



Asset Recovery

A Comparative Analysis of Legislation and Practice

Bulgaria, Croatia, Moldova and Romania



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Executive Summary

The purpose of this study is to assess the current seizure and confiscation mechanisms available in Bulgaria, Croatia, Moldova and Romania, in order to establish their efficient and effective use in the context of the asset recovery process. These seizure and confiscation mechanisms have furthermore been benchmarked with the relevant international and European standards applicable to the asset recovery process. For the purpose of this study, asset recovery is understood as a four-phase process¹ focusing on the seizure and confiscation of proceeds and instrumentalities of crime and encompassing all stages of the criminal proceedings. The study has been undertaken with a view to identifying shortcomings at the national level which can impact regional and international co-operation and in turn the success of the case. It further proposes solutions to overcome the identified shortcomings. It should be noted that the present study complements its sister publication, *Asset Recovery in the Western Balkans – A Comparative Analysis of Legislation and Practice*².

Overall, the study finds that the international and European standards have been to a large extent transposed into the national legislation of Bulgaria, Croatia, Moldova and Romania, with the systems found in Croatia and Romania being more developed than those found in Bulgaria, and Moldova in particular. However, several implementation aspects of these standards at the operational level remain weak. The conclusions stemming from this study will serve as a basis for future actions to strengthen human resources, the investigative and enforcement capacities of competent authorities in relation to the asset recovery process. Thus, steps should be taken to strengthen these national asset recovery processes; ensuring a more coherent and consistent application of the national laws and practice; and raising the efficiency and effectiveness of seizure and confiscation proceedings relating to the proceeds and instrumentalities of crime.

The study is structured as follows: Section 1 introduces the scope and defines the methodology used for this study.³ Section 2 provides an overview of the asset recovery system in Bulgaria, Croatia, Moldova and Romania, focusing particularly on seizure and confiscation mechanisms. This overview includes for each of the jurisdictions: (i) their legal tradition and their respective influences; the authority or authorities tasked with conducting the investigation and leading the prosecutorial efforts; (ii) the types of seizures available; their evidentiary thresholds required; and the authorities authorised to initiate and grant seizure orders; and (iii) the types of confiscation available (e.g., object-based, value-based, non-conviction based, third-party and extended confiscations); and the evidentiary thresholds required. The scope of the assessment undertaken in this study has been based on the information provided by the national experts and the limited case law available.

¹ ICAR (2009). *Tracing Stolen Assets: A Practitioner's Handbook*, p. 20-21.

² Gomes Pereira, P. (2018).

³ While there are no common definitions contained in this publication, reference is made to the list of definitions contained in the sister publication, *Asset Recovery in the Western Balkans – A Comparative Analysis of Legislation and Practice*.

Section 3 concludes the study with a series of findings and recommendations. National reports have shown that despite domestic legislation being in principle in accordance with the relevant international and European standards, there has been mixed results with regards to seizure and confiscation in Bulgaria, Croatia, Moldova and Romania.

Abbreviations

AIRE	Advice on Individual Rights in Europe
BGN	Bulgarian Lev
CCUAAFA	Counter-Corruption and Unlawfully Acquired Assets Forfeiture Act (Bulgaria)
EUR	Euro
HCCJ	High Court of Cassation and Justice of Romania
HRK	Croatian Kuna
MDL	Moldovan Leu
MLA	Mutual legal assistance
NCB	Non-conviction based
OSCE	Organisation for Security and Co-operation in Europe
RAI	Regional Anti-Corruption Initiative
UNCAC	United Nations Convention Against Corruption
UNTOC	United Nations Convention against Transnational Organised Crime

1 Introduction

Regional Anti-Corruption Initiative (RAI) is an inter-governmental regional organisation, which deals solely with anti-corruption issues, covering the organisation's nine member states from South East Europe.

Asset Recovery – a Comparative Analysis of Legislation and Practice (hereinafter, the study) is published within the regional project titled “Combating corruption in the Western Balkans: strengthening regional cooperation in the field of asset recovery. The study has been prepared by RAI Secretariat and complements its sister publication, *Asset Recovery in the Western Balkans – A Comparative Analysis of Legislation and Practice*, which was undertaken by RAI together with the Advice on Individual Rights in Europe (AIRE) Centre. The study has been financed with support from the Organisation for Security and Co-operation in Europe (OSCE).

While working with the AIRE Centre in the mentioned project, RAI expanded its scope to include all of its member states. *Asset Recovery – A Comparative analysis of Legislation and Practice* is the result of this additional work carried out by RAI and includes Bulgaria, Croatia, Moldova and Romania.

The study is a complementary contribution which further provides an overview into the current trends and challenges in the field of asset recovery in Bulgaria, Croatia, Moldova and Romania, thereby allowing a comparative study of all RAI member states in this field. The potential areas for action identified in the study should be read together with those identified in the publication *Asset Recovery in the Western Balkans – A Comparative Analysis of Legislation and Practice*, in order to allow for joint action to be undertaken by all RAI member states to strengthen their capacities in the field of asset recovery.

The first draft of the study was presented at the Regional Conference on Strengthening Co-operation in the Field of Asset Recovery, which took place in Sarajevo, Bosnia and Herzegovina, on 28 March 2018.

The study is intended for readers with a solid understanding of asset recovery, and who wish to learn about the developments in this field in Bulgaria, Croatia, Moldova and Romania. It is also intended for judges, prosecutors and investigators, and other professionals with an interest in asset recovery policies and practices.

1.1 Methodology

The study builds on the methodology prepared for the publication *Asset Recovery in the Western Balkans – A Comparative Analysis of Legislation and Practice*,⁴ expanding its geographical scope to include Bulgaria, Croatia, Moldova and

⁴ Gomes Pereira, P. (2018). *Asset Recovery in the Western Balkans – A Comparative Analysis of Legislation and Practice*.

Romania. The study also gathered national experts from these four jurisdictions, as well as an international expert in asset recovery.

In order to conduct the comparative analysis of the four jurisdictions, the process began with defining the information and datasets needed, such as the areas of interest for the study (legal system, mechanisms for seizure and confiscation of proceeds and instrumentalities of crime) and the timeframe for the analysis (2012-2017). Finally, the study focused on judicial proceedings regarding corruption-related offences in the four target jurisdictions: Bulgaria, Croatia, Moldova and Romania.

The objectives of the publication are:

- To present findings, conclusions and recommendations at the national and regional levels;
- To propose tangible actions based on the findings, conclusions and recommendations.

The comparative analysis attempts to provide insight into the extent to which seizure and confiscation of illegally obtained assets have been used nationally and transnationally during the period reviewed for this study, and what are the results deriving from seizure and confiscation of illegally obtained assets.

The structure of the study reflects the described methodology and approach. However, as much of the efforts had already been produced for the publication *Asset Recovery in the Western Balkans – A Comparative Analysis of Legislation and Practice*, the chapters on definitions and international and European standards on asset recovery have not been duplicated in the study. Notwithstanding, the study contains an overview of Bulgaria, Croatia, Moldova and Romania mechanisms and regime for seizure and confiscation of assets, and well as a focus on the applicable conclusions and recommendations for these jurisdictions.

1.2 Definitions

The definitions below are drawn from the existing European and other international standards; they provide an integrated understanding of the key terms used throughout the study. Where diverging definitions or interpretations are found between inter-national and European standards, or where none are provided by either, these have been indicated.

“Asset recovery” is acknowledged as a four-phase process:⁵

- Pre-investigative or intelligence gathering phase, during which the investigator verifies the source of the information, initiates the investigation, and determines its authenticity. If there are inconsistencies in the intelligence, or incorrect statements and assumptions, then the true facts must be established;

⁵ ICAR (2009). *Tracing Stolen Assets: A Practitioner's Handbook*, p. 20-21.

- Investigative phase, during which proceeds of crime are located and identified in the pre-investigative phase and evidence of ownership is collated covering several areas of investigative work in more formal processes, e.g., through the use of requests for mutual legal assistance, to obtain information relating to off-shore bank accounts and other records, and financial investigations to obtain and analyse bank records. This phase involves substantiating the veracity of the intelligence and information and converting it into admissible evidence. The result of this investigation can therefore be only a temporary measure – e.g., seizure – in order to later secure a confiscation order through the court;
- Judicial phase, during which the accused person/defendant is convicted (or acquitted), and the decision on confiscation is determined;
- Disposal phase, where the property is actually confiscated and disposed of by the jurisdiction in accordance with the law, whilst taking into account international asset-sharing obligations, where applicable and in appropriate cases, as well as compensation for victims and determination of what to do with the confiscated assets.

“Confiscation” or “forfeiture”⁶ is a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property.

“Embezzlement”⁷ is the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

“Extended confiscation”⁸ is when a court, based on specific facts, finds that the property has been derived from the criminal activities of the convicted person during a period prior to conviction, which is deemed reasonable by the court in the circumstances of the particular case, or where the court is convinced, to the requisite legal standard, that the value of the goods are disproportionate to the known income of the convicted person.

“Freezing” or “seizure”⁹ temporarily prohibit the transfer, destruction, conversion, disposition or movement of property; or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority. *Article 2(f) of both the UNTOC and the UNCAC differ from the abovementioned definitions, as they do not contain in their definition what is meant by the act of “destruction”.*

⁶ Art. 1 CFD 2001/500/JHA; Art. 1(d) CETS 198; and Art. 1(d) ETS 141.

⁷ Art. 17 UNCAC.

⁸ CFD 2005/212/JHA.

⁹ Art. 1(g) CETS No. 198. CFD 2003/577/JHA, on the other hand, defines a ‘freezing order’ as any measure taken by a competent judicial authority in the issuing EU Member State in order provisionally to prevent the destruction, transformation, moving, transfer or disposal of property that could be subject to confiscation or evidence.

"Instruments of the crime"¹⁰ are any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences.

"Money laundering"¹¹ is either (i) the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action; (ii) the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime; (iii) the acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime; or (iv) participation in, association with, or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

"Non-conviction based confiscation"¹² is where confiscation is ordered, but does not derive from a criminal conviction.

"Predicate offence"¹³ means any criminal offence as a result of which proceeds were generated that may become the subject of a money-laundering offence.

"Proceeds" or "proceeds of crime"¹⁴ is any property, benefit or advantage derived from or obtained, directly or indirectly, through the commission of an offence.

"Property"¹⁵ includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property, which is considered the proceeds or the instrumentalities of crime.

"Value confiscation" or "value-based confiscation"¹⁶ refers to legislative provisions that allow for alternative procedures on the confiscation of the proceeds of crime, in cases where these proceeds cannot be seized, for the confiscation of property the value of which corresponds to such proceeds, both in purely domestic proceedings and in proceedings instituted at the request of another Member State, including requests for the enforcement of foreign confiscation orders. Notwithstanding the above, Member States may exclude the confiscation of property, the value of which corresponds to the proceeds of crime in cases in which that value would be less than EUR 4,000.

¹⁰ Art. 1 of the CFD 2001/500/JHA; Art. 1(c) of the CETS No. 198; and Art. 1(c) ETS No. 141.

¹¹ Art. 6 UNTOC, Art. 23 UNCAC, Art. 6 ETS 141, Art. 13 ETS 173.

¹² Art. 3(4) CFD 2005/212/JHA.

¹³ Art. 2(h) UNTOC, Art. 2(h) UNCAC and Art. 1(e) ETS 141.

¹⁴ Art. 2(e) UNTOC, Art. 2(e) UNCAC, Art. 1(a) ETS 141.

¹⁵ Art. 1 CFD 2001/500/JHA; Art. 1(b) CETS No. 198; and Art. 1(b) ETS No. 141. The definition contained in European regulation is broader than the one found in Art. 2(d) of both the UNTOC and the UNCAC, as these do not make specific reference to tangible or intangible assets.

¹⁶ Art. 3 CFD 2001/500/JHA.

2 Overview of jurisdictions

This section of the study contains an overview of the seizure and confiscation regimes in Bulgaria, Croatia, Moldova and Romania. The focus given in this section relates to the effectiveness and efficiency of these regimes, particularly in relation to corruption-related offences. Statistical data has been additionally reviewed, to the extent of their availability in these jurisdictions.

2.1 Bulgaria

Bulgaria belongs to the continental European tradition of law. Fundamental rights may be restricted to the extent necessary for the purposes of a fair trial (Art. 31(4) Constitution Bulgaria). The restriction of fundamental rights may only be afforded through express provisions in law.

Criminal investigations are carried out by the Bulgarian Investigative Service and police investigators (Art. 51(1) Criminal Procedure Code Bulgaria), which operate under the guidance of the prosecutor (Art. 51(3) Criminal Procedure Code Bulgaria). Under the newly-enacted Counter-Corruption and Unlawfully Acquired Assets Forfeiture Act (CCUAFA), the verifications are undertaken by the Anti-Corruption and Forfeiture of Illegally Acquired Assets Commission. The work of the Commission commences on the basis of a notification from: (i) the prosecutor supervising the criminal pre-trial investigation to the concerned territorial directorate (Art. 110(1) CCUAFA); (ii) the Ministry of Justice, where Bulgaria is notified or the opening of a criminal state in another jurisdiction, or where another jurisdiction has submitted an enforceable sentence issue by one of its courts (Art. 110(3) CCUAFA); or (iii) when the Commission is notified of a transfer of a criminal proceeding to a foreign jurisdiction (Art. 110(4) CCUAFA).

Seizure of property is foreseen in Art. 53 Criminal Code Bulgaria, and includes both the instrumentalities of, and proceeds acquired through the commission of a criminal offence (Art. 53(1)(a) and (b) Criminal Code Bulgaria, respectively), as well as prohibited property or property which has been acquired through the commission of a criminal offence (Art. 53(2) Criminal Code Bulgaria). Art. 53 Criminal Code Bulgaria is applicable to all criminal offences set in the Criminal Code,¹⁷ and applies only to property belonging to the suspect and which can be subject to forfeiture^{18,19}. Furthermore, Art. 53 Criminal Code Bulgaria does not refer to the seizure of intermingled property.²⁰ Seizure of assets is performed during the pre-trial investigation and rendered by courts.²¹ The seizure of property that may be subject to criminal confiscation is secured by the criminal

¹⁷ MONEYVAL. (2013). Report on Fourth Assessment Visit: Anti-money Laundering and Combating the Financing of Terrorism, p. 57, para. 255.

¹⁸ *Ibid*, para. 256.

¹⁹ UNODC. (2011). Country Review Report of Bulgaria, p. 71.

²⁰ MONEYVAL. (2013). Report on Fourth Assessment Visit: Anti-money Laundering and Combating the Financing of Terrorism, p. 57, para. 257.

²¹ UNODC. (2011). Country Review Report of Bulgaria, p. 72 and 73.

court upon request by the Prosecutor's office (Art. 72 Criminal Procedure Code Bulgaria).²²

Seizure of property is also foreseen in Art. 116 CCUAFA, which is applied to a wide range of criminal offences provided for under its Art. 108(1). The procedure under the CCUAFA is established where there is reasonable assumption that property has been acquired unlawfully (Art. 107 CCUAFA) and the person has been constituted as an accused party of one of the criminal offences under Art. 108(1) CCUAFA. Notwithstanding, the procedure is also established where: (i) the person has not been constituted as an accused party if, among others, an amnesty has been afforded to the person, the statutes of limitation have run, the person has passed away, or there has been a transfer of the criminal proceedings against the person to another jurisdiction (Art. 108(2) CCUAFA); and (ii) the person has been constituted as an accused party by the proceeding that has been suspended due to, among others, immunity or the address of the accused party is unknown and the person cannot be found (Art. 108(3) CCUAFA). Moreover, the proceedings under the CCUAFA continue regardless of the outcome of the criminal proceedings (Art. 108(4) CCUAFA). Under Art. 118(1) CCUAFA, the rules contained in Art. 397(1) Civil Procedure Code Bulgaria apply to the property and the civil fruits derived therefrom (Art. 118(2) CCUAFA). It is unclear whether the seizure of property under the CCUAFA allows for the seizure of the instrumentalities of crime.

Confiscation is a form of punishment, as defined by Art. 37(1)(3) Criminal Code Bulgaria. It is a compulsory measure whereby the defendant is liable to the amount of the value of confiscated property in order to compensate for the damages caused by the commission of the criminal offence, as well as any applicable judicial costs (Art. 44 and 46 Criminal Code Bulgaria). As a rule, the confiscation is asset-based pursuant to the Criminal Procedure Code Bulgaria; however, value-based seizure is also envisaged if the property subject to confiscation is unavailable.²³ Confiscation under the Criminal Code can only be extended to the property of the defendant.²⁴ Notwithstanding, confiscation under Art. 53(2)(b) Criminal Code Bulgaria can be imposed on assets acquired through the commission of a criminal offence, regardless of who is owning or holding them.²⁵ Thus, confiscation of the instrumentalities of crime is only possible when the property is being held and belonging to the defendant.²⁶ The criminal confiscation regime in Bulgaria is subject to the rules defined in article 72 of the Criminal Procedure Code, which indicates that the court, upon request of the prosecutor shall take measures for securing the fine, confiscation and appropriation of devices in favour of the state.

Turning to the CCUAFA, a confiscation proceeding is initiated when:

²² Center for the Study of Democracy. (2014). *Disposal of Confiscated Assets in the EU Member States: Laws and practices*, p. 55.

²³ UNODC. (2011). *Country Review Report of Bulgaria*, p. 72.

²⁴ MONEYVAL. (2013). *Report on Fourth Assessment Visit Bulgaria: Anti-money Laundering and Combating the Financing of Terrorism*, p. 58, para. 269.

²⁵ *Ibid*

²⁶ *Ibid*

- (i) There is an enforceable decision determining a conflict of interest;
- (ii) The declaration of assets has been submitted outside the foreseen time limit;
- (iii) The declaration of assets has a discrepancy of over EUR 10,000;
- (iv) There is a verified discrepancy of over EUR 10,000 which has been based on whistleblowing.

The proceedings under the CCUAAFA are carried out in two stages: the verification stage and the proceedings stage. To seize and confiscate property during the proceedings stage, two conditions must be met: (i) one of the conditions for commencing the verification stage; and (ii) a well-grounded presumption that the property is the proceeds of crime. This provision requires that expenses should exceed the net income by EUR 75,000 for a period of 10 years.

International co-operation is provided for in Art. 471(2)(5) Criminal Procedure Code Bulgaria²⁷, and is afforded based on the provisions of the international treaty invoked (and to which Bulgaria has ratified)²⁸ or based on reciprocity.²⁹ Assistance afforded by Bulgaria through international co-operation includes: service of process; acts of investigation; collection of evidence; provision of information; all other forms of legal assistance, if they are provided for in an international treaty to which Bulgaria is a party, or if they are provided for on the basis of reciprocity.³⁰ Thus, international co-operation for the purposes of seizure and confiscation of assets may also be granted, as they are foreseen in the international treaties ratified by Bulgaria.³¹ Notwithstanding, it should be noted that the seizure and confiscation of assets held by third parties may not be subject to a request for mutual legal assistance (MLA), given the legal restrictions imposed by the Criminal Procedure Code Bulgaria.³²

Statistical data was not readily available in relation to the amounts of seized and confiscated assets in Bulgaria.

2.2 Croatia

Croatia belongs to the continental European tradition of law. Fundamental rights foreseen in the constitution of Croatia (e.g. right to property) may be limited when foreseen in law. Moreover, the limitation of such fundamental rights must respect the principle of proportionality, ensuring that the interference of the State into

²⁷ MONEYVAL. (2013). Report on Fourth Assessment Visit Bulgaria: Anti-money Laundering and Combating the Financing of Terrorism, p. 187, para. 1238.

²⁸ Bulgaria is party to Council of Europe Conventions on Mutual Legal Assistance in Criminal Cases and its additional protocols (ETS 30, 99 and 182), Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and its additional protocol (ETS 141 and CETS 198). It has also ratified the United Nations Convention against Transnational Organised Crime (UNTOC) and the United Nations Convention Against Corruption (UNCAC), as well as a number of bilateral treaties on mutual legal assistance.

²⁹ MONEYVAL. (2013). Report on Fourth Assessment Visit: Anti-money Laundering and Combating the Financing of Terrorism, p. 188, para. 1243.

³⁰ *Ibid*, p. 188, para. 1244.

³¹ *Ibid*, p. 188-189, para. 1251.

³² *Ibid*, p. 189, para. 1252.

the ownership rights is minimised with a view to preserve the interests of the community and that no person is allowed to benefit from the commission of a criminal offence.

The prosecution leads the investigation (Art. 38 Criminal Procedure Code Croatia). In order to seize the proceeds and instrumentalities of crime, the prosecutor must demonstrate to the judicial authority reasonable doubt that the accused person has committed a criminal offence and as a result of such criminal activity has acquired a specific property gain (Art. 87(22) Criminal Procedure Code Croatia). If the seizure is sought for the purposes of applying extended confiscation, the prosecution must furthermore demonstrate the existence of a disproportion between the perpetrator's assets and his/her legal revenues. If the court is satisfied that the disproportion has been determined by the prosecution, there is a legal presumption that the asset surplus over the perpetrator's legal revenues derives from criminal activity. At this point, there is a reversal of the burden of proof, and the accused person can contest the presumption by proving that his/her property derives from legal sources.

In order to seize property of a third person, the prosecution must satisfy the court that the property held by the third party can be presumed to have been obtained through the commission of a criminal offence and transferred to the third person, who was aware of the origin and nature of the property. In the case of seizure of property held by a third party for the purpose of extended confiscation, the prosecution must satisfy the court that the third person is a merely a formal holder of the property rights, and that the real owner of the property is the perpetrator. In that regard, the Supreme Court of Croatia ruled that the prosecution must determine the time period when the property was acquired and in what way the acquisition of the property links to the perpetrator.³³

Confiscation is a mandatory *sui generis* criminal measure which can be applied to both proceeds and instrumentalities of crime.³⁴ Art. 78-79 Criminal Code Croatia distinguishes between the basic confiscation of property gain, and extended confiscation.

Basic confiscation is guided by the principle that nobody can retain property acquired by the commission of a criminal offence (Art. 5 Criminal Code Croatia). Thus, it is necessary to separate during the criminal proceedings from the property held or owned by the perpetrator those which are connected with the alleged commission of a criminal offence. Moreover, if the proceeds or instrumentalities of crime were transferred to a third person who knew, or could have known, that the property derives from the commission of a criminal offence, it is possible to proceed with third-party confiscation.

On the other hand, extended confiscation under Croatian law widens the scope of entities and property which may be subject to confiscation. In such circumstances, it is possible to confiscate property belonging to the perpetrator

³³ Kž-47/16-3, Kž-13/14-6.

³⁴ MONEYVAL. (2013). Report on Fourth Assessment Visit Croatia: Anti-money Laundering and Combating the Financing of Terrorism, p. 66, para. 294.

which is not directly or factually linked with the commission of a particular criminal offence under investigation. It is furthermore possible to confiscate property which has been transferred to family members or to third persons. In Croatia extended confiscation can be applied to a list of criminal offences. In order to apply extended confiscation, the prosecution must satisfy the court that there is a disproportion between the perpetrator's assets and his/her legally obtained revenues. If the disproportion is determined, the law contains a presumption that the asset surplus over the perpetrator's legal revenues derives from criminal activities. The accused person can contest that presumption by making probable that his/her property derives from legal sources.

The general rule in Croatia is conviction-based confiscation, requiring the conviction of the perpetrator. Notwithstanding, Croatia also has provisions for non-conviction based (NCB) confiscation (Art. 560a-560f Criminal Procedure Code Croatia). In order to apply NCB confiscation, one of the circumstances which exclude a criminal prosecution must be present (e.g. death of the perpetrator, flight from the jurisdiction, permanent legal incompetence because of mental or physical illness). Moreover, the benefit obtained by the perpetrator from the commission of a criminal offence (Art. 87(22) Criminal Code Croatia) must exceed HRK³⁵ 60,000.³⁶ When these two cumulative conditions have been met, a proceeding for NCB confiscation may be initiated against the perpetrator, his/her legal successors or any person to whom the property was transferred.

Croatia allows for both object-based and value-based confiscation. To the extent possible, however, the prosecution must detect property which was acquired as a result of a criminal offence and which is held by the perpetrator or third parties. Where it is not possible to confiscate in full or in part the proceeds and instrumentalities of crime, the court must determine the perpetrator to pay the equivalent sum. In such cases, the assets belonging to the defendant guarantee the amount to be confiscated, regardless of the manner in which they were obtained.

International co-operation is regulated by several different laws in Croatia, such as the Criminal Procedure Code and the Law on Mutual Legal Assistance in Criminal Matters. Croatia has furthermore ratified all the main international conventions on MLA.³⁷ Assistance afforded by Croatia through MLA includes: production, search and seizure of information, documents or evidence (including financial records); taking of evidence or statements; service of documents; identification, freezing, seizure, or confiscation of proceeds and instrumentalities of crime.³⁸

³⁵ EUR 1.00 equals HRK 7.42 at the time of writing of this study.

³⁶ Approximately EUR 8000 at the time of writing of the present report.

³⁷ Croatia is party to Council of Europe Conventions on Mutual Legal Assistance in Criminal Cases and its additional protocols (ETS 30, 99 and 182), Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and its additional protocol (ETS 141 and CETS 198). It has also ratified the UNTOC and the UNCAC, as well as a number of bilateral treaties on mutual legal assistance.

³⁸ MONEYVAL. (2013). Report on Fourth Assessment Visit Croatia: Anti-money Laundering and Combating the Financing of Terrorism, p. 239, para. 1447.

With regards to statistical data available in relation to seizure of the proceeds and instrumentalities of crime, it has been possible to identify the following values (in HRK):

2012	2013	2014	2015	2016	2017
99.923.857,84	196.478.105,32	175.385.727,00	114.100.000,00	51.506.000,00	Not available

In relation to the confiscation of proceeds and instrumentalities of crime, it has been possible to identify the following values (in HRK):

2012	2013	2014	2015	2016	2017
200.441.248,3	210.988.003,45	202.403.226,66	160.381.355,32	192.270.016,85	Not available

2.3 Moldova

Moldova belongs to the continental European tradition of law. Art. 4 Constitution Moldova sets forth the primacy of international human rights instruments over domestic legislation and the Moldovan Constitution itself. While Article 54 notes that law may not restrict fundamental rights, their exercise may be subject to limitations expressly indicated in law.

Criminal investigations are carried out by different law enforcement bodies in Moldova (Ministry of Internal Affairs, Customs Service and the National Anti-Corruption Centre), as well as the Prosecutor-General's Office. They can be initiated by either the prosecutor or an investigator, although the latter must inform the prosecutor that a criminal investigation has been opened.

Seizure is considered a coercive, provisional procedural measure which prohibits the owner or possessor from disposing or making use of such property (Art. 203(1) Criminal Procedure Code Moldova). There are two types of provisional measures under the criminal procedural law of Moldova: (i) seizure under Art. 126-132 and 159-162; and (ii) seizure under Art. 203 to 210. Moreover, the legal system of Moldova allows for both asset-based and value-based seizure.

Seizure under item (i) above is applied in relation to tangible property (e.g. objects or documents) relevant to the investigation and which are material to the criminal proceedings as evidence, or to property acquired illegally.³⁹ Seizure under item (ii), on the other hand, is used for securing the proceeds and instrumentalities of crime with a view to their confiscation.^{40, 41} It is therefore aimed at securing

³⁹ European Commission. (2013). Fourth Report on the Implementation by the Republic of Moldova of the Action Plan on Visa Liberalisation. COM(2013) 459 final, para. 244.

⁴⁰ MONEYVAL. (2007). Third Round Detailed Assessment Report on Moldova Anti-Money Laundering and Combating the Financing of Terrorism, para. 124.

property which: (i) may be subject to special (or extended) confiscation; (ii) may be used to repair the damage resulting from the commission of a criminal offence; or (iii) to guarantee the execution of a fine as a criminal sanction (Art. 204 Criminal Procedure Code Moldova).

Property may be seized either by law enforcement, in the specific cases provided by law, or the judge. In the latter case, the prosecutor is responsible for addressing the court either at the request, or on behalf of law enforcement officials,⁴² victim,⁴³ injured party⁴⁴ and the civil party⁴⁵ (Art. 202(1) Criminal Procedure Code Moldova). Property may be subject to seizure where the court is satisfied there is reasonable suspicion that the property will be hidden, damaged or dissipated.

The Criminal Code Moldova provides for two main types of confiscation: (i) special confiscation (confiscation of the proceeds and instrumentalities of crime), contained in Art. 106 Criminal Code Moldova; and (ii) extended confiscation (Art. 106(1) Criminal Code Moldova). Special confiscation is defined as a security measure which aims at removing the danger resulting from the commission of criminal acts, as well as preventing the perpetration of future criminal offences (Art. 98(1) Criminal Code Moldova). Moldovan legislation allows for special confiscation even in cases when a criminal sanction is not imposed to the perpetrator (Article 106(3) of the Criminal Code Moldova). As the Criminal Code Moldova does not define confiscation as a form of (accessory) criminal punishment, it is seen as a preventive tool whereby property is secured to repair the damage suffered.⁴⁶

To confiscate property according to Art. 106(2) Criminal Code Moldova, the court must be satisfied that the property in question falls into one of the following categories:

- Has been used or intended to be used for the perpetration of a crime;
- Results from criminal offences and other income obtained from capitalisation of such property;
- Was offered to determine the commission of a criminal offence, or was offered to repay the perpetrator;

⁴¹ European Commission. (2013). Fourth Report on the Implementation by the Republic of Moldova of the Action Plan on Visa Liberalisation. COM(2013) 459 final, para. 245.

⁴² MONEYVAL. (2007). Third Round Detailed Assessment Report on Moldova Anti-Money Laundering and Combating the Financing of Terrorism, para. 126.

⁴³ Any individual or legal entity that suffers moral, physical, or material damage due to the commission of a crime (art. 58 Criminal Procedure Code Moldova).

⁴⁴ An individual or a legal entity that has suffered moral, physical or material damage as a result of a crime acknowledged as such in line with the law and upon consent of the victim (art. 59(1) Criminal Procedure Code Moldova).

⁴⁵ An individual or a legal entity that files with a criminal investigative body or a court a civil action against a suspect or accused or defendant or persons who are materially liable for their actions provided that there are sufficient grounds to consider that the individual or the legal entity has suffered material or moral damage as a result of a crime. A civil action shall be heard in court as part of a criminal proceeding should the extent of the damage be unquestionable (art. 61 Criminal Procedure Code Moldova).

⁴⁶ MONEYVAL. (2007). Third Round Detailed Assessment Report on Moldova Anti-Money Laundering and Combating the Financing of Terrorism, para. 120.

- Was kept contrary to legal provisions;
- Was converted or transformed, partially or wholly, from assets resulting from the commission of a criminal offence and from incomes accrued from such property;
- Results from the commission money laundering.

The application of extended confiscation in Moldova requires fulfilling several legal conditions set forth in Art. 106(1) Criminal Code Moldova:

- The criminality of the assets derive from one of the criminal offences subject to extended confiscation – money laundering (Art. 243); creating or leading a criminal organisation (Art. 284); corruption-related offences (Art. 324-329; 330(2) and 330-335(1);
- When these offences are prosecuted and when the offence was committed with a pecuniary interest (Art. 106(1) Criminal Code Moldova).
- The value of assets acquired by the convicted person, within 5 years prior and after the commission of crime, before adopting the judgment, substantially exceeds the income legally obtained by this person (Art. 106(2a) Criminal Code Moldova);
- The court must also apply extended confiscation to the value of the assets transferred by the convicted person or by a third party to a family member, to legal entities which the convicted person has control over, or to other persons who knew or should have known about the illegal acquisition of the assets (Art. 106(3) Criminal Code Moldova).

Article 106(5) Criminal Code Moldova also provides for value-based confiscation when the assets no longer exist, or if they were intermingled with property acquired from legitimate sources. In such cases money and other assets can be confiscated to cover the value. The same rule applies with proceeds or instrumentalities of crime which have been transformed or converted, as well as income or profits arising from those assets (Art. 106(6) Criminal Code Moldova).

International co-operation is provided for in Chapter IX of the Criminal Procedure Code Moldova and complemented by the Law on International Legal Assistance in Criminal Matters. Moldova has furthermore ratified all the main international conventions on MLA.⁴⁷ The possible forms of international co-operation that Moldova affords includes: service of process; interviewing witnesses and suspects; investigations, searches, seizures of objects and documents; seizure and confiscation of the proceeds and instrumentalities of crime.⁴⁸

⁴⁷ Moldova is party to Council of Europe Conventions on Mutual Legal Assistance in Criminal Cases and its additional protocols (ETS 30, 99 and 182), Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and its additional protocol (ETS 141 and CETS 198). It has also ratified the United Nations Convention against Transnational Organised Crime (UNTOC) and the United Nations Convention Against Corruption (UNCAC), as well as a number of bilateral treaties on mutual legal assistance.

⁴⁸ MONEYVAL. (2012). Report on Fourth Assessment VisitMoldova: Anti-money Laundering and Combating the Financing of Terrorism, p. 241-242, para. 1428.

With regards to statistical data available in relation to seizure of the proceeds and instrumentalities of crime, it has been possible to identify the following values (in MDL)⁴⁹:

2012	2013	2014	2015-2016	2017
Not available	Not available	Not available	943,661,429	Not available

In relation to the confiscation of proceeds and instrumentalities of crime, it has been possible to identify the following values (in MDL):

2012	2013	2014	2015-2016	2017
Not available	Not available	Not available	153,999,999	Not available

2.4 Romania

Romania belongs to the continental European tradition of law. The primary source of law is written legislation. Notwithstanding, while Romania follows the continental European tradition of law, the decisions stemming from the Constitutional Court analysing the constitutionality of legal provisions are mandatory for all courts. Moreover, the decisions from the High Court of Cassation and Justice (HCCJ) bringing uniformity to the interpretation of the law, while not a source of law in the Romanian legal system, tends to provide a unitary practice, when requested by other Romanian courts.

Criminal investigations are conducted by prosecutors and judicial police (Art. 55 Criminal Procedure Code Romania). The investigation is led and supervised by the prosecutor, who can perform any criminal investigation act in the cases he or she coordinates and supervises. The law enforcement bodies carry out their criminal investigation directly under the guidance and supervision of the prosecutor. While the judicial police is responsible for conducting the criminal investigation, there are crimes whereby the prosecutor must conduct the investigation. In these cases, the prosecutor must initiate and lead the procedural acts, and may delegate some actions to the judicial police.

The Constitution of Romania guarantees in its Title II fundamental rights, e.g., the right to property, to life, to privacy and to defence. Not all these fundamental rights are, however, absolute: the Constitutional Court of Romania has stated on multiple occasions that certain fundamental rights, e.g. the right to property, may be subject to limitations under certain strict conditions foreseen in law. In this regard, the Constitutional Court has stated that extended confiscation does not

⁴⁹ EUR 1 equals MDL 20.05 at the time of writing of this study.

infringe the right to property, specifically concerning the presumption of the licit nature of the acquisition of property.⁵⁰

Seizure of the proceeds and instrumentalities of crime may be carried out by the prosecutor during the criminal investigation, or by courts (*ex officio* or upon a motion from the prosecution), in order to prevent the concealment, destruction, disposal or dissipation of the property which may be subject to special or extended confiscation, or which may be used to secure the payment of a fine, court fees or the compensation of damages resulting from the commission of a criminal offence (Art. 249 Criminal Procedure Code Romania). While movable and immovable property may be seized, assets belonging to a public authority or institution, to public legal persons, or property exempted from seizure by law can be restrained (Art. 249(8) Criminal Procedure Code Romania).

Only property belonging to the suspect, perpetrator or defendant may be subject to a seizure order when it is seeking to guarantee the future enforcement of a penalty by fine. However, where the object of the seizure is to satisfy a future order for special or extended confiscation, property belonging to the suspect, perpetrator or defendant, as well as other persons which own or are holding the property to be confiscated. Finally, when the seizure of assets is intended to repair the damages caused by the commission of the criminal offence, or to guarantee the payment of court expenses, any property (whether legal or illegal in origin) belonging to the suspect, perpetrator or defendant, as well as persons with civil liability,⁵¹ up to the limit of the probable value owed.

The authority responsible for enforcing the seizure order has the obligation of identifying and evaluating the assets which have been seized. Notwithstanding, the HCCJ has stated that when precautionary measures are instituted in the course of the criminal proceedings, it is not necessary to indicate or individualise the property on which the seizure is enforced.⁵²

Art. 112 Criminal Code Romania provides for special confiscation. This type of confiscation targets property:

- Obtained through the commission of a criminal offence;
- Used, or intended to be used for the commission of a criminal offence;
- Used immediately after the commission of a criminal offence in order to ensure the perpetrator from evading justice, or for the suspect to keep the proceeds of crime;
- Offered in order to determine the commission of a criminal offence or to reward a perpetrator for the commission of a criminal offence;
- Acquired through the commission of a criminal offence, unless they have been returned to the aggrieved party and they serve as indemnification to the aggrieved party;
- The possession of which is prohibited by law.

⁵⁰ Constitutional Court, Decision No. 356/2014.

⁵¹ An individual or legal entity that, based on the law or the civil action filed during a criminal proceeding, may be liable for material damages caused by the acts of the accused or defendant.

⁵² High Court of Cassation and Justice, Decision No. 17/2017.

Both object-based and value-based confiscation is permissible under Romanian law. Where property is used, or intended to be used for the commission of a criminal offence, or it is used by the perpetrator to ensure his or her evasion of justice, and the value to be confiscated is manifestly disproportionate to the nature and severity of the criminal offence committed, the court may determine the partial confiscation of the property, through its monetary equivalent. However, if the property was produced, modified or adapted in order to commit the criminal offence, it is to be fully confiscated. The property obtained from exploiting the assets subject to confiscation is also subject to confiscation.

Property belonging to a third party who was not aware of their use for criminal purpose shall not be confiscated, although their monetary equivalent shall be subject to confiscation which is to be satisfied through the property of the perpetrator. Moreover, where property – with the exception of property which was obtained through the commission of a criminal offence – cannot be found, its monetary value shall be subject to confiscation.

Extended confiscation was introduced in Art. 112(1) Criminal Code Romania in 2012, enabling courts to confiscate property obtained up to 5 years prior to the moment the criminal offence was committed, where the court is satisfied that the property exceeded the income legally obtained by the perpetrator and the court is satisfied that the property was obtained through the commission of offences similar to those to which the defendant was convicted. Extended confiscation is applied in Romania in relation to, among others, the following criminal offences:

- Trafficking in drugs or its precursors;
- Trafficking in, and exploitation of vulnerable persons;
- Money laundering;
- Organised crime;
- Corruption-related offences.

Third-party confiscation is furthermore possible in Romania. Where the value of proceeds and instrumentalities of crime have been transferred by the defendant to a family member or to a legal entity over which the defendant has control, it may be subject to confiscation. Should the property not be found, the equivalent value of the asset may be confiscated (value-based confiscation). Unlawful profits stemming from the exploitation of such property is furthermore also subject to confiscation.

It should be noted that Romania does not have non-conviction based confiscation, as the confiscation of property is always done in correlation to the conviction of a person for the commission of a criminal offence.

International co-operation is provided for in Law No. 302/2004 on international judicial co-operation in criminal matters, in conjunction with special laws that have specific provisions on MLA.⁵³ Romania has furthermore ratified all the main

⁵³ MONEYVAL. (2014). Report on Fourth Assessment Visit Romania: Anti-money Laundering and Combating the Financing of Terrorism, p. 349-350, para. 1615.

international conventions on MLA.⁵⁴ Romania affords international co-operation in the following matters, among others: obtaining information, documents or evidence; service of documents; as well as seizure and confiscation of proceeds and instrumentalities of crime.⁵⁵

With regards to statistical data available in relation to seizure of the proceeds and instrumentalities of crime, it has been possible to identify the following values (in EUR):

2012	2013	2014	2015	2016	2017
419.587.519	434.576.213	Not available	493.460.000	667.940.000	202.400.000

In relation to the confiscation of proceeds and instrumentalities of crime, it has been possible to identify the following values (in EUR):

2012	2013	2014	2015	2016	2017
7.814.500	7.620.436	Not available	29.769.985	36.746.205	8.988.768

⁵⁴ Romania is party to Council of Europe Conventions on Mutual Legal Assistance in Criminal Cases and its additional protocols (ETS 30, 99 and 182), Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and its additional protocol (ETS 141 and CETS 198). It has also ratified UNTOC and UNCAC, as well as a number of bilateral treaties on mutual legal assistance.

⁵⁵ MONEYVAL. (2014). Report on Fourth Assessment Visit Romania: Anti-money Laundering and Combating the Financing of Terrorism, p. 350, para. 1618.

3 Conclusions and Recommendations

The study has focused on the available seizure and confiscation mechanisms available in Bulgaria, Croatia, Moldova and Romania. While three of the jurisdictions are Member States of the European Union (Bulgaria, Croatia and Romania), all four jurisdictions largely comply with both the international and European standards concerning the asset recovery process. A detailed analysis of the international and European standards in relation to this project is available in the publication *Asset Recovery in the Western Balkans – A Comparative Analysis of Legislation and Practice*⁵⁶.

As discussed in the aforementioned publication, one of the key obstacles to the implementation of seizure and confiscation measures is insufficient capacities to effectively utilise different tools available within the asset recovery process. Based on publicly available information, with the exception of Croatia, it has generally not been possible to establish and utilise an adequate level of international co-operation in Bulgaria, Moldova and Romania. The trend seems to indicate an insufficient use of international co-operation mechanisms in relation to cases dealing with asset recovery.⁵⁷

The legislations of Bulgaria, Croatia, Moldova and Romania contain provisions on the use of financial investigations. However, the use of financial investigations varies greatly among the four jurisdictions. Based on the available statistics indicating the amounts of proceeds and instrumentalities of crime seized over time, Croatia and Romania appear to utilise financial investigations more proactively, while Bulgaria and Moldova less so. Ultimately, the effectiveness and efficiency of the asset recovery process is directly impacted by the results obtained in seizure orders and confiscation judgements, which in turn relies directly on the quality of the financial investigation. In this regard, attention is given to the current practice in Croatia, whereby electronic databases relevant to the asset recovery process have been set up and access to them has been granted to prosecutors. Moreover, the use of specialised financial investigation units within the Tax Administration enabled a relatively quick detection of the property of defendants and associated persons.

The terminology used by Bulgaria, Croatia, Moldova and Romania for seizure and confiscation varies widely. This unclear use of terminology may ultimately result in the use of the inappropriate legal tools by the national practitioner and may impede the international cooperation process. Finally, it should be underscored that Bulgaria, Croatia, Moldova and Romania all collect statistics in relation to the asset recovery process, given that this is a requirement that these jurisdictions (with the exception of Moldova) have under their EU obligations. Notwithstanding, it is important to note that the methodology used for the collection of statistics is not uniform among these jurisdictions, making the comparative analysis more difficult.

⁵⁶ Gomes Pereira, P. (2018). *Asset Recovery in the Western Balkans: a Comparative Analysis of Legislation and Practice*, section 2.

⁵⁷ *Ibid* p. 70.

This study therefore recommends the following actions, divided into the four main areas below.

3.1 Knowledge and skills in areas relevant to the asset recovery process

Strengthening the capacities of national law enforcement authorities, prosecutors and judges in obtaining the necessary skillset for implementing the asset recovery process, or updating such skillset through continuous training is essential for the effective and efficient seizure and confiscation of the proceeds and instrumentalities of crime. The initial and continuous trainings should include:

- Evidentiary thresholds required for obtaining both the seizure and confiscation of property;
- Application of specific confiscation mechanisms, particularly extended, third-party and non-conviction based confiscation and their impact on procedural guarantees and fair trial;
- Civil and commercial tools and practices, particularly in relation to different types of properties, legal entities and services which may be used by the perpetrator(s) to launder the proceeds and instrumentalities of crime;
- Assessment of the value of property subject to seizure or confiscation during the asset recovery process;
- Assessment of the amount of damage resulting from the commission of a corruption-related offence.

3.2 International co-operation

The study has established a need to strengthen the ability of law enforcement agencies, prosecution services and judicial bodies to implement international co-operation mechanisms into the asset recovery process, thereby ensuring the collection of evidence, as well as the seizure and confiscation of property beyond national borders. Targeted technical assistance and capacity-building measures in the area of international co-operation should specifically focus on:

- The different types of and options in international co-operation used in the asset recovery process;
- Application of available tools and mechanisms within the asset recovery process vis-à-vis international co-operation;
- Drafting requests for mutual legal assistance to obtain evidence, and to seize and confiscate property abroad;
- Peer-to-peer learning.

3.3 Knowledge of financial investigation techniques

The study identified a need to strengthen the capacities of law enforcement agencies and prosecution services to systematically conduct financial

investigations in parallel to criminal investigations, as the effectiveness of seizure orders and confiscation judgements is correlated with the ability to trace, identify and locate the proceeds and instrumentalities of crime. Specific issues that such comprehensive capacity building should focus on include:

- Capacity to systematically conduct financial investigations with a view to establishing the true nature, origin and ownership of the proceeds and instrumentalities of crime;
- Application of specific financial investigation techniques and theories, available in the context of the asset recovery process;
- Ability to conduct a financial investigation seeking to determine the apparent disproportion of property in the context of a criminal proceeding.

3.4 Recording of key statistics and use of common terminology in the asset recovery process

The study has established a need for the collection of specific datasets which would enable a better assessment of the effectiveness and efficiency of the asset recovery process, as well as fulfilling international obligations of data collection in the field of seizure and confiscation of assets. Specific issues that such comprehensive technical assistance should focus on include:

- Harmonisation of terminology at the national, subnational (where applicable) and transnational levels in the context of the asset recovery process in general, and the seizure and confiscation of proceeds and instrumentalities of crime in particular;
- Designing a common regional methodology for the collection of statistics relevant to the asset recovery process.

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