117</sup> Verbal information from officials at the Office of the Special Prosecutor.

<sup>118</sup> Council of Europe website: <http://conventions.coe.int/>.

<sup>119</sup> *Strasbourg Convention*. Preamble.

<sup>120</sup> *Strasbourg Convention*. Explanatory Report. Points 8 to 14.

The Strasbourg Convention refers to the 1988 UN Vienna Convention basic principles and terminology. But it underlines that as the Vienna Convention is a global instrument, the CoE Convention is a regional that will “operate in the context of a smaller community of like-minded States.”<sup>121</sup> The Strasbourg Convention therefore represents “a more binding system than ... created by the United Nations Convention.”<sup>122</sup>

### **4.3 The 2005/2008 Warsaw Convention**

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime and on the Financing of Terrorism (henceforth the Warsaw Convention) which was adopted in 2005 is an update of the 1990 Strasbourg Convention. The convention, which entered into force in 2008, has been ratified in 16 of the 47 CoE member states.<sup>123</sup> Iceland has not yet ratified the Warsaw Convention.<sup>124</sup>

The Council of Europe had identified the necessity to update and modernize the 1990 Strasbourg Convention and adopt a new convention covering both the prevention and the control of money laundering and the financing of terrorism. The evaluations also revealed problems in the CoE member states both in implementation of domestic anti-money laundering measures and international cooperation. In addition it became clear that the Strasbourg Convention covered the preventive aspects only in a very general way. Furthermore, money laundering techniques and anti-money laundering strategies had evolved significantly. For example, the private financial non-bank sector and the use of professional intermediaries to invest criminal proceeds in the legitimate economy had increased considerably. Lastly, as interestingly pointed out in the Explanatory Report of the convention, there is need for a more “comprehensive and user-friendly legal framework, so as to enable practitioners to use a single instrument, both domestically and internationally, instead of series of texts that regulate various aspects.”<sup>125</sup>

The Warsaw Convention stretches further than any other previous international legal instrument with regard to reversal of the burden of proof. It not only invites countries, but it

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<sup>121</sup> Ibid. Explanatory Report. Point 14.

<sup>122</sup> Ibid.

<sup>123</sup> Council of Europe website: <http://conventions.coe.int/>.

<sup>124</sup> Information from the Icelandic Ministry of Interior. April 2011.

<sup>125</sup> *Warsaw Convention*. Explanatory Report. (2005). Point 22. Page 3.

requires them to provide the possibility for the burden of proof to be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation in serious offences.<sup>126</sup>

Another example of the Warsaw Convention aiming higher than its predecessors are the mandatory provisions where states must adopt, in their national legislation, procedures enabling them to identify and obtain information on accounts held by specified beneficiaries.<sup>127</sup> These actions are to be taken to address the international problem of law enforcement of dealing with front persons or firms covering the real beneficiary of accounts, properties or funds. It is stated that practical examples have revealed serious difficulties in prosecuting natural persons acting on behalf of the firms or other legal entities and therefore a corporate liability is outlined more thoroughly than in earlier conventions.<sup>128</sup>

#### **4.4 EU Measures**

Through the last two decades the EU has actively been trying to create a regional legal framework, adopting numerous different legal instruments in the area of assets tracing and proceeds of crime confiscation. But, it is also clear that this framework is not in full harmony with the international instruments, such as the UN and Council of Europe Conventions in the sense that the EU legislation does not cover all aspects of the international ones. Furthermore, there seems to be a gap between EU legal provisions and domestic implementation as the Commission has itself identified and highlighted. This has been confirmed in a study made in 2007 by Borgers and Moors at the University of Amsterdam and the University of Tilburg.<sup>129</sup> The study identified several bottlenecks in assets tracing and confiscation cooperation within European countries. According to the study it is evident that

of all these bottlenecks in international cooperation in confiscation matters ... few bottlenecks actually emerged which relate specifically to the level of international cooperation. Practically all bottlenecks have causes which are rooted in the national organization of the process of international cooperation.<sup>130</sup>

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<sup>126</sup> Ibid. Article 3 (4).

<sup>127</sup> Ibid. Article 7 (2) (a) and (b).

<sup>128</sup> Ibid. Explanatory Report. (2005). Point 103 to 107. Pages 11-12.

<sup>129</sup> Borges and Moors (2007). Pages 1-22.

<sup>130</sup> Ibid. Page 13-14.

The authors explain this by the fact that international cooperation in confiscation matters lacks an international organizational framework; after all it usually takes place between the countries themselves and the responsibility for the implementation is at national level.

Another important conclusion of this study is that confiscation is given little priority as a weapon to fight international crime. Politically, there seems to be full support in the EU for making intense efforts to confiscate proceeds of crime, both nationally and internationally, but not much of that will is noticeable domestically at implementation or enforcement level. „European institutions, the national governments and the central authorities lack an explicit vision on the significance of confiscation in the fight against international crime“ and such has de-motivating effects in practice.<sup>131</sup> The member states thus seem to ratify the obligatory legal instruments without the intent to practically implement them. Stronger supervision, follow-up or evaluation tools from the EU have until now been missing, something that the FATF has employed globally with good results, as explained before in this paper.

This study has revealed that the status in Iceland is in coherence with the results of Borge's and Moor's results both regarding the top-down vision and the practical implementation.<sup>132</sup>

Below are the main EU measures addressing different aspects of criminal assets recovery and confiscation of proceeds of crime:

Council Directive 91/308/EEC from 1991 on prevention of the use of the financial system for the purpose of money laundering<sup>133</sup> (called the *First Money Laundering Directive*) was a legally binding decision for all the member states of the then EEC and also for Iceland when adopting the EEA Agreement in 1994. The Directive led to the issuing of Law against money laundering in Iceland in 1993 where money laundering was defined legally and various provisions adopted which made Icelandic banks and other financial institutions liable for introducing a monitoring system within their business environment to identify suspicious financial transactions.<sup>134</sup> The purpose of the EEC Directive was to coordinate measures in Europe against laundering illicit proceeds of crime and harmonize the participation and

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<sup>131</sup> Ibid. Page 14.

<sup>132</sup> See chapter 7.

<sup>133</sup> See the *Council Directive 28/06/1991*. Pages 0077 - 0083.

<sup>134</sup> *Law on Actions against Money Laundering* No 80/1993.



liability of the financial institutions in the region with regard to the adoption of the fourfold freedom, one of which was freedom of the movement of money.

Directive 2001/97/EC in December 2001, sometimes referred to as the *Second ML Directive* was an update of the first Directive (above).<sup>135</sup> It amends the earlier 1991 Directive in two main respects. First, it widens the definition of criminal activity giving rise to money laundering to include all serious crimes. Second, it applies to activities and professions beyond credit and financial institution such as accountants, lawyers, notaries, real estate agents, casinos and dealers in high value goods. These were now subject to the same obligations as regards customer identification, record keeping and reporting of suspicious transactions.

The Council Directive 2005/60/EC<sup>136</sup> (the *Third ML Directive*) was an update of the 2001 one, as it was then clear that the 2001 Directive needed to be widened to fully cover provisions regarding the use of the financial system for terrorist financing. The Directive appears to represent the minimum threshold of anti-money laundering and anti-terrorist financing regulations, as Article 5 provides for flexibility, expressly empowering member states to enforce tighter, more stringent regulations in their home state. Iceland has ratified and implemented this Directive by adopting in 2006 new and updated Laws against money laundering and financing of terrorism.<sup>137</sup>

The EU Council's Joint Action of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime is also legally binding for the EU member states.<sup>138</sup> It builds on principles and foundation laid down in the UN 1988 Vienna Convention, the 1990 CoE Strasbourg Convention and Financial Action Task Force's 40 Recommendations from 1996 by instructing EU member states to adopt measures presented in these three documents. It especially underlines

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<sup>135</sup> *Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering.* Pages 0076-0082.

<sup>136</sup> *Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorism financing.* Pages 0015-0032.

<sup>137</sup> *Law against money laundering and financing of terrorism*, no 64/2006 (Iceland).

<sup>138</sup> *Joint Action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty of the European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime.*

instructions that all member states adopt value confiscation both in domestic cases and also when requested by foreign states.<sup>139</sup> Another fundamental issue running through the Joint Action document is that all states must insure the legal basis and practical procedures to be able to trace, seize, freeze and confiscate proceeds from crime.

The Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, refers to the 1998 Joint Action and instructs member states to adopt in its domestic legislations provisions put forth in the 1990 Strasbourg Convention concerning confiscation.<sup>140</sup>

The Council Framework Decision 2003/577/JHA on orders freezing property or evidence has the purpose to establish rules under which a member state of the EU shall recognize and execute a freezing order issued by another member state under criminal proceedings. Under this Decision the principle of mutual court orders' recognition (direct enforcement) is applied. This is meant to speed up the process to secure evidences and seize or freeze assets which are easily movable.<sup>141</sup>

The Council Framework Decision 2005/212/JHA on confiscation on crime related proceeds, instrumentalities and property was adopted to ensure that all member states of the EU have effective rules governing the confiscation of proceeds of crime. The introduction states that existing instruments have not to a sufficient extent achieved effective cooperation regarding confiscation because at that time still some of the member states had not taken the necessary measures.<sup>142</sup> This Framework Decision also instructs states to adopt so called "third party confiscation" and "extended confiscation" where assets which have been transferred to spouses, partners, relatives, legal persons or third parties can be confiscated.

The Hague Programme was launched by the EU Commission on May 10th 2005.<sup>143</sup> The Hague Programme is a 5 years action plan where proposals are presented on fundamental

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<sup>139</sup> Ibid. Article 1 (2).

<sup>140</sup> *Council Framework Decision 2001/500/JHA of 26 June 2001.*

<sup>141</sup> *Council Framework Decision 2003/577/JHA of 22 July 2003.*

<sup>142</sup> *Council Framework Decision 2005/212/JHA of 24 February 2005.* Introduction. Page 1.

<sup>143</sup> *Commission of the European Communities: The Hague Programme - Ten priorities for the next five years.* Pages 001-0014.

rights of citizens, terrorism, migration, visa policies, asylum, privacy and security in information sharing, the fighting against organized crime and criminal justice. Under point 8, *Fighting organized crime: prevention, investigation and cooperation*; some strategic aims are presented one of which is to strengthen investigations and tools to address financial aspects of organized crime.

Developing a strategic concept on tackling organized crime from June 2005 is an EU Commission's strategic document based on the Hague Programme.<sup>144</sup> Its main purpose was to integrate the different measures and tools that EU had presented so far and fill identified gaps in light of recent developments.<sup>145</sup> The financial aspects of organized crime are strongly addressed in the document and the need to strengthen and harmonize legislative and law enforcement measures in Europe.<sup>146</sup>

The document refers to the UN Palermo Convention and encourages states to use non-criminal procedures, especially with regard to extended confiscations, but also invites all states to consider the reversal of the onus of proof or lowering the standards of proof in criminal assets confiscation cases. The Commission announces that it will review current EU legislations on confiscation with this regard.<sup>147</sup>

The Council Framework Decision 2006/783/JHA on mutual recognition to confiscation orders presents legally binding rules under which member states shall recognize and execute a confiscation order issued by a court in another member state. This decision furthermore introduces the concept of sharing of confiscated assets/proceeds between affected countries.<sup>148</sup>

The Council Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States was adopted in December 2007.<sup>149</sup> As this legal document concerns the core subject of this study, its content will be examined in more detail in the next sub-chapter.

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<sup>144</sup> *Commission of the European Communities: Developing a strategic concept on tackling organized crime of 2 June 2005.*

<sup>145</sup> *Ibid.* Introduction. Points 1-3.

<sup>146</sup> *Ibid.* Chapter 2.3.2. Point 22.

<sup>147</sup> *Ibid.* Point 23.

<sup>148</sup> *Council Framework Decision 2006/783/JHA of 6 October 2006 on mutual recognition to confiscation orders.*

<sup>149</sup> *Council Decision 2007/845/JHA of 6 December 2006 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related, to crime.*

#### 4.5 Network of Assets Recovery Offices in Europe

EU Council Decision 2007/845/JHA is the first legally binding EU document containing instructions and provisions for specialized units solely tasked to recover criminal assets in each of the EU member states. According to the Council Decision each member state was obliged to establish a centralized Asset Recovery Office (henceforth ARO) before the end of 2008. The basis for this is outlined in Decision's opening:

The main motive for cross-border organized crime is financial gain. This financial gain is the stimulus for committing further crime to achieve even more profit. Accordingly, law enforcement services should have the necessary skills to investigate and analyze financial trails of criminal activity ....

Member states should have national Asset Recovery Offices in place which are competent in these fields, and should ensure that these offices can exchange information rapidly.<sup>150</sup>

The purpose of the AROs is to facilitate the tracing and identification of proceeds of crime and other crime related property which may become the object of a freezing, seizure or confiscation order, either in the course of criminal proceedings or in a separate civil case.<sup>151</sup> The Decision leaves it up to the states to decide if the ARO is a part of administration, law enforcement or judicial authority but underlines that states have to ensure that the ARO's effectiveness and cooperation is not hampered by the status of the unit under national law.<sup>152</sup> It provides a legal basis for direct exchange of information between Asset Recovery Offices.

According to article 4 of the Decision, requests and information exchange between AROs shall be spontaneous and without any delay. To ensure this, member states are encouraged to use another EU legal instrument when sending requests or exchanging information between AROs: Framework Decision 2006/960/JHA on simplifying the exchange of information between law enforcement authorities of the EU Member States (usually called the Swedish Initiative). This instrument contains a specific form that can be sent directly between law

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<sup>150</sup> *Council Decision 2007/845/JHA of 6 December 2007, concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime.* Page 1.

<sup>151</sup> *Ibid.* See article 1.

<sup>152</sup> *Ibid.* See article 2.

enforcement authorities within Europe. The Swedish Initiative falls under the Schengen acquis and is therefore applicable to Iceland and Norway.<sup>153</sup> According to officials in the Icelandic Ministry of Interior, Iceland has already ratified and implemented the Swedish Initiative.

In March 2008 the EU Commission called high level officials to a conference in Brussels to discuss and advise on the structure, position, powers and processes of these AROs. Although not legally binding, this resulted in a document which includes general recommendations and practical guidelines for setting up Asset Recovery Offices in the member states of the EU.<sup>154</sup>

1. AROs should have a multidisciplinary structure comprising expertise from law enforcement, judicial authorities, tax authorities, social welfare, customs and any other relevant services. Representatives from all these agencies should be able to exercise their usual powers and have access to all relevant databases in order to identify and trace assets.
2. AROs should provide a central point for all incoming requests relating to assets recovery.
3. AROs should have access to a central bank account registry at national level.
4. AROs should have access to police databases and criminal convictions registry.
5. AROs should at least have access to land registries, company records, car registrations, tax databases and social welfare databases.
6. AROs should collect all relevant statistics on freezing and confiscation.
7. AROs should have the power to share information both nationally and internationally where appropriate.
8. AROs should have the power to issue a short term administrative restraint order where funds are identified which could be dissipated quickly.
9. AROs should have the power to conduct joint international investigations.

According to article 8 of the Council Decision 2007/845, the Commission shall report to the EU Council on the evaluation of the countries' compliance before the end of the year

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<sup>153</sup> *Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information between law enforcement authorities of the EU Member States of the European Union.* Introduction, point 13, page 2.

<sup>154</sup> Unpublished internal document: *High Level Conference on Establishing National Asset Recovery Offices.* Brussels 6/7 March 2008. Information from Mr Burkhard Muhl, Head of the Europol Criminal Asset Bureau (ECAB). Personal interview. April 2011.

2010. This evaluation has been completed and issued in an unpublished Commission document to the Council and the EU Parliament.<sup>155</sup> According to this evaluation 22 EU states had AROs in place in December 2010 but five were in the process of setting them up. Cooperation between the existing AROs seemed to meet all the standards of the Council Decision and no AROs were identified as having refused cooperation or information from other AROs. Most of the AROs used the Swedish Initiative form for exchanging information or sending/receiving requests but the offices also used other various channels of communication, for example via Liaison Bureaus at Europol, via Interpol channels and via Financial Intelligence Units.

The Commission's evaluation report also addresses some challenges and barriers for the AROs to effectively carry out their tasks. The most important one is lack of resources, both qualified personnel and access to relevant databases, such as bank accounts and other financial information. The second most important concern is the lack of a secure communication system to directly exchange information. The third one is that financial investigators receive little specialized training in assets recovery matters. Other challenges mentioned are differences in national legislations on which information are accessible to the AROs and lack of cooperation between AROs and the managing authorities of seized or confiscated assets.

In the report the Commission stresses Europol's coordinating role of the AROs and the use of Europol's Siena Secure Communication System for exchanging information and sending/receiving requests. Before the end of 2011, sixteen AROs will be linked to the Siena System and the plan is to link all of them before the end of 2012. Europol's plan is to link third country AROs to the system when all the 27 member states have been connected.<sup>156</sup>

The Commission concludes the 2010 Evaluation Report by announcing amendments to the existing EU legal framework on asset recovery and confiscation by the end of 2011. These amendments will enhance the powers of the AROs, especially their capacity to access information to effectively carry out their tasks. In the report's conclusion the Commission

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<sup>155</sup> *Report to the Commission to the European Parliament and the Council, based on article 8 of the Council Decision 2007/845/JHA of 6 December 2010.*

<sup>156</sup> Mr. Burkhard Muhl, Head of ECAB. Personal interview. April 2011.

announces that it will develop common indicators by 2013 for the evaluation of the performance of the AROs.<sup>157</sup>

Some of the above EU legal and political provisions overlap each other and achieving a full picture of existing EU legal instruments and the proceeds of crime strategy is confusing. Not surprisingly the Commission issued one new document late 2008 which highlights various unclaritys and unsuccessful implementations of the EU strategy. The document's title is: "Proceeds of organized crime. Ensuring that crime does not pay."<sup>158</sup> In the document the Commission is very self-critical of the state of play in the EU. It expresses its opinion of the failure of implementation of the EU Decisions in some EU states and due to different legal procedures regarding proceeds of crime confiscation the EU strategy is rendered ineffective. It is also underlined that

some provisions of the Framework Decisions are not very clear with the result that transposition into national legislation is patchy. A lack of coordination ... and the provisions on the execution of confiscation orders ... may heavily affect mutual recognition.<sup>159</sup>

The Commission points out that a number of important provisions in the UN Palermo Convention, the UN Corruption Convention, the CoE Strasbourg and Warsaw Conventions are not yet incorporated into the EU legislation. It also emphasizes the FATF Recommendations as a model of practice. The Commission therefore suggests to the EU Parliament and the Council that a complete recasting of the existing EU legal framework is needed.<sup>160</sup>

This view from the 2008 report is endorsed and repeated in the EU Internal Strategy, issued in 2010.<sup>161</sup> The Commission announces a new, comprehensive EU legislation in 2011

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<sup>157</sup> *Report to the Commission to the European Parliament and the Council, based on article 8 of the Council Decision 2007/845/JHA of 6 December 2010.* Conclusion remarks, page 9.

Also Mr Burkhard Muhl, Head of ECAB. Personal interview. April 2011.

<sup>158</sup> *Commission of the European Communities: Communication from the Commission to the European Parliament and the Council. Proceeds of organized crime. Ensuring that crime does not pay.* From 20 November 2008.

<sup>159</sup> *Ibid.* Chapter 3.2. Page 5.

<sup>160</sup> *Ibid.* Chapter 3.3. Page 6.

<sup>161</sup> The EU Council (2010). *Internal Security Strategy for the European Union: Towards a European Security Model.*

to strengthen the EU legal framework on confiscation. It also states that all EU member states must, by 2014, have their AROs equipped with the necessary recourses, powers, training to effectively carry out the criminal asset recovery strategy of the EU.<sup>162</sup>

## 4.6 Europol

Europol is the law enforcement organization of the EU. The European Council took the first steps in formalizing European police cooperation in 1993 when the Europol Drugs Unit was established in the Hague in the Netherlands. Europol became fully operational in 1999 with an extended mandate that covers all serious international crime and terrorism.<sup>163</sup> One of Europol's units is Serious Financial Crimes Unit which assists Europol's cooperation countries in analyzing and investigating serious financial cases, suspected money laundering and the tracing and identification of criminal assets.<sup>164</sup> On behalf of Iceland, the National Police Commissioner signed an operational cooperation agreement with Europol in 2001 and in the beginning of 2007 Iceland launched a liaison bureau with one liaison officer at Europol headquarters in the Hague.<sup>165</sup> Since then Iceland has actively participated in different law enforcement cooperative tasks and gained access to Europol databases and experts in all major crime areas.

### 4.6.1 Europol Criminal Assets Bureau, ECAB

The Europol Criminal Assets Bureau (henceforth ECAB) was established in 2006 following an internal decision by the Europol directorate to extend activities in the field of existing Financial Crimes Unit of the organization. This decision was in line with the growing international and EU emphasis on assets recovery matters. It underlines a more focused operational support to ongoing investigations in the EU member states and third partners in the area of criminal assets tracing and recovery. It also reflected the will of Europol to support the establishment of AROs in the EU member states and third partner states.<sup>166</sup> ECAB is

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<sup>162</sup> The EU Commission (2010). *Communication from the Commission to the European Parliament and the Council: The EU Internal Security Strategy in Action. Five steps towards a more secure Europe.*

<sup>163</sup> *Ten Years of Europol 1999-2009.* Pages 12 and 21.

<sup>164</sup> Europol web site: <http://www.europol.eu>.

<sup>165</sup> *Agreement between the Republic of Iceland and the European Police Office* from 28 June 2001. See announcement no 36 in *Lögbirtingablaðið* from 29 November 2001. Liaison Agreement between Iceland and Europol is in Annex 3 to the Cooperation Agreement.

<sup>166</sup> Mr. Burkhard Muhl. Head of ECAB. Personal interview. April 2011. Information in this chapter is also from unpublished internal Europol documents that Mr Muhl showed but was not able to deliver.



formally based on three EU legal instruments which form the legal basis for existence and projects<sup>167</sup> and has the following main objectives:

1. Support and advice Europol partner states in tracing and retrieving criminal assets. ECAB has information on legal procedures and practical processes in different countries but the bureau also has a list of assets recovery experts and contacts throughout the world via the CARIN Network.<sup>168</sup> By bringing parties from the requesting state in direct contact with experts and practitioners in the requested state ECAB can often simplify and speed up the processes considerably.
2. Assist Europol partner states to set up Asset Recovery Offices (AROs). Since the issuing of the Council Decision on Asset Recovery Offices in 2007 the ECAB has been an active partner in supporting the establishment of these offices in the EU member states.
3. Hold the CARIN permanent secretariat. (See further on CARIN in next chapter).
4. Manage Financial Crimes Information Centre (FCIC) web site. The FCIC is a Europol internet based website which supports law enforcement authorities with technical, non-operational information on financial crime, assets tracing and related issues. Over 2500 users from 45 countries have access to this closed forum of assets recovery practitioners.

Under an EU Commission funded project, ECAB has assisted 6 EU countries thus far in setting up their AROs. Staff from ECAB together with a group of external experts have gone on-site and prepared legal, administrative and practical setups of the AROs. Europol has requested further funding from the EU Commission for extending this project further for third cooperation parties, such as Iceland. If Iceland would request ECAB for advice or assistance in preparing and launching an ARO in Iceland it is likely that the answer would be positive and even free of charge if the Commission accepts ECAB's ongoing funding request.<sup>169</sup>

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<sup>167</sup> The first is *Council Decision Establishing the European Police Office of 9 October 2008*.

Second is the *Communication from the Commission to the European Parliament and the Council, Proceeds of organized crime* of 20 November 2008.

Third is the *Council Decision on cooperation between Asset Recovery Offices etc.*, of 6 December 2007.

<sup>168</sup> See chapter 4.5.2 on CARIN.

<sup>169</sup> Mr Burkhard Muhl. Head of ECAB. Personal interview. April 2011.

#### 4.6.2 The CARIN Network

In October 2002 a conference was held at the Camden hotel in Dublin co-hosted by the Irish Criminal Assets Bureau and Europol. Participants were drawn from law enforcement agencies and judicial authorities within member states of the EU together with representatives from Europol and Eurojust. Workshops were held between practitioners and the objective was to present recommendations on the subject of identifying, tracing and seizing criminal proceeds. One of the recommendations was the establishment of an informal network of direct contacts. Representatives at the conference identified the need to have access to a network of practitioners from the judicial and law enforcement authorities, each of whom was an expert in his/hers own jurisdiction and could therefore guide and advise on possibilities and proper legal channels for identifying and tracing proceeds between countries. This network could also be used for assessing and preparing formal measures for freezing, seizure and confiscation of those proceeds throughout the world.<sup>170</sup>

This led to the official establishment of the Camden Assets Recovery Inter-Agency Network (the CARIN Network) in the Hague in 2004. On behalf of the EU, Europol holds the secretariat of CARIN and took the initiative in promoting this informal tool within and outside the EU. The secretariat is located within the Europol Criminal Assets Bureau. CARIN's aim is to enhance the effectiveness of efforts, on a multi-agency basis, in depriving criminals of their illicit profits. The nine key objectives are:

1. Establish a global network of contact points.
2. Focus on the proceeds of all crimes, within the scope of international obligations.
3. Establish itself as a centre of expertise on all aspects of tackling the proceeds of crime.
4. Promote the exchange of information and good practice.
5. Undertake to make recommendations to bodies such as the European Commission and the Council of the European Union, relating to all aspects of tackling the proceeds of crime.
6. Act as an advisory group to other appropriate authorities.
7. Facilitate, where possible, training in all aspects of tackling the proceeds of crime.
8. Emphasize the importance of cooperation with the private sector in achieving its goal.
9. Encourage members to establish national assets recovery offices.<sup>171</sup>

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<sup>170</sup> Ms. Jill Thomas. Senior specialist in CARIN Secretariat. Personal interview. April 2011.

<sup>171</sup> *The CARIN Manual* (2006). An in-house Europol document. Unpublished.

As stated above the CARIN Network is an informal cooperation for improving effectiveness not least by simplifying and speeding up preparations for formal legal requests between countries. Each member state nominates two English speaking experts, who must be day-to-day practitioners in assets recovery matters. One should be from law enforcement and the other from judicial authorities, usually the prosecution. These two serve as contact points for each country in such matters. They supply CARIN secretariat a summary of their legislation and their country's practical procedural guidelines relating to assets recovery. The CARIN secretariat runs a Financial Crimes Information Centre which is a website accessible to all CARIN members where relevant information from all states and locations is centrally based.<sup>172</sup>

The CARIN Network and the FCIC website have proved to be valuable and highly appreciated tools for the police and judicial agencies, not only in Europe but increasingly around the world. Annually the CARIN Network has received more than 400 requests for assistance in tracing and restraining criminal proceeds. These requests vary from single assets tracing requests to support of complete confiscation investigations.<sup>173</sup>

The CARIN Network's steering group of nine representatives meets annually. The group has on several occasions presented recommendations to improve the effectiveness and efficiency of the assets recovery measures, especially in Europe.<sup>174</sup> Some of these recommendations are based on real examples of barriers to criminal assets recovery but others are drawn from positive results and best practices in different jurisdictions. This paper will not detail all the recommendations but the ones that seem directly to be of interest for Iceland are briefly mentioned below:

1. There is a need for harmonization of national legislations concerning proceeds of crime. All members should adopt and implement EU decisions into national legislations.<sup>175</sup>
2. All countries should establish a centralized Asset Recovery Office (ARO) for identifying, tracing and recovering proceeds of crime. All AROs should have powers

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<sup>172</sup> Ibid. Page 3-4.

<sup>173</sup> Ms. Jill Thomas. Senior specialist in CARIN Secretariat. Personal interview. April 2011.

<sup>174</sup> CARIN's recommendations have been presented in two unpublished documents in 2010. While giving an interview Ms. Jill Thomas explained these documents and the recommendations to the author of this paper.

<sup>175</sup> Recommendations 28, 42 and 52.

to provisionally freeze assets for at least 72 hours. CARIN should be represented within each ARO. This unit should include all competent authorities.<sup>176</sup>

3. There should be a close cooperation and effective interface between the domestic FIUs, which handle reports from banks on suspicious financial transactions, and the AROs. The FIUs should have access to ARO data and vice versa.<sup>177</sup>
4. Investigators tracing the proceeds of crime should have the possibility to access domestic banking data from a central point. Central access should also be possible to financial data from other financial institutions, such as stock brokers, dealers trading shares, mortgage lenders, insurance brokers, loan companies and investment firms.<sup>178</sup>
5. The use of taxation powers should be a part of the overall proceeds of crime strategy. Countries should consider allowing taxation of criminal income in order to tackle serious crime.<sup>179</sup>
6. Law enforcement authorities should have the means of access to taxation and social welfare records when dealing with criminal proceeds investigations.<sup>180</sup>
7. The use of non-conviction based confiscation should be a part of the overall strategy.<sup>181</sup>
8. Members should adopt and implement the EU Framework Decision on Mutual recognition of Confiscation Orders in relation to sharing of confiscated assets.<sup>182</sup>
9. Financial investigations should always be a consideration at the commencement of all serious criminal investigations. Senior law enforcement managers must be made aware of the importance of financial investigations and recovery of criminal assets.<sup>183</sup>
10. CARIN should consider the possibility of maintaining a panel of experts to assist countries in high profile and major financial investigations.<sup>184</sup>

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<sup>176</sup> Recommendations 19, 51, 58 and 60.

<sup>177</sup> Recommendation 1.

<sup>178</sup> Recommendation 4.

<sup>179</sup> Recommendations 1-3.

<sup>180</sup> Recommendations 4 and 18.

<sup>181</sup> Recommendations 5, 38 and 64.

<sup>182</sup> *Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.* See Recommendation 11, 2005-2009.

<sup>183</sup> Recommendations 13 and 14.

<sup>184</sup> Recommendation 82.

11. Countries that have access to Europol Siena Secure Communication system should use that for exchanging operational data between AROs.<sup>185</sup>

When the network was launched in 2004 around 30 European countries and USA were participants. Today there are 48 member states and 9 international organizations, such as the World Bank, the IMF, the UNODC and Interpol. Similar networks, which cooperate closely with CARIN, have now been established in Africa<sup>186</sup> and South-America<sup>187</sup>. This further illustrates the success of this practical model which in many ways resembles the FATF money laundering network.

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<sup>185</sup> Recommendation 65.

<sup>186</sup> ARINSA. Asset Recovery Inter-Agency Network of 9 Southern African states.

<sup>187</sup> RRAG. Red de la Recuperación de Activos de GAFISUD which is a network of 12 South-American states.

## 5 The Irish Criminal Assets Bureau – CAB

Ireland heralded an unprecedented wave of criminal gang killings in the 1990s coupled with a low conviction rate for such crimes. Public and political concern that organized criminals were evading justice arose severely.<sup>188</sup> Two specific events in Ireland in 1996 paved the way for a new comprehensive evaluation followed by a new strategy and legislation aiming at controlling organized crime in the country. Interestingly, the Irish government's conclusion was neither to strengthen its Penal Code nor increase punishments or jail sentences for serious offences but to take all possible action to attack the underlying reasons for most serious and organized crime; the revenues.

The first event was the killing of the police detective Jerry McCabe and the second was the murder of an internationally awarded journalist, Veronica Guerin.<sup>189</sup> Ms Guerin had been writing about serious and organized crime in Ireland for years. She received severe threats in 1995 after writing about the lavish lifestyle of the convicted Irish criminal John Gillingan and after that received 24 hour police escort for her protection. In June 1996 Ms Guerin was shot at traffic light cross-roads in Dublin. Guerin's murder caused outrage in Ireland and the government reacted by establishing the multi-agency Criminal Assets Bureau (henceforth the CAB) the same year. Its original aim was very clear; to remove the motive (profit) and the means (operating capital) to commit serious crimes.<sup>190</sup>

This high goal called for new legal acts and a new powerful organization. The first of these acts, the Criminal Asset Bureau Act, outlines in details the purpose, powers, legal and practical processes and structure of the new CAB.<sup>191</sup> The second act, also issued in 1996, is the Proceeds of Crime Act that describes all arrangements concerning the tracing, seizing, freezing and confiscation of illegal assets.<sup>192</sup> The third important act is the Taxes

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<sup>188</sup> Campbell (2006). Page 1.

<sup>189</sup> Mr. Patrick Byrne, Chief Superintendent and the Head of CAB until 2010. Personal interview. April 2011.

<sup>190</sup> Barrett (2007). Page 229.

<sup>191</sup> *Irish Criminal Asset Bureau Act No 31 of 1996*. Amendments 2005 and 2007.

<sup>192</sup> *Irish Proceeds of Crime Act No 30 of 1996*. Amendments 2005.

Consolidation Act that consolidates all relevant tax law and regulations into one single act which is created to meet the aims of the new strategy.<sup>193</sup>

The CAB is a unique organization, positioned within the National Police Commissioner's structures. Although within the police structure CAB is a separate legal statutory body and an independent legal entity. It is in practice one law enforcement unit with a separate budget and an independent management. CAB is staffed with officers drawing powers from the Irish National Police, the Irish Customs, the Irish Revenue Service and from the Irish Social Welfare Service, all of whom are answerable to the CAB Chief who has the rank of Chief Superintendent. In addition there are different supporting experts such as forensic accountants, IT specialists and people with economic-, business- and banking backgrounds. Senior lawyers representing the Director of Public Prosecutions constitute an important part of CAB as they bring the prosecution powers to the table.<sup>194</sup>

Officers from each of these organizations retain their original powers and possibilities as if they were working within their separate entities. They all have direct access to information and databases that their original organizations are allowed by law.<sup>195</sup> Based on the Irish Disclosure of Information Act and the Criminal Assets Bureau Act officers from all organizations within the CAB can and must exchange information with all other CAB officers with the goal of mapping and analyzing information regarding possible illegal proceeds. This status gives CAB a unique variety of powers and a range of possibilities for information overview and executions.<sup>196</sup> "The whole idea was to use all possible resources and fully apply every law possible to retrieve illegally gained profits. The laws were to meet the aims of the public policy and the government strategy."<sup>197</sup>

The fundamental purpose of the laws relating to the CAB is disruption and discouragement, rather than elimination of criminal activity through enforcement of the criminal law. The CAB neither uses the Penal Code nor provisions for criminal proceedings when claiming confiscation of assets, but civil legal procedures. Cases which CAB takes to the courts are presented to a civil court with expert judges that have been specially selected

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<sup>193</sup> *Irish Taxes Consolidation Act 1997*. Amendments in 2008.

<sup>194</sup> Mr. Patrick Byrne, Chief Superintendent and the Head of CAB until 2010. Personal interview. April 2011.

<sup>195</sup> *Ibid.*

See also Campbell (2006). Pages 1-2.

<sup>196</sup> Campbell (2006). Page 2.

<sup>197</sup> Mr. Patrick Byrne. Interview.

and trained to handle assets recovery cases as many of them are very complex, technical and international.<sup>198</sup>

One obvious benefit for the state of using the civil procedures is that the burden of proof is “on balance of probabilities” and therefore the CAB “only” has to prove its case with 50% certainty. In the former system the Irish Police put the confiscation claims as a part of its criminal cases against a defendant and had to prove “without reasonable doubt” that the offences in question generated proceeds. As in the latter instance the prosecution has to prove its case with 95-99% certainty and all doubt is in the defendant’s favor, this failed repeatedly. In the new system CAB opens civil cases completely apart from the criminal/guilt procedures which can be done whenever convenient. Since 1996 numerous CAB cases have been challenged to the High Courts but so far no defendant has been able to convince the High Court that the assets in question stem from a legally obtained income.<sup>199</sup> That fact is probably the best indicator of the strength of the Irish criminal asset recovery strategy and system.

The CAB was set up to restrain criminal assets with the aim of returning them to other parties, to pay revenue debts and to be eventually returned and then disposed of by the state. The Bureau has the task of finding the assets and building a case for restraining them temporarily (freezing or seizing) but does not manage them. CAB returns the assets to the Ministry of Finance for handling until the assets are either confiscated or returned. All confiscated assets run directly to the Irish State via the Finance Cashier and the CAB does not benefit directly. A strategic decision was taken in 1996 that CAB would not handle or manage the frozen or seized assets but focus on the seizures, freezing and confiscations, so that the CAB officers could stick to their main objective.<sup>200</sup>

According to the Taxes Consolidation Act all income is taxable, both from domestic and foreign sources. Even profits or gains from unlawful sources can be subject to taxes as “miscellaneous income”.<sup>201</sup> This means that after conducting a preliminary investigation the CAB’s Chief Officer can evaluate and decide which legal instruments he believes best fit for that particular case and choose the most prominent one. On the basis of the Proceeds of Crime Act he can file a civil claim for confiscation of assets as proceeds of crime. In addition he can

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<sup>198</sup> Ibid.

<sup>199</sup> Mr. Patrick Byrne. Interview.

<sup>200</sup> Ibid.

<sup>201</sup> *Irish Tax Consolidation Act*, Section 58.



use the Customs Act or the Social Welfare regulations in civil proceedings for retrieving payments based on false information. If he thinks that the above means are unlikely to be successful he can decide to use the Tax Consolidation Act and take action under revenue legislation to ensure that the proceeds of a suspected criminal activity are subject to tax and that the revenue legislation is applied fully to such proceeds.<sup>202</sup> In this way the CAB is given a range of tools and options for retrieving ill gotten gains and “in money terms, the most effective weapon in the Bureau’s armoury is its tax powers.”<sup>203</sup>

The CAB processes are entirely independent from the operation of criminal confiscation provisions post-conviction by the Irish prosecution authorities. CAB has no statutory role in relation to criminal confiscation post-conviction. However, it is not unusual for the two processes to arise within the same case. When this happens the Proceeds of Crime Act provides that the civil asset recovery procedure must take second place to the criminal case or the criminal confiscation route, which the police and the prosecution authorities carry out.<sup>204</sup>

According to Mr. Patrick Byrne who was the CAB Chief Officer in 2009 and 2010 the bureau’s key success factors are firstly the comprehensive legal armoury, secondly that CAB has been well resourced of budget and staff from the beginning, thirdly that the bureau has always had a strong political support and lastly that the public has been extremely positive and supportive towards the CAB’s actions so far. In addition Mr. Byrne mentioned that from the start the managing group of CAB has executed a careful strategy with regard to cases brought to the courts. Even though the proof base-line in civil cases is 50/50 CAB has always set the proof limits to 70%. This has resulted in a full house of results which has strengthened the bureau’s reputation not least in the minds of the offenders who now more frequently cooperate, which simplifies and speeds up all procedures.<sup>205</sup>

According to Mr Byrne the annual budget of CAB is around 6 million BPS. The overall cost of CAB from 1996 is approximately 80 million BPS but the bureau has returned around 260 million BPS to the Irish state in the same period. 120 millions of these 260 are seized criminal assets, 136 millions collected through taxes and 3 millions in retrieved social welfare payments.

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<sup>202</sup> Campbell (2006). Page 1-3.

<sup>203</sup> Barrett (2007). Page 230.

<sup>204</sup> Ibid. Page 237.

<sup>205</sup> Mr. Patrick Byrne. Interview.

Undeniably, all of this indicates a very successful criminal assets recovery strategy and executions in Ireland. The Irish CAB model and its results have been subject to global attention. In 2009 the Europol Director, Rob Wainwright, announced that Europol was promoting the Irish CAB as best practice in other European countries.<sup>206</sup>

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<sup>206</sup> O’Keeffe, Cormac. “European Criminal Assets Bureau based on CAB.” *Irish Examiner*. 16 October 2009. Interview with Mr. Rob Wainwright, Europol Director.

## 6 Criminal Assets Recovery in Denmark and Norway

This paper's research question refers to assets recovery and confiscation tools and structures in Iceland compared with the European neighbour countries. Previous chapters have focused on international and EU developments and measures in addition to the Irish CAB. As Iceland usually follows the Nordic countries closely regarding legal and administration developments the paper will briefly examine the position of the ARO and its structure in Denmark in the next sub-chapter. A more in-depth study of assets recovery matters in Norway will follow as Norway has the same status as Iceland regarding the EU and many of the EU measures do not automatically apply to either one of these countries.

### 6.1 Denmark

The Office of the Danish State Prosecutor for Serious Economic Crime (henceforth SØK) was established in 1973. It is responsible at national level for investigations and prosecutions for cases concerning economic crimes which are particularly extensive in scale, linked to organized crime, use characteristic business methods or otherwise require special attention. The office has three sections, two of which investigate and prosecute traditional economic and tax related cases. The third section consists of the Money Laundering Secretariat (covering the Danish FIU), the Economic Crime Intelligence Unit and the Asset Tracing Group, which is the Danish ARO with regard to the EU ARO political and legal regime.<sup>207</sup>

Being a member state of the EU, Denmark has ratified and implemented all the above EU legal instruments regarding cooperation and mutual legal assistance in the field of money laundering and assets recovery, including the EU Council Decision 2007/845/JHA on the establishment and cooperation between AROs.

The Asset Tracing Group (d. Spøringsgruppen) was set up in 2007 within SØK. This step was based on the Danish Government's Plan for the Police and Prosecution Authorities for 2007-2010 where one of the main goals was to strengthen measures to recover proceeds from

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<sup>207</sup> State Prosecutor for Serious Economic Crime. Money Laundering Secretariat. (2010). *Annual Report 2009*. (Denmark).

criminal activities.<sup>208</sup> In 2007 the government instructed the State Prosecutor for Serious Economic Crimes to start a new interdisciplinary unit of police investigators, legal experts and other specialists for investigating, identifying and tracing criminal proceeds which could be frozen or seized for later confiscation. This reflected the Danish government's response to the increased focus on criminal assets recovery on international and EU level.

The Asset Tracing Group investigates money flow in cases concerning complicated economic crimes and makes arrangements for freezing or seizures of criminal proceeds related to those cases. The group also assists in financial investigation in serious cases carried out by the different Danish police districts concerning e.g. trafficking of human beings, illicit labour, weapons smuggling and drug crimes.<sup>209</sup>

In addition, the Asset Tracing Group has the role of collecting and evaluating intelligence on people who are believed to live a so-called "criminal lifestyle" and especially targeting such individuals. A person lives a "criminal lifestyle" when he/she is having a luxurious life, spending and/or buying without having an identified income to support it. One of the Asset Tracing Group's tasks is therefore to assess, in cooperation with other government bodies, information on such people and create a prioritized "target list" of suspects which will then be investigated.<sup>210</sup> Such cases can end with the issuing of a criminal indictment and/or a confiscation claim before a criminal court but SØK also has the option to open an investigation against alleged offences of the Danish income tax act.

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<sup>208</sup> *Udmøntningsplan for flereårsaftale for politiet og anklagemyndigheden 2007-2010*. Page 11-12.

<sup>209</sup> *Ibid.* Page 27-28.

<sup>210</sup> The National Commissioner of the Danish Police. Press release 3 August 2007.

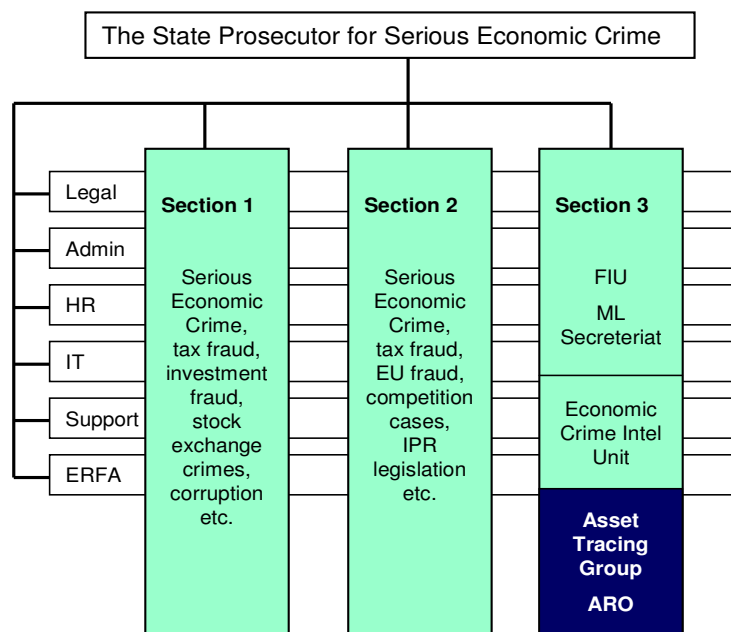


Figure 2: Organization chart for the Office of the Danish State Prosecutor for Serious Economic Crime.<sup>211</sup>

As Figure 2 demonstrates, the Danish Asset Tracing Group is positioned within the same section and works closely with the Danish Financial Intelligence Unit which handles all money laundering related matters. It also works closely with the Danish State Security Service in cases related to terrorism financing. The Asset Tracing Group is the designated Danish ARO for international and EU cooperation. Representatives from the Danish ARO are also active members in the CARIN Network.<sup>212</sup>

## 6.2 Norway

The Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (henceforth ØKOKRIM) is an independent, central entity for investigation and prosecution of economic and environmental crimes. The organization holds the main sources of competencies and specialist skills within the police and the prosecution authorities in these crime areas.<sup>213</sup> The formal rules about ØKOKRIM can be found in chapter 35 of the Norwegian Prosecution Instructions.<sup>214</sup>

<sup>211</sup> SØK. Money Laundering Secretariat. (2010). *Annual Report 2009*. Page 6.

<sup>212</sup> Ibid. Page 27.

<sup>213</sup> ØKOKRIM's website: <http://www.okokrim.no>.

<sup>214</sup> *Forskrift om ordningen av påtalemyndigheten*. Retrieved from ØKOKRIM's website

The organization's main tasks are to:

- Uncover, investigate, prosecute and bring to trial its own cases.
- Assist the national and international police and prosecution authorities.
- Boost the expertise of the police and the prosecution authorities and to provide information.
- Engage in criminal intelligence work, dealing in particular with reports of suspicious transactions.
- Act as an advisory body to central authorities.
- Participate in international cooperation.<sup>215</sup>

Interestingly, the list of main areas of responsibility does not specifically mention the retrieving of criminal proceeds or assets recovery, even though ØKOKRIM has already established a special unit which has that very object. A seemingly obvious reason is that assets recovery is a fairly new law enforcement focus and is still gaining weight and real priority by decision makers and managers of entities like ØKOKRIM. This view was indeed reflected by the head of ØKOKRIM's Assets Tracing Team in his interview.<sup>216</sup>

ØKOKRIM has a flat organizational structure. Investigation work is carried out by twelve permanent interdisciplinary teams of police investigators, prosecutors and other experts, such as forensic accountants. Each individual team, headed by a public prosecutor, holds prime responsibility for a specific crime area. Investigators from other police districts or representatives from other supervisory bodies, such as Tax authorities, the Financial Supervisory Agency or the Customs, can also be involved in the investigations of ØKOKRIM's cases when necessary.

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<sup>215</sup> ØKOKRIM's website: <http://www.okokrim.no>.

<sup>216</sup> Mr. Aage Aase, Head of ØKOKRIM's Asset Tracing Team. Telephone interview. April 2011.

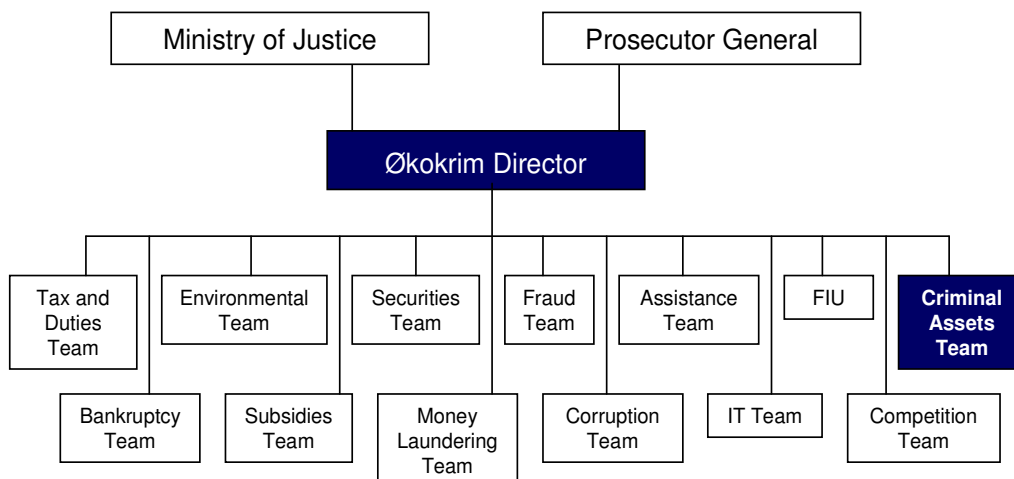


Figure 3: Organization chart for the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM).<sup>217</sup>

The Norwegian Financial Intelligence Unit (FIU) is positioned within ØKOKRIM. The FIU receives and follows up reports from the Norwegian banks and other financial organizations regarding suspicious financial transactions (STRs). The FIU conducts analysis and assessments of the alleged suspicion and then forwards them to the appropriate law enforcement units or authorities for further investigations or operations, such as freezing or seizure.<sup>218</sup>

In 2002 a decision was made by the leaders of ØKOKRIM to launch a special group of investigators for tracing and retrieving proceeds of criminal activities. This decision was partly based on particular internal management reasons but one external reason was a strong factor. Before and around 2000 there was a strong media focus in Norway on offenders convicted of serious crimes who still enjoyed their wealth after conviction. This called for a political and administrative response and the decision was made to task a group of experts to specifically investigate the proceeds side of serious crimes and make necessary arrangements to seize or freeze the alleged proceeds. As a result, the Criminal Assets Team was established within ØKOKRIM in 2002.<sup>219</sup>

<sup>217</sup> State Prosecutor for Serious Economic Crime. Money Laundering Secretariat. (2010). *Annual Report 2009*. Page 6.

<sup>218</sup> Ibid.

<sup>219</sup> Mr. Aage Aase. Telephone interview.

The Criminal Assets Team is responsible for assisting the Norwegian law enforcement authorities to carry out the general strategy that crime should not pay.<sup>220</sup> Local police forces can request assistance from the team if they are investigating a crime which is likely to have generated profits. The team also has responsibilities to react to intelligence handed over from the FIU on suspicious financial transactions within the financial system. Furthermore, it shall assist other units within ØKOKRIM in identifying, tracing and securing assets which could later be confiscated by Norwegian courts. Lastly, the team itself shall start investigations, based on its own analysis and preliminary evaluations, especially concerning serious, international crime that generates considerable financial proceeds.<sup>221</sup>

In 2010 the team consisted of eleven staff members. It is headed by a team leader who has a rank of Detective Superintendent. It has two legal experts, one of whom is a public prosecutor that holds the prosecution powers and can thus make formal decisions on launching a criminal investigation or freezing/seizing assets. The team has seven investigators, five of whom are policemen and two have economics/accountant background. Additionally, the team has one financial consultant. According to the team leader there is a need to strengthen the capabilities of the team considerably as it must frequently reject requests of assistance due to lack of resources.<sup>222</sup>

<b>Year</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
Confiscations: million NOK	133.5	121.0	118.7	125.0	232.6	173.0

*Table 1::* Confiscated criminal proceeds by Norwegian courts in 2005-2010.<sup>223</sup>

Even though the 2007 Council Decision concerning cooperation between Asset Recovery Offices does not apply to Norway, the Assets Recovery Team is presented as the designated Norwegian Assets Recovery Office in the international law enforcement cooperation. It actively participates in the CARIN Network as the Norwegian ARO and both Norway’s

<sup>220</sup> ØKOKRIM Utbytteteam. *Aktivitetsplan 2010*. Internal document. Not published.

<sup>221</sup> Ibid.

<sup>222</sup> Mr. Aage Aase. Telephone interview.

<sup>223</sup> Norwegian Ministry of Justice and Ministry of Finance (2011). *Regjeringens handlingsplan mot økonomisk kriminalitet*.



CARIN representatives are members of the Assets Recovery Team. It also has a very close cooperation with the FIU, both physically as the units are both positioned within ØKOKRIM, and formally as they exchange information and intelligence within their present legal framework. The Assets Recovery Team frequently uses the FIU's means and measures, such as the Egmont Group communication channels, to obtain information or find the right cooperation partners abroad.

Norway does not have a separate legislation regarding freezing, seizure, assets recovery or confiscation of criminal proceeds. The legal confiscation provisions are all found in the Norwegian Penal Code (n. Straffeloven), paragraphs 34 to 37.<sup>224</sup> The provisions concerning temporary freezing or seizures are in the Criminal Procedure Act (n. Straffeprocessloven).<sup>225</sup> According to paragraph 34 of the Penal Code “any gain accruing from a criminal act shall be confiscated”, which mandates the police and the prosecution authorities to investigate and then claim the confiscation of all proceeds from all crimes that possibly generate criminal profits or claim the confiscation of the corresponding value of the illegal profits. In other words: The police and the prosecution authorities have the same obligation to investigate and claim criminal profits as to investigate and indict for the offence itself. This is a very clear top-down message from the Norwegian authorities for stressing the underlying principle that no one should be allowed to gain or enjoy criminal profits.

Paragraph 34a of the Penal Code allows for extended confiscation. If the general conditions for an extended confiscation are met, all assets belonging to the offender and his/her spouse or partner can be confiscated if the offender is found guilty of a serious criminal act that could have generated considerable gains.<sup>226</sup> Then the burden of proof reverses and the offender and his/her spouse have to show that their assets were obtained legally. A confiscation of assets or its value (if the asset itself is not reachable) may be extended to a third party even if the offender has transferred (sold or given) the assets to the third party, if the receiver knew or might have known that the assets were proceeds from

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<sup>224</sup> Norwegian Penal Code. *Almindelig borgerlig Straffelov*. Lov 1902-05-22 nr 10.

<sup>225</sup> Norwegian Criminal Procedure Act. *Lov om rettergangsmåten i straffesaker*. Lov 1981-05-22 nr 25.

<sup>226</sup> According to paragraph 34a of the Norwegian Penal Code an extended confiscation can be executed if an offender is found guilty of offenses of such a nature that considerable gains may accrue from them and the offender has committed one serious crime or series of crimes that are collectively punishable by six years imprisonment.

crime. The goals of these paragraphs are to identify and track those who live the so-called “criminal lifestyle”, similar to the Danish approach, described in the last chapter.

There is no separate assets management entity in Norway that takes the frozen, seized or confiscated assets for management or selling. That is done by the law enforcement entity which originally freezes or seizes the asset. According to the head of the Criminal Assets Team this has created some problems for the unit as it is sometimes time consuming and expensive to manage or store assets. The cost of keeping a seized car in storage facilities can even be higher than its selling price, creating a negative financial outcome for the authorities. It is therefore a need to reorganize this part of the assets recovery process in Norway.<sup>227</sup>

The Norwegian government has for years issued written political strategy documents concerning economic crime and proceeds related criminality. The latest one was issued in March 2011 where the government put forward clear strategic plans for the next three years.<sup>228</sup> A special sub-chapter of the document is on assets recovery and confiscation (no. inndragning) where the government underlines that the most promising tactic and therefore a central key against economic and other serious crimes is to attack the motive: The illegal profits. The government instructs all law enforcement and prosecution authorities to raise their priorities regarding assets recovery and use all possible means to retrieve criminal proceeds.

In this strategic document the Norwegian government announces that it is evaluating possibilities of introducing new and more powerful legal instruments for retrieving criminal proceeds. Non-conviction based confiscation under civil proceedings as conducted in the UK and Ireland is especially mentioned as a possible alternative for Norway.

Getting the Norwegian police’s investigation units to prioritize confiscation has been a challenge, even though legislation has improved and the importance highlighted as a strategic priority and mandated according to article 34 of the Penal Code. The traditional approach of investigating, proving the offender’s guilt and having him punished is still in the foreground. According to leaders and staff of the ØKOKRIM Assets Tracing Team this older and traditional view is still dominant throughout the law enforcement, prosecution and judicial system, often because investigators, prosecutors and judges maintain their traditional ways of

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<sup>227</sup> Mr. Aage Aase. Telephone interview.

<sup>228</sup> Norwegian Ministry of Justice and Ministry of Finance (2011). *Regjeringens handlingsplan mot økonomisk kriminalitet*.

doing things.<sup>229</sup> Another reason is that criminal proceeds identification and tracing can be time consuming, complex and specialized. In addition serious crime has globalised and the crime venue often covers multiple jurisdictions. This makes it more difficult for the police to access information and to map the actual financial circumstances that should form the basis for the confiscation.<sup>230</sup>

The above problem of the system not practicing the new priorities will probably only be met by general awareness, training and focused management. The second problem concerning the increased internationalization and complexity of crime calls for more efficient international cooperation and increased competences and specialization within the law enforcement.

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<sup>229</sup> Mr. Aage Aase. Telephone interview.

<sup>230</sup> Ibid.

## 7 Iceland: Developments and Status

Iceland's first steps towards the new global proceeds of crime strategy were taken as a direct consequence of the country's adoption of the EEA Agreement in 1994 which obliged Iceland to accept numerous EC legal instruments. One of them was the EU Directive on Combating Money Laundering.<sup>231</sup> The money laundering Directive provided the basis for the EU and the EEA member states' efforts to prevent criminal money entering the financial system. The cornerstone of the Directive is the obligation on financial institutions to require identification of all their customers when establishing a business relationship or transferring money through the system. This called for two new legal provisions in Iceland. The first one was the introduction of a new Icelandic Law on Actions against Money Laundering, where different obligations were posed on the financial system to detect and report suspicious financial transactions to the law enforcement authorities.<sup>232</sup> The second was an amendment to the Icelandic Penal Code criminalizing laundering of proceeds of drug offences.<sup>233</sup> These measures did not touch on seizure, freezing or confiscation.

The next step was taken in 1996 when the Minister of Justice presented a bill of law at the National Parliament for the ratification of the UN Vienna Convention and the Council of Europe Strasbourg Convention. It is clear from the bill that these legal amendments were not based on identified Icelandic needs or domestic assessments but authorities seemed to be, just as before, reacting on external legally binding obligations.<sup>234</sup>

The ratification of the two Conventions required law amendments in Iceland in four main areas.<sup>235</sup>

1. Criminalize money laundering of proceeds from all criminal offences presented in the Icelandic Penal Code.

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<sup>231</sup> *Council Directive 91/308/EEC* of 10 June 1991 on Prevention of the use of the Financial System for the Purpose of Money Laundering.

<sup>232</sup> *Law on Actions against Money Laundering*. No 80/1993.

<sup>233</sup> *Law on amendments of the Icelandic Penal Code*. No 39/1993.

<sup>234</sup> *Bill of law no 183* on the 121<sup>st</sup> Althingi, 1996. Introduction. Page 1.

<sup>235</sup> *Ibid.* Chapter IV. Page 11.

2. Present value confiscation as an alternative for the first time in Icelandic legislation. Another new legal tool was presented: The possibility that a judge can estimate/decide the amount of the proceeds from the predicate offence in instances where the calculation and estimation by the prosecutor is either difficult or even impossible
3. Criminalize the possession of instruments related to drug production.
4. Clarify law paragraphs, with regard to the above Conventions, regarding foreign requests concerning proceeds confiscation in Iceland and also request from Icelandic authorities to foreign countries.

In 1997 these legal steps were followed by the establishment of the Economic Crime Unit at the then newly established Office of a National Police Commissioner. One of the new unit's sub-tasks was to receive all money laundering reports from financial institutions, analyze them and investigate further. The unit was also given the task of financial investigations related to money laundering and was later designated as the Icelandic FIU.<sup>236</sup>

The third major step the Icelandic authorities have taken regarding proceeds of crime confiscation was taken in October 2009 when the UN Palermo Convention was ratified by the Icelandic Parliament. The ratification called for obligatory law amendments of the Icelandic Penal Code in the area of confiscation, terrorism, organized crime, trafficking in human beings and money laundering.<sup>237</sup> The ratification and similar bills were presented to the three previous parliaments in 2006-2008 but did not go through due to prioritizing in the parliament, which evidently is a strong indication that the Icelandic governments and members of Parliament did not regard this issue of a vital importance. The bill was passed as law in December 2009, effective from 1 January 2010.<sup>238</sup> In addition Icelandic authorities had to react on two international evaluations in the areas of corruption and money laundering by Group of States against Corruption (henceforth GRECO) in 2005 and Financial Action Task

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<sup>236</sup> *Icelandic Police Act No 90* from 13 June 1996. See also *Regulations regarding Investigations and Prosecutions of Economic Crimes No 406/1997*. This Regulation was terminated in 2006 by a new *Regulation on Investigations and Prosecutions of Economic Crime No 1050/2006*.

<sup>237</sup> *Bill of law No 16 regarding amendments on the Icelandic Penal Code (confiscation, terrorism, organized crime, trafficking in human beings and money laundering)*. Presented at 136 Althingi 2008-2009. (Iceland).

<sup>238</sup> *Law Amendments of the Icelandic Penal Code*. No. 149/2009.

Force in 2006.<sup>239</sup> Hence, once again Icelandic authorities were responding to external pressure rather than internally identified needs or domestic policy.<sup>240</sup>

GRECO was established in 1999 by the Council of Europe to monitor States' compliance with the organization's anti-corruption standards. Currently GRECO comprises 46 member states, Iceland being one.<sup>241</sup> Evaluation groups from GRECO have made rounds in Iceland twice, in 2001 and 2003. According to the evaluation report from the 2003 inspection, GRECO's view was that the Icelandic proceeds confiscation possibilities were far too limited and recommended

to enlarge the scope of the provisions on confiscation of instrumentalities and proceeds of crime and consider reviewing the burden of evidence necessary in various situations to provide for better possibilities to use confiscation effectively in cases of corruption; in particular with regard to situations where no conviction is possible (*in rem* confiscation / non-conviction based confiscation) and when the property is held by a third party.<sup>242</sup>

In its report after the last evaluation round in Iceland in 2006, the FATF makes several remarks regarding the legal and procedural status of provisional measures and confiscation tools.<sup>243</sup> The evaluation identified that the Icelandic laws allowed for basic object and value confiscation. The main obstacles according to the evaluation were that

the prosecutor generally needs to prove that the assets sought to be confiscated derived from the commission of the offence for which the accused has been found guilty on the basis of the normal criminal standard of proof, i.e. beyond any reasonable doubt.<sup>244</sup>

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<sup>239</sup> Ibid. Explanatory notes. Chapter 1. Page 4.

<sup>240</sup> Ibid. Explanatory notes. Chapter IV. Page 9.

<sup>241</sup> See GRECO's website: [http://www.coe.int/t/dghl/monitoring/greco/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/default_en.asp).

<sup>242</sup> Council of Europe. Group of States against Corruption. (2004). *Evaluation Report on Iceland. Second Evaluation Round 2003*.

<sup>243</sup> Financial Action Task Force. (2006). *Third mutual evaluation report. Iceland. Anti-Money Laundering and Combating the Financing of Terrorism*.

<sup>244</sup> Ibid. Chapter 2.3.1. Points 17 and 18. Page 33.

The FATF notes that the question of shifting or lowering the burden of proof in serious cases has been under considerations by the Icelandic authorities for some time. Special notice is given to the fact that this same recommendation was presented to the Icelandic authorities in the FATF evaluation report in 1998, but as of yet no alterations had been made.<sup>245</sup> The FATF thus re-stretches its recommendation that Iceland should consider lowering or reversing the burden of proof, especially regarding serious offences that can generate profits and in situations where assets can be held by third parties.<sup>246</sup> As a political and administrative issue the FATF underlines its previous comments, originally introduced in the 1998 report, that apparently the whole Icelandic system seems to give confiscation of criminal properties a low priority and that “Icelandic authorities should give higher priority to confiscation of criminal proceeds.”<sup>247</sup>

The new Icelandic law amendments from December 2009 are aimed at meeting the criticism and recommendations of FATF and GRECO regarding confiscation and criminal assets recovery. A complete new chapter containing eight new paragraphs concerning confiscation was inserted into the Icelandic Penal Code. These new provision not only describe in far greater details the conditions where confiscations are possible but also allow for an exemption from the traditional criminal legal procedures in Iceland by reversing the standard of proof the under certain circumstances. These provisions seem to partly cover the concept of extended confiscation as it is now possible to confiscate all assets belonging to an offender who has committed a serious crime and his spouse/partner or former partner, if they are not able to prove themselves that their assets were obtained legally.<sup>248</sup> In addition the amendments cover third party confiscation as it is now possible to confiscate proceeds in any form from a third party that has received them if he knew or should have known that these were criminal proceeds.<sup>249</sup>

The Icelandic legal provisions do not, under any circumstances, mandate the police or the prosecution authorities to claim confiscation of criminal proceeds. The freezing and seizure

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<sup>245</sup> Ibid Point 18. Page 34.

<sup>246</sup> Ibid. Chapter 2.3.2. Points 129, 130 and 132. Page 35.

<sup>247</sup> Ibid. Chapter 2.3.3. Point R.3. Page 35.

<sup>248</sup> *Icelandic Penal Code*, Chapter VII, Article 69b. See also explanations to the bill in Althingi’s document number 16 in case number 19, 2009.

<sup>249</sup> *Icelandic Penal Code*, Article 69d.

provision are found in chapter IX of the newly passed Icelandic Criminal Procedure Act<sup>250</sup>. According to article 68 it is mandatory to seize objects/assets if they could be subject to later confiscation but neither the Icelandic Penal Code nor the Criminal Procedure Act oblige the prosecution to claim confiscation. The wording in all the confiscation paragraphs is “may be confiscated” but not “shall be confiscated” as in the Norwegian Penal Code. Therefore it is up to the prosecutor in each case to decide if and what confiscation claims will be presented. As already mentioned, the Norwegian Penal Code on the other hand very clearly obliges all prosecutors in all criminal cases to claim any gain accruing from a criminal act.<sup>251</sup> Even though the new Icelandic confiscation provisions are based on the Norwegian legislation no explanations are provided of this basic difference in the bill of the December 2009 amendments.

Although the step taken in December 2009 regarding confiscation is a very positive one from the criminal assets recovery point of view, it has to be noted that it does not cover offences committed before the ratification of the law, December 2009. Thus, with regard to criminal investigations connected to the Icelandic bank collapse it will not be of use. This study could only reveal one retroactive legal tool for retrieving criminal assets back in time, namely the non-conviction based confiscation under civil proceedings.<sup>252</sup> At this moment there are no plans in Iceland to adopt such measures,<sup>253</sup> which is really surprising in light of the enormous public interests. Even the Norwegian government, which by no means is facing similar circumstances as Iceland, is presently looking into adopting civil non-conviction based measures.<sup>254</sup>

No specific entity in Iceland is tasked to recover criminal assets. The Economic Crime Unit at the National Police Commissioner’s Office has the task of investigating and prosecuting in serious financial and economic cases but has never been a designated assets recovery office. Regulations for this unit do not mention assets recovery or proceeds of crime.<sup>255</sup> However, the unit shall take over serious investigations from the local police by decisions of the National Police Commissioner and receive and analyze reports from the

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<sup>250</sup> *Icelandic Criminal Procedure Act* number 88 from 12 June 2008.

<sup>251</sup> *Norwegian Penal Code*, Article 34.

<sup>252</sup> Greenberg et. al. (2009). Chapter 3. Pages 13-16.

<sup>253</sup> Anonymous source in the Icelandic Administration.

<sup>254</sup> See chapter 6.2 on Norway.

<sup>255</sup> *Regulations of 7 September 2007 on investigation and prosecution of economic crime*. No 804, 2007.



Icelandic banks regarding suspicious financial transaction. To designate and task the Economic Crime Unit as the assets recovery office would therefore have been in a perfect coherence with other tasks of the unit.

According to employees within the unit and within the National Commissioner's Office the reasons for this are probably the low priority assets recovery has within the Icelandic law enforcement, prosecution and judicial authorities and lack of knowledge and competences to deal with such matters. Following are answers given by present and former employees of the Economic Crime Unit and the office of the National Police Commissioner when asked why assets recovery did not have higher priority within serious financial investigations:

The main focus has always been, and still is, on the investigation and prosecution of the crime itself, to have the offenders indicted and sentenced.

Although we have in some instances focused on confiscating the criminal proceeds and even with positive results, that is always a secondary goal.

Because of workload, we usually stick to trying to prove the crime committed.

The seizures and freezing processes are so complex and time consuming that we simply do not have the manpower for it.

We hardly have any knowledge or experience in assets recovery process and cooperation, especially when it has an international dimension.<sup>256</sup>

These answers seem to reflect many of the same reasons that the head of the Norwegian Assets Tracing Team described: Firstly, the slow changing traditions of investigations and prosecutions. Secondly, the managers do not seem to realize and stress the importance of the assets tracing side of cases. Thirdly, assets identification and tracing is a new and often complex and time consuming process which is set aside especially when the workload is heavy. And lastly, there is too fragmented knowledge, training and experience in this area.

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<sup>256</sup> Interviews with four anonymous employees (A, B, C and D) of the Office of the Icelandic National Police Commissioner and the Economic Crime Unit. March 2011.

This paper also argues that an official assets tracing strategy is completely missing in Iceland, signalling de-motivating effects, as argued and reasoned in the next chapter.

## **7.1 The missing Icelandic Assets Recovery Strategy**

As explained in previous chapters on Ireland, Denmark and Norway, there is a clear top-down governmental strategy concerning criminal assets recovery in all those countries. This strategy is the basis for the legal amendments and administrative structures for retrieving criminal proceeds. Law enforcement and prosecution policy documents and action plans in these countries are based on the government strategy. This study did not find a similar strategy or policy in Iceland regarding recovery of illegal proceeds. All amendments Icelandic authorities have made so far are reactions to obligatory conditions to the EEA agreement, instructions on international binding conventions or even reactive measures to negative remarks in evaluations by international organizations. The Icelandic legal, administrative and structural developments have therefore solely been reactive while neighbouring countries have taken proactive steps based on a top-down governmental policy.

The Danish Asset Recovery Office was established in 2007 on basis of a strategic plan from the Danish government for the police and prosecution authorities for 2007-2010 where one of the main goal was to strengthen measures to recover proceeds from criminal activities.<sup>257</sup> The Norwegian government has also given clear instructions to law enforcement and prosecution authorities in its strategic plans regarding the emphasis on criminal assets recovery and recognized it as the most promising tactic to tackle serious crime.<sup>258</sup> The Internal Security Strategy of the EU sets the basic stage for all EU member states regarding this same subject.<sup>259</sup> This strategy is non-existing in Iceland which is probably the basic reason for the low priority assets recovery is given.

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<sup>257</sup> *Udmøntningsplan for flereårsaftale for politiet og anklagemyndigheden 2007-2010.*

<sup>258</sup> Norwegian Ministry of Justice and Ministry of Finance (2011). *Regjeringens handlingsplan mot økonomisk kriminalitet.*

<sup>259</sup> *Internal Security Strategy for the European Union: "Towards a European Security Model".* (2010).

See also European Union. (2010). *Communication from the Commission to the European Parliament and the Council. The EU Internal Strategy in Action: Five steps towards a more secure Europe.*

The latest strategic document for the Icelandic law enforcement does not mention the retrieving of criminal proceeds or assets recovery at all, an obvious signal of prioritizing and/or lack of competences or interests.<sup>260</sup>

Based on the above and the concluding chapters on comparison between Iceland and the neighbour countries, this paper supports the conclusion of Borges and Moor's study presented in chapter 4.3 that the lack of an explicit strategy from the central government has demotivating effects in practice.<sup>261</sup> It is therefore essential that the Icelandic government presents an explicit written strategy as underlined in the concluding recommendations of this paper.

An obvious opportunity for the Icelandic authorities to address this seems to be in sight. Early 2011 the Icelandic Minister of Interior made a decision to move the entire Economic Crime Unit from the Office of the National Police Commissioner to the Office of the Special Prosecutor in September 2011. According to law number 82/2011, which allow for these amendments, a working group is to be established that is to present recommendations before the end of 2013 on future structure and processes of investigations and prosecutions of economic crime in Iceland.<sup>262</sup> When this paper was written this working group had not been established but here seems to be a perfect opportunity to address the issue of criminal assets recovery and make the necessary improvements to build up an effective system in Iceland.

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<sup>260</sup> National Commissioner of the Icelandic Police. (2007). *Law Enforcement Strategy 2007-2011*. (i. *Löggæsluáætlun 2007-2011*).

<sup>261</sup> Borges and Moors (2006). Page 14.

<sup>262</sup> See Explanatory notes to the Bill of law no 82, 2011.

## 8 Iceland compared to EU and Neighbour States

One of the EU's first requirements in connection to Iceland's application procedure to become an EU member state, was to send a comprehensive questionnaire to the Icelandic authorities.<sup>263</sup> Chapter 4 of the questionnaire concerns free movement of capital and includes a detailed study on the status in Iceland regarding the legal and administrative framework concerning capital movement, payment systems and money laundering.<sup>264</sup> All the EEC and EC Directives regarding these issues are listed and the Commission not only seeks affirmation of Iceland's ratification of all of them or which Icelandic legislations transposes them but also the responsibility and execution of their implementation.

Chapter 24 of the questionnaire dedicated to Justice, Freedom and Security requires in-depth explanations of Icelandic legal and administrative measures towards international cooperation concerning confiscation matters. It specifically targets potential impact on money laundering trends by the Icelandic financial crisis. A full sub-chapter VII concerns confiscation and clearly reflects the EU emphasis on the subject. Specific questions are raised regarding "value confiscation", "extended confiscation" and "non-conviction based confiscation" but in addition the Commission aims to establish if Iceland has put in place a national Assets Recovery Office and an assets management system.

The questionnaire shows that the EU Commission wants a confirmation of ratifications and implementations of legal instruments concerning confiscation and money laundering. The Commission is in addition evaluating if other EU countries with different legal frameworks can enforce confiscations orders and assets recoveries in Iceland. Furthermore, it obviously wants to establish that Iceland holds an effective domestic system to confiscate illegally obtained assets within Iceland and in other countries.

How does Iceland stand in regard to confiscation and assets recovery in comparison with EU member states and Norway? With reference to EU member states the question is complex

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<sup>263</sup> European Union. (2009). *Questionnaire. Information requested for the preparation of the Opinion on the application of Iceland for membership of the European Union.*

<sup>264</sup> Ibid. Chapter 4. Pages 56-72.

for a number of reasons. Firstly, the EU bucketful of directives, decisions and regulations on this subject make it hard to grasp the real up-to-date status. Secondly, the legal and administrative framework in EU countries differ considerably. Some of them, for instance Ireland and UK, have a common law system while others have a civil law system. Some have placed confiscation and money laundering matters under law enforcement authorities but others under prosecutors or even security services. Thirdly, there is only one recent example of Icelandic freezing orders abroad and no examples of foreign confiscation measures in Iceland. The evaluation of the present Icelandic legal provisions and their practical functions is thus hardly significant.<sup>265</sup>

One way of countering the question where Iceland stands in regard to confiscation and assets recovery measures to other European states is to evaluate and compare the implementation of some key components and elements of criminal assets recovery strategy in these countries. Therefore, the next three sub-chapters will highlight the comparison of these key issues between the EU and Iceland; secondly between Ireland and Iceland and lastly between Norway and Iceland. That should give a significant basis for conclusions and recommendations of improvements for Iceland, which will be presented in the final chapters.

Chapter 2 of this paper examined the concept of criminal assets recovery and concluded that it is the whole process of identifying, tracing, seizing or freezing, confiscating criminal proceeds and returning them back to their rightful owners. The evaluation and assessment of the status of criminal assets recovery strategy and practice must therefore embody that full process. For this comparison this study has mainly examined:

1. Governmental strategy.
2. Policy and action plans of the law enforcement and the prosecution authorities.
3. Legal provisions.
4. Administrative structures.
5. Internal and external cooperation.
6. Practical processes and results.

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<sup>265</sup> See written replies from Iceland to the EU Questionnaire. Chapter 24 on Justice, Freedom and Security. This can be viewed on the website of the Icelandic Ministry of Justice <http://www.utanrikisraduneyti.is>.

## 8.1 Iceland versus the EU

The EU has a clear Internal Security Strategy explained in detail in an Action Plan which describes five priority steps for a more secure Europe.<sup>266</sup> The first introduced priority step is to disrupt international crime networks in Europe as they have become an ever increasing threat to Europe's internal security. To reach that goal the document describes three action points, two of which focus on the financial side of the crime:

1. Identify and dismantle criminal networks.
2. Protect the economy against criminal infiltration.
3. Confiscate criminal assets.<sup>267</sup>

The Commission stresses a common approach by all EU states to reach these goals. In order to achieve results in confiscating criminal assets, all EU states must ratify and implement domestic legal provisions for a full third party confiscation, a full extended confiscation and a non-conviction based confiscation. In addition all EU states must establish an effective centralized Asset Recovery Office and necessary arrangements for assets management.<sup>268</sup> Lastly, member states of the EU are obliged to ratify and implement legal instruments for international cooperation and mutual recognition by domestic courts of freezing and confiscation orders issued in other EU member states.

Iceland has implemented the 1988 UN Vienna Convention, the 1990 CoE Strasbourg and the 2000 Palermo Conventions. The 2003 UN Convention against Corruption was ratified in Iceland in March 2011.<sup>269</sup> The 2005 Coe Warsaw Convention has not yet been ratified. Iceland has implemented third party confiscation into the Penal Code and, to a certain extent, the extended confiscation but not the non-conviction based confiscation except in extraordinary circumstances that are not relevant for the subject of this study.<sup>270</sup>

Iceland has no governmental strategy on internal security and no strategy on criminal assets recovery apart from the general legal provisions. Iceland does neither have a law enforcement/prosecution policy nor an action plan regarding criminal assets recovery. The

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<sup>266</sup> European Commission (2010). *Communication from the Commission to the European parliament and the Council. The EU Internal Security Strategy in Action: Five steps towards a more secure Europe.*

<sup>267</sup> Ibid. Pages 4-7.

<sup>268</sup> Ibid. Page 14.

<sup>269</sup> Information from officials of the Icelandic Ministry of Interior.

<sup>270</sup> See for example Article 69 d. and f. of the Icelandic Penal Code.

establishment of an office of a Special Prosecutor for criminal cases related to the collapse of the Icelandic banks evidently reflects the government's strong reactions to that specific issue. Albeit a highly positive progress, it does not cover or substitute for a holistic government proceeds of crime strategy.

Conviction of a criminal offence is a general prerequisite for confiscation in Iceland. According to Icelandic Penal Code's amendments, effective since January 2010, all the defendant's assets may be frozen or seized and then confiscated when found guilty of a serious offence which generated considerable amounts of criminal proceeds, unless he/she can convince the court that he/she gained the assets by legal means.

Iceland has not established an Assets Recovery Office and is not participating in the international network of AROs. There is no specific criminal assets management structure within the state system.

All Icelandic legal assistance requests are still based on the old and obsolete 1959 MLAT and Iceland has not made any attempts to reach an agreement with EU to implement the Directives on mutual recognition of freezing and confiscation orders, which certainly would be an important improvement to strengthen the legal basis for retrieving illegal proceeds from EU countries.

Based on legal provisions in the Icelandic Criminal Procedure Act, the police and the prosecution authorities have the power of seizing criminal proceeds or have them frozen for later confiscation claims in court. Several cases of such nature have given positive results, based both on confiscation of profits directly linked to the offence but also confiscation of the estimated value of the criminal proceeds that the offences generated.<sup>271</sup> The use of value confiscation, third party confiscation or extended confiscation is however a rare exception. This study did not find any instances of a third party or extended confiscations, or confiscations based on reversal of the burden of proof. This paper therefore concludes that value confiscation is rarely used and the extended or third party confiscation or the reversal of the burden of proof is simply not practiced. It has to be noted though, that legal amendments allowing for these measures were not effective before 1 January 2010.

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<sup>271</sup> Verbal information from an unnamed lawyer at the Economic Crime Unit of the Icelandic National Commissioner.

## **8.2 Iceland versus Norway**

Due to Iceland's and Norway's equivalent status towards the EU a comparison of these countries is appropriate.

Norway has had a clear government strategy for serious financial crime for the last 15 years. Recent strategy for the Norwegian law enforcement and the prosecution authorities has given criminal assets recovery a high priority. This is non-existing in Iceland.

The Assets Tracing Team within ØKOKRIM is the Norwegian ARO. Specific internal rules are in place for its functions, activities and powers. Iceland does not have a national assets recovery office and no written strategy or policy documents on proceeds of crime recovery.

Confiscation of criminal proceeds is not mandatory under any circumstances in Iceland but is a mandatory part of all criminal investigations in Norway.

General competences of the Icelandic law enforcement, prosecution and judicial authorities in the field of criminal proceeds recovery are very limited. Norwegian colleagues have accumulated considerable international experience in the area of assets tracing and recovery since the establishment of the Assets Tracing Team in 2002. They are active participants in the CARIN Network of international practitioners.

Assets recovery investigations or international assets tracing cooperation are not covered in the police training in Iceland but are given considerable weight in the Norwegian Police College.<sup>272</sup>

Based on above comparison this study concludes that Icelandic authorities are far behind the Norwegian in terms of criminal assets recovery measures. The possibilities of retrieving criminal proceeds in Iceland are therefore much weaker than in Norway. Many of the basic elements of an assets recovery strategy are non-existing in Iceland, as will be outlined further in the concluding chapter.

## **8.3 Iceland versus Ireland**

Some might argue that pursuing a comparison between Iceland and Ireland would neither be fair nor professional as the legal and judicial systems in these countries are very different. This paper argues for the evaluation and study of Irish practices, not only because of the Irish

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<sup>272</sup> Mr. Aage Aase, Head of ØKOKRIM's Asset Tracing Team. Telephone interview. April 2011.



Criminal Assets Bureau's (CAB's) considerable results in retrieving criminal assets but also because of the Irish positive professional and international reputation in the legal and judicial area of criminal assets recovery.

The Irish government made a comprehensive evaluation and assessment of the effect that proceeds of serious crime had on society in 1996. As a result a new Asset Recovery Act was implemented covering the whole process of assets recovering. A new Tax Consolidation Act was issued, consolidating and streamlining numerous tax laws and regulations for this purpose. The third major legal instrument was the Criminal Assets Bureau Act outlining in detail the structure, powers and processes of a new centralized bureau. All these legal and structural measures were implemented to serve the government's strategy against criminal proceeds: Crime should never pay and all criminal assets should be confiscated. General public interests demanded radical steps to be taken, even moving the proceeds of crime practices from the criminal procedures to the civil procedures, as experience had revealed that in most cases it was nearly impossible to confiscate assets under traditional criminal burden of proof and criminal procedures. But the Irish went further; if confiscation of the alleged criminal assets under civil rules remained unattainable due to lack of proof, the proceeds would be taxable.

These measures were quite radical fifteen years ago and few countries followed the Irish example in the first years thereafter. In recent years however, more and more countries are taking up the Irish model and EU has in recent 2-3 years encouraged states to implement non-conviction based confiscation under civil judicial processes. Europol has officially announced that it will push for the Irish model as a benchmark within the EU and Europol cooperation states.

As already explained, Iceland does not have a governmental strategy. Neither the police nor prosecution authorities have a policy or plans concerning proceeds of crime recovery as Ireland. The latest Icelandic National Police Strategy 2007-2011 does not mention the recovery of proceeds of crime. There are no administrative structures in Iceland aimed specifically for criminal assets recovery, as also explored above.

Legal provisions in Iceland are restricted to proven guilt of the offender for the predicate offence. External law enforcement cooperation is still based on the 1959 MLAT and Iceland has not made any attempts to become a part of the EU legal instruments that target proceeds

of crime, such as the decisions on mutual recognition of seizure, freezing or confiscation orders or the EU Decision on Cooperation between Asset Recovery Offices.

These facts make Iceland's comparison with Ireland poor with regard to means of retrieving and returning criminal proceeds, and even more if the criminal assets are located in foreign jurisdictions.

## 9 Conclusions

As examined in this paper, the increased illegal revenues from crime have spurred series of international, regional and domestic responses in last two decades. These responses have emerged in international agreements and conventions, regional conventions and policies and domestic law, followed by administrative and structural rearrangements. Further, soft law regimes have emerged, evolving into domestic hard legislations. The three core elements of these numerous instruments are:

1. Money laundering legislations.
2. Criminal assets recovery legislations.
3. Organizational and administrative arrangements, such as the creation of Financial Intelligence Units for anti-money laundering and Assets Recovery Offices for assets identification and tracing, freezing and seizures of criminal proceeds.<sup>273</sup>

This global development can be summarized into three different proceeds of crime models that have evolved over the period of the past 20 years.

The first model emerged as a response to the increased and huge illicit revenues of drug trafficking in the 1980s and has the following main characteristics:

1. Confiscation of the proceeds of crime is limited to drug trafficking only.
2. Money laundering offences are also limited to drug trafficking.
3. The conditions for money laundering offences require the prosecution to prove that the proceeds are the actual revenues of the offence.
4. Confiscation is only possible after a criminal conviction for the predicate offence creating the proceeds (criminal confiscation/conviction based confiscation).
5. Law enforcement and prosecution authorities have not yet developed specialized proceeds of crime units.

The three main weaknesses identified in this first model which later brought forth new elements appearing in the second model were:

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<sup>273</sup> Bell (2007).

- a) It was not possible to tackle proceeds from other crime than drug offences.
- b) It was extremely difficult to prosecute and prove money laundering offences and build legal grounds for confiscation.
- c) The law enforcement efforts were ineffective because of lack of expertise.<sup>274</sup>

The second model which developed from the first has the following main characteristics:

1. Confiscation of the proceeds of crime is possible of drug offences as well as other types of serious offences.
2. Confiscation remains only possible after criminal conviction.
3. Money laundering offences may be committed in respect of the proceeds of range of serious crimes.
4. All property in the possession of the defendant is proceeds of crime if the defendant fails to convince the court that his assets are legally obtained.
5. Specialist units within the police and the prosecution services conducting financial investigations and confiscations proceedings.

The second model is however also considered to suffer from several weaknesses that can be grouped into the following:

- a) Confiscation of the assets of the top leaders is still immensely difficult as they use their wealth to distance themselves from the crimes and hence elude prosecution.
- b) The legislation lacks strength against organized crime or criminal activities that cover multiple jurisdictions.
- c) Domestic agencies and their information are too divided and fragmented.

The third model represents further steps on the evolutionary scale. This most recent model could be called “the modern assets recovery model” and has the following three main features:

1. Non-conviction based confiscation under civil procedures where the proof threshold is “on balance of probabilities“.

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<sup>274</sup> Ibid. Pages 23-26.

2. Legislative action to open up for information gateways between all state agencies so that all information possessed by the state can be used in criminal assets investigations and such court proceedings.
3. A multi-disciplinary agency, National Assets Recovery Office, has a centralized responsibility for proceedings seeking the tracing and confiscation of criminal assets.

This evolution from general to highly specialized legal provisions and administrative structures clearly reflects the numerous international, regional and domestic assessments that pursuing criminal assets is a critical mechanism for combating serious crime. It also reveals how far international organizations, regional institutions and domestic authorities have reached in their attempt to confiscate the illicit revenues.

As clear from the previous chapters on the comparison between Iceland and EU, Norway and Ireland, Iceland not only seems to have very constraint and limited potentials to retrieve criminal proceeds but also weak political messages and no strategy whatsoever. The same applies to administrative structures and law enforcement or prosecution policy. It seems to be up to the individual prosecutor in charge of each and every criminal investigation to push for the possible recovery of criminal proceeds.

Some of the present Icelandic measures still apply to the first model above. Conviction of the predicate offence is a general precondition and there is no specialized unit designated and equipped to handle the recovery of criminal proceeds. Two of three identified weaknesses to this original model also still apply to Iceland: Firstly, it is extremely difficult to prove the legal grounds for confiscation and secondly, a considerable lack of knowledge and expertise in criminal assets recovery operations and processes.

This paper also argues that the three identified weaknesses in the second model are still applicable to Iceland. This factor must be of serious concern, especially with regard to the hopes of the Icelandic public that some of the ongoing police investigations will return considerable assets back to its rightful owners.

The research questions of this study are:

1. Does Iceland have sufficient legal and administrative tools to retrieve illegally gained assets and return them to their rightful owners?
  - 1.1. Does Iceland have equivalent tools to the EU neighbour states, Ireland or Norway?

1.2. Are there presently justifiable grounds to apply extraordinary measures to extend such tools for Iceland?

Based on the comparison between Iceland, EU, Ireland and Norway, and with regard to the three criminal assets recovery models presented above, this study concludes that Iceland still needs to strengthen its legal tools considerably and does not have sufficient administrative or practical measures to effectively retrieve criminal proceeds and return them to their rightful owners. Secondly, with reference to chapters 8.1, 8.2 and 8.3, Iceland is far from having equivalent tools to EU member states, Ireland or Norway. Thirdly, this study concludes that there are indeed justifiable grounds for extraordinary measures to be taken by Icelandic authorities to extend the possibilities of retrieving criminal assets generated by Icelandic criminal offences, as will be further outlined in the closing recommendations chapter of this paper.

## 10 Recommendations

As described earlier in this paper new events and/or extraordinary circumstances in neighbour countries have led to the adoption of new legal and administrative assets recovery instruments. This paper argues that such circumstances are presently existing in Iceland. At the time this paper was written, there are between 80 and 90 ongoing criminal investigations related to the collapse of the three biggest Icelandic banks, some of which concern alleged falsifying of documents, illegal loans, fraud, embezzlement, market manipulation and other serious criminal activities.<sup>275</sup> Most of these alleged offences fall under the definition of serious crimes as they are punishable for up to six years imprisonment according to the Icelandic Penal Code. These investigations are directly linked to the public interest both regarding public liabilities of the bank debts and general financial circumstances for the public. It is therefore of enormous importance for the Icelandic nation that no stone be left unturned to retrieve the assets that have allegedly been illegally obtained or transferred out of the collapsed banks in recent years.

This fact seems to fully rationalize and justify drastic legal, administrative and enforcement measures of the Icelandic state. It is therefore recommended that the Icelandic authorities take the following proactive steps:

1. The Icelandic government should issue a strategic document concerning criminal assets recovery policy, covering the next 3-5 years.
  - a. Assessment should be carried out of the necessary legal amendments and administrative changes that must be made to implement that strategy and reach its goals.
  - b. The government must ensure that law enforcement officers, prosecutors and judges are educated and trained in enforcing the assets recovery strategy and provisions.
2. Confiscation of all proceeds from all crimes should be mandatory by law.

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<sup>275</sup> Verbal information from the Office of the Special Prosecutor. August and September 2011.

3. Non-conviction based confiscation under civil proceedings should be implemented into Icelandic law.
4. Legal instruments should be passed to open up for clear and fast information gateways between all state agencies so that all information possessed by the state can be used in criminal asset investigations and court proceedings.
5. A centralized Assets Recovery Office (ARO) should be established within the Special Prosecutor's Office which will take over the National Economic Crime investigations and prosecutions in 2011. This office should be the designated Icelandic ARO in international cooperation.
  - a. When preparing, planning and launching the ARO, expert advice should be requested from the Europol Criminal Asset Recovery Bureau.
  - b. The ARO should be entrusted with the sufficient legal, financial and administrative resources, powers and access to databases as recommended in the EU Commission Evaluation Report<sup>276</sup> and by the CARIN network.<sup>277</sup>
  - c. The ARO should be multi-disciplinary, staffed at least with representatives from the police, prosecution, customs, tax authorities, social services and financial experts. Each should carry their original powers and be able to access directly their organization's information and databases.
  - d. The Icelandic FIU should be within the Office of the Special Prosecutor in close cooperation with the ARO.
  - e. The Icelandic CARIN representatives should be located within the ARO.
6. The Icelandic authorities should actively follow the developments within the EU Commission regarding the preparation for the planned new legal EU framework concerning criminal assets recovery. The aim should at least be to ratify and implement EU legal instruments for the following:
  - a. Cooperation between AROs.
  - b. Mutual recognition and execution of freezing orders.
  - c. Mutual recognition of confiscation orders.
  - d. Sharing of confiscated assets between countries.

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<sup>276</sup> *Report to the Commission to the European Parliament and the Council, based on article 8 of the Council Decision 2007/845/JHA of 6 December 2010.*

<sup>277</sup> See chapter 4.5.2 of this paper.



The Icelandic authorities should adhere to positive experience in the neighbour countries. They should follow the developments that have proven to be effective and efficient yet professional and respect the human right issues as presented in the European Convention on Human rights. This paper argues that the Irish Criminal Assets Bureau has proven to fulfil all these requirements resulting in ever increasing number of countries looking at the Irish CAB as a benchmark for future criminal assets recovery framework. This study recommends that Iceland should do the same.

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## **Attachment 1: Terminology and definitions**

Terminology and definitions are taken from the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime and on the Financing of Terrorism from 2005 (Warsaw Convention) and from the UN Convention against Transnational Organized Crime from 2000 (Palermo Convention).

“Asset”. See definition for “property”.

“Assets recovery”. The whole process of recovering illicit proceeds from all crimes and return them to their owners.<sup>278</sup> See further in chapter 2.1.

“Beneficial owner” means the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted. For further definition in relation to corporate entities and legal entities, see EU Money Laundering Directive 2005/60/EC.

“Confiscation” means the permanent deprivation of property by order of a court or other competent authority. The literature sometimes uses the term “forfeiture“ but the word “confiscation“ is used in this paper. See further in chapter 2.2.

“Non-conviction based confiscation”. See chapter 2.3.

“Freezing” or “seizure” means temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.

“Instrumentalities” means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences.

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<sup>278</sup> This definition is taken from the 2007 EU Council Decision concerning the establishment and cooperation between Asset Recovery Offices. The 2003 UN Convention against Corruption defines the process of assets recovery in a very similar way.

“Organized criminal group” means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit.

“Predicate offence” means a criminal offence as a result of which proceeds were generated.

“Proceeds” means any property or economic advantage, derived from or obtained, directly or indirectly, from criminal offences.

“Property” includes asset of every kind or property of any description, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such property.

“Proceeds of crime” means any property derived from or obtained, directly or indirectly, through the commission of an offence.

“Serious crime” means conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.