TECHNICAL REPORT

Study for an impact assessment on a proposal for a new legal framework on the confiscation and recovery of criminal assets

James Forsaith, Barrie Irving, Eva Nanopoulos, Mihaly Fazekas

RAND EUROPE

TECHNICAL
REPORT

Study for an impact assessment on a proposal for a new legal framework on the confiscation and recovery of criminal assets

James Forsaith, Barrie Irving, Eva Nanopoulos, Mihaly Fazekas

Prepared for the European Commission Directorate General Home Affairs

RAND EUROPE

The research described in this report was prepared for the European Commission Directorate General Home Affairs.

Published 2012 by the RAND Corporation
1776 Main Street, P.O. Box 2138, Santa Monica, CA 90407-2138
1200 South Hayes Street, Arlington, VA 22202-5050
4570 Fifth Avenue, Suite 600, Pittsburgh, PA 15213-2665
Westbrook Centre, Milton Road, Cambridge CB4 1YG, United Kingdom
RAND URL: http://www.rand.org/
RAND Europe URL: http://www.rand.org/randeurope
To order RAND documents or to obtain additional information, contact
Distribution Services: Telephone: (310) 451-7002;
Fax: (310) 451-6915; Email: order@rand.org

Preface

This document is the final report of a 'Study for an impact assessment on a proposal for a new legal framework on the confiscation and recovery of criminal assets' commissioned by the European Commission Directorate General Home Affairs (DG HOME).

The objective of this study is to assemble the evidence required by the DG in order to produce an Impact Assessment in line with the guidelines for such assessments laid out in the Commission's handbook.

As a result of the unavailability of key data at both national and pan European levels, innovative estimation procedures were used to bridge some of the most important data lacunae. Our strategy may be of interest to those facing similar problems in preparing for Impact Assessments in the criminal justice field.

This study has been conducted by RAND Europe. RAND Europe is an independent not-for-profit policy research organisation that aims to improve policy and decision making in the public interest, through research and analysis. RAND Europe's clients include European governments, institutions, NGOs and firms with a need for rigorous, independent, multidisciplinary analysis.

For more information about RAND Europe or this document, please contact:

Dr Barrie Irving
Senior Research Fellow
RAND Europe
Westbrook Centre
Milton Road
Cambridge
CB4 1YG
United Kingdom
Tel. +44 (1223) 353 329
reinfo@rand.org

Contents

Tables

Figures

Abbreviations

AFSJ	Area of Freedom, Security and Justice
AMO	Asset Management Office
ANI	National Integrity Agency (Romania)
ARA	Asset Recovery Agency (UK)
ARIS	Asset Recovery Incentivisation Scheme (UK)
ARO	Asset Recovery Office
AT	Austria
BE	Belgium
BG	Bulgaria
BKA	Federal Criminal Police Office (Germany)
BOOM	Bureau Ontnemingswetgeving Openbaar Ministerie (the Netherlands)
CAB	Criminal Assets Bureau (Ireland)
CARIN	Camden Assets Recovery Inter-Agency Network
CDPC	European Committee on Crime Problems
CEPAIA	Commission for Establishing Property Acquired from Illegal Activity (Bulgaria; formerly the Commission for Establishing Property Acquired from Criminal Activity)
CESIFO	Ifo Institute for Economic Research (ifo Institut für Wirtschaftsforschung), Center for Economic Studies
CoE	Council of Europe
CPS	Crown Prosecution Service (UK)
CSD	Centre for the Study of Democracy, Bulgaria
CY	Cyprus
CZ	Czech Republic
DG	Directorate General, Justice Liberty and Security
DE	Germany
DG HOME	Directorate General Home Affairs
DK	Denmark
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EE	Estonia
EIO	European Investigation Order
EJN	European Judicial Network
EL	Greece

ES	Spain
EU	European Union
EU-27	27 Member States of the European Union
EUR	Euro (currency)
EV	Expected value
FATF	Financial Action Task Force
FD	(Council) Framework Decision
FI	Finland
FIU	Financial Intelligence Unit (Greece)
FLARE	Freedom, Legality and Rights in Europe
FR	France
FSB	Federation of Small Businesses
FY	Financial Year
GDP	Gross Domestic Product
GRECO	Group of States against Corruption
HM	Her Majesty's (UK)
HMCS	Her Majesty's Courts Service (UK)
HMRC	Her Majesty's Revenue and Customs (UK)
HU	Hungary
IAG	Impact Assessment Guideline
ICVS	International Crime Victim Survey
IE	Ireland
IN-LE	influencing law enforcement
IN-SO	influencing society
IN-VI-SO	combining all modes of influence
IT	Italy
JARD	Joint Asset Recovery Database (UK)
JHA	Justice and Home Affairs
LT	Lithuania
LU	Luxembourg
LV	Latvia
MDMA	Methylenedioxymethamphetamine
MLA	Mutual legal assistance
Moneyval	Moneyval Committee of the Council of Europe
MPA	Metropolitan Police Authority (UK)
MR	mutual recognition
MS	(European Union) Member State
MT	Malta
NCB	Non-conviction based
NGO	Non-governmental organisation
NICA	Northern Ireland Court of Appeal
NL	The Netherlands
OC	Organised Crime
OCTA	Organised Crime Threat Assessment
OECD	Organisation for Economic Cooperation and Development
PIAC	Platform for the Identification of Criminal Assets (France)

PIU	Performance and Innovation Unit (of the Cabinet Office, UK)
PoCA	Proceeds of Crime Act 2002 (UK)
PL	Poland
PPP	purchasing power parity
PT	Portugal
RCPO	Revenue and Customs Prosecution Office (UK)
RePEc	Research Papers in Economics
RO	Romania
SI	Slovenia
SE	Sweden
SK	Slovakia
SMEs	Small and Medium Enterprises
SOCA	Serious Organised Crime Agency (UK)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNODC	UN Office on Drugs and Crime
US	United States
VI-SO	violence in the local society
WEF	World Economic Forum

Summary

The confiscation and recovery of criminal assets, which has a long pedigree within the criminal-justice systems of many Member States, has in recent decades assumed a prominent position in the fight against organised crime. Led by Italy, many EU Member States have introduced asset-confiscation laws which, by targeting the motivation for profit-driven crime, aim to deter would-be criminals. The force of this logic is easily demonstrated at the microeconomic level (by examining the choices facing individual decision-makers) but the macroeconomic consequences of asset confiscation remain poorly researched. Nevertheless, the logic is widely accepted – no doubt in part because depriving criminals of their ill-gotten gains is a politically attractive concept.

Although asset confiscation is a popular concept with a basis in international law, EU law and Member-State laws, these laws remain underdeveloped and underutilised. It is unlikely that any Member State confiscates a significant proportion of criminal assets and, accordingly, it is unlikely that the laws themselves are achieving their stated aim. To a large extent this may be because asset confiscation presents as a paradigm shift in criminal justice and agents of the state are likely to remain focused upon their tradition roles (arrest and prosecution) unless they face specific incentives to use the available tools. There are noticeable trends towards improved laws and greater utilisation, but these trends are not so strong as to render EU-level action unnecessary.

This study for an impact assessment on a proposal for a new legal framework on the confiscation and recovery of criminal assets aims to assist the European Commission by providing inputs in aid of a formal impact assessment. These inputs consist of policy options for EU-level intervention analysed against evaluation criteria. The evaluation criteria and policy options have both been derived in consultation with the European Commission: the former based on the European Commission's own Impact Assessment Guidelines (IAGs) and the latter based on a problem definition produced as part of this study. This problem definition is based on extensive desk research and fieldwork which generated a detailed map of Member-State asset-confiscation laws, sought to understand their operation in practice and collated available statistical data.

Our problem definition notes three arguments for the confiscation and recovery of criminal assets, all of them grounded in the Treaty of Lisbon. In addition to the argument that it can help to combat organised crime, we also argue that it can help both to achieve justice for victims and to raise public confidence in the criminal-justice system. Based on these arguments we proffer two 'problems': insufficient asset recovery and inadequate

redistribution of recovered assets. We then examine five 'causes', which we develop into a comprehensive five-part problem definition. These causes are as follows:

- **Confiscation:** Which assets should be subject to confiscation orders, and how should these orders be obtained?
- **Preservation:** How can assets be preserved, pending enforcement of a confiscation order?
- **Enforcement:** What powers are needed to enforce confiscation orders and preservation orders successfully?
- **Utilisation:** What can be done to improve utilisation of laws by Member States?
- **Redistribution:** What tools are needed for recovered criminal assets to be distributed to maximum effect in terms of social impact?

These five causes, together with descriptions of the status quo at EU level and associated specific and operational objectives are summarised in the following table. It can be seen that the existing EU legal framework is far from comprehensive.

Problem	Cause	Existing EU-legal framework	Specific objective	Operational objectives
Insufficient recovery	Gaps in MS confiscation powers	Rules are contained in FD 2005/212/JHA, but many aspects of the problem are not addressed.	A. Eliminate gaps	1. MS to have confiscation of type 1 criminal assets 2. MS to have confiscation of type 2 criminal assets 3. MS to have confiscation of type 3 criminal assets 4. MS to have confiscation of assets of third parties
	Gaps in MS preservation powers	No EU rules.	B. Eliminate gaps	1. MS to have freezing/seizure orders for all assets liable to confiscation 2. MS to have effective mechanisms to preserve assets pending enforcement of freezing/seizure orders 3. MS to have effective systems for managing frozen/seized assets
	Gaps in MS enforcement powers	FD 2003/577/JHA and FD 2006/783/JHA deal with mutual recognition of freezing and confiscation orders, but	C. Eliminate gaps	1. MS to recognise and enforce freezing/seizure orders from other MS 2. MS to recognise and enforce confiscation orders from other MS
	MS agents underutilise tools	No EU rules.	D. Raise utilisation	1. MS to raise utilisation of freezing powers 2. MS to raise utilisation of confiscation powers 3. MS to raise utilisation of MR instruments
Inadequate redistribution	MS lack tools to maximise social utility	FD 2006/783/JHA contains provisions on asset sharing in cross-border cases, but there are no rules targeting social utility.	E. Ensure adequate tools for redistribution	1. MS to have mechanisms to compensate dispersed victims 2. MS to have mechanisms to prevent criminals from reacquiring confiscated assets 3. MS to take measures to raise public awareness of confiscated assets 4. MS to have mechanisms to fill economic voids

The complexity of the problem and the heterogeneity of Member-State baselines make a sophisticated problem definition essential. For example, to ensure clarity of logic, we categorise criminal assets as 'type 1' (those which relate to a criminal conviction), 'type 2' (where a criminal conviction cannot be obtained despite sufficient evidence that a crime was committed) or 'type 3' (where a criminal conviction cannot be obtained for want of evidence), each of which demands different tools. Of course, not every aspect of our theoretical problem definition turned out to be relevant in practice. For example, it quickly became clear that cross-border cases were the only aspect of enforcement warranting consideration within the EU legal framework on asset confiscation.

A sophisticated problem definition gives rise, in turn, to a large number of possible EU-level actions of which, in the time available, we analysed 21. These actions are mostly

complementary because they address different aspects of the problem or because different Member-State baselines warrant different treatment. Accordingly, it is not useful to evaluate them as alternatives. Instead, we group them into policy options representing different degrees of EU-level intervention: non-legislative, minimal legislative (correcting deficiencies in the existing EU legal framework which inhibit it from functioning as intended) and maximal legislative (going beyond the aims of the existing EU legal framework). We analyse two different maximal legislative options: one with and one without EU-level action relating to mutual recognition (MR). The 'do nothing' option forms a baseline against which all of these options are analysed.

We conclude in favour of the maximal option featuring action on MR. The following table shows the policy options ranked against each other with reference to various evaluation criteria, as well as an overall assessment in the form of a ranking.

Criteria	**Policy option**				
	no change	**non-legislative**	**minimal legislative**	**maximal without MR**	**maximal with MR**
Economic impacts	5	4	3	2	1
Social impacts	5	4	3	2	1
Environmental impacts	1	1	1	1	1
Fundamental rights	1	1	1	2	2
Proportionality	1	1	1	2	2
MS compatibility	1	1	1	2	3
Simplicity and coherence	4	4	2	3	1
Direct costs	1	1	1	2	2
Geographical disposition	1	1	1	1	1
Overall assessment	4	3	2	2	1

The maximal legislative option without action on MR and the minimal legislative option are ranked equal second, because the rankings differ across Member States. In practice, however, no issue will arise as to which option to pursue in the event that the maximal legislative option featuring MR is not viable. This is because the maximal legislative option featuring MR is nothing more than the combination of maximal legislative option without MR and some actions relating to MR (some of which are in the minimal legislative option). If either aspect proves impossible to pursue then there is no longer any 'choice' as to which of the second-ranked options to pursue.

Our conclusions follow a two-phase analysis. In the first phase, the 21 EU-level actions are analysed individually. In the second phase, further analyses are undertaken for the options considered as wholes.

The first phase begins with an analysis of potential barriers to implementation. Four of the actions are discarded because they offend the principle of proportionality, because the EU lacks the necessary conferral of power and/or because they offend fundamental constitutional or criminal law principles at Member-State level. It is important to note that the EU's conferral of power has narrowed following entry into force of the Treaty of Lisbon. Whereas action under the old 'third pillar' was essentially unconstrained provided all Member States agreed, the Treaty of Lisbon – as *quid pro quo* for subjecting 'judicial cooperation in criminal matters' to the ordinary legislative procedure – places specific limits upon the EU's right to act (even calling into question an aspect of the existing legal framework).

We analyse fundamental rights in considerable detail, based on a thorough audit of relevant jurisprudence of the European Court of Human Rights (ECtHR). Whilst many policy actions do affect fundamental rights, most of the negative consequences can be mollified through appropriate remedies. In a minority of cases this is not entirely possible. On the other hand, in some cases it appears that appropriate remedies can actually promote fundamental rights throughout the EU (by inducing a positive impact in Member States that currently afford low levels of protection).

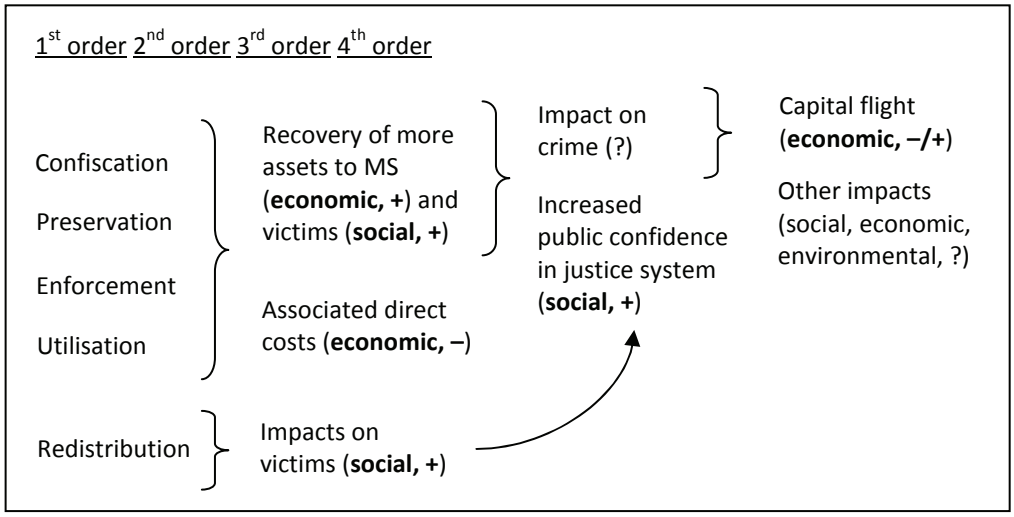
The following table summarises the operational objectives targeted by each of the 21 EU-level policy actions, together with the results of our analysis. Policy actions discarded due to barriers are shown struck out, yet it can be seen that there remains at least one policy action referable to each operational objective. In some cases, however, the remaining policy actions are themselves subject to doubt as to barriers (expressed in the table as **?** for doubts or **??** for serious doubts). We analyse impacts upon the five aspects of the problem definition (confiscation, preservation, enforcement, utilisation and redistribution) as well as fundamental rights, direct costs (administrative burden and implementation costs) and the simplicity/coherence of the EU legal framework, grading them on a scale ranging from **– – –** to **+ + +**. For **fundamental rights**, **R** indicates a negative impact which can be mollified with remedies. For **direct costs**, **V** indicates that this will vary depending upon the level of implementing action taken by Member States. Finally, we decline to assess the impact of the proposed utilisation workshops (policy action #15) owing to insufficient data. Having made these assessments, we group EU-level policy actions for analysis as policy options representing different levels of analysis. These groupings are also shown in the following table.

It can be seen that EU-level action #7 appears in its original form and also in a modified form as #7a. The purpose of this modification is to provide an alternative which does not affect fundamental rights in the event that the European Commission regards the impact upon fundamental rights as disproportionate. This impact (denoted by a ranking of **– –**) concerns the rights of third parties (right to property, presumption of innocence, etc.) in the event of legal presumptions that they, by virtue of a close association with the criminal from whom they acquired the assets in question, lack *bona fides* and/or did not purchase for market value. Incidentally, this presumption against closely associated third parties will

oftentimes benefit victims in search of restorative justice (a fact also recorded in the summary table).

EU-level policy actions (grouped by specific objective)	Operational objectives																Barriers			Primary impacts								Options			
	A1	A2	A3	A4	B1	B2	B3	C1	C2	D1	D2	D3	E1	E2	E3	E4	*Conferral*	*Proportionality*	*Compatibility*	*F.R.*	*Direct costs*	*Simplicity*	*Confiscation*	*Preservation*	*Enforcement*	*Utilisation*	*Redistribution*	*non-legislative*	*minimal*	*maximal - MR*	*maximal + MR*
Confiscation																															
1 Implementation of 2005/212/JHA	✓	.	✓	.	.	.	.	.	.	.	.	.	.	.	.	.	✓	✓	✓	.	.	.	.	.	.	.	.	✓	✓	✓	✓
2 Indirect proceeds	✓	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	✓	✓	✓	R/+	V	.	+	.	.	.	.	.	.	✓	✓
3 ~~Civil standard of proof~~	~~✓~~	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	??	??	×	R	–	.	++	.	.	.	.	.	.	.	.
4 Separable proceedings	✓	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	??	✓	?	R/+	–	.	++	.	.	.	.	.	.	✓	✓
5 Stronger extended confiscation	.	.	✓	.	.	.	.	.	.	.	.	.	.	.	.	.	✓	?	?	R	.	++	++	.	.	.	.	.	.	✓	✓
6 NCB in limited circumstances	.	✓	.	.	.	.	.	.	.	.	.	.	.	.	.	.	?	?	?	–	.	.	++	.	.	.	.	.	.	✓	✓
7 Third party confiscation	.	.	.	✓	.	.	.	.	.	.	.	.	.	.	.	.	✓	?	??	– –	.	.	+++	.	.	.	+	.	.	✓	✓
7a Third party confiscation (adjusted)	.	.	.	✓	.	.	.	.	.	.	.	.	.	.	.	.	✓	✓	✓	.	.	.	++	.	.	.	.	.	.		
Preservation																															
8 Universal freezing/seizure	.	.	.	.	✓	.	.	.	.	.	.	.	.	.	.	.	✓	✓	✓	.	.	.	.	.	.	.	.	.	.	✓	✓
9 Mechanisms to safeguard freezing	.	.	.	.	.	✓	.	.	.	.	.	.	.	.	.	.	✓	✓	✓	R/+	.	.	.	+	.	.	.	.	.	✓	✓
10 Powers to realise seized assets	.	.	.	.	.	.	✓	.	.	.	.	.	.	.	.	.	✓	✓	?	R	+	.	.	++	.	.	.	.	.	✓	✓
11 ~~Asset management office~~	.	.	.	.	.	.	~~✓~~	.	.	.	.	.	.	.	.	.	×	✓	✓	.	V	.	.	++	.	.	.	.	.	.	.
Enforcement																															
12 Implementation of MR obligations	.	.	.	.	.	.	.	✓	✓	.	.	.	.	.	.	.	✓	✓	✓	.	+	.	.	.	+	.	.	✓	✓	✓	✓
13 Broadened scope of MR	.	.	.	.	.	.	.	✓	✓	.	.	.	.	.	.	.	✓	✓	?	+	.	+	.	.	+++	.	.	.	.	.	✓
14 MR of compensation orders	.	.	.	.	.	.	.	.	✓	.	.	.	.	.	.	.	✓	✓	✓	.	.	++	.	.	++	.	++	.	✓	.	✓
Utilisation																															
15 Utilisation workshops	.	.	.	.	.	.	.	.	.	✓	✓	✓	.	.	.	.	✓	NA	NA	.	V	.	.	.	.	/	.	✓	✓	✓	✓
16 Reporting obligations	.	.	.	.	.	.	.	.	.	✓	✓	✓	.	.	.	.	✓	✓	✓	.	– –	.	.	.	.	++	.	.	.	✓	✓
17 ~~Mandatory assets investigation~~	.	.	.	.	.	.	.	.	.	~~✓~~	~~✓~~	.	.	.	.	.	×	×	×	.	– – –	.	.	.	.	NA	.	.	.	.	.
18 ~~Limited judicial discretion~~	.	.	.	.	.	.	.	.	.	~~✓~~	~~✓~~	.	.	.	.	.	×	×	×	–	– – –	.	.	.	.	NA	.	.	.	.	.
19 Consolidated MR forms (cf. 20)	.	.	.	.	.	.	.	.	.	.	.	✓	.	.	.	.	✓	✓	✓	.	+	+++	.	.	++	+++	.	.	✓	.	✓
20 Enforced primacy of MR (cf. 19)	.	.	.	.	.	.	.	.	.	.	.	✓	.	.	.	.	✓	✓	✓	.	+	+	.	.		+++	.	.	✓	.	✓
Redistribution																															
21 Social reuse programme	.	.	.	.	.	.	.	.	.	.	.	.	✓	✓	✓	✓	??	✓	?	.	V	.	.	.	.	.	+++	.	.	✓	✓

The purpose of the second phase of analysis is to produce an overall estimate of the **social, economic and environmental impact** of each policy option. The following figure shows the most important of such impacts and highlights in bold those that we are able to analyse meaningfully. We are not able to analyse impacts flowing from a reduction in crime for the simple reason that there is insufficient evidence that asset confiscation will reduce crime. It is tempting simply to assume this on the basis of a compelling (and popular) microeconomic logic – that is, that the prospect of asset confiscation will deter potential offenders. However, strong competing hypotheses prevent this. In particular, it may be that asset confiscation disproportionately affects less sophisticated suppliers of illicit markets, creating barriers to entry and, thus, oligopolies, in which suppliers become larger and more difficult to disrupt.



Our main economic analysis is an EU-27 profitability estimate based on a model which uses proxy indicators to extrapolate from a detailed analysis of income and cost in the United Kingdom (UK). We are forced to take this approach by a severe lack of data. Specifically, the UK is the only Member States for which we are able to estimate income and costs for all elements of the asset-confiscation system. The UK's asset-confiscation system is, moreover, a reasonable approximation of the maximal legislative option under consideration. Although only indicative, the results of this exercise are nevertheless encouraging: 21 of 27 Member States are indicated by the model to be profitable (many of them highly profitable) for the maximal legislative option without mutual recognition (MR). Adding in EU-level action on MR improves the results still further.

The fact that asset-confiscation work appears to be profitable in most Member States is a strong argument in its favour and, thus, in favour of EU-level intervention. In essence, the profitability of the enterprise significantly reduces the immediate need to demonstrate other benefits. These can instead be re-examined at a later stage when, hopefully, better data are available and phenomena are better understood (these two factors are likely to go hand in hand, as social scientists make use of better data). In the interim, we argue that it is a 'wise wager' for Member States to pursue criminal assets and – subsidiarity being satisfied – for the EU to take action to cause this to occur. This argument is weaker for the minority of Member States for which asset confiscation may be unprofitable (mostly Nordic Member States where relatively low criminality and commensurately low investment in policing may results in fewer assets recovered). However, this does not detract from the case for EU-level

intervention for the simple reason that even the maximal legislative options would not force sceptical Member States to incur the costs of increased utilisation.

We are also able to assess some social impacts:

First, it can be assumed that recovering more assets in favour of the state will, *ceteris paribus*, go hand in hand with recovering more assets in favour of victims of crime.

Second, victims and victimised communities will benefit from actions which specifically aim to ensure a fair redistribution of recovered criminal assets, such as EU support for social reuse programmes.

Third, it is reasonable to assume that confiscating criminal assets (especially in favour of victims) will cause public confidence in criminal justice to rise.

These positive social impacts – together with our conclusion that asset confiscation is likely to be self-financing or profitable in most Member States – lend support to a maximal legislative option aimed at strengthening asset-confiscation law and practice. Moreover, as we have already outlined, detriment to fundamental rights can be largely averted through appropriate remedies (or, in one case, scaling back an action if it is considered by the European Commission to be disproportionate).

CHAPTER 1. Introduction

The title of this report refers to the 'confiscation and recovery of criminal assets'. This is a reference to two stages of a legal process whereby criminal assets – that is, assets which are proceeds or instrumentalities of crime – are recovered in favour of victims, deprived communities or the state. At the heart of this process lies a determination by a court that particular assets are criminal and, thereby, liable to confiscation. This typically takes the form of a confiscation order. The full process is illustrated in Figure 1.1.

1. Identification	Regardless of the nature of the confiscation order, criminal assets can only be confiscated once they are identified.
2. Preservation	It takes time to obtain the confiscation order, so there must be mechanisms to preserve assets in the interim. The typical mechanisms are freezing (for bank accounts and real property) and seizure (for other moveable assets).
3. Confiscation	The confiscation order makes it legally possible to recover criminal assets.
4. Enforcement	Recovery involves enforcing the confiscation order against particular assets.
5. Redistribution	Recovered assets may be returned to victims or deprived communities, or they may revert to the state.

Figure 1.1 Steps in the asset confiscation and recovery process

The confiscation process is in practice complicated by the presence of a dynamic opponent. Sophisticated criminals will attempt to conceal their illicit gains from investigators. When detected they will – if they have not already done so – take whatever measures they can to put assets beyond the scope of confiscation laws or enforcement measures. In microeconomic terms, the criminals are engaged in a 'game' against the state, where both sides respond to each other. This game evolves over time, with criminals becoming ever more sophisticated as the legal tools available to authorities become ever more powerful. Examples of this include the introduction of:

- **value confiscation**, so that assets of equivalent value can be confiscated where specific criminal assets are outside the reach of investigators;
- **third-party confiscation**, so that assets can be confiscated from third parties to whom they have been transferred; and

- **MR of confiscation orders**, so that assets can be more efficiently confiscated from other jurisdictions.

These tools are all designed to make it easier for authorities to recover criminal assets. However, at a more fundamental level, the parameters of the game are defined by the question of what assets should be deemed criminal and, thus, liable to confiscation. The traditional approach of ordinary confiscation is to confiscate assets linked to a specific crime, following a criminal conviction for that crime. Yet here too there have been legal developments in favour of the state. Examples include:

- **extended confiscation**, in which a criminal conviction is followed by the confiscation not only of assets associated with the specific crime, but of additional assets which the court determines are the proceeds of other, unspecified crimes;
- **non-conviction-based confiscation**, in which civil procedure applies to the question of whether particular assets are licit or illicit; and
- **extended criminalisation**, which involves defining non-traditional crimes, with the result that more assets are liable to confiscation.

Within the EU, each Member State's asset-confiscation laws have evolved organically in response to domestic imperatives and, more recently, an EU legal framework. This process began in Italy in the 1960s, spreading to other Member States in the 1980s and 1990s. By the time the EU began to act in the late 1990s,[1] some Member States had potent asset-confiscation regimes, whilst others did not.

The current EU legal framework consists of three Council Framework Decisions (FDs):

- FD 2005/212/JHA (Justice and Home Affairs), which harmonises confiscation laws. Ordinary confiscation, including value confiscation, must be available for all crimes punishable by one year's imprisonment. Extended confiscation must be available for certain serious offences, when 'committed within the framework of a criminal organisation';
- FD 2003/577/JHA, which requires MR of freezing orders for a long list of crimes punishable by three years' imprisonment, or if the 'dual criminality' principle is satisfied (i.e. for any offence punishable in both countries); and
- FD 2006/783/JHA, which mirrors these provisions for the MR of confiscation orders.

Each of these instruments was passed unanimously by the Council, exercising very broad powers under Title VI of the Treaty on European Union (TEU). The context in each case has been the fight against organised crime but, with the exception of the provisions on extended confiscation, the EU legal framework is not limited to organised criminal activity. It is arguable, however, that this goes beyond the scope of the Treaty of Lisbon, which has redefined, in relatively narrow terms, the EU's competence in the field of Judicial Cooperation in Criminal Matters. In particular, the application of FD 2005/212/JHA to all crimes punishable by one year's imprisonment appears tenuous in the light of Lisbon.

[1] Joint Action 98/699/JHA.

The purpose of this study is to examine the adequacy of the existing EU legal framework, to identify options for improvement and to analyse the impacts of these in accordance with the European Commission's own Impact Assessment Guidelines (IAGs). We set out our methodology in Chapter 1. It begins with a problem definition in which problems and causes are defined and explained theoretically and with reference to the EU legal framework and the baseline situations prevailing in all 27 EU Member States. This work, which reveals in detail the heterogeneity of Member-State law and practice, is presented as Chapter 1.

We next derive objectives for the EU (Chapter 1) and policy options aimed at meeting these (Chapter 1). Our policy options depart from the norms of the IAGs in so far as they are synthetic amalgams of various – often disparate – EU-level policy actions. This approach was rendered necessary because of the multiplex nature of the problem and the myriad solutions which have evolved organically in different Member States. In short, whereas the IAGs assume a small number of discrete, competing options, the asset-confiscation problem cannot be addressed other than through multiple complementary options. To avoid doubt, we have termed these 'EU-level actions' and then grouped them into a more manageable number of 'policy options'.

Chapter 1 then presents our analysis and conclusions. Here again we follow the IAGs as closely as possible, given the subject matter. We begin by analysing individual EU-level actions, which also serves to highlight the location of impacts. We then shift to analysing policy options. We devote considerable attention to an analysis of profitability, which is the main economic impact that we are able to quantify. We conclude that a 'maximal' EU-level intervention is justified, taking into account various evaluation criteria. We then go on to make recommendations for monitoring and evaluation in Chapter 1.

CHAPTER 2. Method

This chapter outlines our method, beginning in Section 2.1 with our approach to formulating the problem. Next, Section 2.2 outlines our data-gathering activities in support of this problem definition. Third, Section 2.3 describes how we generated analytical inputs consisting of objectives for the EU, options for intervention at EU level and a set of evaluation criteria against which to assess these. Section 2.4 then explains certain analytical challenges, before Section 2.5 describes our analytical approach. Our methods are in large part a response to the paucity of statistical data maintained by Member States and the time constraints we faced.

2.1 Formulating the problem

A problem definition for the confiscation and recovery of criminal assets must begin by answering three fundamental questions.

First, looking 'upwards' towards a higher level of generality, it must identify the end(s) towards which the confiscation and recovery of criminal assets can be expected to contribute. This is especially important for the EU because asset confiscation is not itself mentioned in the Treaty of Lisbon. Its relevance as an area of EU-level intervention therefore depends upon its ability to contribute to other identifiable goals of the EU.

Second, the problem definition must ask whether there is an identifiable deficit in asset-confiscation activity throughout the EU, without which there is no need for EU-level intervention.

Third, looking 'downwards' at specific details, the problem definition must identify the essential features of a successful asset-confiscation system.

Only when these questions have been answered is it possible to examine critically (a) the existing EU legal framework and (b) the current baselines in each Member State, let alone the forces which may ultimately be driving any deficit.

Formulating the problem in this way required significant data-gathering efforts, along two separate lines of enquiry. First, we sought evidence regarding the impact of asset confiscation upon those EU-level goals which we had identified as potentially relevant, *viz*:

- combating organised crime;
- delivering justice to victims of crime; and

- maintaining public confidence in Member-State justice systems.[2]

At the same time, we sought to identify all relevant Member States' asset-confiscation laws, and understand how they operate in practice. Owing to time constraints, there was limited opportunity for iteration: initial desk research led to a (largely theoretical) *a priori* problem definition which informed fieldwork. Fieldwork outputs and the results of further desk research were then fed back to produce a working problem definition.

2.2 Data collection

As noted above, data-collection activities centred on producing a working problem definition. In accordance with the terms of reference for this study, data collection included both desk research and fieldwork. It can be summarised under the following headings.

2.2.1 Literature reviews to identify impacts

We conducted separate, targeted literature reviews with the aim of understanding better the consequences of confiscating and recovering criminal assets. Most fundamentally, we searched for any association between asset confiscation and criminal activity. This forms part of Appendix G on social impacts, the remainder of which deals with other social impacts by examining the concept of social capital. Social capital has recently become a popular criminological concept and usually refers to sets of pro-social activities such as volunteering, belonging to social groups in the community, helping neighbours, and staying in the location rather than moving out. At the attitudinal level social cohesion and social capital are seen to be exemplified by pro-community attitudes and feelings.

We also conducted literature reviews into economic impacts (Appendix G, which contains information on the cost of crime) and environmental impacts (Appendix G, which contains information on environmental crimes).

2.2.2 Mapping of Member-State law and practice

A detailed problem definition demands an understanding of the laws prevailing in each Member State. These vary greatly owing to differences not only in national legal systems, but also in levels of commitment; some Member States have not yet implemented existing EU-level obligations, whilst others have gone far beyond these. It was therefore necessary to acquire a sophisticated understanding of Member-State laws in a format permitting rapid comparison across issues and Member States, so that priority areas of legal deficiency could be identified together, in each case, with those Member States in which they are most pronounced. Initially, we produced a law template based on an early version of the problem definition set out in Chapter 1. This served to capture desk research for each Member State in preparation for fieldwork.

As already noted, mapping of Member-State laws initially involved populating law templates based on desk research. This was based on both primary and secondary sources. Primary sources include 'law on the books' and key cases, whilst secondary sources include textbooks, academic journals, government publications and grey literature. The last of these includes the 'mutual evaluation' reports prepared by the Financial Action Task Force (FATF), by the

[2] See Section 3.1.

Moneyval Committee of the Council of Europe (Moneyval) and by the Council of the EU.[3] A list of the mutual evaluation reports consulted is given in Table 2-1.[4] It may be seen that at least one report is available for all states except the Netherlands and France.

Table 2-1 Mutual evaluation reports consulted

Member State	Mutual evaluation report		
	FATF	Moneyval	Council of EU
BE	2005/2007	-	2010
BG	-	2008/2009	2010
CZ	-	2007/2009	-
DK	2006	-	-
DE	2010	-	-
EE	-	2008/2009	-
IE	2006	-	-
EL	2007/2010	-	-
ES	2006	-	-
FR	-	-	-
IT	2006/2009	-	-
CY	-	2006/2009	-
LV	-	2006/2009	-
LT	-	2006/2010	-
LU	2010	-	-
HU	-	2005/2008	2010
MT	-	2007/2008	-
NL	-	-	-
AT	2009	-	2010
PL	-	2007/2008	-
PT	2006/2008	-	-
RO	-	2008/2009	2010

[3] Specifically, the fifth round of mutual evaluations pursuant to Joint Action 97/827/JHA.

[4] Where two dates are given, the latter date represents a supplementary report; these typically contain updated statistics but not updated descriptions of laws.

Member State	Mutual evaluation report		
	FATF	Moneyval	Council of EU
SI	-	2010	-
SK	-	2006/2009	-
FI	2007	-	-
SE	2006	-	-
UK	2007/2009	-	2010

These primary and secondary sources allowed Member-State law templates to be populated to varying extents. However, the information available is in some cases dated and, in any event, provides an incomplete picture of 'law in practice' – that is, of how, to what extent and to what effect the laws of each Member State are applied. We therefore undertook fieldwork to provide an enhanced understanding and to make good substantial gaps in current knowledge. This fieldwork consisted of semi-structured interviews with practitioners and other experts conducted in person and by telephone throughout the EU by skilled interviewers, all of whom were briefed with the same background information regarding the purpose of fieldwork, the techniques to be employed and the information sought (in the form of a fieldwork instrument consisting of interview questions designed to elicit information regarding law in practice). Appendix A is a summary list of the fieldwork undertaken.[5] As fieldwork was processed and the problem definition refined, the law templates evolved into a series of tables addressing relevant aspects of Member-State laws which, together with some explanatory discussion, constitute baseline scenarios.[6]

The need to arrange EU-27 fieldwork at short notice over the summer holiday period was challenging and it must be emphasised that time and resources did not permit iterative fieldwork except in limited cases. As a consequence, fieldwork to map Member-State laws – such as the preliminary desk research – was informed by an *ex ante* problem definition, which attempted to cover all potentially relevant aspects of the problem. It was inevitable that some new issues would emerge from the fieldwork itself; time constraints meant that it was not always possible to obtain the necessary data to achieve a sophisticated understanding of these on an EU-27 basis.

The main instance of iterative fieldwork involved distributing a list of potential EU-level actions to practitioners at the 2010 Camden Assets Recovery Inter-Agency Network (CARIN) plenary meeting and requesting feedback, in particular:

- whether the options would increase the amount of criminal assets confiscated;
- whether the options face any constitutional or other serious legal barriers; and
- whether the options would be difficult or expensive to implement in practice.

[5] To protect those interviewees who spoke on condition of anonymity, we do not name particular interviewees.

[6] These tables are presented in 0 as part of the problem definition.

The responses which we received were a useful addition to the practitioner interviews, but the overall response rate for this second wave of fieldwork was poor.

2.2.3 Identifying potentially useful statistical data

Through desk research and fieldwork we also sought to identify and collate relevant statistical data, with a view to the quantification of impacts wherever possible. We are mindful in this regard that the Matrix Insight report (Matrix Insight, 2008) concluded that existing operational statistics were an inadequate basis for decision-making, and we note the negative reaction of some practitioners (at the Asset Recovery Office – ARO – Experts' Platform meeting in May 2010) to the suggestion that more statistical data on the operation of AROs should be collected and analysed. In short, at the Member-State level relatively little has changed since that report, presenting a serious methodological challenge which we have generally been unable to alleviate with recourse to other sources.[7] Aside from the FATF and Moneyval reports (which typically refer narrowly to money laundering / terrorist financing data), we obtained Member-State confiscation statistics from a small number of government publications and academic articles, as well as through fieldwork (requests to government departments and agencies). These are presented in Appendix A. It should be noted that these data relate mostly to the amounts confiscated (or frozen/seized for protective purposes). There are very few data for MR, or for the costs of asset-recovery work, which is often undertaken by agencies with multiple functions (meaning that only an unknown fraction of agency operating costs relate to asset-confiscation work).

There also tend to be few data available regarding the value of assets returned to victims. Because these are not logged as receipts in favour of the state the data, if it is to be ascertained, must be extracted from court or police records. Our data-gathering exercise (a quick scan of Appendix A confirms the paucity of data made available either publicly or via interviewees) suggests that this is not done. The reasons for this may be that it is impossible, or too labour intensive, or not viewed as valuable. To take a tangible example, whilst many Member States have police records estimating the value of assets seized, subtracting from this the value of assets realised in favour of the state still does not allow assets recovered in favour of victims to be separated from assets returned to defendants whose guilt was not established. And this is to say nothing of separate civil claims, for which assets may not be logged by the police.

2.3 Analytical inputs

Sets of objectives, policy options and evaluation criteria are all essential to the impact assessment process. For this study we were required to derive all of these analytical inputs ourselves, based on our problem definition in combination with the European Commission IAGs. We followed a standard analytic process: each element of the **problem definition** leads to an **objective** to remedy the problem, inviting **policy options**. These are then assessed against evaluation criteria, which are largely drawn from the IAGs.

[7] The CARIN network maintain a very limited number of statistics, but have been unable to provide these within the timeframes of this study. Eurostat have some survey data which remain unpublished as they do not meet Eurostat requirements.

2.3.1 Objectives and policy options

We were not provided with a defined list of policy options but, rather, developed these in consultation with the European Commission based on objectives derived from the problem definition. Here again, time constraints influenced the process. It was not possible to wait until all fieldwork outputs had been returned before beginning work on objectives and policy options. Therefore, our approach was to base these initially upon an incomplete version of the problem definition, which meant that they evolved with the problem definition as further fieldwork outputs were returned and analysed.

Early in the study it became clear that the problem definition was so complex, and Member-State laws so heterogeneous, that actual deficiencies were likely to vary greatly between Member States (more on this in Section 2.4.2). Two corollaries follow:

First, any single action at EU level will only be able to target one aspect of the problem.

Second, the impact of any such action will be limited to those Member States in which this aspect of the problem is manifest. In these circumstances, different EU-level actions are in many cases complementary rather than alternatives, making it unhelpful to try to establish whether one is more important or necessary than the others. A comprehensive legislative intervention by the EU would in fact need to consist of several complementary actions. Moreover, an impact assessment of such an intervention needs to examine the overall impact of these actions in combination. We therefore devised policy options synthetically by combining multiple EU-level actions. We did this by grouping together actions that represent different degrees of EU intervention, *viz*:

- no action at EU level (the baseline 'do nothing' option);
- non-legislative intervention;
- minimal legislative intervention;
- maximal legislative intervention (not including MR); and
- maximal legislative intervention (including MR).

Because EU-level action on MR would be likely to require a separate legal instrument from actions to harmonise substantive Member-State laws, having two different maximal legislative options allows the additional impact of MR to be assessed.

2.3.2 Evaluation criteria

Assuming that a number of discrete policy options can be defined for impact assessment, traditional evaluation criteria have two critical roles: driving the search for relevant impacts (impacts can then be grouped under evaluation criteria) and providing a basis for assessing and ranking options. It is clearly important in utilising such a paradigm for the options to be discrete, as ranking on one policy option would otherwise influence correlated options. If the extent of correlation varies from Member State to Member State then scores will be non-comparable. In effect the process of assessment will be corrupted. Likewise if statistical data permitting of ranking on a given criterion are available in some Member States but not others and the pattern of absence and presence of appropriate data is different across different criteria, then the ideal assessment process will also be corrupt. With these issues in mind we list the evaluation criteria for impact assessment:

- Economic impacts: These might include in this context: the effect of asset confiscation on Gross Domestic Product (GDP); on various indicators of economic

activity; on capital flows (e.g. flight of illegitimate capital in the short term, followed by an improved flow of legitimate capital in the long term); and on the estimated national cost of crime.

- **Social impacts:** These might include in this context: quality of life for victims of crime and deprived communities; belief in the efficacy of government; social cohesion/capital; legitimacy of the criminal-justice system; falling local and national crime rate and rates for certain types of crime associated with organised crime; increase in the flow of criminal intelligence and hence higher detection rates.
- **Environmental impacts:** Including reduction in environmental crimes committed by organised criminal groups.[8]
- **Respect for fundamental rights:** Each option can be assessed qualitatively for the extent to which it affects fundamental rights.
- **Proportionality:** As with respect for fundamental rights, each option may involve the EU acting in a proportional or disproportional manner in respect of the target problem which the option is intended to fix.
- **Constitutional barriers within Member State:** Each option may or may not conflict with Member States' constitutions. The significance of this at EU level is not merely political but also legal owing to the 'emergency brake', whereby Member States can derail the ordinary legislative procedure as it applies to certain conferrals of power (Section 6.2.1).
- **Simplicity and coherence:** Each option can be assessed in terms of its simplicity and coherence.
- **Direct costs:** These include implementation costs and administrative burden.
- **Geographical disposition of impacts:** There are two aspects to this. First, whether some Member States (or regions) are affected more than others, in which case it is important to distinguish between disparities which are essential to the policy objective (e.g. it is to be expected that an improved regime to confiscate and recover criminal assets will have the most impact in Member State*s* that have been slow to transpose existing EU legislation) and those which are not (e.g. those arising from different legal traditions, or from different financial resources). Second, any impacts upon non-EU countries should also be taken into account.

2.4 Analytical challenges

This section begins by setting out, in general terms, an intervention logic showing relationships between different types of impacts. Ideally, it would be possible to produce a quantitative analysis at each stage, building upon quantitative analysis at the previous stage. This is made difficult, however, by three distinct analytical challenges.

2.4.1 Intervention logic

Figure 2.1 illustrates intervention logic in very general terms. Hoped-for economic (blue), social (yellow) and environmental (green) benefits appear as second, third or fourth-order

[8] Fieldwork outputs suggest that is already taking place in areas with high environmental standards, e.g. in northern Europe.

impacts. Policy options aiming to achieve these benefits must first be filtered against potential barriers (red). They are then analysed for their first-order impacts upon Member-State law, policy and practice, which are then analysed to determine second-order impacts, and so on. It can be seen that each stage is dependent on the last. Specifically, the higher-order impacts assume an impact upon crime, which assumes an impact upon the number of assets recovered (whether in favour of the state or known victims), which assumes that the policy option produces changes to law, policy and/or practice at Member-State level. It can be seen that victims benefit not only from assets recovered in their favour, but also when assets recovered in favour of the state are applied to their benefit (known as 'social reuse'). It can also be seen that asset-confiscation work is profitable in a direct sense if the value of assets recovered in favour of the state exceeds the direct economic costs incurred (i.e. implementation costs and administrative burden). Direct profit/loss and high-order economic impacts can then be summed to determine overall economic impact.

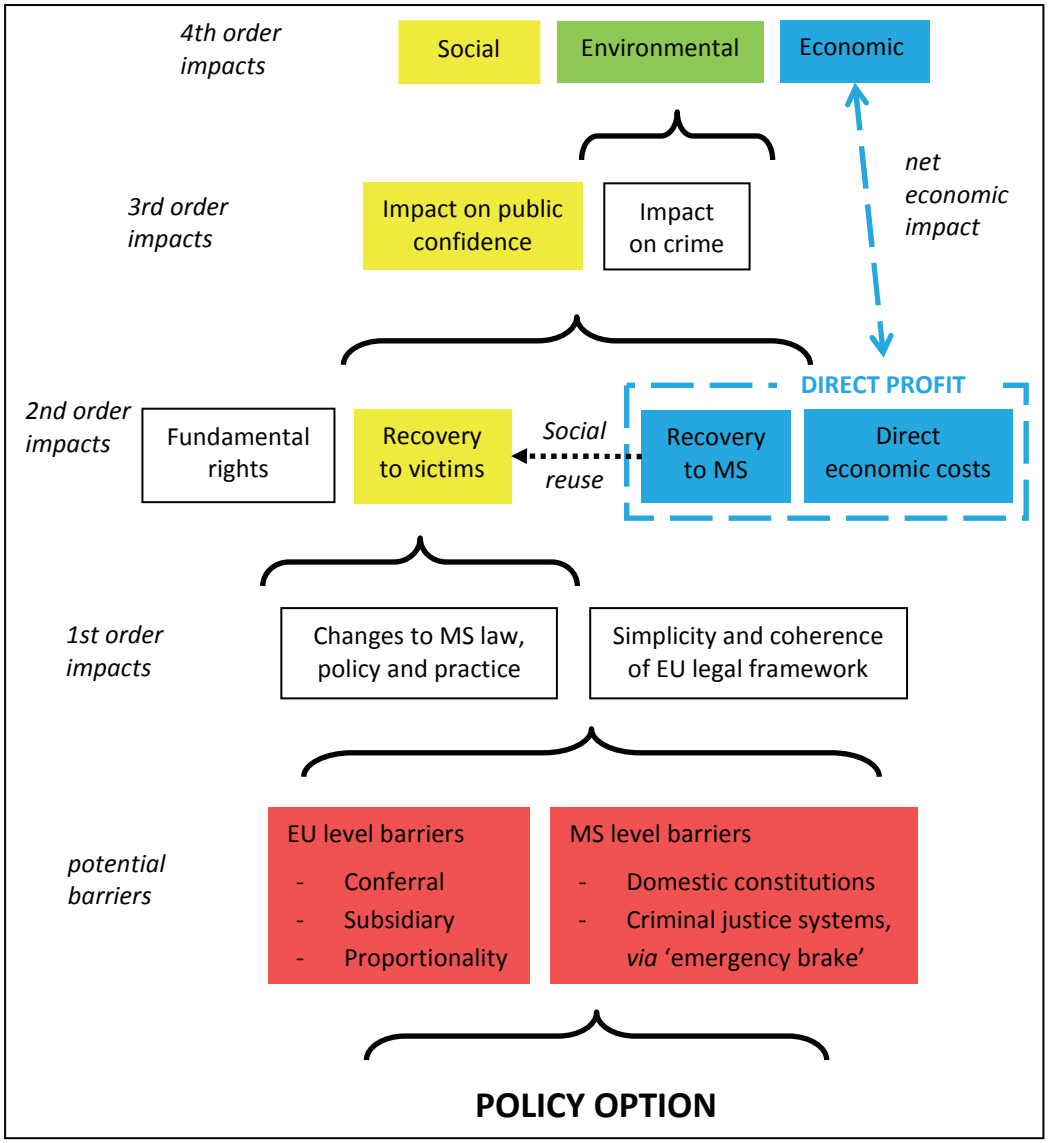


Figure 2.1 Intervention logic diagram

We now discuss several analytical challenges which limit our ability to analyse the impacts illustrated above.

2.4.2 Heterogeneity and complexity

Member States' laws (as summarised in 0) show a level of heterogeneity and overall complexity not revealed in the earlier Matrix Insight study (Matrix Insight, 2008). These laws are everywhere the result of domestic and international political pressures, and the difficulties arising when trying to reconcile new (and often controversial) ideas with domestic constitutional and criminal procedural norms. They are somewhere modelled on the growing EU legal framework, elsewhere amended piecemeal in response to it. As a result of these organic processes, Member States have diverse systems which, although often composed of similar components, achieve their effect by unique interdependencies between these components. Where one component operates weakly due to local factors, system performance may suffer or, alternatively, law and practice may adapt by emphasising other components to buttress overall system operation. Where a component is underutilised, this may be a problem or, alternatively, the component may be redundant.

A perfect (whether holistic or reductionist) understanding of the functioning of a country's asset-confiscation apparatus is a difficult task and impossible for 27 Member States in the time available for this study. A perfect understanding is not essential for EU-level action. So long as the problems are reasonably well understood, EU-level action can elicit responses at Member-State level which improve system efficiency and increase the number of assets recovered. A useful analogy is, we believe, to think of Member-State legal systems as the rigging of a sailboat. Tightening the rigging for racing can be achieved in many different ways depending on the order in which components are manipulated; moreover which component is manipulated first has a disproportionate effect on how the rest of the task is completed. A particular effort at one point can result in other points of action receiving correspondingly little attention (depending on the exact nature of component interconnectivity). As this 'Markov chain process' continues, so the effectiveness of it becomes apparent – the rigging may or may not tighten overall, or it may tighten out of line, and finally it is possible to see whether the overall effort has been effective – the boat sails properly or it does not (Markov, 1971). In order for the boat to sail it does not matter which actions contribute most to the end result, so long as no wrong actions are taken which disturb it. Likewise, it is not necessary to be able to predict how much a particular Member State will benefit from particular elements of an EU legal framework on asset confiscation. Nevertheless, an understanding of Member-State systems (together with respect for the principle of proportionality) can help to avoid any incompatibilities.

2.4.3 State of knowledge about relationships

Another key limitation is the undetermined nature of certain key relationships. Most significantly, the critical link between assets confiscated and organised crime is poorly researched and understood at a macro level even though compelling behavioural models for individual actors and organised criminal groups can be derived from microeconomic and criminological theory. We illustrate what can be achieved at the micro level in Appendix A. By way of summary:

- individuals face a rational economic incentive to engage in profitable crime;

- criminals face rational incentives to organise themselves into, or join, organised criminal groups, the existence of which complicates individual decision-making;
- where the state tries to confiscate criminal assets, it engages in a 'game' against these criminals and organised criminal groups;
- increased asset-confiscation activity by the state will tend to make crime less profitable and thereby encourage some players to exit the game; and
- other players – especially more sophisticated players such as well-resourced organised criminal groups – will choose to remain in the game, increasing their own efforts to hide their ill-gotten gains.

There is no shortage of examples of such micro-level behaviour.[9] Indeed, conviction regarding the reliability of this micro-model could drive the pursuit of more efficient and effective criminal asset-confiscation system performance, almost irrespective of other considerations, if the effort were self-financing (cost neutral). This, however, does not diminish the significant uncertainty and indeed controversy regarding resultant macro-level phenomena. In particular, it is by no means obvious that overall crime rates will reduce if asset-confiscation activity is increased until some less sophisticated players choose to exit the game. The strength of illicit demand is likely to ensure that vacancies are rapidly filled either by new players willing to seize an opportunity, or by existing players with spare capacity. In the latter case – especially if a heightened imperative to hide criminal assets creates barriers to entry – markets may become more oligopolistic. Reasoning by analogy with licit markets, this would tend to make organised crime more profitable.

This logic invites empirical research. However, our literature review found no reliable evidence of such a relationship (see Appendix G). To be sure, we also enquired of the FATF whether it, as an institution with an obvious interest in scientifically demonstrating a negative correlation between asset-confiscation activities and organised crime,[10] had conducted or was aware of relevant research in this context. We were advised that the FATF does indeed maintain this interest, but that no such research was known.[11] This is in fact unsurprising, because the proportion of criminal assets confiscated within the EU appears to be tiny (see Section 3.2.1)). This makes it implausible to expect macro relationships to manifest themselves, because the power of the lever is too small compared to the target. This holds true at least until the target economic variables are disaggregated down to municipality or city sector level, by which point there are virtually no published statistical records to work with. In certain circumstances, however, it seems reasonable to assume a significant local impact. In particular, it is plausible that asset confiscation (in combination with other actions) could seriously disrupt a Mafia-type organised-crime group entrenched within a particular locality.

[9] During fieldwork in the present study, investigators and prosecutors told of criminals studying asset-confiscation legislation, or in some cases 'retiring' in the face of extended confiscation laws that render their accumulated criminal wealth liable to confiscation in the event of a conviction.

[10] FATF recommendations treat asset confiscation as a key tool for combating money laundering and terrorist financing.

[11] Given that the resources of FATF vastly exceed our own, we take this to confirm, for practical purposes, our conclusion that the literature in this area is wholly inadequate.

Overall, however much it may go against the grain of official rhetoric, we cannot exclude the possibility that asset confiscation does not correlate negatively with crime, or organised crime – in other words, the possibility that it has a negligible or even harmful impact.[12] Moreover, even if one is willing to assume beneficial macro-level impacts, there is no evidence regarding the stage at which these will manifest (which is a factor crucial for impact analysis).

Finally, it should be noted that there is, to the best of our knowledge, no empirical (as opposed to anecdotal) evidence of a link between asset confiscation and public confidence in criminal justice. A positive association does, however, seem logical. Indeed, in the absence of convincing logic in the opposite direction, this absence of evidence is of less concern than that discussed above for the hypothesised negative association between asset confiscation and crime.

2.4.4 Available statistics

In the absence of useful literature, we turned to available statistical data, which we include as B. We found these to be very patchy across the EU. In many Member States where there are records, these have not been kept for long, making trend analysis precarious.[13] This is unsurprising given that the Matrix Insight report (Matrix Insight, 2008) has recently argued for better operational statistics to be kept at Member-State level (to support the very kind of decision-making research being attempted here). These arguments remain critically important to future development of a more efficient and effective EU legal framework.

Noting that the prevailing IAGs demand quantitative analysis wherever possible, we attempted to gather *any* potentially useful statistics with a view to constructing even simple linear models. Such a process helps to illustrate the challenges involved and gives policy-makers the chance to assess the gap between the current data-modelling potential in this field and what is required to provide truly helpful guidance.

To permit quantitative analysis, the available data should be harmonised across Member States, with a long enough time-series to include important variation. Although one may be tempted to analyse variations across Member States, there are so many other factors that vary between Member States that relationships may not be apparent. As such, in addition to collecting available data from key sources (e.g. European Sourcebook, Eurostat), we also contacted experts in the field of organised crime in Europe and statistical officers. All sources confirmed our working hypothesis that there were no harmonised data on asset confiscation over time and/or across countries. In particular, the field has recently been reviewed by a team from RAND Europe preparing a report for the European Commission on European crime. This research has concluded:

[12] Although it is outside the scope of this study, it is worth drawing attention to the literature on the history and effectiveness of taxation in the licit economy, which could form a useful analogy base for future research in the asset-confiscation field. Even when taxation levels are very high and collection regimes are efficient, individual entrepreneurs are still apparently reluctant to quit the markets they know and understand for pastures new – e.g. Swedish marginal taxation rates, which would be considered catastrophically high in US Republican circles, do not of themselves produce the effects on entrepreneurial activity predicted by critics.

[13] It is more accurate to say that trend analysis, while possible, yields results that are so indeterminate as to be practically useless because the range of predicted quantified impacts will be so great.

- the key research priority identified by numerous academics, policy analysts, statistical officers and early career researchers is better data and analysis in organised crime across Europe;
- among approximately 90 data sets on crime and criminology with at least one Member State, not one data set (beyond Moneyval) considers asset-confiscation statistics (Hunt *et al.*, forthcoming).

The lack of harmonised data makes it necessary first to conduct analysis on a country level – considering as many Member States as possible – with results then aggregated at EU level. Missing Member States can be estimated by analogy but the validity of such an approach depends upon a sufficiently large and diverse evidence base. In this regard, our evidence base was unfortunately very constrained. This presents a severe challenge to the expectation, per the IAGs, of quantitative analysis at the level of individual Member States. With this in mind, we have opted for the following analytical strategy, which takes into account all of the exigencies identified above.

2.5 Analytical process

We have developed a three-part analytical strategy to meet the challenges described above. It begins with primary analysis of the 21 EU-level actions considered individually. We continue this until it is no longer useful in light of the foregoing challenges. We then synthesise the primary analyses by grouping the EU-level actions into policy options, upon which we conduct secondary analysis.

2.5.1 Phase 1 analysis

Primary analysis focuses on immediate impacts of the EU-level actions. An assumption is made, at this stage, that asset confiscation is a good thing (i.e. that it produces desirable third-order and higher-order economic, social and environmental impacts).

Screening options against barriers: This is logically the first step in the analysis because there is no need to analyse the impacts of an option that cannot be implemented. Barriers exist at EU level (conferral, subsidiarity and proportionality) and also at Member-State level, as many of the most relevant conferrals of power in the Treaty of Lisbon either require measures to take into account the differences between the legal traditions and systems of the Member States and/or provide an emergency brake, whereby EU legislative procedures can be derailed by any Member State claiming that a proposed measure would affect fundamental aspects of its criminal justice system. A comprehensive screening of policy options would require them to be examined in detail against the criminal-justice systems (including constitutions) of all 27 Member States. This was not possible in the time available, but we were nevertheless able to achieve considerable insights through targeted desk research and fieldwork with practitioners and academic experts.

Locating potential first-order impacts: The second step involves examining baseline scenarios for each Member State to identify potential deficiencies and, thereby, determine where law, policy and practice may be affected. A holistic treatment of each Member State's confiscation apparatus is desirable in order to confirm that identified gaps represent actual problems, rather than factors that have already been compensated for through organic

development elsewhere in the system. Every effort was made, within the time available, to identify such systemic responses.

Quantification of first-order impacts: A sophisticated quantification of first-order impacts upon Member-State law, policy and practice would require understanding, for each Member State, not only whether identified gaps represent actual problems, but also the relative importance of different aspects of the problem to the question of overall assets recovered. This was not possible within the time available. Instead, we assigned a simple ordinal ranking to each impact based on a combination of the prevalence of the underlying problem (already assessed when locating impacts) and our own judgement as to which aspects of the problem definition are, generally, the most important.

Second-order impacts for individual EU-level actions: Impacts upon fundamental rights are assessed through legal analysis and ranked on an ordinal scale. Impacts upon administrative burden are assessed in accordance with the IAGs, also using an ordinal scale. We do not assess impacts upon the amount of assets recovered in favour of either the state or known victims; to do so would be misleading as asset-confiscation systems are not well enough understood, to say nothing of the lack of data. We instead analyse the profitability of asset-recovery work at a level of generality which is more appropriate.

At this stage, the 21 EU-level actions are combined into policy options for further analysis, and the primary analyses are grouped accordingly. A preliminary ranking is possible, based on the assumption that asset confiscation is a good thing.

2.5.2 Phase 2 analysis

The policy options are now subjected to secondary analysis. Secondary analysis aims to identify whether asset confiscation is profitable and, by analysing third- and higher-order impacts to the extent possible, whether or not it is a good thing.

Profitability of asset-recovery work: For Member States, the administrative burden of asset-confiscation work consists mostly of ongoing costs proportional to the volume of work done. These are offset by the value of assets recovered in favour of Member States which, if in excess of costs, makes the work directly profitable. If it can be shown that asset-confiscation work is likely to be profitable, then a major impediment to its pursuit at Member State and EU level evaporates. On the other hand, the result may be opposite, making it all the more necessary to demonstrate other economic, social or environmental benefits to justify the net administrative burden. Profitability (assets recovered minus costs, relative to costs) can be calculated wherever Member States maintain sufficient operational statistics. Unfortunately, due to the paucity of available data we had no choice (other than abandoning the enterprise) but to base our EU-27 profitability estimate upon a linear model in which historical data from just one Member State are transformed using proxy indicators to account for important differences between Member States. Our methodology is described in detail in Section 6.3.1 and the appendices referred to therein. Through cautious use of the model, we aim to provide the maximum degree of non-speculative quantitative analysis.[14] Although the data platform

[14] In the absence of any reliable data on other economic impacts of the policy options being assessed, and given the imperative to present the Impact Assessment Board with quantified assessments of impacts, we place a significant emphasis upon this profitability analysis. Moreover, where new legislation is being considered and the content is politically sensitive or significant, the imperative to quantify economic impacts becomes greater, not smaller. So

on which the model is constructed is far from ideal, we believe it provides the EU with the basis for making a 'wise wager' (Pascal, 2006).

Assets recovered in favour of victims: If asset-confiscation activity rises in a Member State as a result of EU policy, resulting in improved outputs (i.e. more assets confiscated) then, all else equal, compensation achieved for victims of crime will rise *pro rata*. The same can be said for disbursements under existing social reuse schemes. We assume these effects in our analysis.

Possible impact upon public confidence: Asset-confiscation work may directly affect public confidence in the criminal-justice system. Such an impact has not been proved in literature, but anecdotal evidence suggests it is very likely. As with recoveries in favour of victims, the impact will be a function of the amount of asset-confiscation work performed, although here it may be non-linear. Although we attempt to identify potential impacts, we cannot assess them quantitatively due to a lack of data.

Impact upon crime: As we have already exhaustively argued, there is insufficient evidence to determine the nature (let alone the strength) of any macro impact upon crime rates. It follows that it would be speculative (and potentially misleading) to examine potential fourth-order (economic, social or environmental) impacts flowing from any hypothesised reduction in crime as a result of increased asset-confiscation activity. This does not, however, rule out impacts flowing from any impact upon criminal behaviour which can be predicted as a matter of logic (i.e. due to an absence of alternative hypotheses) regardless of whether asset confiscation has a macro impact upon crime rates. We therefore search for, and analyse, such impacts.

---

even if there is considerable moral and political will to improve asset-confiscation regimes through EU-level intervention, the Impact Assessment Board will require stronger, not weaker, economic evidence. It is this challenge that has driven our novel approach to overcoming the lack of macroeconomic data. The novelty of the approach may, of course, draw a response from Member States – in the form of suggested adjustments to the approach or the production of previously unavailable statistics or of alternative calculations. Alternatively, where these do not yet exist, Member States may be prompted to improve their own data-collection efforts.

CHAPTER 3. Problem definition

This chapter defines the problem that gives rise to the present study. Section 3.1 considers the imperative to confiscate and recover criminal assets in context. Section 3.2 then identifies aspects of this problem. Those which fall within the scope of the present study (i.e. those which can be dealt with in the EU legal framework on confiscation and recovery) are described in detail in Section 3.4. This exposition is theoretical, but prepared in the light of our data-gathering activities so as to ensure that all of the major problems are captured and synthesised.[15] The existing EU legal framework is then described in Section 3.5, before Section 3.6 provides Member-State baselines (i.e. by examining the state of domestic laws, and their utilisation, throughout the EU).

3.1 Reasons to confiscate and recover criminal assets

The imperative to confiscate and recover criminal assets has increasingly found reflection internationally and within the EU. In 1980, the Council of Europe's (CofE) Committee of Ministers issued its 'recommendation on measures against the transfer and safekeeping of funds of criminal origin'. The Organisation for Economic Cooperation and Development's (OECD) Financial Action Task Force, established in 1989, has since been subjecting its members to a process of 'mutual evaluation' against 40 recommendations to combat money laundering, some of which relate to the confiscation and recovery of criminal assets.[16] Moneyval have overseen a parallel process since 1997. The persuasive activities of these international clubs are complemented by a growing body of international law. This includes the 2004 UN (Palermo) Convention against Transnational Organised Crime and the CoE's 1990 and 2005 Conventions on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Within the EU, meanwhile, the 1997 Action Plan to Combat Organised Crime, emphasised 'the importance for each Member State of having well-developed and wide-ranging legislation in the field of confiscation of the proceeds of crime and the laundering of such proceeds'.[17] This was followed by several FDs.[18]

---

[15] Although the problem definition incorporates various concepts mentioned in literature, its structure and overall logic are organic to this study, having been developed and iterated through the extensive data-gathering exercises described in Section 2.1.

[16] Recommendations 3 and 38.

[17] Political guideline 11.

[18] Discussed in detail in Section 3.5.

These historical developments all tend to emphasise the role of asset confiscation in combating organised crime (especially money laundering). In the contemporary European context, however, the Treaty on the Functioning of the European Union (TFEU) provides a broader rationale: 'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.'[19]

This Area of Freedom, Security and Justice (AFSJ) in Title V of the TFEU provides three distinct yet related problems that may demand the confiscation and recovery of criminal assets:

- the existence of organised crime within the EU;
- the rights of identified victims and deprived communities; and
- the need to maintain public confidence in justice systems.[20]

These problems are now described.

3.1.1 Combating organised crime

The existence of organised crime is antithetical to the goal of maintaining the EU as an AFSJ. Organised criminal groups are involved in a variety of illegal activities such as illicit drug trafficking, people trafficking, fraud and counterfeiting. All of these activities entail negative socio-economic externalities – for example, the health effects of illicit drug use, the exploitation of vulnerable trafficked groups and the economic profit lost from legitimate business as a result of counterfeiting. There are also more general reasons why organised crime is undesirable. Corruption, which is both immoral and a drain on the economy, often goes hand in hand with organised crime. Corrupt states, moreover, attract organised criminal groups, creating a vicious spiral. Foreign investors and traders may, in turn, be reluctant to invest in an economy racked with crime and corruption. Organised crime thus has a deleterious economic impact which is deeper than the costs of individual illegal activities.

The threats posed by organised crime are taken very seriously within the EU. In 1997 a high-level group of senior Member-State officials prepared the Action Plan to Combat Organized Crime, which noted as follows:

> Organised crime is increasingly becoming a threat to society as we know it and want to preserve it. Criminal behaviour no longer is the domain of individuals only, but also of organisations that pervade the various structures of civil society, and indeed society as a whole. Crime is increasingly organising itself across national borders, also taking advantage of the free movement of goods, capital, services and persons.[21]

Thereafter, the EU's Strategy against Organised Crime has been developed through the 2000 Millennium Strategy, the 2004 Hague Programme and the 2005 Communication on Developing a Strategic Concept on Tackling Organised Crime (COM (2005) 232 final). Most recently, the 2009 Stockholm Programme (European Council, 2009) has called upon

[19] Article 67(1). See also TEU Article 3.

[20] These related goals are adopted as 'general objectives' of the EU. See Section 4.2.

[21] Article 1.

the Council and the European Commission to adopt an organised crime strategy within the framework of a comprehensive internal security strategy.

Organised crime, whether acquisitive (e.g. fraud) or based on demand for illicit goods and services, or the ability to profit from legal markets using illegal means, is profit driven. Most commonly, criminalisation of goods and services creates illicit markets, profit-motivated individuals supply these markets and, in the face of competition and other forms of external threat, they face business imperatives to organise themselves at least into loose – and sometimes into highly structured – networks.[22] It follows that strategies to counter organised crime may take at least three forms:

- opportunity reduction – decriminalising prohibited goods and services to reduce the demand for illicit providers;
- prosecution – deterring potential offenders through the threat of arrest and incarceration; and
- asset confiscation – deterring potential offenders by directly targeting their profit motive and working capital.

Member States are generally not attracted to reduction in opportunity because it involves normalising the very harms which they seek to combat. Prosecution constitutes the 'traditional' approach to deterring crime, which is widely regarded to have failed to deter organised crime, because the potential profits – especially from drug trafficking – are simply too great.[23] This belief (and in some cases the political popularity of depriving offenders of 'unjust deserts') has given rise to asset confiscation: the deliberate pursuit of criminal assets as a primary goal of the criminal-justice process alongside the traditional goal of convicting offenders (rather than as a mere corollary of the latter) (Hodgson, 1984). The main aim is to deter prospective offenders by ensuring that crime does not pay.

Whilst the force of the microeconomic logic has provided a strong basis for developments at international and EU level, we have already noted (Section 2.4.3) that corresponding macro impacts (in particular reductions in crime) are yet to be scientifically demonstrated. This makes it even more important to examine the two other arguments for asset confiscation.

3.1.2 Restorative justice for victims

Historically, the EU lacked a specific conferral of power in relation to victims, but had nevertheless acted by passing Council Directive 2004/80/EC on compensation to crime victims, which gives victims of violent, intentional crimes the right to submit applications for compensation in their Member State of residence.[24] More recently, the Treaty of Lisbon has specifically recognised the rights of victims as an aspect of the AFSJ.[25]

Organised crime produces many types of victim: individual, corporate, community and societal. Individuals, corporations and communities can all be deprived of their property through acquisitive crimes such as fraud; they may suffer from the threat of violence, as with

[22] See Appendix A.

[23] In the UK, a watershed moment was the case of *R v Cuthbertson* [1980], discussed in Appendix G.

[24] This was done pursuant to Article 308 of the then Treaty Establishing the European Community.

[25] TFEU Article 82(2).

extortion and racketeering; they may be victimised as a result of the provision of illicit goods and services (drugs, sex workers, shoddy counterfeit goods, etc.). Regardless of the type of victim, there is scope for the confiscation and recovery of criminal assets to play a restorative role. For identified victims of acquisitive crimes, it is relatively simple to achieve restitution through the courts, whether through the criminal-justice system or civil proceedings. Different approaches will be needed where the victims are deprived subgroups (e.g. drug users) or entire communities. In these situations, restorative justice may demand state intervention of one form or another.

3.1.3 Promoting confidence in justice systems

An AFSJ presupposes public confidence in the justice systems of Member States. The argument here is simple: people who lack confidence in the justice system will be less inclined to abide by the law or cooperate with criminal-justice agencies. They may also withdraw from their communities, diminishing 'social capital'. In the absence of literature on how asset confiscation affects public confidence (or social capital), it is necessary to undertake a purely logical examination, supported by anecdotal evidence where available.

We begin with the proposition that public confidence demands that criminal-justice systems be efficient, properly resourced and free from corruption, in which case people can expect offenders to be deterred, or else detected, arrested, prosecuted, punished and, hopefully, rehabilitated. These characteristics give rise to two bases for expecting asset confiscation to have a positive impact.

First, public confidence could rise on the assumption that asset confiscation deters crime (even if this is not the case, the microeconomic logic of Appendix A is largely a matter of common sense, and ordinary people are unlikely to distinguish between micro and macro consequences).

Second, public confidence could rise if people regard asset confiscation as essential to proper punishment.[26] In this regard, fieldwork revealed strong anecdotal evidence that visible displays of criminal wealth (especially in one's own community) send the message that 'crime pays', encouraging criminal behaviour from those at the margins, whilst demoralising law-abiding citizens. There is a corresponding imperative for the state to ensure that criminal wealth is not displayed or otherwise publicised; the simplest way to achieve this is to confiscate it.

As law-abiding citizens see criminal assets being confiscated, or perceive a decline in ostentatious displays of criminal wealth, they may conclude that criminal wealth is being successfully pursued, causing their confidence in the criminal-justice system to rise. The impact may be enhanced where assets are returned to victims or victimised communities (especially where the victimised community is one's own.) Furthermore, it seems reasonable to assume a non-linear relationship in which asset-confiscation work first produces isolated, local impacts, which coalesce into wider impacts as the results become generally visible. Thereafter (especially if the media stop carrying stories because they are no longer newsworthy) the marginal impact of additional confiscation activity (upon public confidence)

[26] There is no shortage of anecdotal evidence, in the form of public outrage at the most egregious examples, such as R v *Cuthbertson* [1980] described in Appendix I.

may diminish. The role of the media in this process seems rather obvious. Indeed, the impact upon public confidence (not to mention any associated political impact) could be enhanced through media strategies and community liaison.

3.2 Identifiable problems

We identify two main problems: (1) that the value of assets recovered within the EU is insufficient; and (2) that the redistribution of these assets is inadequate.

3.2.1 Insufficient recovery

The notion that there is a 'problem' of insufficient asset recovery within the EU raises two questions. One is conceptual: is there cause to infer a positive correlation between the proportion of criminal assets recovered and a legitimate goal of the EU? If so, then there is the potential for a problem. The answer, as just discussed, is mixed. We have seen that the most common justification for asset confiscation – that it will help to combat organised crime – is unsupported by empirical evidence and subject to plausible macro-level counterarguments. On the other hand, it is relatively clear that asset confiscation has the potential to benefit victims whilst helping to build public confidence in criminal justice. On these bases we may conclude that a low proportion of criminal assets recovered (i.e. a gap between the amount recovered and the amount which could be recovered) would represent a problem.

Having established the potential for such a problem, the next question is whether it exists in practice. One could approach this question by comparing data on an annual basis, *viz* the value of assets recovered versus criminal turnover. This is in fact a conservative approach in so far as it ignores any unrecovered amounts from previous years which remain recoverable. Unfortunately, reliable data sources are scarce. Appendix A contains some data for the value of assets recovered, but there are few data on organised criminal turnover against which to compare them. Nevertheless, data from the UK and Italy do support the notion of a problem.

In the UK, for example, an official estimate in 2006 put organised criminal revenue at £15bn per annum.[27] Meanwhile, the UK's Joint Asset Recovery Database (JARD) recorded approximately £125m worth of recoveries that year (see Appendix I). This figure is likely to underestimate the proportion of criminal wealth recovered for at least three reasons: it is net of expenses paid to private receivers; it does not include amounts recovered in favour of victims; and for non-financial assets it records values realised at auction, which may be less than values reported stolen. Even so, the data suggest that the vast majority of criminal wealth goes unrecovered, especially given that the £15bn estimate relates only to organised crime. Sproat (2007), investigating other estimates for the UK, reached the same conclusion.

In Italy, the government has recently endorsed an estimate of organised criminal revenue of €135bn per annum.[28] According to data set out in Appendix A (Table B.7), this dwarfs the amounts recovered to the government (including to communities via social reuse programmes) annually.

[27] Referred to in the 2010 Organised Crime Threat Assessment (OCTA).

[28] http://www.antimafiaduemila.com (as at November 2010).

3.2.2 Inadequate redistribution

The aims of asset confiscation are realised not only when criminals are deprived of their ill-gotten gains, but when these are redistributed effectively. In particular, we have noted in Section 3.1 that deliberate efforts may be required to achieve restorative justice where victims are deprived subgroups or communities. We have also noted that the impact of asset confiscation upon public confidence in criminal justice may be enhanced through redistribution.

A problem of inadequate redistribution is more difficult to diagnose than a problem of insufficient recovery, which can be exposed through simple numerical examples where data are available. By contrast, redistributional needs and activities are likely to vary considerably throughout the EU. Our data-colllection efforts (see Appendix A) do suggest, however, that the EU is host to considerable Mafia-style organised crime which can be expected to produce deprived communities. In all Member States, moreover, it is possible to imagine situations where flexible mechanisms for redistribution are necessary – for example, to ensure that organised criminal groups are not able to reaquire criminal assets at an undervalue through intimidatory tactics. On these bases we make inadequate redistribution part of our problem definiation going forwards.

3.3 Causes of the problem

Taken together, the two foregoing problems give rise to three fundamental questions:

- what assets should be liable to confiscation (i.e. how to delineate between assets which are, and are not, 'criminal');[29]
- how to confiscate and recover these assets; and
- what to do with the recovered assets.

The confiscation and recovery of criminal assets may take many forms but, amongst states which respect the rule of law, an essential feature is that it be court ordered. The **confiscation order** is thus central to our problem definition. Accordingly, the question of how to confiscate and recover criminal assets breaks down thus:

- how to identify criminal assets;
- how to preserve these pending a confiscation order;
- how to obtain a confiscation order so that they can be recovered; and
- how to enforce these orders.

These questions represent stages of an attrition process, which is illustrated in Figure 3.1. At each stage of the process, attrition (i.e. a reduction in the size of the asset pool) will occur if tools are inadequate and/or underutilised. This is undesirable because the aim is to confiscate as many criminal assets as possible, making each stage an essential part of the problem definition. Utilisation of tools is an essential aspect of the problem for the basic reason that it

[29] Throughout this report we use the term 'criminal assets' loosely to refer to all assets derived from criminal/unlawful activity, regardless of whether a criminal conviction has been obtained.

bears directly upon the attrition rate at each stage of the process. Thus, in the extreme, zero utilisation at any stage will cause the remaining asset pool to drop to zero.[30]

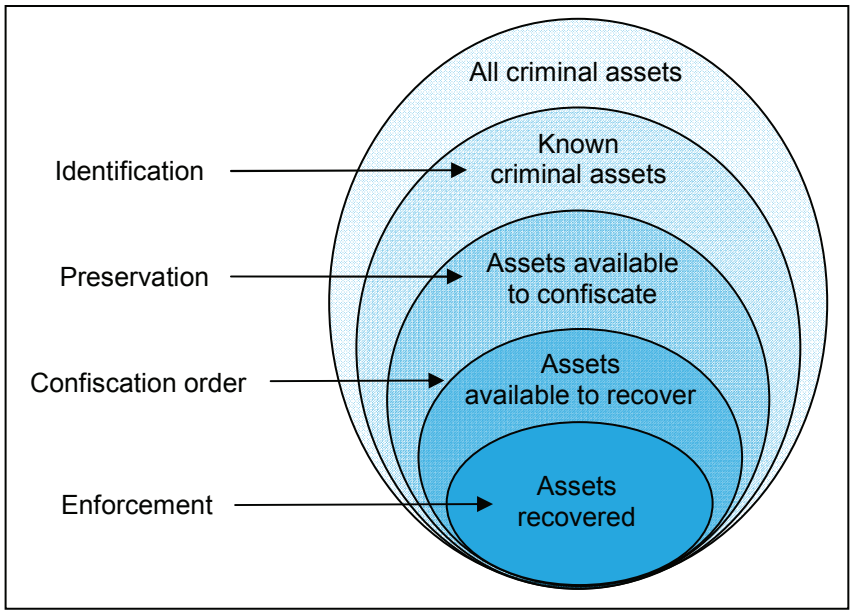


Figure 3.1 Stages of attrition

All but one of the foregoing questions fall within the scope of this impact assessment. The exception is the question of how to identify criminal assets.[31] This is a matter of investigative tools, police powers and access to information, which are issues of broad application relating to other EU legislative frameworks.

Those questions which fall within the scope of this research must now be analysed in more detail. To assist with clarity, we group them in certain ways.

First, it is convenient to examine the underlying question of what assets to confiscate together with problem of how to obtain a confiscation order, as laws will typically answer the first question by delimiting the scope of confiscation orders.[32]

Second, it is convenient to consider the question of utilisation 'horizontally' as an issue which spans different stages of the attrition process, as many of the underlying drivers will apply to multiple stages. This is illustrated schematically in Figure 3.2 (noting that the identification of criminal assets is an aspect of the problem that falls outside the scope of this research).

[30] Mathematically, the attrition rate (A) at each stage is simply the product of the adequacy of law (L) and its utilisation (U): i.e. $A = L \times U$. The overall attrition rate is the product of the attrition rate at each stage, i.e. $A_{identification} \times A_{preservation} \times A_{confiscation\ order} \times A_{enforcement}$.

[31] This delimitation of the problem definition was agreed at the Inception Meeting of 17 May 2010.

[32] This is not always the case. An alternative approach is to deal with questions of scope in laws aimed at preservation. In either case, the underlying issues are the same.

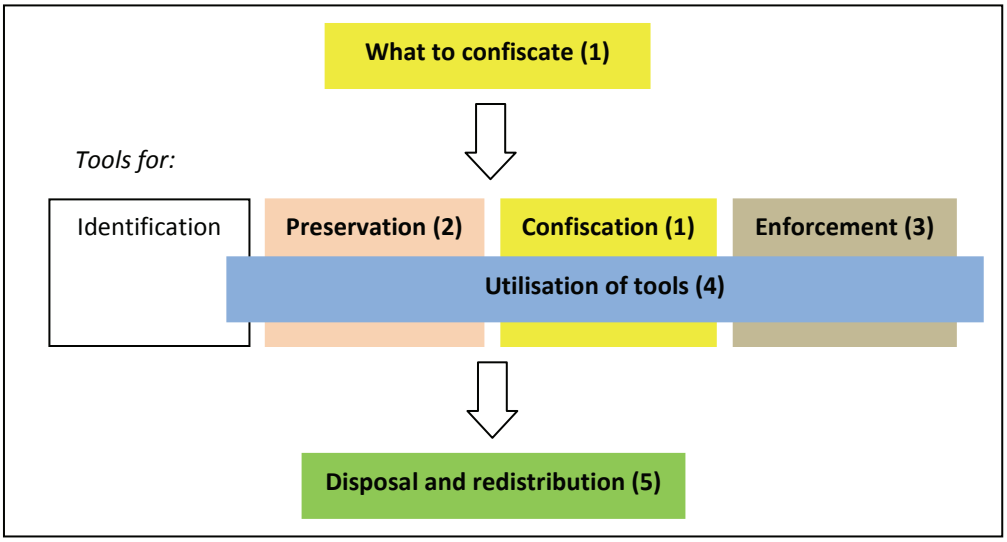


Figure 3.2 Components of the problem definition

Table 3-1 now expresses these five components as causes of the foregoing problems.

Table 3-1 Problems and their causes

Problem	Cause
Insufficient recovery	**Confiscation**: Inadequate powers for confiscating criminal assets
	Preservation: Inadequate powers for preserving criminal assets pending confiscation
	Enforcement: Inadequate powers for enforcing confiscation orders
	Utilisation: Powers of confiscation, preservation and enforcement are underutilised
Inadequate redistribution	**Redistribution**: Member States lack tools to maximise social utility from recovered assets

These five components/causes are now used to structure the remainder of this problem definition. We provide a detailed theoretical exposition of each component before examining the existing EU legal framework and Member-State baselines.

3.4 Theoretical exposition

We examine issues from various perspectives. There is the perspective of the state trying to confiscate criminal assets (or preserve suspected criminal assets). Then there are the perspectives of victims, ranging from identified victims with a claim on a particular asset, through to victimised communities and subgroups. On the opposing side, we examine the perspective of the person who stands to be deprived of the criminal asset, who may be either a suspect/defendant/criminal or a third party. We are thus examining not only the imperative to confiscate and recover criminal assets, but also (drawing upon a fuller discussion in

Appendix A) the need to ensure respect for the fundamental rights of citizens. The words of the EU's 1997 Action Plan are apposite in this regard (European Council, 1997: para. 4):

> The fight [against organised crime] must be uncompromising but must always use legitimate means and pay full respect to the principles of the Rule of Law, democracy and human rights, not losing sight of the fact that it is the protection of those values which is the raison d'être for fighting organised crime.

3.4.1 Confiscation

The most obvious criminal assets to target are proceeds and instrumentalities (i.e. objects used to commit) specific crimes for which a criminal conviction has been obtained. Confiscation of these assets is known as 'ordinary confiscation'. Whilst we are here concerned with combating organised crime, there is no reason in principle for confiscation to be limited to particular types of crime as there is no *prima facie* moral justification for retaining the proceeds of any crime – organised or otherwise.[33]

Given that the purpose of acquisitive crime is to generate proceeds, we assume that the vast majority of criminal assets consist of proceeds rather than instrumentalities. The definition of 'proceeds' is, thus, central to designing a legal framework for the confiscation and recovery of criminal assets. A key distinction may be drawn between **direct proceeds** with an immediate connection to crime (including any payments received for participating in the crime) and **indirect proceeds**, which are any second-order or higher-order profits (e.g. where proceeds are invested into profitable enterprises, or into other assets that appreciate in value). The moral argument for confiscating indirect proceeds is one of unjust enrichment rather than restitution; criminals simply should not be allowed to profit from their crimes. For obvious reasons, laws which encompass indirect proceeds can be expected to have a greater deterrent effect.

At an even more basic level, a definition of 'proceeds' should depend on whether a defendant has benefited in any meaningful way from their criminal conduct. For example, does a tax evader benefit to the tune of the unpaid tax if this remains payable?[34] Should the proceeds of money laundering be the value of the laundered money, or only of any payment received for the service rendered? Should a criminal's 'business' expenses be deductible (the question of 'net' versus 'gross' proceeds)? Whilst there may be reasons of policy for taking an expansive view in answering these questions, there are also arguments the other way, especially in Member States where confiscation is by definition non-punitive, or where there arises the potential for the same proceeds to be forfeited twice over.[35]

The availability of ordinary confiscation can never ensure the recovery of all criminal assets for the simple reason that authorities will not always be able to prove that assets are the proceeds of specific crimes. In some cases, a conviction will have been obtained for the relevant crime but authorities will lack evidence that particular assets are in fact proceeds of this crime. In such cases, the **burden of proof** (i.e. whether the state must adduce evidence

[33] Any carve-out for reasons of fundamental rights (to avoid destitution) is a separate issue from that of *prima facie* availability.

[34] See, e.g., Alldridge and Mumford (2005).

[35] In some Member States this may amount to an infringement of *ne bis in idem*.

that assets are criminal, or whether, in certain circumstances, this is assumed) and the **standard of proof** (i.e. how convinced the court needs to be) matter. In other cases criminal assets will go unrecovered because there is no criminal conviction to serve as a basis for ordinary confiscation. Such cases essentially consist of two types.

First are those where authorities have sufficient evidence but a case cannot be brought because it is time barred or because the defendant is too ill, has died or absconded, lacks legal capacity (e.g. is a minor or of unsound mind), or has immunity from prosecution or amnesty.[36]

Second are those situations in which authorities have insufficient evidence to obtain a criminal conviction. This typology of criminal assets is illustrated in Figure 3.3. Type 1 assets are those amenable to ordinary confiscation proceedings; type 2 assets are those not so amenable due to barriers to prosecution; type 3 assets are those not so amenable due to insufficient evidence; type 4 assets are those not so amenable for both of these reasons.

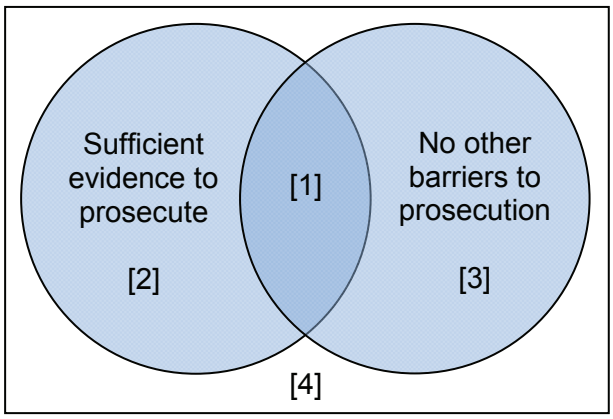


Figure 3.3 Typology of criminal assets

There are strong arguments that authorities should be able to recover known criminal assets notwithstanding that they are not of type 1. As Greenberg *et al.* have recently argued: 'To allow a person who can avoid prosecution to retain his or her illegally acquired assets (or pass the assets on to heirs in the event of death) provides an enormous incentive to any would-be criminal' (Greenberg *et al.*, 2009: 31–33).

This argument is stronger with respect to type 2 assets; it is difficult to argue that someone is morally entitled to retain ill-gotten gains merely because they lack criminal competence, have fled the jurisdiction, have immunity from prosecution, and so on. Yet it also applies to type 3 and 4 assets (i.e. to circumstances in which authorities lack the evidence to convict the perpetrator of a crime that can be reasonably held to have occurred). The two cases, however, commend different solutions. Type 2 assets can be precisely targeted by removing the requirement of a criminal conviction in defined circumstances while maintaining the protections (e.g. standard of proof, evidentiary rules) which the criminal-justice process affords defendants. Assets of type 3 are more problematic because, by definition, their recovery means eroding or circumventing some of these protections which, *ipso facto*, increases the probability of an unjust outcome (i.e. the confiscation of non-criminal assets,

[36] For practical purposes, a defendant who is convicted and then pardoned may be similarly immune to confiscation proceedings.

which would be an infringement of, *inter alia*, the right to property). This means that measures aimed at confiscating type 3 assets need to be more carefully justified. Broadly, they fall into three categories: non-conviction-based (NCB) confiscation, extended confiscation and extended criminalisation.[37]

NCB confiscation essentially involves removing the need for a criminal conviction and substituting civil procedure for some or all aspects of criminal procedure. Some countries have now introduced such regimes. Rather than proceeding against a defendant *in personam*, authorities proceed against a suspected criminal asset *in rem*. They are opposed by any person(s) claiming a legitimate interest in the asset – typically the person accused of having acquired the asset illegally, or someone to whom the asset has been subsequently transferred. It is still necessary to prove criminal conduct (i.e. the elements constituting a crime), but not necessarily to the criminal standard of proof. Likewise, evidentiary rules may be civil rather than criminal.

Extended confiscation essentially means that authorities are not required to establish a connection between suspected criminal assets and specific criminal conduct. Confiscation can instead be based on circumstantial evidence, typically an imbalance between a person's assets and their lawful sources of income and/or general evidence of engagement in profitable criminal conduct (e.g. a pattern of convictions, evidence of participation in a criminal organisation).

Extended criminalisation involves defining non-specific crimes in order to bring type 3 criminal assets within the purview of ordinary confiscation (i.e. they become type 1 criminal assets). For example, Part 7 of the Proceeds of Crime Act 2002 (UK) (PoCA) defines money laundering with respect to non-specific predicate offences.[38] Another approach is simply to criminalise the ownership of assets not corresponding to lawful sources of income.[39]

Each of these approaches must be considered in the light of both fundamental rights and the constitutional and criminal law traditions of individual Member States. Appendix A provides a detailed discussion of the fundamental-rights issues raised by each of these different types of actions. It discusses European Court of Human Rights (ECtHR) case law and seeks to extract the minimum human right standards applicable in this area. Generally speaking, although the more draconian NCB and extended confiscation regimes have been examined by the European Court on numerous occasions, the Court has so far only ruled on their application in the particular case, by applying the principle of proportionality. It has not examined the compatibility of these regimes with the convention *in abstracto*.

Finally, because criminals will naturally seek to put themselves beyond the reach of confiscation orders, confiscation regimes must be designed with this in mind. In particular, they must be applicable where proceeds are no longer in the possession of the criminal. One aspect of this is applicability against assets for which proceeds have been exchanged and – at least in circumstances where even these assets cannot be recovered – against other assets,

[37] Another way to recover assets (often viewed as a last resort) is to tax them and demand any penalties and accrued interest that are payable.

[38] The limits of this are discussed in *R v Anwoir and Ors* [2008].

[39] See, e.g., COM (2008) 766 final, para. 3.3.2.

whether licit or otherwise. This is known as **value confiscation**, and its necessity has long been accepted by all Member States.[40] The logic in support of value confiscation is twofold. There is the moral argument that if authorities can prove that proceeds of a certain value were obtained, there is no reason why this value should be unrecoverable simply because the criminal has successfully hidden the proceeds. There is also the practical argument that, because hiding assets is costly (see Appendix A) criminals will be deterred by the imperative to hide *all* of their assets rather than only their illicit assets.

Even if value confiscation is available, criminals may possess insufficient assets to satisfy a confiscation order – indeed, divesting assets to third parties is a common tactic for defeating authorities.[41] A confiscation regime is thus incomplete without some means of application to third parties. Broadly, there are two routes. One is to base confiscation upon a separate crime (e.g. a 'fencing' or money-laundering charge), in which case there is no longer a third party. The other, known as **third-party confiscation**, is to allow confiscation orders to extend to third parties. The difference here is not simply mechanical: criminality implies moral culpability and a criminal record typically entails other negative consequences. Criminal charges also demand higher procedural safeguards, which are likely to make recovery less likely. They are also likely to be more expensive in terms of court time, because separate criminal proceedings will need to be brought against a different defendant. For all of these reasons, third-party confiscation is likely to be viable in some situations where separate criminal charges are not. This is not to suggest, however, that third-party confiscation is unproblematic. On the contrary, it is inherently problematic for the simple reason that depriving an innocent person of an asset has the potential to affect fundamental rights negatively – in particular the right to property.

A system for third-party recovery must define the circumstances in which the claim of the third party outweighs the public interest in confiscating and recovering criminal assets. The most important factor here is whether the third party is *bona fide*. If not, they do not have the same moral entitlement to the asset. This may be obvious where the person knew, or suspected, that an asset is the proceeds of crime, but the issue becomes less clear cut where it is necessary to apply an objective standard – that is, where their suspicions were not aroused in circumstances where those of a reasonable person would have been. Another relevant factor is the amount, if anything, paid for the asset, as this bears upon the strength of the third party's moral claim *vis-à-vis* the deprived victim. Where a third party has not paid market value, their moral claim may nevertheless be stronger if they have subsequently arranged their affairs in reliance on the asset, such that its confiscation would place them in a position worse than that in which they were originally. In addition to competing moral claims, there are also more practical questions of policy relating to the deterrent effect of third-party confiscation upon criminals who hope to continue to enjoy their ill-gotten gains – either directly or vicariously – in the hands of third parties. This strength of this deterrent effect (and, thus, of the argument for a strong third-party confiscation regime) depends upon the relationship between the criminal and the third party (i.e. whether they are related or at arm's length).

---

[40] See Article 3 of FD 2001/500/JHA.

[41] Although it should be noted that NCB confiscation regimes will generally not require tools for third-party confiscation, as *in rem* proceedings are brought against the person in possession of the asset.

3.4.2 Preservation

The essential tools for preservation of criminal assets are freezing and seizure orders. These have many different names or labels throughout the EU Member States, but essentially fall within two categories: those which allow for assets to be physically seized (referred to here as 'seizure') and those which, at risk of some penalty, ban people from dealing with the asset (referred to here as 'freezing'). Seizure is necessary whenever there is a significant risk that the affected person would deal with the asset notwithstanding a ban on their doing so. This is not typically the case for real estate, bank accounts, security and deposited valuables, which can be frozen with little risk of dissipation – either because the assets are in the possession of a trustworthy financial institution (in the case of bank accounts, securities and deposited valuables) or because special rules prevent disposal of encumbered assets (in the case of real estate).

Ordinarily, where a person's rights are liable to be adversely affected by a decision, procedural fairness (i.e. an opportunity to be heard) must be afforded. The protective purpose of freezing orders does, however, justify some exceptions to due process, especially where assets can be transferred instantaneously, as with money in bank accounts. Two procedures, in particular, help to ensure that assets do not disappear before authorities are able to obtain and enforce a freezing order:

- secret or *ex parte* applications, to ensure that the judicial process does not provide an opportunity to deal in assets before a freezing orders is made and/or enforced; and
- 'precautionary' powers, whereby assets can be temporarily frozen or seized where there is no time to bring an application before a court. This prevents someone from dealing in assets where they have become aware, through the investigative process, that a freezing order may be sought.

In either case, it is essential that procedural norms are restored promptly. It is particularly important, from a fundamental-rights perspective, that the affected person is afforded the opportunity to challenge such measures after their adoption. Precautionary orders should also be endorsed, as soon as possible, by a court of law. In general, given the temporary nature of freezing orders, mechanisms should apply, and/or remedies exist, to ensure that these are not unduly and indefinitely applied.

Unless precautionary action has already been taken, a freezing or seizure order (like a confiscation order), requires enforcement. The issues arising for freezing and seizure, being similar to those which arise for confiscation orders, are discussed in Section 3.4.3 below.

Another important tool for the confiscation and recovery of criminal assets is a system for managing frozen assets and disposing of confiscated assets. This is especially important where seized assets are perishable, or otherwise liable to decline in value if not properly managed (e.g. cars or businesses). In these situations, informed decisions need to be taken to preserve the value of frozen assets. These decisions, however, have an obvious potential to impact upon the rights of affected persons (in particular, the right to property) in circumstances where a confiscation order is not ultimately obtained. According to the ECtHR, this right will not be infringed unless the decline in value is due to the negligence of authorities (see Appendix A).

3.4.3 Enforcement

Enforcement refers broadly to those processes by which assets are recovered in order to satisfy a confiscation order or a freezing/seizure order. Four distinct issues may be identified.

First, there is the simple question of whether orders are backed by sufficient enforcement powers.

Second, there is the question of whether it is efficient to utilise these powers (or whether, on the other hand, the administrative burden exceeds the value of the assets sought to be recovered).

Third, there is the question of whether enforcement unduly infringes upon fundamental rights. In this regard, even if confiscation or freezing powers are themselves compliant with the European Convention on Human Rights (ECHR), there may be circumstances in which the enforcement of an order would have a disproportionate impact upon the fundamental rights of the person in possession of the asset. For example, there is the possibility that the right to private and family life,[42] and in extreme cases even the prohibition against inhumane treatment,[43] may be unacceptably infringed where a person is left destitute.

Fourth is the question of whether orders can be enforced in other jurisdictions. As between EU Member States, this is an aspect of the wider goal of a European Judicial Area, as well as an essential tool for Member States to keep pace with organised crime, which, which greater agility, can avail itself of the Four Freedoms. It presents two questions: what foreign orders should be recognised, and how should they be recognised?

Regarding the question of **what foreign orders should be recognised**, there is a need to achieve sufficient enforceability of orders whilst ensuring that the judicial systems of receiving Member States are not overburdened with minor cases. Delimitation can be with reference to the type of criminal activity, the applicable criminal penalty, or the value of the proceeds obtained. There is also a need to allow for non-recognition where this is demanded by other, competing, legitimate interests – for example, the *ne bis in idem* principle (i.e. where assets have already been confiscated in relation to the crime in question). There are circumstances which demand only postponement too – for example, where enforcement is liable to prejudice ongoing criminal investigations.

Turning now to the question of **how foreign orders should be recognised**, the EU has in the last decade moved away from traditional concepts of mutual legal assistance (MLA) towards an enhanced form of judicial cooperation known as MR. Described by the 1999 Tampere European Council as 'a cornerstone' of MLA within the EU, MR has since been enshrined by the Treaty of Lisbon as the prevailing paradigm.[44] Essentially, it means that Member States' judicial authorities are required to enforce properly transmitted foreign judgments and orders, unless an exception applies. Underlying it is an assumption that Member States, having mutual confidence in each others' legal systems, need not review the substance of foreign judgments and orders. Traditional MLA, on the other hand, involves

[42] Article 8 ECHR.

[43] Article 3 ECHR.

[44] TFEU Article 82.

Member States examining incoming requests and responding, as appropriate, under their domestic system.

In theory, MR is fast and efficient because it does not involve the processing of requests via central authorities, because it narrows the scope of enquiry in the receiving Member State, and finally because it indirectly encourages the harmonisation of procedures. Realising these benefits depends, however, upon Member States actually using the MR procedures (i.e. circulating orders under cover of the prescribed forms). A decade of experience indicates that this uptake is unlikely to occur if practitioners do not perceive a clear benefit to new MR procedures (in which case, instead of transitioning, they will continue to use residual procedures for MLA). Thus, to ensure uptake, MR procedures should:

- be as simple as possible;
- demonstrate clear advantages;
- be communicated to relevant judicial officers; and
- be available in all Member States.

Potential barriers to MR are not only constitutional. In particular, and despite statements to the contrary at EU level, Member States may still lack confidence in each others' justice systems (Van Tiggelen and Surano, 2008). This has led to the incorporation of various safeguards in transposing existing MR instruments. For example, several Member States, in implementing FD 2002/584/JHA on the European Arrest Warrant, retained the ability to review the substance of foreign decisions in limited circumstances.[45] There has, in general, been a hesitance to strip national courts of the ability to review a foreign order for compliance with fundamental rights (even if this means examining the substance of the order, *contra* the principle of MR) in circumstances where no other court may be willing to do so. Furthermore, the ECtHR has ruled that states party to the convention must refuse cooperation where there has been a 'flagrant' violation of the convention or denial of justice (*Drozd v. France and Spain* [2008]), and this ground has been invoked by Member-State national courts in numerous cases.[46]

Looking ahead, the extension of the EU courts' jurisdiction to the old 'third pillar' should help to alleviate concerns over fundamental rights in two ways.

First, the EU legal framework will have direct effect, allowing it to be invoked by individuals before national courts to challenge national laws falling within its scope.

Second, the Commission will have the power to proceed in EU courts against Member States that breach their EU law obligations, including the obligation to respect fundamental rights when implementing EU law.

[45] The UK, for instance, retained their right to assess the compatibility of the foreign decision with fundamental rights despite ECHR authority that states should assume that fellow signatories do not disregard their obligations under the Convention; see *Pellegrini v Italy* [2001].////

[46] See, e.g., Amsterdam [2005], where the Court refused to recognise a Spanish extradition request because the length of time that has passed since the original offence constituted a flagrant breach of Article 6 ECHR.

All of this should make national courts more accepting of each others' orders, because they can afford MR in the knowledge that infringements of fundamental rights can be reviewed at EU level.

3.4.4 Utilisation

Utilisation of laws and tools depends upon the roles, powers, discretions and motivations of those agents who investigate criminal assets; those who pursue them in court; and those who pass judgment. Where these are the same police, prosecutors and judges who investigate, prosecute and try criminal cases, there is the potential for resource constraints to discourage asset-recovery work. Whether or not this happens will depend on how agencies and, ultimately, individuals are incentivised and performance assessed. If assessment is based on the number of criminals apprehended, or the number of successful prosecutions, or the rate at which criminal cases progress through the judicial system (i.e. if it is biased towards traditional criminal-justice work as opposed to asset-confiscation work) then asset-confiscation work is unlikely to be prioritised. Even in the absence of such bias, agents of the criminal-justice system may be slow to adopt new functions in the absence of specific incentives to do so. This is especially so if training and additional resources are not made available for this purpose. Barriers may also be cultural (for agents who do not see asset-confiscation work as their role because it has not been so traditionally) or ideological (for agents with memories of property rights disrespected by totalitarian regimes). They may even be perverse, as where an agent is reluctant to move against someone who is politically influential. Even where all of these factors can be discounted, simple bureaucratic inertia may suffice to ensure a slow uptake of new functions.

For all of these reasons, utilisation of new laws by practitioners is largely a matter of incentives,[47] of which there are essentially two types:

- **Positive incentives** may be construed as rewards for engaging in asset-confiscation work.
- **Negative incentives** may be construed as punishments for not doing so.

A Member State wishing to promote asset-confiscation work could even go so far as to make certain steps mandatory, rather than discretionary.

It should not, of course, be taken for granted that Member States regard a greater emphasis on asset-confiscation work as being in their interests. Instead, in deciding whether to incentivise this work they may take into account a number of financial considerations. In the first instance, there is profitability in the direct sense (i.e. the cost of the work versus the value of the assets recovered). Then there are also potential higher-order impacts. If the work succeeds in reducing the rate of crime, there will be savings resulting from a reduction in negative externalities (e.g. fewer costs to the health care system). However, Member States that are relatively attractive destinations (havens) for criminal assets may – especially if the negative externalities associated with these assets are borne elsewhere – fear capital flight. Of

[47] It also depends on having adequate laws and tools in the first place. From the practitioner's perspective, it must be difficult to motivate oneself to begin a financial investigation if one is inadequately trained or equipped; equally so to seek freezing in support of a confiscation order which one is very unlikely to obtain.

course, if (as we argue elsewhere in this report) Member States lack the necessary data to assess profitability, policy-makers' appetite for risk becomes the important factor.

Other motivations may be non-financial. In theory at least, if Member States subscribe to the argument that asset confiscation is an effective way to combat organised crime, they should be motivated to support asset-confiscation work, in the interests of justice and victims, even if it is unprofitable. It is of course possible that some Member-State governments remain unconvinced about the necessity of asset-confiscation work, despite this message having been repeatedly conveyed internationally and by the EU. It is also possible that Member States do not necessarily behave as rational actors for perverse, political reasons (e.g. because persons in positions of power have links to organised crime, or because they may be implicated by the 'money trail' generated by asset-confiscation work).

3.4.5 Redistribution

Having considered those aspects of the problem definition that bear upon the amount of criminal assets recovered, we now turn to consider how these can be disposed of and redistributed. The aim here is to maximise social utility by restoring assets to victims and boosting public confidence in criminal justice (see Sections 3.1.2 and 3.1.3).

As regards victims, a regime for redistribution must first ensure restitution for identified victims ahead of the state in a residual capacity. Beyond this basic proposition lie several vexed questions. Should the state take priority over civil creditors? This has the potential to transfer loss to innocent third parties, but the alternative provides yet another mechanism for criminal wealth to be rendered irrecoverable (i.e. by creating liabilities which are difficult for authorities to trace as bogus, and then declaring bankruptcy). Another question is how to compensate victims who are dispersed or unknown. In some cases (e.g. where consumers have been defrauded) there are the procedural questions of how to identify and accommodate potentially thousands of victims. In other cases the nature of the victimisation is itself the issue. The damage suffered by victims of drug-related violence or robbery is only indirectly referable to the activities of dealers and traffickers. Mafia-type groups impact negatively upon entire communities over extended periods. In such circumstances, legal claims may be an inefficient mechanism for compensating victims. It may be more efficient for the state to pursue appropriate social programmes in favour of entire victimised groups or communities, in which case there are two approaches. One approach is to commit criminal assets – either directly or following liquidation – into a 'social reuse' programme. The opposite approach is to have no such formal link, allowing confiscated assets to vest in the general state revenue.

Whatever the model chosen, liquidation of criminal assets raises the possibility of criminals buying them back. In most cases, this will be undesirable due to the message sent. In the words of one Italian prosecutor whom we interviewed: 'Should, instead, Mafiosi be able to re-buy confiscated assets, the psychological effects would be devastating and the message spread would ... be a tangible proof, for the entire community, of the power of organised crime.'

Member States may face practical difficulties (and perhaps even constitutional difficulties) in excluding the criminals, or their associates, from a public sale process. They may also fail to realise a decent price if organised criminals intimidate rival bidders at auction or simply if organised criminals are the only wealthy members of the community in which an immoveable asset is located.

Social reuse programmes can help to overcome such problems. They can also send positive messages that reinforce public confidence in the criminal-justice system. This is a matter of amplifying the message already flowing from the confiscation itself and making it enduring. This effect can be achieved when assets are liquidated to fund social programmes, but it is potentially far greater where assets are directly reapplied to social purposes. This will of course depend on the location and type of assets. Real estate in the affected community itself can be socially reapplied to tremendous symbolic effect, whereas investments away from the affected communities (especially foreign assets) may be more apt for liquidation. In any case, the end is the same: to provide tangible social benefits whilst reminding the community that the state is active in combating organised crime.

Social reuse programmes also produce direct social benefits that flow through to victimised communities and disadvantaged groups. Some such benefits could equally well be achieved through directly funded social programmes, but there are certain circumstances in which a social reuse programme may be preferable. In particular, where a community has suffered entrenched and enduring Mafia-type organised crime, a successful law-enforcement operation may leave a vacuum in the local economy. This is because the wealthy criminals provide employment income for many in the legal economy both through extravagant consumption and also by investing in property developments and local businesses (both licit and illicit). Furthermore, many of these businesses deliver services, both illegal (e.g. private protection and 'enforcement' services for business contracts) and legal (e.g. garbage collection). Unless action is taken to fill the ensuing economic void, communities are liable to economic downturn and a resurgence of organised criminal activity. Social reuse programmes, backed by the state (and, indeed, by local communities themselves), have the potential to achieve this in circumstances where private entrepreneurs are unlikely to do so (at least in the short term) due to the historical presence of organised crime. They can help to transition from a Mafia economy into a licit economy.

Efficiency must also be considered when determining how best to provide restorative justice for deprived communities. Social reuse programmes have benefits, but creating an additional redistributive mechanism for confiscated criminal assets entails additional administrative costs (although costs associated with liquidation are avoided). Moreover, management of confiscated assets may require specific knowledge or skills, the lack of which could result in mismanagement and loss of value. Losses could also accrue if authorities fail to identify assets that are inapt for social reuse (such as an inefficient business, the real purpose of which was to facilitate money laundering).

Corruption also presents as a risk. If social reuse schemes (or individual assets redistributed through them) are managed corruptly then the result will be to damage further, rather than restore, confidence in the criminal-justice system. Because corruption and organised crime tend to go hand in hand (see discussion in Appendix A) this risk is greatest in the very circumstances (entrenched Mafia-style groups) where social reuse has the potential to do the most good. To avoid maladministration it is especially important that programmes are carefully designed with corruption in mind – for example, a degree of central control, transparency and reporting obligations, all of which, it should be noted, will add to the risk of bureaucratic inefficiency. The risk of corruption, although significant, is hardly unique to social reuse programmes. Indeed, a system involving liquidation of assets in favour of the state presents comparable corruption risks.

Whether social reuse programmes will be beneficial overall will depend upon the circumstances prevailing in different countries. It is for this reason that the FATF recommends only that Member States should consider 'Establishing an asset forfeiture fund in its respective country into which all or a portion of confiscated property will be deposited for law enforcement, health, education, or other appropriate purposes.' (FATF, 2003: Recommendation 38)

Finally, a further source of complexity arises in cross-border cases where assets are recovered pursuant to confiscation orders executed in other countries, giving rise to the question of how they should be split between issuing and executing Member States. Protocols for asset sharing need to take account of two competing imperatives. On the one hand, an entitlement to a share of the recovered assets may serve to incentivise authorities within the executing Member State. On the other hand, it can be argued that victims should retain primacy over states as residual beneficiaries even where the assets are located in a different country. In crafting a protocol on this basis, it would be necessary to specify which Member State is entitled to approve and value the claims of victims. At the very least, a working definition of 'victim' would be needed.

3.5 Existing measures at EU level

An existing EU legal framework consists primarily of FDs on confiscation orders (FD 2005/212/JHA), MR of freezing orders (FD 2003/577/JHA) and MR of confiscation orders (FD 2006/783/JHA). There is also Council Decision 2007/845/JHA, which aims to enhance the practical utilisation of confiscation laws. Complementing the pre-existing CARIN practitioner network,[48] it requires Member States to designate Asset Recovery Offices (AROs) to facilitate the tracing and identification of cross-border criminal assets, including by exchanging information and best practices. Non-legislative measures at EU level include implementation workshops in relation to the FDs, as well as ARO platform meetings which aim, *inter alia*, to share information and promote best practice.

The existing EU legal framework is now described in detail with respect to the five-category problem definition structure derived above. Whilst its stated purpose is to combat organised crime, with the exception of the provisions on extended confiscation in FD 2005/212/JHA, the EU legal framework is not limited to organised crime in particular.

3.5.1 Confiscation orders

Confiscation law is harmonised by FD 2005/212/JHA. Ordinary confiscation is required by Article 2(1):

> Each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.

Proceeds are defined in Article 1 as 'any economic advantage from criminal offences', but it is not clear that this incorporates *indirect* proceeds achieved through reinvestment. Nor is it clear, from the usage of the word 'or', that Article 2(1) demands a regime for value

[48] C ARIN is an informal practitioner network. Membership of it is open to Member States and to states, jurisdictions and third parties invited to the CARIN launch congress in 2004. Observer status is available to those that cannot be members.

confiscation, although even if it does not, Article 3 of FD 2001/500/JHA clearly does in cases where 'proceeds cannot be seized'. No attempt is made to prescribe a standard of proof regarding the question of whether particular assets are proceeds. Nor are there compulsory provisions on recovery from third parties.

Article 3 then sets out minimum requirements for extended confiscation, *viz* where an offence is 'committed within the framework of a criminal organisation' and 'covered by' one of several FDs dealing with specific criminal activities, then a Member State must provide for confiscation of at least one of the following three categories of property:

> (a) where a national court based on specific facts is fully convinced that the property in question has been derived from criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,
>
> (b) where a national court based on specific facts is fully convinced that the property in question has been derived from similar criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,
>
> (c) where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person.

This is a rather limited regime for extended confiscation, for several reasons.

First, it applies only to property of the defendant falling within one of the three categories cited above. Thus, if a Member State implements only para. (b), then extended confiscation will not be possible based on evidence of proceeds from dissimilar criminal activities, nor evidence of assets disproportionate to lawful income, nor, indeed, evidence of participation in a criminal organisation.

Second, the regime applies only to the following offences:

- counterfeiting the euro;
- money laundering;
- human trafficking;
- unauthorised entry etc.;
- child sex/pornography; and
- drug trafficking.[49]

Third, the regime only applies to offences 'committed within the framework of a criminal organisation' as defined by Article 1 of Joint Action 98/733/JHA, *viz*:

> a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years.[50]

[49] This list is more limited than the lists of offences to which MR of freezing and confiscation orders applies (see below).

This definition carries several elements, the proof of which will detract from prosecutorial resources for the vast majority of cases in which it is not part of the offence giving rise to confiscation. Its effect, if transposed, is likely to be to discourage the utilisation in practice of extended confiscation powers.

Fourth, there is no requirement for NCB confiscation.[51] This includes type 2 assets (i.e. circumstances in which a conviction is unobtainable for non-evidentiary reasons).

Fifth, the regime does not extend to assets in the possession of third parties. Article 3(3) provides only that Member States 'may also consider' measures to enable confiscation of 'property acquired by the closest relations of the person concerned and property transferred to a legal person in respect of which the person concerned – acting either alone or in conjunction with his closest relations – has a controlling influence'.

3.5.2 Preservation

The existing EU legal framework does not impose any requirements upon Member States regarding preservation of assets pending confiscation.

3.5.3 Enforcement

The EU legal framework contains two FDs for the MR of freezing and confiscation orders. These exist in parallel to residual MLA procedures, which remain in common use for freezing and confiscation orders, so it is useful to examine these first.

'Mutual assistance in criminal matters' is governed by the 1959 CoE Convention, to which all EU Member States are party, and the supplementary 2000 EU Convention. Parties to the 1959 convention 'undertake to afford each other ... the widest measure of mutual assistance'.[52] This non-specific commitment is weakened by most EU Member States reserving the right to refuse requests in certain circumstances. A common basis for refusal is the absence of 'dual criminality' (i.e. where the act in question is not criminal in both the requesting and the executing state). All but three EU Member States assert the right to refuse, on this basis, requests for search and/or seizure of property.[53]

Non-conviction-based orders lie outside the scope of these conventions, so it is necessary to turn to their civil equivalent, namely the Brussels I Regulation, which lays down rules for recognition and enforcement of civil and commercial judgments (European Union, 2000). Although this regulation was apparently not written with quasi-criminal judgments in mind, NCB orders are not amongst the types of orders explicitly excluded from the definition of

---

[50] This instrument has been replaced by FD 2008/841/JHA, which narrows the definition slightly by adding that the purpose of the offence be 'to obtain, directly or indirectly, a financial or other material benefit'.

[51] There is only Article 3(4), which provides that Member States 'may use procedures other than criminal procedures to deprive the perpetrator of the property in question'. Aside from being merely optional, this arguably refers only to enforcement mechanisms rather than the question of what property is liable for confiscation, because the 'property in question', according to Article 3(1), is 'property belonging to a person convicted of an offence'. cf. Greenberg *et al.* (2009).

[52] CoE 1959, Article 1(1).

[53] Only Greece, Italy and Latvia do not make this reservation. In most cases the reservation takes the form of a declaration lodged pursuant to Article 5(1), which specifically envisaged dual criminality as a basis for non-recognition. The reservations of each Member State are listed at: http://conventions.coe.int.

'judgment' as 'any judgment given by a court or tribunal of a Member State, whatever the judgment may be called'.[54] Nevertheless, incoming orders need to be recognised via an *exequatur* procedure, and this may raise difficulties where civil courts in the Member State of enforcement simply lack jurisdiction to make an order of this type. It is also worth noting that the Brussels I Regulation contains a 'contrary to public policy' basis for non-recognition.[55]

Three further conventions dealing specifically with the confiscation and recovery of criminal assets contain provisions on MLA. These are: the 1990 CoE Convention, the 2000 UN (Palermo) Convention and the 2005 CoE Convention.

The 1990 CoE Convention, to which all EU Member States are party, sets out minimum standards for MLA. In particular, Article 13 provides that parties, upon receipt of a request for confiscation, shall either enforce it or 'submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it'. Article 11 provides for 'necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal' of property that may become the subject of a confiscation order. A clear gap in this regime, however, is that there is no obligation to take provisional measures during the crucial early stages of an investigation, but only after the requesting party has 'instituted criminal proceedings or proceedings for the purpose of confiscation'.

The 2000 UN (Palermo) Convention and the 2005 CoE Convention, like the 1990 CoE Convention, give parties a choice between enforcing an incoming confiscation order and taking the necessary steps to obtain a domestic confiscation order.[56] Both also require MLA for freezing, in broader terms than the 1990 convention.[57]

The 1990 and 2005 CoE conventions are not limited to conviction-based confiscation orders. Whilst neither convention purports to *require* parties to recognise NCB orders if doing so would be incompatible with domestic judicial systems, both contain a *basis* for recognition. Within the 1990 convention, NCB orders are subtly recognised by Article 11, which provides for freezing in support of 'criminal proceedings or proceedings for the purpose of confiscation'.[58] The 2005 convention, in force in 12 EU Member States, is clearer, stating in Article 23(5):

> The Parties shall cooperate to the widest extent possible under their domestic law with those Parties which request the execution of measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions, in so far as such measures are

[54] Article 32.

[55] Article 34.

[56] Palermo Convention Article 13(1); CoE 2005, Convention Article 23(1).

[57] Palermo Convention Article 13(2); CoE 2005, Convention Article 21.

[58] This acknowledgement of NCB confiscation proceedings is clearer in para. 43 of the Explanatory Report to CoE 1990, *viz*: 'Any type of proceedings, independently of their relationship with criminal proceedings and of applicable procedural rules, might qualify in so far as they may result in a confiscation order, provided that they are carried out by judicial authorities and that they are criminal in nature, that is, that they concern instrumentalities or proceeds. Such types of proceedings (which include, for instance, the so called "*in rem* proceedings") are ... referred to in the text of the Convention as "proceedings for the purpose of confiscation".'

> ordered by a judicial authority of the requesting Party in relation to a criminal offence, provided that it has been established that the property constitutes proceeds or other property in the meaning of Article 5 of this Convention.[59]

All of these MLA instruments exist in parallel to the EU legislative framework for the MR of freezing and confiscation orders, consisting of FDs 2003/577/JHA (freezing) and FD 2006/783/JHA (confiscation).[60] MR offers two potential advantages to traditional MLA mechanisms.

First, and recalling Section 3.4.3, it should offer a faster, more efficient means of cross-border enforcement, because it involves direct contact between judicial authorities without interposing central authorities. In this regard, both FDs prescribe protocols for the transmission of orders to competent judicial authorities (i.e. those in the receiving Member State with competence to execute foreign orders) under cover of standard forms.[61] Upon receipt of a properly transmitted order, competent authorities are required to recognise it 'without further formality' and to 'forthwith' take the measures necessary for execution.[62]

The second potential advantage of MR is that it presents an opportunity to require recognition that would be merely optional under traditional MLA. In this regard, the scope of the EU legal framework is delimited in various ways. In general, delimitation is via the concept of dual criminality, with reference to the type of offence and the penalties incurred. Member States are required to afford MR for listed offences punishable by three or more years' deprivation of liberty, as well as where 'the offence the acts for which the order was issued constitute an offence under the laws of [the executing Member] State'. The listed offences are:

- participation in a criminal organisation;
- terrorism;
- trafficking in human beings;
- sexual exploitation of children and child pornography;
- illicit trafficking in narcotic drugs and psychotropic substances;
- illicit trafficking in weapons, munitions and explosives;
- corruption;
- fraud, including that affecting the financial interests of the European Communities within the meaning of the convention of 26 July 1995 on the protection of the European Communities' financial interests;
- laundering of the proceeds of crime;

---

[59] See also para. 165 of Explanatory Report to CoE 2005 and paras. 24–26 of the Venice Commission Interim (2010).

[60] The concept of a 'freezing order' as defined in Article 2 of FD 2003/577/JHA encompasses both 'freezing' and 'seizure' in the sense used in Section 3.4.2. The concept of a 'confiscation order' as defined in Article 2 of FD 2006/783/JHA is essentially the same as in Section 3.4.1.

[61] FD 2003/577/JHA Article 4; FD 2006/783/JHA Article 4.

[62] FD 2003/577/JHA Article 5; FD 2006/783/JHA Article 7. FD 2003/577/JHA explicitly states that freezing orders are to be executed in the same way as for a freezing order made by an authority of the executing state; FD 2006/783/JHA does not contain an equivalent statement for confiscation orders.

- counterfeiting currency, including of the euro;
- computer-related crime;
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties;
- facilitation of unauthorised entry and residence;
- murder, grievous bodily injury;
- illicit trade in human organs and tissue;
- kidnapping, illegal restraint and hostage-taking;
- racism and xenophobia;
- organised or armed robbery;
- illicit trafficking in cultural goods, including antiques and works of art;
- swindling;
- racketeering and extortion;
- counterfeiting and piracy of products;
- forgery of administrative documents and trafficking therein;
- forgery of means of payment;
- illicit trafficking in hormonal substances and other growth promoters;
- illicit trafficking in nuclear or radioactive materials;
- trafficking in stolen vehicles;
- rape;
- arson;
- crimes within the jurisdiction of the International Criminal Court;
- unlawful seizure of aircraft/ships; and
- sabotage.[63]

Bases for non-recognition, non-enforcement and postponement are exhaustively set out in the FDs. Some of these leave significant scope for interpretation. One might wonder, for example, at what stage does execution of a foreign confiscation order become 'impossible' due to conflicting third-party rights?[64]

Delimitation is also contained in the definitions of 'property' within the two FDs. In FD 2003/577/JHA, property includes anything which is 'the proceeds of an offence ... or equivalent to either the full value or part of the value of such proceeds'. To this definition FD 2006/783/JHA adds anything 'liable to confiscation resulting from the application in the issuing State of any of the extended powers of confiscation specified in Article 3(1) and (2) of Framework Decision 2005/212/JHA'. The reason for this difference appears to be that FD 2003/577/JHA predates harmonisation of extended confiscation under FD 2005/212/JHA. In any event, it effectively limits MR of freezing orders to cases of 'ordinary' confiscation.

This is not to say that FD 2006/783/JHA is unproblematic. It does not apply to NCB confiscation orders,[65] nor to extended confiscation orders falling outside the scope of Article

[63] FD 2003/577/JHA Article 3(2); FD 2006/783/JHA Article 6(1).

[64] FD 2006/783/JHA, Article 8(2)(d).

[65] Article 8(2)(g).

3(2) of FD 2005/212/JHA. In fact, its relationship to FD 2005/212/JHA is even more tortuous, because – recalling that Article 3(2) of FD 2005/212/JHA gives Member States a choice of three approaches to extended confiscation – there is a partial ground for non-recognition where the executing Member State has not provided for the type of orders in question, whereby that it 'shall execute the confiscation order at least to the extent provided for in similar domestic cases under national law'.[66]

Issues of scope also arise because FD 2006/783/JHA exists alongside FD 2005/214/JHA on MR of 'financial penalties'. Financial penalties are defined to include 'the obligation to pay ... compensation ... for the benefit of victims' but only 'where the victim may not be a civil party to the proceedings and the court is acting in the exercise of its criminal jurisdiction'.[67] This definition goes on to exclude explicitly 'orders for the confiscation of ... proceeds of crime' (presumably any orders to which FD 2006/783/JHA applies) as well as any orders enforceable under the Brussels I Regulation, thus avoiding any overlap between the various means of enforcement.

The delineation in scope between FD 2006/783/JHA and FD 2005/214/JHA depends upon the meaning of 'confiscation' within the latter (which predates the former). The difference may be that *confiscation* orders are defined with reference to the proceeds generated by a crime, whereas *compensation* orders are defined with reference to the loss suffered by the victim. In practice, provided both instruments are available as between two Member States, it is unlikely to matter whether an order falls within the scope of FD 2006/783/JHA or FD 2005/214/JHA (unless the executing Member State is reluctant to share the recovered assets, for which see Section 3.5.5 on redistribution).[68] However, the reference in FD 2005/214/JHA reminds us that not all orders for the recovery of criminal assets will fall within either of these instruments. In particular, where a court exercises civil jurisdiction then enforcement is no longer a matter of 'judicial cooperation in criminal matters' and we are in the domain of the Brussels I Regulation. This is significant because Member-State judicial authorities would no longer take the lead; enforcement would instead be at the initiative of the victim.

3.5.4 Utilisation

The EU legal framework contains no provisions dealing directly with utilisation, although some provisions may have an indirect effect.

3.5.5 Redistribution

The EU legal framework deals with redistribution only in cross-border cases, by providing in Article 16 of FD 2006/783/JHA that recovered assets are to be shared 50/50 between the issuing and enforcing Member States, unless they agree otherwise (except for sums below €10,000, which need not be shared by the enforcing Member State). This guaranteed return gives Member States an incentive to utilise FD 2006/783/JHA – at least when compared to

[66] Article 8(3).

[67] Article 1(b)(ii).

[68] Both instruments clearly contemplate orders made with victims in mind: see Article 13 of FD 2005/214/JHA and clause 4 of the preamble to FD 2006/783/JHA. However, neither instrument contains a mechanism to achieve restitution directly; as discussed in Section 3.5.5, recovered assets will in the first instance be split between the issuing and executing Member States.

the status quo *ante* in which there was no requirement for asset sharing. It also sets FD 2006/783/JHA apart from FD 2005/214/JHA on MR of financial penalties, which allows the executing Member State to retain the entire penalty unless agreed otherwise.

Neither FD 2006/783/JHA nor FD 2005/214/JHA establishes mechanisms for recovered assets to be returned to known victims, even where this is contemplated by the order being enforced. The assumption – implicit in the former and explicit in Article 13 of the latter – is that the two Member States will be able to agree on the return of assets to victims, probably via the issuing Member. Seen in this light, a civil order enforceable under Brussels I, whilst it requires more effort on the part of the victim, at least avoids the (hopefully unlikely) possibility that the victim is denied restitution because the enforcing Member State decides to retain some or all of the assets in question.

3.6 Member-State baselines

The following baselines – informed throughout by fieldwork and desk research at the Member-State level – describe prevailing law and practice. Some utilisation trends and legislative proposals are also noted, but it is generally fraught to attempt to predict how a particular Member State's law and practice will evolve into the future. Even where we gained insight into aspects of the system which practitioners identify as deficient (as in Sweden), it is not obvious that Member-State law-makers will address these deficiencies any time soon, especially if there are attendant concerns about fundamental rights. It is therefore far less speculative to examine baseline trends for the EU as a whole, which we do later in Section 6.1.

3.6.1 Confiscation orders

Key elements of Member-State confiscation regimes are tabulated in 0. Each confiscation regime is listed individually (most Member States have more than one), and the following characteristics described:

- relevant Member-State laws;
- type of regime (whether ordinary, extended, NCB);
- date of introduction;
- trigger event (whether certain types of crime, minimum value, etc.);
- extent (whether proceeds of other crimes recoverable);
- definition of proceeds (direct or indirect; gross or net);
- value confiscation;
- standard of proof (for the question of whether assets are proceeds);
- burden of proof (whether reversed or shared);
- procedure (including timing); and
- third-party confiscation.

There are numerous points to note when interpreting this table. The first is that not all of the more controversial aspects of Member-State confiscation laws have survived constitutional challenge. Some extended confiscation regimes are yet to be definitively upheld. In Slovakia, where a NCB confiscation law was ruled unconstitutional in 2008, the legislature has recently

introduced a similar law together with a constitutional amendment, but doubts remain.[69] Experts interviewed in Greece and Estonia expressed grave constitutional concerns and considered it not unlikely (international pressure notwithstanding) that their countries' extended confiscation regimes would eventually be ruled unconstitutional. This is not unheard of: whilst many extended confiscation regimes have survived constitutional challenge,[70] in 2003, following a decade of uncertainty and academic controversy, Germany's 'asset penalty' was laid to rest by the Bundesverfassungsgericht.[71]

A related point is that in some Member States extended confiscation regimes are already pressed against the limits of constitutionality. Evidence of this comes from court decisions, as in Germany, where the Bundesverfassungsgericht upheld the extended confiscation regime in 73d of the Criminal Code,[72] but also from the legislative process, as in Finland, where a reversal of the burden of proof was removed from proposed extended confiscation laws by the parliament's constitutional committee. It is also important to note that constitutional limits are not uniform throughout the EU. Although some concepts such as the presumption of innocence and the right to property are found in many places, uniform interpretations should not be expected. Furthermore, some constitutions contain more protections than others. The Greek constitution protects many rights; the Romanian constitution deals explicitly with the confiscation and recovery of criminal assets, by providing that 'goods intended, used or resulting from crimes or offences can be confiscated only in the conditions set out by the law',[73] and that 'licit acquired assets cannot be confiscated. The licit character of the acquired assets is presumed'.[74]

Constitutionality aside, it is important to realise that some legal tools may be more necessary in some Member States than in others (even if Member States faced identical organised-crime threats, this would be the case owing to their having different legal systems). To take a concrete example, NCB confiscation is most useful, in the language of Section 3.3, in Member States where there are a smaller proportion of 'type 1' assets because criminal convictions are more difficult to obtain. Variations in this regard could be due to different

[69] On 3 September 2008, the Slovakian Constitutional Court declared Law 335/2005 to be unconstitutional, noting that it could become an arbitrary tool in the hands of public authorities. On 26 March 2010, the Slovakian parliament passed Act 101/2010 in similar terms, together with Constitutional Act 100/2010, inserting into Article 20 of the constitution a statement that the constitution does not protect illicit assets. For a discussion see Stahovcová (2010) (as of access date).

[70] e.g. the UK's 'criminal lifestyle' provisions, Sweden's Article 36(1b) and Germany's Section 73(d).

[71] Decision of the *Bundesverfassungsgericht (Federal Constitutional Court)* [2002]. The Court held that the 'asset penalty' in *StGB* s43a, a flexible instrument that allowed for confiscation of all of the defendant's assets, infringed the principle of 'clarity and definiteness' in Article 103(2) of the German constitution. For a discussion, see Kilchling (2004).

[72] *Bundesverfassungsgericht (Federal Constitutional Court)* [2004].

[73] Article 44(9).

[74] Article 44(8).

police powers (i.e. because wider powers can be used to generate more evidence). Alternatively they could be due to differing procedural rules – especially rules of evidence.[75]

Extended confiscation may also be less necessary where there is **extended criminalisation**. In this regard, France has criminalised the ownership of unjustified assets of persons 'maintaining habitual relationships' with drug dealers/users, prostitutes, members of organised criminal groups and even beggars,[76] whilst Portugal has seriously debated the criminalisation of owning unjustified assets. Furthermore, several Member States have **extended criminalisation** by defining money laundering without reference to specific predicate offences. A Spanish practitioner thus considered NCB confiscation unnecessary because money laundering could be proved relatively easily with circumstantial evidence. Powerful money-laundering laws are a favoured route to confiscation in Belgium and Luxembourg. The UK also has powerful money-laundering laws to complement its other confiscation tools.[77]

Extended criminalisation may also serve as an alternative to third-party confiscation, as already noted in Section 3.4.1. This appears to be the preferred approach in Luxembourg (where prosecutors favour money laundering) and France, where in addition to money-laundering laws the unjustified asset laws introduced in the 2000s also proved a popular route.

Mention must also be made of standards of proof. The baseline table describes these as 'high' (i.e. beyond reasonable doubt), 'medium' or 'low' (balance of probabilities), but the underlying concepts will differ across Member States in ways which it is difficult to capture in the absence of careful study. Thus in Sweden the standard of proof for extended confiscation is 'clearly more likely' ('medium' for the purposes of the table) after an official government report *utvidgat förverkande m.m.* (extended confiscation, etc.) concluded that it would be practically impossible to demonstrate beyond reasonable doubt that assets not linked to a specific crime are criminal. The Spanish Supreme Court, meanwhile, accepts that multiple (more than one), closely related and non-contradictory *indicios* (indications) are constitutionally sufficient evidence to prove, beyond reasonable doubt that assets have an illicit origin; see Jorge (2007: fn. 9). In other Member States it is meaningless even to refer to a standard of proof. Most notably, in France there is only the 'intimate conviction' of the judge.[78]

---

[75] One academic expert compared the UK (where elaborate rules of evidence support the jury trial as the cornerstone of criminal justice, making convictions more difficult to obtain) with Sweden (where benches of professional and lay judges are relatively unconstrained by rules of evidence).

[76] Penal Code, Articles 222-39-1, 225-6(3), 450-2-1 and 225-12-5(4); see also Article 321(6), which has a similar function for guardians of children habitually committing property crimes.

[77] PoCA permits reliance on circumstantial evidence without reference to a predicate offence, but the case of *R v Anwoir & Ors* [2008] states that there must be something more than mere evidence that the defendant's assets are disproportionate to lawful sources of income. The Spanish Constitutional Court has reached a similar conclusion.

[78] This is defined in Article 352 of the French Penal Code and often equated to the 'beyond reasonable doubt' standard known to common lawyers (Greenberg *et al.*, 2008: 58; Clermont and Sherwin, 2002), whilst the Civil Code simply makes no mention of standard of proof and the issue is barely elaborated on in French jurisprudence (Clermont and Sherwin, 2002).

3.6.2 Preservation

Key elements of Member-State freezing/seizure regimes are tabulated in 0. As with the confiscation regimes discussed above, these are listed individually. The following characteristics are described:

- relevant law;
- nature of measure (whether it extends to seizure);
- whether each step is discretionary or mandatory;
- the scope of application;
- precautionary measures; and
- management of assets.

Freezing was seen as critical by practitioners whom we interviewed; as was seizure for moveable assets within a suspect's possession. The threshold for freezing was also viewed as critical: if the bar is set too high then assets may be gone by the time the necessary evidence has been gathered. This is especially important for bank transactions. A key question is whether authorities need to have in mind a specific offence. If so, it will be impossible to freeze a transaction that is suspicious for being disproportionate to the account-holder's lawful sources of income, unless 'self-laundering' is criminalised, in which case any such transaction suggests a money-laundering offence.[79] One investigator noted that, but for preliminary freezing of suspicious bank transactions, his unit would have been unable to pursue many cases of 'carousel' fraud.

Appropriate asset management mechanisms were also seen as important. Where these are lacking – as in, for example, Portugal and Bulgaria – assets are stored on an *ad hoc* basis and often waste away. Appropriate powers of management and realisation are needed, preferably vested in a way that permits best practice to develop.

3.6.3 Enforcement

Enforcement regimes differ throughout the EU, and this can impact upon asset-confiscation work. Central professional enforcement agencies, such as those of Sweden and the Netherlands, are likely to provide a more efficient service than the decentralised, court-intensive (Napoleonic) processes of Spain, France and Italy. This is because procedures are less complicated, and do not need to be undertaken separately for assets in different localities.[80]

For cross-border cases, it is necessary to examine how the two alternative approaches discussed in Section 3.4.3 – traditional MLA and the EU legal framework for MR – function in practice. Where both options are available and practitioners face a choice, they will consider which is more efficient (e.g. simpler and faster to use) and/or applicable to a wider range of assets. Their perceptions of the relative merits of the two options become all-important drivers of utilisation (in fact, problems of utilisation are so intertwined with problems of

[79] Sweden is an example of a country where suspicious transactions are not able to be properly investigated. An extant study, commissioned by the Swedish government, is examining *inter alia* the adequacy of existing money-laundering laws.

[80] These are our assumptions based on the fieldwork undertaken. We have not sought to explore them further in circumstances where no options recommend themselves (see Section 5.1.3).

enforcement that we consider these together). Given that practitioners are generally familiar with traditional MLA procedures, the EU legal framework on MR will need to offer tangible advantages in order to overcome inertia.

Our attempt to gather statistical data on utilisation rates for MR instruments proved fruitless. Some practitioners were able to speak of known cases, but none was able to provide proper statistics, let alone together with statistics on traditional MLA to enable utilisation rates to be compared. Nor are statistics contained in literature, although a 2008 report by the European Judicial Network (EJN), which described the EU legal framework on MR of freezing and confiscation orders to be least used amongst all existing tools for judicial cooperation in criminal matters, is telling.[81] The EJN went on to note a clear preference for the traditional MLA procedures amongst practitioners. Our own fieldwork (albeit limited) revealed practitioner opinion to be a little more balanced, possibly reflecting a trend in favour of utilisation (which is to be expected, given that several Member States have implemented the legal framework only recently). Nevertheless, some practitioners reported that the MR instruments were rarely or never used. This is no doubt due in part to slow transposition by Member States. The status quo is summarised in Table 3-2.

Table 3-2 Implementation of EU legal framework on mutual recognition

MS	Framework Decision		
	2003/577/JHA	2006/783/JHA	2005/214/JHA
BE	Yes	No (draft bill)	No
BG	Yes	Yes (25/02/2010)	Yes (Feb 2010)
CZ	Yes	Yes (01/01/2009)	Yes (2007)
DK	Yes (01/01/2005)	Yes (01/01/2005)	Yes (December 2004)
DE	Yes (06/06/2008)	Yes (October 2009)	No
EE	Yes	Yes (2008)	Yes
IE	Yes (2008)	No	No
EL	No (bill being drafted)	No	No
ES	Yes	Yes (April 2010)	Yes (December 2008)
FR	Yes	Yes (2010)	Yes (2007)
IT	No	No	No
CY	Yes (June 2010)	Yes (June 2010)	Yes (2007)
LV	Yes	Yes (2009)	Yes
LT	Yes	No	Yes (December 2007)
LU	No (draft bill)	No (bill being drafted)	Yes (2010)
HU	Yes (2003)	Yes (January 2009)	Yes (2003)
MT	Yes (2007)	No	Yes (2009)
NL	Yes (01/08/2005)	Yes (2009)	Yes (2007)
AT	Yes	Yes	Yes
PL	Yes (02/08/2007)	Yes (05/02/2009)	Yes (2008)
PT	Yes (July 2009)	Yes (2009)	Yes (2009)

[81] Council of the EU, note 5684/09.

RO	Yes (November 2008)	Yes (November 2008)	Yes (2008)
SI	Yes (October 2007)	Yes (2007)	Yes (2007)
SK	Yes (2005)	No (progress anticipated)	No
FI	Yes (2/08/2005)	Yes (November 2008)	Yes (2007)
SE	Yes (2005)	No (bill being drafted)	No
UK	No*	No	No

*Although it is sometimes written that the UK has implemented FD 2003/577/JHA, this concerns only evidence and not proceeds of crime

It may be seen that, despite the expiration of the implementation periods, not all the Member States have transposed the EU legal framework into domestic law. Some of these results are not readily explicable: the UK and Italy have not transposed either FD even though, as relatively frequent issuers of orders encompassing cross-border assets, they should stand to gain. In any event, their failure to implement the EU legal framework also constrains utilisation possibilities for other Member States which have done so. Specifically, a Member State which has implemented FD 2003/577/JHA can use it with the other 22 Member States (85%) which have done so. A Member State which has implemented FD 2006/783/JHA can use it with 16 other Member States (62%) that have. It is also possible to calculate upper limits on overall utilisation. In the case of FD 2003/577/JHA, implementation by 23 of 27 Member States equates to 253 out of a total of 351 possible pairs (72%). In the case of FD 2006/783/JHA, implementation by 17 of 27 Member States equates to just 136 pairs (less than 40% of the total).[82] Thus it may be seen that overall utilisation remains significantly capped by the slow rate at which the EU legal framework has been implemented.

The quality of transposition may also be expected to affect the utility of MR and, thus, its popularity and rate of utilisation. There have, in this regard, been some notable failures. Several Member States have failed to transpose the terms 'freezing' and 'confiscation', which are autonomous concepts of EU law, instead legislating with reference to domestic concepts. Some have failed to implement the requirement that freezing orders be recognised within 24 hours.[83] Some have added grounds for refusal to lists that are intended to be exhaustive.[84] Although not in contravention of any obligations, several Member States have limited the scope of MR by making grounds of refusal mandatory rather than optional.[85] Yet it is by no means obvious that these factors have played a significant role in practice. Instead, practitioners with whom we spoke identified more fundamental aspects of the problem, which reside in the legal framework itself rather than its implementation.

[82] Mathematically, we examine combinations, *viz:* $C_2^{23} = 253$ and $C_2^{17} = 136$, whilst $C_2^{27} = 351$. Admittedly, this rough heuristic is based on an even spread of potential utilisation amongst all pairs, and it ignores the size of Member States in terms of population or confiscation orders made, but it should be noted that amongst the states yet to implement both FDs are the UK and Italy, both large Member States and relatively prolific issuers of confiscation orders.

[83] e.g. Hungary and Poland.

[84] The most worrying example is perhaps non-recognition on the basis of some conflict with domestic law, e.g. in the case of Hungary.

[85] e.g. France, Slovakia.

The most significant complaints came from Member States that rely either mostly (as in Ireland) or significantly (as in the UK) on NCB confiscation. Such orders are excluded from the EU legal framework on MR, yet here more than anywhere else MR would be advantageous because it is not obvious that the Brussels I Regulation (discussed in Section 3.5.3) presents a viable alternative. Italy, which issues 'preventative' NCB orders under its Law 575/65, has had these recognised by France. The UK, without relying on Brussels I, has enjoyed a degree of success with France and Luxembourg, with the latter recently affording MLA on the basis of the 1990 CoE Convention. Recognition in Spain has proved more difficult, not because of in-principle opposition on the part of authorities, but because only criminal courts can order freezing. Rather than trying to have an NCB order recognised, the UK has thus far favoured a more practical approach – for example, by providing Spain with the information necessary to allow it to obtain a criminal conviction and, hence, confiscation. Most EU Member States, like Spain, do not recognise NCB orders – or at least have not done so to date. In order to understand the current situation better, the recent Council Conclusions on Confiscation and Asset Recovery call upon the European Commission and the Member States to: 'Consider, based on further studies, ways to acknowledge non-conviction-based confiscation systems in those Member States which do not have such systems in place, and in particular to examine, within the framework of MR, ways to enforce non-conviction-based confiscation orders in those Member States.'[86]

Another aspect of the problem definition validated by our fieldwork is the different treatment afforded orders depending on whether they are criminal or civil in nature. The former are enforceable via FD 2006/783/JHA (MR of confiscation) or FD 2005/214/JHA (MR of financial penalties), the latter via Brussels I. Our fieldwork confirms that the problems that may arise are not merely hypothetical. In particular, practitioners from Spain and Finland (both of which have implemented all of the relevant FDs) mentioned a recent fraud case in which Spain froze assets pursuant to a request under FD 2003/577/JHA. Finnish courts subsequently issued a compensation order in favour of many victims, only to discover that this is unenforceable in Spain under either FD 2006/783/JHA or FD 2005/214/JHA.[87] This is through no lack of will on the part of Spanish authorities, nor any failure of transposition. Rather, it is because Finnish criminal courts (like their Swedish and Danish counterparts) can exercise civil jurisdiction to order compensation at the request of the prosecutor. This principle of 'adhesion', whereby a civil case is adhered to a criminal case, gives the victim a claim against the criminal which is enforceable under the Brussels I Regulation and, therefore, outside the scope of FD 2005/214/JHA. In this particular case there are many victims with moderate claims who cannot reasonably be expected to deal with an *exequatur* procedure in a Spanish court in order to enforce the rights under Brussels I. The upshot is that criminal assets remain unrecovered and victims remain uncompensated.

Most practitioners with whom we discussed cross-border cases focused on more general issues. The majority acknowledged the aim of MR, and believed that it either was – or had the potential to be – a faster process than traditional MLA. However, opinion was divided on

[86] 7769/3/10 Rev 3.

[87] As at September 2010, this problem remained unresolved. It is unclear whether Spanish courts will permit the assets to remain frozen indefinitely.

the forms attached to the current instruments. Some practitioners are perturbed by the length and complexity of these, whilst others consider the forms to be useable once one becomes familiar with them. Similarly, some practitioners consider the form too imprecise (they were unable to locate the relevant asset) whereas some others would prefer not to have to specify assets at all (i.e. in cases of value confiscation). The one point on which practitioners agreed was that it was inconvenient to fill out the freezing order form and then, in any event, prepare a letter rogatory (i.e. a letter formally requesting MLA) for some other investigative action taking place in parallel (e.g. search, transfer of evidence). Practitioners expressed a preference for being able to combine related requests and explained that this was an important advantage of traditional MLA *vis-à-vis* FD 2003/577/JHA.

Some practitioners opined that the existing MR instruments should be allowed to 'settle', so that practice could begin to develop. Others suggested that the EU should intervene to speed up this process by somehow suppressing the alternative MLA route. Some Member States have, indeed, begun to do this at a local level. For example, Finland, a strong proponent of the MR instruments, has refused incoming MLA requests from other Member States on the basis that these instruments are available and should be used; one Swedish practitioner said that this effectively forced him to become familiar with the instruments.

3.6.4 Utilisation

Having examined utilisation of MR instruments in the previous section, we focus now upon utilisation of domestic confiscation and recovery tools such as freezing and seizure. Utilisation rates are, however, inherently difficult to gauge. Defining 'utilisation' as the number of cases in which confiscation is ordered divided by the total number of cases will inevitably produce very low values, as there are many crimes that simply do not generate profit. More sophisticated definitions are possible (e.g. based on subsets of crimes that tend to be profitable) but it then becomes necessary to establish comparable data sets across Member States. This task is already impaired by the need to account not only for assets confiscated in favour of the state, but also those returned to identified victims.[88] Similarly, there may be circumstances in which it is expedient for a court to issue a fine rather than go through confiscation, which may be a more time-consuming procedure. An alternative approach is to rely upon the statements of practitioners whom we interviewed, but this raises its own methodological challenges. Some practitioners openly discussed problems of utilisation, but others appeared reluctant to do so. In these circumstances, our estimates of utilisation are rough at best.

Before discussing Member States individually, certain oft-cited problems should be mentioned. Many practitioners spoke of the difficulty in effecting organisational change against considerable inertia. It is challenging to introduce financial investigation into police forces staffed, generally, by officers who yearn to investigate and solve crimes. It is challenging to motivate prosecutors to prepare confiscation applications against a backlog of pending (often urgent) cases. It is challenging to persuade judges to apply (or even to remember to apply) new laws in which they lack expertise. It is relatively easy to establish special agencies, or to train special magistrates, to undertake the most complex or high-value cases; far more

[88] The latter is far harder to measure because it will not be recorded as income to the state (except where victims are able to recover from confiscation due or paid to the state); see Section 3.6.5.

difficult to effect system change that normalises asset-confiscation work. The latter takes time and also demands continuous informational efforts. Practitioners and judges (most of whom never came across asset confiscation during their university studies and basic vocational training) must be educated in the technical aspects of asset-confiscation work. Moreover, if cultural change is to take place, the purpose and benefits of this work must be clearly communicated throughout the criminal-justice system and, indeed, beyond.

We now comment on individual Member States where specific information permits an assessment. Where it appears that barriers to utilisation exist at the investigative stage, we mention these even though they fall outside the scope of the problem definition, so as not to misrepresent the significance of those barriers which are of more immediate interest.

In **Austria** the government issued a decree on 11 September 2009 decrying the lack of utilisation of asset-confiscation laws. For example, in Vienna confiscation is applied in only 13% of drug cases and just 1% of cases of property crime, whilst extended confiscation provisions – on the books since 2002 – are almost never used.[89] It stressed the mandatory nature of confiscation laws in all but exceptional circumstances, urging early financial investigations especially for drugs, organised crime, economic crimes, and so on, both for suspects and for their close associates – and not only to trace proceeds, but also to identify other assets capable of satisfying a value confiscation order.

In **Bulgaria** confiscation is rarely practised by regular police and prosecutors, but the Commission for Establishing Property Acquired from Illegal Activity (CEPAIA) brings confiscation proceedings in civil courts upon evidence of disproportionate assets. CEPAIA (previously known as CEPACA until the word 'illegal' was substituted for 'criminal) commenced operations in 2006 and rapidly built up a large pipeline of work, but it has so far concluded only a few cases, with some of its first cases still not having resulted even in first-instance decisions. This slow progress is owing to various factors, including the scope for legal challenges to a novel confiscation regime, the opportunities for delay presented by Bulgarian civil procedure and judicial corruption (cases are heard locally, and timetables are entirely a matter of judicial discretion). There is, however, considerable momentum in favour of more action, fuelled by public mood and a populist government. This has very recently culminated in legislative changes which strengthened CEPAIA by, *inter alia*, introducing a genuinely NCB procedure (previously, confiscation was not possible without a conviction in related criminal proceedings). Detailed provisions on how to manage confiscated assets (including through social reuse) may indicate that increased utilisation is anticipated by Bulgarian law-makers.

The **Czech Republic** is not a heavy user of confiscation laws. Courts often issue financial penalties under Section 67 of the penal code instead of ordering confiscation, which is more complicated procedurally.

In **France** asset confiscation was not a focus until the early 2000s. This focus found reflection in the introduction of extended criminalisation provisions[90] and the establishment in 2005 of

[89] *Erlass vom 11. September 2009 über die verstärkte Anwendungvermögensrechtlicher Anordnungen und praktische Probleme ihrer Handhabung.*

[90] See fn.76.

the Platform for Identification of Criminal Assets (PIAC) to provide expert support to investigators. Seizures have risen significantly in recent years, despite a persistent lack of engagement from many prosecutors and investigating judges and a general lack of resources available for early financial investigations. Yet the 2009 figure of €186m seized suggests lower levels of utilisation than the UK (£154m recovered in 2009) and Germany (€281m confiscated in 2009), suggesting scope for positive trends to continue.

In **Germany** federal statistics suggest that utilisation climbed throughout the 1990s for organised crime, and has since been relatively stable at around 25–30% (cases with seizures / number of investigations). One expert suggests that utilisation rates plateaued when the best financial investigators were reassigned to FD 2008/841/JHA terrorist finance investigations.[91] Several practitioners opined that significant progress had been made over the last decade in promoting asset confiscation for ordinary acquisitive crimes, but that work remained to be done in this area.

In **Greece** barriers to utilisation have traditionally included an underdeveloped legal regime, a shortage of financial investigators, inadequate tools for financial investigators (not even a register of real estate) and weak mechanisms for management and disposal of assets. Recently, however, Greece appears to be moving towards higher utilisation rates (one interviewee even spoke of an emerging overzealous approach to freezing of the assets of potential suspects) due to an upsurge of political will following two events: first, her inclusion in February 2010 in an FATF list of countries with deficient legal regimes prompted further strengthening of money-laundering laws; and, second, her parlous financial situation following the global financial crisis has put the spotlight on money laundering and tax evasion. Greece now has a new system for managing confiscated assets and a determination to target illicit wealth through the new anti-money-laundering laws. To that end, there are plans to upgrade the Greek Financial Intelligence Unit (FIU) with powers to control the asset declarations of public servants and investigate the discrepancies identified. There are also plans to set up a new department within the Directorate General of Tax Audits, in order to investigate taxation records and bring money-laundering proceedings against businesses and individuals. These investigations will extend not only to the individuals concerned, but also to family members and close business associates.

In **Hungary** statistics from 2007 show that there were 86,705 convictions (nearly half of these for economic or property crimes) but just 598 forfeiture procedures. In its fifth-round mutual evaluation, the European Council concludes that these statistics suggest utilisation only where authorities happen upon cash and other tangible assets, rather than as a result of financial investigations aimed at recovering criminal assets.

In **Ireland** most asset-confiscation work is done by the Criminal Assets Bureau (CAB), which brings NCB proceedings under the Proceeds of Crime Act (1994 and 2005) and has a staff of approximately 70. Its recovery statistics are skewed towards its taxation powers, but this is in part because confiscated assets typically revert to the state only after seven years. It focuses on serious and organised crime, but also increasingly on low- and medium-level offenders who may present as poor role models within their communities, even though these cases often cost more to bring than they return financially. Such cases are best handled at the local level, to

[91] Kilchling (2004) and fieldwork.

which end the CAB is in the process of training Divisional Assets Profilers, with a view to increasing utilisation of ordinary confiscation rules. There is much still to be achieved in this regard.

In **Italy** laws are systematically utilised to combat Mafia-type crime, and the legislature has generally been responsive to feedback from practitioners aimed at making the overall system more effective. This has recently included Law 125/2008, which permits NCB confiscation from a dead suspect's heirs – an amendment which appears to have paid dividends. Italy's relatively high utilisation rate is reflected in confiscation and disposal statistics, which are likely to continue an upwards trend on the back of many high-value seizures in recent years. Italy also utilises its social reuse options to significant effect, preventing Mafia assets from being bought back at auction and sending a powerful message to victimised communities. Recent changes aim to make disposal and reuse processes even more efficient.

In **the Netherlands**, where robust legislation (including extended confiscation for serious crimes) has been on the books since 1993, utilisation rates have risen relatively recently, with money-laundering law proving a useful investigative tool. Asset-confiscation work is undertaken primarily by the Bureau Ontnemingswetgeving Openbaar Ministerie (BOOM), a special unit within the prosecution service staffed by some 85 prosecutors, financial investigators and others. In the last two years (as in Ireland) the authorities have focused not only on big targets, but also on lower-level criminals who are visible role models within their communities. The Netherlands, like the UK, is very much focused on increasing its utilisation rate, and targets are set with this in mind.[92] Success, in the form of asset-confiscation work becoming generalised throughout the country, will require many more financial investigators.

In **Portugal** ordinary confiscation is used mainly for drug cases and other organised-crime cases, and judges are often reluctant to apply extended confiscation because it contains a reverse burden of proof, which is viewed as draconian. Also, prosecutors often do not seek it as no one has done the anterior work in the form of a financial investigation showing what has been acquired/spent in the last five years, because such work is onerous in light of available resources and tools. For similar reasons, the estates of family and other associated third parties are rarely examined. In theory, compliance with Law 5/2002 on extended confiscation is mandatory; in practice, prosecutors have a high degree of autonomy and corrective mechanisms are weak.

In **Romania**, as in Bulgaria, ordinary confiscation is rarely undertaken in criminal proceedings, but there is a special agency charged with bringing NCB confiscation proceedings on the basis of assets being disproportionate to declared income. The National Integrity Agency (ANI) was established by law in 2007 to, *inter alia*, bring proceedings against politicians, senior bureaucrats and other powerful persons required by law to lodge asset declarations, giving institutional backing to powers which had barely been utilised since their introduction in 1996.[93] Although its powers were never especially great, ANI made some initial progress before a decision of the Romanian Constitutional Court of 14 April 2010 and

[92] In both countries, defence lawyers expressed concern about whether such targets distort incentives in favour of profitable cases.

[93] Law 144/2007, Law 155/1996.

an ensuing curtailment of its powers by the Romanian parliament, which drew criticism for going beyond what was demanded by the limits of constitutionality.[94] This criticism prompted parliament to restore ANI's powers partially (Ciocoiu, 2010), but these events suggests that ANI does not enjoy strong support amongst the elites which it investigates. In some cases, this lack of support may be born of genuine historical/constitutional concerns; some critics argue that it is more a matter of self-interest.[95]

In **Spain** confiscation work relates mostly to organised crime, drug offences, corruption and other serious crimes – as evidenced by the ongoing Operation Malaya in which €2.4b was seized in the first phase of arrests. For ordinary crimes, however, confiscation is rarely practised. A major barrier to normalisation is the opportunity cost to authorities: one practitioner estimated that the cost of judge-managed investigations quadrupled, on average, if a parallel financial investigation was opened. As a remedial measure, Law 10/2010 transposing the third EU money-laundering directive will establish a central financial registry – allowing investigators to trace assets more efficiently – though with access subject to judicial permission.

In **Slovenia** barriers to utilisation include a lack of capacity for completing financial investigation during the period (48 hours) in which suspects may be held without charge, the prospect of police or prosecution agencies having to pay compensation if assets decline in value and procedures which are overly burdensome for prosecutors. There is a trend towards addressing the first of these issues, and also towards increased efforts by the police.[96] Also prosecutors have persevered with the non-conviction-based confiscation power in Article 498A of the *zakon o kazenskem postopku* (code of criminal procedure) and, despite restrictive court rulings,[97] this has recently resulted in a confiscation order in excess of €1m.[98]

In **Sweden**, a recognised barrier to greater utilisation is the inability of authorities to freeze assets unless a specific predicate offence is suspected, which means that the suspicious transactions reported by financial institutions cannot be frozen even where the parties are known to police. Sweden lags behind its neighbours in this regard, and the government have recently commissioned a study examining the possibility of, *inter alia*, criminalising self-laundering. This, according to police and prosecutors of the Ekobrottsmyndigheten (Swedish Economic Crime Authority) and the Rikskriminalpolisen (Swedish National Criminal Police), would allow a money-laundering investigation (and, thus, freezing) where assets

[94] SEC (2010) 949.

[95] The historical context is the Soviet-era Law 18/1968, which reversed the burden of proof for ordinary people who were subjected to secret hearings, given insufficient time to prove the legitimate origins of their assets, and stripped of them. Against this background, a presumption of licit origin was included in the Romanian constitution in 1991 (following amendments in 2003, the presumption is contained in Article 44, paras. 7 and 8). This was debated heavily: some saw it as an essential bulwark against totalitarianism, others as symbolically important, still others as hindering Romania's ability to adopt potentially important tools for combating corruption. See Jorge (2007).

[96] Moneyval fourth round, paras. 83 and 84.

[97] See, e.g., *Cases 763/2007 and 1352/2007 of the Higher Court of Ljubljana*.

[98] Moneyval fourth round, para. 17.

(including financial transactions) are suspicious for being disproportionate to a person's known lawful sources of income.

In the **UK** statistics show that confiscation outputs rose immediately following the introduction of PoCA, in part because the cash seizure/forfeiture regime in Part 5 is fast enough for outputs to register in the first year of operation. The UK now have over 2500 trained financial investigators (though not all of them do confiscation work full-time) and financial investigation is routine for serious and organised crime. As in Germany, there remains considerable scope to continue to expand efforts for ordinary acquisitive crimes. To this end, strategies have included published targets (now discontinued) and an incentive scheme. The UK situation is further discussed in Appendix G.

3.6.5 Redistribution

All Member States have some mechanisms in place for ensuring that victims can be compensated, but these differ greatly in procedural terms, with some Member States offering mechanisms as part of (or joined to) the criminal proceedings themselves, whilst others require a separate civil claim. Some of these procedures essentially give the prosecutor a second function on behalf of victims.[99] This may have interesting consequences. For example, the Swedish or Estonian prosecutor attempting to strip a convicted criminal of an asset faces a criminal standard of proof (regarding whether the asset is derived from crime), unless a victim has come forwards, in which case the civil standard applies. In Poland and Slovakia confiscation is impossible where there is the possibility of a victim claiming compensation.[100] This was also the case in Germany until 1 January 2007, but the law was amended to avoid the situation whereby assets remained with the criminal because victims were not forthcoming. Section 111e of Germany's Criminal Procedural Code now integrates compensation and confiscation into a process whereby confiscated property does not vest in the state for several years, extending the time in which victims and third parties may claim an interest. This new law is widely criticised amongst practitioners for being inscrutable and for prolonging proceedings, but also for not being 'insolvency proof'. Practitioners complain that even an insolvency post-dating the confiscation order could see creditors (all-too often associates of the defendant) take priority over the state. An alternative approach – as in Sweden, Slovenia[101] and Denmark[102] – is to allow victims who have not claimed in advance to come forwards *ex post* and claim from funds which have already vested in the state. In Bulgaria the Law of Divestment in Favour of the State of Property Acquired from Illegal Activity excludes from the bankrupt estate any property frozen pending possible confiscation.

Once confiscated assets have vested in the state, procedures for their disposal and redistribution vary markedly. Several states have social reuse programmes, the largest of which is that established by Italy's Law 109/96, pursuant to which all property acquired through illegal activities should be granted to private organisations, cooperatives and municipal,

[99] In Finland this role has existed since 2002, and the prosecutor's role on behalf of victims has become a motivating force for asset-recovery work.

[100] Polish Criminal Code Article 45; Slovak Criminal Code Article 55(8).

[101] Criminal Code, Article 97.

[102] Criminal Code, Article 77.

provincial and regional administrations, who then should return the property to the community by converting it to socially beneficial uses.[103] Thousands of assets worth some €800m have has since passed through the scheme, with thousands more awaiting disposal following final court orders. Only rarely is this converted into cash or administered for private rental. More commonly, buildings are used as government offices, as classrooms, or as emergency housing. Other assets are used to fund law-enforcement activities. The majority (some €450m) of confiscated assets are administered by organisations and cooperatives for community projects, many of which aim to establish clean economic activity on land reclaimed from the Mafia. For example, confiscated lands in Sicily, Calabria, Campania, Puglia and Lazio have been taken over by cooperatives of students for the production of oil, wine, pasta, taralli, melons, legumes, preserves and other organic goods. Some of this produce is labelled 'from lands freed from the Mafia'.[104]

Other countries with special funds for confiscated assets include France, Luxembourg, Portugal, Spain and the UK, with Bulgaria having recently passed a law establishing one. Many of these funds relate specifically to the proceeds of drug crime, which are disbursed for drug-related law-enforcement and rehabilitation programmes. In Luxembourg the Law of 17 March 1992 established a fund for the fight against drug trafficking with a mission 'to promote the development, coordination and implementation of means to fight against drug trafficking, against drugs and against all direct and indirect effects related to these illegal practices' (FATF, 2010b). In France assets confiscated following criminal investigations into drugs-related crime are transferred to the Fonds de Concours (Drugs Help Fund) and allocated 35% to the national police, 25% to the Gendarmerie, 20% to the Ministry of Justice, 10% to Customs and 10% to the Ministry of Health (Matrix Insight, 2008: 120). In Spain the *Plan Nacional sobre drogas* (National Plan on Drugs), established by Law 36/1995 and recently strengthened by Law 17/2003, manages all confiscated assets relating to drugs. Some assets (typically real estate) are put to public use; others are liquidated, with the revenue stream reinvested into drug-prevention and rehabilitation programmes. Furthermore, coming into force in December 2010 is new Article 367 *septies* of the Code of Criminal Procedure, whereby seized assets can (at the judge's discretion) be assigned to an asset management office (AMO), in which case, upon confiscation, they may be realised in favour of law-enforcement agencies.

The Portuguese system sees assets split, *inter alia*, between the judicial system, a fund for the victims of violent crime, funds for the rehabilitation of prisoners and drug addicts, and general state revenue. Similarly, the UK uses confiscated proceeds of crime to fund (and hence incentivise) the asset-recovery process itself. In England, Wales and Northern Ireland, 50% of the revenue stream is returned to law-enforcement agencies, prosecution agencies and the courts (which incur expenses through the enforcement process), with the remaining 50% remitted into the budget of the Home Office (FATF, 2007). In 2009 the UK also began a Community Cashback programme which saw £4m allocated to fund 269 community

[103] *Consistenza, destinazione ed utilizzo dei beni sequestrati o confiscate Stato dei procedimenti di sequestro o confisca* (Report to parliament under Law 109/1996), April 2010, Italian Ministry of Justice. See also the website of Libera, an umbrella network of organisations and associations interested in the fight against Mafia and organised crime: www.libera.it.

[104] http://www.libera.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/4141(as at September 2012).

projects suggested by members of the public.[105] In Bulgaria new Section II of Chapter 5 of the Act on Forfeiture in Favour of the State of Assets Acquired through Illegal Activity provides for recovered assets to be liquidated, with the revenue stream used to offset the cost of managing frozen assets and other costs of enforcing the Act, after which surplus revenue is directed to a social fund managed by the Minister for Labour and Social Policy and/or the National Strategy for Encouraging Small and Medium Enterprises. Assets that it is not possible to liquidate may be granted by the Minister of Finance for humanitarian purposes.

Whilst agency incentives may perversely distort incentive structures if not carefully designed, social reuse funds raise problems of their own, regarding oversight and efficiency. In the Italian context Law 109/96 has been amended more than once to ensure that confiscated assets are allocated and managed efficiently, and the law itself provides for regular reports to parliament by the Ministry of Justice. In the Spanish context, the performance of the *Plan Nacional sobre drogas* has often been criticised as wasteful (Matrix Insight, 2008; FATF, 2006a).

A different approach altogether is to establish rules for dealing with particular *types* of asset. In Estonia the Decree of 30 July 2004 provides that historical artefacts revert to the Ministry of Culture, computer systems revert to the local governments to be used by police officers, counterfeit products can (with the permission of the brand owner) be given over to children's social institutions, and so on, with a residual rule that assets are realised in favour of general state revenue.[106] Other Member States have systems that allow for flexibility in extraordinary circumstances. A recent example is the Irish Minister for Finance's decision to hand over two bullet-proof cars to the Garda Síochána for police escort use, on the basis that they could not safely be auctioned (O'Keeffe, 2010, as of 25 November).

Member States which have not established asset forfeiture funds may be divided into those which have considered doing so in accordance with the FATF's Recommendation 38, and those which have not. The former category includes Poland (Moneyval, 2007) as well as strongly federalist Germany, which prefers to leave the question of disposal to the *Lander* in accordance with Section 60 of the ordinance on the Execution of Sentences (Strafvollstreckungsordnung) (FATF, 2010a). Some *Lander* have legislated to use confiscated assets for law enforcement or other purposes, whereas others have not done so. In Ireland Sinn Fein has repeatedly raised for parliamentary debate the question of an asset forfeiture fund in favour of victims of crime, but the majority remain unconvinced of the need to hypothecate state revenue (FATF, 2009; Sinn Féin, 2010 – as of access date).[107] In Denmark, meanwhile, there is a long tradition against hypothecation, making it unsurprising that the legislature has decided against establishing any special fund (FATF, 2006b).

---

[105] http://webarchive.nationalarchives.gov.uk/20100115015804/http://cashback.cjsonline.gov.uk/ (as of September 2012)

[106] RT 1 2004, 61, 432.

[107] Also, practitioners opined during fieldwork that it would be highly unusual to confiscate property with an obvious social utility.

CHAPTER 4. Objectives for the EU

This chapter derives objectives for the EU based on the problem definition. However, in order for the EU to have legitimate objectives in this field, its legal 'right to act' must first be established in accordance with the Treaty of Lisbon.[108] The necessary checks are performed in Section 4.1, leading to the conclusion that the EU does have the right to act. Section 4.2 then defines objectives which, in accordance with the IAGs, take the form of general, specific and operational objectives.[109]

4.1 The EU's right to act

As was noted in Section 2.3, the EU has already passed measures relating to the confiscation and recovery of criminal assets. However, it does not automatically follow that the EU has the power to take further action in this field. On the contrary, the EU's right to act is limited in several ways.

First, the EU is built on the principle of conferred powers, so measures adopted at EU level must have a specific basis in the TEU and/or the TFEU.

Second, in areas of shared competence[110] with the Member States, these powers can only be exercised according to the principles of subsidiarity and proportionality.

Third, powers must be exercised with respect for fundamental rights.[111] Each of these restrictions upon the EU's right to act, with the exception of the principle of proportionality, are discussed below. The principle of proportionality is discussed later, in Chapter 1.

4.1.1 Conferral of competence

The Treaty of Lisbon has made it easier for the EU to legislate in the field of 'judicial cooperation in criminal matters' (by removing the requirement for unanimity in the Council) but, as *quid pro quo*, some competencies in this area have been rather narrowly redefined (Ladenburger, 2008: 34). In practice, therefore, there is now less scope to circumvent the

[108] See Section 5.2 of the IAGs.

[109] See Chapter 6 of the IAGs.

[110] In which the provisions on an area of freedom, security and justice fall. See Article 4 TFEU.

[111] See in particular the courts' case law on general principles of law, charter on fundamental rights, Article 4 TEU, Article 67(1) TFEU in the context of an AFSJ.

express definition of powers contained in the TFEU. These powers, moreover, may well prove to be more limited than those available prior to Lisbon.

Potentially relevant conferrals of power are discussed in detail in Appendix G, upon which the present summary is based. It seeks to determine, first, whether a legal basis to support action in the field of recovery and confiscation of assets may be found in the treaties (this involves determining the exact scope of each provision deemed relevant to the subject matter); and, second, what are the exact conditions for, and/or limits to, such action (these include, but are not limited to, examining the formal legal requirements that each relevant provision prescribes for the institutions to exercise their powers). Based on the foregoing problem definition, three main issues arise, *viz*:

- can the EU legislate to harmonise confiscation/freezing powers;
- can the EU legislate for the MR of freezing and confiscation orders; and
- can the EU legislate for the rights of victims?

In the summary that follows, all references are to the TFEU.

Harmonisation of freezing and confiscation laws: Article 82(1), which is the opening provision for Title V, Chapter 4, on 'Judicial cooperation in criminal matters', broadly defines the powers of the EU in this area. It provides that cooperation shall include approximation of laws 'in the areas referred to in paragraph 2 and in Article 83'. The question is whether this means that harmonisation can occur only by using either Article 82(2) or Article 83, or whether this merely refers to the subject matter covered by these provisions (i.e. specific aspects of criminal procedure and the definition of criminal offences and sanctions in certain listed areas). If the second reading is endorsed, then harmonisation of confiscation laws could also occur under Article 82(1)(d), which broadly allows for the adoption of measures to facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters. It would need to be established that confiscation/freezing measures fulfil this function.

If harmonisation can only be achieved by means of Articles 82(2) and 83, the appropriate legal basis, and the extent of the EU's power to harmonise, will depend on the classification of confiscation laws as either 'sanctions' or 'procedural measures'. If confiscation and/or freezing are **criminal sanctions**, then Article 83 would allow the adoption of common EU rules in relation to listed 'areas' of crime with a cross-border dimension (there are currently ten areas, including drug trafficking, money laundering and any 'organised crime') and also any area of EU policy subject to harmonised standards. Confiscation orders are more likely than freezing orders to be interpreted in this way, as the purpose of a freezing order is not to punish an offender, but only to preserve an asset.[112] Nevertheless, freezing orders are arguably integral to the imposition of a sanction because they serve to guarantee confiscation orders.

[112] There is authority for the proposition that confiscation is a 'penalty' (see, for instance, *Phillips v UK* [2001], para. 51).

If confiscation and/or freezing are instead **procedural measures**, then the relevant legal basis is Article 82(2).[113] There are two main issues here.

First, the proposed measures must be necessary to facilitate MR and police and judicial cooperation in criminal matters having a cross-border dimension. The exact meaning of 'cross-border dimension' – and, hence, of how it limits the EU's right to act – remains unclear.

Second, Article 82(2) contains an exhaustive list of the aspects of criminal procedure that can be harmonised, which list includes neither freezing nor confiscation. There is a general provision on 'the rights of victims of crime', but this would cover only a limited part of the subject matter. The Council, acting unanimously and with the consent of the European Parliament, may extend the list of EU competences, so freezing and/or confiscation could be added in the future.

Finally, as regards rules harmonising NCB confiscation, there are two possible courses of action. The first would be to include these within a general EU confiscation instrument adopted under one of the legal bases outlined above on the basis that although NCB confiscation is a civil measure, it is still imposed in relation to conduct that is deemed to be criminal in nature. (It may also be arguable that the objective and content of NCB regimes broadly relate to criminal law and justice.) A second option is to use the EU's harmonising powers in the field of judicial cooperation in civil matters having cross-border implications. In this regard, Article 81(1) refers to measures 'for the approximation of the laws and regulations of the Member States', while under Article 81(2)(a), a measure must be necessary to facilitate MR of judgments. Like the term 'cross-border dimension' in the criminal context, the exact meaning of 'cross-border implications' – and, hence, of how it limits the EU's right to act – remains unclear.

Mutual recognition: The question of a legal basis for an instrument on MR of freezing and confiscation orders is much less controversial. For conviction-based orders, it is Article 82(1); the only uncertainty is whether the words 'facilitate cooperation between judicial *or equivalent authorities* [emphasis added]' can be used to provide for MR of precautionary freezing orders or whether the provisions on police cooperation should be used instead. If necessary, MR of NBC orders could be adopted under the civil cooperation provisions (i.e. Article 81).

Procedural safeguards: Finally, a legal basis for procedural rules concerning the rights of suspects, defendants and victims in the context of confiscation proceedings may be found in Article 82(2). It would have to be shown, however, that EU rules facilitate MR and/or judicial and police cooperation in criminal matters having a cross-border dimension.

4.1.2 Fundamental rights

Fundamental rights have acquired a prominent place in the EU legal order. First developed as general principles of law the observance of which it is the duty of the EU courts to ensure, they are now referred to in numerous provisions of the treaties. Most importantly, following the Treaty of Lisbon, the Charter of Fundamental Rights was made legally binding and

[113] This provision confers power to enact minimum rules in certain areas of criminal procedure to 'facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension'.

granted equal status to the treaties. It sets out a whole range of rights and freedoms that the institutions and the Member States when acting within the scope of EU law must respect. Thus compliance with fundamental rights is a condition for the legality of EU acts.[114] Even further, there is increasingly a view that it conditions the very existence of an EU power to act. Any purported action to promote the confiscation and recovery of criminal assets must therefore be assessed for its compatibility with fundamental rights. The principles applying in this area are explored in Appendix A, which we now draw upon to discuss those issues that may apply to an EU legal framework on freezing and confiscation.

Confiscation: Ordinary conviction-based confiscation is generally perceived to be a legitimate restriction to the right to property, if coupled with procedural guarantees to secure the rights of individuals affected. The provision of adequate remedies is moreover specifically required by Article 47 of the Charter. In principle, however, conviction-based confiscation will raise fundamental-rights issues only in extreme case

NCB and extended confiscation regimes are more controversial. Given that they enable interferences with the right to property without the said property being linked to a specific criminal conviction, stronger arguments must be put forwards to demonstrate that these are legitimate and proportionate restrictions to fundamental rights. More particularly, since these regimes do not pursue solely a punitive objective, they have to be justified on broader grounds. Any EU law on these matters will have to reflect duly on this and carefully phrase the purpose of the legislation.

With regard to Article 6 ECHR, NCB confiscation regimes have consistently been held to be civil in nature (see, e.g., *Walsh v United Kingdom* [2006]), and the European Court has also refused to qualify extended confiscation as a 'criminal charge'.[115] However, while this means that the full guarantees of Article 6(2) and (3) do not apply, Article 6(1) has nonetheless been held to encompass the right to be presumed innocent.[116] Since these regimes do not relate to assets for which a criminal conviction has been obtained, they do raise issues with regard to the presumption of innocence. This issue arises where criminal proceedings have been terminated and, even more strongly, where the relevant assets are said to be proceeds of a crime for which the person affected has been acquitted.

As regards reversals of the burden of proof concerning the legitimacy of assets, these have survived the scrutiny of the European Court, as long as they were applied fairly in the particular case, with adequate safeguards in place to allow the person affected to challenge the presumption.

Freezing: There is an inherent tension in the necessity for, and application of, freezing orders. On the one hand, they have far-reaching consequences for individuals despite criminal liability having yet to be established. There is thus an issue regarding the justifications for such restrictive measures. On the other hand, they are necessary to ensure the subsequent application of confiscation orders, and have been upheld on this basis.[117] An added difficulty

[114] Opinion 2/94, para. 34

[115] *Phillips v UK* [2001].

[116] *Phillips*.

[117] See, e.g., *Raimondo v Italy* [1994].

is that freezing orders often justify departures from traditional principles of due process. Many states use techniques such as *ex parte* or *in camera* proceedings to ensure that the person affected is not able to defeat the purpose of the order through prior knowledge of it. The procedural guarantees which normally serve to justify restrictions on substantive rights are lowered. It thus becomes even more pressing to have adequate mechanisms in place for individuals to challenge the imposition of such orders. Some guidance regarding the approach that the EU courts may take on this point may be found in their case law on administrative freezing decisions adopted against terrorist suspects.

4.1.3 Subsidiarity

The establishment of an area of freedom, security and justice is expressly listed in Article 4(2)(j) TFEU as an area of shared competences between the EU and its Member States. As a consequence, beyond the need to establish the *existence* of an EU power to act in a given field, one must consider whether such power/competence should be *exercised,* with due regard to the principle of subsidiarity.

Under Article 5(3) TEU, the EU shall act only if the proposed action cannot be sufficiently achieved by the Member States 'but can rather, by reason of the scale or effects of the proposed action, be better achieved at the level of the Union'. The core test of subsidiarity is seen as a test of comparative efficiency: are there more advantages in taking action at EU level or at Member-State level?[118] Moreover, in the field of judicial cooperation in criminal matters, national parliaments now must, pursuant to Article 69 TFEU, ensure that any proposal or legislative initiative complies with the principle of subsidiarity, making it even more important for proposed measures to demonstrate that the principle is respected. However, compliance with subsidiarity is hard to assess (indeed, it is widely regarded as a political – as opposed to legal – concept). Protocol No. 2 on the application on the principles of subsidiarity and proportionality provides some guidance.[119] The criteria to apply in the context of the efficiency test thus include an appraisal of:

- the financial impact;
- in the case of a directive, its implications for the rule to be put in place by Member States, including regional legislation; and
- the added value of EU action, which must be supported by qualitative and sometimes quantitative indicators.

Section 3.1.1 explained how pursuing assets is increasingly recognised as necessary to combat organised crime. Organised crime is very often transnational in nature and thus needs to be tackled on a common basis; this is all the more true in the EU, where the abolition of internal frontiers makes it far easier to commit cross-border crimes. These two propositions, in combination, justify pan-European action to target the assets of organised criminal groups. This is supported by the proliferation of both international law and EU instruments in this area.

---

[118] Craig and De Burca (1992).

[119] Particularly Articles 2 and 5 Protocol No. 2 on the application of the principles of subsidiarity and proportionality.

A more difficult question is whether, in order to be an effective tool in the fight against organised crime, common confiscation laws need only to relate to crimes of a cross-border nature, or whether it is advantageous for them to extend to all criminal activity from which organised criminal groups might derive revenue.[120] There are strong logical arguments for an expansive view – for example, (a) that depriving organised criminal groups of assets is a useful tool regardless of exactly what type of crime each asset is derived from; (b) the tools needed are the same in either case; and (c) assets themselves can cross borders regardless of the nature of the crimes from which they derive. Notably, the current EU-harmonised rules on ordinary confiscation extend to all offences punishable by one year's imprisonment, and not merely to crimes having cross-border implications.[121]

4.2 Objectives

Objectives are the link between the problem definition and policy options. Clear objectives based on the problem definition allow for targeted policy options. This takes place at three levels: general objectives, specific objectives and operational objectives. General objectives are high-level treaty-based goals which help to achieve the AFSJ. In the present context, these follow from the main problems identified in Section 3.2, *viz*:

- recovery of all criminal assets located within the EU; and
- disposal/redistribution of these assets to maximum effect.

These general objectives can be achieved through five specific objectives, each dealing with one of the five causes identified in Section 3.3, *viz*: confiscation, preservation, enforcement, utilisation and disposal/redistribution. Under each specific objective sit operational objectives, addressing aspects of the problem for which baseline scenarios reveal deficiencies at Member-State level which may warrant EU-level intervention. We acknowledge here the imperative to respect fundamental rights, but we do not establish this as an objective in its own right as it is more appropriately considered 'horizontally' across all objectives.[122] The specific objectives, together with operational objectives, are as follows:

A. **Eliminating deficiencies in Member-State confiscation laws:** The aim is to ensure, through harmonisation, that confiscation orders are available for all criminal assets the confiscation of which accords with fundamental rights of interested parties. Operational objectives are to ensure that Member States:
    1. provide for confiscation orders for type 1 criminal assets;
    2. provide for confiscation orders for type 2 criminal assets;
    3. provide for confiscation orders for type 3 criminal assets; and
    4. provide for confiscation orders for assets held by third parties.

[120] This question only really arises if the EU's conferral of power extends beyond cross-border crimes: see Section 4.1.1.

[121] FD 2005/212/JHA.

[122] This horizontal treatment aims to ensure that the EU legal framework on the confiscation and recovery of criminal assets does not disproportionately affect fundamental rights. It does not aim to espouse measures with wider application.

B. **Eliminating deficiencies in Member-State preservation laws:** The aim is to ensure that criminal assets can be effectively frozen or seized wherever this accords with the fundamental rights of interested parties. Operational objectives are to ensure that Member States:
    1. provide for freezing/seizure orders for assets liable to confiscation;
    2. have effective mechanisms to preserve assets pending enforcement of freezing/seizure orders; and
    3. have effective systems for managing frozen/seized assets.

C. **Eliminating deficiencies in Member-State enforcement laws:** The aim is to ensure that freezing/seizure and confiscation orders can be enforced wherever this accords with the fundamental rights of interested parties. However, it is not appropriate to address all aspects of the problem within the EU legal framework on confiscation and recovery of criminal assets. In particular, baseline scenarios revealed concerns that decentralised enforcement mechanisms in some Member States were inefficient and liable to corruption, but the issues involved are not unique to asset confiscation and would require far-reaching procedural reforms.[123] Cross-border enforcement, on the other hand, falls squarely within the scope of this study and is also an area in which baseline scenarios reveal deficiencies. The operational objectives, which focus deliberately on MR (as the EU's preferred approach to MLA), are to ensure that Member States must:
    1. recognise and enforce freezing/seizure orders from other Member States; and
    2. recognise and enforce confiscation orders from other Member States.

D. **Raising utilisation rates in Member States:** In theory, utilisation rates are measurable at each stage of the attrition process, but the paucity of statistics maintained by most Member States makes measurement impossible. It follows that it is not possible to formulate objectives as quantitative targets at either Member-State or EU level. This does not, however, mean that higher utilisation rates should not be an objective. On the contrary, the vast gaps between estimates of organised criminal turnover and amounts finally recovered (which are known for several Member States) are evidence of high overall attrition rates. The evidence available (especially practitioner opinion) suggests that problems of utilisation involve a lack of focus on freezing and confiscation (and an associated bias towards the traditional law-enforcement functions of arrest and prosecution) as well as a slow uptake of existing MR tools. It does not suggest that Member States fail to utilise available asset management tools.[124] Operational objectives are thus for Member States continually to increase utilisation of:
    1. freezing powers;

[123] Such a system is inefficient if orders need to be enforced in multiple jurisdictions, and liable to corruption if organised criminals are able to bribe or intimidate a relatively small number of local magistrates and other officials.

[124] It should be noted that many interviewees are not involved in the practical aspects of asset management, and therefore were only able to comment on the tools available in theory. There is, however, no reason to expect underutilisation of this sort; as a matter of logic, it would be counter-intuitive for Member-State authorities to fail to take economical steps to preserve the value of assets under management. This is so first because negligence renders Member States liable to remedies at the hands of interested parties (see the baselines in this regard), and second because the assets concerned will often revert to the state.

2. confiscation powers; and
3. MR instruments.

E. **Disposal and redistribution mechanisms that maximise social utility:** Once assets are recovered, the aim (as with the general objectives) is to apply them in ways that benefit victims and raise confidence in the justice systems of Member States. Baselines reveal that Member States have various mechanisms for restitution in the case of known victims of acquisitive crime (i.e. those who have been directly deprived of assets), but that such mechanisms are less common in the case of deprived communities and subgroups. Another aspect of the problem is the need to apportion assets between Member States in cross-border cases. This is already dealt with in the existing EU legal framework in the form of a default 50/50 split which can be derogated from by agreement.[125] Although it is theoretically possible that this system could work against the interests of victims, there is no evidence that this occurs in practice. In general, the data-gathering exercise did not reveal comprehensive systems for disposal and redistribution so as to maximise social utility. Recognising that social problems will vary across Member States, operational objectives are to ensure that Member States have effective mechanisms – where necessary – to:
   1. compensate dispersed victims;
   2. prevent criminals from reacquiring confiscated assets;
   3. raise public awareness; and
   4. fill economic voids.

[125] Article 16 of FD 2006/783/JHA.

CHAPTER 5. Policy options

This chapter derives policy options based on the operational objectives set out in the previous chapter. As discussed in Section 2.3.1, the complexity and heterogeneity of the problem demands a two-stage process. First, in Section 5.1, we derive 21 EU-level actions targeting particular operational objectives. Then, in Section 5.2, we group these into policy options for analysis, *viz*: a 'do nothing' option, a non-legislative option, a 'minimal' legislative in which existing framework decisions are amended and two 'maximal' legislative options which would go beyond the aims of the existing legal framework – one with and one without EU-level action on MR.

5.1 EU-level actions

The 21 EU-level actions are now introduced and described, grouped by the specific objectives to which they relate. In order to allow these descriptions to focus on matters of substance, we preface them with some general comments regarding common issues of scope. In general, a wide scope of application (in terms of the crimes to which the actions apply) seems desirable, for two reasons.

First, given that the definition of organised crime as operationalised in Member States is problematic, it is important that the policy options are elastic in their effect beyond what may be formally defined as organised crime by the EU.

Second, even though the problem definition here is centred on 'organised' crime, asset confiscation also has utility in combating 'ordinary' crime and an expansive scope is in this sense legitimate.

Against these arguments, the principle of proportionality may warrant more draconian measures to be limited in scope to organised-crime types, or even just a serious subset of these. Moreover, even where this is not the case, the Treaty of Lisbon may impose constraints.

5.1.1 Confiscation

The existing legal framework in FD 2005/212/JHA contains obligations regarding extended confiscation and value confiscation (relating to operational objectives A1 and A3) yet to be fully implemented by Member States.

1. **Promoting implementation of existing confiscation obligations:** Although the trends towards compliance are clearly positive, the European Commission could help to ensure ongoing progress via continued implementation/expert workshops in which

practitioners and experts could share best practice and learn from each others' experiences.

Even if FD 2005/212/JHA were fully implemented, it does not address several aspects of the problem definition, giving rise to further policy options of a legislative nature. We begin with operational objective A1 (recovery of type 1 criminal assets – i.e. those amenable to 'ordinary' confiscation):

2. **Confiscation of all valuable benefits, including indirect proceeds:** Baselines reveal that Member States currently employ varying definitions of criminal 'proceeds', a term that is currently undefined within the EU legal framework. These definitions could be harmonised to ensure the recovery of 'indirect' proceeds resulting from the appreciation in value, or profitable reinvestment, of direct proceeds. Harmonisation could also ensure that any valuable benefit (e.g. including the value of liabilities avoided) is liable to confiscation.
3. **Civil standard of proof regarding whether an asset is 'criminal':** Baselines reveal that the majority of Member States employ a high (full criminal) standard of proof regarding whether particular assets are proceeds.[126] This could be harmonised to a lower 'balance of probabilities' standard, to make it more difficult for convicted criminals to retain type 1 assets.
4. **Separate confiscation proceedings:** Baselines reveal that in many Member States the opportunity to confiscate criminal assets ends when criminal proceedings are finalised. This encourages criminals to try to conceal assets for the duration of the criminal proceedings. It may also cause authorities to rush financial investigations in order to conform to timetables imposed by criminal procedure. These limitations could be ameliorated by harmonising to ensure that separate confiscation proceedings can be brought at a later date.

Turning to operational objectives A2 and A3, the existing EU legal framework contains no mandatory provision for the confiscation of type 2 assets (those not amenable to ordinary confiscation because criminal proceedings are not allowed to be brought despite sufficient evidence), whilst type 3 assets (those which are believed to be criminal even though there is insufficient evidence to obtain the criminal conviction that would bring them within the scope of ordinary confiscation) are covered – in a limited and complicated way – by Article 3(2) of FD 2005/212/JHA. Options for reforming the EU legal framework include the following:

5. **Strengthening extended confiscation:** Baselines show that Member States have enacted many different types of extended confiscation regimes, taking different approaches to ensuring respect for fundamental rights.[127] As a consequence, it is difficult to design ways of strengthening extended confiscation that target only those

[126] In some Member States the standard of proof may vary; e.g. in Sweden the criminal standard prevails unless a victim has laid claim to the asset in question, in which case a balance of probabilities standard prevails (with the prosecutor essentially seeking compensation for the victim rather than confiscation in favour of the state).

[127] e.g. Limiting the categories of crime which may trigger extended confiscation, limiting the categories of assets to which it applies, limited its temporal scope, requiring a pattern of criminal behaviour, or imposing criminal procedural safeguards (e.g. standard of proof, rules of evidence) upon the state.

states with more limited regimes. Failure to do so could very easily disturb the delicate balance struck by Member-State legislatures, even to the point of unconstitutionality.[128] Looking at baseline scenarios, it may nevertheless be possible to simplify and strengthen the existing EU legal framework by providing for extended confiscation at least where a court is absolutely convinced (including as a result of circumstantial evidence) that a person convicted of a serious offence is in possession of assets derived from other criminal activities. The attendant definition of 'serious offence' could be linked to Article 83(1) of the TFEU.

6. **Non-conviction-based confiscation in limited circumstances:** In some Member States it is impossible to confiscate criminal assets where a conviction cannot be obtained because the suspect has died, fled the jurisdiction, is unable to stand trial, has immunity from prosecution, and so on. This option would harmonise laws by making ordinary confiscation possible in such circumstances.

Finally, the problem definition reveals scope for action in relation to operational objective A4 on confiscation from third parties, which is an entirely optional aspect of the existing EU legal framework within Section 3(3) of FD 2005/212/JHA.

7. **Third-party confiscation:** Baselines show that some confiscation regimes do not apply to assets which have been passed on to third parties. Others do, but require proof of *mala fides* even where the third party is a relative or close associate who has received far less than market value. Typically, a criminal evidentiary standard prevails, but in practice this is far harder to satisfy in some Member States than in others. Laws could be harmonised by requiring third-party confiscation to be available for assets which a reasonable person in the position of the third party would suspect to be derived from crime, or for assets received for significantly less than market value. This would be presumed (i.e. reverse burden of proof) where the third party is a spouse, blood relative, heir or other close associate of the convicted person, and also for companies linked to the perpetrator.

5.1.2 Preservation

Preservation of criminal assets pending confiscation is an important aspect of the problem definition. The following relates to operational objective B1:

8. **Universal freezing/seizure:** Baselines reveal that all confiscation regimes are supported by freezing/seizure powers, but that, in a minority of cases, these do not apply to all assets liable to confiscation (e.g. because they do not extend to assets in the possession of third parties, or to assets representing equivalent value). Harmonised minimum standards for freezing/seizure could ensure that it is possible to preserve any assets over which a confiscation order may be sought.[129] Harmonisation would also tend to ease the MR of freezing orders.

---

[128] See especially the situation in Germany, discussed above in fn.72, which makes it almost certain, e.g., that the Bundesverfassungsgericht would reject a law seeking to apply a civil standard of proof to extended confiscation proceedings, or to reverse the burden of proof. Incidentally, the latter would directly contradict Article 44 of the Romanian constitution.

[129] This could be achieved without harmonising freezing/seizure procedures themselves, a move that would require more careful consideration, as these differ considerably throughout the EU, including as regards their fundamental relationship to confiscation.

For operational objective B2 – aimed at preserving assets during and prior to application for a freezing/seizure order – any EU-level action must take account of the different approaches already employed throughout the EU. The general approaches are twofold: judicial procedures which ensure that the defendant does not become aware that an order is being sought (e.g. hearings *ex parte* and *in camera*, or decision 'on the papers' based on written evidence provided to a judge) and/or providing for preliminary freezing on the authorisation of a prosecutor or investigator. Baseline scenarios are difficult to assess because there is overlap with other areas beyond the scope of this study (e.g. police powers to seize evidence, and special anti-money-laundering provisions for freezing suspicious bank transactions).[130] Moreover, it is difficult to design specific yet simple policy actions in circumstances where Member States have gone down different procedural paths,[131] or have different priorities.[132] To avoid unnecessary interference in criminal-justice procedural matters, a less specific approach recommends itself.

9. **Mechanisms for safeguard freezing:** Without specifying specific approaches, Member States could be required to have in place appropriate mechanisms to ensure that assets in danger of being hidden or transferred out of the jurisdiction are able to be immediately frozen/seized. This would include, in appropriate circumstances, the ability to freeze/seize prior to seeking a court order, in which case, as a minimum procedural safeguard, persons affected would be immediately entitled to challenge the basis of this freezing/seizure.

Finally, operational objective B3 concerns the imperative to preserve the value of frozen assets. Baselines show that in many Member States assets are managed *ad hoc* by agents (court officials, prosecutors and police) involved in the criminal proceedings. In some cases, they lack even basic powers to realise seized assets which are liable to decline in value (even where requested to do so by the affected person):

10. **Powers to realise frozen assets:** Harmonisation could ensure that, regardless of how frozen assets are managed, there are powers to realise them at least where they are liable to decline in value or uneconomical to maintain.
11. **Designating AMOs:** Further harmonisation could require all Member States to entrust the management of frozen assets to AMOs at a national or regional level. This could increase efficiency and promote best practice.

---

[130] As discussed at the 2010 CARIN plenary, most but not all Member States provide for temporary freezing of suspicious transactions reported by financial institutions pursuant to anti-money-laundering obligations. The circumstances vary widely.

[131] In particular, if preliminary freezing is always an option, then there is no need for *ex parte* applications. This is the approach taken by Portugal's code of criminal procedure (which was also amended in 2007 to abolish judicial secrecy). On the other hand, if preliminary freezing is available only in circumstances where there is insufficient time to seek a court order, there remains an argument for judicial secrecy in the first instance.

[132] E.g. in Romania, where there is preliminary freezing on the authority of prosecutors but not police, one Romanian expert argued that this limitation is appropriate to guard against the possibility of abuse by corrupt police officers (another expert argued the opposite – i.e. that it is an important tool missing from Romanian confiscation legislation).

5.1.3 Enforcement

Operational objectives C1 and C2 aim to ensure MR of, respectively, freezing/seizure orders and compensation orders.

12. **Promoting implementation of existing MR obligations:** Baselines reveal that some Member States are yet to implement fully existing MR obligations under FDs 2003/577/JHA (freezing orders), 2006/783/JHA (confiscation orders) and 2005/214/JHA (financial penalties, including compensation orders that may encompass proceeds of crime). As with FD 2005/212/JHA, the trends towards compliance are positive. The European Commission could help to ensure ongoing progress via continued implementation / expert workshops. Similarly, the European Commission could continue to support initiatives such as the extant Moneyval survey aimed at understanding perceived barriers to the mutual recognition of NCB confiscation orders.
13. **MR of all types of order:** The existing framework decisions are limited in scope. Extended confiscation is not supported by FD 2003/577/JHA, whilst FD 2006/783/JHA supports extended confiscation in a limited way, through a tortuous relationship with FD 2005/212/JHA. Neither requires MR of NCB orders. These limitations handicap the ability of Member States to combat organised crime by strengthening extended confiscation, or introducing NCB confiscation. This is especially true for NCB confiscation because the alternative MLA route is relatively weak. The European Commission could remove these limitations, allowing orders to circulate better around the EU. This would also make the existing EU legal framework more coherent.
14. **MR of compensation orders:** The existing EU legal framework involves a confusing delineation between two similar instruments, *viz*: FD 2006/783/JHA (MR of confiscation orders) and FD 2005/214/JHA (MR of financial penalties, including compensation orders). This dichotomy between confiscation and compensation seems unnecessary given that the recovery mechanisms employed are very similar. Moreover, civil compensation orders (such as those made in Finland, Sweden and Denmark pursuant to the principle of 'adhesion') fall outside the scope of these instruments and must instead be enforced under the Brussels I Regulation. This creates practical barriers to enforcement of exactly the type that MR seeks to avoid. A perverse consequence may be that criminal assets become less likely to be recovered if a victim steps forwards. The EU could resolve this issue – and simplify the existing EU legal framework – by consolidating FD 2006/783/JHA and 2005/214/JHA and extending their scope to include all compensation orders made in the context of criminal proceedings.

5.1.4 Utilisation

Regarding specific objective D, the first thing to note is that the existing EU legal framework neither obliges utilisation nor provides for incentives. This is true for each of the operational objectives – *viz* utilisation of confiscation laws, freezing laws and MR instruments. The ultimate aim, in each case, is cultural change through the normalisation of asset-confiscation activity; in the same way that it is viewed as unacceptable for police and prosecutors to fail through negligence or reticence to convict a criminal, so it would become unacceptable for

them to fail for these reasons to recover criminal assets. At the outset it is convenient to mention cross-cutting options.

15. **Utilisation workshops:** There is evidence that the profitability (in a narrow, direct economic sense) of asset-confiscation work is poorly understood by government decision-makers in some Member States – even in those with relatively developed asset-confiscation programmes.[133] This lack of understanding causes asset-confiscation work to be viewed as a drain upon scarce resources, tending to retard utilisation. In order to improve understanding, utilisation workshops – attended by senior bureaucrats, experts and practitioners – could provide a forum for the sharing of scientific knowledge and practitioner experience.[134]
16. **Reporting obligations:** Underutilisation of asset-confiscation tools persists in the face of ample rhetoric regarding the utility of confiscating and recovering criminal assets. Publicly drawing out this inconsistency has the potential to motivate Member States to do more. One way to achieve this is through reporting obligations. Reporting criteria would need to be settled. An example would be an obligation to report, for all cases covered by TFEU Article 83(1), assets frozen/seized, the confiscation orders (if any) obtained and the type of order. A potentially beneficial corollary would be the generation of statistical information that could be used for performance audit and training purposes.

Regarding operational objectives D1 and D2, FD 2005/212/JHA only requires Member States to legislate to 'enable' the confiscation of criminal assets. It does not require courts to make orders, or even to consider making orders, for confiscation. Nor does it do so for freezing. Nor (going further back in the chain of necessary events) does it require an investigation into whether criminal assets exist.

17. **Mandatory assets investigation:** In some Member States, tracing of criminal assets is neglected in favour of the criminal investigation. This tendency could be reduced by requiring investigators to open a parallel financial investigation for crimes listed in TFEU Article 83(1). Greater emphasis upon identifying criminal assets – aside from increasing the pool of known criminal assets – would make practitioners more likely to take timely action to freeze/seize those assets that they do find.
18. **Limited judicial discretion:** Baselines show that freezing/seizure and confiscation orders are in some sense discretionary in most Member States, allowing them to go underutilised for a variety of reasons. This could be overcome by harmonising procedure to require freezing/seizure to be ordered wherever there is reasonable cause to suspect that an asset may become liable to confiscation and then, in the event of a

[133] During fieldwork several practitioners spoke of impending cuts to profitable financial investigation activities in the aftermath of the global financial crisis. In contrast the Greek government, viewing asset confiscation as a potential revenue stream in austere times, has moved to increase utilisation.

[134] The aim is to engineer system change by providing the information necessary for the professional information system itself to exert a motivating influence. Such feedback mechanisms are useful not only to overcome reticence or bureaucratic inertia, but also to promote reasoned decision-making where there are principled objections to innovation (e.g. because of the potential for system change conflicting with fundamental rights of citizens). Moreover, by arming proponents, they can help to overcome perverse elements within Member-State decision-making processes.

criminal conviction, to require confiscation to be ordered unless doing so would disproportionately affect fundamental rights. This means limiting judicial discretion and also imposing procedural obligations upon police, prosecutors and/or investigating magistrates, depending upon individual criminal-justice systems.

Regarding operational objective D3, there is evidence – from the fieldwork conducted in this study as well as from other sources – that many practitioners are slow to switch from traditional mechanisms of MLA to the FDs on MR of freezing and confiscation orders. Trends suggest that uptake will continue to improve with time. Nevertheless, EU-level intervention has the potential to accelerate this process.

19. **Consolidated MR forms:** Requests for freezing are very often made alongside other requests (e.g. for assistance in identifying and tracing assets, or requests for transfer of evidence, or for a coordinated arrest).[135] This means that a practitioner using the existing MR instruments must complete additional paperwork *vis-à-vis* MLA mechanisms which allow all requests to be combined in a single letter rogatory. It also means that practitioners need to be familiar with many different instruments. Fieldwork revealed these to be significant barriers in practice. The obvious solution is to provide a single form for all types of MR at the investigative stage. This could be achieved by including all freezing orders within the recently proposed European Investigation Order (EIO).[136] In this regard, it should be noted that the draft EIO proposal envisages suppressing the existing MLA alternative, so this EU-level policy action also incorporates the following one (at least as regards freezing).
20. **Enforcing the primacy of MR:** A different way to increase uptake of the MR instruments is to suppress the use of MLA with respect to freezing, seizure and confiscation. The EU could achieve this by repealing the existing MLA conventions as regards requests between Member States in these areas.

5.1.5 Redistribution

The final question to be addressed within a comprehensive framework for the confiscation and recovery of criminal assets is, per specific objective E: what to do with the recovered assets? Four distinct operational objectives have been identified, all of which could be achieved through social reuse schemes.

21. **Social reuse:** The social reuse schemes established by some Member States take various forms. In some cases confiscated assets are directly put to social purposes, whilst in others income streams are used to fund social benefits. To promote social reuse in other Member States, the EU could require Member States to establish mechanisms allowing confiscated assets, in appropriate cases, to be returned to deprived and victimised communities through social reuse schemes. (Although there are four operational objectives relating to specific objective E, we focus here only on operational objective E1 because the link to victims makes it more likely that a conferral of power could be found for EU-level action.)

[135] From a practical perspective arrests and freezing should occur together to ensure that neither suspects nor assets are put beyond the reach of authorities.

[136] The EIO draft includes freezing for evidentiary purposes only (i.e. a partial repeal of FD 2003/577/JHA).

To recapitulate, Table 5-1 shows which EU-level policy actions relate to which operational objectives.

Table 5-1 Targeting of EU-level actions

EU-level policy actions (grouped by specific objective)		Operational objectives															
		A1	A2	A3	A4	B1	B2	B3	C1	C2	D1	D2	D3	E1	E2	E3	E4
Confiscation																	
1	Implementation of 2005/212/JHA	✓	.	✓	.	.	.	.	.	.	.	.	.	.	.	.	.
2	Indirect proceeds	✓	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
3	Civil standard of proof	✓	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
4	Separable proceedings	✓	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
5	Stronger extended confiscation	.	.	✓	.	.	.	.	.	.	.	.	.	.	.	.	.
6	NCB in limited circumstances	.	✓	.	.	.	.	.	.	.	.	.	.	.	.	.	.
7	Third party confiscation	.	.	.	✓	.	.	.	.	.	.	.	.	.	.	.	.
Preservation																	
8	Universal freezing/seizure	.	.	.	.	✓	.	.	.	.	.	.	.	.	.	.	.
9	Mechanisms to safeguard freezing	.	.	.	.	.	✓	.	.	.	.	.	.	.	.	.	.
10	Powers to realise seized assets	.	.	.	.	.	.	✓	.	.	.	.	.	.	.	.	.
11	Asset management office	.	.	.	.	.	.	✓	.	.	.	.	.	.	.	.	.
Enforcement																	
12	Implementation of MR obligations	.	.	.	.	.	.	.	✓	✓	.	.	.	.	.	.	.
13	Broadened scope of MR	.	.	.	.	.	.	.	✓	✓	.	.	.	.	.	.	.
14	MR of compensation orders	.	.	.	.	.	.	.	.	✓	.	.	.	.	.	.	.
Utilisation																	
15	Utilisation workshops	.	.	.	.	.	.	.	.	.	✓	✓	✓	.	.	.	.
16	Reporting obligations	.	.	.	.	.	.	.	.	.	✓	✓	✓	.	.	.	.
17	Mandatory assets investigation	.	.	.	.	.	.	.	.	.	✓	✓	.	.	.	.	.
18	Limited judicial discretion	.	.	.	.	.	.	.	.	.	✓	✓	.	.	.	.	.
19	Consolidated MR forms	.	.	.	.	.	.	.	.	.	.	.	✓	.	.	.	.
20	Enforced primacy of MR	.	.	.	.	.	.	.	.	.	.	.	✓	.	.	.	.
Redistribution																	
21	Social reuse programme	.	.	.	.	.	.	.	.	.	.	.	.	✓	✓	✓	✓

5.2 Grouping actions into policy options

As discussed in Section 2.3.1, the complexity and heterogeneity of the problem definition necessitates numerous EU-level actions, many of them complementary. In order to produce meaningful recommendations, these actions must now be grouped into synthetic policy options for analysis. As it is impracticable to analyse every potential combination of actions as a separate policy option, we have – in consultation with the European Commission – grouped them into four options which, over and above the 'do nothing' option, represent different degrees of EU-level intervention, *viz*: a 'non-legislative' option, a 'minimal' legislative option to correct identified deficiencies in the existing EU legal framework, and two 'maximal' legislative options that go beyond the aims of the existing EU legal framework. Each option is now described in more detail, with reference to its constituent policy actions.

No action at EU level: This does not mean no change at EU level. As will be discussed in Section 6.1.1, Protocol No. 36 to the Treaty of Lisbon ensures that the existing EU legal framework – or at least those provisions that do not exceed the EU's post-Lisbon competence – will, on 1 December 2014, become enforceable against Member States through infringement proceedings brought by the European Commission before the European Court of Justice (ECJ). Analysis will need to account for this step-change, as well as for other factors,

including continued international developments and scrutiny in the forum of mutual evaluations by Moneyval and the FATF.

Non-legislative option: Policy actions 1, 12 and 15 combine to form this option. In broad terms, it has two aims: encouraging Member States to transpose the existing EU legal framework better into domestic law (by highlighting its benefits and reiterating its compulsory nature); and encouraging Member States to utilise their asset-confiscation laws better (again by highlighting benefits and sharing scientific knowledge and best practice).

Minimal legislative option: This option consists of the non-legislative option plus policy actions 14 and 19. These additional policy actions deal with identified deficiencies in the existing legal framework – both of which concern MR. Although some interviewees identified further deficiencies, opinion in these cases was too variable to sustain further policy actions.

Maximal legislative option not including MR: This option consists of the non-legislative option plus policy actions 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 17, 18 and 21 (i.e. all policy actions that do not involve legislative action in relation to MR).

Maximal legislative option including MR: This option consists of all policy actions – that is, it takes the previous maximal legislative option and adds policy actions 14 and 19 (which feature in the minimal legislative option) and also policy actions 13 and 20. We note again that policy actions 19 and 20 partly overlap, and shall be analysed as such.

CHAPTER 6. Analysis

This chapter begins by examining the factors that drive the baseline 'do nothing' option against which the other options are ranked (Section 6.1). Impacts are analysed in accordance with the process laid out in Section 2.5. First, we examine the immediate impacts of all 21 EU-level actions (Section 6.2). We then analyse economic, social and environmental impacts for the different policy options (Section 6.3). Finally, we rank the policy options in accordance with the evaluation criteria (Section 6.4).

6.1 Trends and drivers

To ensure that second- and higher-order impacts have time to develop, our analysis spans the period to 2020, the main point of comparison being the year 2020 itself. Options will be analysed *vis-à-vis* a 'no change' option, which is simply a function of known trends and driving forces. These are now described.

6.1.1 Impact of Lisbon

Protocol No. 36 to the Treaty of Lisbon ensures that existing Council framework decisions (including the existing EU legal framework on asset confiscation described in Section 3.5) remain in force until 'repealed, annulled or amended in implementation of the Treaties'. It implies (but does not require) a process whereby existing instruments are replaced with directives, at which point obligations will become subject to infringement proceedings brought by the European Commission before the ECJ. It also provides for this enforceability, upon amendment of an existing instrument or, in any event, five years after the Treaty enters into force (i.e. 1 December 2014). Member States failing to implement the EU legal framework on confiscation and recovery of criminal assets will face penalties, the prospect of which will tend to encourage timely implementation. There is, however, one significant caveat regarding the enforceability of the existing legal framework come 1 December 2014: the need to ensure an ongoing legal basis for the existing measures. This issue arises because the Lisbon Treaty narrowly (re)defines the EU's competencies in the field of criminal justice, giving rise to the possibility that existing measures are no longer supported by a relevant conferral.[137] It essentially divides into two questions: (a) Is the EU competent, post-Lisbon, to do what it has already done? If not, (b) what is the status of the pre-Lisbon legal framework?

[137] This narrow redefinition accompanies the introduction into this field of the ordinary legislative procedure. Whereas FDs were adopted unanimously via procedures that constituted the 'third pillar' of the EU, directives do not require unanimity (except in the sense that a Member State can pull the 'emergency brake'), making Member States more circumspect about conferring competence upon the EU.

Regarding the first question, the potentially relevant conferrals of power in the TFEU appear not to support the existing legal framework in its entirety. The problem lies not with the framework decisions on MR, which find a clear basis in TFEU Article 82(1)(a) and (d),[138] and will therefore become enforceable on 1 December 2014 if not sooner, but rather with FD 2005/212/JHA – in particular its application to all crimes punishable by imprisonment of at least one year. The two most promising conferrals of power are Article 82(2), which allows harmonisation of criminal procedure to the extent necessary to facilitate MR, and Article 83(1), which allows for the harmonisation of crimes and penalties. As already discussed in Section 4.1.1, the former exhaustively sets out the aspects of criminal procedure to which it applies and is thus useless unless confiscation is added to the list. This would require the support of both the European Parliament and the Council acting unanimously, which should not be presumed even though this is an area in which the EU has already legislated (consider, e.g., recent rhetoric within conservative elements of the UK's coalition government against conferring new powers upon the EU).

Reliance upon Article 83(1) raises two issues.

First, the conferral is limited to 'particularly serious crime with a cross-border dimension', defined as 'terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime', to which list the Council acting unanimously may add. Clearly, this list can never encompass all crimes punishable by more than one year's imprisonment.

Second, there is the question of whether confiscation is a 'penalty' within the meaning of Article 83(1). In this regard, Article 1 of FD 2005/212/JHA defines confiscation as 'a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences', while Article 3(4) specifies that 'Member States may use procedures other than criminal procedures to deprive the perpetrator of the property in question'. These provisions reflect the fact that there is no uniform conception of even conviction-based confiscation across the EU; it is in some places regarded as a penalty, elsewhere as a non-punitive (restitutionary) consequence of a criminal conviction. This diversity has hitherto presented no difficulty for the existing legal framework, but it calls into question the adequacy of the narrowed post-Lisbon conferral. Such a question has yet to be ruled upon by the ECJ, but an interpretation in the EU's favour is quite plausible, for the simple reason that directives are concerned with ends rather than means, far less with mere form. The opposite interpretation could cause the EU to act in a way antithetical to the very essence of subsidiarity and proportionality – specifying means instead of ends and forcing some Member States to redefine confiscation as a penalty to no substantive benefit.

We now return to question (b) above by asking where this leaves the existing EU legal framework in the event that it is not replaced before 2014. This depends upon the exact meaning of Protocol No. 36, which is also yet to be ruled upon by the ECJ, but the text suggests two things. On the one hand, the very fact that FDs become enforceable five years after entry into force of the Lisbon Treaty suggests that they can continue to exist until at least this time, and probably indefinitely. On the other hand, the inclusion of the word

[138] See TFEU.

'annulled' alongside 'repealed' and 'amended' suggests that the ECJ will not enforce provisions for which there is no ongoing conferral.[139]

6.1.2 International obligations

Relevant international conventions may impose obligations, or present opportunities, beyond those flowing from the EU legal framework. An example is the clear basis for recognising NCB confiscation orders afforded by the 2005 CoE convention (see Section 3.5.2 above). So far, 12 Member States have ratified this convention and it is likely that others will do so in the future. It is also possible that the additional international treaties will ensue, presenting still further obligations and opportunities, but our analysis is not based on this assumption.

6.1.3 Related EU obligations

The EU legal framework on confiscation is interrelated with other EU legislation and it is therefore possible that amendments in other areas will bear upon baselines in some relevant way. Future developments are, of course, difficult to predict. We therefore assume only one, which looks reasonably probable: an MR instrument along the lines of the initiative of 29 April 2010 for an EIO.[140] Although the legislative process is far from complete, we assume in line with the proposed initiative that the EIO will cover almost all investigative measures, replacing MLA and absorbing existing MR instruments including the European Evidence Warrant (FD 2008/978/JHA) and, in so far as it relates to freezing of evidence, FD 2003/577/JHA. This assumption is, in fact, built into EU-level action #19, to be analysed shortly.

6.1.4 Financial interests

Financial pressure will undoubtedly influence Member States into the future, but it is difficult to predict the extent and even the direction of this influence. On the one hand, the cost of asset-confiscation activity is borne by the state; on the other hand, the activity yields an economic return. In other words, asset-confiscation work is potentially profitable, and this will naturally tend to influence government investment levels. If Member-State governments behave rationally, they will always invest in asset-confiscation work to the extent that they expect it to yield a financial dividend; if they expect other valuable higher-order impacts, they will invest even more.

Unfortunately, even if the rational actor assumption is valid, Member-State governments almost certainly lack the information necessary to make informed decisions on profitability.[141] Thus it is difficult to evaluate whether the Greek government's recent enthusiasm for increased asset-confiscation activity as an adjunct to their taxation system is well placed. Exceptional in this regard, however, is the UK, where system-wide income statistics, as well as

---

[139] The two-month deadline for a direct challenge under Article 35(6) TEU (as in force prior to the Treaty of Lisbon) has long passed, so a direct challenge would not be possible in the event of infringement proceedings: *Commission v Greece* [1988]. However, because 'third pillar' acts would have become subject to the full jurisdiction of the ECJ, the ongoing validity of FD 2005/212/JHA could be contested indirectly, through a reference for a preliminary ruling by a national court. Provisions lacking a proper legal basis in the TFEU are therefore unlikely to remain in force.

[140] JUST/B/1/AA-et D(2010) 6815.

[141] The data-gathering exercise for the present study leads us to this conclusion.

pockets of useful cost statistics, allow profitability to be estimated.[142] The evidence, however, does not necessarily validate the rational actor assumption. In particular, a recent decision by the Metropolitan Police Authority (MPA) to reduce its ranks of financial investigators appears to be a classic case of suboptimal 'bureaucratic rationality'.[143] The MPA appears to have acted on the basis that projected receipts under the prevailing Asset Recovery Incentivisation Scheme (ARIS) would not cover agency costs – an entirely rational decision from its own (narrow financial) perspective, but irrational from a 'whole of government' perspective.[144]

6.1.5 Domestic politics

Domestic political imperatives can take several forms, which we shall consider here as ideal types.

First, there is the imperative to be seen to be confiscating criminal wealth, as this action tends to resonate well with law-abiding voters.

Second, there is the opposite imperative, as the targets of the asset-confiscation work also have a share of the vote. This is not necessarily insignificant – if asset-confiscation powers are used to supplement the tax base then large numbers of voters could consider themselves potential targets, especially in Member States with high rates of tax avoidance.

Third, there are perverse incentives, when decision-makers are themselves in possession of criminal assets or perhaps under the influence of others who are. One might expect these perverse incentives in Member States with acknowledged corruption problems, but they are almost certainly a factor, albeit perhaps to a lesser extent, in other Member States too.

Unfortunately, the interplay between all of these domestic political incentives is difficult to predict. Consider, for example, Romania and Bulgaria – former Soviet bloc countries with comparable *per-capita* GDP, corruption problems and post-accession obligations. Both have agencies empowered to investigate disproportionate assets and bring confiscation proceedings, but, whereas the Bulgarian parliament has recently granted new powers to CEPAIA, the Romanian government has recently decimated those of ANI. These differences apparently have much to do with domestic politics: the ruling party in Bulgaria has made asset confiscation part of its populist agenda. If this assessment is correct then it follows that current trends (in both countries) may wax and wane with the currents of domestic politics.

6.1.6 External pressures

The most important sources of international pressure (in that they apply to all EU Member States) are perhaps the mutual assessment procedures of Moneyval and the FATF. These procedures, which are formally focused on the threat posed by money laundering and terrorist financing, are taken seriously by Member States, not least out of a desire to compare well to

---

[142] This is attempted in Appendix G.

[143] See para. 25 of: http://www.mpa.gov.uk/committees/finres/2010/100923/07/. The scheme is discussed in detail in Appendix G.

[144] Specifically, because only half of recovered money is returned to agencies under ARIS, the MPA is delivering a 100% return on investment to the UK government despite being at break-even point as an agency. This produces a disconnection between what is rational for the MPA and what is rational for the UK, leading to suboptimal decision-making from the perspective of the latter.

their neighbours.[145] In extreme cases, a poor assessment can result in further measures, as happened recently to Greece. This is confirmed by Greek interviewees, who described how FATF pressure has previously caused Greece to strengthen anti-money-laundering laws (including asset-confiscation powers) and is likely to do so again.

Moneyval and the FATF assessments of legal regimes for confiscation and freezing will typically look for many aspects which we are here analysing as potential EU-level policy options, including: (2) indirect proceeds, (6) NCB confiscation in limited circumstances, (7) third-party confiscation, (8) freezing regimes, (9) mechanisms to safeguard freezing, (10) powers to realise frozen assets and (11) asset management arrangements. Both organisations are acutely aware, however, that all of these tools are useless unless utilised. In the future, therefore, they will complement a continued focus on legal tools with an increased focus not only upon how they work in practice, but also the extent to which they are utilised.[146]

Other sources of external pressure include criticisms by the EU and the US, often in the context of the imperative to combat official corruption. An example already mentioned is the criticism that followed the Romanian parliament's revision of ANI's powers, which went beyond what was necessary to bring them into line with a recent ruling of the constitutional court.

6.1.7 Cultural evolution

Fieldwork in this study has confirmed that police and judicial culture are significant factors in the utilisation of asset-confiscation laws. Police officers, prosecutors and judges who have spent their careers pursuing traditional criminal-justice ends (detecting, arresting and prosecuting offenders) will be slow to adopt new functions, especially where this presents an additional demand upon their time. System change requires that training, as well as the work itself, is properly resourced. Even then, interviewees stressed that change takes time, measurable in decades rather than years or months. This is especially true where the aim is to have asset-confiscation work performed routinely by regular police officers, prosecutors and judges, rather than by specialist agencies, which can be raised relatively quickly by bringing together interested practitioners to tackle the most serious cases only. Even practitioners from Member States with relatively strong asset-confiscation programmes (e.g. the UK, Germany and the Netherlands) admit that there is a long road to travel in this regard.

For present purposes, the slow rate of cultural evolution has two important consequences. Where Member States have implemented policies aimed at raising utilisation rates, it can be assumed that simply continuing these will have an ongoing beneficial impact, as their full impacts are unlikely yet to have been achieved. The flipside of this, however, is that the impacts of further system change – including anything engineered at EU level – may take a long time to manifest fully.

---

[145] Swedish practitioners, e.g., were conscious of the fact that their legal tools for confiscating criminal assets, which were previously 'ahead of the pack' in northern Europe, are now comparatively weak in some aspects.

[146] The purpose of the FATF recommendation on statistics is to allow utilisation to be properly assessed. This will be strongly emphasised in the next round of FATF mutual evaluations (fieldwork: FATF).

6.1.8 Trends in organised crime and public confidence

Empirically backed knowledge about organised crime and associated trends at EU level is available solely through the Europol Organised Crime Threat Assessment (OCTA). OCTA collates confidential questionnaire returns from Member-State and other key law-enforcement agencies. The published OCTA (Europol, 2009) is a non-quantitative descriptive account based on a typology of organised-crime types and a mapping of developing and existing markets across a number of hubs (see Appendix A). It is generally the case that the threat assessments detail a steady increase in the number of hubs, the types of criminal activity and markets involved and the number and size of criminal transactions taking place. This picture is not accompanied by any empirical detail and the changes recorded are not quantified. However, a reasonable conclusion from a reading of the 2009 OCTA is that as Member States increase their efforts to counter organised crime, more and more organised criminal activity is identified even if this is not reflected in convictions or confiscated assets. We are therefore inclined to conclude that while absolute trends in organised-crime prevalence and incidence are unknowable, estimates of them drawn from enforcement operations will grow *pari passu* with investment of enforcement resources. Given the strong economic constraints on this investment, it is unlikely that this association will reach an asymptote.

Indicators of public confidence in criminal justice are available from the International Survey of crime victims (ICVS, 2005; van Dijk *et al.*, 2008). Of necessity this survey deals with the victims of volume crime, but it can be argued that the fear-of-crime tables for Member States (fear of burglary and fear of being on the streets after dark) reflect not just specific fears but more generalised anxiety about criminality. The fear-of-crime Member-State profiles suggest that with a few exceptions fear of crime across Europe was diminishing from its high points in the mid 1990s. Whether this trend will continue into the current recession cannot be predicted, especially given the putative relationship between economic prosperity and falling acquisitive crime (Dhiri *et al.*, 2009) .Moreover, confidence in the police has risen in nearly every Member State over the course of this period (1989–2005) of falling property crime. However, if the current recession leads to an upswing in acquisitive crime this increased confidence may evaporate.

6.2 Phase 1: analysis of EU-level actions

This section identifies and analyses the immediate impacts of each of the 21 EU-level actions considered individually. Actions deemed not to be viable are then cut from the list, whilst those remaining are grouped into the policy options defined, in Section 5.2, by degree of intervention. Immediate impacts are then synthesised along these lines.

6.2.1 Barriers and impacts

For policy actions which would harmonise laws, it is relatively straightforward to identify which Member States have already introduced the measure in question and, thus, the likely locations of the most significant impacts. The results of this exercise – including efforts to identify where weak or missing components of a Member State's asset-confiscation system are compensated for elsewhere in the system – are displayed in Table 6-1, in which ✓ denotes that the measure under consideration is already implemented, × denotes that it is not, **P**

denotes partial implementation, **A** denotes an alternative approach to the objective, **?** denotes a gap in the data set and **P/?** denotes at least partial implementation.

Table 6-1 Location of potential impacts by Member State

EU-level policy actions (grouped by specific objective)		Member State																								
		BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
Confiscation																												
1A	Extended confiscation	✓	✓	✓	✓	✓	✓	P/A	P	✓	✓	✓	✓	✓	✗	✗	✓	✓	✓	✓	P	✓	P	✗	✓	✓	✓	✓
1B	Value confiscation	✓	✓	✓	✓	✓	✓	✓	P	✓	✓	P	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
(2)	Indirect proceeds	✓	✓	✓	P	✓	✓	✓	P	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	?	✓	✓	✓	?	✓	✓	✓	✓
3	Civil standard of proof	✗	P	✗	P	✗	✗	✓	P	✗	✗	P	?	✗	✗	✗	✗	?	✓	P	✗	✗	✗	✗	P	P	P	✓
4	Separable proceedings	?	P	✗	✗	✗	✓	✓	P	✗	?	P/?	✗	?	?	?	✗	?	✓	?	?	✗	P	?	P/?	?	?	✓
5	Stronger extended confiscation	✗	✓	✓	✓	✓	✓	P/A	✗	✓	✓	✓	✓	✓	✗	✗	✗	P	✓	✗	P	✓	P	✗	?	✓	✓	✓
6	NCB in limited circumstances	✗	P	✓	P	✓	✓	✓	P	✓	?	P	P	✓	✗	P	✓	✗	✓	P	P	✗	P	P	P	✓	✓	✓
(7A)	Third party: if *mala fide*	✓	P/?	P/?	✓	P	✓	✓	P	✓	A	P	✗	✓	✓	P/A	✓	P	✓	✗	P	✓	✗	P	?	P	✓	✓
7B	Third party: if gift	?	P/?	P/?	✓	P	✓	✓	P	?	A	P	✓	✓	✗	A	✓	P	A	✗	P	P	✗	P	?	P	✗	✓
Preservation																												
8	Universal freezing/seizure	✓	✓	?	✓	✓	✓	✓	✓	P/?	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	P/?	P/?	✓	P	P/?	✓
9	Mechanisms to safeguard freezing	✓	P	✓	✓	✓	✓	✓	P/?	✓	P	P	P	✓	✓	✓	✓	P	P	✓	P/?	P	?	P/?	P/?	P/?	✓	✓
10	Powers to realise frozen assets	✓	✓	✓	✗	✓	✓	?	?	✓	✓	?	?	✓	✓	✗	✓	✗	✓	✗	?	✗	✗	?	?	?	?	✓
11	Asset management office	✓	✗	✗	?	✗	✗	?	?	✓	✓	✓	✗	✗	✗	✗	✗	✗	✓	✗	?	✗	✗	✗	✗	?	?	✗
Enforcement																												
12A	Implemented FD 2003/577/JHA	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✗	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗
12B	Implemented FD 2006/783/JHA	✗	✓	✓	✓	✓	✓	✗	✗	✓	✓	✗	✓	✓	✗	✗	✓	✗	✓	✓	✓	✓	✓	✓	✗	✓	✗	✗
12C	Implemented FD 2005/214/JHA	✗	✓	✓	✓	✗	✓	✗	✗	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✗	✗
(13A)	Recognition of NCB orders (CARIN)	✗	✗	✗	✗	✓	✗	?	✗	✗	✓	?	✗	?	✗	✓	✗	✗	✗	✗	?	✗	✗	✗	✗	✗	✓	✓
(13B)	Ratified 2005 Warsaw convention	✓	✗	✗	✗	✗	✗	✗	✗	✓	✗	✗	✓	✓	✗	✗	✓	✓	✓	✗	✓	✓	✓	✓	✓	✗	✗	✗
14	Principle of 'adhesion' or similar	?	?	?	✓	?	?	?	?	?	?	?	?	?	?	?	?	?	?	?	?	?	?	?	?	✓	✓	?
Utilisation																												
17	Mandatory assets investigation	?	?	?	?	✗	✓	?	?	✗	✓	?	?	✗	✗	✗	?	?	?	✓	?	✗	?	✓	?	✗	?	✗
18A	Limited discretion re: freezing	✗	?	?	?	✗	P	✗	?	✗	✓	✓	?	P	✓	✗	?	?	?	?	?	P	P	?	?	?	?	✗
18B	Limited discretion re: confiscation	P	?	✗	?	✓	✓	P	?	✗	✓	?	✓	?	?	?	?	?	✗	?	?	✓	✓	✓	?	P	✓	✓
Redistribution																												
21	Social reuse programme	✗	✓	✗	✗	P	✗	✗	✗	✓	✓	✓	✗	✗	✗	✓	✗	✗	✗	✗	✗	✓	✗	✗	✗	✗	✗	✓

It may be seen that 17 of the 21 policy actions have been assessed in this way. The four policy actions not so assessed are:

- 15 (utilisation workshops) and 16 (reporting obligations), based on our assumption that there is scope for increased utilisation in all Member States; and
- 19 (consolidated MR forms) and 20 (enforced primacy of MR) because, in the absence of policy at Member-State level, the impacts here would be at the level of individual practitioners.

It may also be seen that some policy actions are split into two parts (e.g. 1A and 1B). This is done where the data set would permit a judgement as to whether a subset of the policy is redundant. Finally, it may be seen that some policy actions are listed in round brackets. This means that, in order to expand the comparative data set, we have examined only one aspect of the policy action in question, or used a proxy.

Having identified and located potential primary impacts, we now analyse each of the EU-level policy actions. We analyse potential change through to 2020, both with and without each action, in each case taking into account underlying driving forces as well as the action itself. We examine, with implicit reference to Table 6-1 and the underlying Member-State baselines, the following positive and negative impacts:

- impact upon aspects of the specific objective being targeted (confiscation, preservation, enforcement, utilisation, redistribution);
- other system effects (including unintended consequences);
- fundamental rights;
- direct economic costs (administrative burden, implementation costs, ongoing costs); and
- simplicity and coherence.

We also examine the following as potential barriers to action:

- The need for a conferral of power (unless otherwise specified, we refer to articles of the TFEU and, to avoid repetition, we refer often to the analysis of Articles 82(2) and 83(1) already conducted in Section 6.1.1).
- Proportionality.
- Compatibility – that is, the possibility that Member States will rely upon the 'emergency brake' to derail a proposal regarded as unconstitutional or *contra* fundamental principles of their criminal-justice systems. This is a safeguard built into the legislative process in certain conferrals of power, whereby Member States can claim that a proposal affects 'fundamental aspects' of their criminal-justice system and, thereby, prolong the legislative process and ultimately force the Council to act unanimously rather than by qualified majority.

The 21 individual analyses are contained in Appendix G and the results are summarised in Table 6.2 (which contains an additional action #7a, being a less ambitious version of #7 given that the latter may face barriers). In the analysis of barriers, ✓ indicates that there is no barrier, **?** indicates a potential barrier, **??** indicates a likely barrier and ✖ indicates a clear barrier, in which case the action itself is struck out. Impacts are rated **+** or **–** for slight impacts, **++** or **– –** for moderate impacts and **+++** or **– – –** for significant impacts. (Within Appendix H, all impacts are described as slight, moderate or significant.) For fundamental-rights impacts, **R** indicates that it should be possible to require remedies at EU level to mitigate any negative impact, whilst **R/+** indicates that such remedies could result in a positive impact. Finally, **V** indicates either that administrative burden will vary greatly depending upon an individual Member State's approach to implementation, or an impact that cannot be assessed owing to a lack of data; and **NA** indicates an impact that is not applicable or that we have chosen not to assess. Impact ratings are applied *vis-à-vis* the 'no change' baseline, so a score of ++ represents a moderate improvement upon the baseline (in each case, the baseline is described, usually in terms of trends, in Appendix G).

Table 6-2 Summary of EU-level policy actions

EU-level policy actions (grouped by specific objective)	Barriers			Impacts							
	Conferral	*Proportionality*	*Compatibility*	*F.R.*	*Direct costs*	*Simplicity*	*Confiscation*	*Preservation*	*Enforcement*	*Utilisation*	*Redistribution*
Confiscation											
1 Implementation of 2005/212/JHA	✓	✓	✓	.	.	.	.	.	.	.	.
2 Indirect proceeds	✓	✓	✓	R/+	.	.	+	.	.	.	.
3 ~~Civil standard of proof~~	??	??	×	R	V	.	++	.	.	.	.
4 Separable proceedings	??	✓	?	R/+	–	.	++	.	.	.	.
5 Stronger extended confiscation	✓	?	?	R	.	++	++	.	.	.	.
6 NCB in limited circumstances	?	?	?	–	.	.	++	.	.	.	.
7 Third party confiscation	✓	?	??	– –	.	.	+++	.	.	.	+
7a Third party confiscation (adjusted)	✓	✓	✓	.	.	.	++	.	.	.	.
Preservation											
8 Universal freezing/seizure	✓	✓	✓	.	.	.	.	.	.	.	.
9 Mechanisms to safeguard freezing	✓	✓	✓	R/+	.	.	.	+	.	.	.
10 Powers to realise seized assets	✓	✓	?	R	+	.	.	++	.	.	.
11 ~~Asset management office~~	×	✓	✓	.	V	.	.	++	.	.	.
Enforcement											
12 Implementation of MR obligations	✓	✓	✓	.	+	.	.	.	+	.	.
13 Broadened scope of MR	✓	✓	?	+	.	+	.	.	+++	.	.
14 MR of compensation orders	✓	✓	✓	.	.	++	.	.	++	.	++
Utilisation											
15 Utilisation workshops	✓	NA	NA	.	V	.	.	.	.	/	.
16 Reporting obligations	✓	✓	✓	.	– –	.	.	.	.	++	.
17 ~~Mandatory assets investigation~~	×	×	×	.	– – –	.	.	.	.	NA	.
18 ~~Limited judicial discretion~~	×	×	×	–	– – –	.	.	.	.	NA	.
19 Consolidated MR forms (cf. 20)	✓	✓	✓	.	+	+++	.	.	++	+++	.
20 Enforced primacy of MR (cf. 19)	✓	✓	✓	.	+	+	.	.		+++	.
Redistribution											
21 Social reuse programme	??	✓	?	.	V	.	.	.	.	.	+++

The only impact that we do not assess, for want of data, is that of utilisation workshops (action #15) upon utilisation rates. We feel that such an assessment would be premature owing to the lack of good data upon which to base the analysis. In this regard, our own analysis in Section 6.3.1 is an encouraging basis upon which to hypothesise that asset-recovery work is profitable, but further research is needed to turn this hypothesis (hopefully) into an evidence base which will have persuasive force in utilisation workshops of the type envisaged. This does not mean that utilisation workshops cannot be held; on the contrary, they could initially provide a forum for information sharing and tasking in support of the very research that is needed and, where this leads to an improved evidence base, the results could be presented.

6.2.2 Synthesis

The foregoing analyses of individual EU-level actions are now synthesised by eliminating those that are very unlikely to be viable and grouping those that remain into policy options. Table 6-3 gives the results of this exercise. The 'do nothing' option is not shown as it is simply the baseline against which the other options are assessed.

Table 6-3 Potentially viable EU-level actions and corresponding options

EU-level policy actions (grouped by specific objective; non-viable actions removed)	Impacts								Options			
	F.R.	*Direct costs*	*Simplicity*	*Confiscation*	*Preservation*	*Enforcement*	*Utilisation*	*Redistribution*	*non-legislative*	*minimal*	*maximal - MR*	*maximal + MR*
Confiscation												
1 Implementation of 2005/212/JHA	.	.	.	.	.	.	.	.	✓	✓	✓	✓
2 Indirect proceeds	R/+	.	.	+	.	.	.	.	.	.	✓	✓
4 Separable proceedings	R/+	–	.	++	.	.	.	.	.	.	✓	✓
5 Stronger extended confiscation	R	.	++	++	.	.	.	.	.	.	✓	✓
6 NCB in limited circumstances	–	.	.	++	.	.	.	.	.	.	✓	✓
7 Third party confiscation	– –	.	.	+++	.	.	.	+	.	.	✓	✓
Preservation												
8 Universal freezing/seizure	.	.	.	.	.	.	.	.	.	.	✓	✓
9 Mechanisms to safeguard freezing	R/+	.	.	.	+	.	.	.	.	.	✓	✓
10 Powers to realise seized assets	R	+	.	.	++	.	.	.	.	.	✓	✓
Enforcement												
12 Implementation of MR obligations	.	+	.	.	.	+	.	.	✓	✓	✓	✓
13 Broadened scope of MR	+	.	+	.	.	+++	.	.	.	.	.	✓
14 MR of compensation orders	.	.	++	.	.	++	.	++	.	✓	.	✓
Utilisation												
15 Utilisation workshops	.	V	.	.	.	.	/	.	✓	✓	✓	✓
16 Reporting obligations	.	– –	.	.	.	.	++	.	.	.	✓	✓
19 Consolidated MR forms (cf. 20)	.	+	+++	.	.	++	+++	.	.	✓	.	✓
20 Enforced primacy of MR (cf. 19)	.	+	+	.	.		+++	.	.	✓	.	✓
Redistribution												
21 Social reuse programme	.	V	.	.	.	.	.	+++	.	.	✓	✓

We begin by reiterating our predictions regarding the 'do nothing' option, which are set out in Appendix G. In essence, we predict progress against each of the specific objectives (i.e. confiscation orders, preservation, enforcement, utilisation and distribution) based not only upon the driving forces identified in Section 6.1, but also upon historical trends which are evident both in the evolution of Member-State laws and in statistical data available. Positive trends are not, however, cause for complacency: our legal analysis revealed significant gaps, MR instruments remain underutilised and the amount of criminal assets confiscated throughout the EU remains tiny compared to estimates of organised criminal turnover. Thus, whilst the situation without EU-level intervention is far from static, the rate of change is not fast, suggesting that there may be scope for the EU to effect positive system change.

It is immediately evident from Table 6-3 that the added value of the **non-legislative option** is likely to be low. The reason for this is that, although transposition of existing options remains incomplete, there is only slight scope for non-legislative action to add value in circumstances where the existing legal framework will become enforceable by 2014 in any event (although it may be noted here that the bringing of infringement proceedings is itself a form of non-legislative action, in which case the line between the 'no change' option and the non-legislative option becomes blurred).[147] The most promising aspect of the non-legislative option is the utilisation workshops. Although we are not yet able to analyse the expected impact of these, owing to insufficient evidence, we see significant potential for the workshops

[147] We note that our research is limited to the legal framework relevant for confiscation and recovery of criminal assets. By no means are we suggesting that non-legislative intervention cannot play a significant role in other areas. Indeed, we have argued the opposite in our recommendations.

themselves to help generate this. Moreover, even if this evidence suggests that certain Member States are not likely to be profitable, the process will have usefully served to identify likely causes of this, facilitating future remedial efforts (perhaps assisted by the EU).

Compared to the non-legislative option, the **minimal legislative option** contains additional action relating to MR instruments and their utilisation, in the form of EU-level action #14 and actions #19 and #20, which are alternatives. Either of these alternative actions would significantly enhance utilisation of MR instruments, but the former has additional benefits. Incorporating MR of freezing orders into the EIO would ensure not only that MR was compulsory amongst those to whom it applies, but also amongst those four Member States to whom FD 2003/577/JHA does not yet apply (because the new legislative framework would be immediately enforceable against Member States via infringement proceedings). Furthermore, the simplicity of the EU legal framework would be significantly enhanced because practitioners would only need to deal with a single MR instrument during the investigative phase.

The **maximal legislative option (without MR)** builds upon the non-legislative option by introducing many new aspects to the existing EU legal framework, the immediate impacts of which include stronger systems for confiscation, freezing and managing assets. These changes are important, but in our opinion the most important issue is utilisation. If the EU wishes asset-confiscation work to become truly a key factor in combating organised crime, it must encourage Member States to utilise their powers. We devised various additional EU-level actions, but the only one of these not struck out by barriers is the requirement to report asset-confiscation activity to the EU (#16). The intervention logic for this action assumes that Member States do not want to be seen to be performing poorly (a negative incentive). This relies on different intervention logic from the utilisation workshops proposed above, which aim to inform Member-State decision-makers about the potential profitability of asset-confiscation work (a positive incentive) and thus empower them to promote change. These intervention logics may prove highly complementary, in the sense that there is the potential for Member States to appear to underperform notwithstanding evidence of profitability, which prospect should serve to motivate decision-makers.

At this point we should also note two system effects likely to flow from a maximal legislative option.

First, more powerful legislative tools will themselves tend to encourage utilisation by raising the chances of successful intervention.

Second, harmonisation of laws (particularly for concepts such as extended confiscation, NCB confiscation and third-party confiscation) can *de facto* promote MR by ensuring that incoming orders are compatible with the judicial system of the executing Member State.

The **maximal legislative option (with MR)** adds the related policy actions 19 and 20 (which feature in the minimal legislative option and aim to ensure utilisation of MR) and also policy action #13, which aims to expand the scope of MR. Together, these options will significantly improve the status quo as regards cross-border enforcement of orders throughout the EU, which is important because barriers to enforcement are effectively a dampener on profitability, tending to discourage utilisation in Member States with NCB regimes.

6.2.3 Preliminary rankings

Based on Table 6-3, it is possible to rank each policy option in terms of its impact against the five specific objectives of confiscation, preservation, enforcement, utilisation and redistribution. Based on the first four of these rankings, a ranking may also be derived for impact upon the number of assets recovered.[148] Our preliminary rankings are set out in Table 6-4.

Table 6-4 Preliminary rankings of options

Specific objective	Policy option rankings				
	no change	non-legislative	minimal legislative	maximal without MR	maximal with MR
Confiscation	3	2	2	1	1
Preservation	2	2	2	1	1
Enforcement	4	3	2	3	1
Utilisation	5	4	2	3	1
Redistribution	4	4	3	2	1
Assets recovered*	4	3	2	2	1

* Impact on number of assets recovered is a function of confiscation, preservation, enforcement and utilisation.

Looking first at impacts upon specific objectives, it may be seen that the **maximal with MR** option is ranked first or equal first against all of the specific objectives, suggesting that it will result in the most assets confiscated. For three of the specific objectives, the **minimal legislative** option actually surpasses the **maximal without MR** option as it includes actions on MR that impact not only upon enforcement, but also on utilisation and redistribution. On the other hand, the maximal without MR option ranks equal first for confiscation and preservation and is an obvious cut above the minimal legislative option in these areas. Overall, the **non-legislative option** clearly ranks below the minimal legislative option and the maximal legislative options, but above the **no change** option.

In terms of **number of assets recovered**, the maximal with MR option clearly has the greatest impact as it ranks first for confiscation, preservation, enforcement and utilisation. The maximal without MR option and the minimal legislative option are then ranked equal second overall because their relative impacts may be expected to differ amongst Member States. Member States which already have robust confiscation and preservation laws, as well as those which stand to gain greatly from action on MR (the UK is a paradigm example of both categories), may experience a greater impact under the minimal legislative option, whereas other Member States may experience a greater impact under the maximal without MR

[148] Whilst it is also possible at this stage to rank policy options against some of the evaluation criteria, we hold off doing so until we are in a position to so this for all of the evaluation criteria (see Section 6.4).

option. In any case, both are ahead of the non-legislative option, which is ahead of the no change option.

6.3 Phase 2: analysis of policy options

This section translates rankings against specific objectives into rankings against the evaluation criteria of **social, economic and environmental impacts**. We examine first profitability (a measure of economic impact), then recovery for victims (a social impact), then public confidence in criminal justice (another social impact) and, finally, other economic, social and environmental impacts that may flow from the impact of asset confiscation upon crime.

6.3.1 Profitability

The potential profitability of asset-confiscation work is a critical factor because it drives utilisation (see Section 6.1.4). In particular, where asset-recovery work is known to be profitable – such that the marginal impact of doing more work is a direct financial benefit – Member States acting rationally will invest even with zero expectation of other valuable economic, social or environmental benefits. Despite doubts about the rational actor assumption,[149] we consider that the profitability of asset-confiscation work warrants quantitative analysis to the extent possible. We examine profitability in the narrowest sense – that is, the ratio of annual ongoing profit (amount confiscated less cost of asset-confiscation work in a given year) – to annual ongoing cost of asset-confiscation work.

Impacts upon profitability are inherently difficult to predict. Because asset-confiscation systems are so complex – with outputs consisting of the aggregated results of individual cases, the outcomes of which are impossible to predict with certainty – it is hopeless to try to predict profitability using a (reductionist) systemic model. It is instead necessary to estimate future profitability with reference to known profitability data. These data could involve extrapolating trend data for each Member State or, alternatively, analogising between Member States. The former type of data obviously accounts for the unique characteristics of the Member State in question, but it may have low predictive value if it describes a situation that is a long way removed from that which the option aims to bring about (because historical trends may not provide a reliable basis upon which to estimate future performance). The latter type of data may need to be adjusted to account for differences in unique characteristics but it may be advantageous where one can reason by analogy with a Member State that has already gone down a path similar to that contemplated by the option in question.

With this in mind, our data-gathering activities sought to identify any relevant data through literature reviews (academic, 'grey literature', government publications) and conversations with practitioners throughout the EU. Unfortunately, but not unexpectedly, we identified only a small amount of potentially useful data, which we set out in Appendix A.[150] Only for a

[149] At the micro level, these are doubts as to whether rational proponents of asset recovery will prevail at the domestic level. This is the very focus of EU-level policy action #15.

[150] This is one aspect of the general paucity of statistical data already noted. It is conceivable (although we have no evidence) that some Member States are reluctant to provide data that call into question the efficiency of existing programmes. In most cases, Member States themselves probably lack the necessary data to assess profitability, in which case decisions are likely to be based (even subconsciously) on a conservative estimate that asset confiscation, like most work done by the government, is not self-financing.

very few Member States did we identify data on the specific cost of asset-confiscation work – *viz* Bulgaria, Ireland and the UK.[151] We have not attempted to build a profitability model around the Irish or Bulgarian data for several reasons. First and foremost, both data sets are incomplete; they include only one aspect of the prevailing asset-confiscation apparatus (the specialist agencies CAB and CEPAIA) and not court or enforcement costs. Moreover, the country examples are poor approximates of the maximal legislative option considered here. Both CAB and CEPAIA rely exclusively upon NCB powers. The Bulgarian CEPAIA has been operating for only a short period of time and hardly any cases have been finally determined, making future profitability almost impossible to estimate. The Irish CAB dates from 1996, but its results cannot easily be compared with those of other Member States, nor with the options proposed here, owing to a heavy reliance upon revenue (taxation) powers (not proposed here) and an idiosyncratic seven-year lag between assets being confiscated and their vesting in the state.

By contrast, the UK has data available (or able to be estimated) for all elements of its asset-confiscation apparatus. It also has a relatively 'normal' mix of asset-confiscation powers, which, although it does not exactly parallel those proposed in our 'maximal' policy option, is not too far removed.[152] More specifically, the UK is a reasonable approximation of the maximal policy option *without* action on MR. Finally, the UK profitability data available are based on some six years of effort to raise utilisation rates following the introduction of PoCA, which usefully reflects what a 'maximal' policy option could hope to achieve by the year 2020, given that Member States will need time to transpose the new EU legal framework into national law (the issue of timing is discussed below).

Due to the general lack of useful data, we are required to reason by analogy, and the UK provides the only viable benchmark. The UK data set, together with the assumptions underlying its compilation from several sources and some trend-based projections through to 2020, is produced in Appendix G.[153] Reliance upon these data does not, however, mean that it is necessary to ignore differences between Member States. On the contrary, we build upon a simple but important insight: if it is possible to identify key factors affecting the profitability of asset-confiscation work, and EU-wide data are available for these factors, then these data can be combined with benchmark profitability data for a given Member State to examine how profitability may vary owing to differences in the key factors between Member States. In this way, we develop EU-27 estimates for the impact of the 'maximal' policy option upon income and cost and, thus, profit and profitability. This analysis is set out in Appendix G. By

[151] The official website of the Netherlands' Openbaar Ministerie (public prosecution) claims a profitable asset-recovery programme, but this cannot be assessed because data are provided only for income, not administrative burden.

[152] It should be noted that an exact parallel would not necessarily be any more useful where other Member States themselves differ from the proposed 'maximal' option (consider, e.g., France's 'general confiscation' power, or the equivalent powers in Denmark, the Czech Republic, Slovakia and Latvia).

[153] Whilst a database consisting of other Member States in addition to the UK would be preferable, it is not possible to present it at this stage. Should further data become available in the future, they can be incorporated into our analysis. Indeed, if the method is recognised as valuable, appropriate data for the purposes of refining the application of this method could be generated quickly by limited future research exercises in selected Member States (given sufficient cooperation from local experts).

way of summary, the components of the logic model for generalising profitability are as follows:

- Income is a function of **profitable criminality** (in order to generate a pool of criminal assets) and also **investment in policing** (representing a Member State's capacity and willingness to combat organised crime).
- Cost is assumed to be a function of **administrative efficiency** within the Member State as a whole.

The results of this analysis are encouraging. Table 6-5 shows that 21 of the 27 Member States are estimated to be profitable ground for the maximal legislative option even if MR is excluded. The additional benefit of MR is very difficult to estimate, so we include a sensitivity analysis, the results of which indicate that some of the unprofitable Member States will become profitable under different MR scenarios. Even an optimistic scenario would not, however, bring about profitability in Finland and Denmark. This is explained by relatively low levels of criminality and relatively low investment in policing in these countries.

Table 6-5 Profitability of maximal legislative option without MR, EU-27

Member State	Revenue (€m)	Cost (€m)	Profit (€m)	Profit ratio (profit/cost)	Categorisation
Czech Republic	131.00	36.57	94.43	3.50	highly profitable
Lithuania	188.08	131.08	57.00	2.63	highly profitable
Spain	167.56	124.86	42.70	2.58	highly profitable
Latvia	31.66	10.87	20.79	2.12	highly profitable
Poland	19.21	4.27	14.94	1.91	highly profitable
Slovakia	32.49	18.33	14.15	1.46	highly profitable
Slovenia	105.42	91.92	13.49	1.37	highly profitable
Romania	109.13	96.73	12.40	1.16	highly profitable
Estonia	19.24	13.80	5.44	1.11	highly profitable
Bulgaria	10.78	5.77	5.01	0.87	moderately profitable
Hungary	8.89	4.12	4.77	0.81	moderately profitable
Netherlands	12.88	8.32	4.56	0.77	moderately profitable
Portugal	8.02	4.43	3.59	0.55	moderately profitable
Malta	5.85	2.38	3.47	0.46	moderately profitable
United Kingdom	21.39	19.22	2.17	0.43	moderately profitable
Cyprus	2.74	0.75	1.99	0.42	moderately profitable
Greece	3.43	1.45	1.98	0.39	moderately profitable
Italy	2.37	0.76	1.61	0.34	moderately profitable
France	2.11	1.49	0.62	0.15	moderately profitable
Germany	1.00	0.48	0.53	0.13	moderately profitable
Belgium	0.26	0.18	0.08	0.11	moderately profitable
Luxembourg	1.48	1.51	–0.03	–0.02	not profitable
Sweden	7.67	8.62	–0.96	–0.11	not profitable
Austria	7.74	9.27	–1.53	–0.17	not profitable
Ireland	7.66	9.89	–2.23	–0.23	not profitable

Member State	Revenue (€m)	Cost (€m)	Profit (€m)	Profit ratio (profit/cost)	Categorisation
Finland	1.99	4.33	–2.35	–0.54	not profitable
Denmark	1.73	5.79	–4.06	–0.70	not profitable

Source: own calculation

It is important that these results are not misinterpreted. They are rough estimates which indicate that asset confiscation is likely to be profitable overall if pursued with vigour. By analogy with the UK, they represent annual performance which the maximal legislative options could achieve, from a standing start, by 2020. Member States that are already some way along this route, together with those that can implement change faster than the UK (including by learning from the UK's experience), may of course be able to achieve more. Likewise, a Member State that faces additional limitations may take longer to become profitable. It is important to realise that, during this time, confiscation work will not necessarily be profitable as it will take time to implement changes, and then for cases to progress through the judicial system. We did not have sufficient data to model this process.[154] Rather, our results are estimates of annual performance which a Member State with currently low utilisation can, all else being equal *vis-à-vis* the UK, achieve by 2020.

6.3.2 Recovery in favour of victims

Our analysis of profitability focuses entirely on assets recovered in favour of the state. However, at least as valuable to society are assets recovered in favour of identified victims, as these assets are not only denied to criminals (contributing, if the logic holds, to the first general objective) but their restitution also achieves restorative justice for victims (which is the second general objective). The paucity of statistics in this area has already been noted.[155] Nevertheless, experienced practitioners to whom we spoke estimated that recoveries in favour of victims were significant.[156]

Importantly, actions which help to recover assets in favour of the state are, at least in the early stages, identical to those which help to recover assets in favour of identified victims. Referring back to the attrition diagram (Figure 3.1), there is in both cases a need to identify and preserve criminal assets; in some Member States it is even possible for victims to claim from the state after assets have been recovered. Two assumptions follow from this. The first is that an impact upon recoveries in favour of the state will be attended by a *pro rata* impact upon recoveries in favour of victims. The second is that the two types of recovery have a similar cost base. However, because the costs tend not to be separated out by the agencies involved,[157] most of them are already built into the foregoing profitability estimate. Consequently, if

[154] For an example of a fledgling asset-recovery agency currently operating at a loss, see the annual reports of CEPAIA.

[155] See Section 2.2.3.

[156] According to experts in the UK, a significant minority (perhaps a third) of assets recovered in the context of criminal proceedings goes to victims. In Germany the proportion may be higher. According to one expert there, some three-quarters of all freezing/seizure orders are made possible by the availability of 'recovery assistance' in favour of victims, meaning that, at the time the action was taken, restitution in favour of victims was contemplated (although this does not mean that this proportion ultimately goes to victims).

[157] Separate accounting is difficult in light of the fact that it is often not clear until the latter stages of the asset-recovery process whether state or victim stands to benefit.

assets recovered in favour of victims are counted alongside those recovered in favour of the state, the profitability of asset-recovery work rises. We do not attempt to quantify this effect, other than to note that it is likely to be significant.

For Member States which have social reuse programmes, it is also reasonable to assume that an increase in confiscations will result in a *pro rata* increase in assets flowing through these programmes, to the benefit of victimised communities and subgroups.

6.3.3 Impacts upon public confidence

The logic supporting a positive association between asset confiscation and public confidence (and social reuse and public confidence) has been set out in Section 3.1.3. Whilst the available data do not permit either of these associations to be quantified, we nevertheless assume them with a reasonable degree of confidence based on the said logic, as backed by anecdotal evidence from practitioners.

6.3.4 Impact upon crime

Higher-order impacts – defined as those flowing from impacts upon crime – may be social, environmental or economic. **Social impacts** have been discussed elsewhere. Defined in positive terms, they would include a decrease in the suffering of victims and an increase in 'social capital' (see Appendix G). **Environmental impacts** would include a decrease in the frequency of environmental degradation due to environmental crimes, as well as any remedial work able to be funded through 'social reuse' programmes. A literature review (Appendix G) revealed a number of case histories and sectoral studies of the links between organised criminal enterprise and environmental depredations such as toxic-waste dumping, and these were supported by an example relayed in fieldwork.[158] Thus, if asset confiscation has a macro impact upon organised crime, then we would expect this to manifest itself in relation to environmental crime and nothing suggests that the impact for environmental crime would be greater or less than the overall impact. **Economic impacts** would include reduction in the economic cost of crime – for example, medical expenses, repairing and replacing damaged property, costs to businesses (Appendix G reviews literature on the costs of crime, giving some idea of the scope for such impacts). Other potential impacts include increased foreign direct investment and several different impacts upon small and medium enterprises (SMEs) – for example, reduced patronage from organised criminal groups, greater ability to seek recourse in the law, and greater ability to raise legitimate capital.

All of these impacts presume that asset confiscation will have a macro impact upon crime rates (i.e. by reducing crime). Because we do not make this assumption (for the reasons explained in Section 2.4.3), it would be speculative for us to go on to assess them, and we do not do so. This does not, however, rule out higher-order impacts flowing from changed criminal behaviour rather than from reduced crime rates. We identify one such impact which, far from being speculative, seems highly likely owing to an absence of competing logic: *viz* that increased asset-confiscation work will cause an outflow of illegitimate capital from the EU. Insufficient data prevent us from quantifying this impact, but its logical contours may be deduced as follows.

---

[158] It was reported that Member States with high environmental standards may present opportunities for organised criminal groups to secure waste-disposal contracts through competitive bids and then profit by disregarding the standards (dumping the waste illegally), in the process driving out legitimate competitors.

Capital flight is inevitable in circumstances where criminals are involved in a 'game' against a state trying to confiscate their assets, for the simple reason that shifting assets to another jurisdiction erects a barrier, raising the cost to the state of playing the game as it must seek cooperation from agencies abroad. Not all criminals will behave in this way. For some the costs (e.g. lawyers, accountants, bankers) may be prohibitive. Others may face rational incentives to maintain significant amounts of assets in their local communities (as is often the case with Mafia-type criminals, who benefit from visible displays of power). Still, the imperative to shift assets abroad – often laundering them *en route* – is strongly felt by many criminals, who then face a choice of many destinations, both within and outside the EU.

Many factors will influence this decision and not all of these will be rational in terms of the game being played against the state (e.g. language, climate, physical proximity). All else being equal, however, it is logical to assume that criminals will favour potential destination states with weak systems for confiscating criminal assets and/or rendering MLA. This means that, discernible or not, the flow of illicit capital within the EU is already influenced by differences between Member States in these areas. As a corollary, EU-level action to reduce these differences – by harmonising laws, requiring MR and promoting utilisation – will have two consequences.

First, it will tend to even out differences between Member States, affecting capital flows throughout the EU.

Second, the overall boost to asset confiscation in the EU will make countries outside the EU relatively more attractive destinations, resulting in a net capital flight out of the EU.

Member States may be unlikely to complain publicly about an outflow of illicit capital, but this does not mean that there will be no negative impacts. On the contrary, it is likely to cause localised economic decline in areas (geographical regions, or particular sectors of the economy) which are popular as havens for illicit wealth. Such impacts will be felt not only by the criminals and their associates but also, for example, by legitimate businesses that have hitherto enjoyed their custom. These negative impacts are likely, however, to be accompanied by positive impacts. Stripped of organised criminal patronage, a community may be poorer in the short term, but it will also be more equal as between its citizens. Moreover, as rule of law returns, so does a level playing field for business and, thus, competition and economic growth. An inflow of legitimate capital may even replace that which has been lost, especially if authorities make clear a long-term intention to pursue criminal assets. Taking all this into account, the overall impact of capital flight is far from obvious. Without any means of even determining whether it is positive or negative overall, we do not take this assessment any further.

6.4 Ranking of policy options

In order to rank policy options against the various evaluation criteria defined in Section 2.3.2, we draw upon the synthesised phase 1 analyses (Table 6-3) in order to assess **fundamental rights, proportionality, compatibility, simplicity/coherence** and **direct costs**; and upon the phase 2 analyses (Section 6.3) in order to assess **social, economic and environmental impacts**. We then make an overall comment on the **geographical disposition** of impacts.

Amongst the phase 2 analyses, we draw only upon those that are non-speculative. These are highlighted in bold in Figure 6.1.

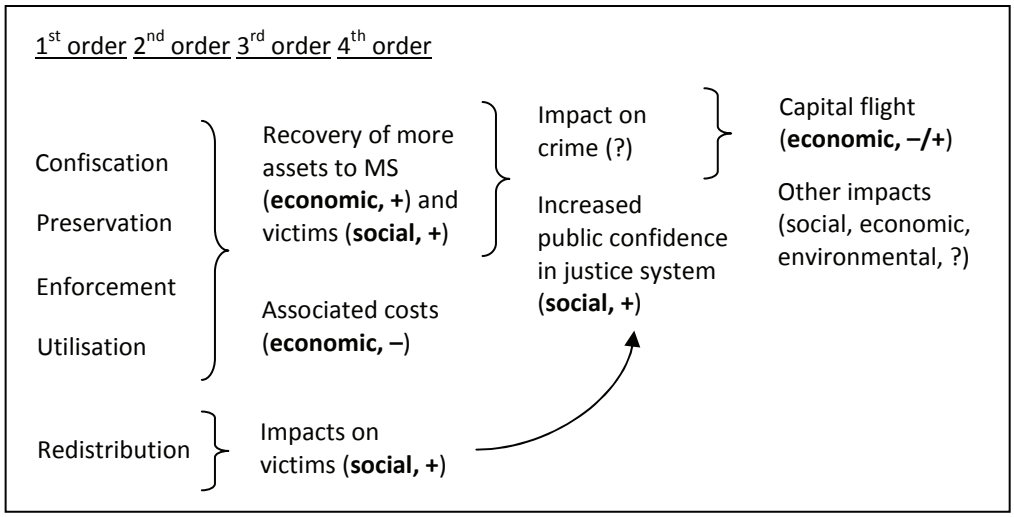


Figure 6.1 Non-speculative economic, social and environmental impacts

Although the occurrence of capital flight is reasonably certain, we are unable to assess its overall impact, including whether desirable or not. We therefore rank policy options against the **economic impacts** criterion on the basis of our profitability assessments only. These, it will be recalled, take into account both income (recovered assets) and costs by offsetting these against each other. According to our analysis, 21 Member States would be profitable for the maximal without MR option, rising for the maximal with MR option. Whether the minimal legislative option affects profitability more or less than the maximal without MR option will vary between Member States.[159] Given that our modelling suggests that some Member States may remain unprofitable, it should be made clear that none of the options actually forces such Member States to incur costs through utilisation. Member States may, if they choose, incur only **direct costs** (implementation costs and administrative burden). Here we note that the maximal legislative options incur additional direct costs owing to EU-level action #16, which would impose reporting obligations upon Member States in order to encourage utilisation. We do not consider these costs to be disproportionate to the legitimate aim of increasing utilisation throughout the EU as they are also essential monitoring and evaluation activities (see Chapter 1) and, in any event, the ongoing costs will be minimised where utilisation is in fact low.

Against the **social impacts** criterion we rank policy options based on two positive impacts: assets recovered to victims and greater public confidence in Member-State criminal-justice systems. These are first and foremost a function of the fact that criminal assets are being confiscated, so the maximal with MR option would have the greatest impact followed by either the maximal without MR option or the minimal legislative option, depending upon Member State. The additional, direct impacts upon redistribution of some EU-level actions (in particular, #14 and #21) do not alter this ranking.

[159] For the same reasons explained in Section 6.2.3.

We analyse no **environmental impacts** as, for the reasons already given, all such impacts are speculative.

Many EU-level actions would improve the **simplicity and coherence** of the EU legal framework. Because several of these relate to MR, the minimal legislative option outranks the maximal without MR option.

Both of the maximal legislative options harbour concerns regarding **fundamental rights**. Most of these can be turned into positives by including minimum remedies or other appropriate safeguards in the EU legal framework. This is not the case, though, for concerns over EU-level action #7, which includes a presumption against close associates of criminals in order to achieve third-party confiscation. In the event that this impact is considered disproportionate, the EU can substitute the milder third-party confiscation regime in #7a. This would weaken the impact of the maximal legislative options upon confiscation and, thus, slightly dampen our estimates of profitability and the amount of assets recovered.

Similarly, some aspects of the maximal legislative options also harbour concerns over **proportionality** and **compatibility** with Member-State justice systems. These were determined to be potential or likely barriers and therefore not fatal to the policy options. It is nevertheless appropriate to take into account the possibility that they will materialise and, thereby, weaken the maximal legislative options. This would affect estimates of profitability and the amount of assets recovered, but probably not catastrophically, so as to change our overall conclusions.

Finally, we comment briefly on the **geographical disposition of impacts** by noting whether any regions or subgroups of Member States may experience particular impacts (especially any disproportionate negative impacts). In this regard, few trends are evident despite the 21 EU-level policy actions, and also profitability, being analysed at the Member-State level. The main region-specific impact is the aforementioned lower profitability in Nordic countries. Capital flight will also be an uneven phenomenon, although the available information here is less specific. Our analysis does not confirm any trends based on economic or historical factors. Whilst the data available do not permit utilisation to be formally ranked, enthusiasm for asset confiscation appears to vary amongst relatively rich Member States, relatively poor Member States, and even within the former Soviet bloc. In saying this we do not claim that such factors are irrelevant; we seek only to highlight a high level of heterogeneity that does not lend itself to simple categorisations.

Rankings against each evaluation criteria are now summarised in Table 6-6.

Table 6-6 Rankings against evaluation criteria

Criteria	Policy option				
	no change	non-legislative	minimal legislative	maximal without MR	maximal with MR
Economic impacts	5	4	3	2	1
Social impacts	5	4	3	2	1
Environmental impacts	1	1	1	1	1

Criteria	Policy option				
	no change	non-legislative	minimal legislative	maximal without MR	maximal with MR
Fundamental rights	1	1	1	2	2
Proportionality	1	1	1	2	2
MS compatibility	1	1	1	2	3
Simplicity and coherence	4	4	2	3	1
Direct costs	1	1	1	2	2
Geographical disposition	1	1	1	1	1

It should be remembered that these are rankings rather than scores on a scale. Differences in rank may therefore have vastly different meanings and, in this sense, the table is but a rough summary. Moreover, the different evaluation criteria do not necessarily deserve equal weight in the context of this study (e.g. **direct costs** would seem to be of far less importance than **economic impacts**, as defined). For these reasons, it is not possible to arrive at an overall assessment simply by summing rankings. A holistic approach is instead called for. With this in mind, we rank the policy options as follows:

1. Maximal legislative option including action on MR.
2. Maximal legislative option without action on MR.
2. Minimal legislative option.
3. Non-legislative option.
4. No action at EU level.

We have ranked the maximal without MR and minimal legislative options as equal second on the basis that the rankings here will vary between Member States. The relative ranking of these two options is, however, not very important for the simple reason that action on MR will belong to separate legal frameworks (one for freezing orders, the other to confiscation orders) from action to harmonise Member-State laws. In each case – for any number of reasons – it either will, or will not, be possible for the EU to take legislative action. In the event that action on all fronts is possible, the EU can pursue the maximal with MR option. If not, then the 'choice' between the maximal without MR and minimal legislative options is in fact dictated by circumstance.

CHAPTER 7. Monitoring and evaluation

The usual strategy for designing monitoring and evaluation systems sits within the 'theory of change' tradition of evaluation,[160] and consists of three analytical steps: (1) mapping the intervention logic using logic models; (2) identifying and defining indicators; and (3) presenting the findings in a dashboard that visualises and synthesises component measures. Taking this as a starting point, it is important to clarify out the outset what is and is not possible.

At the core stands the development of an 'intervention logic' articulating how policies are supposed to meet their objectives. This involves identifying key causal chains leading from policies to objectives. These can be used to structure and focus the measurement activities. However, for a monitoring and evaluation system to be built on intervention logic in this way, there must be a shared cause-and-effect process across all significant operating units being monitored and evaluated. This is not necessarily the case in the present context. In particular, our analysis of law and practice across the EU-27 has shown that Member States enjoy ideosyncratic causal chains, with any given component featuring more or prominently across different systems. Whilst our work in constructing detailed Member-State baselines has the potential to form the basis of many different logic models, such an approach would inevitably lead to an expensive and time-consuming centralised monitoring and evaluation system with many different indicators, requiring considerable statistical and reporting support from each Member State. Moreover, as the logic models evolve organically, monitoring and evaluation systems could become outdated. Clearly, a simpler approach is required, even if some scientific accuracy is sacrificed. The European Commission's own IAGs, which link indicators to general, specific and operational objectives, permit such an approach. In essence, this focus on objectives is a means by which we can abstract from the existence of unique logic models throughout the EU.

7.1 Indicators

This discussion follows the distinction in the IAGs between **output indicators** (which align to operational objectives), **result indicators** (specific objectives), **impact indicators** (general objectives) and **context indicators** (which are more general still). At the outset, it may be observed that the examples provided in the IAGs appear to envisage very different types of

[160] For a more detailed discussion of this approach see Tiessen *et al.* (2009).

problems from that under consideration here. Nevertheless, we follow the typology of the IAGs in our search for indicators.

7.1.1 Output indicators

This study has, for the first time, produced a detailed map of EU-27 asset-confiscation law. This permitted a gap analysis, which we used to identify the locations of first-order impacts for those EU-level policy actions focused on eliminating these gaps (that is, all of the policy actions except those relating to utilisation). This same gap analysis could be developed into a system for monitoring output indicators, which would take the form of changes in Member-State law and practice. A simple system would examine whether Member-State laws existed to cover particular issues; a more sophisticated system could grade the adequacy of the laws on a numerical scale.

7.1.2 Result indicators

Result indicators for specific objectives A, B, C and E (i.e. all except utilisation) could be based on the output indicators discussed above. They could either be produced synthetically by weighting the different components (in which case the weightings should be based on expert input) or, if a holistic approach is preferred, expert judgement could be applied to each Member State's law and practice as a whole.

For utilisation of freezing and confiscation, result indicators need to be based on statistics. One possibility is to measure the proportion of particular types of cases in which freezing/seizure and confiscation are sought/obtained. This could be a useful indicator, notwithstanding that not all cases will be apt for these measures. It would also be useful to measure the direct profitability of asset-confiscation work, which (as we saw in Section 6.3.1) involves measuring the amount recovered and the amount spent. These indicators could help to explain utilisation rates.

For utilisation of MR instruments, the obvious result indicator is the uptake of MR as a proportion of all cases. This would require statistics on the number of MR cases as well as the number of traditional MLA cases. It would be helpful if such statistics were disaggregated by Member State, because the relationships between different pairs of Member States remain poorly understood.

7.1.3 Impact indicators

By way of recapitulation, the general objectives are:

- recovery of all criminal assets located within the EU; and
- disposal/redistribution of these assets to maximum effect.

An obvious impact indicator corresponding to the first of these is simply the proportion of criminal assets recovered annually, which is the value of assets recovered annually as a function of organised criminal turnover. This metric is not perfect as it disregards the presence of previous years' gains which would remain liable to confiscation, as well as the fact that some criminal turnover may no longer be in the EU. In any event, as it would be a very difficult task to estimate organised criminal turnover consistently across the EU, a more realistic approach is simply to measure the absolute value of assets recovered annually. Alternatively, focusing upon victims of acquisitive crime, the proportion who succeed in recovering their property may be a useful indicator. Again, however, it is difficult to estimate

the denominator; some crimes will go unreported, in other cases the value of the property may be recorded inaccurately or not at all.

It is far more difficult to imagine impact indicators corresponding to the second general objective. Here, context indicators are likely to be more useful.

7.1.4 Context indicators

The reasons for confiscating and recovering criminal assets identified in Section 3.1 provide fertile ground for context indicators. We may recall that three reasons were identified, *viz*:

- combating organised crime;
- restorative justice for victims; and
- promoting confidence in justice systems.

Beginning with the first of these, context indicators could include crime rates (or organised-crime rates). For the second, context indicators could focus on social harm within deprived communities and subgroups. For the third, context indicators would include any measures of public confidence in the administration of justice.

7.2 Monitoring and evaluation arrangements

We now turn to consider how it may be possible to obtain data for the foregoing indicators as a basis for monitoring and evaluation. Reporting obligations are likely to feature heavily in any monitoring and evaluation system, but we show that there may also be scope for the EU to conduct its own research.

7.2.1 Ascertaining changes to law and practice

Member-State law and practice is continuously evolving, and the EU has a need for current information. This could be captured through various means, ranging from formal reporting obligations, through informal reporting arrangements (e.g. updates via the ARO Expert's Platform) and the commissioning of further research projects, and to in-house research.

7.2.2 Reporting statistics

Member States are best positioned to gather statistical data of the type required for the foregoing indicators. As we have already noted, however, there is a reluctance to gather such data. Ultimately, the surest way to overcome this is to impose reporting obligations upon Member States. This is, indeed, the very purpose of policy action #16. However, the desirability of additional statistics must be balanced against the administrative burden placed upon Member States. There may be practical limits to how much data Member States can be expected to provide. Unfortunately, however, we lack the data to estimate how much administrative burden the different statistics are likely to generate.

7.2.3 Modelling profitability

Profitability is an important indicator with the ability to explain (or predict) utilisation data and trends. A lack of useable statistics prevented us from taking a traditional approach to estimating cost and, hence, profitability. However, we were nevertheless able to estimate economic impacts through an innovative profitability model. Our modelling suggested that asset-confiscation work in the vast majority of Member States is likely to be profitable in the medium term. However, these results are based on data from a single Member State – the UK – extrapolated via a list of plausible (but untested) weighting metrics.

More reliable estimates of profitability would be desirable. An efficient way to achieve these would be to estimate actual costs in other Member States for which income data (i.e. amounts recovered annually) exist. This would increase the range of Member States from which we extrapolate, thus making all of the results more credible. Costs in these Member States could be estimated based on available data, in the absence of which Activity Based Costing exercises could be carried out for components of Member-State asset-confiscation apparatus.[161] Such exercises may be alien to relevant Member-State authorities, in which case they could be carried out in research commissioned by the EU.

7.2.4 Modelling social harms

Using asset confiscation as a means of restoring to victims (individuals, communities and corporations) what they have lost as a result of organised crime is both morally and politically attractive, but the effect has not been established empirically or quantified. It will therefore be inherently difficult for the EU to monitor the efficiency and effectiveness of any EU-level action in aid of victims (e.g. support for social reuse programmes). Furthermore, where losses are indirect or not easily monetised or where communities or other groups are involved, there is an obvious problem of establishing a fair and reasonable level of compensation.

Whereas there are currently no reliable indicators for social harm within victimised communities and subgroups, efforts are underway to establish reliable means of measuring the social, psychological and economic harms created at community level by different forms of crime. These efforts will result in benchmarks that can then be used to assess the impact of both asset-confiscation enterprises and social reuse strategies. Based on our review of the literature, no top-down macroeconomic impact research can seriously compete with such a bottom-up approach. We therefore recommend that consideration be given to how such an approach might be harnessed to a monitoring and evaluation system. The European Commission should keep abreast of relevant research developments, with a view to incorporating appropriate metrics eventually into an overall monitoring and evaluation system.

[161] The following reference from the UK's Crown Prosecution Service (CPS) is especially appropriate in this context: http://www.cps.gov.uk/publications/finance/abc_guide.pdf (as of September 2012).

References

Aebi, M.F., B.A. de Cavarlay, G. Barclay, B. Gruszczynska, S. Harrendorf, M. Heiskanen, V. Hysi, V. Jaquier, J.M. Jehle and M. Killias, 'European Sourcebook of Crime and Criminal Justice Statistics-2010 Fourth Edition,' ISBN 978-90-8974-299-5, 2010, p. 382.

Akçomak, I.S. and B. ter Weel, 'The Impact of Social Capital on Crime,' *CPB Discussion Papers*, 2009.

Alldridge, P., and A. Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002,' *Legal Studies,* vol. 25, no. 3, 2005, pp. 353–373.

Álvarez, M., 'Illicit Crops and Bird Conservation Priorities in Colombia,' *Conservation Biology, v*ol. 16, 2002, pp. 1086–1096.

Armstead, L, 'Illicit Narcotics Cultivation and Processing: The Ignored Environmental Drama,' *United Nations International Drug Control Programme*, 1992.

Bichot, Jacques, *Le Coût du Crime et de la Délinquance*, l'Institut pour la Justice, 2010.

Block, A, 'Environmental Crime and Pollution: Wasteful Reflections,' *Social Justice – San Francisco*, vol. 29, no. 1/2, 2002, pp. 61–81.

Bouffard, Jeffrey A., M. Lyn Exum and Peter A. Collins, 'Methodological Artifacts in Tests of Rational Choice Theory,' *Journal of Criminal Justice,* vol. 38, no. 4, 2010, pp. 400–409.

Brand, Sam, and Richard Price, *The Economic and Social Costs of Crime*, London: Home Office, Home Office Research Study 217, 2000.

Bundeskriminalamt, *Lagebericht Organisierte Kriminalität 2001 Bundesrepublik Deutschland, Kurzfassung*, Wiesbaden: Bundeskriminalamt, 2002.

Buscaglia, E., 'The Paradox of Expected Punishment: Legal and Economic Factors determining Success and Failure in the Fight against Organized Crime,' *Review of Law & Economics, v*ol. 4, no. 1, 2008, pp. 290–317.

Cheloukhine, Serguei, 'The Roots of Russian Organized Crime: From Old-fashioned Professionals to the Organized Criminal Groups of Today,' *Crime, Law and Social Change,* vol. 50, no. 4, 2008, pp. 353–374.

Ciocoiu, Paul, 'Romania Responds to EU Criticism,' 2010. Online at http://setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2010/09/01/feature-01 (as of January 2010).

Clapp, J., 'The Illicit Trade in Hazardous Wastes and Cfcs: International Responses to Environmental "Bads",' *Trends in Organized Crime,* vol. 3, no. 2, 1997, pp. 14–18.

Clermont, K.M., and E. Sherwin, 'A Comparative View of Standards of Proof,' *The American Journal of Comparative Law,* vol. 50, no. 2, 2002, pp. 243–275.

Craig, P., and G. de Burca, *EU Law, Text, Cases and Materials*, Oxford: Oxford University Press, 1992.

Cressey, D.R., *Theft of the Nation: The Structure and Operations of Organized Crime in America*: Harper & Row, 1969.

CSD, *Examining the Links between Organised Crime and Corruption*, Sofia, Bulgaria, Center for the Study of Democracy, 2010.

Czabański, Jacek, 'The Feasibility of Cost of Crime Estimations in Eastern Europe – the Case of Poland,' *European Journal of Criminal Policy and Research, v*ol. 15, 2009, pp. 327–342.

Dhiri, S., Brand, S., Harries, R., & Price, R. (1999). *Modelling and predicting property crime trends in England and Wales (Home Office Research Study 198)*. London: Home Office.

Dubourg, R., J. Hamed and J. Thorns, *The Economic and Social Costs of Crime against Individuals and Households 2003/04*, London, Home Office, Home Office Online Report 30/05, 2005.

Edwards, S., T. Edwards and C. Fields, *Environmental Crime and Criminality: Theoretical and Practical Issues*: Routledge, 1996.

European Commission, *Impact Assessment Guidelines, Sec(2009) 92*, Brussels, 15 January, 2009.

European Council, *Action Plan to Combat Organised Crime*, Brussels, 28 April, 1997.

—, *The Stockholm Programme – an Open and Secure Europe Serving and Protecting the Citizens*, Brussels, 2 December, 2009.

European Union, 'Council Regulation (Ec) no. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,' 2000.

Europol, *Octa 2007. EU Organised Crime Threat Assessment*, The Hague, 2007.

—, *Octa 2008. EU Organised Crime Threat Assessment*, The Hague: Europol, 2008.

—, *Octa 2009. EU Organised Crime Threat Assessment*, The Hague: Europol, 2009.

Eurostat, 'Statistics, Crime and Criminal Justice, Comparisons', 2009. Online at http://epp.eurostat.ec.europa.eu/portal/page/portal/crime/data/comparisons (as of september 2012).

—, *Statistics: Crime and Criminal Justice*, Luxembourg, ESTAT, DG, European Commission, 2010.

FATF, *40 Recommendations*, 2003, http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf. (as of September 2012).

—, *Third Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, Spain*, Paris, 657, 23 June, 2006a.

—, *Third Mutual Evaluation / Detailed Assessment Report, Anti-Money Laundering and Combating the Financing of Terrorism, Kingdom of Denmark*, Paris, 963, 22 June, 2006b.

—, *Third Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, the United Kingdom of Great Britain and Northern Ireland*, Paris, 1292, 29 June, 2007.

—, *Mutual Evaluating Report, Ireland* [735]; 2009.

—, *Third Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, Germany*, Paris, 1216, 19 February, 2010a.

—, *Third Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, Luxembourg*, Paris, 1150, 19 February, 2010b.

Fichera, M., 'Mutual Recognition in Criminal Matters from its Creation to the New Developments in the Lisbon Treaty', p. 4; available at http://www.uaces.org/pdf/papers/0801/2008_Fichera.pdf (as of 25 November 2010).

Fijnaut, C., and L Paoli, eds., *Organised Crime in Europe: Concepts, Patterns, and Control Policies in the European Union and Beyond*: Kluwer Academic Pub, 2004.

Finckenauer, J.O., 'Problems of Definition: What is Organized Crime?,' *Trends in Organized Crime, v*ol. 8, no. 3, 2005, pp. 63–83.

Flormann, W., and P. Krevert, *In Den Fängen Der Mafia-Kraken: Organisiertes Verbrechen in Deutschland*, Hamburg: Verlag E.S. Mittler & Sohn, 2001.

Gabor, Thomas, *Assessing the Effectiveness of Organized Crime Control Strategies: A Review of the Literature*, Division, Department of Justice Canada: Research and Statistics, Department of Justice Canada, 2003.

Gaviria, Alejandro. 'Increasing Returns and the Evolution of Violent Crime: The Case of Colombia', *Journal of Development Economics*, January 2000, pp. 30–40.

Greenberg, T, *et al*., *Stolen Asset Recovery*, Washington DC, World Bank, 2009.

Grill, M., 'Manni, Manni, Manni,' *Der Tagesspiegel*, 26 October, 2001.

Gwam, C., 'Adverse Effects of the Illicit Movement and Dumping of Hazardous, Toxic, and Dangerous Wastes and Products on the Enjoyment of Human Rights,' *Florida Journal of International Law,* vol. 14, no. 427, 2001.

Heaton, Paul, *Hidden in Plain Sight: What Cost-of-crime Research can tell us about Investing in Police*, RAND Corporation, 2010.

Hodgson, D., *Profits of Crime and their Recovery: Report of a Committee chaired by Derek Hodgson,* Heinemann, 1984.

Hsieh, C.C., and M.D. Pugh, 'Poverty, Income Inequality, and Violent Crime: A Meta-analysis of Recent Aggregate Data Studies,' *Criminal Justice Review,* vol. 18, no. 2, 1993, p. 182.

Hunt *et al.*, *Developing a Blueprint for a European Crime Report: Improving Safety and Justice with Existing Crime and Criminal Justice Data,* RAND Europe report for DG Home Affairs, forthcoming.

Hyatt, W., and T. Trexler, 'Environmental Crime and Organized Crime: What will the Future hold?,' *Environmental Crime and Criminality: Theoretical and Practical Issues*, 1996.

Jacquemart, C., 'An Assessment of Legal Measures to trace, freeze and confiscate the Proceeds of Drug Crimes in France: The Customs Viewpoint,' *Bulletin on Narcotics,* vol. 36, no. 4, 1984, p. 43.

Jorge, Guillermo, *The Romanian Legal Framework on Illicit Enrichment, Report Prepared with Support from the American Bar Association Central European and Eurasian Law Initiative,* CEELI Institute, 2007.

Kawata, J., *Comparing Political Corruption and Clientelism*, Ashgate, England, 2006.

Kennedy, B.P., I. Kawachi, D. Prothrow-Stith, K. Lochner and V. Gupta, 'Social Capital, Income Inequality, and Firearm Violent Crime,' *Social Science & Medicine,* vol. 47, no. 1, 1998, pp. 7–17.

Kilchling, Michael, 'Organised Crime Policies in Germany,' in *Organised Crime in Europe*, C. Fijnaut and L. Paoli, eds., 2004, pp. 717–762.

Klebnikov, P., *Godfather of the Kremlin: The Decline of Russia in the Age of Gangster Capitalism*, New York, Harcourt, 2000.

Ladenburger, C., 'Police and Criminal Law in the Treaty of Lisbon: A New Dimension for the Community Method,' *European Constitutional Law Review,* vol. 4, no. 1, 2008.

Lederman, D., N. Loayza and A.M. Menéndez, 'Violent Crime: Does Social Capital Matter?,' *Economic Development and Cultural Change,* vol. 50, no. 3, 2002, pp. 509–539.

Levi, M., and M. Maguire, 'Reducing and preventing Organised Crime: An Evidence-based Critique,' *Crime, Law and Social Change,* vol. 41, no. 397–469, 2004.

Levi, M., and L. Osofsky, *Investigating, seizing and confiscating the Proceeds of Crime*, London, Home Office, 1995.

Liddick, D., 'The Traffic in Garbage and Hazardous Wastes: An Overview,' *Trends in Organized Crime,* vol. 1–13, 2010.

Mahmutaj, Klentiana, 'Cash Forfeiture following Acquittal: An ''Affront to Public Perception'' or a Breach of a Fundamental Human Right?,' *Criminal Law Review,* vol. 11, 2009, pp. 783–793

Markov, A.A., 'Extension of the Limit Theorems of Probability Theory to a Sum of Variables Connected in a Chain,' *Dynamic Probabilistic Systems,* vol. 1, 1971.

Massari, M., 'Ecomafias and Waste Entrepreneurs in the Italian Market,' paper presented at 6th Cross-border Crime Colloquium, Berlin, 2004.

Massari, M. and P. Monzini, 'Dirty Businesses in Italy: A Case-study of Illegal Trafficking in Hazardous Waste,' *Global Crime,* vol. 6, no. 3–4, 2004, pp. 285–304.

Matrix Insight, *Assessing the Effectiveness of EU Member States' Practices in the Identification, Tracing, Freezing and Confiscation of Criminal Assets*, European Commission, 5 November, 2008.

McIllwain, J.S., 'Organized Crime: A Social Network Approach,' *Crime, Law and Social Change,* vol. 32, no. 4, 1999, pp. 301–323.

Meagher, R.P., D. Heydon and M. Leeming, *Meagher, Gummow and Lehane's Equity - Doctrines and Remedies*, 4th edition, ed., Butterworths, 2002.

Meloen, J., R. Landman, H. De Miranda, J. van Eekelen and S. van Soest, 'Buit En Besteding: Een Empoirisch Onderzoek Naar De Omvang, De Kenmerken En De Besteding Van Misdaadgeld.'S-Gravenhage,' Reed Business Information, 2003.

Mitsilegas, V., E*U Criminal Law*, Hart Publishing, 2009.

Moneyval, *Third Round Detailed Assessment Report on Poland*, Strasbourg, 630, 22 November, 2007.

Murphy, Cian C., 'The Principle of Legality in Criminal Law under the ECHR,' *European Human Rights Law Review,* vol. 2, 2010, p. 192.

Murphy, R.D., 'Crime, Confiscation, and Growth: For and against Leviathan,' *Public Choice,* vol. 118, no. 3–4, March, 2004, pp. 325–339.

Nelen, H., 'Hit them where it hurts Most? The Proceeds-of-Crime Approach in the Netherlands,' *Crime Law and Social Change,* vol. 41, no. 5, June, 2004, pp. 517–534.

O'Keeffe, Cormac, 'Gardaí use Bullet-Proof Cars seized from Gangs,' *Irish Examiner.com*, 2010. Online at http://www.irishexaminer.com/ireland/gardai-use-bullet-proof-cars-seized-from-gangs-134598.html (as of 25 November 2010).

Pacula, Rosalie Liccardo, and Beau Kilmer, *Estimating the Size of the Global Drug Market: A Demand-side Approach*, Santa Monica, RAND Corporation, 2009.

Paoli, L., *Mafia Brotherhoods: Organized Crime, Italian Style*: Oxford University Press, USA, 2003.

Papadopoulos, Ioannis, *Introduction to comparative legal cultures: the civil law and the common law on evidence and judgment*, Cornell Law Faculty Working Paper no. 15, 2004.

Pascal, Blaise, 'Note 223,' in *Pensées*, Kindle, 2006.

Poret, Sylvaine, and Cyril Tejedo, 'Law Enforcement and Concentration in Illicit Drug Markets,' *European Journal of Political Economy,* vol. 22, no. 1, 2006, pp. 99–114.

Rosenfeld, R., S.F. Messner, and E.P. Baumer, 'Social Capital and Homicide,' *Social Forces,* vol. 80, no. 1, 2001, pp. 283–310.

Ruggiero, V., 'Organized Crime: Between the Informal and the Formal Economy,' *GCST Working Paper Series,* vol. 4, July, 2010.

Saegert, Susan, and Gary Winkel, 'Crime, Social Capital, and Community Participation,' *American Journal of Community Psychology,* vol. 34, no. 3, 2004, pp. 219–233.

Sampson, R.J., and W.B. Groves, 'Community Structure and Crime: Testing Social-disorganization Theory,' *American Journal of Sociology,* vol. 94, no. 4, 1989, pp. 774–802.

Sampson, R.J., S.W. Raudenbush and F. Earls, 'Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy,' *Science,* vol. 277, no. 5328, 1997, p. 918.

Schneider, Friedrich, 'Turnover of Organized Crime and Money Laundering: Some Preliminary Empirical Findings,' *Public Choice,* vol. 144, no. 3–4, 2009, pp. 473–486.

Shelley, L., 'Transnational Organized Crime: An Imminent Threat to the Nation-state,' *Journal of International Affairs,* vol. 48, no. 2, 1995.

Sinn Féin, 'Government Refusal to Ringfence Cab Monies for Crime Prevention in Disadvantaged Areas Scandalous,' 2004. Online at http://www.sinnfein.ie/print/3160 (as of 25 November, 2010).

Skogan, W.G., *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods*, University of California Press, 1992.

Smith, Dwight C., 'Paragons, Pariahs, and Pirates: A Spectrum-based Theory of Enterprise,' *Crime & Delinquency,* vol. 26, no. 3, 1980, pp. 358–386.

Sproat, P.A., 'An Evaluation of the UK's Anti-money Laundering and Asset Recovery Regime,' *Crime Law and Social Change,* vol. 47, no. 3, April, 2007, pp. 169–184.

Taylor, Ralph, 'Neighborhood Responses to Disorder and Local Attachments: The Systemic Model of Attachment, Social Disorganization, and Neighborhood Use Value,' *Sociological Forum,* vol. 11, no. 1, 1996, pp. 41–74.

Thomas, Vinoo, 'No Longer for Fun: Exploiting the Internet for Profit,' *Siliconindia,* vol. 11, no. 3, 2008, pp. 36–37.

Tiessen, J., C. Celia, L.V. v. Dijk, A. Reding, C. v. Stolk and T. Ling, *Impacts and Outcomes of Local Authority Regulatory Services: Final Report*, RAND Europe, Rand Corporation. and Great Britain, Local Better Regulation Office, Santa Monica, CA, RAND, 2009.

Ugo, Marani, *Organized Crime and Foreign Direct Investment: The Italian Case*, Munich: CESifo Group, 2008.

UNODC, *Coca Cultivation in the Andean Region*, New York: United Nations Office on Drugs and Crime, 2006.

Van Daele, S., N. Dorn and T. Vander Beken, 'European Waste Disposal Sector,' *The European Waste Industry and Crime Vulnerabilities*, 2007, p. 17.

van Dijk, F., and J. de Waard, 'Key Findings from the Study Legal Infrastructure of the Netherlands in International Perspective: Crime Control,' *European Journal on Criminal Policy and Research,* vol. 8, 2000, pp. 517–527.

van Dijk, J.J.M., 'The International Crime Victims Survey and Complementary Measures of Corruption and Organised Crime,' *Crime Prevention Studies,* vol. 22, 2007a, p. 125.

van Dijk, J.J.M., 'Mafia Markers: Assessing Organized Crime and its Impact upon Societies,' *Trends in Organized Crime,* vol. 10, no. 4, 2007b, pp. 39–56.

van Dijk, J.J.M., J.N. van Kesteren and P. Smit, Criminal Victimisation in International Perspective, Key findings from the 2004–2005 ICVS and EU ICS, The Hague, Boom Legal Publishers, 2008.

van Duyne, Petrus C., 'Money Laundering: Fears and Facts,' in *Criminal Finances and Organizing Crime in Europe*, Petrus van Duyne, Klaus von Lampe and J.L. Newell, eds., Nijmeghen, Wolf Legal Publishers, 2003.

van Duyne, Petrus C., 'Criminal Finances in the State-of-the-art: Case for Concern,' in *Crime Business and Crime Money in Europe: The Dirty Linen of Illegal Enterprise*. Nijmegen, Wolf Legal Publishers, 2007, pp. 69–98.

van Duyne, Petrus C., Stefano Donati, Jackie Harvey, Almir Maljevic and Klaus von Lampe, eds., *Crime, Money and Criminal Mobility in Europe*, Nijmegen, Wolf Legal Publishers, 2009.

Van Tiggelen, V., and L. Surano, *Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union*, Institute for European Studies, Université Libre de Bruxelles, 2008.

Varese, Federico, 'Is Sicily the Future of Russia? Private Protection and the Rise of the Russian Mafia,' *European Journal of Sociology,* vol. 35, 1994, pp. 224–258.

—, 'Mafia Transplantation,' in *Creating Social Trust: Problems of Post-socialist Transition*, J. Kornai *et al.*, eds., London, Macmillian-Palgrave, 2004.

—, 'How Mafias migrate: The Case of the "Ndrangheta",' *Northern Italy. Law and Society Review,* vol. 40, no. 2, 2006, pp. 411–444.

von Lampe, Klaus, 'The Use of Models in the Study of Organized Crime,' *Conference of the European Consortium for Political Research (ECPR)*, Marburg, Germany, 19 September, 2003.

von Lampe, Klaus, 'Making the Second Step before the First: Assessing Organized Crime. The Case of Germany,' *Crime, Law & Social Change,* vol. 42, 2004, pp. 227–259.

—, 'Organized Crime in Europe: Conceptions and Realities,' *Policing,* vol. 2, no. 1, 2008, p. 7.

Whyte, W.F., 'Street Corner Society: The Social Structure of an Italian Slum,' ISBN 0-2 26-89543-2, 1981, p. 406.

Zhang, Sheldon, and Ko-lin Chin, 'Snakeheads, Mules, and Protective Umbrellas: A Review of Current Research on Chinese Organized Crime,' *Crime, Law and Social Change,* vol. 50, no. 3, 2008, pp. 177–195.

EU documents cited

2000/C 197/01: European Convention on Council Act of 29 May 2000 establishing the Convention on mutual assistance in criminal matters between the Member States of the European Union)

7769/3/10 Rev. 3: note of 28 May 2010 on Council conclusions on confiscation and asset recovery

Action Plan to Combat Organised Crime 1997: 97/6 251/01

Brussels I Regulation: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Convention on the Enforcement of Foreign Criminal Sentences 1991: Convention between the Member States of the European Communities on the enforcement of foreign criminal sentences

CoE 1959: Council of Europe Convention on mutual assistance in criminal matters

CoE 1990: Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime

CoE 2005: Council of Europe Convention. on laundering, search, seizure and confiscation of the proceeds from crime 2005

COM (2005) 232 final: communication of 2 June 2005 to the Council and the European Parliament on developing a strategic concept on tackling organised crime

COM (2008) 766 final: communication from the Commission to the European Parliament and the Council: proceeds of organised crime / ensuring that 'crime does not pay'

Council Decision 2007/845/JHA Council Decision 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 (practical utilisation of confiscation laws)

Council Directive 2004/80/EC: Council Directive of 29 April 2004 relating to compensation to crime victims

Council of the EU, note 5684/09: note of 26 January 2009 from European Judicial Network to delegations: replies to the questionnaire on the evaluation of the tools for judicial cooperation in criminal matters

FD 2001/500/JHA: Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime

FD 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – statements made by certain Member States on the adoption of the Framework Decision

FD 2003/577/JHA: Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence

FD 2005/212/JHA: Council Framework Decision 2005/212/JHA

of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property

FD 2005/214/JHA: Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties

FD 2006/783/JHA: Council Framework Decision of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders

FD 2008/841/JHA: Council Framework Decision of 24 October 2008 on the fight against organised crime

FD 2008/978/JHA: Council Framework Decision of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters

Hague Convention on the international validity of foreign criminal sentences 1970

Hague Programme 2004: 14292/1/04 rev 1, annex I

Joint Action 97/827/JHA, Council Joint Action of 5 December 1997establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime

Joint Action 98/699/JHA. 98/699/JHA: Joint Action of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime

Joint Action 98/733/JHA: Joint Action of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union

Joint Thematic Review 2010: Joint Thematic Review of asset recovery: restraint and confiscation casework, HMCPSI/HMICA/HMIC

JUST/B/1/AA-et D(2010) 6815: initiative taken by the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden

Millennium Strategy: 2000/C 124/01 the prevention and control of organised crime: a European Union strategy for the beginning of the new millennium

Protocol No. 1: Protocol No. 1 (ECHR) on the enforcement of certain rights and freedoms

Protocol No. 2: Protocol No. 2 (TFEU) on the application of the principles of subsidiarity and proportionality

Stockholm Programme 2009: 17024/09 guidelines for justice and home affairs, an open and secure Europe serving the citizen (see also European Union, 2009)

Legal cases

Name in document	Reference
Rutili [1975]	*Rutili* [1975] ECR 1219
Engel v The Netherlands [1976]	*Engel v The Netherlands (no. 1)* [1976] 1 EHRR 647
R v Cuthbertson [1980]	*R v Cuthbertson* [1980] 2 All ER 401 (UK)
Minelli v Switzerland [1983]	*Minelli v Switzerland* [1983] 5 E.H.R.R. 554 at [37]
Piraino [1985]	*Piraino* judgment of the Italian Court of Cassation, 30 January 1985
Allgemeine Gold-und Silverscheideanstalt v United Kingdom [1986]	*Allgemeine Gold-und Silverscheideanstalt v United Kingdom* [1986] 9 E.H.R.R. 1 at [52]
James v United Kingdom [1986]	*James v United Kingdom* [1986] 8 E.H.R.R. 123 ECtHR at [50]
Johnston v Chief Constable of the RUC [1986]	Case C-222/84 *Johnston v Chief Constable of the RUC* [1986] ECR-1651
Oliveri [1986]	*Oliveri* judgment of the Italian Court of Cassation, 12 May 1986
Commission v Greece [1988]	case 226/87 *Commission v Greece* [1988] ECR 3611
Salabiaku v France [1988]	*Salabiaku v France* [1988] 13 EHRR 379
Francovich [1991]	*Andrea Francovich and others, Danila Bonifaci and others vs Italian Republic*, Joined Cases C-6/90 and C-9/90, [1991] ECR I-5357
M v Italy [1991]	*M v Italy* [1991] Application no 12386/86, 17 DR 59, at 98.
Drozd v France and Spain [1992]	*Drozd v France and Spain* [2009] 26 June 1992.
Pham Hoang v France [1992]	*Pham Hoang v France* [1992] *ECHR 25-09-1992*
Sekanina [1993]	*Sekanina* [1993] 17 E.H.R.R. 221
Raimondo v Italy [1994]	*Raimondo v Italy*[1994] ECHR 3
Welch v UK [1995]	*Welch v UK* [1995] ECHR 4
Opinion 2/94 [1996]	*Opinion 2/94 on the Accession by the Community to the ECHR [1996] ECR I-1759*

Name in document	Reference
Asan Rushiti v Austria [2000]	*Asan Rushiti v Austria* [2000] 33 EHRR 1331
R. v DPP Ex p. Kebilene [2000]	*R. v DPP Ex p. Kebilene* [2000] 2 A.C. 326 HL at 380
Rushiti [2000]	*Rushiti (2000) 33 E.H.R.R. 56*
Arcuri v Italy [2001]	*Arcuri v Italy* ECHR admissibility decision of 5 July 2001, Application no 52024/99
Pellegrini v Italy [2001]	*Pellegrini v Italy* [2001], Application No. 30882/96.
Phillips v UK [2001]	*Phillips v UK* [2001] ECHR 437
Phillips v United Kingdom [2001]	*Phillips v United Kingdom* [2001] 11 B.H.R.C. 280 at [44].
Riela v Italy [2001]	*Riela v Italy* ECHR admissibility decision of 4 September 2001, Application no 52439/99
Bundesverfassungsgericht (Federal Constitutional Court) [2002]	*Bundesverfassungsgericht (Federal Constitutional Court)* [2002] – decision of 20 March 2002 (2002 NJW: 1779)
Butler v United Kingdom [2002]	*Butler v United Kingdom* [2002] Application no 41661/98;
OMPI I [2002]	*OMPI I* [2002] T-228/02
R. v Rezvi [2003]	Lord Steyn in *R. v Rezvi* [2002] UKHL 2; [2003] 1 A.C. 1099 at [14]
Bundesverfassungsgericht (Federal Constitutional Court) [2004]	*Bundesverfassungsgericht (Federal Constitutional Court)* [2004] *Forfeiture, § 73d Criminal Code: Constitutionality of extended forfeiture* – judgment of 14 January 2004 – 2 BvR 564/95, NJW 2004, 2073
R v He and Chen [2004]	*R v He and Chen* [2004] EWHC (Admin) 3021 (orders available in support of 'civil recovery' orders in Part 5 of the Proceeds of Crime Act 2002)
S v The Commissioners of HM Customs and Excise [2004]	*S v The Commissioners of HM Customs and Excise* [2004] EWCA Crim 2374
Webb v United Kingdom [2004]	*Webb v United Kingdom* [2004] Application no 56054/00
Amsterdam [2005]	*Amsterdam District Court LJN AT 8580, decision of 1 July 2005*
Jamil v France [2005]	*Jamil v France* [2005], Application no. 15917/89
Walsh v Assets Recovery Agency [2005]	Cecil Walsh v Director of the Assets Recovery Agency [2005] NICA 6
Walsh v United Kingdom [2005]	*Walsh v United Kingdom [2005] NICA 6*
Walsh v United Kingdom [2006]	*Walsh v United Kingdom* [2006] Application no. 43384/05
Case 763/2007 of the Higher Court of Ljubljana [2007]	Case 763/2007 of the Higher Court of Ljubljana
Case 1352/2007 of the Higher Court of Ljubljana [2007]	Case 1352/2007 of the Higher Court of Ljubljana

Name in document	Reference
Geerings v Nertherlands [2007]	*Geerings* [2007] 46 E.H.R.R. 49 at [47].
J.A. Pye (Oxford) Ltd v United Kingdom [2007]	*J.A. Pye (Oxford) Ltd v United Kingdom* [2007] 46 E.H.R.R. 45 at [55]
Grayson v United Kingdom [2008]	*Grayson v United Kingdom* [2008] 48 E.H.R.R. 42 at [43], [44], [49]
A v United Kingdom [2009]	*A v United Kingdom* [2009] 49 EHRR 29
Adzhigovich v Russia [2009]	*Adzhigovich v Russia* (Application no. 23202/05), decision of October 8, 2009 ECtHR at [32]-[34]
Gabric v Croatia [2009]	*Gabric v Croatia* (Application no. 9702/04), decision of February 5, 2009 ECtHR at [35]
Kadi v Commission [2009] (Kadi II decision)	Case T-85/09 *Kadi v Commission* [2009], judgment of 30 September 2009
Serious Organised Crime Agency v Gale [2009]	*Serious Organised Crime Agency v Gale* [2009] EWHC 1015 (Q.B.).11
Sun v Russia [2009]	*Sun v Russia* (Application no. 31004/02), decision of February 5, 2009 at [26]-[27]
Venice Commission [2009]	*Venice Commission Opinion* 563/2009, document CDL-AD(2010)030

Appendix A. Summary of fieldwork

Fieldwork was carried out *in situ* and/or by telephone in all 27 EU Member States. In order to understand how Member-State laws operate in practice through the EU, we endeavoured to interview government practitioners (i.e. police, prosecutors and others) in each Member State. Only in Poland did scheduling difficulties prevent this. We complemented this core of interviews with other perspectives from judges, defence lawyers, academics and, in the case of Italy, from persons with experience in the social reuse of confiscated assets. Table A.1 summarises this fieldwork.

Table A.1 Fieldwork in Member States

MS	Police / prosecutor	Judge	Defence	Academic	Other
BE	1	.	.	1	.
BG	3	.	1	.	.
CZ	2	.	.	.	.
DK	2	.	.	.	.
DE	5	.	.	1	.
EE	2	1	.	.	.
IE	2	.	.	.	.
EL	2	.	1	2	.
ES	3	.	.	1	.
FR	2	.	.	1	.
IT	2	.	.	3	3
CY	2	.	.	.	.
LV	2	.	.	.	.
LT	1	.	.	.	.
LU	2	.	.	.	.
HU	2	.	.	.	.

MS	Police / prosecutor	Judge	Defence	Academic	Other
MT	2	.	.	.	.
NL	2	.	1	1	.
AT	2	.	.	.	.
PL	.	.	1	.	.
PT	3	.	.	.	.
RO	2	.	.	1	.
SI	2	.	.	.	.
SK	2	.	.	.	.
FI	3	.	.	1	.
SE	3	1	.	1	.
UK	7	.	2	1	.

In addition to this fieldwork we conducted interviews with representatives of the following EU and international institutions:

- Europol
- Eurojust
- CARIN
- Moneyval
- FATF
- CoE: ECHR
- CoE Venice Commission.

Appendix B. Confiscation statistics

We present statistics for the following Member States in which relevant material was provided or located through fieldwork and data search:

- Bulgaria
- France
- Germany
- Hungary
- Ireland
- Italy
- Netherlands
- United Kingdom.

Bulgaria

Table B.1 Bulgarian statistics (2006–10)

	Freezing cases p/a	Assets frozen p/a (€m)	Confiscation cases p/a	Costs* (€ millions)
2006	100	21.8	12	.
2007	109	66.6	33	.
2008	126	66.3	57	.
2009	155	254	79	6.5

Source: CEPACA Annual Report (2009)

As at the end of 2009, of all the confiscation cases brought to date:

- 133 remained at first instance trial;
- 28 decisions at first instance (CEPACA won 22);
- 13 decisions at second instance (CEPACA won 7); and
- 6 cases finalised (CEPACA won 4).

Recovered assets from the four cases won = €1.0m.

Value of assets in the 29 successful cases = €10m.

France

Table B.2 French statistics (2005–9)

	Seizures by police (€m)	Seizures by *gendarmerie* (€m)	Total seizures (€m)
2005	.	.	51.3
2006	60.5	11.4	71.9
2007	51.8	3.8	55.5
2008	35.1	58.8	93.9
2009	58	127.7	185.7

Source: reports of PIAC

Germany

Table B.3 German statistics, organised crime (1992–2009)

	% of investigations in which assets seized	Estimated profit in these cases (€m)	Amount seized (€m)	Total number of recorded crimes
1992	5.0	.	.	.
1993	6.6	.		.
1994	6.8	.		.
1995	8.3	.	<20 in mid-1990s	.
1996	10.5	.		6,647,598
1997	12.1	.		6,586,165
1998	21.5	.	.	6,456,996
1999	22.2	.	118.5	6,302,316
2000	30.2	.	.	6,264,723
2001	30.7	760	.	6,363,865
2002	25.0	1500	31	6,507,394
2003	25.3	468	69	6,572,135
2004	24.2	1337	68	6,633,156
2005	25.4	842	97	6,391,715
2006	25.9	1815	60	6,304,223
2007	29.1	481	39	6,284,661
2008	27.0	663	170	.
2009	26.9	903	113	.

Source: Utilisation, seizure, profit: BKA annual organised-crime situation reports); total number of crimes: Eurostat (2010)

It is important to note that utilisation, amount seized and estimated profit refer to organised crime as defined by the Federal Criminal Police Office (BKA). We do not have a precise definition of 'profit' in this context.

Table B.4 German statistics, all crime (1999–2009)

	Number of proceedings in which assets confiscated	Total (state and civil) claim (€m)	Total amounts confiscated or forfeited (€m)	Total number of recorded crimes

1999	-	-	219	6,302,316
2000	-	-	.536.9	6,264,723
2001	–	–	.332.6	6,363,865
2002	–	–	294	6,507,394
2003	–	–	–	6,572,135
2004	6045	1268	306	6,633,156
2005	6010	1191	319	6,391,715
2006	6101	1066	301	6,304,223
2007	7050	592	219	6,284,661
2008	–	–	–	–
2009	6725	901	281	–

Source: Confiscation statistics – fieldwork, FATF (2010a), Fijnaut and Paoli (2004), pp. 752–753; total number of crimes – Eurostat (2010)

Hungary

Table B.5 Hungarian statistics (1999–2008)

	Recorded crimes	Convictions (total)	Convictions (property and financial crime)	Forfeiture cases	Amount frozen/seized (€m)
1999	505,716	95398	50840	56	.
2000	450,673				.
2001	465,694	94538	48249	14	.
2002	420,782				.
2003	413,343	93442	45090	35	.
2004	418,833				41
2005	436,522	97558	44676	233	69
2006	425,941				42
2007	426,914	86705	38112	598	102
2008	.				57

Source: Utilisation, amount frozen seized – police interviews and criminality and criminal justice' report of Hungarian Prosecutor General (2008); recorded crimes – Eurostat (2010)

These statistics evidence a rising utilisation rate (forfeiture cases as a function of convictions). Data are not available for amounts ordered, confiscated or subsequently recovered.

Ireland

Table B.6 Irish statistics (2003–9)

	CAB recovery from NCB confiscation (€m)	CAB recovery from revenue powers (€m)	CAB total recoveries (€m)	Running costs of CAB (€m)	Recorded crimes
2003*	?	10	?	5.7	103,462
2004*	?	16.4	?	5.7	99,244
2005	2	16.3	18.3	5.2	102,206
2006	3	19.1	22.1	5.2	103,178
2007	0.3	10	10.3	5,1	.
2008	6.1	5.9	12.0	7.5	.
2009	1.4	5.2	6.6	6.9	.

Source: CAB data – annual reports of the CAB; recorded crimes – Eurostat (2010)

The recovery data relate only to the CAB, which has NCB confiscation powers and also revenue powers (i.e. the ability to levy tax on previously undeclared income where even an NCB case cannot be made out on the evidence). Amounts recovered from NCB confiscation mostly relate to work from previous years, owing to a lag between the seizure of assets and their vesting in the state (unless there is disposal by consent, the law requires seven years).[162] Moneys recovered by victims through the work of CAB were not identified and so were not available to add to these figures.

Operating costs for the CAB include the cost of training regular *gardai* (police officers) so that conviction-based confiscation can be performed at local level. No conviction-based data are available.

Italy

Table B.7 Italian statistics (1992–2009)

	Assets investigated	Assets ordered confiscated	Final orders	Disposals	Recovered value (€)	Social reuse (€m)
1992		0	13	9	1.8	0.5
1993		85	9	3	0.4	0.1
1994		1	27	2	0.2	0.1
1995		0	22	5	1.0	0.5
1996		15	102	18	3.7	2.7
1997		71	340	63	18.6	9.3

[162] Fieldwork interview.

1998		155	404	129	18.2	8.6
1999		392	640	216	37.2	27.2
2000		435	575	249	38.9	18.2
2001		203	718	231	47.4	35.4
2002		211	477	329	89.9	71.5
2003		464	300	287	40.8	22.5
2004		660	328	287	47.4	27.1
2005		1044	400	190	51.8	32.1
2006	4427	1566	414	172	31.8	10.0
2007	8040	1790	325	518	97.5	38.1
2008	6173	949	319	804	165.5	80.8
2009	12741	2333	380	544	101.3	60.7
TOTAL	62551	11067	6207	4074	797.1	447.4

Source: Italian Department of Justice (2010)

Social reuse data refer to assets used or allocated for social purposes by municipalities. They do not include any assets or revenue streams allocated to law-enforcement agencies.

Netherlands

Table B.8 Dutch statistics (2003–9)

	Frozen assets under administration (€m)	Amount ordered confiscated (€m)	Amount recovered (€m)	Recorded crimes
2003	.	.	10	1,369,271
2004	.	.	.	1,319,482
2005	.	.	.	1,255,079
2006	.	.	.	1,218,447
2007	.	.	.	1,214,503
2008	550	.	23.4	.
2009	600	70	50	.

Source: Amount confiscated – authors' fieldwork; recorded crimes – Eurostat (2010)

Data for frozen assets under administration include assets frozen in previous years and remaining under administration. Data for amounts received refer to confiscation orders successfully enforced, which typically relate to confiscation orders from previous years.

United Kingdom

Table B.9 UK statistics (2001–9)

	Amount confiscated (£m, realised orders)	Recorded crimes
2001	.	6,085,903
2002	.	6,544,490
2003	25	6,548,691
2004	46	6,193,756
2005	84	6,096,153
2006	125	5,968,674
2007	136	5,444,648
2008	146	.
2009	154	.

Source: Amount confiscated – UK Home Office; recorded crimes – Eurostat (2010)

More detailed information for the UK is given in Appendix G.

Appendix C. Organised crime typologies

Organised crime is an ill-defined concept for the purposes of pan-European analysis. This is hardly surprising given that it varies markedly across and even within Member States. It is a daunting task to develop a definition of organised crime which is applicable across cultural contexts (Finckenauer, 2005). Political, economic and sociological perspectives all regard human relationships as the basis for organised criminal activity both within organised criminal networks and between them and their milieu (McIllwain, 1999). However, whether these relationships are organised according to a hierarchic, patron–client or enterprise model is a difficult empirical question (von Lampe, 2003). It is clear from the literature that the Italian Mafia-type organised criminal group is only one end of a diverse spectrum of criminal organisations (Fijnaut and Paoli, 2004) in which links to legitimate markets and the embeddedness of groups in societal, economic and political life may take various forms (von Lampe, 2008).

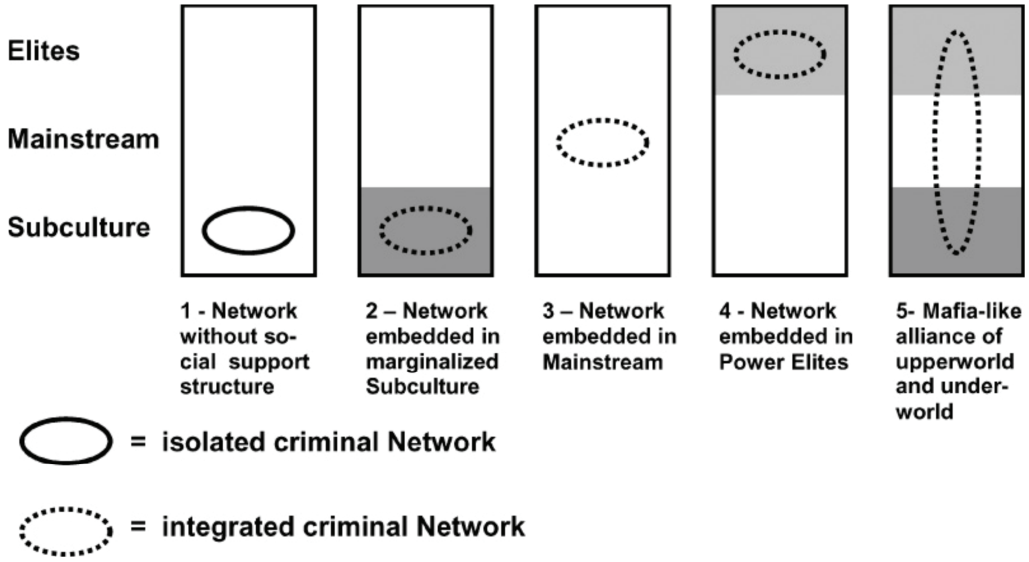
The individual criminal's motivations to join an organised-crime group may be conceptualised in an economic framework in which financial motivations provide the prime driver. In this enterprise model of organised crime (cf. Smith, 1980), organised criminal groups provide financial or in-kind benefits to the communities in which they operate in three major forms:

- as part of their operating costs such as wages to 'employees' or corruption 'fees' to police officers and other public servants;
- by providing illegal or legal inputs to local businesses and households, which range from private protection through enforcement of business contracts to garbage collection; and
- by consumer spending or investing profits in the legal economy.

Naturally, fighting organised crime and improving the effectiveness of asset confiscation would terminate or curtail some of these financial flows and transfers to communities. In order to understand this link between the organised criminal group and its social, economic and political environment a simple typology may be sketched. This typology combines two distinct categorisations in order to arrive at a theoretically sound and empirically valid typology: (1) the works of von Lampe (2008, 2004) as they provide a simple yet insightful theoretical framework which is applicable in the diverse cultural contexts of the EU and which focuses analytical attention on the embeddedness of criminal groups in the societal milieu in which they operate; and (2) Europol's organised-crime group typology ((Europol,

2007, 2008, 2009) which adds insights about modes of influence (i.e. violence, corruption, brand) and influenced actors (i.e. law enforcement, local society).[163] These two typologies are sufficiently similar to each other to allow a sound synthesis. In addition, they also complement each other; thus, the resulting typology covers all decisive aspects of organised crime.

The typology of von Lampe (2008, 2004) identifies five ideal-types as depicted in Figure C.1, to which we subsequently match the organised-crime categories of Europol (2009, 2008, 2007).



Source: von Lampe (2008)

Figure C.1 Different constellations of organised crime

The **first type of organised criminals** comprises criminal networks with no social support structure within the country or locality of operation. These are referred to as representative agents of organised-crime groups in a country other than the group's own.[164] These often play a crucial role in mediating between different groups and in managing supplies and sales (Europol, 2009). This type is exemplified by burglary gangs that use home bases in Eastern Europe as a hub for criminal activities in Western Europe (von Lampe, 2003).

The **second ideal-type of organised crime** depicts criminal networks that are rooted in the marginalised subcultures of their country or locality of operation. This allows them to rely on a social support structure which is larger than the immediate circle of their accomplices, but one largely separate from the mainstream society and its institutions. According to Europol (2009), these groups often use violence as the dominant mode of assuring compliance. This

[163] Alternative typologies are either too complex and punctuated for our purposes (e.g. Fijnaut and Paoli, 2004) or focus on other aspects of criminal activities such as relation to markets and state (e.g. Kawata, 2006).

[164] It is not recognized as an independent type, rather as an auxiliary category.

type is referred to in the Europol literature as VI-SO: violence in the local society. One example of this type is the drug business and friendship ties within Turkish communities, believed to play a major role in heroin smuggling and trade (Bundeskriminalamt (2002: 26); Flormann and Krevert (2001: 61–85).

The **third ideal-type** covers criminal groups that are embedded in mainstream society. These groups comprise outwardly law-abiding persons who are not restricted from taking advantage of the legitimate local infrastructure. While many of these persons are clearly aware of the criminal nature of their own activities there may be many others, including those close to them, who are unwitting accomplices. Being embedded in mainstream society allows organised criminal groups to exert corruption influence on law-enforcement officers such as low- and middle-ranking police officers and judges. This influence may be based on mutual favours or direct payment of bribes. In the Europol (2009) typology this type is called IN-LE: influencing law enforcement. Examples cover investment or benefit fraud such as the case of FlowTex in Germany in 2000 (Grill, 2001: 3).

The **fourth ideal-type** of criminal group covers criminal networks that consist of members of the local power elite. It benefits from direct access to socially relevant decision-making processes; this is in contrast with the previous type, where access is granted only through lower-level officials via corruption. The fourth type enjoys a strong immunity from criminal investigation owing to its high-level connections and membership. In this case the corrupting influence concerns the whole society, not only a section of it, as – for example – public policy decisions and public procurement outcomes usually have widely felt impacts. Due to their connections to the legal economy and the wide networks they sustain, these organised-crime groups often play an intermediary role between crime groups with less influence both nationally and internationally. This type is labelled by Europol (2009) as IN-SO: influencing society. Examples cover frequently quoted, but much less often completely unfolded, cases of corrupted public procurement, for example in the former communist countries of Central and Eastern Europe.

The final, **fifth ideal-type** of criminal network consist of an alliance between the political and business elites and the underworld even though the balance of power may shift between the criminal and legitimate spheres. These groups enjoy a great degree of immunity from prosecutions as they can draw on a wide range of legitimate and illegitimate resources to support their organisations. The comprehensive influence of these organised criminal networks across all strata of society, economy and polity and their typically extended survival tends to lead to their acquiring a distinctive brand on a par with the great international corporations (e.g. La Cosa Nostra). The brand is often associated with control over a specific territory and makes it possible for compliance to be achieved without direct use of violence or corrupting influence. These types of group can choose between a wider range of modes of influence, depending on which serves their purposes the best. Europol (2009) labels this type as IN-VI-SO, highlighting that it combines all modes of influence and exerts power over all stakeholders considered. This type is exemplified by politically entrenched Mafia-like organisations in Sicily and Russia (Klebnikov, 2000; Paoli, 2003). Nevertheless, within the EU this last type is perhaps much less widespread than feared, and there is little indication of any rapid change of prevalence. This is a natural outcome of the importance of history in the development of such groups (Europol, 2009; Fijnaut and Paoli, 2004).

In terms of **financial flows and transfers** into the local communities in which organised networks operate, the above different types have various characteristics. Distinctively, the operating costs of the non-rooted first type typically arise outside the communities in which it operates; likewise, it tends to spend its profits elsewhere. However, in each of the four other networks a significant portion of operating costs arises in the local communities affected, even if the criminal activities involved are part of an international operation. This arises because embedded types of organised crime have to expend resources on preserving connections and underpinning operations either in the form of wages to accomplices or in the form of corruption fees to public or private officials. The deeper the criminal group is rooted in societal life, the larger the amount of money that flows into the local economy. The key difficulty in ascertaining this impact lies in the different degrees of interconnectedness of illegal and legal activities (Ruggiero, 2010). For example, in Naples criminal groups are heavily involved in the waste-collection industry, supporting their businesses through a range of illegal activities (e.g. physical threatening of competitors). In such a situation illegal and legal profits are difficult to delineate; in addition, local economic benefits are inherently intertwined with the apparent costs of Mafia operations (Ruggiero, 2010). This helps to explain why calculation of costs and benefits associated with organised criminal activity remains a controversial and difficult enterprise.

Spending of criminal profits follows an erratic path free of normal accounting procedures, where lavish personal spending is intertwined with operational spending. The few analyses of organised-crime finances that deal with this issue shed some light, whilst leaving many questions unanswered (van Duyne, 2007). It is well established that wealthy criminals who got rich through engaging in organised criminal activities often attempt to find means of money laundering in order to secure their wealth and to enjoy it by consuming goods and services in the legal economy (Schneider, 2009). The only cross-national research which traces such activity focuses on the Netherlands (Meloen *et al.*, 2003) and is further elaborated by van Duyne (2003, 2007). These studies found, not surprisingly, that patterns of asset flow and expenditure depend on the kind of criminal business and the social and economic environment of the individuals involved. Typically, criminals do not venture far from their country of income source. In terms of spending structure, it appears that about 20% of overall profits was spent on gadgets and luxury goods, being reinvested in the criminal activity itself (e.g. through buying new means of transportation). The remaining 80% flowed into legal commercial activities, most notably real estate but also sports clubs, pubs and cafes – most of which had only small to minimal economic value for their local markets (van Duyne, 2007). None of these investments and consumption activities appeared to have a systematic impact on the legal markets, even though a few of them were significant in terms of turnover.

The amount of financial flows and transfers resulting from services provided by organised criminal groups depends on the nature of the activity pursued and the degree of embeddedness. Organised criminal groups that engage in racketeering, private protection and enforcement of business contracts, and that impose significant costs on individual victims and victim enterprises, nevertheless provide services which are valued by their 'clients' and substitute for deficiencies in public services in many instances (Varese, 2006, 2004, 1994). These activities may form part of the activity portfolio of all embedded types of organised criminal networks. Moreover, organised criminal groups, especially the ones linked to the

mainstream society and power elites, often aim at building up a range of legal enterprises either for legalising their income or for generating additional profit. These legal enterprises are often supported by illegal activities as well – for example, violence against legal competitors or acquisition of competitive advantage through illegal means. Regardless of the purposes and means used, these services also represent value for their consumers either as households (e.g. garbage collection) or as companies.

In order to ascertain the geographical distribution of different types of organised criminal groups within Europe, and to explore the links among them, Europol uses the concept of a 'criminal hub', defined as 'a conceptual entity that is generated by a combination of factors such as proximity to major destination markets, geographic location, infrastructure, types of OC groups and migration processes concerning key criminals or OC groups in general' (Europol, 2009: 27).

Each criminal hub receives goods and services from various sources inside its own territory and outside it; and it also distributes these in the EU, thus forging criminal markets and creating opportunities by linking organised criminal networks. The hubs are as follows (Europol, 2009):

- North West hub – a distribution centre for drugs, centred in the Netherlands and Belgium;
- North East hub – St Petersburg is an important logistical nexus for trafficked people and contraband;
- Southern hub – Italian organised criminal groups work with counterparts outside the EU and remit proceeds;
- South West hub – centred on the Iberian peninsula and engaged in exploitation of West and Central Africa for drug cultivation; and
- South East hub – trafficking activities based around the Black Sea.

In Eastern European criminal hubs, IN-SO and IN-LE types are most frequent, especially in Romania, Slovak Republic, Czech Republic and Poland (Europol, 2009). Furthermore, there are indications that in Hungary, Poland and especially in Bulgaria more violent organised-crime group types are present such as VI-SO (CSD, 2010; Europol, 2009).

In Western European criminal hubs, many of the organised criminal groups play an intermediary role in the world outside the EU as well as between various Member-State markets. IN-SO types are also frequent here; however, a larger proportion of IN-VI-SO types may be found especially in the Mediterranean region (Europol, 2009).

Organised criminal groups engage in a range of activities – such as crimes against persons (e.g. human smuggling), drug trafficking, fraud, counterfeiting, gambling and robberies – and are active in a variety of markets. We now briefly review some indicators for these activities.

Organised criminal groups tend to be involved in the drug trade, which continues to grow despite the trend towards harsher drug laws and enforcement policies (Poret and Tejedo, 2006: 4). Pacula and Kilmer (2009) calculate expenditure in global drug markets by looking at the amount that street dealers may earn in revenue. For the EU, they examine retail spending on amphetamines, methylenedioxymethamphetamine (MDMA) and cannabis. Given large uncertainties in this area, authors encourage users to consider the range of low and high estimates, rather than any particular point estimate. Taking this approach, the

market in the Member States in 2005 for these three drugs alone was estimated, as per Table C.1, to be between €1.4 billion and €8.0 billion.

Table C.1 Retail spending for amphetamines, MDMA and cannabis, EU-27, 2005

	Low (000s €)	High (000s €)
Belgium	25,169	152,200
Bulgaria	.	.
Czech Republic*	62,078	256,055
Denmark	24,962	113,680
Germany*	200,366	826,610
Estonia	7295	46,598
Ireland	12,918	80,231
Greece	10,904	75,890
Spain	253,932	1,543,068
France	63,554	431,082
Italy	250,928	1,602,778
Cyprus	3068	22,078
Latvia	11,741	56,796
Lithuania	3338	19,051
Luxembourg	1,073	6820
Hungary	39,334	216,619
Malta	387	2327
Netherlands	23,205	160,491
Austria*	35,123	144,859
Poland	68,403	299,340
Portugal	8601	50,791
Romania	.	.
Slovenia	5981	44,291
Slovakia	30,162	186,899
Finland	26,191	149,465
Sweden	22,530	135,431
United Kingdom	469,528	2,559,180
TOTAL	1,363,204	7,955,106

Source: Pacula and Kilmer (2009)
* Only amphetamines and cannabis.

Organised criminal groups are also involved in 'modern crimes', which present difficult new challenges to law-enforcement agencies. Internet crime, for example, may be a source of 'easy money' for those who are technically literate (Thomas, 2008). More generally, research is exploring how organised-crime groups are able to take advantage of a more 'networked' society by exploiting advanced technology and IT in particular.[165] In essence, IT breaks down the geographical barriers to developing business in other countries, and organised-crime groups are well placed to utilise IT systems to develop their businesses in drug trafficking, smuggling, counterfeiting, gambling, and so on. The authors discuss how swift technological change and complex dynamics within the international system provide new opportunities for 'complex and advanced criminal activity'.

For the Member States reporting data in the European Sourcebook, approximately one in six suspected offenders on average is an 'alien'[166] (see Table C.2). Such offenders are likely to have connections that allow them to hide their assets in foreign countries better.

Table C.2 Origin of persons suspected of money laundering and drug trafficking, EU-27, 2006

	Money laundering		Drug trafficking	
	% of aliens	% EU citizens amongst aliens	% of aliens	% EU citizens amongst aliens
Belgium	–	–	–	–
Bulgaria	0	–	1.6	14.6
Czech Republic	–	–	–	–
Denmark	–	–	–	–
Germany	35.7	–	27	–
Estonia	0	–	40.4	3.1
Ireland	–	–	–	–
Greece	–	–	–	–
Spain	–	–	–	–
France	–	–	23.5	–
Italy	–	–	–	–
Cyprus	–	–	–	–
Latvia	–	–	–	–
Lithuania	0	–	2.8	50
Luxembourg	–	–	–	–
Hungary	20	–	3.6	30.8
Malta	–	–	–	–
Netherlands	–	–	–	–
Austria	56.4	–	36.5	–
Poland	–	–	–	–
Portugal	–	–	–	–
Romania	25–4	34–3	–	–

[165] http://centrim.mis.brighton.ac.uk/research/projects/orcrilin (as of September 2012).

[166] Defined as not a citizen of the state in which the offence took place.

	Money laundering		Drug trafficking	
	% of aliens	% EU citizens amongst aliens	% of aliens	% EU citizens amongst aliens
Slovenia	14–3	0	4–7	19–1
Slovakia	0–3	–	9–5	–
Finland	–	–	–	–
Sweden	–	–	–	–
UK	–	–	–	–
MEAN	16–9	–	16–6	–

Source: Aebi *et al.* (2010)

It must be appreciated that these useful conceptual qualitative descriptions, backed up in some cases with interesting case studies in which some quantitative data are available, are a long way from providing the kind of basis for impact assessment in the present study that would be useful to policy-makers. In particular, it should be noted that in nearly all cases quantification of the activities of criminal groups, even if it were not problematic because of the lack of raw data, would be rendered so by the intertwining of victim costs with client benefits at the local community level. Establishing a social cost balance sheet for organised crime is far from straightforward.

This area of research has also not yet ventured into the asset-confiscation arena. We have an hypothetical model of activity flows through geographical hubs, but we do not have a similar model for the effects of asset confiscation on this model; nor do we have any information about how the different types of organised-crime group respond to the threat or experience of asset confiscation.

Appendix D. Microeconomic analysis

This appendix uses microeconomic analysis to explain: (a) the profit motive for individuals to engage in crime; (b) interventions by the state aimed at reducing the rate of crime; and (c) the formation of organised criminal groups to spread risk.

The individual profit motive for engaging in crime

The process by which people engage in criminal activity may be thought of as a series of economic decisions. People generally prefer more money than less, and their options for obtaining money include legal and illegal activities.[167] Illegal activities may be profitable because they supply an illicit market (e.g. drug trafficking) or simply because they are acquisitive of others' property (e.g. fraud). Regardless, they entail a risk of detection by authorities, which gives rise to two further risks, both of which may be thought of as costs.

First, there are criminal-justice costs. Detection can lead to arrest and remand in custody whilst awaiting trial. Even if bail is granted, there may be heightened police attention. If a conviction ensues, then if the crime is serious (and the most profitable crimes usually are), the offender is likely to go to jail. Throughout this process the criminal, quite apart from facing the lifestyle consequences of being made to stand trial and/or be sent to jail, has a reduced capacity to profit from crime.

Second, there are asset-confiscation consequences, which are discussed below. As noted in Section 3.1, interest in asset confiscation stems from the realisation that the threat of (even lengthy) incarceration is not enough to deter highly profitable criminal activities. In particular, 'extended' confiscation of the accumulated proceeds of previous crimes (see Section 3.4.1) is expected to have a strong deterrent effect.

Figure D.1 is a simplified representation of the outcomes of a decision whether or not to commit a particular crime. It shows only the potential consequences of asset confiscation and not traditional criminal-justice consequences (e.g. financial and other consequences of being in jail). The process starts with the individual seeking money and ends with a particular amount of money, *viz* €*x* if they decide not to commit crime and engage in legitimate income-earning activities, nothing if they commit the crime and fail to gain any assets, €*y* if they gain and retain assets, nothing if they gain assets but these are confiscated, and –€*z* if they suffer extended confiscation against their existing assets.

[167] Assuming criminals to be economically motivated 'rational actors' abstracts from other factors, such as risk appetite or social status, but is a useful starting point.

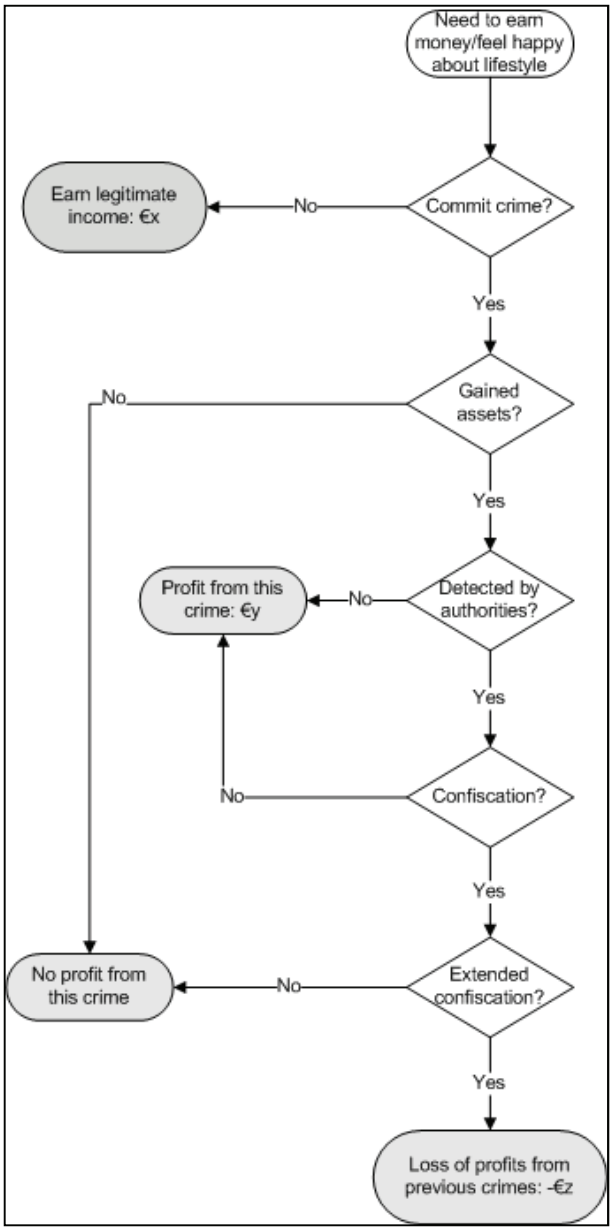


Figure D.1 Asset-confiscation potentialities

The calculus of a person contemplating whether to engage in profit-motivated crime may be expressed using **expected value theory**, which is rooted in a rational model of decision-making. Several observations are in order.

First, not all criminals will correctly gauge the chances of being caught. This is so even on average, as it has been observed that profit-motivated individuals make decisions that appear to violate rational-actor assumptions. Experimental observations of real-life decision-making thus led to the development of 'prospect theory', which predicts that individuals are relatively risk averse regarding gains, and relatively risk loving regarding losses, as when leaders face critical or crisis situations.

Second, most people discount the value of future benefits (and penalties), caring more about today than about tomorrow. This tends to make crime more attractive than it otherwise

would be, because of the (often lengthy) time lag between the acquisition of proceeds and future confiscation.

Also, it is necessary to consider the criminal-justice consequences from which Figure D.1 abstracts. These include reduced quality of life in the event of incarceration, for which individual utility functions – that is, the monetary value accorded one's own liberty – will vary widely. It is also relevant that attitudes towards criminality vary widely. Whereas some criminals might prefer, all else equal, to earn a legitimate income, others place a positive value on feelings of power, respect or belonging to a group (Bouffard *et al.*, 2010).

Taking all of these considerations into account, the following equation gives the expected value (EV) of committing a crime, being: the value of the proceeds that a criminal activity is expected to generate, minus the amount that can be expected to be confiscated by authorities, minus the cost of carrying out the crime, minus expected loss due to incarceration, plus the 'satisfaction' received from living a criminal lifestyle:

$$EV(crime) = \alpha \sum_{ij} \quad \rho\left(1 - \pi_i^j\right) P_i^j - \beta \sum_{kl} \pi_k^l W_k^l R - c + \mu + \theta,$$

where:

P_i^j is the proceeds of the crime under contemplation, in the form of assets of types $j \in (cash, real\ estate, \dots, J)$ intended to be held in countries $i \in (country\ A, country\ B, \dots, I)$ and π_i^j is the probability of losing asset j in country i pursuant to a confiscation order. P_i^j consists of assets with the potential to become proceeds of the crime under contemplation, thus: $P_i^j = \rho_i^j V_i^j$, where ρ_i^j is the probability that an asset of value V_i^j will become part of the proceeds;

W_i^j is existing criminal wealth – that is, the proceeds of previous crime, in the form of assets of type *k* in countries *l*;

π_k^l is the probability of losing asset *k* in country *l* due to an extended confiscation order;

R is a discount factor associated with the loss of asset W_i^j to account for the fact that confiscation happens in the future, thus: $R = 1/(1+r)^t$, where r is the discount rate and t is the time at which confiscation of W_i^j is thought to occur;

c is the cost of carrying out the crime (and hiding/laundering proceeds);

μ is the subjective value of potential loss of liberty;

θ is the moral premium – that is, the satisfaction (greater than zero) or dissatisfaction (less than zero) associated with criminal behaviour; and

α and β adjust for attitude towards different types (i.e. good and bad) potentialities.

The probability of losing an asset, or π, is the probability that a series of events (not all of them shown in Figure D.1) will occur. These events are as follows:

- Detection of crime (τ) – the probability that authorities detect the crime under contemplation and commence an investigation into the individual.

- Identification of asset (ω) – for each asset the probability that the investigation will lead authorities to suspect that this asset constitutes proceeds of crime.
- Freezing/seizure (σ) – for each asset the probability that dealing in it will become impossible, pending possible confiscation.
- Conviction (γ) – the probability that the individual will be convicted of the crime under contemplation. This is relevant for conviction-based confiscation proceedings only.
- Confiscation order (ε) – the probability, for each asset, of authorities achieving a confiscation order.
- Enforcement (φ) – the probability, for each asset, that a confiscation order will be enforceable in the country in which the asset is held.

These are all independent probabilities, so the probability of losing assets is:

$$\pi = \tau \,.\, \omega \,.\, \sigma \,.\, \gamma \,.\, \varepsilon \,.\, \varphi$$

Individuals contemplating carrying out a crime will need to evaluate π for different scenarios. In trying to minimise π, they essentially face two decisions.

First, they must decide on the details of the crime that they intend to carry out (this affects τ).

Second, they must decide if, where and how to conceal any proceeds gained (this affectsω,σ, ε andφ). Each of these decisions will consist of a series of sequential choices. Concealing proceeds, for example, involves choosing how to launder them; whose name to hold them in; where to hold them, and so on; which choices will depend upon the nature of the assets; and the information and resources available to the individual.

Whenever an individual has to make sequential choices, the decision-making process can be performed through backwards induction. In a process with a distinct or finite time horizon, this involves determining the best decision path by starting at the end and working back to the beginning. Figure D.2 illustrates a basic example in which there are two decisions: whether to commit crime and, if so, whether to hide assets. This results in a total of three pathways, each with a different expected value function. Working backwards, the individual contemplating committing the crime must first determine whether – if they committed the crime – they would be better off hiding the assets (incurring the fees of accountants, lawyers and bankers) or not hiding them (cheaper, but π will be higher). In the example given, the EV function returns a higher value if assets are hidden (€100 compared to €90). The individual next considers whether to commit the crime (knowing that they will then hide the assets) or not. The EV function returns a higher value if they commit the crime (€100 compared to €75), on which basis, preferring more money to less, they choose to commit the crime.

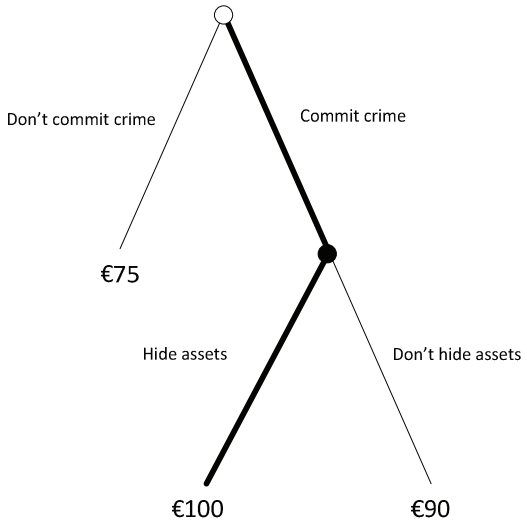


Figure D.2 Example of economic crime decision-making process

Intervention by the state

Just as the individual contemplating crime takes measures to reduce π, the state may take measures to increaseπ, in which case it enters into a game against the criminals.[168] Indeed, the independent probabilities which, multiplied, make up π, consist of a series of interventions by authorities, all of which must occur for criminal assets to be recovered. If intervention fails at any stage, the asset is not recovered. Thus, all else being equal, measures to make any stage of intervention more likely (e.g. laws making intervention easier or less costly for authorities, or greater resources for authorities), will reduce the expected value of crime by increasing π. Referring back to Figure D.1, there is a reduced probability of earning €y and an increased probability of earning nothing, or of losing €z. Since individuals contemplating crime would rather have more money than less, some of those at the margin are likely to reduce or cease criminal activities, opting instead to follow the non-criminal path shown in Figure D.2. As there may be peer and information effects, this may even dissuade others from engaging in crime.[169] Meanwhile, those remaining in crime face greater risks. Measures that facilitate intervention thereby reduce the attractiveness of a life of crime *vis-à-vis* a life without crime.

In reality, criminals are dynamic agents who may attempt to minimise the possibility of intervention. It would be naive to assume that they do not innovate to counteract changes to the probabilities of the various interventions confiscation process. Typically, however, they will face trade-offs, because these innovations will increase 'operating costs' (e.g. the cost of

[168] It is not necessarily obvious that states play this game hard, or at all. This may be because individual agents of the state (police, prosecutors, judges) are not incentivised to utilise asset- confiscation laws. In extreme cases, states may deliberately abstain from the game owing to fear of capital flight, or even as a measure to attract foreign criminal assets (e.g. in the case of tax havens).

[169] e.g. See Gaviria (2000), which finds a statistical link between aggregate crime rates and the drug trade. The author finds this is due to a variety of mechanisms, including the knowledge transfer from those in the drug trade (e.g. on how to acquire firearms for those involved in other criminal activities) and the reduction in status for criminal behaviour as individuals in the drug trade are offered higher status.

paying bankers, accountants and lawyers to move or hide assets). This will be too costly for some, who will be deterred from criminal activity. Others will remain in the game,[170] with their assets better concealed than previously. Indeed, Levi and Osofsky point out the possibility that 'confiscation following Crime A does little more than make the offender more careful with his assets when he commits Crime B. Thus, the offenders appear to get smart about hiding their assets once they have been deprived of them' (Levi and Osofsky, 1995: 13).

Criminals are not the only ones who face trade-offs. Asset-confiscation work places demands upon the time of those agents of the state (police, prosecutors and judges) who carry it out. Because these are the same professionals engaged in criminal-justice work, asset-confiscation work may detract from the criminal-justice system unless the state makes additional resources available. Yet this does not automatically mean that asset-confiscation work is a financial burden upon the state. On the contrary, because it generates revenue in the form of recovered assets, it has the potential to be cost neutral, or even to make a positive contribution. In every country there will almost certainly be some 'low-hanging fruit' in the form of relatively valuable criminal assets that are relatively easy to recover. Likewise, there will be criminal assets which, being either well hidden or of low value, are uneconomic to recover. Moreover, a thorough economic analysis should take into account second-order system effects. For example, the deterrent effect of confiscation work should reduce the burden upon the criminal-justice system. Likewise, if less crime is being committed then there should be less criminal damage to property and a lower burden upon the health system arising from violent offences and drug-taking. Finally, it is worth noting that asset-confiscation work can be justified even if it is not cost neutral because crime reduction and restorative justice (or, at the EU level, the AFSJ) are results worth paying for.

In the game between criminals and the state, one of the biggest factors is the ability of the criminal to hide assets overseas, where the state's powers are constrained. Specifically, the probabilitiesω, σ and φ depend heavily upon the country in which an asset is located. Assuming transaction costs are low, there is an obvious incentive for criminals to hold assets in countries in which these probabilities are low. Low transaction costs are, of course, a goal of the EU, making this an example of a negative side-effect of the EU's economic agenda. Of course, the imperative to shift assets to other Member States can be reduced by measures aimed at convergingω, σ and φ by raising them wherever they are low throughout the EU. The EU itself, by enacting supranational measures, can 'triangulate' this game between the individual and the state. However, the EU is not a closed system, so any such measures will, all else equal, result in capital flight as those at the margins – that is, criminals contemplating moving assets outside the EU – are persuaded to do so. Of course, the opposite course of action – measures aimed at convergingω, σ and φ by lowering them wherever they are high – would tend to promote the EU as a haven for criminal assets, which is antithetical to the goal of an AFSJ.

[170] They may suffer reduced profits. On the other hand, criminals involved in supplying illicit markets may be able to pass on their higher operating costs, especially if they face reduced competition owing to the exiting of less sophisticated competitors.

Formation of organised criminal groups

The basic principles underlying the formation of organised criminal groups are the same as those underlying the formation of legitimate businesses. There is, in the first place, an underlying demand for illicit goods and services, which provides a profit motive. Individual suppliers can then become more efficient, and capture more market share, if they pool resources, share overhead costs and embrace specialisation. To avoid being undercut, their competitors must do the same. The resultant firms, seeking then to preserve their own existence, diversify by spreading risk across various activities, some of which may be licit.[171]

Organised criminal groups alter the framework within which individual decisions to commit crime are made. For those contemplating criminal activity, membership of a criminal organisation can provide both opportunities and job security. Expecting loyalty to be rewarded over the long term, members may commit crimes (e.g. assassinating a rival) for which the immediate risks outweigh the immediate rewards. The imperative for authorities to confiscate criminal assets remains, however, because it is ultimately the proceeds of crime that drive these expectations.

As criminals become organised, they become more difficult and, hence, expensive to police. Those at the top of organised criminal groups can afford to distance themselves from evidence of their criminality, whilst low-level members are easily replaced.[172] Profitable groups can also invest in sophisticated responses to intervention by authorities. They can afford lawyers, accountants and bankers to conceal assets. They can maintain semi-legitimate businesses through which to launder criminal proceeds. They can afford to bribe officials. They can maintain an intelligence apparatus and even, in exceptional cases, weaponry enough to threaten the state's monopoly on violence, at least at the local level. All else equal, these sophisticated tools will tend to give criminals the upper hand in the asset-confiscation 'game' against the state – that is, by decreasing π. However, just as criminals respond dynamically to intervention by state authorities, so can the latter respond to alarming trends in the underworld. A heightened effort to confiscate criminal proceeds could constitute one such approach.

[171] These risks include those arising from the criminal justice system and those arising from asset-confiscation activity, which have been discussed already. They also include the generic risks facing suppliers of markets, e.g. increased competition from other firms, or falling consumer demand.

[172] In particular, the delay between benefiting from crime (and being able to afford an expensive lifestyle) and the possible negative consequences (e.g. confiscation) is long enough for finding willing recruits to be generally not a problem.

Appendix E. Fundamental rights

Fundamental rights hold a prominent position in the EU legal order. Fundamental rights were initially developed as general principles of law which it was the duty of the EU courts to protect. The EU treaties now contain numerous provisions on the requirement to respect fundamental rights. Most importantly, following the Treaty of Lisbon, the Charter of Fundamental Rights was made legally binding and granted equal status to the treaties. It sets out a whole range of rights and freedoms that the institutions and the Member States when acting within the scope of EU law must respect. Thus compliance with fundamental rights is a condition for the legality of EU acts.[173] Even further, there is increasingly a view that it is a precondition for the very existence or exercise of the EU's powers. Any purported action to promote the confiscation and recovery of criminal assets must therefore be assessed for its compatibility with fundamental rights.

There is as yet no case law of the EU courts on this point, but guidance may be sought in the more elaborated jurisprudence of the ECtHR. The EU courts have consistently held that the rights enshrined in the convention are part of EU law (*Rutili* [1975]) and convention rights actually find an equivalent in the Charter, although the reverse is not true. Also, in defining the scope of fundamental rights in the EU, the jurisprudence of the ECtHR has special significance.[174] Indeed, there are only a handful of cases where the two courts have reached different conclusions. Even further, with the eventual accession of the EU to the ECHR, convention rights are likely to become the minimum standards applicable in the EU. The principles developed by the ECtHR in the field of asset freezing and confiscation are examined below and should be considered as the minimum benchmark to be applied in the EU.

Ordinary confiscation

Right to property

Article 1 Protocol No. 1 ECHR provides that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions'. In as much as it deprives the offender of their possession, confiscation interferes with the right to property. This right is not however absolute; it can legitimately be subject to restrictions that are, under Article 1 Protocol 1,

[173] Opinion 2/94 [1996], para. 34.

[174] Opinion 2/94 [1996].

grouped under three headings. There are (1) restrictions in the public interest under the conditions provided by law and by the general principles of international law. Two headings then provide for the right of a state (2) to enforce such laws as it deems necessary for control on the use of property in accordance with the general interest and (3) to secure the contribution of taxes or other contributions or penalties. In *Phillips v UK* [2001], para. 51, it was held that confiscation constitutes a 'penalty' within the meaning of the convention; it hence fell within the scope of the 'control on use of property to secure the payment of penalties' limb of Article 1 Protocol No. 1. Confiscation as a limitation to the right to property is allowed under the convention. That said, the restrictions foreseen by para. 2 must still be read in the light of, and assessed in accordance with, the principles spelled out in para. 1.

First, the confiscation must be 'lawful' or 'provided by law', a term which the European Court has consistently interpreted as requiring a clear and precise legal provision, adopted in accordance with the rule of law (*Adzhigovich v Russia* [2009]; *Sun v Russia* [2009]).

Second, the law must pursue a legitimate objective (or be in the public interest). Confiscation laws often do. To give an example, it was recently held that 'the purpose [of a confiscation order] is to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises',[175] all of which were perceived as valid objectives from the perspective of human rights law. The prevention of organised crime is presumably a valid objective for ECHR purposes.

Third, there must still be a 'reasonable relationship of proportionality' between the policy behind the law and its effect upon the individual (*J.A. Pye (Oxford) Ltd v United Kingdom* [2007]). The proportionality test is not very strict in this area; the European Court doesn't usually declare a particular legislative provision incompatible with Article 1 Protocol No. 1 simply because a less restrictive solution might be available. Some states can have more severe regimes than others as long as they do not go beyond the 'margin of appreciation'. States usually enjoin in assessing the justification for a measure and the means most suitable to enforce it. The proportionality test often mainly depends on the application of the confiscation order in the particular case under examination. In that regard, the Court gives great weight to the procedural guarantees in place; a measure will be usually be proportional if the individual had effective means to contest it.

Prima facie, the position under the Charter is even more liberal. It is unclear whether a criminal actually enjoys a right to property where the said property is of illegal origin. Article 17 reads: 'Everyone has the right to own, use, dispose of and bequeath his or her *lawfully acquired* possessions [emphasis added]'. In relation to the confiscation of direct and indirect proceeds, compatibility with the Charter seems to be ensured almost automatically.[176] The Charter further allows for the regulation of the use of property where this is necessary for the general interest. The compatibility of a confiscation regime with the right to property will hence be subject to a similar balancing exercise to that applying under the convention. As

[175] Lord Steyn in *R. v Rezvi* [2003].

[176] That is the case because, by definition, direct and indirect proceeds will have proved to be of illegal origin. In the alternative, it will be sufficient for the EU confiscation regime to recall that the unlawful origin of the assets must be established.

long as the measure pursues a legitimate aim and is proportionate to that aim, it is most likely to receive the approval of the EU courts.

The right to an effective remedy and to a fair trial

The right to an effective remedy, as recognised by Article 13 ECHR, as well as the Article 6 ECHR right to a fair trial, have long been recognised as general principles of EU law (*Johnston v Chief Constable of the RUC* [1986]). Article 47 merges the two. Para. 1 provides that 'everyone whose rights and freedoms guaranteed by the law of the EU are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article'. These include, according to para. 2, 'a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'. This largely echoes the safeguards applicable under Article 6(1) in proceedings involving a 'determination of civil rights and obligations', which has been held to be applicable to confiscation proceedings on numerous occasions.[177]

In as much as confiscation orders interfere with the right to property, they must be capable of challenge by affected parties under the conditions set by Article 6 ECHR and Article 47 of the Charter. However, as will be discussed in more detail below, it seems that confiscation does not amount to a criminal charge and does not trigger the added procedural guarantees applying to criminal proceedings. It will hence be sufficient for EU laws on the matter to comply with Article 6(1) ECHR and Article 47 of the Charter

Other rights in connection with enforcement

Even in cases where the imposition of a confiscation order is justified and proportionate, distinct human rights issues may arise with regard to its enforcement. This is so in particular where the regime provides for imprisonment in case of non-payment or non-compliance with a confiscation order. Article 6 of the Charter states: 'everyone has the right to liberty and security of person'. The convention equivalent, Article 5 ECHR, exhaustively lists the cases where detention may be allowed.. This includes, pursuant to Article 5(1)(b), the lawful 'detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law'. A number of provisions then elaborate on the procedural safeguards that should apply in these cases. In so far as confiscation can be perceived as a 'lawful order of a court' or 'an obligation prescribed by law', detention will be justified if adequate remedies exist for affected persons to contest it. Article 5(3) requires indeed that the lawfulness of any detention be decided speedily by a court.[178] Detention may still raise an issue under Article 7 ECHR, however, if – as in *Jamil* [2005], it is applied retrospectively pursuant to a law that entered into force after the commission of the offence.

Another issue may arise where enforcement of a confiscation order would leave a person or their family in such a state of deprivation as to infringe the right to private and family life (Article 7 of the Charter and Article 9 ECHR), the principle of proportionality of criminal

[177] See, e.g., *Phillips v UK* [2001].

[178] Note in this connection that Article 267(4) TFEU now provides that if a preliminary reference is made in relation to a case pending before a national court in relation to a person in custody, the ECJ should give a ruling with a minimum of delay.

offences and penalties (Article 49 of the Charter and Article 7 ECHR) or even possibly the prohibition again inhumane and degrading treatment (Article 4 of the Charter and Article 3 ECHR). Such extreme scenarios seldom arise in practice since either confiscation only applies to a limited portion of one's property or special provisions exist to the effect that confiscation should not extend to the person's basic means of survival.[179]

In general conviction-based confiscation regimes do not raise serious issues from a fundamental-rights perspective. Only in extra cases will they prove problematic. NCB and extended confiscation regimes are more contentious; the European Court has consistently avoided ruling on the principled question of their compatibility with the convention. Rather, decisions tend to focus on their application in a particular case. This denotes the controversy surrounding the issue and the lack of consensus amongst European States regarding the need and justifications for these regimes.

Non-conviction-based confiscation

When compared with their 'conviction-based' counterparts, NCB confiscation regimes may have the following implications.

First, it may raise some added difficulties with regard to Article 17 of the Charter and Article 1 Protocol No. 1 ECHR. In so far as they are not connected to the commission of, and conviction for, a particular criminal offence, the 'strength' of the punitive objective of NCB orders is reduced. They are thus harder to justify in principle as necessary and proportionate restrictions to the right to property. In *Raimondo v Italy* [1994], however, the Italian regime was held to be a proportionate restriction in as much as it constitutes a 'necessary weapon' in the fight against the Mafia. By contrast, the UK regime is more generally targeted at recovering criminal assets.[180] This was noted by the European Court in *Walsh v United Kingdom* [2006], where it held that neither the proceedings nor the recovery order imposed were punitive or deterrent in purpose. Rather, they merely sought 'to recover assets that did not lawfully belong to the applicant'.[181] This statement was made to classify NCB confiscation proceedings as civil and not criminal in nature; the Court did not determine whether this qualifies as a legitimate objective for the purposes of Article 1 Protocol No. 1. Indeed, it did not rule on the compatibility of the UK regime with this provision because the applicant had failed to exhaust local remedies. But it did give a hint that the objective pursued by NCB confiscation may be weaker than that of ordinary regimes.

Second, additional issues are likely to arise in relation to the compatibility of NCB regimes with the right to a fair trial. As set out in Article 6 ECHR, the right differs depending on whether proceedings are criminal or civil. In either case, there is the entitlement, per Article 6(1), 'to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. But criminal defendants are further entitled to the presumption

[179] See, e.g., the Slovakian confiscation regime, Articles 59 and 60 Criminal Code.

[180] Part 5 PoCA. On one reading, the UK regime pursues a wider objective since it is aimed at the recovery of criminal assets in general, whilst the Italian one focuses only on the Mafia. On another reading, though, the UK regime has no specific deterrent purpose, whilst the Italian laws clearly aim to prevent future criminal actions of the Mafia

[181] *Walsh*, para. 1.

of innocence per Article 6 (2), as well as certain procedural safeguards per Article 6(3).[182] Under Article 48 of the Charter, moreover, 'everyone who has been charged shall be presumed innocent until proved guilty according to law'. This provision only applies when a person has been charged under criminal law and not where the proceedings are civil in nature. This difference means in essence that the question of whether fundamental rights have been infringed may depend upon the classification of proceedings as either criminal or civil. This classification, however, is an autonomous concept of the ECHR. Formal statements under domestic law are the starting point, but the classification then depends upon 'the very nature of the offence' and 'the degree of severity of the penalty that the person concerned risks incurring' (*Engel v The Netherlands* [1976]).

As discussed above, the *raison d'être* of NCB confiscation is to promote the confiscation of criminal assets by ensuring that legal barriers (in the case of type 2 assets) and criminal-justice safeguards (in the case of type 3 assets) do not preclude confiscation orders. One such safeguard is the presumption of innocence, which manifests itself, *inter alia*, in the requirement for the prosecution to prove its case to a high evidentiary standard (e.g. beyond reasonable doubt). Respondents in NCB confiscation proceedings have thus sought to argue that these are criminal for Article 6 purposes and that, consequently, the prescription of a civil standard of proof and other aspects of civil procedure constitutes a breach of the convention. These arguments have persistently failed before the ECtHR in Strasbourg, in particular in relation to the Italian anti-Mafia laws and the 'civil forfeiture' laws of the UK.

The Italian anti-Mafia laws include a seizure/confiscation regime in Section 2 of Act no. 575/1965, which was inserted by Act no. 646/1982. Under this regime, property may be seized on the basis of 'sufficient circumstantial evidence, such as a considerable discrepancy between his lifestyle and his apparent or declared income, to show that the property concerned forms the proceeds from unlawful activities or their reinvestment';[183] it can thereafter be confiscated if evidence of its lawful origin is not forthcoming. The ECHR refused, in *M v Italy* [1991] to entertain the argument that this regime was criminal, stating that it was 'designed to prevent the unlawful use of the property which is the subject of the order' and, further, 'that the severity of the measure is not so great in this case as to warrant its classification as a criminal penalty for the purposes of the convention.'[184] Similar refusals have followed in *Arcuri v Italy* [2001] and *Riela v Italy* [2001].

The UK NCB confiscation regime essentially consists of two strands: seizure/forfeiture of cash and *in rem* NCB recovery for other assets. In relation to seizure or forfeiture of cash, relevant case law mainly concerns precursor legislation, but it could extend to Part 5 of PoCA. The European Court has already twice held that cash forfeiture proceedings under the 1994 Act were not criminal in nature: *Butler v United Kingdom* [2002] and *Webb v United Kingdom* [2004]. Hence they did not attract the full guarantees of Article 6 ECHR.

---

[182] Although in serious cases these protections are increasingly being read into other provisions such as Article 5 ECHR. See, e.g., *A v United Kingdom* [2009].

[183] English translation from *Raimondo v Italy* [1994].

[184] *M v Italy* [1991].

This was confirmed in relation to PoCA in *Walsh v United Kingdom* [2006]. Walsh was the respondent in NCB proceedings under Part 5 of PoCA. He argued that these breached his Article 6(2) right to the presumption of innocence because they were based on a civil standard of proof. This argument had been rejected by the Northern Ireland Court of Appeal.[185] The Court held that the appellant had not be charged with a criminal offence and, more broadly, that the 'primary purpose of the legislation was restitutionary rather than penal'; the fact that the confiscation effectively amounted to a penalty was not such as to change the legal nature of the proceedings. The European Court largely confirmed this analysis. As we have already seen, it held that neither the proceedings nor the recovery order imposed were punitive or deterrent in purpose.

The presumption of innocence has, however, been held to extend to Article 6(1) (*Phillips v UK* [2001]) so that NCB confiscation regimes are liable to raise some issues in that respect despite not being criminal in nature. In the case of *Walsh* discussed above, the Court specifically emphasised that the order had not taken account of any offence for which Walsh had been acquitted. There is indeed a principle in ECHR case law that 'following a final acquittal, even the voicing of suspicions regarding the innocence of the accused is no longer admissible' (*Asan Rushiti v Austria* [2000]). Thus, although the Court found no violation of Article 6(1) in this case, it appeared to imply that a different conclusion may be reached if the principle developed in *Asan Rushiti* were to find application. One should therefore explore exactly what the principle entails and in what circumstances an NCB order may be held to breach the presumption of innocence.

Article 6(2) may be breached by judicial statements made in civil proceedings arising out of the same facts as, and following, prior criminal proceedings that ended in a discontinuation of those proceedings or an acquittal, if the civil proceedings are linked to the criminal proceedings in such a way as to be brought within the scope of Article 6(2). The link that is required has been addressed in cases before the ECHR dealing with several categories of civil proceedings arising out of, or involving, the same facts as other prior criminal proceedings. A helpful insight into these issues (including a categorisation of the different civil proceedings) has been offered by Klentiana Mahmutaj (Mahmutaj, 2009) and will provide the ground for the discussion to follow.

First, an issue will arise in trying to safeguard the presumption of innocence following the termination of the criminal proceedings (principle first set by the ECHR in *Minelli v Switzerland* [1983]). The court stated in *Minelli* that:

> the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.

The factors that the ECHR has taken into account in deciding whether a link exists include whether the same court that decides the issue(s) in the civil proceedings decided the termination of the criminal proceedings; whether the decision in the civil proceedings relies on the same or very similar evidence to the criminal proceedings; how much time has passed

[185] Northern Ireland Court of Appeal (NICA) in *Walsh v United Kingdom* [2005].

since the criminal proceedings were terminated; and whether and to what extent the two sets of proceedings are linked procedurally and under the relevant legislation. Another guiding principle is that the threshold for finding a breach of Article 6(2) will be lower when the termination of the criminal proceedings was due to an acquittal; in that case the mere 'voicing of suspicions' will suffice to breach the presumption of innocence (*Sekanina* [1993]; *Rushiti* [2000]).

Second, an issue arises where confiscation is applied in relation to offences for which the defendant was acquitted. The European Court has not yet considered this question in the context of NCB confiscation proceedings, but it has done so in relation to extended confiscation. The question arose in a case where the defendant was acquitted for several of the crimes imputed but was found guilty for others, and the authorities confiscated assets amidst which were those which were purported to have arisen from the criminal conduct of which the defendant had been acquitted. After a rather controversial decision, the court reconsidered the issue in 2007 in *Geerings v Netherlands* [2007]. Mr Geerings complained that the confiscation order imposed upon him infringed his right to be presumed innocent under Article 6(2) since it was based on a judicial finding that he had derived advantages from offences for which he had been acquitted in the substantive criminal proceedings that had been brought against him. The European Court agreed, stating that:

> The Court considers that 'confiscation' following on from a conviction … is a measure … inappropriate to assets which are not known to have been in the possession of the person affected, the more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty … More importantly, the court notes that, unlike in the *Phillips* case and *Van Offeren*, the order related to the very crimes of which the applicant had in fact been acquitted.

Post-acquittal NCB confiscation proceedings are likely to be treated in a similar way. The Strasbourg Court generally invites both civil and criminal courts to approach criminal acquittals with great caution and warns against any reference to criminal guilt that casts doubt on a defendant's final acquittal. One may note that it may only be a matter of time before the ECtHR is called upon to examine this point in the context of NCB confiscation. In the UK, PoCA specifically envisages civil proceedings based on evidence which founded a failed prosecution, and the Serious Organised Crime Agency has brought such proceedings (e.g. *Serious Organised Crime Agency v Gale* [2009]).

Extended confiscation

Like NCB confiscation regimes, with extended confiscation it is harder to justify in principle compatibility with the right to property. Indeed, the confiscation order extends to assets beyond those derived from, or having served to commit, the offence for which the person was convicted in the main proceedings. It therefore has to be shown that it pursues a broader legitimate objective than that of punishing the individual. The Strasbourg Court has consistently held that the Italian seizure-confiscation regime (perhaps the most severe regime in the EU in that it combines NCB and extended confiscation) is not a disproportionate interference with the right to private property. The case of *Arcuri v Italy* [2001] is typical. Noting the 'very disturbing level' of organised crime in Italy, the Court granted the Italian legislature 'a wide margin of appreciation both with regard to the existence of a problem affecting the public interest which requires measures of control and the appropriate way to

apply such measures'. Focusing then on the opportunity afforded the applicants to put their case before a competent court, it held that their convention rights had been adequately protected.

The Italian seizure-confiscation regime would not, perhaps, be a proportionate response to the level of organised crime in some other Member States or the EU generally, most particularly since proportionality in the EU bears its own, independent meaning. In *Phillips v UK* [2001], the ECHR held that the UK's conviction-based extended confiscation provisions were a proportionate response to 'the scourge of drug trafficking', especially given that the amount payable represented the proceeds of drug trafficking. Admittedly, drug trafficking is also quite a peculiar category of crime. In general, compatibility with the convention is assessed on a case-by-case basis, with the degree of procedural safeguards afforded to applicants playing a determinant role in assessing the proportionality of the measure.

As with NCB confiscation, extended confiscation raises issues with regard to the presumption of innocence, given that it is by definition a process which enables confiscation without an established link between the asset and a particular criminal conviction. The leading case in this area is *Phillips v UK* [2001]. The Court started by stating that an application for a confiscation order following conviction was analogous to sentencing and did not amount to the bringing of a 'new charge' for the purposes of Article 6(2) ECHR. Accordingly, the presumption of innocence did not apply and the assumptions used by the Court to calculate the amount of the order were not such as to change the status quo and trigger application of Article 6(2). It came to this conclusion after the contradictory statement that, on the one hand, Article 6(2) 'governs criminal proceedings in their entirety' but that, on the other hand, the presumption of innocence (which is precisely what Article 6(2) is about) 'arises only in connection with the particular offence being charged' (para. 35).

Continuing along this controversial path, the Court held that Article 6(1) applies throughout the criminal proceedings, 'including proceedings whereby a sentence is fixed'. It continued that the Article 6(1) concept of a fair trial includes the right to be presumed innocent, although this right is not absolute but may be subject to a number of presumptions of fact and law, typical of many criminal law systems.[186] The Court, however, declined to rule on the principled question of the lawfulness of the UK extended confiscation regime, including the use of assumptions regarding the origin of property. Rather, it limited its examination to whether the assumption was applied fairly in the circumstances of the case and concluded that it was, given that (1) the person's guilt for any additional offence was not at stake; (2) adequate procedural safeguards were in place, including the possibility for the accused to rebut the presumption and prove on the balance of probabilities that he didn't acquire the property through drug trafficking. The Court held, however, that an issue may arise where the amount of the confiscation order was fixed on the basis of assumed hidden assets.

This last issue also arose before the European Court in *Grayson v United Kingdom* [2008] and *Phillips v United Kingdom* [2001]. Both appellants had been convicted of drug-trafficking offences. It was presumed that they had large amounts of hidden assets and their confiscation orders reflected that assumption. The appellants claimed that they didn't have enough money

[186] It cites in that regard *Salabiaku v France* [1988], which is an important case re the circumstances in which a statutory presumption can shift the burden of proof to defendants.

to pay the large confiscation orders and they argued that there had been a violation of Article 6(1) as well as of Article 1 Protocol No. 1. The Court reiterated that the principle according to which the prosecution must bear the burden of proof is not a rigid one – persuasive presumptions are acceptable as long as states act within reasonable limits. Crucial to the case was the fact that the national judge had discretion as to whether to apply the assumptions and that he could avoid doing so if it were to cause serious injustice. Hence there was no violation of Article 6. All in all, it seems that the compatibility of statutory assumptions typical of extended confiscation regimes with Article 6(1) and (2) will be assessed on a case-by-case basis and will pass muster if reasonably applied and if adequate procedural safeguards are injected into the process. Also, it should be added that the case of *Geerings v Netherlands* [2007] concerned the Dutch extended confiscation regime; thus the statutory assumptions involved in these regimes are no longer permissible if they are applied to conduct for which the person has expressly been acquitted.

Extended confiscation regimes may also raise concerns with regard to Article 49 of the Charter and Article 7 ECHR, which spell out the principle of legality, including the non-retroactivity of criminal law, and the prohibition against the imposition of harsher penalties.[187] An issue may in particular arise in respect of newly introduced extended confiscation provisions that allow for the confiscation of assets acquired through criminal conduct which occurred prior to the introduction of the extended confiscation regime. A case in point is *Welch v UK* [1995]. There the Court stated that the concept of penalty had an autonomous meaning under the convention and that it applied to extended confiscation in as much as it constitutes a criminal penalty (i.e. as opposed to the Italian seizure confiscation regime – which, being non-criminal, doesn't engage Article 7).[188] Since the latter had been applied retrospectively, there was a breach of Article 7 ECHR.

Extended criminalisation

Some of the above issues will arguably be resolved by opting for extended criminalisation. There would be no debate, for instance, about whether extended confiscation, given its effects, amounts to a distinct criminal charge. The corresponding assets will now be confiscated on the basis of a criminal conviction for unjust enrichment. Also, the person would be entitled to the full protection of Article 47 of the Charter. On the other hand however, there are objections to criminalisation. Concepts as 'unjust enrichment' are primarily employed in a civil law context and their transposition to the criminal sphere may be problematic. The constitutive elements of such an offence as unjust enrichment would have to be carefully drafted to ensure compatibility with both Article 48 (Article 6(3) ECHR) and Article 49 of the Charter (Article 7 ECHR). Also, overcriminalisation is now always well perceived from a fundamental-rights perspective.

---

[187] Article 7 applies only to criminal cases and is rarely invoked in practice. See Murphy, C., 2010).

[188] See *M v Italy* [1991]. Even before this case went to Strasbourg, the Italian Court of Cassation had consistently ruled that the regime did not permit the retroactive application of criminal provisions *contra* Article 25 para. 2 of the Constitution, for two reasons: first, because preventative measures are not criminal (see, e.g., *Piraino* [1985]); second, because the regime is in any event not retroactive, as it relates to property in a person's possession at the time when confiscation is ordered (*Oliveri* [1986]).

Victims and third parties

Although the relationship between the victim and the state is only indirect in criminal proceedings, there may be instances where their fundamental rights will come into play. The ECtHR has developed the concept of 'positive obligations' whereby states in certain cases have a positive duty to ensure the protection of convention rights. Pursuant to this concept, states are liable under the ECHR not only where they interfere with a particular right but also where they fail to take adequate positive steps to secure that particular right. Some cases show that this may go as far as engaging the responsibility of a state where it has failed to take action against a private party whose conduct has interfered with another person's rights.

Positive obligations have provided the ground for the recognition of some fundamental rights to the benefit of victims of crimes, although these are obviously incidental to the rights of the accused in criminal proceedings. But, in theory, cases could be envisaged where states would have an obligation to ensure that a particular crime is adequately investigated and prosecuted and the assets belonging to the victims recovered, and has failed to do so because of negligent conduct. Most particularly, in the light of the growing objective of restorative justice, tensions may arise where states cannot recover the victims' assets because these have been acquired by a *bona fide* third party following the commission of the offence. There are hypothetical scenarios, but there is a growing awareness of the need to protect the rights of victims – which are moreover also now specifically mentioned in the Lisbon Treaty.

Freezing and seizure

Freezing orders

Freezing and seizure orders touch upon several of the fundamental rights discussed above, *viz* the right to property, the right to private life and the right to a fair trial.[189] Although freezing orders are only temporary measures which do not deprive the person of their possessions, their consequences may be very far-eaching, particularly with regard to the right to property. They can apply to both the suspect's current assets and those acquired after the imposition of the order. The person often requires court approval before engaging in any sort of transaction, which effectively results in the *de facto* administration of his or her assets by the court.[190]

Freezing orders can raise issues with regard to the right to private and family life. Such orders usually also impact on the person's family although there is a growing awareness that, to ensure compatibility with fundamental rights, people should be left with their basic means of survival. Freezing orders may also have effects on third parties since it is often a criminal offence to have any dealings, commercial or otherwise, with a person on whom such a measure has been imposed.

---

[189] It is arguable that the right to a fair trial includes the Article 6(2) and 6(3) rights in the case of freezing orders in support of conviction-based confiscation. There seems to be no ECHR case law on this point. In the UK, the England and Wales Court of Appeal has held, in *S v The Commissioners of HM Customs and Excise* [2004], that it is 'impossible to conceptualise the restraint proceedings [under Part 2 of PoCA] as criminal' because they can be issued regardless of whether criminal charges have been brought.

[190] See for a critical view Meagher *et al.* (2002: 800, para. 21-445).

Usually a restrictive measure is upheld if the person was in a position to safeguard their rights. An added difficulty in this field is that legislature/courts often accept that the imposition of freezing orders requires a departure from traditional principles of due process. A significant number of Member States have provisions to allow such orders to be decided upon in the course of *ex parte, in camera* proceedings.

Despite the above, in *Raimondo v Italy* [1994], for example, the Court held that the seizure was clearly a provisional measure which aimed to guarantee the subsequent application of a confiscation order and was hence justified in the public interest. In addition, given the danger represented by the Mafia, it could not be held to be disproportionate with regard to the right to property. Hence, due to their utility in ensuring the subsequent application of confiscation orders, freezing orders are perceived to be legitimate restrictions to fundamental rights despite the fact that the person's criminal liability still needs to be established. The key question becomes whether the requirements for obtaining them are proportionate to the imperative to preserve assets pending possible confiscation.[191] In this regard, it should be noted that a seizure order against moveable assets, because it constitutes an intrusion over and above a freezing order (i.e. a mere prohibition in dealing), may warrant stricter conditions for its imposition

Recent case law of the EU courts on administrative assets-freezing measures imposed upon suspected terrorists suggests that they will adopt a stricter stance than their European counterpart on the compatibility of freezing orders with fundamental rights.[192] An automatic analogy should, however, be avoided. In both cases there is a need to ensure that asset-freezing measures strike a fair balance between the rights of individuals and the need to combat serious forms of crimes, in particular by preventing the dissipation of assets. But administrative sanctions are adopted within the very peculiar context of the fight against the financing of terrorism and operate in a very different fashion. Criminal freezing orders are imposed by a judicial body once formal charges are brought and only for a limited period of time, pending the decision on confiscation. Administrative sanctions, by contrast, rest on mere suspicion by executive authorities and, in practice, apply almost indefinitely.[193] Criminal freezing orders thus raise fewer issues regarding fundamental rights. If sufficient safeguards exist to ensure that the person's rights are not restricted beyond what is necessary, they should receive the approval of the EU judiciary.

Management of frozen assets

A few words should finally be said in relation to the management of frozen assets, as well as loss of value and restitution in cases where a freezing order was wrongfully imposed.

---

[191] For judicial treatment of this question see, e.g., *Raimondo v Italy* [1994] (Italian anti-Mafia seizure-confiscation regime); and *R v He and Chen* [2004].

[192] While the courts accepted that certain limitations on the rights of due process could be permitted, these had to be justified by overriding considerations regarding public security and the conduct of the EU's or the Member State's international relations. The rule is thus that fundamental rights should be respected to the full. See, e.g., *OMPI I* [2002]; *Kadi v Commission* [2009].

[193] In cases where precautionary freezing is allowed, such measures are usually coupled with clear time limits, after which the measure will become void if it has not been endorsed by a judicial authority.

First there the question of whether there should be remedies available against individual management decisions and, more broadly, how much say individuals should have in management decisions. The answer to this question effectively depends on whether a management decision is perceived as a distinct interference with the person's right to property from that resulting from the imposition of the freezing order or whether the possibility of challenging the order suffices. Given that management decisions are likely to have permanent effects, they should be amenable to review, although there has not been any case on this specific point. Admittedly, serious public interest considerations militate in favour of disposing and using frozen assets.

There is also the issue of compensation where the proceedings do not result in confiscation but the freezing order caused a loss of value of the asset. In *Raimondo v Italy* [1994], the Court held that a degree of damage is inevitable when property is seized, and hence the real question is whether the damage suffered went beyond what is inevitable. If that is the case, then compensation will be required. Article 17 of the Charter provides that deprivation of possession should be 'subject to fair compensation being paid in good time for their loss'. *A priori*, this provision only applies to confiscation orders, but there may well be a point where the freezing order has resulted in such a loss of value that the individual is in effect deprived of their property and can thus rely on this provision to claim compensation.

Appendix F. Member-State legislation

Two tables supplement Sections 3.6.1 and 3.6.2 with detailed descriptions of key aspects of Member-State confiscation and preservation laws.

Table F-1 Confiscation powers, grouped by Member State

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
			O *= ordinary;* ***Ext*** *= extended;* ***NCB*** *= non-conviction based;* ***ncb*** *= conviction based but conviction not required in limited circumstances*	*Type of crime, other prerequisites*	*What proceeds? (**C**)rime for which conviction obtained; (**S**)imilar crimes, even if no conviction; (**A**)ny crimes, even if no conviction*	*(**I**)ndirect; or only (**D**)irect*	*(**Y**)es - specify any circumstances which must be satisfied; or (**N**)ever*	*(**H**)igh, e.g. beyond reasonable doubt; (**M**)edium; (**L**)ow, e.g. balance of probabilities*	*(**N**)ot reversed; (**R**)eversed; (**S**)hared, including where satisfied by, or reversed upon, evidence of unexplained assets*	*regime #*	*list any limitations e.g. If cannot freeze/seize value or for 3rd parties*	*(**O**)ptional (**M**)andatory*	*(**H**)igh (**M**)edium (**L**)ow*	*What is the latest date that confiscation proceedings can be brought? Can further proceedings be brought if more assets are found?*	*(**Y**) = 3rd party confiscation; (**N**) = need to charge 3rd party, e.g. with ML*	*(**Y**)/state rules or exceptions; (**N**)ot if bona fide*	*(**N**) or (**Y**)/specify e.g. spouse, heirs, other family, companies, etc.*
BE	CC- Art. 42 - 'special confiscation'	modified by law of 17/07/1999	O	Crimes, misdemeanours , *contraventions* if provided for by law	C	I	Y - where cannot find proceeds	'intimate conviction'	N	1		Optional for substitute assets (value confiscation) or indirect proceeds or assets in hands of third parties, otherwise mandatory			Court of Cassation has ruled that the personal nature of special		N

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	CC - Art 43 *quarter* (not used a single time, too complicated, and the same result can be achieved by the broad definition of ML)	19/12/2002	Ext - on the basis of discrepancy between his normal assets and his actual assets up to 5 years back	List of serious offences (trafficking, corruption, war crimes, etc, also some tax offences); also any offence committed within the framework of a criminal organisation	S or A (assets available to criminal organisations)	I	Y	'intimate conviction' based on 'serious and concrete indications'	S	1		O (mandatory for assets of criminal organisation)			confiscation does not preclude its application to third parties, who then need to take an active role in demonstrating their legitimate property rights.		
	CC art 505	Amended in 10/05/2007	O	ML	C	I	Y		N or S [?]	1		Optional for 3rd party confiscation, otherwise mandatory					
BG	PC art 44, with 53(2)(b)	1982	O	any crime	C	? - Moneyval [233]	Y			2					? - Moneyval [233]		
	PC art 44, with 253		O	ML	C	object of ML	Y - 253(6)			2		M	L				
	PC art 44, with 321a	1997	Ext	OC group	All assets relating to OC activities					2							
	PC art 44, with 114, 119(5), 201, etc		Ext - punitive confiscation of wealth	certain crimes	Up to half or all of the assets owned			NA	NA	2							

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	[OLD] Law of Divestment in Favour of the State of Property Acquired From Criminal Activity	into force 01/01/2006	Ext; ncb (dead, absent, illness, immunity) [art 27]	serious offences *per* art 3(1); value > 60,000 Lev (~EUR30,000€) *per* additional provision §1(2)	All disproportionate assets			L - civil procedure applies	S - art 17 allows a financial declaration to be sought (including on behalf of family members) and unexplained assets are presumed to be proceeds; if these amount to 60,000 Levs then it is for the respondent to disprove criminal orogin; see also art 9	3	Yes, but not until notice served.	M		within 25 years of acquisition (art 11)	Y (art 7)	Y (art 7)	Y, spouses, heirs, other relatives, companies, etc (art 8 reverses burden of proof re: *bona fides*), in other cases, lack of *bona fides* very difficult for CEPACA to show.
	[NEW] Law of Divestment in Favour of the State of Property Acquired From Criminal and Illegal Activity	Amending law Oct 2010	NCB	an offence listed in art 20()2); value > 60,000Lev (~30,000€) *per* supplementary provision §2(8)	All disproportionate assets			L - arts 47(2), 88(5)	S - reversed if CEPAIA demonstrates disproporationate assets and also some evidence of illegal activity - art 88.	3	Yes			within 20 years of acquisition - art 58(1); within 3 months of freezing.	Y - art 46	Y - art 44	Y, reverse burden of proof re: *bona fides* of spouses, heirs, other relatives, companies, etc (arts 42, 43, 45, 47)

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
CZ	CC s 70(1)(c) and (d) - 'forfeiture of things'	New penal code act 40/2009	O	any crime	C	I - s 70(1)(d)	s 71 - if unable to confiscate actual proceeds	H	N	4		O	H - 'can', one of several penalties	any time during criminal proceedings	No - third-party confiscation is dealt with in the non-punitive 'seizure' regime described below		
	CC s 98 *et seq* - 'seizure' (supplementary to forfeiture of things)		ncb (s101) - if person cannot be convicted for various reasons	any crime	C	I	s 102 - if unable to confiscate actual proceeds	H	N	4		O			art 101 - what exactly	art 101 - what exactly	No
	CC s 66 - 'forfeiture of property'		Ext - punitive confiscation of wealth	certain serious crimes	any assets whether legally or illegally acquired			N/A	N/A	?							
DK	CC art 75		ncb: dead - CC art 76(5); absconded - Administration of Justice Act art 855	any crime	C	I (limited to interest; not profits of reinvestment)	Y		N	5		O		opportunity to seek confiscation ends with judgment	arts 76(1), (4)	art 76(1), (4)	

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	CC art 76a		Ext	a punishable act of a nature which may entail significant gain, which is punishably by 6+ years *or* is a drug offence	total or partial confiscation of property				R - art 76(4)	5		O			assets transferred (within 5 years prior to the offence) to partners [but not other family], persons over whom control is exercised, legal persons - art 76a (2), (3)		reverse burden of proof re bona fides - art 76a (4)
	CC art 77a		NCB (preventative)	objects (including money) which may be used in a criminal act	the object in question					5		O					

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
DE	CC s 73 forfeiture of proceeds	before 1992	ncb (where prosecution sought but not possible [s76a] ? whether this includes death)	any crime	C	I	Y - where forfeiture of the asset itself impossible; also where asset has declined in value [s73a]. Used often in practice.	H - 'beyond reasonable doubt' [s73c]	N	6		M	L	Claim for confiscation must be made together with criminal proceedings.	Y	?	N
	CC s 73d extended forfeiture	1992	Ext	Crimes which specifically mention s73d (most serious crimes but not some modern OC types, e.g. computer crime, credit card fraud)	A	I	Y	H - 'fully convinced' (according to one expert, may be slightly lower than 'beyond reasonable doubt')	? - practitioner views differ on whether N or S	6					N		

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	Dates	Type	Trigger event	Extent	Definition of proceeds	Value confiscation	Standard of proof re: assets/value liable to confiscation	Burden of proof	Freezing/ seizure in support		Confiscation proceedings/ request	Discretion of court	Timing	Liable to confiscation if lack *bona fides*?	Liable to confiscation if purchased for less than market value?	Rules for special classes of 3rd parties?
EE	PC s 83-1, confiscation of assets obtained through crime		ncb	any crime	C	I	Y	H	N	7		M	L - discretion where confiscation uneconomical or unfairly burdensome to defendant: 83-1(3)	Until the end of first instance when decided within the same proceedings, within 2 years if sepratae proceedings	Y - 83-1(2)	Y - 83-1(2)	N
	PC s 83-2, extended confiscation	2007	Ext	punishable by imprisonment more than 3 years	A	I	Y	reasonable to assume'	S	7		M	H		Only if transferred in previous 5 years: art 83-2, (2), (3)	Only if transferred in previous 5 years: art 83-2, (2), (3)	N
IE	Criminal Justice Act 1994, s9		ncb (dead, absconded) - s 13	any indictable crime	C	I - 'in connection with'	Y	L - s 9(7)	N	8		O - 'may'	H 'may'	during criminal proceedings or later - s 9(3)			

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	Criminal Justice Act 1994, s4 *et seq*		ext	drug trafficking	S		Y	L - s 4(6)	R, for all property transferred in 6 years before proceedings commenced - s 5	8		O - 'may'	L, though some discretion re: reverse burden	during criminal proceedings or later - s 4(2)			
	Seizure-forfeiture of cash: CJA 1994 s 38 *et seq*, as amended by Proceeds of Crime (Amendment) Act 2005		NCB (including preventative)	finding on application by prosecutor that seized cash obtained through or intended for use in criminal conduct	A - no need to show specific crime	I	N/A	L - s39(2)	N	N/A		O - 'may'	H - 'may'	within 2 days of seizure, extendable to 3 months - s38(3)	N/A - power triggered by cash seizure		
	Proceed of Crime Act 1996		NCB	finding that property > EUR10k is proceeds of crime	A - property which 'appears to the court' to be proceeds of crime	I	Y; need to trace - s 3	L - s8(2)	N	10		O - 'may'	L - 'shall' (s 3)		proceeding is brought against the person 'in posession or control' of property believed to be proceeds of crime		

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
EL	CC art 76 - confiscation		ncb (only for absconded defendant or preventative purposes) - art 76(2)	any intential crime	C	D	N		N	11		O		decided at end of trial	N		
	art 88-10, law 3386/2005			people smuggling													
	art 60-3, law 2960/2001			smuggling													
	art 37, law 3459/2006			drugs											N		
	AML (2008) - art 46		ncb - various bases *per* art 46(3) but compatibility with constitution is doubtful	money laundering	C	I	Y - where cannot confiscate original: art 46-2		N	12		M - art 46		decided at end of trial	Y - aware at time of transfer of the ML or predicate offence	N	N

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	AML (2008) - art 47		Ext (civil claim resembling extended confiscation)	opinion of State Legal Council + sentence of imprisonment for ML offence	S/A (any ML offences or predicates, of which there is an extensive list *per* art 3)	I	Y - where assets transferred to 3rd person	L (civil procedure)	N	12		O	L - determining a civil claim	seperate proceeding brought after trial	Y - aware at time of transfer of initiation of criminal proceedings)	No need to show awareness for spouse, lineal relative, sibling or adopted child who received as a gift.	
ES	CC art 127(1) para 1		ncb (where a judge-led investigation has commenced but cannot proceed) - art 127(4)	all intentional crimes (see art 374 for drug crimes)	C	I - FATF [131]	Y - art 127(3)	H	N	13		M - principle of legality	H	confiscation is part of criminal proceedings	Y - art 127(1)	?	N (no formal rules, but courts are willing to find absence of bona fides for relatives etc) Lopez: 'confiscation of close persons' is introduced by recent reforms.
	CC art 127(2)	into force Dec 2010		unintentional crime punishable by > 1 year	C			H	N	13		O			apparently N: cf. art 127(1) and (2)		

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	CC art 127(1) para 2	(amending law 5/2010)	Ext	crimes committed within context of terrorist or organised criminal group *per* CC art 570 *bis*	All disproportionate assets				S	?		M			apparently Y as *per* art 127(1) para 1, which is what para 2 builds upon		
FR	CC art 131-21(1)	reformed by Law 768/2010; into force 11 July 2010	O	mandatory for all crimes > 1 year of imprisonment (except press offences)	C	I	Y	'intimate conviction'	N	15	only shares can be frozen from 3rd parties notwithstanding bona fide (art 706-152 CPP)	M	L		Y, but only for some serious drug offences: 222-49 CC, and securities can always be confiscated from 3rd parties)	N	N
	CC art 131-21(5); art 706-148 CCP		Ext	crime > 5 years imprisonment	Any disproportionate assets from last 5 years			'intimate conviction'	R	15		O - art 706-148	H		N		
	'General confiscation' provided for by various articles of CC		Ext - punitive confiscation of wealth	available for certain serious crimes (though rarely used)	All property belonging to the defendant			N/A	N/A						N		

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
IT	CC art. 240(1)		O	any crime	C	I (according to recent judicial interpretations, which place onus on prosecutor to trace)	N - only where provided for in *lex specialis* provisions	H	N	17		O	H	limited	N		
	CC art. 322 *ter*		O	bribery, corruption etc	C		Y	H	N	17		M		limited	N		
	CC art. 416 *bis*		O	crime of belonging to mafia type organisation	Any property acquired through the organisation			H	N	17		M		limited	N		
	Law 356/92, art 12 *sexties*		Ext	drugs, organised crime, money laundering, many other serious offences	Any disproportionate assets [especially powerful when used following a conviction under cc art. 416 *bis*]			H	S	18		M		limited	Assets include things held indirectly through other people	judges have held that, for close relatives, it is sufficient to show that they lack the legitimate income to have purchased.	
	Law 575/65		NCB; can be brought against a deceaced's estate within 5 years of death	preventative: finding that threat posed by mafia-type organisations or person suspected of a serious offence	Any disproportionate assets			L	S	18		M		no limit		*mala fides* presumed (reverse burden of proof) for close relatives and recipients of gifts: art. 2 *ter*	

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
CY	The Prevention and Suppresion of Money Laundering and Terrorist Financing Laws	2007 and 2010	ncb (dead, absconded) - arts 32, 33	Money laundering and its predicates, which include all crimes punishable by > 1 year imprisonment (ss 4, 5)	C	I	Y		R for all payments made in connection with the offence - s 7(1); otherwise N	19		M	L - 'must'	Following conviction Court sets date before sentencing for the confiscation hearing to begin (usually 10-14 days after convictio n)	N - not unless a 'prohibited gift' (see adjacent)	Y - 'prohibited gifts' include all assets transferred at undervalue in previous 6 years - s 13(7) and (8)	N
	PSMLTF Laws, s 7(2)		Ext	As above (in practice utilised for drug offences)	S/A - Any ML predicates (i.e. anything punishable by > 1 year imprisonment)	I	Y		R for all assets/expenditure in previous 6 years	19			H - 'may'				
LV	CCP 240(1), evidence found to be proceeds of crime		ncb (judgment or decision to terminate proceedings)	any crime	C	D	N	H	N	N/A - already seized		O	H	CPC arts 491(6) and 492 oblige the court in preparing the case	Any item in evidence is liable to confiscation.		

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	CCP ch 27	2005	ncb - art 356 and ch 59: property is 'criminally acquireired' if so judged by a court or decided by a prosecutor in terminating proceedings.	any crime	C	I	Y/ if direct proceeds unrecoverable	H	N	20		O	M	for trial to consider confiscation, suggesting that the application has to be made before the trial commences. But confiscation proceedings can be separated at pre-trial stage if necessary.	Y - Compensation for victims takes priority over *all* third parties, but confiscation in favour of the state is only possible for spouses, others with shared households, or persons to whom property was transferred at an undervalue: arts 358-360		N
	CCP ch 27, featuring s 355(2)	2005	ncb (as above); Ext	organised crime group, terrorism, human trafficking, drugs, counterfeiting, people smuggling, child sex	All property belonging to the defendant				R	20		O	M				
	CC art 42 - punitive confiscation of property		Ext	many crimes within the 'special part' of the criminal code	Any property belonging to the defendant			N/A	N/A	20			H	before sentencing	Y - art 42(1) simply states that property transferred to 3rd parties may be confiscated		N

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
LT	CCP art 72		O	any crime	C	I	Y - if unavailable: art 72(5)	H	N	21		M	M		Y - art 72(3)	N	N
	Proposed amendment to CCP	bill before parliament	Ext: a bill to introduce extended confiscation is being debated in the Lithuanian parliament, see: http://www.bernardinai.lt/straipsnis/2010-09-19-rytas-staselis-banginiu-medziokle/50457 (as of September 2012).														
LU	CC arts 31, 32		O	Any crime and misdeneavours when provided for by law	C	I	Y		N	22	Y	*Crimes*: M *Délits*: O *Contraventions*: only where specifically provided for by law			N		
	Loi du 19/02/1973 concernant la vente de substance medicamenteuses et la lutte contre la toxicomanie art 18; CC art 32-1	ML and terrorism added 27/10/2010	NCB - acquitted, exempted from sentencing, extinction of proceedings (death), prosecution time-barred	Drugs, Money laundering and Terrorism	C	I	Y		N	22	Y	M			Y	N	N

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
HU	CC art 77B(1)		ncb: dead - 77B(3), cannot be located or mentally ill - s569(1) of Act XIX of 1998	any crime	C	I - 77B(1)(c)	Y - 77C(1)	H	N	23		M - art 77B(1)		end of criminal procedure	Y - art 77B(2), (5)	Y - art 77B(2), (5)	N
	CC art 77B(4)		ext; ncb (as above)	organised crime group	A - all assets acquired from offences committed in affiliation with organised crime	I - 77B(1)(c)	Y - 77C(1)	H	R - for all assets acquired during period of involvement in organised crime	23		M - art 77B(4)					N
MT	CC - s 23		O	any crime	C	I	Y - s 23B1		N	24			M		N		
	CC - s 23C(1)	2007	Ext	Crimes punishable by at least 1 year imprisonment + evidence of disproportionate assets	A	I	Y	H - convinced that the assets derive from criminal activity	N	24					N		

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	Prevention of Money Laundering Act art 3(5); Dangerous Drugs Ordinance; Medical and Kindred Professions Ordinance		Ext	ML, drug related offences	A	I	Y - for laundering: FATF [277]	L- all ssets of the accused are deemed to be proceeds	R	24			M		Y, only for drugs: DDO s22(3A)(d), MKPO s120A(2B)		N
NL	CC art 33, 33a		O	any crime	C	D	? (art 34)		N	26	seizable as evidence	O	H		Y - art 33a(2) and (3)	N	N
	CC art 36e para 2	1993	Ext, ncb - art 36b	any crime	S; or A (if liable to 5th category fine)	I - art 36c	Y	L - 'sufficient evidence'	?	26	value can be seized in support of potential extended confiscation order	M - directive requiring prosecutor to submit request if proceeds > EUR500	H	2 years from end of criminal case	Y - CCP art 94a(3)	N	N
	proposed new CC art 36e para 2	not yet passed			A		Y		S - see Kooijmans (2010)	26				can identify and confiscate further assets			
	CC art 36e para 3	1993		crime liable to 5th category fine	A (committed by anyone)		Y	L - 'likely'	S - discussed in *Hoge Raad*	26				2 years from end of criminal case			

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	proposed new CC art 36e para 3	not yet passed					Y		R (assets and expenditure in previous 6 years, if may have benefited from other offences)	26				can identify and confiscate further assets			
AT	CC s20(1)		ncb (died) - CC a 20(5)	any crime	C	N (proposal to shift to G)	Y	?	N	27		M			Only direct recipients *per* arts 20(4), (5) and 20c: in practice 3rd parties almost never receive directly, so a ML charge is the only alternative (*contra* FATF [205] which implies a satisfactory regime)	N	N
	CC s20(2)		Ext	repeated crimes (not ML, which is a misdemeanour) punishable by 3+ years	S	as above	Y	L: an 'obvious supposition' that not of lawful origin	R	27							
	CC ss 20(3) and 20b [very rarely used]		Ext	Participating in criminal organisation or terrorist group *per* arts 278a and 278b	All disproportionate assets of the offender plus all property at the disposal of the criminal organisation or terrorist group			L: an 'obvious supposition' that not of lawful origin	R	27							
PL	CC art 44 with 45(1); also Penal Fiscal Code art 33		O	any crime	C, provided not liable to compensation claim by victim	I	Y		N	28					N		

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	CC art 45(2)		Ext	crime + 'considerable' proceeds (PLN200k ~50k Euro)	A - all assets acquired at time of crime and thereafter until a court decision.	I	Y		R	28					Y - 3rd party must show bona fides (reverse burden)	NA	NA
	Civil Code art 412	1990	NCB	consideration received in exchange for doing an act which is illegal or vile	consideration received	D	Y		N	?	unknown whether freezing available						
PT	CC ss109-112		O	any crime	C	I	Y - s111(4)	H	N	29		M (where there are seizures)	L	confiscation is part of criminal proceedings	Y (but difficult to prove)	N (but transfer at undervalue is prima facie evidence of bad faith)	N

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	Law 5/2002, ss 7-12	2002	Ext	C (drugs, ML, most types of organised crime)	A, previous 5 years	I	Y	H (regarding whether the estate is 'incongruent')	R (for assets held and received in previous 5 years where there is evidenced of an 'incongruent estate')	30		M	L - must confiscate whatever has been seized: s 12	Financial evidence must go before the trial judge no less than 30 days before beginning of trial - s 8	Y	Y (if gifted or transferred for less than market value)	Y (reverse burden for disproportionate assets can be applied to third parties too)
RO	CC art 118 (with art 25 Law 656/2002; art 13 Law 39/2003; art 19 Law 78/2000, and others)		O	any crime	C	I	Y - if proceeds can no longer be confiscated		N	31		confiscation is generally optional but mandatory for ML, terrorist financing, corruption, tax evasion, offences against financial interests of EU			N		
	Law 144/2007 (institutionalises and partly repeals Law 155/1996)		NCB (for public officials only)	inspection by ANI (based on asset declarations required by law) reveals unjustified wealth of > EUR10k	All disproportionate assets				S	? - following recent amendments		on request of ANI			? - following recent amendments		

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
SI	CC arts 69, 95, 96	before 2003	O	any crime	C	law not settled [fieldwork; Moneyval 3rd round, para 82]	Y - where proceeds not able to be confiscated - art 96	no special rules; presumably the criminal standard applies		33			L	? - confiscation ordered together with criminal judgment - art 95(2) / within 10 years of verdict (fieldwork)	Y - where transferred for less than full value *and* knew or could have known that it was proceeds of crime - art 96(3); also for legal persons - art 98		Y/ reverse burden of proof for close relations *per* art 230 - art 96(4)
	CCP arts 225, 226		NCB	discovery of 'suspicious' item at crime scene, on the defendant or at their house	the suspicious item	NA	NA		R - if an item is 'suspicious' then the onus is on anyone claiming a legitimate interest, but there is little practical experience re: what is 'suspicious'	?			L				

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	CCP art 498A	2003	NCB	laundered money and bribe money - s 498A(a); ? whether also other serious offences - cf. art 155(5) with Moneyval 4th round report [17, 177]	C			no special rules; presumably the criminal standard applies	N - need to prove all of the legal elements required for a conviction (including money laundering predicates) - courts have taken a restrictive view	?			L				
SK	CC art 60 - 'forfeiture of a thing'		O	any crime	C	I - art 60(4)	Y - where cannot recover proceeds - art 60(2)		N	31					No 3rd party confiscation - *per* art 60(5)		
	CC art 58(1) - 'forfeiture of property' (for life sentence)		Ext	life sentence + intention to benefit or significant property damage	Any property belonging to the defendant			N/A		35					? - Criminal Code mentions only spouses - *per* art 59(3); cf. practioners report that 3rd party confiscation does take place		
	CC art 58(2) - 'forfeiture of property' (for other offences)		Ext	drugs, laundering, bribery, organised crime or terrorist group	A	I	Y			35							

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	CC art 83 - preventative seizure		ncb														
	Act 101 of 2010	into force Jan 2011	NCB	inspection by financial police reveal disproportionate assets equivalent to 1500 minimum wages	Any disproportionate assets				S	yes		O		no limit known			
FI	CC, Ch 10, s 2, proceeds of crime	into force Jan 2002	ncb (conviction not necessary but cases must be proved to criminal standard) - ch 10, s 1	any crime	C	I	Y - Ch10, s8	H	N			M	H - 'may'	?	Y (direct recipients only)	Y (direct recipients only)	N
	CC, Ch 32, s 12 (lex specialis for ML)	Act 61 of 2003	ncb (see above)	ML	C	target property of the offence	Y - Ch 21, s 12 with Ch 10, s 8	H	N			M	L - 'shall'	?			

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	CC, Ch 10, s 3, extended confiscation	into force Jan 2002	Ext	ML, smuggling or anything punishable by >4yrs	A (except 'insignificant' crimes)	N/A	Y - Ch 10, s 8	M	S		can freeze but not seize	M	L - 'shall'	?	Y	Y	Y - stricter rules for relatives, close associates, companies, where transfer was made less than 5 years vefore the crime for which convicted - ch10, s3(2)
SE	CC, Ch 36, s 1		ncb - ss 12-14	any crime	C	I - FATF 2005 [149]	Y	H (prosecutor seeking confiscation) / L (prosecutor seeking compensation on behalf of victim)	N	38	? - 'the suspect's property' - query whether tihs applies to 3rd parties		L - confiscation unless 'manifestly unreasonable'		Y - 'knew or had reasonable grounds to know' - s 5 (in practice, need to demonstrate a connectio	N	N

MS	Power				Scope			Proof		Procedure					3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**		**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	CC, Ch 36, s 1b	introduced by act 370/2008	Ext	profit-motivated crime which is either specially listed, or punishable by > 6 years (this includes all drug crimes)	A		Y	M - 'clearly more probable'	S	38					n with the criminal, which can be difficult)	N	N
UK	POCA s 6; lacking 'criminal lifestyle'		O	any crime	C		Y	L - s 6(7)	N			O	L	The later of: 2 years after conviction or 3 months after appeal - s 14	N ('tainted gift' is defined without reference to *bona fides,* so need to bring a ML proceeding)	Y, orders enforceable against property gifted (transferred at significant undervalue) - ss 51, 53, 77, 78, 83	N
	POCA s 6; with 'criminal lifestyle'		Ext	any crime + finding of 'criminal lifestyle' (requires serious types of crime)	A, previous 6 years		Y		R - assets and expenditure in previous 6 years			O	L				
	POCA part 5 - civil recovery	into force 01/01/2003	NCB	finding that asset obtained through unlawful conduct	A - No need to show specific crime, but need some evidence of	I - art 307	Need to trace: ss 304, 305	L	N			O	L - s266	12 years from date cause of action accrued	proceeding is brought against the person who 'holds' the property believed to be recoverable: s 243		

MS	Power				Scope			Proof		Procedure				3rd parties		
	Relevant law	**Dates**	**Type**	**Trigger event**	**Extent**	**Definition of proceeds**	**Value confiscation**	**Standard of proof re: assets/value liable to confiscation**	**Burden of proof**	**Freezing/ seizure in support**	**Confiscation proceedings/ request**	**Discretion of court**	**Timing**	**Liable to confiscation if lack *bona fides*?**	**Liable to confiscation if purchased for less than market value?**	**Rules for special classes of 3rd parties?**
	POCA part 5 - cash forfeiture	into force 01/01/2003	NCB	finding that seized cash obtained through or intended for use in unlawful conduct	criminality beyond disproportionality of assets: *ARA v Green & Ors* [2005] EWHC 3168 (Admin)		N/A	L	N	N/A	O	M	Application for forfeiture within 2 years of date cash seized	N/A - power triggered by cash seizure; proceeding is contested by anyone claiming a legitimate interest in the cash.		

Table F-2 Freezing/seizure powers, grouped by Member State

MS	Freezing regime				Discretion			Precautionary measures		Management of seized assets		
	#	Relevant law	Nature of measure	Limitations	Knowledge basis	Assets investigation	Freezing application	Judicial discretion	secret applications	preliminary freezing of moveable property (excluding bank transactions)	Who is responsible?	Realisation of seized assets?	
			whether seizure, or (only) freezing	e.g. if not applicable to: value confiscation; 3rd parties; etc	(**L**)ow = "reasonable suspicion" or similar standard, or a power which is available whenever investigations have been commenced	(**O**)ptional (**M**)andatory	(**O**)ptional (**M**)andatory	(**L**)ow; (**M**)edium; (**H**)igh			Whether police, prosecutor, judge/court, appointed agent or special bureau	Liable to decline in value	Expensive to store
BE	1	CCP, Article 35-39 and 89 (juge of instruction)	seizure		must appear to constitute criminal assets; a higher standard of 'serious and concrete evidence' for action in support of value confiscation			H	Yes	Yes - must be a direct link with the criminal facts	Prosecutor or Judge (decision open to challenge); management by Central Body for Seizure and Confiscation (OCSC) - ss 12-14, Law of 26 March 2003	Yes - if replacable and value easily estimated - including cars and electronics (28 CCP)	
BG	2	CPC s 72	seizure - s 397						Y - s 72(1)				
	3	Law of Divestment in Favour of the State of Property Acquired From Illigal Activity - Ch 4	seizure		'grounded supposition'					no (but may already be frozen under criminal procedures?)	various, *per* Chapter 5	Y - s 96(1)	Y - s 96(1)
CZ	4	CCP s 78 *et seq* [note: process is	seizure		'reasonable suspicion'				prosecutor can order	police can act on own initiative if time is of the essence, and then involve prosecutor	Cars: police. Real estate: Office of the	Y	

MS	Freezing regime				Discretion			Precautionary measures		Management of seized assets		
	#	Relevant law	Nature of measure	Limitations	Knowledge basis	Assets investigation	Freezing application	Judicial discretion	secret applications	preliminary freezing of moveable property (excluding bank transactions)	Who is responsible?	Realisation of seized assets?	
		underway to introduce a new CCP]									Government Representation in Property Affairs or ad hoc managers		
DK	5	AJA ss801-806	seizure		Reasonable suspicion - AJA s805; not necessary to show risk of dissipation (FATF 2006)				AJA s 748(1); FATF [253]	Police: AJA s 806(3); FATF [253]		Only with defendant's permission	
DE	6	CCP s111b - seizure of proceeds; attachment for value	seizure (in practice never rely on mere freezing)		A low standard for for first 6 or 12 months; thereafter a high standard in order to continue the measure - CCP 111b(3)	O (routine in serious investigations)	O	yes	CCP s33(4)	police - s 111e	prosecution and judicial officers	Y - CCP s 111l	Y - CCP s 111l
EE	7	CCP s142	seizure, freezing (the latter mainly with immovables)		L	M (in theory)	O	M	CCP s142(2)	Police, must go before court within 24hrs - s 142(3)	Generally, local government where assets located	CCP s 126(2-1)	N
IE	8	'Restraint Order' - Criminal Justice Act (1994) s 24	seizure by police or via court-appointed receiver					H - 'may'	Y - s 24(4)				
	9	Seizure of cash - CJA s 38	seizure						NA	yes		N/A	
	10	'Interim Order' - Proceeds of Crime Act	seizure (s 15)			O	O	H - 'may'	s 2		on instruction of Court		

MS	Freezing regime				Discretion			Precautionary measures		Management of seized assets		
	#	Relevant law	Nature of measure	Limitations	Knowledge basis	Assets investigation	Freezing application	Judicial discretion	secret applications	preliminary freezing of moveable property (excluding bank transactions)	Who is responsible?	Realisation of seized assets?	
		2002 s 2											
EL	11	CCP arts 260-269	seizure of items relating to a crime (not a specific power to seize items which may be confiscated)		L					Yes			
	12	AML(2008) - art 48	freezing	3rd parties - only if property is jointly owned						art 48(5)	NA	NA	NA
ES	13	Criminal Proceedings Law arts 326 and 334 - provide general basis for seizing items related to crimes; practitioners consider them adequate.	seizure			O	O	Judge of proceedings has discretion	Y - FATF	police, must go before court within 72hrs - CCP	Asset Recovery Office since December 2010: CCP art. 367 *septie*	Y (broad judicial discretion; codified in new law)	
	14	Penal Law s374(2)	seizure						Y - FATF	police, must go before court within 72hrs - CCP	National Antidrugs Plan (Law 17/2003)		
FR	15	CPC art 706 (general regime)	seizure	for 3rd parties, can only seize shares (706-157 CCP)	L	O	O	H	Y	police need prior authorisation from Prosecutor, who needs prior permission from a court - art 56(1) CCP	Judge can appoint an agent, which may be the Agency of recovery and management	Y (judicial discretion) (art 706-143 CCP)	N
	16	CPC art 706-103 (organised crime offences mentioned in 706-73 and	seizure			M	M	L					

MS	Freezing regime				Discretion			Precautionary measures		Management of seized assets		
	#	Relevant law	Nature of measure	Limitations	Knowledge basis	Assets investigation	Freezing application	Judicial discretion	secret applications	preliminary freezing of moveable property (excluding bank transactions)	Who is responsible?	Realisation of seized assets?	
		706-44)											
IT	17	CCP art 321	seizure						application *inaudita altera parte*	N	Judicial authorities, supported by the Agenzia Nazionale, a recently created national asset management office		
	18	Law 575/65 art 2 *bis*	seizure						application *inaudita altera parte* and *camera di consiglio*	N			
CY	19	AML law	freezing but seizure can be ordered when risk of removal		'balance of probabilities'				Y	No (need a court order)	Court can appoint receiver to deal with frozen assets		
LV	20	CPA s 361	both seizure and freezing		L	O	O	M	Y - s 361(3)	a person directing the proceedings, with the consent of a public prosecutor, must go before court within 24 hours	Police	Y	N
LT	21	CCP art 151	seizure	In practice, very difficult to seize from 3rd parties	L	O	O	L	All freezing on order of prosecutor, renewable after 6 months and subject to appeal.		Police	Y	N
LU	22	CCP	Seizure - movables physically removed. Mention made on the registar for immovables.	not from 3rd parties (no 3rd party confiscation)			O - Court on its own initiative or that of the PP		Y	Yes - where offence is *de lit de flagrance* + evidence that assets are proceeds	Judge of instruction, who in certain cases (shares) will seek input from the suspect	N	
HU	23	CCP art 159	seizure		to freeze judicially under art 159 need to specifically demonstrate				s 160 (widely used): can freeze indefinitely (subject to appeal) on authority of prosecutor or police		Judge - s 154(1)	Y	Y

MS	Freezing regime				Discretion			Precautionary measures		Management of seized assets		
	#	Relevant law	Nature of measure	Limitations	Knowledge basis	Assets investigation	Freezing application	Judicial discretion	secret applications	preliminary freezing of moveable property (excluding bank transactions)	Who is responsible?	Realisation of seized assets?	
					to an investigating magistrate 'reasonable suspicion' that assets will disappear								
MT	24	CC- article 435A 'attachment orders'	freezing		AG must have reasonable cause to suspect a ML offence				Yes without prior notice	Anything on the premise in cases where the police is lawfully conducting searches and the objects are liable to forfeiture.	Special section within the police before charges are formally brought	N	N
	25	CC- article 435C 'freezing orders'	appllies only to international orders; to ensure compliance with FD 2003/577/JHA						After person charged		Responsibility of the Court under the supervision of the Registar of the Court.	N	N
NL	26	CCP art 94 *et seq*	seizure		L					Only where a Special Financial Investigation (SFI) has been ordered (5th category fine + suspected proceeds >12000€).	BOOM (bureau within prosecution responsible for asset recovery)	Y	Y
AT	27	StPO arts 109-115: 'seizure' and 'sequestration'	seizure			M - if suspicion of proceeds: principle of legality - FATF [222]			N/A - initial action can always be taken by police or prosecutor	preliminary 'seizure' by police to be confirmed via sequestration within 14 days	J	N	N
PL	28	CCP arts 291-295	seizure							Y - art 291(2) allows for *ex officio* seizure			
PT	29	CCP ss178-186	seizure			O	O - decision rests with prosecutor, who is also	H - discretion of prosecutor	N/A (although reform of 2007	Y (police; must be confirmed by prosecutor within 72 hrs)	Judge and/or prosecutor, ad hoc	perishibles (cars may be used by public	N

MS	Freezing regime				Discretion			Precautionary measures		Management of seized assets		
	#	Relevant law	Nature of measure	Limitations	Knowledge basis	Assets investigation	Freezing application	Judicial discretion	secret applications	preliminary freezing of moveable property (excluding bank transactions)	Who is responsible?	Realisation of seized assets?	
							a magistrate		prevents secret hearings, the initial freezing is by police or on order of prosecutor)			authorities but not sold)	
	30	Law 5/2002, ss7-12	seizure		'strong evidence' (that property captured by extended confsication regime) - art 10	O	M - s 8	L - s 10	Y: art 4	N	Judge and/or prosecutor, ad hoc	?	N
RO	31	CPC art 163 *et seq*	seizure		suspicion of prosecutor		Seizure is mandatory for perishables and certain high-value moveables; also mandatory for money laundering - art 24 law 656/2002				Statutory arrangements for certain types of assets, but no general provisions for the appointment of receivers to manage assets	only mandatory liquidation of perishables	N
	32	Law 144/2007											
SI	33	CCP art 220	seizure		L	M				220(4), with 148, 164	Court-appointed executor		
SK	34	CCP art 89-98	seizure (of anything important to criminal proceedings)		L					Police do not need to consult judiciary in order to seize. For bank accounts: 48 hrs preliminary freezing: art 95	Police, prosecutor or an appointed agent (accountant) if required	perishables	
	35	CCP art 425			L								

MS	Freezing regime					Discretion			Precautionary measures		Management of seized assets	
	#	Relevant law	Nature of measure	Limitations	Knowledge basis	Assets investigation	Freezing application	Judicial discretion	secret applications	preliminary freezing of moveable property (excluding bank transactions)	Who is responsible?	Realisation of seized assets?
FI	36	Coercive Measures Act, Ch3, s1	freezing		reason to suspect	O	O			Yes (approval within a week)	?	
	37	Coercive Measures Act, Ch4, s1	seizure	Not value confiscation - FATF [173]	likely to be confiscated	O	O			Y	?	
SE	38	Code of Judicial Procedure Ch 26 - 'provisional attachment'	seizure (chapter 27)	? - applies to "the suspect's property" - query whether includes third parteis.	'reasonable cause to anticipate evasion of obligations'				Yes, because no requirement to give notice: FATF 2005, [157]	Yes, by investigation leader or prosecutor, or police if urgent - s 3		
UK	39	Restraint order - s 40 *et seq*	seizure by police (s 45) or via management receiver appointed under ss 48, 49			O	O		Restraint order *ex party* in judge's chambers, together with appointment of management receiver - ss 42, 48	No, but see cash seizure power	either management receiver or (for assets seized under s 45), police under order of court	within the s 49 powers of management receivers
	40	Cash seizure - s 294	seizure of cash		'reasonable grounds'	O	N/A	N/A	N/A	yes, the cash seizure power is preliminary	Prosecutor	N/A N/A
	41	Interim receiving orders - s 246 *et seq*	seizure by court-appointed independent 'interim receiver' who also assists with investigation			O	O	H - "may"	Y - s 246(3)	N	independent interim receiver (typically private accountant)	within the Schedule 6 powers of interim receivers and receivers
	42	Property freezing order: POCA	seizure via receiver (who may be an			O	O	H - "may"	Y - s 245E(3)	N	court appointed receiver	

MS	Freezing regime				Discretion			Precautionary measures		Management of seized assets	
	#	Relevant law	Nature of measure	Limitations	Knowledge basis	Assets investigation	Freezing application	Judicial discretion	secret applications	preliminary freezing of moveable property (excluding bank transactions)	Who is responsible?	Realisation of seized assets?
		s 245A *et seq* inserted by Serious Organised Crime And Police Act 2005 s 98 and Serious Crime Act 2007 s 83	employee of the investigative agency) appointed under s 245E									

Appendix G. Conferrals of power

The EU powers in the field of confiscation and recovery of criminal assets are mainly to be found in Part III, Title V, Chapter 4 (on judicial cooperation in criminal matters) of the TFEU. A number of specific legal bases are relevant to the issue, but one should note that as a result of the shift to the ordinary legislative procedure for most old third-pillar matters, the competences of the EU in this area have been largely rewritten and leave arguably much less scope for interpretation (Ladenburger, 2008: 34).

Article 82(1) now explicitly states that judicial cooperation in the EU shall be based on the principle of MR, which shall include approximation of laws in certain areas. Several provisions elaborate on the details of what these exactly entail.

- Article 82(1)(a) confers power to enact 'rules and procedures for ensuring recognition throughout the EU of all forms of judgments and judicial decisions' and (d) to adopt measures to 'facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions'.
- Article 82(2) confers power to enact minimum rules in certain areas of criminal procedure to 'facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension'.
- Article 83(1) confers power to 'establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'. A list of ten specific offences is included and may be extended by unanimous decision of the Council.
- Article 83(2) codifies earlier case law and provides for the harmonisation of criminal laws and regulations of the Member States if this 'proves essential to ensure the effective implementation of an EU policy in an area which has been subject to harmonisation measures'.
- Potentially Article 75 TFEU, which enables the EU to define a framework for the adoption of administrative measures such as the freezing of funds, is also relevant.
- Some provisions relating to judicial cooperation in civil matters may also prove relevant.

These powers are to be read alongside the general provisions on an AFSJ, which impose certain limits on the exercise of EU competences. Article 67(1) TFEU opens with the following statement: 'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member

States.' Although respect for fundamental rights is a condition for the legality of acts of the institutions generally, this provision clearly emphasises their importance in this context. Enhanced scrutiny of the courts is thus to be expected.

On another level, Article 72 TFEU provides that '[Title V] shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. Although not directly relevant to the area of asset freezing and confiscation, this provision still emphasises that prime responsibility for public order and public security remains with the Member States and implies, together with Article 61 TFEU, that there are limits to the extent to which the EU can intrude into the Member States' sovereign powers in these areas.

Common rules on asset freezing and confiscation

Criminal asset freezing and confiscation

Article 82(1) states that judicial cooperation in the EU shall include approximation of laws *in the areas referred to in para. 2 and in Article 83* [emphasis added]. A first preliminary issue is whether this phrase means that harmonisation in criminal matters can only strictly occur by using either Article 82(2) or Article 83, or whether 'in the areas referred to' relates to the subject matter covered by these provisions (i.e. the specific aspects of criminal procedure and substantive criminal law to which they refer). Under the second reading, harmonisation could concern only the particular aspects of criminal procedure listed in Article 82(2) and criminal offences and sanctions which are either listed in Article 83(1) or relate to a harmonised EU policy for the purposes of Article 83(2). But since Articles 82(2) and 83 prescribe specific procedures and requirements to achieve harmonisation in these fields, they would be deprived of much of their purpose if recourse were possible to another provision of the Treaty to achieve the same result. Thus under a strict reading of Article 82 (1) TFEU, harmonisation of procedural laws can only be achieved by means of Article 82(1) and harmonisation of substantive criminal laws can only be achieved by means of Article 83 TFEU. The use of Article 82(1) would, however, be considered if a broader interpretation were to be endorsed by the institutions.

Article 83(1) confers the power 'to establish minimum rules concerning the definition of criminal offences *and* sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis [emphasis added]'. The applicable procedure is the ordinary legislative procedure and harmonisation can only occur by means of a directive (Article 83(1) TFEU). The question is whether this provision confers the power to harmonise asset freezing and confiscation laws and, if so, to what extent and under what conditions.

The first issue relates to the type of rule that can be harmonised under Article 83 TFEU and, more particularly, to the meaning of the term 'sanctions'. Peers makes the point that Article 83 clearly provides the ground to harmonise **penalties** (i.e. sanctions) for specific offences. If this proposition is accepted, there is the added question of whether freezing and confiscation orders can be considered to be criminal sanctions, or whether these are procedural measures which are to be dealt with under Article 82(2) (see below). Confiscation is often conceived of

as a criminal sanction in national laws[194] and the ECtHR has also ruled on several occasions that the imposition of a confiscation order amounts to a penalty[195] for the purposes of the convention. It may prove harder to bring NCB confiscation orders under the 'sanctions' umbrella since these are not imposed following a particular criminal conviction. Also more controversial is the use of this provision to harmonise asset-freezing *l*aws. Strictly speaking, freezing orders are not sanctions, but rather preventative measures to ensure that assets are not dissipated. Yet from another point of view, in as much as they serve to ensure the future application and hence effectiveness of confiscation orders, they can be viewed as forming an integral part of the imposition of the criminal sanction.

The second issue relates to the material *scope* of application of Article 83 TFEU. Article 83(1) can only serve to harmonise rules in the areas of (a) particularly serious crimes (b) with a cross-border dimension (c) which result from the nature or impact of such offences or from a special need to combat them on a common basis. An exhaustive list of the crimes to which the provision currently applies is provided and includes organised crime, corruption, illicit drug trafficking and money laundering. Additions to the list may be made by means of a unanimous Council decision after obtaining the consent of the European Parliament.[196] It remains to be seen how all these various elements will be interpreted and will work in practice. Much can be expected to depend on the breadth of the definition of these offences and the range of conducts that can be brought within their ambit. Also crucial will be the extent to which the Council and the Parliament show willingness to expand the list.

Difficulties are likely to arise in relation to the present EU ordinary confiscation regime, which requires Member States to confiscate instrumentalities and proceeds of crime across the board of criminal offences punishable by more than one year's imprisonment. It is doubtful that Article 83(1) supports the continuous existence of such a general far-reaching obligation.[197] On the other hand, common rules on extended confiscation could go beyond the current framework. At the moment these not only are limited to offences which are transnational in nature, but encompass the added requirement that the said offences should have been committed within the framework of a criminal organisation or a terrorist network.

A third question relates to the extent to which the Member States can block the adoption of such measures. Pursuant to Article 83(3) TFEU, Member States dispose of a so-called 'emergency brake' whereby they can temporarily suspend the adoption of a measure that they deem to affect a fundamental aspect of their system of criminal justice. It is yet to be seen how this tool will be used in practice. Some say it was just inserted to facilitate negotiations and achieve consensus on the Lisbon Treaty and that it will seldom be invoked. Also, it is

---

[194] See, e.g., Article 36 Dutch Criminal Code. This is moreover testified by the fact that rules on confiscation are most often to be found in the Criminal Code under 'Penalties', whereas for instance laws on seizure are to be found in Codes of Criminal Procedure.

[195] See, e.g., *Welch v United Kingdom* [1995] at para. 35, or *Phillips v UK* [2001] at para. 34. The qualification as a 'penalty' has also been applied to extended confiscation orders.

[196] Although there is no need for a prior legislative proposal.

[197] If nothing is done by the end of the transitional period, then the extension of the powers of the Commission and the jurisdiction of the ECJ to third-pillar instruments would probably mean that the measure could be challenged on the ground that it lacks a legal basis in the treaties.

likely to serve more as a bargaining tool than as a bar to the adoption of legislation on which there is otherwise broad consensus.

In a similar fashion, Article 83(2) confers the power to adopt minimum rules with regard to criminal offences and sanctions 'if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of an EU policy in an area which has been subject to harmonisation measures'. This provision in essence codifies, and further expands, earlier case law of the ECJ in relation to the then Community's competence in the field of criminal law. The question of whether freezing and confiscation are 'sanctions' also applies here and the emergency brake is also available to the Member States to prevent harmonisation moving forwards. There is the added difficulty that the applicable procedure is that used to adopt the harmonised standards. In some cases harmonisation of confiscation laws will thus have to occur under the special legislative procedure. The material scope of Article 83(2) seems, however, to be much broader than its Article 83(1) counterpart. There is no express list or limit regarding the areas covered, but rather, as Peers refers to it, a test that the common rules should serve to ensure the effectiveness of an EU policy. While harmonised areas are still relatively limited and/or do not always rely on criminal law to be effective, this provision still has the potential to expand significantly the number of cases where the EU will be able to enact common rules on confiscation and freezing. One should note in passing that because of the differences in legal procedure between paras. 1 and 2, plus the fact that confiscation rules under Article 83(2) can only be adopted once an EU policy is first harmonised, there could be no single EU instrument establishing a unified EU regime on confiscation.

If, however, confiscation and/or freezing and seizure cannot properly be qualified as 'criminal sanctions', then other venues must be found to adopt common rules on the matter. One argument is that confiscation and freezing are actually measures of a procedural nature.[198] Prior to Lisbon, there was no legal basis to harmonise laws pertaining to criminal procedure. This has been remedied under the new framework by the introduction of Article 82(2) TFEU. This provision allows the adoption of minimum rules to 'facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension'. Such rules should, however, relate to a number of specified areas, which do not include confiscation or freezing. Some aspects of confiscation could be adopted under the heading 'the rights of victims of crime', but this would only cover a limited part of the subject matter. Again, there is the option to expand the list of EU competences in this field. Since confiscation is an area where third-pillar legislation already exists, there should be more readiness on the part of the EU institutions to include it in Article 82(2) TFEU. Note that since the provision also refers to measures necessary to facilitate police and judicial cooperation, these could presumably encompass rules regarding precautionary freezing. In the meantime, however, Article 82(2) TFEU could not provide the legal basis for an instrument harmonising asset freezing and confiscation laws.

Another option would be to envisage the use of Article 82(1)(d), if one considers that common confiscation laws 'facilitate cooperation between judicial or equivalent authorities'.

[198] This is most relevant to freezing and seizure rules, which are often included in the Code of Criminal Procedure and are part of the investigative phase.

FD 2005/212/JHA was adopted, *inter alia*, on the basis of Article 31(1)(c), which provided that common action in criminal matters shall include 'ensuring compatibility in rules applicable in Member States, as may be necessary to improve [judicial] cooperation'. Thus common rules on confiscation were perceived to improve such cooperation. Also, there is the view that the consecutive adoption of FD 2005/212/JHA and FD 2006/783/JHA[199] occurred precisely because it was assumed that common rules on confiscation were required to enable MR and hence judicial cooperation. Measures under Article 82(2) are to be adopted by means of the ordinary legislative procedure and no particular legal instrument is imposed for that purpose; subject to compliance with the principle of proportionality, both a regulation and a directive could be used. In that connection Article 296 TFEU provides that 'where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case by case basis, in compliance with the applicable procedures and with the principles of proportionality'. If strong similarities exist between the rules of the Member States in that area, a regulation could be envisaged since it will only reiterate the status quo. If many disparities exist in the field, a directive would ensure that EU law does not interfere with national legal systems more than strictly necessary to facilitate judicial cooperation.

The objections to the use of this provision pertain more to its place and role amongst the provisions on judicial cooperation in criminal matters. There is a specific legal basis in Article 82(2) for the adoption of minimum *rules* to facilitate MR and judicial cooperation in criminal matters (emphasis added). The reference in Article 82(1)(d) to facilitating judicial cooperation generally in the context of judicial proceedings and the enforcement of decisions could be held to relate to the more operational, practical sides of judicial cooperation. Also, as was seen above, there is a very strong argument in favour of the view that Article 82(1) only allows harmonisation of criminal law and criminal procedure by means of Articles 82(2) and 83.

Non-conviction-based regimes

Administrative asset freezing

The question also arises as to whether Article 75 TFEU could be used to adopt a common regime on freezing orders. This provision enables the EU to define a framework for the adoption of administrative measures with regard to capital movements and payments which include the freezing of funds 'where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities'. This provision was inserted in the Lisbon Treaty to enable the EU to freeze the assets of designated terrorists operating within the territory of the EU. As will be shown, this provision is not *in fine* relevant in this context. However, since the exact scope of the new provisions of the Lisbon Treaty still needs to be determined, it is worth briefly exposing why Article 75 is not an appropriate legal basis.

First, it can only relate to administrative measures (i.e. non-judicially imposed/ordered measures). The provision could thus only be used to impose obligations regarding precautionary freezing, not what we have termed freezing orders.

[199] See in particular Mitsilegas (2009): 102.

Second, its relevance depends on the interpretation of the terms 'terrorism and related activities' and in particular on whether they can encompass a broad range of criminal activities or whether a specific and direct link to terrorism is required.

Third and foremost, this provision can only relate to funds specifically 'belonging to, or owned or held by, mature or legal persons, groups or non-State entities'. Hence, it does not confer competence for a precautionary freezing regime of a generalised nature.

NCB confiscation

NCB confiscation orders are in use in some Member States and may be hard to recognise and enforce in those states where confiscation is still strictly linked to the commission of a specific criminal offence. A level of harmonisation could thus serve to facilitate MR in this field, albeit it is likely to raise some constitutional issues in a number of Member States.

Option 1: One option would be to include minimum rules on NCB confiscation within a general instrument on EU confiscation laws adopted under one of the legal bases outlined above (assuming one of them can provide the basis for such a regime). Although NCB confiscation is not a criminal measure, it is still imposed in relation to conduct that is deemed to be criminal in nature. Also, the objective and content of NCB regimes still broadly relate to criminal law and justice. In any event, a number of legislative instruments which are held to relate to criminal law nonetheless include provisions which are not *stricto census* criminal in nature (Fichera, 2008) – for example, 1970 Hague Convention on the International Validity of Foreign Criminal Sentences and 1991 Convention on the Enforcement of Foreign Criminal Sentences. There is the added argument that harmonisation of NCB confiscation will incidentally facilitate MR of other types of confiscation orders since all form an integral, self-complementary part of a state's confiscation regime.

Option 2: A second option would be to consider the use of the EU's harmonising powers in the field of judicial cooperation in civil matters. Article 81(1) states that judicial cooperation in civil matter having cross-border implications may include 'the adoption of measures for the approximation of the laws and regulations of the Member States'. Para. 2 then elaborates on the kind of measures that can be adopted with Article 81(1)(a) providing for measures to ensure 'the MR and enforcement between Member States of judgments and of decisions in extrajudicial cases'. Thus common rules on NCB confiscation can be adopted so long as they can be shown to facilitate MR. (It will be relevant here to see how many states are ready to recognise and enforce NCB confiscation orders even when they do not possess such regimes themselves. If they are, the argument for harmonisation is less compelling and vice versa.) Also, it is uncertain whether the requirement for a 'cross-border dimension' means that common rules can only relate and apply to cross-border proceedings or whether a less specific cross-border element would be sufficient. The applicable procedure is the ordinary legislative procedure and again no requirement is imposed regarding the choice of legal instrument.

Procedural safeguards/remedies

We saw that harmonisation of rules of criminal procedure is provided for by Article 82(2). EU measures in this field may relate, *inter alia,* to the rights of individuals in criminal procedure, the rights of victims, and any other aspect of criminal procedure that the Council has unanimously identified after obtaining the consent of the European Parliament. This provision could be used to provide remedies for affected parties in the context of asset freezing

and confiscation proceedings. However, the EU's powers are subject to a number of limitations and conditions.

First, the EU rules need to be such as to facilitate the MR of judgments and judicial decisions and/or judicial and police cooperation in criminal matters. One of the reasons behind the Member States' reluctance to engage in MR is their mistrust regarding the compatibility of other states' criminal law procedures with fundamental rights. On this basis, it was argued that harmonisation of aspects of criminal procedure was liable to facilitate judicial cooperation by enhancing the Member States' trust in each other's legal system. That link has not been without controversy, however, and it will need to be positively proved that harmonisation of the rights of suspects/defendants and the rights of victims and other parties having a right in the frozen/confiscated asset is liable to improve MR of asset-freezing and confiscation orders.

Second, what the requirement of a 'cross-border dimension' entails in this context is not entirely straightforwards. Since there is already the distinct necessity for the EU rules to facilitate MR, the reference to the cross-border element is rather obscure. On one reading, it could mean that the EU procedural rules can only enter into play once a cross-border element is introduced in the proceedings – for example, once a request for MR is issued. The EU rules would, for example, introduce legal remedies not against the *adoption* of a confiscation order, but against its *recognition and enforcement* in another Member State. On another reading, the reference to 'criminal matters having a cross-border dimension' could mean more simply that harmonisation of criminal procedure can only relate to crimes that are transnational in nature. This has the potential to have patchy results as certain rules of national procedural law will be affected by the EU regime whilst others will not. A third option would be even more restrictive and result from a cumulative reading of the two: EU procedural rules can only relate to crimes having a cross-border dimension and can only serve individuals in the context of purely cross-border proceedings.

Peers however notes in this regard that the term 'cross-border dimension' used in relation to criminal matters is broader than the term 'cross-border implications' employed in relation to civil law powers, which indeed requires a specific link to cross-border proceedings. He also makes the point that the rules on harmonisation of substantive criminal law use the same expression although it is clear that there are 'not limited to cases where an alleged offence has factual links to more than one Member State'. Thus on his interpretation of that condition, it must merely be shown that there is a degree of likelihood that the proposed EU rules will have a particular impact on cross-border proceedings.

Thirdly, minimum rules can only be adopted by means of a directive under the ordinary legislative procedure; criminal procedure is too sensitive an area for the EU to be able to act by means of directly applicable regulations.

Fourthly, the EU can only adopt minimum rules. As is clarified later, Member States are not prevented from applying a higher level of protection for individuals.[200]

Fifthly, the provision adds that any EU rules 'shall take into account the differences between the legal traditions and systems of the Member States', although this is already stated in the

[200] Article 82(2) TFEU.

opening provision of Title V on an AFSJ. Any proposed harmonisation shall thus result from a careful analysis of the Member States' laws in this area and duly accommodate in particular the differences between civil law and common law countries.

Finally, here too Member States can pull the emergency brake. Again, it remains to be seen what use the Member States will make of it, but criminal procedure has to date been an area of high controversy. The analysis of Member States' laws in this area should reveal whether there are disparities of such a nature as to make the introduction of common EU rules problematic.

Mutual recognition of freezing and confiscation orders

MR has been elevated as the main basis for judicial cooperation (whether in civil or criminal matters) in the EU.[201] More specifically, Article 82(1)(a) confers the power to enact 'rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions' and Article 82(1)(d) provides for measures 'to facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions'. These could provide the basis for measures pertaining to the MR of freezing and confiscation orders; there is, however, a question as to whether they extend to precautionary freezing. Article 82(1)(a) applies only to measures ensuring the recognition of 'judgments and judicial decisions'; hence it couldn't be used to ensure recognition of precautionary freezing orders which are by definition non-judicial decisions. Generally, cooperation between police authorities is regulated by Article 87 TFEU. But precautionary freezings are often ordered by prosecuting and not police authorities. Thus they would not necessarily fall within the scope of the policing provisions either. Also, Article 82(1)(d) allows measures to facilitate cooperation between equivalent authorities, so long as they relate to criminal proceedings and have the general effect of enhancing judicial cooperation as opposed to police cooperation. Now, the MR of precautionary freezing is necessary mainly to guarantee the recognition of a subsequent freezing or confiscation order and ensure that the assets to which they relate are not dissipated. Ultimately, it will serve to facilitate cooperation between judicial authorities in enforcing freezing and confiscation orders, rather than cooperation between prosecuting or police authorities *per se*. In terms of 'EU jargon', the centre of gravity of a measure providing for the MR of precautionary freezing will probably tend more towards judicial cooperation than police cooperation. In any event, given that both Articles 82(1) on judicial cooperation and 87(2) on police cooperation prescribe the ordinary legislative procedure, there could well be a single instrument containing provisions on both precautionary and judicially ordered freezing and based on both legal bases. Moreover, none of these provisions requires the choice of a particular legal form.

MR of NCB confiscation orders could be provided for within the regime on MR of confiscation orders. Alternatively, a separate MR regime could be envisaged using Article 81(2)(a), which provides for the adoption of measures to ensure 'the MR and enforcement between Member States of judgments and of decisions in extrajudicial cases' in civil matters. This should be done using the ordinary legislative procedure with no particular requirement

[201] See Article 67(4) in relation to civil matters and Article 82(1) in relation to criminal matters.

regarding the choice of legal instrument. There is hence little controversy about the EU's competence to legislate in this area.

Incentivisation measures

There need to be some measures to bring states effectively to recovering assets, apart and beyond the requirement that they legally provide for the possibility of doing so. A first step could be for EU law to require Member States to investigate assets (as it is often found that the financial investigation into the property of suspects or defendants is perceived as merely incidental to the investigation of the offence and is thus usually neglected). Such an obligation would apply during the investigative stage and could be based on Article 87(2), which provides that for the purpose of establishing police cooperation in relation to the prevention, detection and investigation of criminal offences, measures can be adopted 'concerning investigative techniques in relation to the detection of serious forms of organised crime'. It could only relate to investigations into serious forms of organised crime, but it is worth noting that the EU endorses quite a broad interpretation of this offence. The institutions would have to act by means of the ordinary legislative procedure without any particular requirement applying regarding the legal form to be used.

If such an obligation is to be effective, then presumably Member States need to face consequences for failure to abide by it. Following the end of the transitional period, the Commission will be able to launch infringement proceedings against any state which does not adequately fulfil or breaches its obligations under EU law. Yet such proceedings will relate only to the way Member States transposed the said obligation into their national legal system, not to the way they apply it in practice. The whole purpose of such an obligation would be to ensure that assets are effectively investigated in a particular case. Hence some other kind of incentive must exist.

One option would be to give victims the right to sue the state for failure to conduct an efficient financial investigation and/or bring recovery proceeding. Following the famous *Francovich* [1991] judgment, the ECJ established a general principle of state responsibility for non-compliance with EU (then EC) law. Liability arises when (1) there is a serious breach of EU law, (2) the breach is attributable to the state and (3) it has caused damage to the individual. If these conditions are fulfilled, compensation can be sought before national courts. Thus, in principle, if there is a corresponding EU law obligation regarding proper conduct of financial investigations, Member States can be sued before their national courts for having failed to discharge it properly. An issue here is that if and when the ECJ is asked to determine the scope of the underlying EU obligation (and hence as it often does incidentally, the legality of the national action with regard to EU law) by a national court called upon to rule on the matter, it will be precluded from ruling on 'the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.[202] From one perspective, determining the existence of say, negligent conduct of the police within the meaning and for the purposes of EU law is not necessarily such as to prejudge the validity or proportionality of actions of the police under national law. Moreover, it could well be the

[202] Article 276 TFEU.

case that the Court, as it often does, will claim to be solely interpreting the concept of negligence under EU law, without looking at all at the underlying conduct of national authorities. This tendency may or may not decrease under Lisbon, given that this is one of the few areas where the jurisdiction of the ECJ remains somewhat limited. It may be the case that EU courts will lose the incentive to engage into activist practices.

Another possibility would be to use Article 82(2), and provide for the right of victims to be compensated by criminal (or even civil) courts whenever the inquiry into the origin of assets was badly conducted. Any EU legislation on the matter would have to limit itself to establishing minimum standards that are necessary to facilitate MR. Also, it is uncertain whether Article 82(2) provides a legal basis for civil law provisions on victims, given that it purports to govern criminal matters.[203]

[203] These issues are currently being discussed – and are highly controversial – in the negotiations of a proposal by the Spanish EU presidency for a European Protection Order.

Appendix H. Analysis of EU-level actions

The following 21 analyses are organised with reference to the different types of first-order impacts and barriers referred to in Section 6.2.1, being impacts upon:

- aspects of the specific objective being targeted (confiscation, preservation, enforcement, utilisation, redistribution);
- fundamental rights;
- direct economic costs (administrative burden, implementation costs and ongoing costs);
- simplicity and coherence;
- conferral of power;
- proportionality; and
- compatibility with Member-State systems in light of the 'emergency brake'.

We assess only those impacts which, *prima facie*, may be bear upon the action in question. This means that some types of impact are not assessed for some EU-level actions.

Each analysis ends with an assessment of impact based on estimates of what could happen with and without the EU-level intervention under consideration.

#1 Promoting implementation of existing confiscation obligations

Impacts:	
Confiscation	We examine extended confiscation and value confiscation as the two most important aspects of the existing legal framework in FD 2005/212/JHA. Value confiscation is ubiquitous except for Greece and Italy, where it does not apply to ordinary confiscation. Lithuania, Luxembourg and Slovenia do not have extended confiscation. Greece has extended confiscation for money laundering only and Poland only where there are significant proceeds (about €50,000). In Ireland a conviction-based extended confiscation regime applies only to drugs, but is supplemented with an NCB regime which satisfies the requirements of FD 2005/212/JHA, Article 3(4) of which allows Member States to comply through non-criminal procedures.
Fundamental rights	Confiscation regimes are compatible with the right to property if coupled with adequate procedural safeguards. Article 4 of FD 2005/212/JHA already requires Member States to ensure 'effective legal remedies' for interested parties affected by confiscation. Furthermore, Article 17 of the EU Charter protects only property which has been lawfully acquired.
Barriers:	
Conferral	As discussed in Section 6.1.1, unless confiscation is added by unanimous vote to the list of procedural aspects in TFEU Article 82(2), it will be necessary to rely upon Article 83 TFEU, in which case it may be

	appropriate for the EU to limit promotion of the existing legal framework to the categories of offence listed therein.
Proportionality	Member States have accepted the general principle that a degree of harmonisation is necessary to achieve MR of confiscation orders. They have also already endorsed the extent of the intervention in FD 2005/212/JHA and the organised-crime threat has not since gone away.
MS compatibility	Extended confiscation remains a controversial concept and, as discussed in Section 3.6.1, a constitutional challenge cannot be ruled out. However, although the emergency brake is available under both Articles 82(2) and 83 TFEU, Member States are unlikely to use it, given that they have already agreed to the existing rules.
Assessment:	
Without intervention	There is an extant bill to introduce extended confiscation in Lithuania, which appears likely to gain the necessary parliamentary support. In any event, the existing legal framework will be enforceable via infringement proceedings come December 2014, so even in the absence of any EU-level intervention general compliance by this date is likely. Continuing international pressure for comprehensive confiscation laws will also tend towards this outcome.
With intervention	This policy action has the potential to encourage full implementation of FD 2005/212/JHA in those few Member States which are yet to comply, perhaps hastening a process which looks set to occur within a few years in any event.

#2 Confiscation of benefits and indirect proceeds

Impacts:	
Confiscation	Desk research and fieldwork looked at whether 'indirect' proceeds are liable to confiscation (this being the major component of this policy action under consideration). The results suggest that this is almost ubiquitous, although there are a few gaps in ordinary confiscation regimes.
Fundamental rights	Confiscation of indirect proceeds is a far less draconian concept than, say, extended confiscation, and the interference with the right to property should thus be unproblematic. Defining proceeds to include all valuable benefits raises a *ne bis in idem* (specifically, double recovery) issue if ill-gotten 'benefits' (e.g. welfare or tax fraud) are otherwise recoverable or remain repayable. This problem should be avoidable through careful legislative drafting, but the UK has done the opposite, consciously embracing double recovery.[204] Should it so choose, the EU, by requiring Member States to guard against this potentiality, could slightly promote fundamental rights in those Member States (including the UK) yet to ratify ECHR Protocol 7, Article 4 of which contains the *ne bis in idem* principle.
Barriers:	
Conferral	As per Section 6.1.1.
Proportionality	Proportionality is not infringed because the deterrent value of asset confiscation (explained in Appendix A) is necessarily compromised if the offender is able to benefit from the offence by retaining indirect proceeds or other advantages. Moreover, this action does not prescribe particular words, leaving Member States free to adopt definitions which suit their unique legal systems.

[204] See the definition of 'pecuniary advantage' in s 76(5) of PoCA and the discussion in Alldridge and Mumford (2005: 363–365).

MS compatibility	If the philosophical basis of confiscation in a Member State is restitution, it may be possible to construct an argument that confiscation of indirect proceeds goes beyond this purpose. Yet it would seem unlikely that Member States (or their courts) would take such a narrow view, in the process permitting an unjust enrichment to stand. Thus, whilst the emergency brake is available under both Article 82(2) and Article 83 TFEU, compatibility issues seem unlikely.
Assessment:	
Without intervention	Most confiscation regimes already permit recovery of indirect proceeds. Article 12(5) of the 2000 UN (Palermo) Convention against Transnational Organized Crime, which all Member States have signed (although Greece and the Czech Republic are yet to ratify), actually requires this, so further progress can be anticipated. More generally, as Member States gain experience of using their confiscation laws, loopholes permitting unjust enrichment will be identified and closed, tending to expand definitions of 'proceeds'.
With intervention	Intervention by the EU could speed up harmonisation in this area, producing a **slight positive impact upon confiscation tools**, whilst the EU's formal approval of the Palermo Convention in 2004 provides an additional basis for action. A definition of 'proceeds' which includes all benefits raises potential fundamental-rights issues relating to double recovery but, by incorporating safeguards, the EU could achieve a **slight positive impact on fundamental rights**.

#3 Civil standard of proof regarding whether an asset is 'criminal'

Impacts:	
Confiscation tools	Only a minority of Member States employ a civil standard of proof within their legal framework on confiscation. This suggests a *prima facie* case for action in the majority (in order to make assets easier to recover) but, for the reasons set out below (compatibility), the option cannot be implemented by at least some of these.
Fundamental rights	This action aims to remove a procedural protection (high standard of proof) prior to confiscation but following conviction. It has passed ECHR scrutiny in the case of *Phillips v UK* [2001], which concerned an extended confiscation regime, so its application to ordinary confiscation should not constitute a disproportionate interference with fundamental rights. It will, however, be necessary to ensure 'equality of arms' between the individual and the state, through procedural safeguards such as the continuance of legal aid beyond the pronouncement of guilt in appropriate circumstances.
Implementation costs	Implementation costs will be variable: zero unless wholesale legal system reform is required (see *Member States' compatibility* below), in which case, potentially significant.
Barriers:	
Conferral	Procedural rules on the standard of proof are not included in Article 82(2) TFEU, but could be added by unanimous decision of the Council after obtaining the consent of the European Parliament. Account will have to be taken of the different legal traditions and systems of the Member States, which may preclude the introduction of a civil standard of proof in a way that would be alien to most of them. Article 82(2) also allows Member States to maintain or introduce a higher level of protection for individuals, which means in essence that the Member States can always opt for a higher standard of proof. For both of these reasons, this article presents as a poor legal basis, leaving only Article 83. However, this conferral of power is also doubtful since defining the standard of proof is a truly

	procedural matter, such that it arguably does not pertain to the definition of confiscation as a criminal sanction.
Proportionality	It is difficult to argue that EU-level action on standard of proof is necessary and respectful of well-established Member-State principles, given the immense diversity of criminal-justice systems throughout the EU and the subtle conceptual differences at play (see, e.g., the discussion in Section 3.6.1).
Member States' compatibility	Member States treat standard of proof very differently. Member States adhering to the common law tradition employ a 'balance of probabilities' standard routinely in civil cases, whereas many Member States adhering to a civil law tradition do so less regularly. In some countries (e.g. Germany) a single high standard prevails unless explicitly derogated from. In other countries, there is but one standard (e.g. France, discussed in Section 3.6.1). Thus it is meaningless to introduce into France a concept of 'balance of probabilities'. Indeed, this could even offend the philosophical underpinnings of the French system, effectively requiring it to be rewritten.[205] The emergency brake is available under both Article 82(2) and Article 83 and would almost certainly be activated by France and other countries in an equivalent situation.
Assessment:	
Without intervention	There is a slow but observable trend towards lowering the standard of proof in confiscation regimes, which is likely to continue, although some Member States will never be affected.
With intervention	Attempting to force a faster rate of change would make asset-recovery work significantly easier (albeit at the cost of a negative impact on fundamental rights), but for **proportionality** and **compatibility** reasons this is unlikely to be possible in practice.

#4 Separate confiscation proceedings

Impacts:	
Confiscation tools	Although the data here are incomplete, they clearly show that many Member States do not have the ability to separate confiscation proceedings from underlying criminal proceedings. Input both from practitioners whose systems allow for this (e.g. the Netherlands), as well as from those whose systems do not (e.g. Denmark, Czech Republic), suggests that the absence of this ability can inhibit confiscation for the reasons proffered.
Fundamental rights	According to *Phillips v UK* [2001], a convicted defendant continues to enjoy the protection of Article 6(1) which, in the context of a confiscation hearing, includes the right to a fair trial. This includes, relevantly, the right to be tried within a reasonable time. In practice, some time limits/constraints should be imposed either to the period in which confiscation proceedings must be held following a criminal conviction, or perhaps instead to the overall length of the proceedings (criminal + confiscation proceedings). There are many different ways to achieve this (e.g. absolute maximum time limits, shorter time limits renewable as necessary, or remedies in the event of 'undue delay'). If appropriate measures are taken in this regard then the overall impact upon fundamental rights could indeed be positive, in the sense that the ability to separate confiscation proceedings can help to ensure that criminal trials

[205] An inherent corollary of multiple standards of proof is the possibility that the 'truth' will differ depending on which is applied. This, according to one author, is intellectually heresy in France: see Papadopoulos (2004).

	are not delayed owing to complexities arising from financial investigations. This benefit will be greatest for defendants deprived of liberty during the criminal trial. Furthermore, in certain circumstances the ability to separate confiscation proceedings can help to ensure that the defendant receives the full force of the presumption of innocence by ensuring that the criminal proceedings are not taken up with evidence which is irrelevant to criminal guilt (the very introduction of which presumes that the defendant will be found guilty).
Ongoing costs	Whether there would be a significant implementation cost depends on whether Member States comply by separating confiscation proceedings in all cases, or simply by allowing them to be separated (e.g. postponed) in appropriate cases. In the latter case, costs will be entirely a function of how much the option is utilised; in the former case there would be additional costs because new procedures would be introduced on a routine basis. Even then, however, the increase could be slight if the procedure were permitted to take place before the trial judge following sentencing. Therefore, overall, we predict **slightly increased direct costs**. To monetise this impact we would need additional data on, *inter alia*, costs of different elements of criminal procedure.
Barriers:	
Conferral	As per Section 6.1.1, except that the applicability of Article 82 TFEU is doubtful because it is limited to cases where harmonisation will facilitate MR and there is no evidence to support the contention that this would be the case if Member States introduced separate confiscation proceedings. The applicability of Article 83 is also doubtful because (as for policy action #3) the timing of proceedings is a truly procedural matter, such that it arguably does not pertain to the definition of confiscation as a criminal sanction.
Proportionality	The option concerns ends and not means: Member States could comply (where applicable) by creating a mechanism to postpone this aspect of the sentencing procedure, a mechanism to revisit it on the basis of new information, or a separate legal procedure able to be commenced at a later date (which could be either conviction based or NCB regime).
MS compatibility	The emergency brake is available under Article 83 TFEU. It is conceivable that a Member State has fundamental principles of criminal procedure which preclude all of the possible means of implementation;[206] we know of no specific examples, but a more detailed examination is warranted.
Assessment:	
Without intervention	Even without EU intervention, in Member States wanting to utilise their asset-confiscation laws better, practitioners are likely to experience frustration if their system suffers from inflexible time limits, and this could prompt legal reform (as happened in the Netherlands).
With intervention	EU intervention will considerably hasten what would otherwise be a slow process, possibly producing **a moderate positive impact upon asset-confiscation tools**.

#5 Strengthening extended confiscation

Impacts:	
Confiscation tools	The extended confiscation regime being analysed here is stronger than those currently in place in: BE, IE, EL, LT, LU, HU, MT (slight impact), AT,

[206] What would be needed would be a combination of principles relating to the precision of penalties, the time within which they can be ordered and the inability to revisit them (i.e. due to *ne bis in idem*).

	PL, RO and SI. As noted above, in Ireland, where extended confiscation applies only for drug-trafficking offences, the gap is covered by a comprehensive NCB regime.
Fundamental rights	Referring to Appendix A, cases like *Arcuri v Italy* [2001] and *Phillips v UK* [2001] show that extended confiscation is in principle acceptable, although issues may arise under ECHR Article 6, particularly with regard to the principle of legal certainty and the presumption of innocence. The latter, as it is protected under Article 6(1), is not an absolute right but may be subject to a number of presumptions of fact and law *(Salabiaku v France* [1988]). However, adequate procedural safeguards must be in place to ensure that the accused can effectively rebut such presumptions (*Pham Hoang v France* [1992] and prove that assets are not proceeds of crime. Some limits are also needed with regard to the scope of application of extended confiscation; it cannot, for instance, apply to assets connected with an offence for which the defendant has been acquitted (*Geerings v Netherlands* [2007]). Issues may also arise with regard to Article 7 if the regime is applied retroactively to assets acquired prior to its introduction.
Simplicity/coherence	The EU legal framework currently contains a choice of three alternative options, which also complicates the existing legal framework on MR (which refers to it). Consolidating to one option will simplify both legal frameworks.
Barriers:	
Conferral	When discussing conferral, it is important to distinguish between two issues: the **trigger** for extended confiscation and the **extent** to which it applies. The trigger for extended confiscation pertains to the kind of crimes in relation to which extended confiscation may be imposed. As discussed in Section 4.1.1, the EU can only adopt minimum rules on sanctions in relation to the serious cross-border crimes listed in TFEU Article 83(1). The extent to which extended confiscation applies pertains to the definition of the sanction *per se*, on which Article 83(1) does not seem to impose any restrictions. The issue here is rather the proportionality of the sanctions (i.e. how far extended confiscation can reach).
Proportionality	The existing EU legal framework in FD 2005/212/JHA allows Member States to choose between three alternatives. This action would remove that choice, but it does so with the aim of strengthening the legal framework (the second alternative is clearly weaker in that extended confiscation can be defeated by arguing that the assets in question were derived through another *type* of criminal activity). Another feature of FD 2005/212/JHA relevant to proportionality is the statement in Article 3(4) that Member States may use NCB regimes if they so wish. This may need to be left unstated in a new legal framework (due to limitations in the post-Lisbon conferral), but it will remain implicit as the purpose of the policy action is to ensure confiscation rather than prescribe means.
MS compatibility	The emergency brake is available under Articles 82 and 83 TFEU and is more likely to be applied here than in the case of policy action #1 because the regime under consideration is stronger. It has been deliberately designed to take into account the domestic constitutional limits in Germany and Romania (which are relatively clear), but in the absence of a complete understanding of the constitutional limitations in each Member State – which in some cases are untested and thus a matter of speculation even to experts[207] – compatibility issues are a distinct possibility.

[207] Consider the uncertainty surrounding the constitutionality of the existing regimes in Greece and Estonia, as noted in Section 3.6.1).

Assessment:	
Without intervention	Many Member States adopted regimes for extended confiscation even before the EU became active in this area, and these have been strengthened over time (e.g. DE, IT, UK, NL). This trend is likely to continue, although it will be weak in Member States with little interest in increased utilisation, whilst some states (e.g. Greece) may remain overly focused on money laundering (the domain of the FATF and Moneyval) to the detriment of other aspects of organised crime.
With intervention	The proposed regime of extended confiscation represents a realistic attempt to continue to strengthen the EU legal framework whilst recognising the practical limitations of Member-State constitutions in combination with the emergency brake. It would strengthen the status quo in numerous countries, making a **moderate positive impact upon confiscation tools** likely. It would also constitute a **moderate simplification** of the existing EU legal framework.

#6 NCB confiscation in limited circumstances

Impacts:	
Confiscation tools	This policy action can be met through systems based on civil procedure or by adjusting criminal procedure to meet particular exigencies. Both are totally lacking in at least BE, LT, MT and PT, whilst there are gaps in their availability in several other Member States.
Fundamental rights	A suspect who is dead lacks legal capacity or is otherwise unavailable to explain the origin of suspected criminal assets. Allowing asset confiscation in these circumstances thus has inescapable fundamental-rights implications. The question is one of proportionality: whether the infringement is justified in the light of the legitimate end pursued (i.e. confiscation of type 2 assets). This is likely to be a matter of detail, depending on the protections which are designed into the NCB system (and, of course, the level of threat posed by organised crime). The utility of different protections will naturally vary across diverse legal systems, so prescription at EU level is likely to offend proportionality. Moreover, Member States should be given a wide margin of appreciation to decide what is acceptable given domestic imperatives; hence in some cases even 'pure' NCB regimes based on civil procedure have been upheld by the ECtHR: *Walsh v United Kingdom* [2006], FD 2005/212/JHA.
Barriers:	
Conferral	It would be difficult for a harmonised concept of NCB confiscation to rest upon Article 83(1), since the lack of a criminal conviction makes it unlikely that they are criminal 'sanctions'. Article 82(2), with the necessary addition to the list, would provide a firmer legal basis. Alternatively, an approximation of national laws in this field could be achieved by Article 81(1) and (2) if this was shown to be necessary to facilitate MR and enforcement of judgments between Member States (note, however, the broader requirement in Article 81(1) that harmonisation must be limited to enhancing judicial cooperation in civil matters *having cross- border implications*).
Proportionality	This policy action seeks to make 'type 2' assets liable to confiscation, without necessarily prescribing a particular approach. The least drastic way to implement it is to introduce a limited regime for NCB confiscation, building upon existing criminal procedure. It could be argued that even this constitutes a disproportionate intrusion into national sovereignty because it requires some detraction from criminal procedural safeguards (i.e. because not all impacts upon fundamental rights could be completely ameliorated through remedies).

MS compatibility	Article 82(2) provides for the emergency brake, whereas Article 81 does not. Whether Member States would use the emergency brake depends on whether there is serious historical or philosophical opposition to a limited NCB regime. Most Member States have already gone some way down this path; those which have yet to do so have all introduced extended confiscation (except Lithuania, which has an extant bill to introduce it), suggesting that entrenched historical or philosophical objections are unlikely; bureaucratic inertia is a far more likely explanation.
Assessment:	
Without intervention	As with other aspects of confiscation law, steady progress is noticeable over time. However, some of this progress is rather limited (e.g. where NCB confiscation applies only in cases where a defendant dies).
With intervention	This policy action combines a strong theoretical basis with demonstrated utility in practice – recent amendments to Italian laws have allowed confiscation proceedings to be brought against Mafia heirs, to the tune of hundreds of millions of Euros. In combination with the 'gap analysis' this renders likely a **moderate positive impact upon confiscation tools**. There will, however, be an attendant **slight negative impact upon fundamental rights**.

#7 Confiscation from third parties

Impacts:	
Confiscation tools	This policy action demands confiscation from both (a) third parties who receive in circumstances where a reasonable person would suspect that assets are proceeds and (b) third parties who have not purchased for market value. Numerous Member States cover only one of these situations, or allow for third-party confiscation in only some of the relevant regimes (typically either only in the ordinary regime, or only in the extended regime).[208] For three Member States (FR, LU, NL) there is evidence that gaps in the regime are mitigated by reliance upon money-laundering laws.
Fundamental rights	The minimum applicable standard regarding the right to property is that applicable under the ECHR, but Article 17 of the EU Charter states that 'everyone has the right to own, use, dispose of and bequeath his or her *lawfully acquired possessions* [emphasis added]'. This is clearly relevant to the policy action under consideration here, raising the questions of whether it is unlawful to receive property which a reasonable person would have suspected to be proceeds of crime and whether it is unlawful to receive a gift in good faith. On the assumption that both questions are answerable in the negative (although money-laundering law will produce an affirmative answer to the first question in some circumstances) this fundamental right is affected, raising the question of whether the infringement is proportionate to the objectives being pursued (deterring crime and restitution for victims). The potential for assets to be simultaneously claimed both by victims and *bona fide* third parties provides the strongest argument in favour of measures that may affect the right to property of a *bona fide* third party. In short, where the perpetrator has insufficient assets to meet a claim by either the victim or the third party (as is often the case), then measures in favour of third parties will weaken the position of victims, and *vice versa*. The approaches taken by Member States differ vastly, ranging from the inviolability of *bona fide* third

[208] In order to provide a more complete data set, Table 6-1 deviates slightly by answering the question whether proceeds are recoverable from *mala fide* third parties (i.e. a subjective standard, rather than the stricter objective standard under consideration here).

	parties (as in the Netherlands) to an objective standard which penalises imprudent third parties (as in Sweden), to a system in which the claim of a victim is always superior to that of a third party (as in Latvia). Seen in this light, the present policy action would harmonise laws in favour of victims and against the interests of third parties who are either imprudent of who have not paid full value. The present policy action would also introduce rebuttable assumptions that certain close persons did not pay full value. It is worth noting that such assumptions are commonplace in the field of bankruptcy law, where it is important to have rules in place for voiding transactions done to avoid liability. Indeed, Finnish confiscation law (Criminal Code, Chapter 10) actually refers directly to bankruptcy law in defining the relevant categories of 'close persons'. Member States may wish to ensure that *bona fide* third parties (who may have paid partial consideration or subsequently arranged their affairs in reliance on their changed financial situation) suffer no net loss; this should be relatively easily accommodated within the EU legal framework.
Barriers:	
Conferral	As per Section 6.1.1.
Proportionality	It could be argued that this option disregards established practice in those Member States that prefer to use money-laundering laws or other forms of extended criminalisation to achieve the same ends. However, money-laundering laws are inapt in circumstances where it would be inappropriate to bring criminal charges against the third party – for example, if the aim (as here) is to recover *inter alia* from third parties who receive gifts in good faith. The most questionable aspect of this policy action is perhaps the rebuttable presumption that certain categories of persons received far less than market value. The impact here will vary with the prevailing standard of proof, being greatest in Member States with a high standard of proof. This will indeed place third parties under great burden. Whilst some Member States have decided upon exactly this (the Polish extended confiscation regime subjects all third-party recipients to a reversed burden), for the EU to force this upon those which have not could breach proportionality.
MS compatibility	The emergency brake is available under both Articles 82 and 83 TFEU. Confiscation from *bona fide* third parties could raise significant constitutional issues, not least in Romania where Article 44 of the constitution provides that 'licit acquired assets cannot be confiscated. The licit character of the acquired assets is presumed'. This issue demands a detailed examination of Member-State constitutional limitations.
Assessment:	
Without intervention	Pressure from the FATF and Moneyval may cause some Member States to take steps to strengthen third-party confiscation.
With intervention	This policy action would greatly speed up the process, which, given that it is a common tactic of criminals to use third parties to distance themselves from their ill-gotten gains, equates to a **significant positive impact upon confiscation tools**. However, it may need to be scaled back on the basis of compatibility and/or proportionality. In this case, the EU could still achieve a lower level of harmonisation; even requiring Member States to provide for recovery from *mala fide* third parties in all cases to which the EU legal framework applied would induce a **moderate positive impact upon confiscation tools**. The policy action in its original form (but not its modified form) will also produce a **moderate negative impact on fundamental rights**, whilst

	affecting the relative legal rights of victims and third parties. This may be a potential improvement upon the general status quo, but we are here in the domain of value judgement and the argument in favour of reform is, moreover, diminished where there is no identified victim seeking compensation, but only the state seeking confiscation.

#8 Freezing and seizure in support of all confiscation regimes

Impacts:	
Preservation	Whilst there may be others, and some areas of uncertainty remain, the only *known* gap in existing Member-State laws is the inability to seize moveable assets in support of extended confiscation in Finland.
Fundamental rights	Asset-freezing measures affect the right to property, due process rights (particularly where decisions are made and executed in secret) and the right to private and family life. They are, however, generally perceived as legitimate restrictions (*Raimondo v Italy* [1994]), so long as they are limited in time and effective remedies are made available.[209]
Barriers:	
Conferral	The conferral of power is as discussed in Section 6.1.1, except that freezing may be too remote from Article 83, being but a procedural measure in support of a potential confiscation order, and thus not itself a 'penalty'. Article 82 does not at present include any provision for asset freezing although that could be added as an aspect of criminal procedure. Even then, it will have to be proved that harmonisation of asset-freezing regimes is necessary to facilitate the MR of freezing orders.[210] It is not possible to use Article 75 TFEU, which presents as another potentially relevant conferral, for the reasons set out in Appendix G.
Assessment:	
	Table 6-1, as a 'gap analysis' of existing Member-State laws, demonstrates no *a priori* need for EU-level intervention. Confiscation powers are of little utility without corresponding freezing powers to preserve assets pending confiscation orders, but the data-gathering exercise does not suggest gaps in this regard. The adequacy of the freezing powers is another question; if, for example, the information requirements are set too high, it may not be possible to satisfy a court in a timely manner of the prerequisites for freezing. Yet here too the data-gathering exercise did not reveal major defects, or a perception of defects.[211]

[209] Note however the recent *Kadi II* decision, which highlights the risk of provisional freezing orders turning into permanent sanctions and hence raising additional issues with regard to fundamental rights. This raises doubts in particular over the argument that the measures are proportionate because they are only imposed temporarily. See *Kadi v Commission* [2009].

[210] This is not implicit in the existing legal framework – contrary to the situation in relation to confiscation, where harmonisation (FD 2005/212/JHA) preceded MR (FD 2006/783/JHA), FD 2003/577/JHA on MR of freezing orders was adopted without any harmonisation.

[211] One notable exception was a practitioner who opined that some Member-State freezing regimes do not permit freezing of value (i.e. of legitimate assets) in support of possible extended confiscation, but the data-gathering exercise did not reveal specific examples or other instances of practitioner concern.

#9 Mechanisms to safeguard freezing

Impacts:	
Preservation	There are two aspects to safeguarding freezing: 'preliminary' freezing on the authority of police or prosecutors, and secret applications for freezing orders. Bearing in mind that the need for the latter depends upon the extent of the former (if preliminary freezing is the norm then there is never any need to make secret applications), our analysis revealed generally high coverage, though in several Member States at least one relevant freezing regime was not entirely supported with a preliminary freezing power. Practitioners interviewed generally considered that mechanisms to safeguard freezing were an important aspect of a legal regime for confiscating criminal assets.
Fundamental rights	Secret applications and preliminary freezing, like freezing orders, involve decisions that interfere with the right to property in order to safeguard a potentiality, the difference being that these decisions are by definition not made in an open court. The underlying assumption here is that freezing, as an interference with property rights, should be court ordered (see Appendix A). It is interesting, however, that in some Member States (at least CZ, LT, HU) prosecutors can order seizures which are not confirmed by a court unless the affected person exercises remedies. It should be relatively simple for each Member State to design appropriate remedies, and the EU legal framework could require this; if it goes further by requiring preliminary measures always to be confirmed by courts, this will arguably constitute an additional fundamental-rights safeguard in at least these three Member States, albeit also an administrative burden and implementation cost.
Barriers:	
Conferral	The conferral of power would be as policy action #8, on the basis that mechanisms to safeguard freezing are considered to be an integral part of the imposition of the freezing order.
Proportionality	This policy action allows Member States to choose an appropriate mix between preliminary freezing powers and/or secret applications.
Assessment:	
Without intervention	In the absence of trend data for preliminary freezing powers, it is difficult to predict how laws would evolve without EU intervention.
With intervention	This action is phrased in very general terms, such that proportionality and compatibility issues are unlikely. It would serve to close some gaps in existing laws usefully, but in the absence of clear evidence that these gaps are causing deficiencies in practice, we can confidently predict only a **slight positive impact upon preservation tools**. Also, there is scope for a **slight positive impact upon fundamental rights**.

#10 Realisation of frozen assets

Impacts:	
Preservation	Despite some gaps in the data, it is clear that, in several Member States, those responsible for managing frozen/seized assets do not have the power to liquidate them when storage is uneconomical (because they are liable to decline in value and/or too expensive to maintain). Some practitioners considered the absence of these powers was a disincentive to seize potentially valuable assets such as cars.
Fundamental rights	Issues are liable to arise where the frozen assets are not ultimately confiscated. A suspect who did not consent to the realisation may then claim infringement of the right to dispose of the property. Against this right must be weighed the manifest benefits of the power to realise: the ability

	to safeguard value (provided a reasonable price is obtained) and the public interest in the efficient allocation of resources. Safeguards for fundamental rights could be specified at EU level – for example, an entitlement to compensation for the full value of the realised item, a limitation of the power to assets that are replaceable and/or adequate remedies to enable individuals to challenge decisions to realise assets.
Implementation costs	Member States will need to establish systems to manage the realisation process.
Ongoing costs	However, in return they can expect reduced ongoing costs from this system, which is designed to save money. Given that several Member States are in want of this power, a **moderate positive economic impact** may be predicted overall. To monetise this impact we would need additional data on, *inter alia*, decline in value under storage and the percentage of resale value that authorities are able to realise.
Barriers:	
Conferral	As per option 8, if such provisions can be included amongst those on minimum rules on freezing.
MS compatibility	Although we are not aware of specific examples, it is possible that the right to property, as formulated in some Member States, would not permit the realisation of assets prior to their vesting in the state.
Assessment:	
Without intervention	Practitioners are very alert to this issue and, prompted by their feedback, Member States may continue to improve laws. However, some Member States have persisted with inadequate arrangements for a long time, suggesting that the overall rate of improvement will be slow.
With intervention	By increasing the range of assets that can realistically be frozen, this policy action will promote asset-confiscation activity in several Member States, resulting in a **moderate positive impact upon preservation tools**, with fundamental-rights consequences which should be entirely manageable through appropriate safeguards.

#11 Designation of asset management offices (AMO)

Impacts:	
Preservation	Despite some gaps in the data-collection exercise, it is apparent that many Member States have not set up agencies responsible for managing frozen/seized assets, which are instead managed *ad hoc* by police, prosecutors, judges or appointed agents.
Implementation costs	The rationale for establishing an AMO is economic efficiency, so the question to ask is whether the additional cost of establishing and operating an AMO (which could be negative, if the AMO costs less than the existing *ad hoc* arrangements) will be outweighed by the additional value preserved for the benefit of the state (a negative value here would mean the AMO actually preserving less value than *ad hoc* managers). To some extent the answer to this question may depend upon workload; the more voluminous the frozen/seized assets, the more opportunity there would to learn from experience and develop 'best practice' (although this could also be shared between AMOs within the EU). However, poor design could render an AMO less efficient than *ad hoc* arrangements even in a high-volume environment. An overly centralised bureaucracy could be less efficient that a decentralised approach, especially in larger Member States. This, of course, assumes that efficient systems are available at local level. This will not necessarily hold true for Member States with high levels of police/judicial corruption, which may benefit by consolidating management activity into a single transparent bureau, the

	performance of which can be more easily monitored. Thus the optimal arrangements for managing frozen assets will depend upon the characteristics of individual Member States, including size, whether federal or unitary, bureaucratic efficiency, level of official corruption, and so on.
Barriers:	
Conferral	There are two problems regarding conferral, which are cumulative. First, of all the policy actions considered here regarding preservation of assets pending potential confiscation, this one is at the farthest remove from criminal procedure and it is doubtful that Article 82 would provide the necessary conferral even if Member States were prepared to act unanimously under Article 82(2)(d). Second, it is also doubtful that AMOs will facilitate the MR of freezing orders (although there is a weak argument that Member States would be more likely to seek MR of a freezing order if they expected assets to be properly managed).
Proportionality	Best practice cannot develop in a vacuum; it requires at least some bureaucratic framework, which this option aims to ensure in a very non-prescriptive way by merely requiring Member States to designate AMOs. It does not require the replacement of existing systems; indeed, where there is already an element of the bureaucracy with a role in developing best practice, this could simply be designated as the AMO, with essentially no changes required.
Assessment:	
Without intervention	History suggests that Member States can persist for a very long time with *ad hoc* management practices that do not take account of best practice.
With intervention	This is a potentially useful option, which could produce a moderate impact upon preservation of assets, but it is unclear whether this will be outweighed by implementation costs in some Member States. Moreover, the requisite **conferral of power** appears to be lacking.

#12 Promotion of implementation of existing MR obligations

Impacts:	
Enforcement	The data-gathering exercise revealed as much opinion about the existing legal framework on MR of confiscation and freezing orders as it did experience, for the simple reason that many practitioners are yet to utilise the mechanisms on offer. Yet the majority perception amongst users seems to be that the MR instruments are a faster route to international freezing and confiscation, at least where the recipient knows what to do with the incoming certificate. This, indeed, aligns with the very purpose of MR generally. We thus assume that freezing and confiscation orders will circulate faster throughout the EU if the MR instruments are utilised more often. Utilisation by practitioners depends upon perceived utility and perceived (in)convenience but, above all else, on sufficient opportunity, which requires implementation of the EU legal framework by both the issuing and the enforcing Member States. Currently, only 17 of 27 Member States have implemented FD 2006/783/JHA. That, as shown in Section 3.6.3, is only 40% of pairs of Member States. The aim here is to promote further implementation through non-legislative means (implementation workshops). Gaps also remain for FD 2003/577/JHA and FD 2005/214/JHA, which is relevant where the value of criminal assets is covered by an order for compensation.
Fundamental rights	Implementing legislation in some Member States includes review grounds that go beyond those exhaustively stated in the framework decisions – often reserving a right to review incoming judgments for compliance with fundamental rights. However, the principle of MR already allows for

	substantive challenges, including on fundamental-rights grounds, but these must be taken in the issuing Member State. Then, once local remedies are exhausted, the ECtHR has jurisdiction to review any decisions of national courts. Because this provides adequate protection for fundamental rights, there is no adverse impact if the EU promotes the existing MR obligations.
Ongoing costs	As utilisation of MR instruments rises, administrative burden will shift from central authorities to judicial authorities. The net impact of this will depend upon the relative efficiencies of MLA and MR, but also of the two authorities. Overall, however, because MR is less convoluted (this, indeed, is its purpose), the administrative burden should decrease. We therefore postulate a **slight decrease in direct costs**. In order to monetise this impact we would need additional data on, *inter alia*, the relative efficiency of different parts of Member-State bureaucracies.
Barriers:	
MS compatibility	The only potential barriers concern the limitation of grounds for non-recognition and the abolition of dual criminality. The relevant issues are not unique to confiscation and freezing. In any event, whilst they affect the quality of implementation, they do not present complete barriers to implementation.
Assessment:	
Without intervention	Quite apart from Lisbon, it is reasonable to assume, in line with trends to date, that more Member States will implement the existing legal framework in the future; indeed, in some cases the legislative process is already underway.
With intervention	Given existing trends and the forthcoming impact of Lisbon, implementation workshops will probably add only a little to the rate of implementation by Member States. Moreover, as the European Commission has conducted implementation workshops in this area in the past, the present policy action is in a sense nothing new. Utilisation of MR instruments, however, is a matter not only of availability, but also practitioner perception. Here, Commission-sponsored workshops will provide a valuable forum for the sharing of practical experience and best practice, allowing Member States to utilise MR tools to better effect, so we consider a **slight positive impact upon enforcement** to be the likely result of this action.

#13 Mutual recognition of all types of orders

Impacts:	
Enforcement	Data from the 2010 CARIN questionnaire suggests that enforcement of foreign NCB orders (even via MLA) is not possible in most Member States – some of whom have ratified the 2005 CoE Convention, which appears to provide a basis for exactly this (see Section 3.5.2 above). Without here attempting to reconcile the two data sets, there is clearly significant potential for the status quo to be improved through EU-level intervention, such as an expanded scope for MR. This would have an immediate impact in those Member States that issue NCB orders – especially in the UK and Ireland, where the orders often encompass assets held overseas. It would also open up new possibilities for other Member States which are considering introducing NCB confiscation. It is widely recognised, however, that MR can be difficult to achieve in practice without a degree of harmonisation of relevant substantive law and/or procedure. The present context is no exception: one practitioner remarked that progress was unimaginable in the absence of harmonisation to ensure a minimum conception of what amounts to NCB

	confiscation. Indeed, even a cursory review of extant NCB regimes reveals a fundamental divide between those that permit confiscation on the basis that assets relate to past criminality (e.g. UK, IE, BG) and those that are preventative (e.g. IT, DK), as a result of which it is not obvious, for example, that an Italian NCB order pursuant to Law 575/1965 can be recognised in the UK, even though the relevant UK laws encompass NCB orders.[212] We conduct the following analysis assuming that the EU defines minimum standards for the types of orders (including, but not limited to, NCB orders) subject to MR, encompassing both retrospective and preventative orders. The alternative approach of simply requiring Member States to recognise any incoming order would almost certainly break down in practice owing to a reluctance to recognise orders which offend domestic standards – especially as regards fundamental rights.
Fundamental rights	As per policy action #12. Unless NCB confiscation raises particular issues at the enforcement stage, it does not warrant a departure from these general principles – especially not since the proportionality of any restrictions on fundamental rights must be assessed against the legitimate end sought to be achieved by the issuing Member State. To the extent that the process of enforcement itself raises new fundamental-rights issues, these cannot differ from issues relating to the enforcement of conviction-based orders. Therefore this policy action does not raise new fundamental-rights issues. Moreover, a system based on harmonised minimum standards would allow the EU to ensure proactively that fundamental rights are not disproportionately affected. This would not only help to avoid the circulation of substandard orders; it would also help to avoid such orders being made in the first place, as the prospect of MR would provide an incentive for Member States to ensure that their laws meet the minimum standards. This could be a source of added value at a time when new NCB regimes are beginning to emerge (e.g. SK and BG – in the latter case, draft laws were presented four times to the Venice Commission in an effort to ensure, *inter alia*, that fundamental rights were not disproportionately affected).
Ongoing costs	Minimal across the whole of the EU, but potentially significant for Member States which are liable to receive many such orders (e.g. Spain, where many UK criminals prefer to keep their assets). However, it must also be noted that the Member State of enforcement is entitled to retain 50% of recovered value under Article 16 of FD 2006/783/JHA for bearing what will typically be less than 50% of the administrative cost, so in this sense there will be no negative impact (noting that, if the issuing state is not inclined to utilise the tool on account of this split, then no expense will be incurred in relation to MR).
Simplicity/coherence	The existing MR criteria contain convoluted references to decisions made by Member States in implementation of FD 2005/212/JHA. Replacing these with explicit minimum standards will enhance simplicity and coherence (provided the chosen standards are themselves simple and coherent). Also, harmonised minimum standards for NCB confiscation regimes will contribute to simplicity and coherence, especially if regard is had to the obligations already upon 12 Member States pursuant to the 2005 CoE Convention.
Barriers:	

[212] See Part 11, and especially Section 447(2), of PoCA.

Conferral	Article 82(1) TFEU provides the necessary conferral for an MR instrument; if partial harmonisation is also sought then an additional conferral is necessary as per policy action #6, examined above.
Proportionality	Although the EU would provide minimum standards around which NCB regimes could be harmonised, there would be no requirement for Member States to introduce laws to make these available domestically. This is simply a case of harmonisation to ensure the free circulation of judgments.
MS compatibility	It is possible – perhaps even likely – that some Member States will resist MR of NCB orders as *contra* their constitutions or criminal-justice systems, and an extant Moneyval questionnaire aims to pinpoint any such concerns. Significantly, however, reliance upon TFEU Article 82(1) would mean that the emergency brake is not available, raising the possibility of Member States being outvoted in the Council.
Assessment:	
Without intervention	As regards cross-border enforcement of NCB orders, some progress is likely even without EU intervention, owing to efforts by issuing Member States to convince other Member States that they can recognise NCB confiscation orders under the 2005 CoE Convention (and even the 1990 CoE Convention, which applies to all Member States). However, without intervention there will be no expansion of the scope of MR to NCB orders (currently none), extended confiscation orders (currently limited) or freezing orders in support of extended confiscation orders (currently none).
With intervention	EU-level intervention can bring about an immediate boost to cross-border enforcement of many types of order, with the benefit being greatest for NCB orders (for which many Member States cannot, at present, even afford traditional MLA). This amounts to a **significant positive impact upon enforcement**, albeit one which favours those Member States with NCB regimes. It also has the potential to simplify one of the more convoluted aspects of the existing legal framework. Finally, the need to define NCB orders as an autonomous concept of EU law presents an opportunity to safeguard fundamental rights through minimum standards (a role which has recently been fulfilled *ad hoc* by the Venice Commission at the request of Bulgaria).

#14 Mutual recognition of compensation orders

Impacts:	
Enforcement	Currently, even where FD 2005/214/JHA has been implemented, victims in Member States employing the principle of 'adhesion' (e.g. FI, SE, DK) are disadvantaged *vis-à-vis* victims in other Member States when it comes to cross-border enforcement of compensation orders. The scope of the existing legal framework could be expanded to include such orders. This would make for a more equality of treatment of compensation orders – and, hence, citizens – throughout the EU.
Simplicity/coherence	The existing EU legal framework on asset recovery – aside from excluding civil compensation orders made in a criminal context – is unnecessarily spread across FD 2005/214/JHA and FD 2006/783/JHA, the delineation between which is unclear. In the post-Lisbon era, none of this is necessary. A single instrument could provide a single legal framework for cross-border enforcement of orders against property arising from criminal proceedings. This would then apply to all criminal assets – regardless of whether recovery is sought via 'confiscation' or a criminal compensation order, or an adhered civil order – greatly simplifying the EU legal framework. Practitioners would no longer need to be familiar with multiple instruments. Courts would no longer fret that their orders will be in a

	practical sense unenforceable for purely procedural reasons.
Barriers:	
Conferral	The appropriate conferral of power for MR of compensation orders issued in the context of criminal proceedings will be either TFEU Article 82(1) or Article 81(2), depending on whether they are to be regarded as criminal or civil in nature. Because the answer to this question will vary throughout the EU, a directive would need to cite both conferrals. This should present no difficulties because both conferrals use the ordinary legislative procedure.[213]
Assessment:	
Without intervention	Victims in some Member States will remain disadvantaged, facing greater procedural hurdles in order to recover assets frozen in other Member States.
With intervention	Victims will benefit from MR, regardless of the Member State in which a compensation order has been issued. Moreover, the likelihood of cross-border enforcement will no longer depend (as it now does in the Member States affected) on whether or not there is an identified victim. Thus, taking into account the limited number of Member States which currently experience these dilemmas, we assess that this action will have **moderate positive impacts upon both *enforcement and redistribution***. It also has the potential to achieve **moderate simplification of the existing EU legal framework**.

#15 Utilisation workshops

Impacts:	
Utilisation	Utilisation workshops could have a significant impact upon utilisation where policy-makers regard asset-confiscation work as a costly adjunct to the criminal-justice system, as they may be more inclined to release the necessary funds if they can be made to understand that the work is potentially profitable. This, of course, presumes not only that there are no other barriers to utilisation, but also that asset-confiscation work is, in fact, potentially profitable – failing which the evidence base falls away. Whilst uplifted effort by Member-State authorities will be likely to come at a net cost at least initially (while a pipeline of work is built up), the important question is whether the work will potentially be profitable within a reasonable time frame. This, of course, is unknowable in advance, making it necessary to project from historical trends or reason by analogy with countries with higher utilisation rates. Unfortunately, due to the general paucity of relevant data, it is difficult to do either. Specifically, in order to calculate profit (and therefore profitability) for a given Member State with a relatively high rate of utilisation, both income and cost data are required.[214] We undertake this exercise in Section 6.3.1, based on the data set available – which is admittedly poor. Our results suggest that asset-confiscation work is potentially profitable throughout most of the EU, but there is an insufficient evidence base for the purpose of arguing for greater utilisation in particular Member States.
Implementation costs	The implementation cost may be carried by the EU budget or the Member States' budgets. The cost of the workshop itself is negligible, although

[213] Because the stricter legislative procedure would prevail, the emergency brake would be available to all Member States even though it is only mentioned in Article 82(1).

[214] By profitability we mean profit divided by cost. By profit we mean income (i.e. the total value of the recovered assets) minus cost. Thus, where cost exceeds income, both profit and profitability will be negative.

	there is clearly an anterior need to carry out further research, which will present a greater burden. This is likely to vary greatly depending on the challenges of carrying out profitability research in different Member States, and additional data would be needed to give a more accurate estimate.
Assessment:	
Without intervention	The potential profitability of asset-confiscation work in Member States is a matter demanding rigorous data collection and comparative analysis. However, the literature reviewed for this study does not suggest that Member States are likely to undertake this on their own accord. Nor should it be assumed that Member States will rigorously study, let alone attempt to value monetarily, the wider (i.e. higher-order) impacts of asset-confiscation work. It follows that decisions may continue to be made based on the assumption that asset-confiscation work is unprofitable in either a narrow or wider sense.
With intervention	Given a suitable evidence base, there should be significant potential for utilisation workshops to influence Member-State investment decisions relating to asset-confiscation work. We base this assessment on the sheer force of the argument flowing from the fact that the utility of asset-confiscation work is widely accepted. This leaves affordability as the only serious argument (excepting perverse arguments) against further investment in asset-confiscation work.[215]

#16 Reporting obligations

Impacts:	
Utilisation	There is significant anecdotal evidence of Member States being motivated to the point of action by a desire to avoid negative publicity. Examples noted in Section 3.6.4 include the Austrian government's decree urging prosecutors to respect the mandatory nature of asset-confiscation laws (issued on 11 September 2009, on the final day of a visit by an international evaluation team in relation to the Council's fifth round of mutual evaluations) and the Greek government's redoubling of efforts to combat money laundering following criticism from the FATF. The Member States most likely to be so affected by additional reporting obligations are those with low utilisation rates and flat or negative utilisation trends. Also concerned will be Member States where asset-confiscation powers are in theory mandatory (e.g. as a result of the principle of legality, as in Austria). Member States may also be concerned where they have powers 'on the books' which are rarely or never utilised.
Performance audit	In addition to its impact on utilisation, this option will generate a comparable set of EU-wide statistics, invaluable for evaluation and performance-audit purposes. For example, it would be possible to examine conversion rates of freezing orders into confiscation orders, or identify the relative importance of ordinary and extended confiscation powers, on a per-Member-State basis.
Fundamental rights	Although the EU may consider it useful to have data on assets frozen and seized, as well as on assets confiscated, a corresponding reporting requirement could be perceived as an affront to the presumption of innocence. This issue could be avoided by limiting data collection to the number of seizures and the estimated value of the assets seized.

[215] Fundamental rights concerns relate essentially to the state of the law rather than to the extent to which it is utilised.

Administrative burden	Administrative burden presents as a significant cost of this option, but it is probably not insurmountable. Member States with sophisticated electronic court record-keeping systems may be able to retrieve and transmit data at little cost. In other cases, such functionality may need to be added at considerable expense. However, in these cases – as in Member States where court record-keeping systems are paper based – alternative, affordable approaches could probably be devised. This would involve, for example, an obligation upon practitioners involved in confiscation proceedings to complete a standard form and send it to a central compiler, who would then compile information manually and report it to the EU.[216] It should also be remembered that all Member States, as members of Moneyval or the FATF, are expected to maintain 'comprehensive statistics on matters relating to the effectiveness and efficiency' of their systems for combating money laundering and terrorist financing.[217] Unfortunately, this recommendation enjoys a relatively low level of compliance; were this not the case it would presumably be a relatively simple matter to expand the system to incorporate all crimes mentioned in TFEU Article 83(1). Overall, we predict **moderate direct costs** in the form of administrative burden. It would be speculative to attempt to monetise such costs in the absence of basic data regarding if/how reportable information is recorded, collated and stored within the criminal-justice systems of individual Member States.
Barriers:	
Conferral	Pursuant to Article 70 TFEU the Council can adopt measures laying down arrangements for Member States to conduct objective and impartial evaluations of the implementation of EU policies by Member States' authorities in this field. These measures shall aim in particular to facilitate full application of the principle of MR. But in so far as the harmonisation of rules on confiscation also aims at facilitating MR, their implementation may be subject to such evaluations/reports too.
Assessment:	
Without intervention	Member States already face external pressures from Moneyval and the FATF which will be likely to focus increasingly upon utilisation in years ahead (see Section 6.1.6), as well as from the Group of States against Corruption (GRECO) and, of late, the Council.
With intervention	The added value of an EU reporting mechanism would be its wider scope and the frequency (annual) and comparability of the data generated. The data generated would be motivating precisely because they would allow the EU to compare (publicly) the performance of Member States and identify areas of concern. We therefore predict **moderate positive impact upon utilisation**.

#17 Mandatory asset investigation

Impacts:	
Utilisation	Albeit with many gaps, the data-gathering phase yielded only a few examples of Member States in which there is currently a theoretical obligation upon authorities to carry out a financial investigation. This suggests an impact potential, although strictly speaking the obligation to open a financial investigation for certain types of crime would not require

[216] FATF informed us that such simple systems have allowed countries to satisfy their FATF reporting obligations.

[217] FATF Recommendation #32, against which Moneyval members are also assessed.

	the investigation to be adequately resourced. It is probably fair to assume, however, that a formal requirement would cause some Member States to commit additional resources to financial investigation, causing more assets to be identified for potential freezing and confiscation.
Implementation costs	Implementation cost presents as a major cost. Fieldwork with practitioners suggests that this cost is likely to manifest in a variety of forms. First, there are Member States that lack the financial resources to hire additional financial investigators, or the necessary skill base and infrastructure to train them. Second, there are Member States in which financial investigation is very expensive (in terms of professional time) because the necessary tools are lacking, or difficult to access. Third, there are Member States where the investigation process itself plays a role. In Spain, for example, criminal investigations are judge managed, and a financial investigation can typically quadruple the resource cost of the overall process.
Barriers:	
Conferral	The TFEU appears to provide no basis for a standing obligation upon Member-State authorities to conduct financial investigations in certain circumstances. For now, there is only the power of Eurojust and Europol to ask Member States to initiate investigations. Eurojust may in the future be given the power to initiate criminal investigations under Article 85(1) TFEU by means of regulations using the ordinary legislative procedure. Under Lisbon,[218] the Commission will be able to initiate infringement proceedings against Member States which are found to be in breach of their obligations under EU law; they could thus be held liable for failing to respond to a request from Eurojust to investigate assets. This would still, however, amount to an *ad hoc* solution rather than a standing requirement enshrined in the EU legal framework.
Proportionality	Proportionality presents as another major barrier because there are almost certainly less intrusive ways for the EU to achieve its objective. If the underlying problems for Member States are to do with administrative burden, then simply telling Member States to do more is likely to be seen as antagonistic rather than practically useful. This leads to a strong argument that EU efforts would be better directed at the underlying problems. This is quite apart from any arguments that the action would intrude too far into Member-State sovereignty.
MS compatibility	Limiting the discretion of the police may contradict fundamental principles of the criminal-justice system in some Member States – for example, if investigations are under the control of prosecutors and the *principe de l'opportunité de poursuites* (principle of prosecutorial discretion), or an equivalent principle, prevails. There is, however, no emergency brake under Article 85 TFEU, so Member States could be outvoted in the Council under the ordinary legislative procedure.
Assessment:	
Without intervention	Some Member States are discouraged from investing resources into financial investigation because they see it as costly and too technically difficult.
With intervention	There are **problems of conferral, proportionality and compatibility**. It is probably not possible for the EU to mandate this additional investment and, even if it were, it is not obvious that there would be a net benefit. Any consideration of such action should be deferred at least until the EU has

[218] Due to the merging of the 'third pillar' into the 'Community method'.

	made efforts to tackle the underlying problems directly.

#18 Limited judicial discretion

Impacts:	
Utilisation	The capacity for this action to result in increased utilisation of asset-confiscation tools is obvious. This is so even in countries with relatively high utilisation rates.
Other system effects	Also obvious, however, is the potential for negative impacts in other parts of the criminal-justice system owing to resources being redirected. In short, unless overall investment is massively increased, prosecution rates will decline as focus shifts from prosecution work to asset-confiscation work.
Fundamental rights	There are potential issues regarding the ECHR Article 6 right to a fair hearing by an independent and impartial tribunal, since this demands judicial independence and, hence, judicial discretion. This issue will be stronger for confiscation than for freezing because the latter is a temporary measure, to be revisited by the courts in due course.
Implementation costs	Given the low utilisation rates which currently prevail, the implementation cost of this option would be significant. It would depend upon (a) the extent to which resources could be diverted from other aspects of the criminal-justice system, as discussed above; (b) the extent of underutilisation in each Member State; and (c) the procedures for seeking confiscation orders in each Member State. In many Member States, the implementation cost will probably be untenable.
Barriers:	
Conferral	This action is arguably possible under TFEU Article 82(2), but this is very doubtful in particular since Article 67 enshrines national diversity in the field of criminal law as one of the cornerstones of EU criminal law.
Proportionality	The proportionality principle is a serious obstacle, not only because of the need to demonstrate the necessity of stripping judges of their discretion to determine cases on their individual merits in a general sense, but also for two more specific reasons. First, the action presents as an extremely blunt instrument given that the systemic problems being targeted differ immensely between Member States. For example, Member-State systems differ in how broadly they define proceeds, including whether they envisage the possibility of double recovery. In these circumstances, an absence of judicial discretion may see defendants facing confiscation orders disproportionate to their actions or, at least, to the advantage they stood to gain. Second, the action may present difficulties where thresholds are deliberately low in order to permit flexibility. For example, Member States generally employ low thresholds for freezing in order to ensure that suspected proceeds can be frozen in a timely manner, without the need to gather large quantities of evidence. If these low thresholds are not tempered by a broad discretion whether to freeze, the result could be the freezing of assets from many different suspects at an early stage of an investigation. Because there are multiple suspects, the total amount frozen may far exceed the value of the proceeds in question, inevitably meaning that most of the assets would be returned at a later stage. Aside from the inconvenience to those affected, there would be significant costs associated with executing the freezing orders and, in the event that seized assets decline in value, the loss would either be borne by the state (if compensation were paid) or the innocent suspects (if compensation were

	not paid on the basis that the state was not negligent).[219]
MS compatibility	The emergency brake is available under TFEU Article 82(2). The ability of judges to exercise discretion is an aspect of the independence of the judiciary which is fundamental to the separate of powers, a principle enshrined in the constitution of all Member States. Rules limiting such discretion will almost invariably be viewed by Member States as affecting 'fundamental aspects' of their criminal-justice systems, causing the emergency brake to be pulled in the (highly unlikely) event that there was sufficient support to reach that stage of the legislative process. The same could be said for the roles of prosecutors in many Member States, although prosecutors are in some Member States formally part of the executive branch government (as in Germany), whilst elsewhere they are formally within the judicial branch (as in France, where their independence is protected, *inter alia*, by the principle of *principe de l'opportunité de poursuites*).
Assessment:	
Without intervention	Some Member States will inevitably continue to underutilise confiscation laws.
With intervention	Attempting to force change by restricting judicial discretion will almost certainly prove politically impossible and, in any event, it poses **problems of conferral, proportionality and compatibility** which, in combination, are likely to outweigh any benefit.

#19 Consolidated MR forms

Impacts:	
Confiscation tools	The most consistent feedback from practitioners regarding MR was a wish for simplification and consolidation – in particular at the investigative stage, where freezing orders are typically sought alongside other types of order. Satisfying this wish would cause more practitioners to utilise the MR instrument (in circumstances where they still have the alternative option of a traditional request for MLA). The following analysis assumes that a new European Investigation Order (EIO) will be agreed, and that this will present a viable vehicle for simplification and consolidation. On the assumption that the EIO will suppress the alternative MLA procedure as between EU Member States, the present analysis also incorporates our analysis of policy action #20, below.
Ongoing costs	Time saving (small reduction in paperwork). Otherwise per policy action #12.
Simplicity/coherence	Reducing the number of different MR instruments, and the number of requests required of practitioners, should improve the simplicity and coherence of the existing EU legal framework on MR. This, indeed, is one of the aims of the EIO, into which MR of freezing orders would be incorporated. Indeed, it is already proposed to include freezing of evidence (which forms part of FD 2003/577/JHA), so also failing to include freezing in support of confiscation could leave the EU legal framework on freezing even less coherent than it already is (especially for cases in which assets could be frozen on both bases).
Barriers:	
Conferral	Article 82(1) provides the necessary conferral of power.
Assessment:	

[219] The negligence standard is endorsed by the ECHR in *Raimondo v Italy* [1994]; see Appendix A.

Without intervention	If MR of freezing orders remains a stand-alone procedure, some practitioners will continue to prefer to use traditional MLA procedures owing to the convenience of being able to combine all requests into a single letter rogatory. This argument will, however, diminish as practitioners switch to using the EIO once it becomes available as a corollary utilisation of FD 2003/577/JHA.
With intervention	We have assumed that adding requests for freezing (in support of confiscation) to the EIO will effectively suppress the residual MLA option, constituting a **significant positive impact upon utilisation**. An additional benefit is a **significant simplification** of the existing EU legal framework.

#20 Enforcement of the primacy of MR

Impacts:	
Utilisation	This option will directly raise utilisation rates of MR instruments throughout the EU.
Fundamental rights	Traditional MLA procedures allow Member States to examine an order for compliance with fundamental rights. The scope for this under MR procedures is much restricted. This could cause concern relating to fundamental rights. However, the ECtHR has ruled that states party to the ECHR cannot refuse to execute each others' decisions on fundamental-rights grounds. Thus, since all Member States are parties to the ECHR, the transition to MR should raise no fundamental-rights issues. (To say otherwise is to question the basis of mutual trust that underpins the very concept of MR.)
Ongoing costs	As per policy action #12.
Simplicity/coherence	This action will simplify the EU legal framework by eliminating a confusing and unnecessary choice between two alternative and very different approaches.
Barriers:	
Conferral	TFEU Article 82(1) on MR provides the necessary conferral of power. The question is whether it even need be exercised. Arguably, once Member States have transposed the existing legal framework on MR, they should also implement it in practice by ceasing to use the tradition MLA mechanism that it aims to replace. Clearly, there is currently little adherence to this view in practice.[220] Any such obligation will, of course, not be enforceable until infringement proceedings are enlivened pursuant to TFEU Protocol 36. For the avoidance of doubt, the EU could adopt the approach taken with the European Evidence Warrant, and proposed for the EIO, *viz* specifically stating that in the legal framework on MR that 'corresponding provisions' of the 1959 convention are replaced.
Assessment:	
Without intervention	The forced transition to MR is to some extent occurring *de facto* where certain Member States require their own practitioners to use the MR instruments where available and even (as in Finland) insist on this for incoming requests. This effectively forces practitioners in other Member States to gain experience using the MR instruments, promoting their further utilisation. This transition process is likely to be slow, however, due to inertia and the fact that the instruments are still not available between all Member States (see policy action #12 above).
With intervention	By contrast, the transition to MR will be almost immediate if the EU

[220] Finland is a notable exception, and may be contrasted with, e.g., Slovakia.

	suppresses the alternative MLA procedure; as noted in the analysis of policy action #20, this constitutes a **significant positive impact upon utilisation**. There may be inefficiencies in the short term (as practitioners are forced to acquaint themselves with new methods) but once this temporary effect has passed, all Member States will benefit from the streamlined MR procedures.

#21 Social reuse

Impacts:	
Social	Redistribution through social reuse has the potential to improve greatly public confidence in the criminal-justice systems in some Member States, whilst delivering compensation to dispersed victims. Unlike the other policy actions discussed above (which relate to specific objectives 1 to 4), this action (which relates to specific object 5) aims not to increase the amount of asset-confiscation activity, but rather – acting as a 'force multiplier' – to raise the social impact of this activity. EU-level action on social reuse would not affect those Member States that already have programmes in place (i.e. FR, LU, IT, PT, ES, UK and BG).[221] Other Member States may have mechanisms for disposing of certain types of asset (e.g. donating perishable foodstuffs) or systems that permit flexibility in extraordinary circumstances, but we know of no example where such systems have been deployed in favour of dispersed victims of deprived communities. Accordingly, we consider potential impacts in Member States not mentioned above (including Germany, where some systems at *Länder* level do not apply to the whole country). Our analysis builds upon the typology of organised criminal networks set out in Appendix A, taking into account existing social reuse programmes as an evidence base. Whilst we do not consider every Member State in detail, we consider Member States at various points along a spectrum of typologies. The potential benefits and costs of social reuse programmes have been described in Section 3.4.5. Whether or not these materialise in particular Member States will of course depend upon the nature of the mechanisms chosen by each Member State (we return to this later) as well as, generally, upon two factors. One of these is the **type of organised criminal activity** present in each Member State, in particular: • the degree of embeddedness of the organised criminal network in the local and national society, economy and polity; • the concentration of organised criminal activities in a given geographical area, local community and social group (e.g. young immigrants); • the nature of organised criminal activity, most notably the industry and markets of activities; • the methods used; and • the geographical spread of spending of organised criminal groups (e.g. where profits are invested or consumed). The other relevant factor is the **quality, regulation and implementation** of the social reuse programmes, in particular:

[221] Each of these countries has some mechanism for returning the proceeds of crime to dispersed victims or deprived communities. Section 3.6.5 discusses all of the social reuse schemes identified through desk research and fieldwork in more detail. The UK is perhaps a borderline case, because ARIS (described in Appendix G) returns money to government agencies involved in asset-recovery work without specifying how it is to be applied, and the Community Cashback programme is not funded on a permanent basis.

- systems for allocating confiscated assets according to the aims of the programme;
- transparency of procedures for liquidation and asset/fund management;
- safeguards against corruption and misuse;
- administrative and bureaucratic efficiency; and
- systems for managing non-liquidated assets productively.

Referring to the detailed theoretical and empirical discussions in Appendix A, we consider first the Member States in which organised crime is most embedded and concentrated as these provide the most fertile ground for social reuse programmes. We identify these as the Member States that host organised-crime groups of type IN-VI-SO, in which organised criminal networks concentrate on a given geographical territory and infiltrate the whole spectrum of legal and illegal economies, political life and social relations. Some Member States in this category already employ social reuse programmes; those with no such programme, but which host organised-crime groups either on a larger scale or in niches, are:

- Greece;
- Hungary;
- Lithuania;
- Romania; and
- Poland.

In **Greece**, in spite of the official view that corruption is non-institutionalised and rather infrequent, thorough academic analysis reveals that in fact the whole spectrum of political and economic life is permeated by corrupt practices linked to organised crime; both to the so-called underworld and the white-collar, politically embedded groups (CSD, 2010). The victims of this type of organised crime are probably too disbursed to be targeted effectively through social reuse programmes, but – given sufficient political will to combat corruption – there is the potential for social reuse (in combination with other appropriate policies) to amplify positive messages in high-profile cases. Greece is also home to certain immigrant communities (e.g. Pakistani and Kurdish) which are extensively infiltrated by lower-level organised-crime groups in control of local black labour markets and transit routes for illegal goods (Europol, 2009). Social reuse programmes could benefit these victimised communities.

Romania faces a similar organised-crime situation to Greece and Bulgaria in that the corrupting influence of these groups has permeated all important public institutions and sectors.[222] Organised crime strongly influences local and sometimes national policy-making, exerting considerable influence on larger communities by capturing public procurement and EU funds, often investing profits at home (e.g. luxurious palaces in poor villages) (Europol, 2009). It is not unusual for entire local communities to be in the hands of criminal groups controlling investment flows through corruption and intimidation. Social reuse has an obvious potential to benefit such communities, but the risks are considerable: a simple programme based on liquidating assets would be likely to result in assets flowing back to organised criminals (able to intimidate and outspend other potential buyers) at a fraction of their worth, whilst vesting assets in local authorities carries a very high risk of maladministration by corrupt officials. These risks call for a carefully designed, centralised system. Bulgaria, which has broadly similar organised-crime problems, has recently introduced a system based on the liquidation of assets, but with a proviso that assets can be directly applied where they cannot be realised for true value. This potentially provides a template for Romania,

[222] Nevertheless, it must be noted that a comprehensive review of Romanian organised crime and corruption is missing from the literature.

but will pay dividends (i.e. will not be worth the administrative burden unless) only if coupled with effective utilisation of asset-confiscation laws to generate a useful stream of recovered assets.

In **Hungary and Poland**, organised crime and its corrupting activities are considerably less widespread than in Bulgaria, for example. However, some markets, social groups and communities are highly affected. Reportedly, organised criminal groups use corruptive and violent means to influence the law-enforcement process, politicians (occasionally) and complete local communities through capturing public procurement and real estate investment (Europol, 2009). In Hungary organised crime rose in the early 1990s, mainly in the oil business – managed partially by domestic and partially by Russian criminal entrepreneurs (Varese, 2004). Since then criminal groups have expanded into the legal economy and established a vast array of businesses in arms manufacturing, banking and other sectors. Moreover, much of the profit, especially that of domestic criminal groups, has been invested and consumed in Hungary. More recently, scholarly research revealed sophisticated networks of white-collar criminals occasionally interacting with the underworld and exerting a corruptive influence on local-level policy-making in terms of urban development regulations, public procurement and public utilities. In Poland similar tendencies to those in Hungary are to be found, with violence more frequently used by organised criminal groups to exert influence (Europol, 2009). Both Hungary and Poland could benefit from a social reuse programme to assist victimised communities in extricating themselves from organised criminal influence and to restore legal entrepreneurial activities in some sectors.

Lithuania appears to be most severely touched by organised crime among the Baltic states, and in some respects it displays characteristics similar to Bulgaria and Romania. It hosts a number of criminal groups simultaneously engaging in multiple markets and influencing law-making and law enforcement, as well as wider communities (Europol, 2009). Lithuania's penetration by organised crime is also driven by the proximity of Kaliningrad, Russian territory, and its crucial role in linking Russian and Belorussian organised criminal groups to Northern and Western European markets and their criminal networks. The high exposure and concentration as well as the crucial interlinking role of Lithuanian-organised crime, provides support for a social reuse programme aimed at assisting social groups (e.g. the Russian-speaking minority) to develop their economic and social life independently of organised criminal groups.

Countries where organised crime is less widespread (typically typologies IN-LE and IN-SO) could also derive considerable benefits from social reuse programmes, especially where organised crime is concentrated in vulnerable communities or social groups. Countries (with no known social reuse programmes) that fall in this category are Germany, the Netherlands and Belgium. In **Germany**, the drug business is largely managed by wide networks based on familial and friendship ties within the Turkish community, which also sustain strong links to Turkey. Turkish criminal groups in Germany mainly play a role in heroin smuggling and trade within Germany and throughout the Western European criminal hub (Bundeskriminalamt, 2002: 26; Flormann and Krevert, 2001: 61–85; Europol, 2009). Similarly, in **the Netherlands and Belgium** organised criminal networks based in immigrant populations of Moroccan or Turkish origin play a crucial intermediary role in drug trade and other markets in the Western criminal hub as well as linking it to other EU criminal hubs and extra-EU sourcing territories (Europol, 2009). In each case, social reuse programmes could build confidence in the justice system and, thereby, weaken the support base of the groups in question. In the worst affected areas, social reuse programmes could enable the state to play a role in filling the economic void left by weakened organised-crime groups.

The foregoing analysis, based as it is upon a limited number of sources,

cannot hope to be comprehensive but it does demonstrate that there is considerable scope for beneficial social reuse programmes throughout the EU. There is, necessarily, a concomitant risk of corruption. As already noted, this risk is likely to be greatest precisely where the potential benefits of social reuse are also greatest. Overcoming this risk in a country such as Romania will require a carefully designed system with transparent decision-making procedures and other safeguards. Bulgaria's newly introduced system, for example, provides for central authorities to liquidate confiscated assets in favour of a social reuse fund. Assets cannot be sold for less than their value and, where this cannot be achieved, they can be directly granted for social purposes. Although the system is yet to be put into practice, it presents as a genuine attempt to ensure social reuse in a state that still suffers from high levels of official corruption.[223] However, it must be viewed in its domestic political context, *viz* the present government's platform against corruption and organised crime. Without political will (even that which is borne of populist motivations) it is questionable whether Member States would be inclined to build in appropriate safeguards, in which case social reuse programmes may amount to little more than new avenues for embezzlement and corruption.

An entirely different question hangs over those Member States with relatively low levels of organised crime, such as **Sweden, Finland and Denmark** (where motorcycle gangs pose the biggest threat).[224] In these countries the benefits of social reuse are likely to be comparatively low. Directly making use of confiscated properties will have less symbolic value because relatively few people will be familiar with criminal groups and their assets. Nor is organised crime so entrenched in the licit economy that economic vacuums are liable to form if it exits. Nor, moreover, do the citizens of these countries tend to lack confidence in their criminal-justice systems. On the other hand, in almost all Member States it is possible to identify victimised groups, and Sweden, Finland and Denmark are no exception (e.g. drug addicts, victims of drug-related violence, victims of motorcycle gang crime). This suggests scope for less wide-ranging social reuse programmes, perhaps resembling the drug-related programmes in Spain, France and Luxembourg. However, the added value of such programmes may be limited by the extent that advanced welfare states and their associated judicial systems already provide considerable support to victims of crime. Moreover, these Member States may have a tradition against hypothecating revenue, making EU-level interference even less justifiable.[225]

Another consideration is the inevitability of a degree of bureaucratic inefficiency, which has been the experience in both Spain and Italy, prompting reforms. With sufficient political will and sharing of best practice it should be possible to contain this within reasonable levels, provided the system makes use of suitably qualified personnel to allocate and manage assets and/or revenue streams.

Finally, it is necessary to consider the position of **Germany**, a highly federalist Member State with pockets of organised crime as described above, where the residual destination of recovered criminal assets are the *Länder* rather than the federal state. Germany cannot be expected to

[223] For this reason it has been praised by the Venice Commission [2009].

[224] See, e.g. http://www.politi.dk/NR/rdonlyres/82E19B50-E8AC-48E3-8A0E-8A58F64525F1/0/Organized_Crime_Denmark_2004.pdf (as of September 2012); http://www.poliisi.fi/poliisi/krp/home.nsf/pages/948D7C0222AFF54EC225779D003132C1?opendocument (as of September 2012).

[225] This is the case at least for Denmark; see Section 3.6.5.

	replace existing arrangements with a national scheme, but it may be possible for her to ensure that compliant systems are introduced at *Land* level.[226] Having reviewed the potential positive and negative impacts of social reuse for different types of Member States, it is important to consider the likely extent of implementation. In Member States with little appetite for social reuse programmes, this would probably be minimal, in the form of establishing an unobtrusive funding stream (e.g. the UK's 'Community Cashback' programme, which receives £4m annually) or even just by establishing a formal mechanism for assets to be granted for social purposes in the event that they cannot be sold for a reasonable price (it is difficult to argue that Member States should not at least have this tool available – even in Sweden, Finland or Denmark it is conceivable, for example, that an outlaw motorcycle gang might intimidate a community so that in the event that its clubhouse or other property was confiscated and put up for auction). In other Member States, action at EU level could encourage uptake of more ambitious schemes, as has recently happened in Bulgaria. This would open up the full range of potential benefits, but also the risks (i.e. maladministration in the form of bureaucratic waste and/or corruption). Indeed, creating a layer of bureaucracy almost inevitably has a cost in terms of efficiency; in both Italy and Spain practical difficulties regarding implementation have led to amendments to ensure better transparency and a more efficient process. This suggests that other Member States too may face such difficulties, but the Spanish and Italian experiences also provide a basis for the development of best practice, whether through the EU, interested Member States, non-governmental organisations (NGOs) and/or informal governmental and non-governmental networks. Moreover, even if corruption and waste are minimal, social reuse programmes will achieve nothing in the absence of confiscated criminal assets, necessitating a holistic treatment. In sum, social reuse programmes have the potential to bring about significant social benefits where organised crime is entrenched if carefully designed as part of a holistic strategy centred on utilising asset-confiscation laws. Even where this occurs, it may take several years for the benefits to materialise – Bulgarians, for example, still await tangible results from CEPAIA, which has been pursuing criminal wealth since 2006, and these results will flow only from sustained effort and political will. This does not mean, however, that unenthusiastic Member States – or Member States wholly different from Bulgaria – will be forced to introduce expensive bureaucracy for little gain, due to the flexibility inherent in the option considered. If hypothecation of revenue is anathema in Denmark, or if there is not yet sufficient political will in Romania, the option could be complied with in a more minimalist way by, for example, creating a transparent mechanism for assets to be directly applied to social purposes in circumstances where they are unable to be realised for full value. Such a mechanism, if carefully designed, could reside within a government ministry with relatively little potential for corruption and with very little administrative burden. In the event that it proved beneficial, it could be further developed into the future.
Implementation costs	Social reuse can involve a formal hypothecation of Member-State revenue, but (on the assumption that Member States which choose this are comfortable with the consequences) we shall here focus only on bureaucratic efficiency. In this regard, a social reuse programme will typically amount to additional bureaucracy. However, by ensuring that assets are not auctioned for less than their worth, or by displacing corrupt

[226] This question demands an examination of the constitutional division of powers within Germany.

	disposal practices, it can potentially add value. The balance will naturally differ throughout the EU depending upon the characteristics of Member States (i.e. administrative efficiency, organised-crime types and corruption levels). It should be noted that an efficient Member State with generally low levels of organised crime and corruption can opt for a minimalist approach to this policy action (e.g. simply ensuring that a mechanism exists to apply assets directly to social purposes in extraordinary circumstances); this would generate little additional cost. Overall, then, we predict **significantly variable direct economic costs** which, given the uncertainties, it would be speculative to attempt to monetise.
Barriers:	
Conferral	Article 82(2) allows the EU to adopt directives under the ordinary legislative procedure setting minimum rules on the rights of victims of crime, taking into account the different legal systems of the Member States. This provides a potential legal basis for social reuse, if a link to the rights of victims is made clear (i.e. facilitating compensation of dispersed victims, and/or ensuring that victims are not affronted by criminals being able to reacquire assets cheaply). However, a major barrier remains because Article 82(2) allows the EU to act only 'to the extent necessary to facilitate mutual recognition'. The link here is far from obvious, but because Article 16(4) of FD 2006/783/JHA permits Member States to agree not to apply the default asset-sharing arrangements (50/50 split) specified in Article 16(1) to (3), it could be argued that Member States would be assisted in coming to such arrangements by knowing how each other will dispose of the asset in favour of dispersed victims. An alternative approach is to use Article 83, allowing AROs, in addition to their present task, to administer or dispose of confiscated assets into social reuse programmes. The question of how criminal assets should be used is, however, remote from the definition of confiscation as a criminal sanction, making this a weak basis.
Proportionality	Proportionality is likely to be satisfied because Member States would be required to adopt mechanisms to achieve an end (disposal of assets so as to benefit dispersed victims) without specifying the nature (including which categories of victims) or extent (i.e. whether used routinely or only occasionally). Moreover, existing social reuse schemes would probably meet the terms of the option proposed.
MS compatibility	The emergency brake is available under both Articles 82 and 83 TFEU. Whether 'fundamental principles' are at stake depends on whether Member States have principles against hypothecation of revenue (e.g. a principle that all money recovered via judicial processes be returned to general state revenue). The only example of this uncovered by the data-gathering exercise is in Denmark, where there is a 'long standing practice that receipts to the State from whatever source are placed in the Treasury'.[227]
Assessment:	
Without intervention	There is a recognisable trend towards the adoption of social reuse schemes (Bulgaria being the most recent example), with debate encouraged by Moneyval, the FATF and international organisations (in particular, the Freedom, Legality and Rights in Europe – FLARE – network). It seems likely that this trend will continue, but certain Member States that have already considered and decided against a social reuse programme are quite unlikely to change their decisions in the short term.

[227] FATF (2006b): 963.

With intervention	Intervention by the EU will probably be met with minimalist responses in many Member States (e.g. a programme relating only to drugs, or an optional mechanism for social reuse in extraordinary circumstances). In many cases this may simply be the formalisation of discretions which already exist – although once formalised, increased utilisation is possible. It is also likely that some Member States will take the opportunity to introduce more wide-ranging social reuse programmes, resulting in a **significant positive impact upon redistribution**, but it would be speculative to attempt to predict in advance which these might be.

Appendix I. Asset recovery in the UK

Utilisation trends

As in other EU Member States, the UK's traditional approach to criminal justice has been to detect and prosecute offenders, punishing them with fines and imprisonment. This approach came under scrutiny following *R v Cuthbertson* [1980], in which a drug trafficker sentenced to a lengthy jail term retained £750,000 in proceeds because the prevailing forfeiture regime in the Misuse of Drugs Act 1971 was too narrow. This led eventually to stronger asset-recovery laws in the form of the Drug Trafficking Offences Act 1986 and the Criminal Justice Act 1988. These laws extended confiscation to all indictable offences and introduced value confiscation. Extended confiscation – a reverse burden of proof regarding the legitimacy of all assets acquired in the preceding six years – was introduced for drug offences and then generalised by the Proceeds of Crime Act 1995.[228]

Visible impacts can be expected to lag the introduction of such new powers for several reasons: it takes time for practitioners to learn how to use them; it takes time for cases to progress through the courts; and legal challenges will further slow the first wave of cases. Yet Levi and Osofsky reported in 1995 that confiscation powers were still being utilised only occasionally for drug crimes, and rarely for other crimes (Levi and Osofsky, 1995). Five years later, the Performance and Innovation Unit of the Cabinet Office reported that:

> In the last five years, confiscation orders have been raised in an average of only 20 per cent of drugs cases in which they were available, and in a mere 0.3 per cent of other crime cases. The collection rate is running at an average of 40 per cent or less of the amounts ordered by the courts to be seized. Specially tasked law-enforcement officers struggle to investigate the financial aspects of crime to support this effort, but their effectiveness is limited by their numbers and modest training.

This report's recommendations included a strategic approach aimed at incentivising asset-recovery work within practitioner communities, more resources for financial investigation and a 'new legislative attack'. The last of these took the form of PoCA, which consolidated existing legislation, tightened some aspects and introduced three new elements: an NCB 'civil recovery' power, an NCB cash seizure/forfeiture regime and new revenue powers to allow otherwise unrecoverable criminal profits to be taxed.[229] These new powers were given over to a new Asset Recovery Agency (ARA), while responsibility for conviction-based confiscation

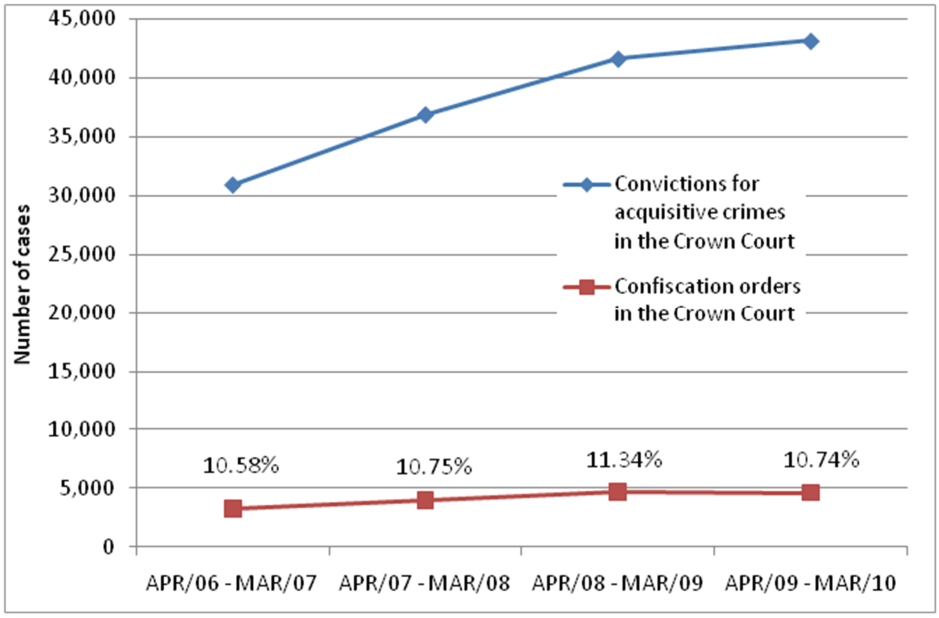
[228] This Act provided for extended confiscation wherever a 'course of criminal conduct' was identified.

[229] See PoCA.

work remained with police forces throughout the country. A year after the new legislation entered into force, a government report concluded that there were:

> pockets of excellent practice but that the overall application of the powers across England and Wales was patchy, with money laundering and confiscation seen as complex, specialist activities, divorced from mainstream business. Activity was often only targeted at the higher profile 'crime barons' and almost exclusively against drug trafficking, leading to failure to use PoCA to its full potential. Opportunities to combat those engaged in volume crime, street robbery and low-level drug dealing were being missed.[230]

Essentially, whereas ARA had embraced asset recovery as its *raison d'être*, it remained alien to the mindset of ordinary police officers and prosecutors. Part of the solution, beginning in April 2004, was to raise utilisation within all relevant government agencies through the Asset Recovery Incentivisation Scheme (ARIS), whereby 50% of the revenue stream generated by confiscated assets is returned to the agencies who played a role. Another part of the solution has been a concerted effort to train and deploy financial investigators. These efforts have led to increased utilisation, with more than 10% of Crown Court convictions for acquisitive crimes (fraud, burglary, drug trafficking, etc.) now resulting in confiscation orders.



Source: Data from JARD and other sources, collated by the National Policing Improvement Agency

Figure I.1 Utilisation in the UK Crown Courts, April 2006 – March 2010

Although a utilisation rate just above 10% may seem low, the effective utilisation rate will be somewhat higher because these total figures included cases in which a confiscation order would be inappropriate, either because there are no relevant proceeds (despite the offence being of an acquisitive type) or because there are known to be no recoverable proceeds (e.g. where the proceeds have been dissipated). Against this, there are also cases in which 'nominal' confiscation orders in the amount of £1 are obtained, to allow the issue to be reopened should proceeds be identified at a later stage.

[230] http://library.npia.police.uk/docs/hmcpsi/AssetRecovery.pdf (as of September 2012).

Another interesting point to note is that, in the last four years, recoveries in the Crown Courts have been rising in absolute terms (by an average of more than 12% a year) but not as a proportion of convictions for acquisitive crimes in the Crown Courts because these too are rising.[231] However, even though the 2006–10 Crown Court time-series data do not show an increasing rate of utilisation, a look at past statistics (e.g. the 0.3% utilisation rate for non-drug cases quoted above) suggests an increase in the wake of PoCA. Indeed, there is strong evidence of this in the form of hugely increased Treasury receipts, which reached £154m in the financial year 2008/09 (see Table I.2). This figure is, however, felt by the UK government to be still too low. In particular, a recent report has bemoaned the UK law-enforcement community's failure to 'mainstream' asset-recovery work. Significantly, it recognised that one of the main barriers may be profitability:

> There is a dichotomy between the need to mainstream asset recovery if the value recovered from confiscation is to grow significantly, and the risk that a move away from specialisation could dilute skills, knowledge and experience, and prejudice performance if it is not done in a carefully planned manner. One route out of the conflict would involve a significant commitment to training and performance management over a sustained period, in order to achieve the necessary shift in thinking amongst frontline staff in all agencies. Alternatively, the way forwards is to recognise that mainstreaming is unlikely to provide value for money, and focus resources where they will be most cost-effective, such as in expanded specialist units. There is also an argument for making the statutory process leading to a confiscation order more streamlined, so that orders take less time, and there are fewer procedural steps to take; this could improve the cost-effectiveness and the commitment to asset recovery at the same time.[232]

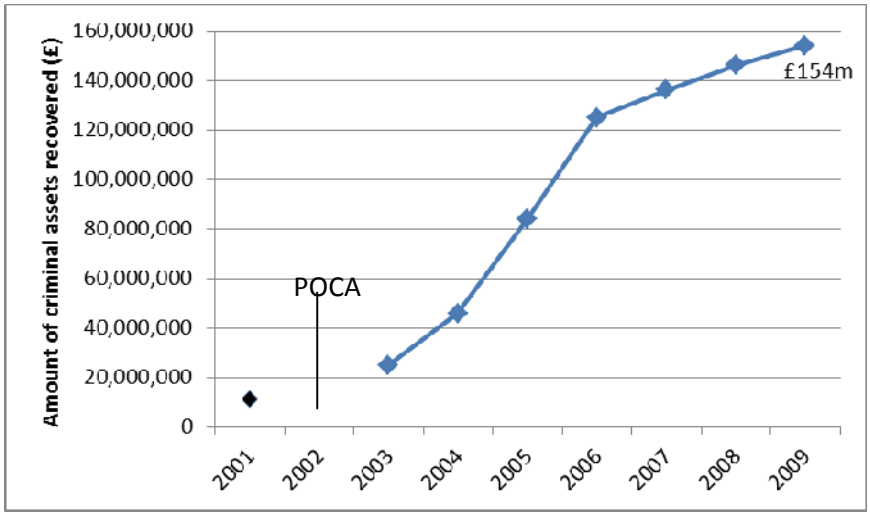
We now turn to consider the profitability of asset-recovery work in the UK. We take a narrow approach, looking only at the ongoing costs of asset-recovery work and the annual revenue stream generated, disregarding the value of any other potential economic, social and environmental benefits. We focus on ongoing costs. We lack the data to examine one-off costs, which we estimate to be small by comparison, especially given the period under scrutiny (i.e. several years after the introduction of PoCA).

Profitability analysis

The UK maintains a Joint Asset Recovery Database (JARD) which records all amounts finally recovered in favour of the state (though not those recovered in favour of victims). Records date back to the financial year April 2003 – March 2004 following the introduction of PoCA. Amounts are net of any management expenses payable to private receivers, but not of agency operating costs. The data show a clear upwards trend, reflecting increasing utilisation of powers in recent years, reaching £154m in financial year 2009/10.

[231] This is especially interesting because, with the exception of drug trafficking, the number of acquisitive crimes recorded in the UK has fallen during the relevant period. There are many possible ways to reconcile the statistics, but there is no need to do so here.

[232] Joint Thematic Review (2010), para. 2.13.



Source: UK Home Office 2003–9, interview estimate for 2001

Figure I.2 Assets recovered in favour of the state, England and Wales, 2001–9

In order to analyse profitability we now turn to consider the ongoing costs of asset-recovery work within the UK. In the absence of an equivalent system to JARD for recording costs, we examine the constituent parts of the UK's asset-confiscation apparatus. In many cases, the agencies concerned have a reasonably good understanding of their own costs, as there has been considerable emphasis placed on this politically.[233] Indeed, understanding costs is essential when negotiating the division of assets returned as incentives under ARIS.[234] In some cases, agencies have published information that directly addresses costs and profitability. In other cases, we base our estimates on expert opinions elicited through fieldwork with senior members of the agencies themselves. Using this information, we are able to estimate roughly the ongoing cost of the UK's asset-confiscation apparatus.

We begin by reviewing the main 'frontline' agencies involved in asset-recovery work, examining cost data available and making assumptions where necessary along the way.

- **Police authorities:** Police authorities are responsible for financial investigations in support of criminal confiscation proceedings pursuant to PoCA Section 6, and also (using their own legal representation) for the cash seizure/forfeiture procedure in PoCA Part 5. The UK has some 50 police authorities, all of which are more or less engaged in asset-confiscation work, using financial investigators who receive the standard training. The Metropolitan Police is by far the largest force. Data for the 2009/10 financial year show that it spent £10.7m on asset-confiscation activity –

[233] Prior to introducing PoCA, the UK government did an estimate of implementation costs. It has since maintained an interest in the costs and benefits of the legislation. Profitability is one aspect of this.

[234] Under ARIS, agencies receive 50% of amounts the recovery of which they are solely responsible for. Where responsibility is shared this amount is apportioned; e.g. criminal confiscation pursuant to POCA Section 6 involves contributions from the police authorities (financial investigation), the CPS (obtaining confiscation orders following successful criminal proceedings) and HM Courts Service (enforcement), and these agencies receive, respectively, 18.75%, 18.75% and 12.5% of the revenue.

including £500,000 funding for community programmes – whilst it had receipts of £10.9m generated by asset-confiscation activity itself (calculated under ARIS as 50% of forfeited cash plus 18.75% of conviction-based recoveries).[235] We assume similar levels of profitability for other police authorities.

- **Her Majesty's Revenue and Customs (HMRC):** HMRC has an equivalent role to the police authorities for cases within its area of responsibility. In the absence of publicly available data, we make the same assumption for profitability as for the police authorities (i.e. that it is equivalent to that of the Metropolitan Police).[236]
- **Serious and Organised Crime Agency (SOCA):** SOCA's asset-recovery work includes conviction-based proceedings arising from its own investigations into serious and organised crime (an equivalent role to the police authorities), NCB 'civil recovery' cases, exercise of revenue (taxation assessment) powers and, where it seizes cash in the course of an investigation, the NCB cash seizure/forfeiture process. The civil recovery and revenue work was previously undertaken by the ARA, which was merged into SOCA from 1 April 2008. As a *sui generis* entity administering a complex piece of legislation, the ARA was beset with lengthy judicial processes and never became 'profitable' in the sense that its costs exceeded the income stream from its asset-recovery work in all five years of its existence. Recently, SOCA's 2008/9 accounts have been audited in a way that specifically permits comparison with the work previously performed by ARA (civil recovery, taxation and some 'legacy' criminal confiscation cases).[237] In these comparable areas (which represent the majority of SOCA's asset-recovery work), SOCA recovered £20.2m at a cost (including receivers' fees) of £16.3m. Having not obtained any data regarding the profitability of the balance of SOCA's asset-recovery work (additional conviction-based cases), we assume an equivalent level of profitability.
- **Crown Prosecution Service:** The CPS brings conviction-based confiscation proceedings on the back of investigations by the police, HMRC and SOCA, and also works to enforce some of the more complex orders obtained.[238] On 1 January 2010 the CPS absorbed the Revenue and Customs Prosecution Office (RCPO), which

[235] http://www.mpa.gov.uk/committees/finres/2010/100923/07/#h1000 (as of November 2010).

[236] Data from 2008/9 suggest that HMRC recovers through conviction-based confiscation and NCB cash seizure/forfeiture in a similar ratio to the police authorities. This is important for their comparability as the seizure/forfeiture regime, by virtue of its simplified procedure, is more profitable overall. As regards conviction-based proceedings, those of the HMRC tend to be more complex and expensive to run, but they also tend to involve higher-value proceeds (although these are often too well hidden to be recovered).

[237] The results of this exercise have been tabled in Parliament, see: http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90720-wms0004.htm#column_WS163 (as of September 2012); SOCA's statement of accounts is useful in interpreting these figures: www.official-documents.gov.uk/document/hc0809/hc08/0870/0870.pdf (as of September 2012).

[238] Recent legislative amendments have given the CPS the power also to bring civil confiscation proceedings, but these are yet to be exercised.

previously brought confiscation cases on behalf of HMRC. Expenditure on asset-recovery work is not published; our own fieldwork (conversations with experts) suggests that it is approximately equal to CPS's share of ARIS revenue. An unpublished internal audit of RCPO undertaken prior to its merger with CPS suggested that its activities had previously been somewhat less profitable, though no figures are given.[239]

- **Her Majesty's Courts Service (HMCS):** HMCS enforces the majority of conviction-based confiscation orders. This work involved writing letters, fixing hearing dates, and then taking measures following the activation of default judgment by a magistrate. An unpublished study showed that in 2008/9 HMCS spent slightly less on asset-recovery work than the ARIS funding it received (at the rate of 12.5% of the value of the orders enforced).[240]

The roles of the agencies described above (which are the main agencies administering PoCA) are summarised in Table I.3. Our assessment of profitability may be summarised as follows:

- Police, HMRC, CPS and HMCS: approximately funded by ARIS funding.
- SOCA: recovers a little more than what it spends, but not enough to be funded through its share of ARIS.

Broadly speaking, there are two plausible explanations for SOCA's work being less profitable than that of the other frontline agencies.

First, mentioned already is that SOCA administers a *sui generis* regime which generates an additional legal burden as case law must be generated, at significant expense in terms of legal fees.

Second, SOCA generates less income through cash seizure/forfeiture powers than the other investigative agencies. These powers are more profitable than other powers because they involve abbreviated court procedures, with the entire 50% of ARIS funding going to the investigative agency.

A third explanation – higher overheads due to smaller agency size – is less relevant following the ARA's merger into SOCA.

Table I.1 Functions of frontline UK asset-confiscation agencies

	Investigation	Confiscation	Enforcement
Criminal confiscation (including extended) – PoCA s6	Police, HMRC, SOCA	CPS	HMCS, CPS
Civil recovery – PoCA Part 5 Chapter 2		SOCA	

[239] Joint Thematic Review, para. 6.12.

[240] Joint Thematic Review, para. 6.12.

	Investigation	Confiscation	Enforcement
Cash seizure/forfeiture – PoCA Part 5 Chapter 3		Police, HMRC, SOCA	
Taxation – PoCA Part 5 Chapter 6		SOCA	

Because the foregoing estimates are expressed as fractions of amounts recovered and ARIS receipts, an absolute cost estimate requires disaggregated recovery data. Data available for the 2008/9 financial year are provided in Table I.2.

Table I.2 Disaggregated Treasury receipts, FY 2008/9

Agency	Cash forfeiture	Confiscation (with CPS/HMCS)	Civil recovery and taxation	Total
Police	£27.51m	£54.03m	–	£81.54m
HMRC	£10.51m	£18.91m	–	£29.42m
SOCA	£1.78m	£10.05m	£16.83m	£28.66m
Other	–	£6.09m	£2.29m	£8.38m
Total	£39.80m	£89.08m	£19.12m	£148m

It can be seen that the non-SOCA share of confiscation work amounts to some £120m, including £8m 'other', which we will assume to be similarly profitable to work undertaken by the non-SOCA agencies.[241] Based on the foregoing assumptions, we therefore calculate the ongoing annual cost of asset-confiscation work performed by frontline agencies in the UK (specifically, in England and Wales) in 2008/9 to be:

$$119.34 * 0.5 + 28.66 * (16.3 / 20.2) = £82.8m$$

In the light of the numerous assumptions that have been made (in particular around the police authorities and HMCS), it is appropriate to express this amount as a range with ±15% uncertainty (i.e. between £70.4m and £95.2m).

To obtain a complete picture of the costs of the administration it is also necessary to consider other costs not borne by frontline agencies. The main such cost is that of an increased caseload for the court system.[242] This cost is not accounted for within the foregoing analysis, where the profitability analysis for HMCS refers only to enforcement work, and not the cost of hearing cases.

[241] Much of this is done by the Department of Work and Pensions. We understand from expert interviews that this work is likely to be no less profitable than that of other agencies.

[242] There are also some costs borne by the Home Office (e.g. maintaining the JARD database), but these are negligible in the context of this analysis.

We begin by considering criminal confiscation cases, which are typically heard in a Crown Court. In the absence of any more specific data, we assume that the cost of such a case is the same as the cost of the average Crown Court case.[243] In 2009 the Crown Courts dealt with 147,200 cases, ranging from guilty pleas to lengthy jury trials.[244] In 2007/8 the cost of operating the Crown Courts was calculated to be £382m.[245] This amounts to some £2,600 per case. Statistics for 2008/9 indicate that there were 4717 confiscation orders made in the Crown Courts that year; this amounts to a total cost of:

2,600 * 4,717 = £12.2m

In addition, it is necessary to account for the costs of civil confiscation cases and taxation cases (both brought by SOCA in civil courts), as well as for cash seizure/forfeiture cases. The former may be less costly to the court system than conviction-based cases because civil courts charge fees, with the aim of making civil procedure cost neutral to the state. The latter may also be less costly, because an abbreviated procedure is employed *vis-à-vis* conviction-based confiscation, and the cases are able to be heard in a magistrates' court, which has lower operating costs. On the other hand, these NCB cases have raised many new questions of law which have been appealed to higher courts, causing much additional delay and expense. Overall, therefore, we make the assumption that these cases present the court system with a similar level of cost to conviction-based cases. Applying a ratio of 148:89.1 (based on Table I.2) we therefore calculate the overall ongoing annual cost upon courts as:

12.2 * (148 / 89.1) = £20.3m

Again, in the light of the broad-ranging assumptions that have been made, it is appropriate to express this amount as a range with ±15% uncertainty (i.e. between £17.3 and £23.4m).

Summing frontline agency and court costs, we arrive at the following estimate of overall annual ongoing cost (and thus profitability, based on a known return of £148m) of asset-recovery activity in England and Wales for 2008/9. These calculations are set out in Table I.3.

Table I.3 Cost and profit calculations for FY 2008/9

Element	Low estimate		High estimate	
	Cost (m£)	Profit (m£)	Cost (m£)	Profit (m£)
Frontline agencies	70.4		95.2	
Courts	17.3		23.4	
Total	87.7	60.3	118.6	29.4

[243] On the one hand, much of the evidence for confiscation cases has already been heard in the context of the criminal proceeding, and there are no jury costs. On the other hand, these cases are sometimes heavily contested.

[244] Ministry of Justice statistics.

[245] http://www.nao.org.uk/idoc.ashx?docId=9db2d94f-0642-41f7-a697-334b2040ffdd&version=-1 (as of September 2012).

To be sure, this analysis has examined the profitability of asset-recovery activity for the financial year 2008/9 only; this is the sixth year after the introduction of PoCA and the fifth year after the introduction of ARIS. Receipts to the state in that year flow from a 'pipeline' of work which includes many cases commenced in previous years; similarly, many cases commenced in that year will not emerge from the pipeline until future years.[246] The time taken for cases to progress through the pipeline varies greatly: cash seizure/forfeiture cases in magistrates' courts typically take three to six months (and are often only lightly contested), whilst conviction-based cases in the Crown Courts may take several years (until appeal rights are exhausted), with convicted criminals often fighting hard to retain their wealth. An important corollary is that, whereas asset-recovery work in the UK appears now to be profitable, it was not necessarily immediately profitable in the wake of PoCA owing to the lag in building a pipeline of work from an initially low base, the costs associated with establishing the ARA from scratch, and the costs of answering the legal challenges that inevitably followed the introduction of novel powers. Unfortunately, whilst the ARA's financial statements are public, a lack of data for other elements of the system prevents us from estimating profitability in these early years.

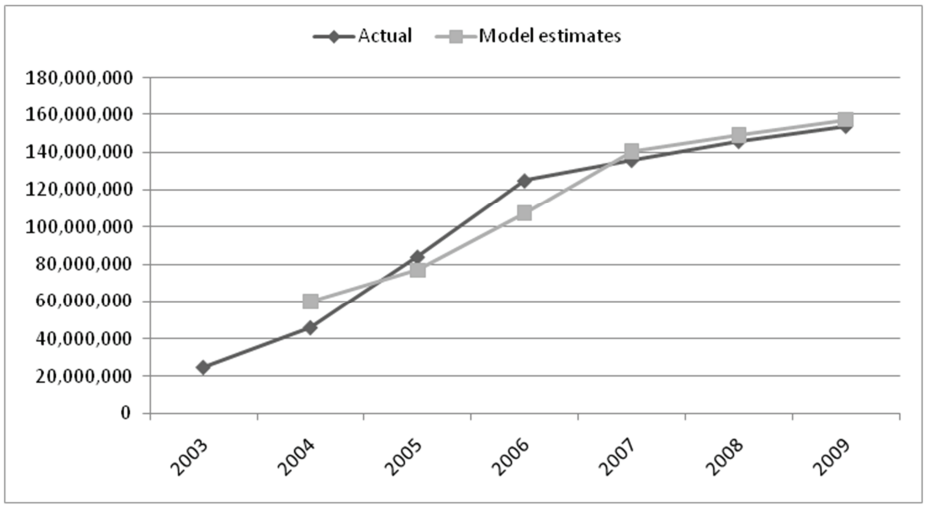
Future possibilities

We have seen that PoCA and the attendant focus on utilisation have led to increased asset-recovery work, the current level of which is profitable in the (narrow) sense that receipts into government coffers exceed the total cost of the work itself. For the purpose of impact analysis, it is useful to consider now the potential for continued growth. This requires estimates of future recoveries and costs.

Turning first to future recoveries, we begin by examining the time-series data available in order to estimate the relationship between past amounts collected and current amounts over the period from 2003 to 2009. Statistical tests suggest the amount recovered in the current year is correlated with the previous year's amount recovered.[247] As such, we regress the amount recovered in the current year on the amount recovered in the previous year (and a constant). Using the mean point estimate for the relationship, we compare the actual and predicted (or estimated) amounts of asset recovery in each year from 2003 to 2009. As shown in Figure I.3, we can see that the match between actual and estimated amounts is better in more recent years. There are any number of explanations for this, not least of which is the short time-series.

[246] In principle, given unlimited time and access to data held on JARD, it should be possible to reconstruct this pipeline for a more exact understanding of the system. However, it is not necessary to do this in order to assess profitability, given that the UK situation is not unusual (more complex cases will tend to take longer to determine finally in all Member States), and also given that profitability is generally assessed with reference to financial-year accounts.

[247] We test current year and one, two and three years previous. Tests do not find statistical significance with two- and three-year lags, possibly due to the limited time-series.



Source: authors

Figure I.3 Illustration of model estimates and actual values

Estimates suggest that we can be 95% confident that the mean proportion of last year's recovery associated with this year's is greater than 50% and less than 110%. Given that there are many uncertainties and other factors for which we have not accounted, we use this range (rather than the point estimate we used to compare our model to the actual amount recovered) to determine the possible range of amounts collected in the UK through to 2020. As shown in Figure I.4, we find that there may be between £80 million and £1.2 billion collected in ten years' time.

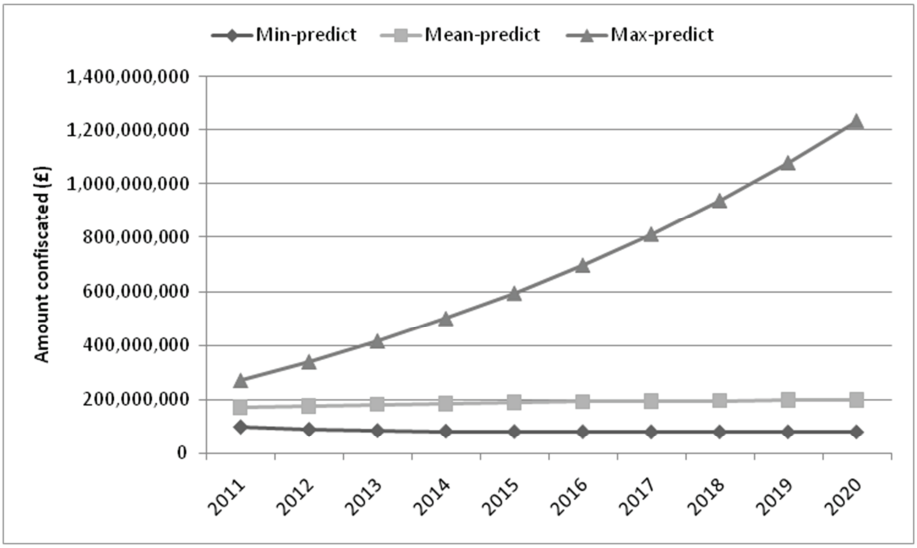


Figure I.4 Potential recoveries through to 2020, United Kingdom

Because these estimations are based purely on the time-series model, it is useful to discuss the type of scenarios which they represent. This is particularly so for the maximal prediction, which involves year-on-year increases that do not diminish with time, thus assuming not only that the pool of criminal assets available is large enough to support this, but also that the marginal return on additional investment remains constant. The first assumption seems likely to be true, given that the annual turnover of organised crime in the UK is estimated to be

£15bn, and given also that extended confiscation powers render previous years' gains liable to confiscation. The second assumption demands closer examination.

All of the frontline agencies involved in financial investigation and bringing confiscation proceedings have finite resources, necessitating selectivity. Managers and practitioners must decide how much confiscation work to undertake and also which cases to prioritise. These decisions should follow a harm-reduction ethos, which should involve (at least for police) differing approaches in different localities with different problems. Sometimes, authorities may take on unprofitable cases in order to deal with specific problems – an example from the UK (and other Member States) is the confiscation of expensive cars from low-ranking criminals in order to discourage crime within their communities. Generally, however, the very purpose of asset confiscation justifies focusing upon profitable cases (especially those where the assets are more readily recoverable), as the deterrent effect of confiscation orders is largely a function of the amount recovered.[248] A more cynical view is that ARIS may encourage agencies to focus on high-value cases at the expense of a harm-reduction ethos. In any event, it is reasonable to assume a bias towards 'low-hanging fruit' – that is, that the most profitable cases tend to be selected ahead of intractable or low-value cases.[249] All else being equal, this will cause the marginal (and overall) profitability of asset-recovery work to decline as more work is undertaken. Some countervailing trends will, however, tend to negate this effect. Frontline agents will become more efficient at identifying, freezing, confiscating and recovering assets owing to learning effects and economies of scale. Court processes will become more efficient for similar reasons, and also because legal challenges will be fewer as the law becomes more settled. Against these trends, success will be met with increased efforts to hide wealth (as criminals play the 'game' against the state, making asset-recovery work more expensive).

Ultimately there must come a point at which the profitability of asset-recovery work begins to decline (because all the low-handing fruit has been picked), and another at which further efforts are unprofitable. In the absence of a detailed model, however, we have no better guide than expert practitioner opinions. In this regard, whilst it is recognised that not every case of acquisitive crime will present an opportunity for profitable asset recovery (hence the doubt about 'mainstreaming' asset-recovery work expressed in the recent Joint Thematic Review, and discussed above), there seems to be a general consensus that much more could be profitably done. Some experts favour a more systematic use of money-laundering laws and confiscation laws to target top-tier criminals. Others consider that much could be achieved if police simply did 'more of the same' by employing more financial investigators in more of the existing investigations into known mid-ranking criminals. It is also believed that financial investigation exposes new crimes and criminals, increasing the pool of assets practically available to be targeted. These opinions have one thing in common: the view that a lack of

[248] The purity of this deterrent logic is questioned by some defence lawyers in the UK and other Member States, on the basis that confiscation proceedings constitute an oppressive interference against a defendant's capacity to defend criminal charges by diverting attention away from preparing a defence and into rearranging personal finances to deal with freezing orders. The suggestion is that confiscation proceedings are sometimes instituted for tactical reasons related to the goal of prosecution.

[249] This bias will not be as strong as one would expect from a rational decision-maker with perfect foresight; it is not always possible to know in advance which cases are ideal targets for investigation and prosecution.

trained financial investigators is a limiting factor, and will remain so into the foreseeable future.[250]

Turning now to potential future costs, these are plotted in as minimum and maximum scenarios. The data for 2008 are the low and high estimates in Figure I.5, with previous years' data (in the absence of any estimate) assumed to be in the same ratio, but reduced in proportion to the relative amount recovered in each year versus 2008. Looking forwards, the minimum scenario then assumes that costs remain at 2009 levels (i.e. that asset-recovery operations do not expand). The maximum scenario assumes instead that costs escalate at 15% per year as more and more financial investigators and other agents are hired, and more cases brought.[251]

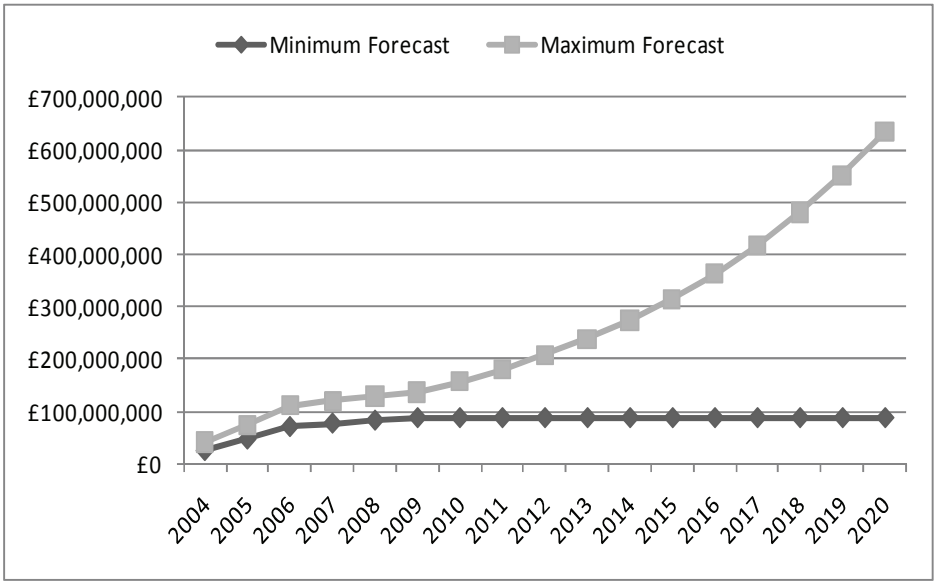
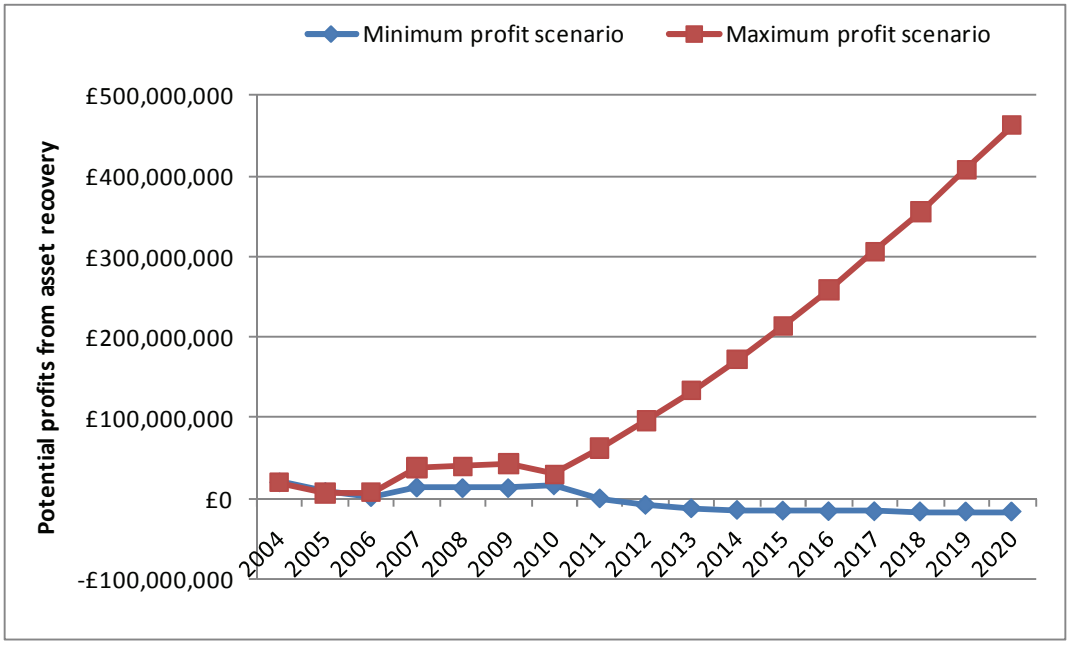


Figure I.5 Potential cost of asset recovery through to 2020, UK

Finally, we combine minimum and maximum revenue and cost forecasts to produce minimum and maximum profit forecasts, shown in Figure I.6. It should be remembered when interpreting these data that the maximum scenario assumes that there are no limitations upon the profitability of asset-recovery work through to 2020, whereas the minimum scenario assumes fixed costs and profitability which (pursuant to the formula derived from the historical time-series) declines and then plateaus.

[250] Paradoxically, there is evidence that, due to financial constraints, some police forces may lay off financial investigators in the near future, even though their work is profitable in the narrow sense considered here. The explanation is that ARIS returns only 50% of recovered revenues to frontline agencies, making it possible for asset-recovery work which is profitable to the UK government overall to entail opportunity costs for the agencies involved – i.e. if it is not sufficiently profitable to be self-financed from ARIS receipts.

[251] This reflects the actual increase in the number of persons trained as financial investigators (from 2283 to 2622) in the period from 2008/9 to 2009/10.



Source: authors' calculation

Figure I.6: Potential profitability to 2020, UK

Appendix J. EU-27 profitability model

This appendix produces profitability estimates for the EU-27 by using proxy indicators to generalise the UK estimate in Appendix G – an approach made necessary by the paucity of useful empirical data, especially as regards the cost of asset-confiscation work. This involves:

- devising a logic model by adverting to evidence available about the causes of (non)utilisation;
- identifying proxy indicators and available EU-27 data sets for the identified barriers and drivers within the model;
- using the proxy indicators to generate output from the model; and
- interpreting the output data.

It is worth reiterating the underlying assumption that the UK situation in 2008/9 approximates the potential impact by 2020 of the maximal policy option (without MR) upon a Member State with a currently low rate of utilisation. We shall return to the implications of this, and other assumptions, when interpreting the results.

Logic model

We begin with the basic equation that profit = income – cost. Lacking any EU-27 indicators of the cost of asset-confiscation work, we assume this to be a function of overall **administrative efficiency** in each Member State. Likewise, lacking any EU-27 indicators of the income generated by asset-confiscation work, we assume this to be a function both of **profitable criminality** (driving the amount of assets available to be confiscated in each Member State based on a given amount of investment) and **investment in policing** (representing the latent apparatus that each Member State is able to bring to bear upon asset-recovery work, as well as the level of commitment to combating organised crime). In addition, the overall size of Member-State economies has an impact on their asset-confiscation costs and revenues.

This simple logic is appropriate, given that research has revealed what would otherwise be a catastrophic lack of appropriate data. Had there been more time available, more investment could have been made in developing the suite of indicators and improving their reliability and validity. We shall return to this issue in our final recommendations.

Because the logic model assumes that the maximal legislative option approximates recent measures in the UK, it must be adjusted (in the case of the maximal legislative option incorporating MR) to account for the impact of increased utilisation of MR instruments (which has not formed part of the UK's approach). The basis of such an adjustment – which takes the form of an adjustment factor coupled with a sensitivity analysis – is that options

targeting MR will ease cross-border enforcement and thus raise the amounts recovered by each Member State. The extent of this depends, however, upon the status quo *ante*. In particular, Member States that rely upon NCB orders stand to enjoy a greater impact because they currently struggle to enforce these orders overseas (whereas, for conviction-based orders, the potential advantages of MR relate mostly to speed and efficiency rather than the more fundamental question of whether an order will be enforced). To account for this difference we double the adjustment factor for those Member States that currently rely upon NCB orders to a significant extent.

Two other potentially relevant factors are:

- the extent to which each Member State is a popular destination for organised-crime profits (relevant because under FD 2006/783/JHA the default position is that the executing Member State retains 50% of the value of the recovered asset); and
- the extent to which proceeds derived from crimes committed within each Member State tend to be retained at home, transferred elsewhere within the EU or transferred outside the EU.

As there are no reliable data for these factors, we do not take them into account in our analysis. Nevertheless, as a matter of logic and in line with the microeconomic decision model for the rational criminal (Appendix A), we suggest that Member States with relatively efficient law-enforcement systems are likely, all else being equal, to experience greater flight of illicit assets to other states. Conversely, Member States with less efficient systems will tend to have a greater inflow of criminal assets. In these countries, criminals are likely to seek ways to transfer their illegal (cash) wealth into the legal economy (Europol, 2009). An error factor in this prediction is the fact that in some countries organised criminal groups benefit from being culturally embedded in particular locations and from being a recognised 'brand' in the local economy. Where this is the case, organised criminal gangs tend to invest large proportions of their profits in the local community, thus reducing the level of capital flight that might otherwise be predicted.

Proxy indicators

The three basic components of the logic model (administrative efficiency, profitable criminality and investment in policing) demand internationally comparable proxy indicators. The proxies employed are outlined in Table J.1. We reiterate that these indicators refer to a whole country (e.g. quality of institutions) or a whole institution in a country (e.g. tax collection efficiency), and are but proxies for narrower concepts specifically impacting on asset-confiscation outputs for which EU-27 data are not available.

Table J.1 Components of the model for generalising profitability, with proxy indicators

Component	Proxy	Reason for inclusion	Source
Profitable criminality	Composite rule of law indicator (2007)	The rule of law indicator is a composite generated by the World Bank's unobserved components model. In essence, it rescales 80 individual indicators used to create the composite rule of law indicator and places them in common units. It then constructs the composite measure as a weighted average of the underlying individual indicators.	World Bank

Component	Proxy	Reason for inclusion	Source
	Costs of organised crime for business (2007)	Perceptions of businessmen about the costs imposed on their business by organised criminal groups are one of the best indicators available of the size of organised criminal business in a country. This is a proxy that is more specific than the rule of law indicator, but it neglects important aspects of organised crime. Thus, the two indicators complement each other in gauging the scope of profitable organised crime in a country.	WEF (2008)
Administrative efficiency	Wastefulness of government spending (2007)	Inefficient government spending is approximated by perceptions of businessmen who are major consumers of public services and thus well placed to formulate informed judgements.	WEF (2008)
	Aggregate tax collection costs to net revenue collected (2007)	Asset confiscation is a particular highly complex and costly form of tax collection. We argue that those states whose taxation systems are less cost effective will tend to resist additional pressures to improve asset confiscation unless it can be demonstrated that asset-confiscation regimes will always be profitable.	OECD (2009)
Investment in policing	Expenditure on public order and safety, PPP EUR per 100,000 citizens (2007)	General government expenditure on public order and safety as well as the number of police officers indicate the available capacities and sophistication of law-enforcement authorities for improved asset-confiscation work.	Eurostat
	Number of police officers per 100,000 citizens (2007)		Eurostat

These chosen proxy indicators reflect the constraints of this short project and suffice to provide headline results for immediate support of policy decisions. The list of indicators can easily be expanded and refined in the future in order to develop a more accurate model. Table J.2 reports the data as collected from the original sources per Table J.1. It should be noted that these data are for 2007, whereas the UK data are for the 2008/9 financial year. This does not represent an important shortcoming in our analysis as the institutional and environmental factors underlying asset-confiscation work – such as wastefulness of government spending – are stable over time.

For the subsequent data analysis and predictions these indicators are standardised using Z-scores where the sample mean is 0 and standard deviation is 1. Furthermore, the standardised values were transformed in order to eliminate negative values by adding to the absolute value of the lowest score plus 1 (to avoid adjusting by a factor of 0). By this means the variable values used for the analysis are rendered of comparable magnitude. They are also made positive while fully preserving the relative variance represented by them. This use of Z-scores eliminates bias caused by underlying variable distributions having different shapes. Table J.2 reports two variables additional to the proxies listed in Table J.1. The first is a purchasing power parity (PPP) variable to account for differences in price levels of Member States relative to the EU-27 average (in 2007), which is necessary for estimating law-enforcement costs in a comparable manner as labour and capital inputs have different prices in different Member

States. The second is a gross domestic product (GDP) variable which indicates the relative size of Member-State economies.

Table J.2 EU-27 country scores of drivers and barriers to enhanced asset-confiscation work

MS	Rule of law; –2.5 = lawless, 2.5 = lawful (2007)	Cost of OC for business; 7 = significant, 1 = insignificant (2007)	Govt spending; 7 = wasteful, 1 = efficient (2007)	Ratio of tax collection costs to net revenue (2007)	Public order spending per 100,000 citizens (EUR, PPP) (2007)	Police officers per 100,000 citizens (2007)	PPP within EU; EU-27 average = 100% (2007)	GDP at market prices, €m (2007)
BE	1.30	1.8	4.2	1.40	4836.9	360	108.3	335,085
BG	-0.08	4.2	5.2	1.29	2504.3	481	46.2	30,772
CZ	0.87	2.1	5.2	1.25	4120.3	421	62.4	127,331
DK	1.96	1.2	3	0.62	3079.5	193	137.4	227,534
DE	1.70	1.8	3.9	0.78	4570.9	305	101.9	2,432,400
EE	1.13	2	4.1	0.86	3532.0	242	73.1	15,828
IE	1.73	1.7	4.2	0.79	5738.8	290	124.5	189,374
HE	0.80	2	4.7	1.69	2679.4	454	90.7	225,540
ES	1.08	1.4	3.9	0.65	4908.8	469	92.8	1,053,537
FR	1.38	2.1	4.1	0.97	3526.6	371	108.1	1,895,284
IT	0.40	4.4	5.8	1.16	4576.5	178	102.9	1,546,177
CY	1.06	1.7	3.4	5.80	4881.8	647	88.1	15,951
LV	0.73	1.8	4.8	1.31	3685.1	364	66.6	21,111
LT	0.64	2.1	5	0.98*	2423.5	334	60	28,577
LU	1.76	1.5	3.4	1.18	5868.4	308	115.3	37,491
HU	0.88	2.4	5.7	1.15	2981.8	263	66.7	100,742
MT	1.58	1.3	4.1	0.97	2608.0	467	75.5	5,480
NL	1.74	2.1	3.2	1.11	6160.6	218	101.9	571,773
AT	1.93	1.4	3.7	0.64	4588.1	319	102.2	272,010
PL	0.41	3.5	5.3	1.42	2406.4	258	62	311,002
PT	1.01	1.5	4.4	1.41	2869.2	487	85.7	168,737
RO	-0.05	3	5.2	0.91	2193.2	211	63.8	124,729
SI	0.89	2.1	4.7	0.83	3467.5	392	79	34,568

MS	Rule of law; –2.5 = lawless, 2.5 = lawful (2007)	Cost of OC for business; 7 = significant, 1 = insignificant (2007)	Govt spending; 7 = wasteful, 1 = efficient (2007)	Ratio of tax collection costs to net revenue (2007)	Public order spending per 100,000 citizens (EUR, PPP) (2007)	Police officers per 100,000 citizens (2007)	PPP within EU; EU-27 average = 100% (2007)	GDP at market prices, €m (2007)
SK	0.49	2.6	5.2	2.41	3172.4	261	63.2	54,905
FI	1.86	1.3	2.9	0.77	3540.3	153	119.9	179,702
SE	1.86	1.7	3.3	0.41	4231.7	193	115.7	337,944
UK	1.66	2.7	4.7	1.10	7546.7	266	112.6	2,052,847

Equations

The predicted asset-confiscation profits were derived by combining the theoretical model with the cost and revenue estimates of the UK available. This has been done by assuming that asset-confiscation costs or revenues would surpass the UK's costs and revenues if the respective net drivers and barrier scores in the given Member State exceed the UK values (e.g. if the given Member State has a more efficient tax collection system than that of the UK, it is expected to achieve the same asset-confiscation revenue under lower costs, *ceteris paribus*). Comparison takes a linear multiplicative form (i.e. we assumed that drivers and barriers multiply each other's impacts). This is justified by the fact that achieving revenue from asset-confiscation work requires a series of institutions such as police, courts, financial investigators, and so on, in order to function properly simultaneously. For example, having an excellent judicial system in combination with zero investigative capacity will result in zero achievement.

By implication, the analytical model may be described by the following:

$$Profit_{MSi} = Revenue_{MSi} - Cost_{MSi}$$

where $_{MSi}$ refers to the *i*th Member State, and *Revenue* and *Cost* refer to asset-confiscation work in the financial year 2008/9.

Revenue of the *i*th Member State is generated in the following way:

$$Revenue_{MSi} = Revenue_{UK} * \frac{Profitable\ criminality_{MSi}}{Profitable\ criminality_{UK}} * \frac{Investment\ in\ policing_{MSi}}{Investment\ in\ policing_{UK}} * \frac{GDP_{MSi}}{GDP_{UK}}$$

where *Profitable criminality* $_{MSi}$ is the arithmetic average of the composite rule of law (2007) and the costs of organised crime for business (2007) indicators; *Investment in policing* $_{MSi}$ is the arithmetic average of expenditure on public order and safety (2007) and number of police officers per 100,000 citizens (2007) indicators; and *GDP* $_{MSi}$ is the gross domestic product at market prices in 2007.

Cost of the *i*th Member State is generated in the following way:

$$Cost_{MSi} = Cost_{UK} * PPP_{MSi} * \frac{Administrative\ efficiency_{MSi}}{Administrative\ efficiency_{UK}} * \frac{GDP_{MSi}}{GDP_{UK}}$$

where *Administrative efficiency* $_{MSi}$ is the arithmetic average of wastefulness of government spending (2007) and aggregate tax collection costs to net revenue collected (2007) indicators. Simple arithmetical averages are used when aggregating constitutive indicators because we lack reliable knowledge about the relative importance of each indicator; arithmetic average assigns equal weights to each indicator.

Modelling outputs

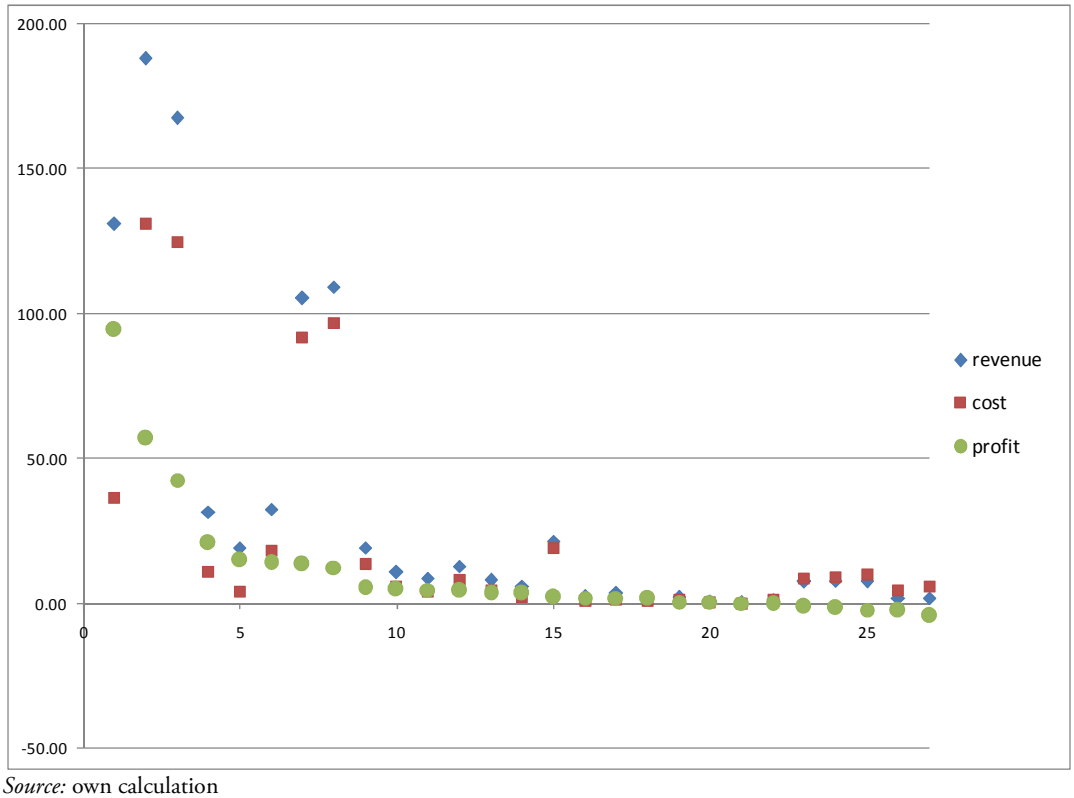
These equations yield the predicted asset-confiscation revenue, cost and profit figures per Member State, as highlighted in Table J.3 and Figure J.1.

Table J.3 Predicted profits for the 'maximal' legislative option, EU-27

Member State	Revenues (€m)	Costs (€m)	Profit (€m)
Spain	131.00	36.57	94.43
UK	188.08	131.08	57.00
Italy	167.56	124.86	42.70
Poland	31.66	10.87	20.79
Czech Republic	19.21	4.27	14.94
Netherlands	32.49	18.33	14.15
France	105.42	91.92	13.49
Germany	109.13	96.73	12.40
Greece	19.24	13.80	5.44
Bulgaria	10.78	5.77	5.01
Romania	8.89	4.12	4.77
Portugal	12.88	8.32	4.56
Hungary	8.02	4.43	3.59
Slovakia	5.85	2.38	3.47
Belgium	21.39	19.22	2.17
Lithuania	2.74	0.75	1.99
Slovenia	3.43	1.45	1.98
Latvia	2.37	0.76	1.61
Cyprus	2.11	1.49	0.62

Member State	Revenues (€m)	Costs (€m)	Profit (€m)
Estonia	1.00	0.48	0.53
Malta	0.26	0.18	0.08
Luxembourg	1.48	1.51	-0.03
Sweden	7.67	8.62	-0.96
Austria	7.74	9.27	-1.53
Ireland	7.66	9.89	-2.23
Finland	1.99	4.33	-2.35
Denmark	1.73	5.79	-4.06

Source: own calculations



Source: own calculation

Figure J.1 Distribution of predicted revenues, costs and profits across EU-27 Member States, 2008/9, million EUR

As may be seen from the above table and graph, enhanced asset-confiscation work would yield positive financial profits in all but five EU Member States. Due to imprecision of the data and the restrictive assumptions used to arrive at predictions, we recommend using a less

refined scale categorising Member States into three broad groups (Table J.4). This categorisation summarises not only the absolute predicted profit per EU Member State, but also the predicted relative profitability of their efforts understood as the ratio of asset-confiscation revenues and costs.

Table J.4 Profitability of the 'maximal' legislative option, EU-27

Member State	Categorisation	Profit ratio (profit/cost)
Czech Republic	highly profitable	3.50
Lithuania	highly profitable	2.63
Spain	highly profitable	2.58
Latvia	highly profitable	2.12
Poland	highly profitable	1.91
Slovakia	highly profitable	1.46
Slovenia	highly profitable	1.37
Romania	highly profitable	1.16
Estonia	highly profitable	1.11
Bulgaria	moderately profitable	0.87
Hungary	moderately profitable	0.81
Netherlands	moderately profitable	0.77
Portugal	moderately profitable	0.55
Malta	moderately profitable	0.46
UK	moderately profitable	0.43
Cyprus	moderately profitable	0.42
Greece	moderately profitable	0.39
Italy	moderately profitable	0.34
France	moderately profitable	0.15
Germany	moderately profitable	0.13
Belgium	moderately profitable	0.11
Luxembourg	not profitable	-0.02
Sweden	not profitable	-0.11

Member State	Categorisation	Profit ratio (profit/cost)
Austria	not profitable	-0.17
Ireland	not profitable	-0.23
Finland	not profitable	-0.54
Denmark	not profitable	-0.70

Source: own calculation

The analysis thus far has not yet accounted for a crucial aspect of the maximal option which transcends national borders: increased utilisation of MR instruments. As this is a significant aspect of the proposed set of policy options, we are bound to comment on this important issue.

There are, unfortunately, no data that would allow us to gauge the potential or actual magnitude of utilisation of MR either across the whole EU or per individual Member State. We have therefore been forced to rely on a range of potential parameters in order to scope the magnitude of impact of MR on profitability. It is assumed that Member States where NCB confiscation constitutes a considerable proportion of asset-confiscation work can benefit relatively more (double the benefit derived by other Member States) from strengthened MR as their scope for alternative solutions is more limited currently. Countries which are considered as such are:

- Bulgaria;
- Ireland;
- Italy;
- Romania; and
- UK.

In the following sensitivity analysis, we assume that MR would increase the revenues of asset confiscation, but would also entail a modest increase in costs. We assume that the former outweighs the latter in a 10:1 ratio, reflecting the fact that by the time assets have been traced to overseas locations, most of the investigative effort has been spent, permitting it to be treated as a sunk cost when analysing the marginal benefits brought by utilisation of MR instruments. Parameters used in sensitivity analysis are shown in Table J.5.

Table J.5 Range of parameters used in the sensitivity analysis

Scenario	Profit aspect	Predominantly conviction based	Significant NCB element
5%	Revenue factor	1.050	1.100
	Cost factor	1.005	1.010
10%	Revenue factor	1.100	1.200
	Cost factor	1.010	1.020
15%	Revenue factor	1.150	1.300
	Cost factor	1.015	1.030

Scenario	Profit aspect	Predominantly conviction based	Significant NCB element
20%	Revenue factor	1.200	1.400
	Cost factor	1.020	1.040
25%	Revenue factor	1.250	1.500
	Cost factor	1.025	1.050
30%	Revenue factor	1.300	1.600
	Cost factor	1.030	1.060
50%	Revenue factor	1.500	2.000
	Cost factor	1.050	1.100

Note: The cost factor is assumed to be 10% of the revenue factor and the NCB regimes have double factors compared to the conviction-based regimes.

The results of the sensitivity analysis show that the already profitable countries would benefit the most from utilisation of an efficient and effective system of MR (Figure J.2). Results are less promising at the other end of the scale; however, four Member State become profitable upon consideration of MR impacts, *viz*:

- Luxemburg (5% scenario or higher);
- Sweden (15% scenario or higher);
- Ireland (20% scenario or higher); and
- Austria (25% scenario or higher).

Figure J.2 presents revenue, cost and profit data adjusted to account for MR. The 5%, 15% and 50% scenarios are shown.

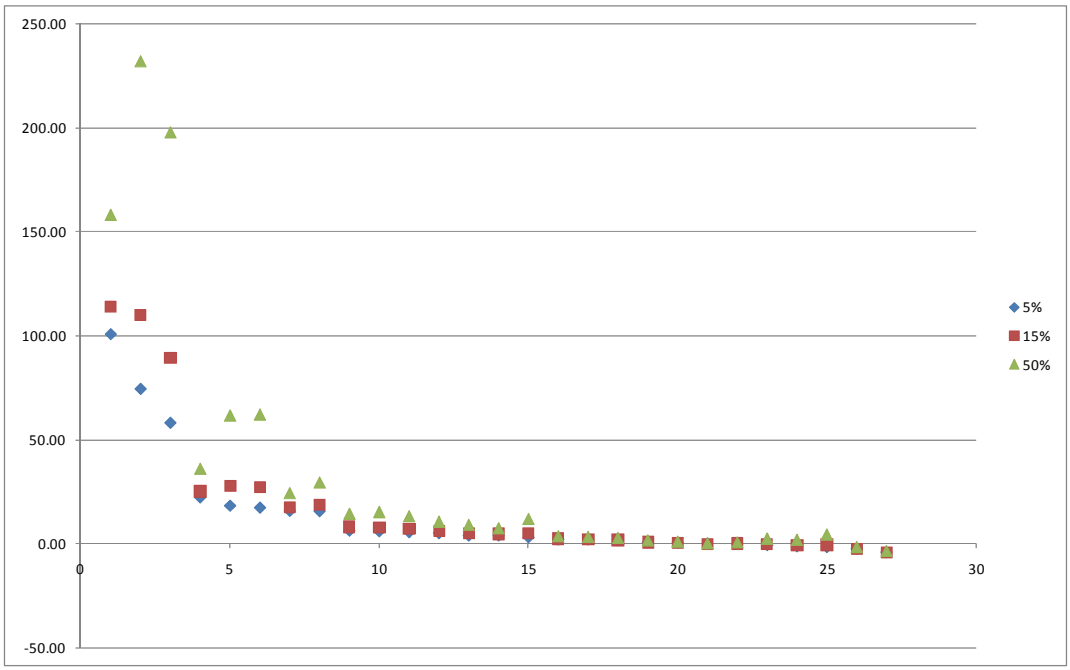


Figure J.2 Profitability for EU-27, including MR

General points of interpretation regarding validity

Our profitability analyses, as already noted, presume increasing utilisation over time, in the absence of which asset-recovery work is likely to be less profitable. However, whilst some policy actions are designed to raise utilisation directly, we do not necessarily regard these policy options as sufficient. Rather, they represent steps which the EU is able to take in the context of the legal framework on the confiscation and recovery of criminal assets. These mostly target political will, but there are also some important practical considerations which fall outside the scope of the EU legal framework. These include the need for greater financial investigation capacity to generate system throughput (i.e. cases in the 'pipeline'). This requires training which, in turn, requires infrastructure and an up-front commitment of resources. This, according to many practitioners with whom we spoke, represents a significant barrier to increased utilisation (especially in Eastern Europe where there were, accordingly, questions raised about our policy action #17). Expansion of financial investigation capacity is, however, not just a matter of quantity, but also of quality. In addition to resources, there is a knowledge-input requirement, which presents as a significant barrier in Member States that do not yet have sophisticated financial investigation capacities. Both of these areas are potentially apt for EU-level intervention in support of the options under consideration in this study.[252]

It can be argued *pro tem* that Member States in the highly or moderately profitable categories may directly benefit from adopting an enhanced asset-confiscation system with a similar cost-benefit structure to the UK in 2008/9. However, this does not mean that Member States with different political-administrative systems cannot adopt different institutional solutions to become profitable or increase their profitability despite our findings. In this regard, it should be reiterated that all of our proxy variables refer to country level or country institutional level characteristics – that is, we could not employ asset-confiscation specific indicators and thus could not take into account the specific characteristics of asset-confiscation work compared to the wider law-enforcement environment.

It should also be remembered that unprofitability in the narrow sense considered here does not imply that Member States will not achieve a net economic benefit once higher-order impacts are taken into account, to say nothing of the value of social and environmental benefits.

General points of interpretation regarding timing

The foregoing analysis centres on a point in time (April 2008 – March 2009) during which there is reasonable availability of UK cost data. As already noted, these data reflects six years of effort to raise utilisation following the introduction of PoCA, prior to which utilisation was minimal, as discussed in Appendix G. Several important points flow from this.

First, whereas asset-recovery work in the UK was profitable in the year considered, it does not necessarily follow that it was profitable in each of the preceding six years. In fact, the opposite is likely to be as true of the UK as of most Member States, because results take time to

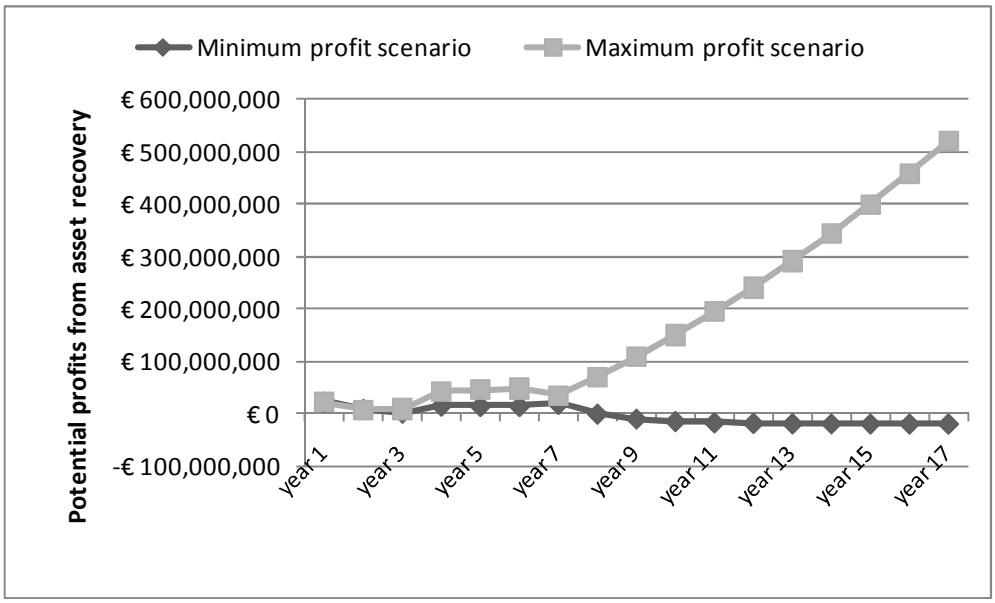
[252] This is already acknowledged within the EU. Consider, e.g., recommendation 4 in Section 6.2 of the Council fifth-round report on the UK: 'the role and powers of financial investigators as well as their training system need to be presented at EU level and taken into account when common EU standards or training projects are being developed'.

manifest as cases progress through the system resulting, finally, in valuable assets vesting in the state. Costs, on the other hand, will be more evenly distributed as capacity is continually added; they may even be greater in the early stages as new policies are implemented and, perhaps, new agencies set up.

Second, the predicted impacts may take more or less time to manifest in other Member States than in the UK. This is a question that involves each aspect of a state's asset-confiscation apparatus, from time taken to increase financial investigation capacity, to the time taken for a case to progress through the judicial system, to the time taken for assets to vest finally in the state. As we are mainly focused here on the question of *whether* asset-recovery work is potentially profitable, we do not make further adjustments to the data.

Third, the fact that utilisation was previously minimal is critical to interpreting the EU-27 profitability results properly. Essentially, it means that Member States can achieve the predicted results from a standing start. By implication, Member States that have already begun to uplift utilisation could exceed the predicted outcome.

Fourth, the foregoing model, fixed as it is upon one point in time, does not predict what happens next. Whilst it seems reasonable to assume that profitability does not suddenly decline, we have attempted to take account of uncertainty in developing a rough (minimum/maximum) prediction for future profits in the UK. This is presented as Figure J.3, with the 2008/9 data for UK (converted to €) at year 6. The projections thus represent what could happen in a country with an asset-confiscation operation the same size as that in the UK; they can be scaled to account for different-sized operations. In any event, the uncertainty involved is so great that the projections are unlikely to assist policy-makers.



Source: authors' calculations per Appendix G, performed in £ and converted to € using the 2009 average annual exchange rate from the European Central Bank as of 11/8/2010, €1 = £0.891

Figure J.3 Annual profit predictions for UK asset-recovery work

Specific points of interpretation

The proxy indicators upon which our results are based can now be used to interpret the results. We focus here on those Member States which, according to the profitability model, are moderately profitable or unprofitable. According to the data available and the theoretical model developed, the reasons for negative or moderate are essentially threefold. They are presented, together with country examples, in Table J.6.

Table J.6 Main causes of negative profitability and potential remedies

Reasons for negative or moderate profitability	Relevant indicator	Country examples	Potential remedy
Low level of potential asset-confiscation revenue			
Not enough assets to confiscate	• High level of rule of law • Low level of reported interference of organised crime	Finland, Denmark	• Not available
Not enough capacity to confiscate	• Low number of police officers • Low spending on public order and safety	Slovenia, Estonia, Lithuania Romania, Hungary	• Increase capacity by training or spending more • More efficient utilisation of available resources
High cost of asset confiscation			
Questionable levels of efficiency in financially oriented law enforcement	• High level of wasteful government spending • Low efficiency of tax collection	Belgium, Greece, Portugal	• Create specific organisations dedicated to asset-confiscation work where efficiency is higher than average public service

Source: own categorisation

However, we reiterate that due to a number of restrictive assumptions, the narrow focus of the proxies available and the form of the theoretical model, some countries may do much better than predicted by this model. For example, in Ireland asset-confiscation work by the specialist CAB has proved to be profitable, partly due to a very effective utilisation of revenue powers (i.e. the ability to levy income tax owed against undeclared income in cases where its illicit origin cannot be proved).[253] The work of the CAB is, however, complemented by that of local police officers. Because the capacity of the CAB is limited, there is a strong focus in Ireland on 'mainstreaming' local asset-recovery work in this way, but the profitability of this component is not known. Nevertheless, the Irish example shows that Member States may be able to establish profitable specialist agencies irrespective of the profitability of mainstream asset-recovery work.[254] On the other hand, our very promising results for Spain are difficult to reconcile with the opinion of one expert whom we interviewed that Spain's (Napoleonic) system of enforcement through local courts makes it very difficult to recover assets cost effectively. This may suggest that our proxy indicator for administrative efficiency takes too

[253] See data from CAB annual reports, presented in Appendix A. These data have not been fed into our profitability model for two reasons: because they do not represent the whole of the Irish asset confiscation apparatus (they only include work done by CAB and even then do not include court costs and enforcement costs), and because the Irish NCB system (administered by CAB) employs a seven-year lag between assets being confiscated and realised, making profitability at a given point in time difficult to estimate from the data available.

[254] The Netherlands is another example of a Member State that has established a profitable specialist agency, specifically, the Bureau Ontnemingswetgeving Openbaar Ministerie (BOOM), which is profitable according to the website of the Openbaar Ministerie (public prosecution) – although figures to support this claim are not provided.

little account of enforcement mechanisms and/or efficiency within the judicial system. This is an aspect of our model that warrants further research.

In any case, we draw attention to an appropriate way to interpret the foregoing rankings. Non-profitability as estimated here flows from certain deficiencies in the Member State involved. Whilst our profitability analysis may disregard many potentially relevant factors (including any factors unique to particular Member States) this does not mean that Member States cannot benefit from attending to any deficiencies that are factors in our analysis.

Appendix K. Economic impacts

This appendix extracts from literature some data on the costs of crime. These data are included to give an indication of the scale of the phenomenon, but for the reasons set out in Section 6.3 it is inapt for quantitative analysis.

Studies show crime has direct and indirect costs to the societies of Europe (Bichot, 2010; Czabański, 2009; Dubourg *et al.*, 2005; van Dijk and de Waard, 2000). Economic costs of crime are generally defined as 'the costs imposed on individuals, households, businesses or institutions by crimes they suffer directly (private costs) and wider impacts on society as whole through, for example, responses to perceived risk of crime (external costs)'.

Estimates of the economic cost of crime may include the following:

- **Private and external costs:** Private costs are those imposed on individuals, households, businesses and institutions. External costs are wider impacts on society, such as fear of crime.
- **Tangible and intangible costs:** Tangible costs are those which are relatively easy to quantify in money terms. Intangible costs are more difficult to measure and quantify.
- **Direct and indirect costs:** Direct costs are those sources diverted from other uses as a result of crime (e.g. health costs of treating injuries). Indirect costs are loss of earnings and productivity (e.g. from time off work to recover).

The methods of generating these costs vary as well. For example, an American study compared estimates for the cost of crime with two methods – accounting based and contingent-valuation – to find relatively large variation with a standard deviation of nearly $3.5 million (see estimates in Table K.1).

Table K.1 Costs of crimes, estimated by different methods

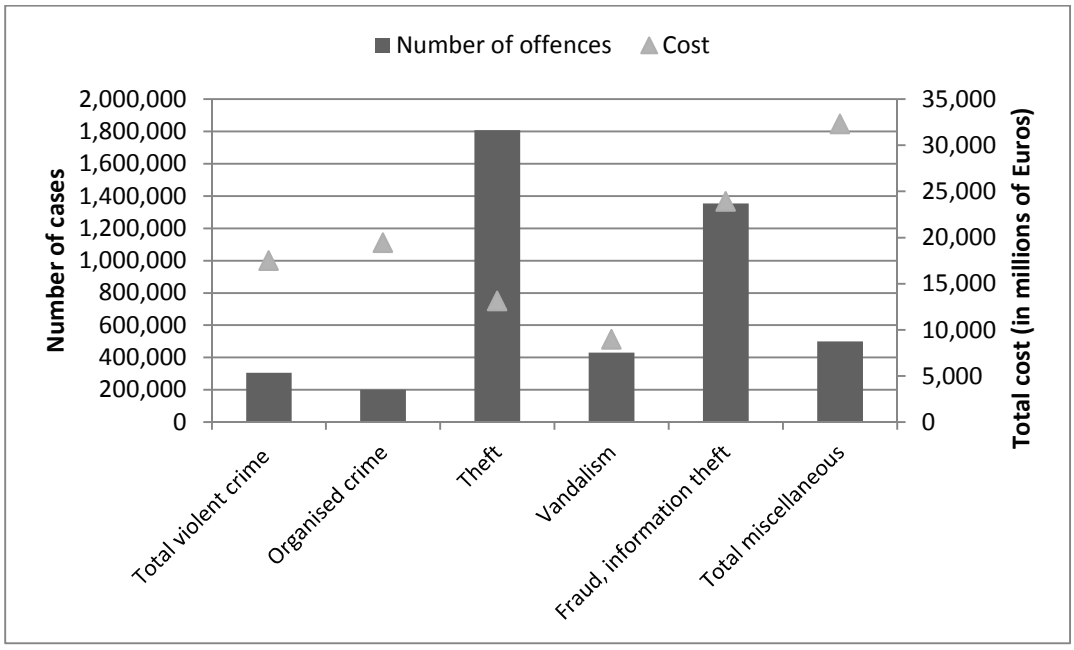
Source: Heaton (2010)

	Accounting-based methods		Contingent-valuation method	Average
	Cohen and Piquero (2009)	French, McCollister and Reznik (2004)	Cohen, Rust *et al.* (2004)	
Homicide	5,000,000	9,339,330	11,608,317	8,649,216
Rape	150,000	219,973	283,626	217,866
Robbery	23,000	51,117	127,715	67,277

	Accounting-based methods		Contingent-valuation method	Average
	Cohen and Piquero (2009)	French, McCollister and Reznik (2004)	Cohen, Rust *et al.* (2004)	
Serious assault	55,000	122,943	83,771	87,238
Burglary	5,000	4,370	29,918	13,096
Larceny	2,800	1,478	N/A	2,139
Motor-vehicle theft	9,000	9,158	N/A	9,079
Total	5,244,800	9,748,369	12,005,632	9,045,911

For several Member States we have identified studies examining the costs of crime.

France: One recent study attempts to quantify the total economic and social cost to France for various offences including illegitimate business – for example, pimping/prostitution, drug offences, other trafficking and counterfeiting – which it calls 'organised crime' (Bichot, 2010). The study finds that in 2009 the total cost to society for recorded offences of organised crime was over €16bn;[255] with over half of this amount coming from drug and pimping/prostitution markets (see Figure K.1). It may be seen that there are more theft cases than organised-crime cases, but that the latter cost far more.



Source: Bichot (2010)

Figure K.1 Cost of crime and number of cases, by crime type, France, 2009

[255] It is important to note this is only for offences recorded and therefore an underestimate where some cases are not reported.

Using the categories as defined by Bichot (2010), the largest proportion of cases within the category of organised crime is drug related, whilst the largest costs are in drugs and pimping/prostitution (see Table K.2).

Table K.2 Costs of organised crime, France, 2009

	Number of cases	Total cost (in millions of Euros)
Pimping/prostitution	2000	5280
Illegal immigration	20,000	615
Drug	178,700	5350
Counterfeiting	.	3000
Various trafficking	.	1,900
Total	200,700	16,145

Source: Bichot (2010)

Poland: Czabański (2009) estimates the costs of the crimes in the International Crime Victim Survey (ICVS),[256] both for victims and for the criminal-justice system. The total cost of crimes to the victims and criminal-justice system in 2003 was approximately €5.8bn.

Table K.3 Cost of crimes, Poland, 2003

Type of crime	Total cost (in millions of Euros)
Violent crimes	
Loss of life	
Homicide	414
Homicide – special cases	29
Assault leading to death	104
Negligent manslaughter	106
Death by dangerous driving	1454
Total criminal deaths	2107
Assaults and robberies	
Assault with injuries where victims sought medical help	1184
Assault with injuries but no medical help needed	342
Assault with no injuries	76
Robbery	368
Total assaults	1996
Sexual crimes	
Rape	.
Sexual assault	.
Total sexual crimes	600
Total violent crimes	4703
Property crimes	

[256] http://rechten.uvt.nl/icvs/ (as of September 2012).

Type of crime	Total cost (in millions of Euros)
Theft	702
Burglary	342
Total property crimes	1044
Total	5747

Source: Czabański (2009). Original values were expressed in 2003 PLN (Polish Zloties); we use the average yearly exchange rate for 2003 – which is €1=3.8898 PLN – in the document.

UK: The cost of crime in the UK in 2003 has been estimated at £36.1bn (€52.16bn, in 2003 prices).[257] This was a decrease of 9.4% from 2000, during which period, it may be noted, the UK introduced PoCA.

Table K.4 Total cost of crime (£ millions), 2003 prices

	2000	2003
Violence against the person	12,489	13,288
Homicide	1528	1997
Wounding	10,961	11,291
Serious wounding	1773	1629
Other wounding	9188	9662
Sexual offences	10,552	8464
Common assault	3559	2666
Robbery	2747	2436
Burglary in a dwelling	3317	2877
Theft	5517	4193
Theft – not vehicle	1714	2001
Theft of vehicle	2135	951
Theft from vehicle	1439	1071
Attempted vehicle theft	229	169
Criminal damage	1727	2242
All crimes against individuals and households	39,908	36,166

Source: Dubourg *et al.* (2005). Note that the methods applied in 2000 and 2003 are the same.

Disparities across countries may be due in part to differences in the value of money, recording practices and crimes considered. The figures nevertheless show that all of these countries have a real challenge regarding financial and welfare losses to society resulting from crime.

In terms of costs uniquely to the criminal-justice system, van Dijk and de Waard (2000) compared the Netherlands to other countries using a top-down approach.[258] Table K.5 shows the annual cost of crime on both per crime and *per capita* bases.

[257] Using the exchange rate of €1 = £0.69199 for 2003 provided by the European Central Bank; accessed on 1 October 2010.

Table K.5 Total public expenditure on the criminal-justice system, 1998 prices

	€ per inhabitant	€ per crime committed
Austria	243	759
Netherlands	223	354
Germany	196	.
Sweden	177	395
Denmark	166	.
France	165	366
UK	274	449
Canada	243	506
USA	379	742
Australia	212	.

Source: van Dijk and de Waard (2000)

[258] Costs are calculated by considering the budgets of departments working in crime and criminal justice (i.e. to prevent and prosecute crime).

Appendix L. Social impacts

This appendix reviews literature in search of two key relationships. First, we search for evidence of a relationship between asset confiscation and organised crime, or crime in general. Next, we search for evidence of impacts of and upon 'social capital'.

Relationship between asset confiscation and organised crime

With the aim of understanding better the macro-level relationship between asset confiscation and organised crime, we conducted a targeted literature review aimed at identifying any potentially relevant studies. This covered the key economics and financial research databases EconLit and RePEc (to ensure coverage on asset recovery) and Criminal Justice Abstracts (to ensure coverage on criminality and asset-recovery laws). For more information about these databases, see Table L.1. This data-capture strategy is proportionate to the scope of this assignment, but is clearly not exhaustive even when added to the results of the other fieldwork. In particular this kind of systematic search strategy will only identify publically available information. It is almost inevitable that some information will emerge as a result of this report either to reinforce or refute our conclusions, notwithstanding the generally high level of cooperation received from Member-State practitioners contacted in relation to this study.

Table L.1 Bibliographic databases

Title	Comments
EconLit	The American Economic Association's electronic bibliography EconLit indexes more than 30 years of economics literature from around the world. Compiled and abstracted in an easily searchable format, EconLit is a comprehensive index of journal articles, books, book reviews, collective volume articles, working papers and dissertations.
RePEc	The largest bibliographic database dedicated to economics and available freely on the Internet. Over 950,000 items of research may be browsed or searched, and over 825,000 may be downloaded in full text. This site is part of a large volunteer effort to enhance the free dissemination of research in economics. There have been 2,308,511 abstract views in September 2010 alone.
Criminal Justice Abstracts	Comprehensive coverage of international journals, books, reports, dissertations and unpublished papers on criminology and related disciplines. The database contains indexes and summaries of international journal articles, books and governmental and non-governmental reports on a wide range of topics in criminal justice.

Table L.2 provides information regarding the search in terms of findings and from where the sources used were derived. After reviewing the articles for relevance in terms of discussing

crime and asset confiscation, we identified six relevant articles. We discuss these further below.

Table L.2 Summary of findings for targeted literature review on asset confiscation and crime

Database or journal	Key words	Number of hits	Sources used
EconLit	'asset confiscation', 'confiscate', 'confiscation'	3	none
RePEc	'confiscation + crime',	10	Buscaglia (2008); Murphy (2004)
Criminal Justice Abstracts	'confiscation', 'asset recovery', 'confiscate'	22	Levi and Osofsky (1995); Jacquemart (1984)
Web of Science*	'confiscation', 'asset recovery', 'confiscate'	16	Sproat (2007); Nelen (2004)

Source: authors. * Exclusion criteria includes subject areas of 'Criminology & Penal', 'Law, 'Social Issues, 'Sociology' and 'Social Sciences- interdisciplinary'

We now summarise and critique the most relevant of the identified literature, which unfortunately does not establish a reliable basis for estimating the impact of asset-confiscation activity on crime / organised crime.

In an economic theoretical analysis of the relationship between crime and confiscation, Murphy considers 'confiscation' as a crime (i.e. theft) and as an activity of the state (i.e. taxation) (Murphy, 2004). The author finds that if the economy cannot prevent confiscation either through crime or by the state, long-term growth is no longer possible. The study demonstrates that unless theft can be made sufficiently unattractive, it becomes increasingly tempting as the economy grows. One limitation to Murphy's framework is of particular importance here: if confiscation is interpreted as government activity (i.e. taxation, asset-confiscation legislation), it may be justified, in part, as necessary to limit the effectiveness of crime (Murphy, 2004); however, this aspect is not captured in the model. Essentially, the model does not include the productivity of confiscation.

In a qualitative criminological analysis of an actual change in 1993 in the Dutch Criminal Code to remove assets from criminal organisations, Nelen examines the results of a shift in investigation and prosecution practices from the traditional offender-based approach to one of the offender-based and proceeds-based approach (Nelen, 2004). The author discusses how weak policy theory and lack of expertise among law enforcement resulted in limited assets recovered. Nelen suggests criminals have such strong techniques for concealing criminal activities, and law enforcement is so undertrained, that criminal activities will carry on; criminals would simply 'write off' the expenses as the risk of doing criminal business and pass on the costs to their customers.

In a qualitative study which nevertheless uses published statistics to describe the UK experience with PoCA, Sproat (2007) examines impacts on crime and organised crime associated with the introduction of PoCA to enhance anti-money laundering and asset-confiscation processes and capabilities. The author draws links between PoCA and criminal

activities in two ways: (a) comparing the possible size of the criminal economy and the number of asset-recovery cases, and (b) comparing the main type of cases (illicit drugs) to changes in indicators for that type of crime (i.e. prices of drugs). The author concludes that PoCA has observably changed criminal behaviour, but not the amount of criminality (Sproat, 2007: 183). Given that the proportion of proceeds of crime confiscated may be less than 1% (0.3-0.7%),[259] the incentive to reduce criminal activities for fear of losing less than 1% of proceeds is unlikely to be strong enough to deter criminality on the whole.

Returning to the number of asset-recovery cases post-PoCA, Sproat conducted content analysis on the cases published by the UK's Concerted Inter-Agency Finances Action Group.[260] Using a precise definition of organised crime by Levi and Maguire (2004), 1.7% of the publicised cases could be classified as involving organised crime (Sproat, 2007). This illustrates that asset confiscation applies to crime generally rather than only to organised crime, although it is possible that a relatively narrow definition of 'organised crime' was employed. Certainly the line between organised crime and ordinary crime is not always clear, making quantitative analysis challenging since a concept must be similarly understood across regions and time.[261] As a former Secretary of State for the Home Department of the UK, Tony McNulty, said in July 2006:[262] 'There are no commonly recognised definitions of serious and major crime ... Corresponding figures for organised crime are not collected centrally.'

Undeterred by these challenges, Buscaglia follows sociological good practice by developing a composite indicator formed of several variables, which he uses to perform time-series analyses within and between states. The author assumes population distributions for the key variables are normally distributed (a challengeable assumption) and performs a multiple regression analysis for the composite index and four other crime and criminal-justice variables. No theoretical framework is provided. This makes it very difficult to interpret the results as there is no clear indication of which variables are considered to be independent in the analysis and which are considered to be dependent. It appears that each country has a computed value for the change in the composite index variable over a designated period (as the author says that the regressions are performed on 107 countries and regression outputs indicate 107 observations), in which case the analysis is based on cross-country changes with one data point for each country (a questionable procedure in this kind of analysis). The critical asset

[259] Using figures reported by the author for the potential range of £19bn to £48bn of the annual proceeds of crime (in 2003) and amount confiscated of £143.25m (in 2006). The author does not account for the fact that assets denied to criminals exceed assets recovered in favour of the state; e.g. UK asset-recovery data are discounted for some costs (receivers' fees) and do not account for assets recovered in favour of victims rather than the state. However, based on conversations with experts, we do not believe that this would more than double the recovery estimate, which would thus remain a tiny fraction of organised criminal turnover.

[260] A coordinating body for agencies involved in asset-recovery work. including courts, law enforcement and prosecutors.

[261] It is well acknowledged that crime and criminal justice statistics, definitions and legal systems vary across countries (and even within a country over time); in order to perform quantitative analysis, studies are guided by statistical offices providing data to examine changes in countries over time; e.g. Eurostat states '[a]s a general rule, comparisons should be based upon trends rather than upon levels, on the assumption that the characteristics of the recording system within a country remain fairly constant over time' (Eurostat, 2009).

[262] In written answer to Tim Farron; Hansard, 3 July 2006.

forfeiture variable in the regression appears to be one value per Member State for the amount collected over the period 2004–6. There is no means available for validating this choice. Moreover, the author does not control for any contextual factors in the regions that affect both organised crime and asset forfeiture (such as economic conditions, political context and social factors). It is therefore difficult to see how the relationship claimed between the organised-crime indicator and the forfeiture indicator has been established in this work.

In any event, the author concludes that a 10% increase in asset forfeiture leads to an 8% reduction in organised crime. The exactitude of this conclusion compared with the laxity of the assumptions made in order to make the analysis possible is provocative, but illustrates how econometric research in this field might be developed by successive refinement of data and assumptions. However, it should be noted that this is a crude signpost of the way forwards and should not be mistaken for anything more definitive, especially not by policy-makers looking for accurate guidance.

Relationships to social capital

We reviewed social impacts associated with crime in general and organised crime in particular. We focused on 'social capital' as one of the major measurements of social impact, but we also looked at the close derivatives of the social capital concept such as corruption, income inequality, threat to national wealth and threat to traditional social networks. Various forms of social capital and its impact upon criminal behaviour as well as the impact of crime upon social capital and other related associations were considered. We also looked at the associations between social capital and victimisation, and social capital and asset confiscation. Social cost of crime as an indicator of a burden of crime upon society was also considered.

Both academic and grey literature was reviewed in our searches. We performed a targeted literature review using Google Scholar and Google. In order to broaden our search we also engaged a 'snowballing' approach in which seemingly relevant articles in the references section were searched. We are aware of the fact that a snowballing search is not considered entirely impartial; however, under the circumstances – in which little literature directly associated with our searching aims was found – it seemed appropriate to extend the search by using the snowballing method. The key searched words were: 'organised crime', 'crime', 'social capital', 'impact', 'social impact', 'consequences of organised crime', 'asset confiscation', 'consequences of asset confiscation', 'victim compensation', 'association between social capital and crime', 'increases in organised crime', 'organised crime and society', 'violent crime', 'civil society', 'accumulating assets' and 'illegal assets'. We reviewed a large number of abstracts returned by these searches. Only the ones directly relevant to this literature review were included in the references.

We did not locate any studies dealing directly with the way social capital is affected by increases and decreases in organised crime or victimisation associated with organised crime. In addition, no studies on the associations between confiscated assets and social capital were found. Some relevant literature on the associations between crime and social capital was located.

One of the possible reasons behind the lack of studies on the subject is the difficulty of the conceptual definitions of the terms 'organised crime' and 'social capital'. Organised crime is a broad concept embracing various forms of criminal activity. Shelley (1995) provides a good description of the organised-crime issue:

> The complexity of transnational organized crime does not permit the construction of simple generalizations; there is no prototypical crime cartel. Organized-crime groups engage in such widely publicized activities as drugs and arms trafficking, smuggling of automobiles and people and trafficking in stolen art. They also engage in such insidious activities as smuggling of embargoed commodities, industrial and technological espionage, financial market manipulation and the corruption and control of groups within and outside of the legal state system. Money laundering through multiple investments in banks, financial institutions and businesses around the globe has become a central and transnational feature of these groups' activities, as they need to hide ever-larger revenues …

Thus, measuring the impact of organised crime as a whole is difficult since different forms of criminality are embedded in the general concept of organised crime and each could have different impacts.

Social capital is also a difficult concept: 'social capital is not a homogeneous concept but comprises various social elements that promote individual and collective action' (Lederman *et al.*, 2002). It can be measured via such non-survey indicators as membership and participation in voluntary secular and religious organisations, contributions to charity, electoral turnout and blood donations, and by such survey indicators as levels of trust between community members. The absence of social trust can be measured by such indicators as divorce rates and population heterogeneity.

Hence, measuring both the impacts of organised crime and social capital is doubly problematic. However, this area of research is developing fast. At present the focus is on the relationship between social cohesion / capital values and levels of crime. The research literature largely relates to social engineering experiments in deprived communities aimed at preventing rises in crime rates or at reducing crime rates from a high level.

Table L.3 Summary of literature research

Source	Topic discussed	Impact of interest
Violent Crime: Does Social Capital Matter? – Daniel Lederman, Norman Loayza and Ana Maria Menendez, by World Bank (Lederman *et al.*, 2002)	The relationship between crime and social capital is multifaceted: social capital can have a crime-reducing effect or it can lead to more violent crime (e.g. gangs, ethnic clans); crime may diminish social capital or it may increase it (community organises to fight crime). The prevalence of trust on community members has the significant effect of reducing the incidence of violent crime. Income inequality and *per capita* GDP growth also determine violent crime rates.	Social-capital indicators: • prevalence of trust on members of the community; • membership and participation in voluntary secular and religious organisations.

Source	Topic discussed	Impact of interest
The impact of social capital on crime: evidence from the Netherlands – I. Semih Akcomak and Bas ter Weel (Akçomak and ter Weel, 2009)	Differences in social capital account for a significant part of the differences in crime rates. History is the main determinant of the present outcomes. The differences in crime rates may be traced back to historical differences in social capital.	Social-capital indicators: • contributions to charity; • electoral turnout; • blood donations; • trust and membership in associations; Absence of social-capital indicators: • divorce rates; • population heterogeneity.
Community structure and crime: testing social disorganisation theory – Sampson and Groves (Sampson and Groves, 1989)	Trust enables communities to take action and cooperate with the police.	Social-capital indicators: • trust between community members.
Neighborhoods and violent crime: a multilevel study of collective efficacy – Sampson, Raundenbush and Earls (Sampson *et al.*, 1997)	Lower crime rates in the areas with high social capital. Social disorganisation leads to more crime.	Social-capital indicators: • collective efficacy.
Social capital, income inequality, and firearm violent crime – Bruce P. Kennedy, Ichiro Kawachi, Deborah Prothrow-Stith, Kimberly Lochner and Vanita Gupta (Kennedy *et al.*, 1998)	Income inequality and social capital, when controlling for other factors such as poverty and firearm availability, have a profound effect on firearm violent crime.	Social-capital indicators: • membership of voluntary groups; • level of social trust; • Income inequality.
Social capital and homicide – Richard Rosenfeld, Steven F. Messner and Eric P. Baumer (Rosenfeld *et al.*, 2001)	Depleted social capital contributes to high levels of homicide.	Social-capital indicators: • voting; • organisational membership.
Crime, social capital, and community participation – Susan Saegert and Gary Winkel (Saegert and Winkel, 2004)	Impact of violent crime on social capital and involvement in neighbourhood organisations. Social capital is more strongly related to participation in community organisations and churches than is crime.	Association between crime and social capital.
Disorder and decline: crime and the spiral of decay in American neighborhoods – Skogan (Skogan, 1992)	Increased disorder fosters social withdrawal and constrains cooperation among neighbours.	Association between crime and social capital.

Source	Topic discussed	Impact of interest
Neighborhood responses to disorder and local attachments: the systematic model of attachment, social disorganization and neighbourhood use value – Taylor (Taylor, 1996)	People living in neighbourhoods experiencing more crime were more attached to and involved in their neighbourhoods than those living in lower crime neighbourhoods.	Association between crime and social capital.
Theft of the nations – the structure and operations of organised crime in America – D.R. Cressey (Cressey, 1969)	Organised crime provides illicit goods and services by corrupting officials.	Corruption of public officials.
Street corner society: the social structure of an Italian slum – W.F. Whyte (Whyte, 1981)	Cooperation between rackets and political organisations.	Corruption of public officials.
Mafia markers: assessing organized crime and its impact upon societies – Jan van Dijk (van Dijk, 2007b)	Although some types of organised crime may bring in some revenues, tolerating organised crime implies means racketeering and grand corruption in government.	Threat to national wealth and threat to state.
The roots of Russian organised crime: from old-fashioned professionals to the organized criminal groups of today – Serguei Cheloukhine. (Cheloukhine, 2008)	Organised-crime groups become the state; organised-crime groups and corrupt government work together.	
Snakeheads, mules, and protective umbrellas: a review of current research on Chinese organised crime – Sheldon X. Zhang and Ko-lin Chin (Zhang and Chin, 2008)	Criminals exploit established networks and behave like ordinary people.	Threat to traditional trustworthy networks.
The international crime victims survey and complementary measures of corruption and organised crime – Jan van Dijk (van Dijk, 2007a)	The perceived prevalence of organised crime and the overall ICVS rates of victimisation by volume crime was found to be unrelated (r<0.01, p>0.05), which indicates that the levels of organised crime and volume crime are determined by different factors. There is a need to develop separate indicators of complex (organised)	Victimisation

Source	Topic discussed	Impact of interest
	crimes.	
Sam Brand and Richard Price, *The Economic and Social Costs of Crime* (Brand and Price, 2000)	Costs are incurred in anticipation of crimes occurring (such as security expenditure and insurance administration costs), as a consequence of criminal events (such as property stolen and damaged, emotional and physical impacts and health services), and as a consequence of responding to crime and tackling criminals (costs to the criminal-justice system). The emotional and physical impact of violent crime on victims is potentially the biggest gap in assessment of the cost of crime.	Cost of crime.

Despite the fact that most countries have legislation on combating organised crime in place, no research has been conducted on the evaluation of organised crime reduction and preventative measures. Such measures are mostly measured via a form of direct outputs, such as number of arrests or the amount of assets confiscated, but not in terms of the overall impact and social impact in particular. 'As in law enforcement generally, operational success has typically been measured by the activity indicator of number and quality of arrests and number of organisations disrupted' (see Gabor, 2003, and Appendices A and B), perhaps supplemented by large headline figures such as funds seized and accounts frozen in different countries. The lack of systematic before-and-after or comparison-based studies makes it hard to conclude or even to plausibly expect there to have been much impact on organised-crime levels, however measured (Levi and Maguire, 2004). It is also suggested that there is a need for developing special separate indicators for measuring such complex crimes as organised crime. Traditional measuring techniques do not provide sufficient results. For example, they show no association between organised crime and overall rates of victimisation (van Dijk, 2007a).

The impact of organised crime: threat to society

Organised crime creates great dangers not just to the lives of its victims or informants but to the whole society in general. Criminals have developed sophisticated techniques that make it difficult to trace their illegal activities. Many of their activities resemble legitimate activities and they provide goods which are demanded by society. For example, they use money obtained through criminal activity to buy legitimate businesses as well as to provide goods and services initially obtained by corrupting officials (Cressey, 1969). Organised criminals have learnt to exploit traditional trustworthy networks which they infiltrate and thus present themselves as ordinary citizens (Zhang and Chin, 2008). By corrupting public officials criminals attempt to involve themselves in political organisations in order to gain legitimate power and influence (Whyte, 1981). On the whole, the main threat to national wealth and the stability of the state is via corruption in government and racketeering, which destroys the basis of civil society (van Dijk, 2007b). Organised-crime groups threaten to become the state by insinuating themselves into government bodies (Cheloukhine, 2008).

The association between social capital and crime

Higher levels of social capital tend to be associated with lower crime rates and lower levels of social capital to be associated with higher crime rates.

As such, higher social capital is associated with a higher cost of committing crime, but the high cost of committing crime means that the probability of committing it becomes lower (Akçomak and ter Weel, 2009). Well-organised neighbourhoods with high social-capital levels are associated with lower violent crime rates, whereas disorganised communities experience more such crime (Sampson *et al.*, 1997). High levels of trust within communities lead to more cooperation with the police (Sampson and Groves, 1989).

Differences in social capital account for a significant number of differences in crime rates. One of the studies concludes that on average a one standard deviation increase in social capital would reduce crime rates by 0.32 of a standard deviation. This implies that the inclusion of social capital explains about 10% of the total variation in crime rates (Akçomak and ter Weel, 2009). The level of exact quantification in this context needs to be treated with extreme caution.

Depleted social capital, on the other hand, contributes to higher homicide rates (Rosenfeld *et al.*, 2001). Increased disorder within neighbourhoods fosters social withdrawal and constrains cooperation among neighbours, leading to higher levels of crime (Skogan, 1992).

The World Bank study concluded that the relationship between crime and social capital is multifaceted: it can either have a crime reducing effect or lead to more violent crime (Lederman *et al.*, 2002). The latter is probably associated with so called 'bonding social capital', which refers to links mainly or exclusively among members of the same group (e.g. gangs). The type of social capital which produces crime reduction effects is referred to as 'bridging social capital' – that is, the links among members of different groups (e.g. various community members). Bonding social capital may reduce overall social capital by restricting interaction among groups of different types, particularly between those with high criminal membership and those without.

A small number of studies located looked at the impact of crime upon social capital. The World Bank study pointed that crime may either diminish social capital or increase it. The latter would happen when communities organise themselves to fight crime (Lederman *et al.*, 2002). It is suggested that people living in neighbourhoods experiencing more crime were more attached to their neighbourhoods and more involved in the communities in comparison to those living in lower crime neighbourhoods (Taylor, 1996). Another study, however, found a very weak impact of violent crime upon community participation, which counters the claim of the two previous studies (Saegert and Winkel, 2004).

Income inequality and crime

Income inequality, together with social-capital level, has a profound effect on firearm violent crime. A study that looked at associations between income inequality, social capital and crime found that decreased social capital is associated with increased violent and firearm crime. Income inequality was strongly correlated with firearm violent crime (firearm homicide, r = 0.76) as well as with the measures of social capital: *per capita* group membership (r = –0.40) and lack of social trust (r = 0.73). Both social trust (firearm homicide, r = 0.83) and group membership (firearm homicide, r = –0.49) were associated with firearm violent crime. These

relationships held when controlling for poverty and a proxy variable for access to firearms (Kennedy *et al.*, 1998). A meta-analysis that aggregated 34 studies looked at the associations between violent crime, poverty and income inequality. The studies reported a total of 76 zero-order correlation coefficients for all measures of violent crime with either poverty or income inequality. Of the 76 coefficients, 97% were positive. Of the positive coefficients, nearly 80% were of at least moderate strength (>.25). Thus, poverty and income inequality are associated with violent crime. However, a considerable variation in the estimated size of the relationships suggested that homicide and assault may be more closely associated with poverty or income inequality than rape and robbery (Hsieh and Pugh, 1993). The World Bank study also concluded that both income inequality and *per capita* GDP growth determine violent crime rates.

Summary

We were unable to locate any literature on the link between confiscated assets and social capital, but some literature on the impact of organised crime upon society was found. The main conclusion of that literature is that organised crime is dangerous for society as it infiltrates into society by corrupt means and hides itself under legitimate societal structures.

Literature results on the associations between social capital and crime in general tend to point to multiple effects which do not always have consistent effects on key dependent variables. Whereas most studies indicate that higher levels of social capital are associated with lower crime rates and vice versa, one study indicates the contrary, namely that social capital can lead to increases in crime rates. Also, some studies assumed that crime may have a decreasing effect upon social capital whereas others found the opposite. The association between crime and social capital has been established, we conclude; however, there is no consensus with regard to the direction of this association. There is no suggestion that the associations observed are causal and indeed, given the ambiguity of the findings, this is highly unlikely.

Income inequality, poverty and social capital all have a profound effect upon violent and firearms crime. Studies report at least a moderate degree of strength (>.25). Again, the strategies employed do not allow us to conclude that there is a causal effect in any direction.

This is generally an immature field of study that has not as yet yielded the kind of causal models and data sets that might be deployed in policy impact assessment. Where indicative associations seem relevant we have nevertheless alluded to them in the main text of the report.

We emphasise that social reuse of confiscated assets potentially has an important role in generating social capital within disadvantaged communities. There is currently no useful research focused on this hypothetical association.

Appendix M. Environmental impacts

In order to identify relevant environmental impacts, we performed targeted literature reviews using three databses: Criminal Justice Abstracts, Social Services Abstracts and Sociological Abstracts. As we did not locate any literature describing links between asset confiscation and environmental impacts, we searched for links between organised crime and environmental impacts, using the keywords: 'organised crime +', 'garbage', 'illicit crops', 'criminal networks', 'nuclear', 'pollution', 'toxic', 'green criminology' and 'waste'.[263] These searches identified a number of articles, reports, studies and impact assessments that looked into the effects of crime and organised crime, or more specifically the impact of a particular criminal activity.

Table M.1 Literature review of environmental impacts

Source	Countries	Topics discussed	Impact of interest
Álvarez (2002)	Colombia	Illicit crops and bird conservation priorities in Colombia	Environmental degradation
Liddick (2010)	Various countries	Illegal traffic in garbage and hazardous wastes	Organised crime and environmental degradation
UNODC (2006)	Colombia, Bolivia,	Coca cultivation in the Andean region	Environmental degradation
Hyatt and Trexler (1996)	Various countries	Environmental crime and organised crime: what will the future hold?	Organised crime and environmental degradation
Edwards et al (1996)	Mexico	Environmental crime and criminality: theoretical and practical issues	Environmental crime
Massari and Monzini (2004)	Italy	Illegal trafficking in hazardous waste	Organised crime and environmental degradation
Gwam (2001)	Developing countries	Adverse effects of the illicit movement and dumping of hazardous, toxic, and dangerous wastes and products on the enjoyment of human rights	Crime and environmental degradation
Massari (2004)	Italy	Ecomafia and illegal waste disposal in Italy	Crime and environmental degradation

[263] The words 'environment' and 'environmental' were not used because of the large number of irrelevant results returned.

Source	Countries	Topics discussed	Impact of interest
Van Daele et al. (2007)	EU	European waste industry and crime	Crime and environmental degradation
Block (2002)	USA	Environmental crime	Environmental crime
Clapp (1997)	Various countries	Illicit trade in hazardous waste	Environmental degradation
Armstead (1992)	South America	Illicit crops and the environment	Organised crime and environmental degradation

The relevant literature divided into two themes: garbage and hazardous waste, and deforestation and biodiversity harm. In each case, it is conceivable that asset confiscation could help to combat organised criminal groups and thereby reduce these types of environmental crime. We reiterate, however, that the literature does not establish these positive environmental impacts; it only describes certain environmental impacts of organised crime, upon which we elaborate below.

Traffic in garbage and hazardous waste

Waste management and disposal is operated by a network of public and private companies in Europe and the United States (Van Daele *et al.*, 2007). There has been a tendency towards privatisation since the 1990s, which has led to the multiplication of actors involved in the process. Privatisation has also led to the emergence of 'waste brokers' who are an integral part of the process but who never legally own the waste and are therefore able to avoid legislative and regulatory control (Liddick, 2010). Increasing awareness of environmental degradation and the subsequent introduction of regulatory procedures have increased the cost of waste disposal, especially for hazardous and radioactive waste, and therefore the potential profitability of the activity through circumnavigation of these regulations (Liddick, 2010; Van Daele *et al.*, 2007; Massari and Monzini, 2004). The liberalisation of the waste-disposal market and the opportunities to yield high profits has led to the active involvement of organised criminal networks and the illegal dumping and traffic of non-hazardous, hazardous and radioactive waste.

It has been noted that the traffic in garbage and waste, and subsequent illegal dumping, have important environmental impacts, although there have been few empirical studies in this field (Massari, 2004). Hazardous and non-hazardous waste are both illegally dumped in the country in which the criminal networks operate, but has increasingly been smuggled or exported to another country, often to a developing country with weak or non-existent environmental laws and high levels of corruption (Clapp, 1997; Liddick, 2010; Massari and Monzini, 2004). The environmental and social consequences of waste trafficking are greatest on the world's poorer nations (Liddick, 2010). Waste is illegally dumped directly on the ground, in legal open-air dumps or directly into the sea (Liddick, 2010; Massari, 2004; Massari and Monzini, 2004). Large piece of discarded waste break into billions of pieces of microscopic plastic particles that are ingested by marine life and passed up the food chain (Liddick, 2010). One of the most severe problems is associated with e-waste (global electronic waste) – including mobile phone, computers and cathode ray tubes – as this poisons land and water with a number of toxins, including lead and cadmium (Liddick, 2010). Hazardous materials are also mixed with other materials before dumping; examples are raw materials for fertilising land intended for growing animal fodder as well as produce for human

consumption, and materials used to make bricks for surfacing roads and highways (Massari, 2004; Massari and Monzini, 2004). Although the literature discussed the involvement of criminal networks in the illegal management and dumping of radioactive material, little detail is provided as to the environmental impacts of such activity.

Cultivation of illicit crops and drug production

Illicit crop cultivation and drug production in the Andean region have been shown to have a number of negative environmental outcomes, namely soil erosion and nutrient depletion, deforestation, species eradication and harm to biodiversity (UNODC, 2006; Armstead, 1992). The cultivation of illicit narcotics, such as cannabis, opium poppy and coca, accounts for an increasing share of tropical forest deforestation which leads to severe environmental damage (UNODC, 2006; Armstead, 1992). Growers of illicit narcotics are often people displaced from other areas with no knowledge of local conditions and agricultural techniques and no emotional ties to the land, and whose aim is to maximise the return on harvest as opposed to maintaining long-term sustainability (UNODC, 2006; Armstead, 1992). Intensive farming means fields are used for a few years until nutrients in the soil are depleted (Armstead, 1992). Furthermore, growers of illicit narcotics frequently move their crops to avoid eradication (Alvarez, 2002). The practice of regularly shifting the location of crop cultivation means there is an ongoing need to acquire new plots to accommodate the illicit crops. The need for new plots in remote areas to avoid detection results in land clearance and rainforest deforestation. It is noted that the 'most severe environmental degradation to tropical forests by illicit narcotics cultivators results from the rapid and damaging techniques used to clear the land' (Armstead, 1992). A number of methods are used to clear the forest, the most common of which is known as 'slash and burn' agriculture, where trees are destroyed by fire leaving no vegetative matter to enable the soil to regenerate (Armstead, 1992). Other land-clearing techniques, including the use of petrol- and diesel-fuelled machinery, destabilise the soil and accelerate the rates of soil loss (Armstead, 1992).

Another negative environmental outcome of illicit crop cultivation is the adverse affect on biodiversity. The tropical Andes is one of the most bio-diverse regions in the world, counting numerous endemic species of fauna and flora. Illicit crop cultivation results in significant biodiversity harm due to the loss, fragmentation and degradation of forest habitat (UNODC, 2006; Armstead, 1992). Complex ecological impacts have been reported wherever deforestation is studied, and a particular study noted the 'total lack of genuine forest species and game birds' in a coca-growing district in Peru (UNODC, 2006). Another practice of narcotics growers is to dump toxic chemical substances used to process the crops into rivers and streams. It is noted that this practice 'is likely to have significant local and downstream impacts on biodiversity' (UNODC, 2006; Armstead, 1992; Álvarez, 2002).