



**ASSET
RECOVERY IN THE
WESTERN BALKANS
COMPARATIVE ANALYSIS OF
LEGISLATION AND PRACTICE**



**REGIONAL
ANTI-CORRUPTION
INITIATIVE**



The AIRE Centre
Advice on Individual Rights in Europe



Title: Asset Recovery in the Western Balkans
A Comparative Analysis of Legislation and
Practice

Publisher: Regional Anti-corruption Initiative (RAI)
Advice on Individual Rights in Europe (AIRE)

Author: Pedro Gomes Pereira

Co-editors: Vladan Joksimovic
Biljana Braithwaite

RAI and AIRE team: Tomislav Curic and Jasna Panjeta
Nuala Mole and Elma Veledar Arifagic

Proofreading: Vera Devine

Design and Print: Planjax Produkt, Tesanj, BiH

ISBN: 978-9926-8016-2-5

Edition: 300 copies

© RAI2018

Views presented in the publication do not necessarily reflect the official position of the Regional Anti-corruption Initiative or its member states.

Asset Recovery in the Western Balkans

A Comparative Analysis of Legislation and Practice

Author: Pedro Gomes Pereira

Regional Anti-Corruption Initiative (RAI) Secretariat
Advice on Individual Rights in Europe (AIRE)
Sarajevo, 2018

Table of contents

Acknowledgements	8
Executive summary.....	9
Abbreviations	15
1 Introduction	16
1.1 Methodology	18
1.2 Definitions.....	20
2 International and European standards on asset recovery.....	23
2.1 United Nations	23
2.2 Council of Europe	24
2.3 European Union	30
2.4 FATF 40 Recommendations.....	35
3 European standards on human rights	38
3.1 The ECHR and seizure of property/assets.....	39
3.2 Procedural Requirements.....	44
3.3 The relationship between confiscation and other Convention rights.....	44
4 Overview of jurisdictions.....	50
4.1 Albania	50
4.2 Bosnia and Herzegovina	55
4.3 Kosovo*	58
4.4 Macedonia	60
4.5 Montenegro	64
4.6 Serbia	66
5 Conclusions and recommendations	70

5.1	Knowledge and skills in areas relevant to the asset recovery process, in line with European legal and human rights standards	71
5.2	International co-operation.....	72
5.3	Knowledge of financial investigation techniques	73
5.4	Recording of key statistics and use of common terminology in the asset recovery process.....	73
6	References.....	74
6.1	Bibliography.....	74
6.2	International Instruments	75
6.3	Relevant case law from the ECtHR.....	77
	Annex 1 – List of relevant projects on asset recovery in the Western Balkans.....	79
	Annex 2 – Comparative tables of legislation and legal tools available for the Western Balkans jurisdictions	80

Acknowledgements

The Advice on Individual Rights in Europe and the Regional Anti-Corruption Initiative wish to acknowledge and thank the experts and specialists who participated in the preparation, development, and presentation of the study Asset Recovery in the Western Balkans – A Comparative Analysis of Legislation and Practice. In particular, Mr. Pedro Gomes Pereira (team leader), Mr. Artur Selmani, Mr. Nermin Kadribasic, Ms. Lejla Kablar, Mr. Besim Tafa, Mrs. Aneta Arnaudovska, Mr. Mitar Susic, Mr. Veljko Milic, Mr. Stefan Dulic (national experts), Mr. Gianluca Esposito (Executive Secretary, GRECO), Mr. Kresimir Kamber (PhD, Lawyer at the ECtHR).

Executive summary

The purpose of this study is to assess the current seizure and confiscation mechanisms available in the Western Balkans jurisdictions, 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 international and European standards applicable to the asset recovery process and have been reviewed in light of the human rights standards applicable to the Western Balkans. For the purpose of this study, asset recovery is understood as a four-phase process 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 local levels which can be affected regionally. It further proposes solutions to overcome the identified shortcomings.

Overall, the study finds that the international and European standards have been to a large extent transposed into the national legislation of the Western Balkans jurisdictions. However, implementation of these standards at the operational level remains weak. The conclusions stemming from this study will serve as a basis for the elaboration of an action plan to strengthen the investigative and enforcement capacities in relation to the asset recovery process. Thus, steps should be taken to strengthen these local 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; defines the methodology used for this study; and establishes common definitions used throughout the document. The definitions contained in this section are of particular importance, given the varying terminology used both within and among the Western Balkans jurisdictions. Furthermore, they allow the study to establish a set of minimum standards which form the basis for comparing similar legal instruments among the relevant jurisdictions, as well as benchmarking the national instruments with the applicable international standards.

Section 2 provides an overview over the relevant international and European standards applicable in the context of the asset recovery process. This section, thus, contains the international standards to which the Western Balkans jurisdictions must adhere to. Moreover, section 2 provides an overview of the EU standards in relation to the asset recovery process. While the Western Balkans jurisdictions are not members of the EU, they are at different stages in the EU accession process. Therefore, it is opportune and timely to review and benchmark the national laws of the Western Balkans jurisdictions with the EU standards as well.

Section 3 reviews the European standards on human rights vis-à-vis the asset recovery process. Attention is given to the need to balance the human rights obligations of the Western Balkans jurisdictions with the general interests of security of society. In this regard, the focus of attention is on ensuring the right to a fair trial (Art. 6 ECHR); the right to property (Art. 1, Protocol No. 1 ECHR); the right to an effective remedy (Art. 13 ECHR); the principle of legality (Art. 7 ECHR); the right to privacy (Art. 8 ECHR); and the principle of ne bis in idem (Art. 4, Protocol No. 7 ECHR).

Section 4 provides an overview of the asset recovery system in each of the Western Balkans jurisdictions, 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. Reduced availability of seizure decisions and limited number of confiscation judgements across the Western Balkans jurisdictions defined the scope of the assessment undertaken in this study.

Section 5 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, seizure and confiscation are not used sufficiently and effectively in the region. The low implementation of these provisions are shown, on the one hand, through publicly available statistics, whereby the quantity of seizures of proceeds and instrumentalities of crime remain low, with a lower amount for confiscation

judgements. On the other hand, reports indicate that the mechanisms leading to seizure and confiscation of property have been inconsistently used and implemented in domestic criminal proceedings.

One of the key obstacles to the effective implementation of seizure and confiscation measures is the lack of sufficient capacity of law enforcement agencies, prosecution, and the courts. In particular, the knowledge required for the implementation of different aspects, tools and mechanisms - international co-operation, meeting the required evidentiary thresholds, seizure of proceeds and instrumentalities of crime, and the use of different confiscation mechanisms available nationally - appears to be limited. For example, based on the information which is publicly available, it has generally not been possible to establish the level of usage of international co-operation in the Western Balkans jurisdictions. However, the trend seems to indicate a low use of international co-operation in relation to cases dealing with asset recovery. While it is difficult to determine the causes - as statistical information is not readily available - it is assumed that it is an area which is underused by the authorities of the Western Balkans jurisdictions and that lack of familiarity with required tools and instruments plays its part. Equally, knowledge of European legal and human rights standards, and of the ECHR in particular, is insufficient as demonstrated in all local reports which note that European standards are used rarely before the courts.

Financial investigations have been used in all Western Balkans jurisdictions. However, national reports seem to indicate that law enforcement agencies and prosecution services are still lacking the necessary expertise and knowledge in the area of financial investigations. The effectiveness and efficiency of the asset recovery process is directly impacted by the results obtained in seizure orders and confiscation judgements. These, in turn, rely on the quality of the financial investigations conducted in parallel to the criminal investigation. There is, therefore, a need to enhance the ability of national law enforcement agencies to utilise different financial investigation techniques to determine the true nature, origin and ownership of the proceeds and instrumentalities of crime.

The national experts for the Western Balkans noted that there is an unclear use of terminology at the national, sub-national and transnational levels, despite the clear definitions contained at the international and European levels. The unclear terminology results in uncertainty in the application of such terms at the local level by the legal practitioner. At the transnational level, the lack of harmonisation (or co-ordination) of the terminology makes it difficult for the practitioner to co-ordinate jurisdictions when, e.g., applying for a request for mutual legal assistance (MLA). Moreover, due to the inconsistent collection of statistics related to the asset recovery process, it is difficult to gain a comprehensive overview of the effectiveness of the asset recovery process at the national and regional levels. Accurate statistics are fundamental for the effective prioritisation of actions to be undertaken at the operation level. They further support the prevention of financial crimes in general. At present, it is difficult to identify trends and patterns in the different stages of the asset recovery process, as well as relating to the process as a whole. Finally, the lack of harmonisation of terminology impairs the ability to collect and cross-verify statistics across the Western Balkans jurisdictions.

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

1. Knowledge and skills in areas relevant to the asset recovery process, in line with European legal and human rights standards

The study identified a need to strengthen the capacity of law enforcement agencies, prosecution and courts in order to secure effective implementation of seizure and confiscation measures in all jurisdictions under consideration, and to ensure its compatibility with applicable European standards. Specific issues that such comprehensive capacity-building measures should focus on include, among other:

- Evidentiary thresholds required for obtaining both the seizure and confiscation of property, in line with the applicable standards established in the ECHR and by the ECtHR;
- Application of specific confiscation mechanisms, particularly extended, third-party and non-conviction based confiscation and their impact on procedural guarantees and fair trial;

- Sufficient procedural guarantees afforded to the parties and (bona fide) third parties during seizure and confiscation proceedings, to secure compatibility with due process and fair trial under ECHR;
- 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;
- Property guarantees under ECHR and their applicability to the confiscation and management of seized and confiscated property;
- 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.

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 during the asset recovery process, thereby ensuring the collection of evidence, as well as the seizure and confiscation of property beyond national borders. Specific technical assistance and capacity-building measures in the area of international co-operation should focus on:

- The different types of international co-operation used in the asset recovery process;
- Applying tools and mechanisms available 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.

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 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.

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 better enable assessing 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 comprehensive technical assistance should focus on include:

- Harmonisation of terminology at the national, sub-national (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.

Abbreviations

AIRE	Advice on Individual Rights in Europe
AML	Anti-money laundering
BD	Brčko District (Bosnia and Herzegovina)
BiH	Bosnia and Herzegovina
CC	Criminal Code
CFD	Council Framework Decision
CFT	Counter Financing of Terrorism
CoE	Council of Europe
CPC	Criminal Procedure Code
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
ETS 141	Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
ETS 173	European Criminal Law Convention on Corruption
ETS 182	Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters
ETS 24	European Convention on Extradition
ETS 30	European Convention on Mutual Assistance in Criminal Matters
ETS 99	Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters
EU	European Union
FATF	Financial Action Task Force
FBiH	Federation of Bosnia and Herzegovina (Bosnia and Herzegovina)
FSRB	FATF Style Regional Body
GRECO	Group of States against Corruption
INTERPOL	International Criminal Police Organisation
JHA	Justice and Home Affairs
MLA	Mutual legal assistance
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
NCB	Non-conviction based
RAI	Regional Anti-Corruption Initiative
RS	Republika Srpska (Bosnia and Herzegovina)
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNTOC	United Nations Convention against Transnational Organised Crime
OSCE	Organisation for Security and Co-operation in Europe

1 Introduction

The idea to conduct a comparative analysis on the subject of asset recovery came about in late 2017, when the Advice on Individual Rights in Europe Centre (AIRE) and the Regional Anti-Corruption Initiative (RAI) Secretariat joined forces to support the Western Balkans jurisdictions in intensifying and consolidating their efforts at the regional level.

The AIRE Centre is a non-governmental organisation based in the United Kingdom, whose mission is to promote awareness of European human rights law, and to assist vulnerable and marginalised individuals in asserting them. RAI is an inter-governmental regional organisation, which deals solely with anti-corruption issues, covering the organisation's nine member states: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Moldova, Montenegro, Romania and Serbia.

The first step AIRE and RAI took together was to obtain sufficient and current information about the asset recovery legislation and practices in the Western Balkans jurisdictions. *Asset Recovery in the Western Balkans – A Comparative Analysis of Legislation and Practice* is the result of these fact-finding efforts.

The jurisdictions examined in this comparative analysis are: Albania, Bosnia and Herzegovina, Kosovo*, Macedonia, Montenegro, and Serbia. The study does not intend to score individual jurisdictions' levels of achievement in the field of asset recovery. Rather, it was conducted with the clear objective to provide a snapshot of the current state of play, and which would include the identification of common challenges in the field of asset recovery in the Western Balkans. The study also provides an outlook as to where the principle issues might be, which, if addressed, would result in a better track record for all stakeholders involved in the asset recovery process. The study discusses asset confiscation in final court judgements in cases of corruption, with a particular focus on human rights norms stipulated by different international standards. It also elaborates on a variety of standards in response to different international commitments.

* This designation is without prejudice to positions on status, and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

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 the Western Balkans. It is also intended for judges, prosecutors and investigators, and other professionals with an interest in asset recovery policies and practices in the neighbouring jurisdictions.

Asset Recovery in the Western Balkans – A Comparative Analysis of Legislation and Practice shares with the reader legislative frameworks applied by different jurisdictions and analyses of case law, as well as providing recommendations for the improvement and more efficient enforcement of asset recovery measures in the respective jurisdictions. Although the collected facts rely on limited statistical data and scarce qualitative information, the presented conclusions and recommendations act as a common denominator for the Western Balkans jurisdictions.

It is also important to state the ulterior motive that underpinned the analytical process. During data collection and consolidation—which involved the analysis of a considerable amount of documents—partners fostered a unified front, resulting in the emergence of a regional approach to the topics at hand. This regional approach, meaning the peer-to-peer exchange and dialogue among professional communities in the respective jurisdictions, proved to be needed, as well as wanted.

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.

1.1 Methodology

Asset Recovery in the Western Balkans – A Comparative Analysis of Legislation and Practice (hereafter: 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 project gathered national experts from all Western Balkan jurisdictions, as well as international experts in the field of human rights and asset recovery.

The comparative analysis development process commenced with introducing the common ground rules on the scope, as well as common definitions and a number of other parameters necessary to ensure the comparative nature and outcome of the process, and which included the timeframe that the analysis would cover. Hence, the analysis focused on judicial proceedings regarding corruption-related offences since January 2012. The jurisdictions covered were: Albania, Bosnia and Herzegovina, Kosovo*, Macedonia, Montenegro, and Serbia.

The preliminary findings and working hypotheses resulting from the desk study informed semi-structured interviews conducted with relevant authorities (law enforcement officials, prosecutors and judges) and the search for relevant judicial decisions. The findings of the comparative analysis have been placed into individual jurisdiction reports.

All the jurisdiction analyses were subjected to review by human rights experts, and they are benchmarked with the international and regional standards. The identified judicial decisions on seizure and confiscation of assets were also benchmarked, taking into consideration case law and practice from the ECtHR.

The objectives of the publication are:

- To review and analyse court decisions on search, seizure and confiscation of illegally obtained assets in Western Balkans jurisdictions;
- To compile ECHR and European Court of Human Rights (ECtHR) standards and case law applicable to search, seizure and confiscation of illegally obtained assets
- To present findings, conclusions and recommendations at the national and regional levels;

- To propose tangible actions based on the findings, conclusions and recommendations.

The revision of both the legal and regulatory frameworks, combined with the quality of the judicial decisions issued by local courts and their benchmarking with international and regional standards and good practices allowed the identification of hurdles that may play a role in reducing the overall effectiveness and efficiency to search, seize and confiscate assets in the Western Balkans.

Essentially, 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 the results deriving from seizure and confiscation of illegally obtained assets are.

In order to achieve this, the team of national experts had to consider outcomes of the (pre-trial) investigations conducted by the national authorities. Analysis of decisions issued by judicial authorities to seize illegally obtained assets during the (pre-trial) investigations, and analysis of judgements rendered by judicial authorities to confiscate illegally obtained assets were key to gaining substantive insight and formulating the findings.

The analytical process also included looking a number of requests for mutual legal assistance issued in relation to the seizure and confiscation of illegally obtained assets, as well as positive and negative responses for the requests for mutual legal assistance issued. Finally, the experts also reviewed, to a limited extent, the social and the political context of the trials and the impact of the decisions rendered.

The structure of the study reflects the described methodology and approach. The collaborative efforts of national and international experts are captured in a four main chapters: international and European standards on asset recovery; European legal and human rights standards; overview of Western Balkans jurisdictions; and conclusions and recommendations. Finally, the study contains an annex which provides a non-exhaustive overview of relevant projects pertaining to the asset recovery process which are being implemented in the Western Balkans.

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 European and international standards, or where none are provided by either, these have been indicated.

“Asset recovery” is acknowledged as a four-phase process:¹

- 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;
- 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.

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

“Confiscation” or “forfeiture”² 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”³ 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”⁴ 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”⁵ 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.”

“Instruments of the crime”⁶ 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”⁷ 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

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

3 Art. 17 UNCAC.

4 CFD 2005/212/JHA.

5 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.

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

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

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”⁸ is where confiscation is ordered, but does not derive from a criminal conviction.

“Predicate offence”⁹ 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”¹⁰ is any property, benefit or advantage derived from or obtained, directly or indirectly, through the commission of an offence.

“Property”¹¹ 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”¹² 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 4,000.00.

8 Art. 3(4) CFD 2005/212/JHA.

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

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

11 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.

12 Art. 3 CFD 2001/500/JHA.

2 International and European standards on asset recovery

This section of the study provides a brief overview of the main instruments both at the international and European levels providing asset recovery standards. The standards set by the international instruments form the basis of the definitions used in section 1 above, allowing for the identification of strengths and shortcomings in relation to the asset recovery-related legislation in the Western Balkans jurisdictions.

The relevant provisions relating to the asset recovery process are found in international or regional instruments from the European Union (EU); the Council of Europe (CoE); the United Nations (UN) and the Financial Action Task Force on Money Laundering (FATF). It should be noted that these instruments do not directly define the term “asset recovery.” Rather, they focus on several of the activities and elements which constitute the asset recovery process.

2.1 United Nations

The UN has two main conventions which deal with the asset recovery process: the United Nations Convention against Transnational Organised Crime (UNTOC)¹³ and the United Nations Convention against Corruption (UNCAC).¹⁴ All Western Balkans jurisdictions have ratified both these conventions, with the exception of Kosovo.*

2.1.1 United Nations Convention against Transnational Organised Crime

UNTOC was the first UN treaty addressing corruption – criminalising active and passive bribery of a national or foreign public official, and of international civil servants. It does not, however, have comprehensive provisions for asset recovery. Notwithstanding, it does contain elements relevant to the asset recovery process, such as measures for international co-operation, measures to combat money laundering and rules on seizure and confiscation of assets.

¹³ UNGA Res. 55/25, United Nations Convention against Transnational Organised Crime, UN Doc. A/RES/55/25 (8 January 2001).

¹⁴ UNGA Res. 58/4, United Nations Convention against Corruption, UN Doc. A/RES/58/4 (21 November 2003).

* This designation is without prejudice to positions on status, and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

2.1.2 United Nations Convention against Corruption

UNCAC is divided into four main areas: (i) prevention, (ii) criminalisation and law enforcement; (iii) international co-operation; and (iv) asset recovery. UNCAC is the first (and only) international treaty to deal with the issue of asset recovery. The structure of the UNCAC is inextricably linked to the asset recovery process, whereby information obtained from the prevention of corruption supports any law enforcement and prosecutorial activities for the enforcement of corruption-related offences. Moreover, given the transnational nature of money laundering, UNCAC devotes an entire chapter to international co-operation. Finally, its chapter V contains general provisions regarding the return of confiscated assets, ranging from international co-operation measures for the return of assets to the hiring of private counsel in jurisdictions where assets are found with a view to mitigating damages resulting from corruption-related offences.

2.2 Council of Europe

The Council of Europe (CoE) has established several international treaties and soft law mechanisms relevant to the asset recovery process and its policies. These are:

- Recommendation R(88)18 of the Committee of Ministers of the Council of Europe;¹⁵
- The European Convention on Mutual Assistance in Criminal Matters and its additional protocols (ETS 30¹⁶ , 99¹⁷ and 182¹⁸);
- The European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 14¹⁹);

15 Recommendation R(88)18 of the Committee of Ministers to the Member States Concerning the Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their Activities, adopted on 20 October 1988.

16 European Convention on Mutual Assistance in Criminal Matters, 20 April 1959, in force 12 June 1962, ETS 30.

17 First Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 13 March 1978, in force 12 April 1982, ETS 99.

18 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 8 November 2001, in force 1 February 2004, ETS 182.

19 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 8 November 1992, in force 1 May 1997, ETS 141

- The European Criminal Law Convention on Corruption (ETS 173²⁰) and its additional protocol (ETS 191²¹);
- The CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198²²).

The Western Balkans jurisdictions are Member States of the Council of Europe²³. Furthermore, with the exception of Kosovo* and Bosnia and Herzegovina for ETS 99, all of the above Conventions have been ratified by the Western Balkans jurisdictions.

2.2.1 Group of States against Corruption

The Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe to monitor Member States' compliance with, and effective implementation of, the organisation's anti-corruption standards.

GRECO's objective is to improve the capacity of its members to fight corruption by monitoring their compliance with CoE anti-corruption standards through a dynamic process of mutual evaluation and peer pressure. It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms.

GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption. GRECO monitors all its members on an equal basis, through a dynamic process of mutual evaluation and peer pressure. The GRECO mechanism ensures the scrupulous observance of the principle of equality of rights and obligations among its members. All members participate in, and submit themselves without restriction to, the mutual evaluation and compliance procedures.

A recent change in the Rules of Procedure allows GRECO to carry out ad hoc evaluations in exceptional circumstances whenever an institutional reform, legislative initiative or procedural change by a member may result in that mem-

20 Criminal Law Convention on Corruption, 27 January 1999, in force 1 July 2002, ETS 173.

21 Additional Protocol to the Criminal Law Convention on Corruption, 15 March 2003, in force 1 February 2005, ETS 191

22 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 16 May 2005, in force 01 May 2008, CETS 198.

23 Kosovo* is not a Member State to the CoE. Notwithstanding, the CoE co-operation with Kosovo* is based on the principle that the CoE and its Secretariat operate in conformity with the United Nations Security Council Resolution (UNSCR) 1244 (1999) and on the status-neutral approach of the CoE.

ber's serious violation of a Council of Europe anti-corruption standard²⁴

One of the themes examined by GRECO in its 2nd evaluation round was identification, seizure and confiscation of proceeds of corruption. The following provisions were under evaluation: Resolution (97) 24: Guiding Principles against Corruption numbers 4 and 19, ETS 173: Art. 13, 19 para. 3 and 23.

The most common recommendation from this evaluation round for the jurisdictions covered by this study was to develop guidelines identifying an effective methodology for performing financial investigations, seizure, and confiscation measures in corruption cases. In addition, GRECO recommended making full use of the legal provisions on temporary seizure at the very beginning of an investigation, as well as of interim measures (preventive attachment) and confiscation, including value-based confiscation. Further, development of a common (initial and in-service) multidisciplinary training programme for police officers and prosecutors was recommended, in order to promote and encourage better use of practical and legal means available for identifying, tracing and seizing proceeds of crime/corruption. Special attention should be paid to making better use of legal provisions concerning confiscation of proceeds of crime held by a third party. A recommendation was made to enlarge the scope of the provisions on confiscation of indirect proceeds of crime and with regard to situations where no conviction is possible (in rem confiscation). Finally, in the area of international co-operation, GRECO encouraged the authorities to consider ways of achieving more direct international communication between prosecutors across jurisdictions in order to optimise the use of direct communication in mutual assistance with regards to seizure and confiscation.

GRECO has identified a general lack of statistics permitting to evaluate the practical implementation of existing legislation on identification, seizure, freezing and confiscation of proceeds of crime in general, and of corruption proceeds in particular, including the aspect of international co-operation.²⁵

One of the strengths of GRECO's monitoring is that the implementation of its recommendations is examined in the compliance procedure. The assessment of whether a recommendation has been implemented satisfactorily, partly or has not been implemented, is based on a situation report, accompanied by supporting documents submitted by the member under scrutiny 18 months after

²⁴ <https://www.coe.int/en/web/greco>

²⁵ <https://www.coe.int/en/web/greco/evaluations/round-2>

the adoption of the evaluation report.²⁶

As for most jurisdictions covered by this study, GRECO concluded within the compliance procedure that progress has been made in terms of the legal frameworks on seizure and confiscation of proceeds from crime. However, effective implementation of existing legislation on identification, seizure, freeing and confiscation of proceeds of corruption remains a challenge and needs to be addressed further.

2.2.2 Recommendation R(88)18 of the Committee of Ministers of the Council of Europe

Criminal liability of legal persons is an important component of the effective combating of financial and organised crime. It is an important tool in criminal justice systems to be able to hold such entities liable for actions committed by and through them. This may include situations whereby legal entities are used to hide the true nature, origin and ownership of property, as is the case with shell corporations created for the purposes of laundering the proceeds of crime.

As the initial European standard in the field of liability of legal persons, Recommendation R(88)18 set out a number of principles to guide its Member States. Section I(1) of the appendix to Recommendation R(88)18 states that legal persons²⁷ should be made liable for offences committed in the exercise of their activities.²⁸ Section I(2) also stipulates that the liability of the legal person should take place separately from any liability from the natural person(s) identified as having committed the criminal offence(s). Finally, section I(5) of Recommendation R(88)18 requires that any natural person implicated in the commission of an offence be held criminally liable, in particular where they perform managerial functions.

2.2.3 European Convention on Mutual Assistance in Criminal Matters and its additional protocols

ETS 30 sets minimum standards for the co-operation in the examination of witnesses or experts; service of official documents and judicial verdicts; summoning of witnesses, experts or persons in custody; and transmission of informa-

²⁶ <https://www.coe.int/en/web/greco/about-greco/how-does-greco-work>

²⁷ Recommendation R(88)18 refers to legal persons as 'enterprises'.

²⁸ Gomes Pereira, P., & Dornbierer, A. (2013). Enhancing the investigation capacities of the Romanian authorities to confiscate and recover proceeds of crime, p. 17.

tion from judicial records.

ETS 30 was complemented by a first additional protocol (ETS 99), which extended the material and procedural scope of ETS 30. Providing a more precise description of fiscal offences without, however, introducing a legal definition,²⁹ it requires States to be restrictive in refusing assistance on the grounds of a fiscal offence (Art. 1 ETS 99). According to the explanatory report,³⁰ the protocol therefore seeks a connection with ETS 30 itself and refers in addition to Art. 5 of the European Extradition Treaty (ETS 24).³¹ The first additional protocol limits the possibility of refusing to provide assistance based on dual criminality requirements.

The second additional protocol (ETS 182) further complemented ETS 30, and seeks to modernise the provisions for mutual legal assistance (MLA) between Member States, extending the range of circumstances under which assistance may be sought,³² thereby increasing the effectiveness of MLA. ETS 182 supplements the standard practice of transmitting requests for mutual legal assistance (MLA) via central authorities, by creating the possibility of direct communication between law enforcement authorities (Art. 4 ETS 182, amending Art. 15(3) of ETS 30).

ETS 182 introduces additional investigative steps. To be mentioned in particular are the provisions allowing the use of video linkage or by telephone conference when interviewing witnesses, experts or accused persons (Art. 9, Art. 10 ETS 182); the spontaneous transmission of information (Art. 11 ETS 182);³³ and the use of joint investigations (Art. 20 ETS 182). While the Convention and its additional protocols do not deal directly with the asset recovery process, it is clear that they make mention of legal and operational tools which are of importance to it, in particular MLA, which is a fundamental step in the asset recovery process in order to restrain and confiscate assets outside the requesting jurisdiction, as well as to obtain evidence for the criminal procedure.

29 Fiscal offences are described as offences in connection with taxes, duties, customs and exchange.

30 CoE. (1978). Explanatory Report to the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

31 European Convention on Extradition, 13 December 1957, in force since 18 April 1960, ETS 24.

32 CoE. (2001). Explanatory Report to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, p. 2, para. 7.

33 Essentially, this article corresponds with Art. 46 (4) UNCAC, which requires is that the information has been obtained in the context of an ongoing criminal investigation.

2.2.4 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

The purpose of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141) is two-fold: (i) to facilitate international co-operation concerning search, seizure and confiscation from all types of criminality;³⁴ and (ii) to complement existing instruments from the CoE, particularly ETS 30, which did not encompass the search and seizure of property with a view to its confiscation.³⁵

The importance of ETS 141 to the asset recovery process cannot be underestimated: money laundering is the offence a (natural or legal) person commits in order to hide the true origin, nature and ownership of their proceeds of crime. In turn, asset recovery is the action taken to trace those unlawful assets; seize them from the perpetrators; and restore them to their rightful owner(s).³⁶

2.2.5 Criminal Law Convention on Corruption and its additional protocol

The European Criminal Law Convention on Corruption (ETS 173) seeks to pursue a common criminal policy against corruption among its States Parties through the adoption of adequate legislation to enhance the criminalisation of many corrupt practices and to provide mechanisms for international co-operation in criminal matters. ETS 173 applies to the public and private sectors, as well as in transnational cases involving bribery of foreign public officials; members of foreign public assemblies; officials of international organisations; and judges and officials of international courts.³⁷

ETS 173 covers a wide range of offences which are to be criminalised by the CoE Member States, and contains provisions on the liability of legal persons and on MLA. The provisions on MLA under ETS 173 are not detailed, due to the fact that the matter has been regulated through ETS 30, 99 and 182, mentioned in section 2.2.3 above. Moreover, it should be noted that ETS 141 specifically includes the corruption-related offences under ETS 173 as predicate offences to money laundering. ETS 173 has been complemented with an Additional Protocol (ETS 191), which extends the required criminalisation of corruption-related offences

34 CoE. (1990). Explanatory Report to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, p. 2, para. 8.

35 CoE. (1990). Explanatory Report to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, p. 2, para. 9.

36 ICAR (2011). Development Assistance, Asset Recovery and Money Laundering: Making the Connection, p. 15.

37 Webb, P. (2005). The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity? *Journal of International Economic Law*, 8(1), p. 199.

2.3 European Union

The Western Balkans jurisdictions are not currently bound by the regulations mentioned in the present section, given that none of the jurisdictions are EU Member States. However, the Western Balkans jurisdictions are all candidate jurisdictions to the EU in different stages of the EU accession process. Therefore, it is pertinent to assess the effectiveness and efficiency of their respective asset recovery systems vis-à-vis the applicable EU regulations.

2.3.1 Joint Action 98/699/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime

The Joint Action 98/699/JHA establishes that EU Member States should ensure their legislation allows them to identify and trace proceeds and instrumentalities of crime at the request and on behalf of another Member State.³⁸ Such legislation and procedures should enable assistance to be given at the earliest possible stages in an investigation (Art. 1(3) Joint Action 98/699/JHA).

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

Seeking to further enhance the effectiveness of the ETS 173, Council Framework Decision (CFD) 2001/500/JHA³⁹ worked towards co-ordination efforts for the confiscation of proceeds and instrumentalities of crime by EU Member States. This CFD raised two other elements to ensure more effective mechanisms in combating money laundering and serious and organised crime: EU Member States were required to (i) put in place systems of value-based confiscation (foreseen and required by Art. 2(1) ETS 173) for both domestic proceedings and those stemming from another EU Member State; and to (ii) receive requests from one another through requests for MLA seeking to identify, trace, freeze, seize or confiscate assets.⁴⁰ These requests for MLA were to be given the same priority as that given to domestic measures.

38 Gomes Pereira, P. (2016). Analytical Study on Mechanisms for Asset Recovery and Confiscation in Moldova, p. 29.

39 Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 05.07.2001, p. 1-2).

40 Gomes Pereira, P. (2016). Analytical Study on Mechanisms for Asset Recovery and Confiscation in Moldova, p. 30.

2.3.3 Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence

CFD 2003/577/JHA⁴¹ came in response to the special meeting held by the European Council on 15-16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the EU, which sought to apply the principle of mutual recognition to “pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State’s authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.”⁴²

CFD 2003/577/JHA thus enables competent judicial authorities to secure evidence and seize the proceeds and instrumentalities of crime.⁴³ It provides for rules of procedure pertaining to the transmission of freezing orders directly between competent judicial authorities; the duration of the freezing order; the grounds for non-recognition; non-execution or postponement of the request; as well as the subsequent treatment to be given to the seized property.

An element introduced by this instrument is that such requests would no longer need to go through the channels of MLA – a direct consequence of the principle of mutual recognition of judicial decisions and judgements – in order to ensure the rapid response by Member States to collect evidence and seize proceeds and instrumentalities of crime, thus removing these unlawful assets from the perpetrators of serious and organised crime.⁴⁴ Under CFD 2003/577/JHA, a seizure order would be directly transmitted between judicial authorities of the involved Member States, without the need for MLA. Thus, while the confiscation of proceeds and instrumentalities of crime still requires the use of MLA channels (under CFD 2001/500/JHA), the execution of seizure orders (as well as other interim measures to secure evidence) would no longer require the use of such a mechanism

41 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, p. 45–55).

42 Presidency Conclusions to the Tampere European Council meeting, 15 -16 October 1999, para. 36.

43 Gomes Pereira, P. (2016). *Analytical Study on Mechanisms for Asset Recovery and Confiscation in Moldova*, p. 31.

44 *Ibid*

2.3.4 Council Framework Decision 2005/212/JH on confiscation of crime-related proceeds, instrumentalities and property

The main aim of CFD 2005/212/JHA⁴⁵ is to ensure that all Member States have effective rules on the confiscation of the proceeds and instrumentalities of crime, especially in relation to the burden of proof regarding the source of assets held by a person convicted of an offence related to organised crime.

This instrument enables the confiscation, wholly or in part, of instrumentalities and proceeds from criminal offences punishable by imprisonment for more than one year, or property, the value of which corresponds to such proceeds (value-based confiscation).

Member States are also encouraged to use procedures other than criminal ones to deprive the perpetrator of the proceeds of crime (e.g., non-conviction based confiscation).⁴⁶

CFD 2005/212/JHA is furthermore an innovative instrument which also introduces extended confiscation, and provides for three situations in which Member States can seek it:

- Where a court is satisfied that the property to be confiscated derives from criminal activity of the convicted person during the period prior to the conviction;
- Where a court is satisfied that the property derives from similar criminal activities of the convicted person during the period prior to the conviction; or
- Where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a court is satisfied that the property in question derives from the criminal activity of the convicted person.

⁴⁵ Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ L 68, 15.3.2005, p. 49–51).

⁴⁶ Gomes Pereira, P. (2016). Analytical Study on Mechanisms for Asset Recovery and Confiscation in Moldova, p. 31-32.

A fourth, non-mandatory, situation foreseen is to allow for the 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 has a controlling influence.”⁴⁷

It should be underscored that these four circumstances require a criminal conviction of the perpetrator in order for the extended confiscation to take place. This means that a court must first establish that the assets are illegal in nature.

2.3.5 Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders

CFD 2006/783/JHA⁴⁸ expanded the principle of mutual recognition introduced through CFD 2003/577/JHA for seizure orders (see section 2.3.3 above) to include the enforcement of confiscation orders among EU Member States. It applies to all offences in relation to which confiscation orders can be issued and has further abolished dual criminality requirements in relation to offences listed in its articles. This instrument seeks to establish rules whereby EU Member States ought to recognise and execute confiscation orders issued by each other’s courts directly, without the need for MLA.⁴⁹

CFD 2006/783/JHA also contains specific provisions pertaining to the disposal of confiscated assets – an area not covered by any of the previous CFDs. A 50 per cent sharing agreement is to be considered in cases in which the amount is higher than EUR 10,000.00 (Art. 16(1) (a) and (b) CFD 2006/783/JHA). For confiscations that do not exceed the mentioned threshold, the value is to remain with the executing Member State (Art. 16(1) (a) CFD 2006/783/JHA).

47 Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ L 68, 15.3.2005, p. 49–51).

48 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59–78).

49 Gomes Pereira, P. (2016). Analytical Study on Mechanisms for Asset Recovery and Confiscation in Moldova, p. 33.

2.3.6 Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

Directive 2014/42/EU⁵⁰ sought to, among other, clarify the existing concept of proceeds of crime to include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds.^{51,52}

It, thus, aims to amend and expand the provisions of CFDs 2001/500/JHA and 2005/212/JHA. Directive 2014/42/EU also establishes that freezing and confiscation under the Directive are autonomous concepts (Recital 13 Directive 2014/42/EU).

Directive 2014/42/EU establishes that Member States are to take the necessary measures to enable confiscation, in whole or in part, of the instrumentalities and the proceeds of crime, or property the value of which corresponds to such instrumentalities or proceeds (value-based confiscation) (Art. 4(1) and 5(1) Directive 2014/42/EU). Furthermore, Directive 2014/42/EU establishes the possibility for NCB confiscation, where the underlying facts would constitute a criminal offence and the suspect or accused person could have been criminally convicted if the person had stood trial (Art. 4(2) Directive 2014/42/EU).

Directive 2014/42/EU indicates that extended confiscation is applicable in situations where not only property associated with a specific crime should be confiscated, but also additional property which the court determines constitutes the proceeds of crime. In such cases, the court should, on the basis of the circumstances of the case, include specific facts and available evidence (e.g., value of the property disproportionate to the lawful income of the convicted person) which satisfies the court that such property is derived from criminal products (Art. 5 Directive 2014/42/EU).

Directive 2014/42/EU also contains provisions related to the confiscation of property transferred to third parties. The reasoning behind this is the fact that

50 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.04.2014, p. 39).

51 Gomes Pereira, P. (2016). Analytical Study on Mechanisms for Asset Recovery and Confiscation in Moldova, p. 35-36.

52 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.04.2014, p. 39), Recital 11.

property can be acquired, directly or indirectly, through an intermediary.⁵³ Thus, confiscation should be possible when the accused person does not have any property to be confiscated, and when third parties knew or should have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer was carried out free of charge or in exchange for an amount significantly lower than the market value (Art. 6(1) Directive 2014/42/EU).

2.4 FATF 40 Recommendations

The Financial Action Task Force (FATF) is a policy-making intergovernmental body responsible for setting standards and promoting effective implementation of legal, regulatory and operational measures for, among other issues, preventing and combating money laundering.⁵⁴ FATF is the international standard-setter in this regard, forming the basis for a co-ordinated response to money laundering and ensuring the integrity of national and international financial systems. The FATF published its 40 recommendations to combat money laundering in 1990, then revised them in 2003 to include special recommendations to prevent and combat the financing of terrorism. The latest revision of the FATF recommendations occurred in 2012.

FATF is comprised of 36 country members and 8 associate members.⁵⁵ These associate members are the FATF Regional Style Bodies (FRSBs), including MONEYVAL. The Western Balkans jurisdictions are members of MONEYVAL, with the exception of Kosovo*, which has been reviewed for AML/CFT compliance by the Joint European Union/Council of Europe Project against Economic Crime in Kosovo*. While the FATF does not directly set standards in the prevention and combating of corruption, it is nevertheless important to review its key documents, given its role of evaluating member countries directly (and other countries indirectly through the FSRBs), through a mutual evaluation mechanism regarding their compliance with money laundering standards.

Recommendation 3 FATF mentions that all jurisdictions should include the widest range of predicate offences to money laundering and, at a minimum, all

53 Gomes Pereira, P. (2016). Analytical Study on Mechanisms for Asset Recovery and Confiscation in Moldova, p. 36-37.

54 See <http://www.fatf-gafi.org/pages/aboutus/>.

55 The list of the 36 members and 8 associate members of FATF (which includes MONEYVAL) can be found at: <http://www.fatf-gafi.org/pages/aboutus/membersandobservers/>.

offences that fall within the category of serious offences under national law.⁵⁶ In relation to MLA, the FATF standards note that predicate offences should extend to conduct that occurred in another jurisdiction and where the offence constitutes or would have constituted an offence in the countries involved.⁵⁷ The FATF standards thus allow for dual criminality requirements in relation to the predicate offence,⁵⁸ as well as in relation to coercive measures (Recommendation 37 FATF).

Recommendation 4 FATF indicates that jurisdictions should adopt measures similar to UNTOC, among other, to enable their competent authorities to freeze or seize and confiscate the following, without prejudicing the rights of bona fide third parties: (i) property laundered, (ii) proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences, (iii) property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations, or (iv) property of corresponding value.

Such measures should include the authority to: (i) identify, trace and evaluate property that is subject to confiscation; (ii) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (iii) take steps that will prevent or void actions that prejudice the ability of the jurisdiction to seize or recover property that is subject to confiscation; and (iv) take any appropriate investigative measures.

Jurisdictions should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law

Jurisdictions should establish mechanisms that will enable their competent authorities to effectively manage and, when necessary, dispose of, property that is frozen or seized, or has been confiscated. These mechanisms should be applicable both in the context of domestic proceedings, and pursuant to requests

56 FATF. (2012b). International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, The FATF Recommendations, p. 34.

57 *Ibid*

58 *Ibid*

by foreign countries.⁵⁹ A core element of Recommendation 4 FATF is that there should be measures in place to identify, trace and evaluate property that is subject to confiscation.⁶⁰ Countries should ensure that appropriate procedures and legal frameworks are in place to allow informal exchanges of information to take place, including prior to MLA, as this practice may help to focus efforts and resources before the request reaches a formal stage.⁶¹

Competent authorities should also engage with foreign counterparts, from a bilateral or regional perspective, and utilise appropriate international bodies such as the Egmont Group, INTERPOL, Europol and Eurojust.⁶²

59 FATF. (2012b). International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, The FATF Recommendations, p. 36.

60 FATF. (2012a). Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery, p.1.

61 FATF. (2012a). Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery, p. 2.

62 *Ibid*

3 European standards on human rights

Imposing a penalty or any other measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property, raises a number of issues in connection with the European Convention on Human Rights (ECHR). Namely, confiscation of property is a very important tool in the fight against organised crime, corruption or other serious offences through the Member States of the CoE. Many jurisdictions' relevant laws prescribe several forms of confiscation, such as extended confiscation, third party confiscation, and non-conviction based confiscation.

Over the past decades, the concept of confiscation has evolved. This has partly been in response to the need to comply with international instruments which are focussed on combatting corruption and organised crime. As a result, a tension arises between the safeguarding of fundamental human rights, and the strong enforcement of confiscation tools. The effective implementation of such measures has become one of the most important objectives in dealing with serious offences.

The case law of the European Court of Human Rights (the Court or ECtHR) provides specific guidance on how ECHR standards apply to the confiscation of property.

As the ECHR is a 'living instrument', and the Court is responsible for judging the compatibility of new forms of confiscation measures with the ECHR (when challenged), understanding whether a specific confiscation measure is compatible with Convention standards requires a high degree of familiarity with the Court's jurisprudence and the underlying principles.

Whilst States do enjoy a wide margin of appreciation in applying confiscation measures, the Court will nevertheless require the respect of a minimum standard guaranteed under the Convention.

The purpose of this section is to provide an understanding of the way in which confiscation measures (specifically in relation to the confiscation, seizure, and forfeiture of assets of proceeds of crime) have conflicted and complied with the rights and fundamental freedoms afforded by the Convention.

There will be an extensive examination highlighting both the content and key principles the Court has developed in relation to the applicable articles of the Convention. The overarching purpose is to allow the reader to gain a deeper understanding of the different contexts in which confiscation measures may amount to a breach of the ECHR standards.

3.1 The ECHR and seizure of property/assets

The confiscation of assets deriving from the proceeds of crime collides with a number of Convention rights. Primarily, these are the right to peaceful enjoyment of property (Art. 1 of Protocol No.1) and the right to a fair trial (Art. 6). Also, as a general point of principle, the Convention must be in harmony with other international principles and law which are applicable to the confiscation of property.

The below will examine the general principles of the seizure of property/assets, stemming from the ECtHR's jurisprudence.

3.1.1 Confiscation, the seizure of assets/property, and Article 1 of Protocol No. 1

Where an applicant is subject to confiscation measures, the first right engaged and usually argued to be violated is Art. 1 of Protocol No.1.

Art. 1 of Protocol No.1 guarantees the right to property and protects individuals or legal persons from arbitrary interference by the State with their possessions.⁶³ Despite these safeguards, the Court has recognised the right of the State to control the use of or even confiscate property belonging to individuals or legal persons under the conditions set out in Art. 1 of Protocol No.1. states:

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
2. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

⁶³ Marckx v. Belgium, judgment of 13 June 1979, no.6833/74.

Any interference with property rights must therefore be pursuant to the general or public interest. Public authorities are able to control property to secure payment of taxes or other contributions or penalties. Further, interference with the right should be conducted in a manner which is not arbitrary and which is in accordance with the law. This will be explored further below.

Thus, States are able to control the use of property as afforded by Art. 1 (2) of Protocol No.1. A control of the use of property will occur through making decisions or adopting measures in relation to the property which do not amount to a deprivation but do affect the owner's enjoyment of it. The State's power to intervene in cases of control is wide, however it cannot be arbitrary.⁶⁴ Forfeiture provisions under enforcement laws have often been cited by the Court as being control of property under Art. 1 (2) of Protocol No.1.

In *Raimondo v. Italy* the Court stated "the seizure, as a provisional measure intended to ensure that property which appeared to be the fruit of unlawful activities carried out to the detriment of the community could subsequently be confiscated if necessary, was justified by the general interest."⁶⁵

What is more, the Court reiterated that the seizure of property for the purposes of legal proceedings falls within the remit of Art. 1 (2) Protocol No.1.

It is important to note that the Court qualifies confiscation measures as control of use of property, rather than amounting to a deprivation of property, even when the result is irrevocable forfeiture of assets. Art. 1 (1) Protocol No.1 considers the deprivation of property to be the extinguishment of all rights of ownership, and subjects this to certain conditions. In order to decide whether there has been or will be a 'deprivation' the judge will need to look at whether the individual is (or will be) able to use, sell, donate or otherwise deal with the possession in question.

3.1.2 Interference

If an applicant's property has been seized, the Court will assess whether the interference with the applicant's property was justified. For such justification to be established, the Court will assess whether the State has passed three distinct tests: lawfulness (i.e. in accordance with law); legitimate aim; and proportionate interference. Each limb will be explained below.

⁶⁴ *Pine Valley Developments Ltd v. Ireland*, judgment of 9 February 1993, no. 12742/87

⁶⁵ *Raimondo v. Italy*, judgment of 22 February 1994, no. 12954/87, para. 27

3.1.3 In accordance with the law

The Court must be satisfied that State interference (i.e. a confiscation order) was lawful and derived from a clear basis in domestic law. This is a general principle, which extends across the Convention as a whole. Lawfulness requires both compliance with domestic law and a fair and proper procedure. A confiscation order, for example, must be from and executed by an appropriate authority and not be arbitrary in nature.⁶⁶ In short, for interference to be lawful, it must have a basis in national law,⁶⁷ and the law must be clear, foreseeable, and precise.⁶⁸

A prime example of unlawful interference is *Baklanov v. Russia*.⁶⁹ This case concerned the confiscation of money on grounds of smuggling, and the Court held that the domestic law was not created with clarity which would "enable the applicant to foresee, to a degree that is reasonable in the circumstances, the consequences of his actions."⁷⁰

Varvara v. Italy concerned criminal proceedings against the applicant for unlawful land development. Many years later, in 2006, a court of appeal discontinued the proceedings on the grounds that prosecution of the offence had become time-barred in 2002, but ordered the confiscation of the land and buildings concerned.⁷¹ The Court noted that "the offence in respect of which the confiscation was imposed on the applicant was not provided for by law(...) accordingly, the interference with the applicant's right to the peaceful enjoyment of his property was contrary to the requirement of lawfulness and was arbitrary, and that there was a violation of Art. 1 of Protocol No. 1 ECHR."⁷²

In *Adzhigovich v. Russia*, the Court found the State authorities' consistent failure to indicate a legal provision which allowed for the confiscation of the applicant's property, and their refusal to return the applicant's money, amounted to an unlawful interference within the meaning of Art. 1 of Protocol No.1. Similarly, in *Ziaunys v. Moldova*, the Court concluded the seizure of the applicant's assets (which was not a clear penalty prescribed by the relevant provision in question) was not lawful within the meaning of Art. 1 of Protocol No. 1.⁷³

66 *Winterwerp v. Netherlands*, judgment of 24 October 1979, no. 6301/73

67 *Bosphorus Airways v. Ireland* (2005) application no.45036/98

68 *Carbonara and Ventura v. Italy* (2000) and *Beyeler v. Italy* (2000)

69 *Baklanov v. Russia*, judgment of 9 June 2005, no.68443/01, para. 46

70 *Ibid*

71 *Varvara v. Italy*, judgment of 29 October 2013, no. 17475/09

72 *Ibid*

73 *Ziaunys v. Moldova*, judgment of 11 February 2014, no. 42416/06, para. 34 – 37

3.1.4 Legitimate aim

An interference with the right to property, by State action, must serve a legitimate aim in the public, or general, interest.⁷⁴ Due to the nature of policy developed by the States, which may impact on property in some way, shape or form, the Court recognises that States possess a wide margin of appreciation in determining what may or may not be in the public or general interest. Where State interference includes social and economic policy implemented via legislation, the Court “will respect the legislature’s judgment as to what is in the public interest unless that judgment is manifestly without reasonable foundation”.⁷⁵

An example of a legitimate aim being pursued can be seen in *Adamczyk v. Poland*. The Court found that the seizure of a car—which was ordered in connection with a criminal investigation relating to forgery—was intended to secure evidence against the applicant. Thus, the seizure was carried out in accordance with the general interest within the meaning of Art. 1 of Protocol No.1.⁷⁶

3.1.5 Proportionate interference

Finally, the interference with property must be proportionate, i.e. the interference with the property must strike a fair balance between the protection of the right to property (the applicant’s rights) and the requirement of the public interest.

Whether a fair balance has been achieved will be a key question for the Court when assessing the proportionality of any interference with property/assets. In *AGOSI v. the United Kingdom*,⁷⁷ the Court had to determine whether a fair balance had been struck in relation to the UK customs authority seizing gold coins purchased by the applicant in Germany on the grounds that they had been smuggled. The Court stated that “the State enjoys a wide margin of appreciation with regard to both choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question”.⁷⁸

Further, the requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden.

74 *James v. the United Kingdom*, judgment of 21 February 1986, no.8793/79

75 *Ibid*

76 *Adamczyk v. Poland*, judgment of 6 November 2006, no. 28551/04

77 *AGOSI v. the United Kingdom*, judgment of 24 October 1986, no. 9118/80

78 *Ibid*

The Court has conceded that striking a fair balance hinges on many factors: the owner of the property's behaviour (in relation to the act causing the State to take action e.g. the criminal act); the degree of fault or care the applicant has displayed; whether applicable procedures allowed reasonable account of the applicant's degree of fault or care;⁷⁹ the aims and objectives of the policy/legislation in question, in particular, it being open to the legislature to take measures in order to effect the aim of the measure adopted;⁸⁰ assessing overall whether the State has exceeded its margin of appreciation.⁸¹

The following cases show how the Court has determined whether a proportionate interference has taken place.

In relation to the seizure of assets, the following two examples illustrate disproportionate State action. In *Tandem v. Spain*, the Court held that where prosecution authorities have seized property, reasonable measures must be taken for their preservation, in the event that the owner of the property is acquitted of the charge against them. The excessive burden placed on the applicant, without sufficient justification, was disproportionate interference in *Gladysheva v. Russia*.⁸²

In *Borzhonov v. Russia*, the Court observed that there "must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the jurisdiction, including measures designed to control the use of the individual's property."⁸³ In *East West Alliance Limited v. Ukraine*, the damage sustained to the applicant's aircraft during seizure amounted to a violation of Art.1 of Protocol No.1. The Court stated that "interference was not of an instantaneous nature, but that the applicant company was denied access to its property for more than ten years. While the applicant company was taking strenuous efforts before various administrative, tax, prosecution and judicial authorities to recover its property, these efforts remained fruitless regardless of their legal outcome, the aircraft was getting damaged and vandalised, or sold to third parties, or simply disappeared without anybody being held accountable."⁸⁴

79 *Ibid*

80 *Mellacher v. Austria*, judgment of 19 December 1989, no.11070/84

81 *Pressos Compania Naviera SA v. Belgium*, judgment of 20 November 1995, no. 17849/91

82 *Gladysheva v. Russia*, judgment of 6 December 2011, No. 7097/10

83 *Borzhonov v. Russia*, judgment of 22 January 2009, no. 18274/04, para. 59

84 *East West Alliance Limited v. Ukraine*, judgment of 23 January 2014, no. 19336/04, para. 216

In *Forminster Enterprises Limited v. the Czech Republic*, the Court found a violation of Art. 1 of Protocol No.1. The excessive length of seizure was held not to be proportionate. The Court stressed “the importance of conducting investigations of suspected serious economic crimes, as in the instant case, with due diligence in order to ensure that these crimes are properly assessed, and the proceedings duly terminated. Nevertheless, the ECtHR, taking into account the length of the seizure of the shares of the applicant company – more than twelve years – and the considerable value of those assets, found that a fair balance had not been struck in the instant case between the general interests of society and the interests of the applicant company, as the latter has been obliged to bear an excessive burden as a result of the continuing seizure.”⁸⁵

3.2 Procedural Requirements

Despite the lack of explicit procedural requirements in the second paragraph of Art. 1 of Protocol No. 1, the Court has held that the proceedings as a whole must afford the applicant a reasonable opportunity for putting their case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake. Thus, domestic courts are under an obligation to exercise their powers of further review – to determine whether a requisite balance was maintained in a manner consistent with the applicant’s right to peaceful enjoyment of property.

In *Paulet v. the United Kingdom*, a case concerning the confiscation of earnings obtained through illegal work, it was found that the appellate court’s scope of review was too narrow to satisfy the requirement of seeking fair balance inherent in Art. 1 of Protocol No.1.⁸⁶

3.3 The relationship between confiscation and other Convention rights

The confiscation of crime proceeds may collide with a number of other Convention rights. Primarily, these are the right to a fair trial (Art. 6), and in certain circumstances, Art. 8 (right to family life) where family property is forfeited or searched. Lastly, Art. 7’s legality and proportionality of criminal offences and penalties may become engaged.

⁸⁵ *Forminster Enterprises Limited v. the Czech Republic*, judgment of 9 October 2008, no. 38238/04, para. 77

⁸⁶ *Paulet v. the United Kingdom*, judgment of 13 May 2014, no. 6219/08

3.3.1 Article 6 ECtHR

Article 6 concerns the right to a fair trial.

In the context of anti-corruption and confiscation proceedings, applicants have argued that their Art. 6 rights have been violated because: confiscation of their assets was ordered in the absence of any procedure compatible with Art. 6(1);⁸⁷ a confiscation order was based on charges of which the applicant had been acquitted;⁸⁸ or they had no access to a competent court to rule on the criminal charges against them (where confiscation was ordered).⁸⁹

The Court established principles applicable to confiscation proceedings and Art. 6 in *Phillips v. the United Kingdom*.⁹⁰ Briefly, *Phillips* concerned a British national who was convicted of being involved in the importation of a large quantity of cannabis resin. The applicant argued that the statutory assumption under the 1994 Act violated his right to be presumed innocent, as set out in Art. 6(2).

The Court set out a number of important findings in relation to Art. 6. With respect to Art. 6 (2) (presumption of innocence), the Court found that the confiscation procedure was analogous to the determination by a court of the amount of a fine or the length of period of imprisonment to impose upon a properly convicted offender i.e. confiscation procedures are a part of the overall sentencing procedure. The Court stated that Art. 6 (2) can have no application in relation to allegations made about an accused character and conduct as part of a sentencing process – unless an accusation amounts to bringing of a new charge within the autonomous meaning of the Convention. Thus, Art. 6 (2) does not apply to sentencing.

The Court then went on to consider Art. 6 (1). It found a person's right in a criminal case to be presumed innocent and requires the prosecution to bear the burden of proving that the allegations formed part of the general concept of a fair hearing under Art. 6 (1). The statutory assumption under the 1994 Act was not used in order to find the applicant guilty of an offence. Instead, it allowed the Court to assess and set the amount at which the confiscation order should be properly fixed. Despite the sum of GBP 91,400 being significant, and risking an additional two years of imprisonment if he failed to pay, the conviction of drug trafficking was not at stake.

87 *Al-Dulimi and Montana Management Inc v Switzerland*, judgment of 5 September 2016, no.5809/08

88 *Geerings v. Netherlands*, judgment of 1 March 2007, no. 30810/03

89 *Iliya Stefanov v. Bulgaria*, judgment of 22 May 2008, no. 65755/01

90 *Phillips v. the United Kingdom*, judgment of 5 July 2001, no. 41087/98

The Court took into account the safeguards which ensured that the applicant's Art. 6 rights were being respected. Most notably, the Court found the principal safeguard to be the applicant's ability to rebut the assumption of the 1994 Act if shown, on the balance of probabilities, that the acquired property was not bought through drug trafficking. Overall, the Court was of the opinion that the provisions of the Drug Trafficking Act 1994 were confined to reasonable limits when weighing up the importance of what was at stake and that they secured the defense rights of the applicant. No violation of Art. 6 (1) was found.

The Court has subsequently upheld and reaffirmed the above dicta. In *Grayson and Barnham v. the United Kingdom*,⁹¹ the applicant argued that the burden placed on him—to show on the balance of probabilities that the money he had had come from a legitimate source—violated Art. 6 (1) (right to a fair trial). This was in response to a confiscation order on sums of money, alleged to have been derived from drug trafficking offences. The Court held that as the applicant had been proved to have been involved in drug dealing over the years, it was not unreasonable to expect him to explain the legitimacy of the money. The Court found no violation, and confirmed the compatibility of the confiscation procedures with the Convention.⁹²

*Geerings v. Netherlands*⁹³ provides a good illustration of where the Court has found a violation of Art. 6 in relation to an applicant's assets being subject to a confiscation order.

In this case, the applicant had been tried for several offences, of which he was convicted for some and acquitted for the majority. The prosecution had submitted an application for a confiscation order in relation to all of the offences – on the grounds of sufficient indications existing that the applicant had committed all of the crimes. Relying on Art. 6 (2) of the Convention, the applicant alleged that the confiscation order had been based on a judicial finding that he had derived advantage from offences of which he had been acquitted in the substantive criminal proceedings brought against him. The Court stated that whilst Art. 6 (2) governs criminal proceedings, the right to be presumed innocent under Art. 6(2) only arises in connection with the particular offence with which a person has been charged. Once a person has been proven guilty of an offence, Article 6(2) had no application in respect of allegations made about

91 *Grayson and Barnham v. the United Kingdom*, judgment of 23 September 2008, 19955/05

92 6 Kings Bench Walk, 'Proceeds of Crime and the European Convention on Human Rights'. 12 August 2010. Available at: <http://www.mondaq.com/uk/x/105904/Human+Rights/Proceeds+of+Crime+and+the+European+Convention+on+Human+Rights>

93 *Geerings v. Netherlands*, judgment of 1 March 2007, no. 30810/03

the accused character and conduct as part of the sentencing process. The only caveat to this will be where an accusation amounts to bringing a new charge within the Convention's meaning.

Moreover, the Court recognised a number of cases where they had treated confiscation proceedings—following conviction and apart from the sentencing process—as beyond the scope of Art. 6(2). The common features of such cases were: the applicant being convicted of a drugs offence; the applicant being continued to be suspected of a drugs offence; the applicant being unable to prove the origin of assets they held; the assets were reasonably presumed to have been obtained from illegal activity and the applicant had failed to provide a satisfactory alternative explanation.

However, upon distinguishing *Geerings* from *Phillips*, the Court noted that the applicant had never possessed assets which he could not adequately explain. Confiscation from a conviction was inappropriate for assets which were not known to be in the possession of the person concerned, particularly where it related to a criminal act where the person had not been found guilty. Finally, the confiscation order related to the crimes which the applicant had been acquitted of. Art. 6 (2) did not allow for the voicing of suspicions regarding an accused's innocence once an acquittal was final. For all intents and purposes, the applicant had been found guilty without being found guilty according to law.⁹⁴

3.3.2 Article 7 ECtHR

Article 7 mandates that there be no punishment without law, in the context of criminal law (*nullem crimen, nulla poena sine lege*).⁹⁵

Alleged Art. 7 violations have arisen in cases where the applicant has sought to challenge the penalty imposed on them by domestic courts.

A prime example of both Art. 7 and Art. 1 of Protocol No.1 being alleged to have been violated can be seen in *Yildirim v. Italy*.⁹⁶ The applicant was the owner of a bus which he hired to run a company. The drivers of the bus were subsequently arrested for unlawfully carrying illegal immigrants and the bus was seized. The drivers were given custodial sentences and the bus was seized. The applicant owner of the bus brought proceedings to recover the bus. His claim for good faith and not knowing of the unlawful use of his bus was rejected. Relying on

94 *Geerings v. Netherlands*, judgment of 1 March 2007, no. 30810/03

95 *Kafkaris v. Cyprus*, judgment of 12 February 2008, no. 21906/04

96 *Yildirim v. Italy*, decision of 10 April 2004, no. 38602/02

Art. 1 of Protocol No.1 and Art. 7, the applicant disputed the rejection of his application to reclaim the bus and the refusal to set aside the confiscation of his vehicle, respectively.

The Court noted that the applicant was able to apply for the return of his vehicle and to appeal the points of law in relation to this. The proceedings relating to the seizure of his vehicle were not arbitrary and the applicant had the chance to show evidence of his good faith. In respect of Art. 7, the applicant himself was not subject to a criminal charge. The applicant had claimed the confiscation was an ancillary penalty. However, the Court stressed that there were no criminal charges against the applicant and the confiscation did not entail a finding of guilt, which follows a charge – therefore it could not constitute a penalty within the meaning of Art. 7.

3.3.3 Article 8

Article 8 provides for the respect for private and family life, which comprises also the right to home and correspondence.

*Gladysheva v. Russia*⁹⁷ best exemplifies the interplay between dispossession of possessions, confiscation, and a breach of Art 8.

The applicant had been evicted from her flat by the State, on the basis of the property being obtained fraudulently. The applicant complained that she had been deprived of her possessions in violation of Art. 1 of Protocol No.1. It was also argued that the eviction was a violation of her right to respect for home (Art. 8).

In respect of Art. 1 of Protocol No.1, the Court stated that a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, and this balance will not be struck where an individual bears an excessive burden. Dispossession of the applicant's flat, without providing her with alternative accommodation, placed an excessive individual burden without sufficient justification that it was in the public interest. Further, once an eviction order has been issued, it amounts to an interference with the right to respect for home, regardless of whether it has been carried out. Any interference has to be proportionate to the legitimate aim pursued.

⁹⁷ *Gladysheva v. Russia*, judgment of 6 December 2011, no.7097/10

The Court further noted that the margin of appreciation in housing matters is narrower when it comes to the rights guaranteed by Art. 8 compared to those in Art. 1 of Protocol No. 1, regard being had to the central importance of Art. 8 to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community. A violation of both Art. 1 of Protocol No.1 and Art. 8 was found.

4 Overview of jurisdictions

This section provides an overview of the seizure and confiscation systems found in the Western Balkan jurisdictions that are part of this study, focusing on the legal framework and tools available to law enforcement and prosecution authorities.

This section also focuses, where applicable, on the effectiveness and efficiency of decisions rendered by the judiciary in relation to seizure and confiscation of assets, with particular focus on corruption-related offences.

Reduced availability of seizure decisions and a limited number of confiscation judgements across the Western Balkans jurisdictions defined the scope of the assessment undertaken in this study. In addition, statistical data has been reviewed to the extent available by jurisdiction.

Finally, as indicated in section 3 above, the ECtHR has dealt with a number of cases relating to, among other, seizure and confiscation of assets and disproportionate amount of property subject to seizure. In this section, specific mention to the ECHR and to ECtHR case law will be made when applicable to the specific country context.

4.1 Albania

Albania belongs to the continental European tradition of law. The Albanian Constitution ensures that fundamental rights (e.g., right to property, right to a fair trial and the right to privacy) are guaranteed. These rights, however, are not absolute, and can be limited in cases expressly provided by Albanian law. The limitation of rights in these cases seeks to balance the general interest to prevent crime on the one hand with individual rights on the other hand.

Criminal investigations are carried out by a number of law enforcement agencies (e.g., State Police, Tax Police, Border Police, Road Police) and are under the direction and responsibility of the Prosecution Service. Law enforcement bodies are, therefore, subordinated at the operational level to the Prosecution Service.

Criminal liability of legal persons is foreseen under Art. 45 of the Criminal Code (CC) of Albania.⁹⁸ Criminal acts performed by representatives on behalf of the legal person is criminalised. It should be noted that the liability of legal persons does not preclude criminal liability of the natural persons who have committed the offences. This provision appears to be in line with Recommendation R(88)18 and ETS 173.

There are two categories of seizure under Albanian law: evidential seizure, and seizure as a security measure. Seizure as a security measure, which is requested by the prosecutor from the court, is subdivided into preventive and conservative seizure. Apart from these two categories, there is also the seizure foreseen under the Anti-Mafia Law.⁹⁹

Evidential seizure is foreseen under Art. 208 of the Criminal Procedure Code (CPC) of Albania,¹⁰⁰ and both prosecutors and courts have the power to seize any property which is to be used as material evidence in the course of the criminal proceedings.¹⁰¹ However, Art. 300 CPC Albania allows evidential seizure to be issued by law enforcement in cases of urgency. In this case, the seizure must be validated by the prosecutor within 48 hours.

Evidential seizure is only applied to property which has been identified as proceeds or instrumentalities of crime, as well as rewards or the promise to reward for the commission of a crime. Property falling outside such scope cannot be subject to evidential seizure.

Concerning the evidentiary threshold necessary for evidential seizure, the prosecutor or court must be satisfied that there is a concrete relation of the property to the criminal offence, as well as of its probative relevance to the criminal case. It should be noted, however, that the CPC of Albania is silent on the evidentiary threshold needed to satisfy such concrete relation and evidential relevance.

98 Law no 7895 of 27 January 1995, Criminal Code of the Republic of Albania. Available in Albanian at: <http://www.qbz.gov.al/botime/kodi%20penal%20%202017.html>.

99 Law no 10192 of 3 December 2009, on Preventing and Combating the Organised Crime, Trafficking and Corruption Through Preventive Measures Against the Property, as amended, Official Gazette of the Republic of Albania, No. 113, 22 May 2017, p. 5965-5973. Available in Albanian at: http://www.qbz.gov.al/botime/fletore_zyrtare/2017/PDF-2017/113-2017.pdf.

100 Law no 7905 of 21 March 1995, Criminal Procedure Code of the Republic of Albania, Official Gazette of Albania No.151, 27 July 2017.

101 Available in Albanian at: <http://www.qbz.gov.al/botime/kodi%20i%20procedures%20penale%20gusht.html>. While the ability to request to courts the seizure of property for the purpose of evidence should belong only to the prosecutor, in practice courts in Albania also have an active role in the criminal proceedings. Thus, pursuant to Art. 367 CPC Albania, courts may request evidence ex officio, even when these have not been requested by the prosecutor.

Preventive seizure, foreseen in Art. 274 CPC of Albania, informs that it applies to all items related to the criminal offence (instrumentalities of crime), where a risk exists that their free availability can aggravate the consequences of a criminal offence or facilitate the commission of other criminal offences. However, an extensive interpretation of preventive seizure (Art. 274 CPC of Albania) with confiscation (Art. 36 CC of Albania) ensures that any asset, whether the proceeds or the instrumentalities of crime, may be subject to preventive seizure, as long as a confiscation judgement can be applied to them.

Conservative seizure, foreseen in Art. 270 CPC of Albania, relates in principle to the seizure of any legitimate property, aiming at assuring the compensation of the victim of the state, when there are reasons to believe that the perpetrator will be unable to compensate the victim or the jurisdiction for damages resulting from the commission of the criminal offence.

In relation to the seizure and confiscation mechanisms under the Anti-Mafia Law, the prosecutor must demonstrate the following elements in order to obtain a preventive or conservative seizure order: (i) that the perpetrator has been involved in a criminal activity, defined as such by law; (ii) the value of the assets are manifestly disproportionate to the economic and financial resources of the respective legal owner (the perpetrator, or his or her relatives and heirs, as well as any relevant legal person); (iii) the assets subject to seizure have been gained after the commission of a criminal offence; (iv) the property is under direct or indirect use or control of the perpetrator; and (v) there is a real risk that the assets may be subject to loss or alienation, or there is a reasonable doubt that the property may be used or is under the control of an organised criminal group. The burden of proof on the elements mentioned above are with the prosecution.

With regards to the evidentiary threshold to obtain a preventive or conservative seizure, courts in Albania require to be satisfied beyond reasonable doubt, through direct evidence, of elements such as the legal owner of the property; the relatives and heirs of the perpetrator; and the disproportion between the value of the property on the one hand, and the economic and financial resources of the respective legal owner on the other hand.

However, for elements such as the alleged involvement of the perpetrator in a criminal activity; his or her level of control over the property subject to seizure; and the risk of loss or alienation of the property, the prosecution must satisfy

the court that there is reasonable doubt and may present the evidence through indirect methods of proof, e.g., circumstantial evidence.

However, Albanian law is silent on the competences of the prosecutor, in cases when he or she comes to the conclusion that there are no grounds supporting a preventive seizure order. The law appears to be silent on what the possible decisions of the prosecutor would be in the end of such verifications and whether courts have jurisdiction with respect to such decisions of the prosecutor.

Courts have an obligation to issue a confiscation order as a supplemental punishment at the end of a criminal proceeding. Confiscation judgements are applied to any property which are the proceeds or instrumentalities of crime, as well as any rewards – awarded or promised – to the perpetrator. Confiscation can further be extended to property which originates, in part or in total, from proceeds of crime, as well as to intermingled property, up to the value of the proceeds of crime.

There are two types of confiscation procedures in Albania. The confiscation punishment, foreseen in Art. 36 CC of Albania, provides for the general rule for confiscation of the proceeds and instrumentalities of crime, as well as intermingled and transformed assets. It also provides for value-based confiscation. In order for the confiscation punishment to occur, two conditions must be met: (i) there is a final judgement convicting the defendant of a criminal offence, and (ii) the court has imposed confiscation of the property as a supplemental punishment, according to the rule contained in Art. 30 CC. Moreover, Art. 190 CPC of Albania also foresees the confiscation of property seized through evidential seizure.

The second type of confiscation is the procedural confiscation, foreseen in Art. 190 CPC of Albania, whereby the court issues a confiscation judgement of proceeds and instrumentalities of crime which belong to the perpetrator. Moreover, procedural confiscation is only applicable to object-based confiscation, given that the property must be established for the evidential seizure.

It should be noted, however, that there is no clear ratio in the law of difference nor criteria for courts to decide in which cases to order a punishment confiscation instead of a procedural confiscation. Likewise, the practice seems not quite clear on the distinction between a preventive seizure and evidential seizure.

Similarly, with the evidentiary threshold for seizure of property, the CPC of Albania is silent in relation to the evidentiary threshold for confiscation, and does not explicitly provide the standard of proof. Notwithstanding, the judicial practice has established that the confiscation of proceeds and instrumentalities of crime must meet a "beyond a reasonable doubt" evidentiary threshold.

Non-conviction based confiscation (NCB confiscation) is foreseen in Albanian law under the so-called Anti-Mafia Law.¹⁰² Thus, it is possible to apply for NCB confiscation in Albania when the conditions of the Anti-Mafia Law has been met. This appears to meet the requirements of Directive 2014/42/EU.

Limited information is available publicly in relation to the experience Albania has with international co-operation, in particular in relation to incoming and outgoing requests for seizure and confiscation of proceeds and instrumentalities of crime. Moreover, statistical information concerning the number of requests for MLA sent (outgoing) or received (incoming) by Albania, is not available. For this reason, it is not possible to assess the effectiveness of international co-operation measures taken by Albania in relation to seizure and confiscation of proceeds and instrumentalities of crime.

On the other hand, cross-referencing statistical information obtained for this study concerning confiscation judgements, and information on seizure orders available in mutual evaluation reports,¹⁰³ it is possible to note that there has been a steady increase of confiscation judgements being issued by courts, although these represent but a fraction of the seizure orders issued. This apparent mismatch between the amount of seizure orders (e.g., 15 seizure orders in 2013 vs. 7 confiscation requests – of which 2 were confiscation judgements; 65 seizure orders in 2014 vs. 4 confiscation judgements) indicates that either tool required for producing the necessary information to meet the evidentiary threshold, i.e., financial investigations, or the understanding of these thresholds has been insufficient.

102 Law No 10192 of 3 December 2009, on Preventing and Combating the Organised Crime, Trafficking and Corruption Through Preventive Measures Against the Property, as amended, Official Gazette of the Republic of Albania, No. 113, 22 May 2017, p. 5965-5973. Available in Albanian at: http://www.qbz.gov.al/botime/fletore_zyrtare/2017/PDF-2017/113-2017.pdf.

103 UNODC. 2015. UNCAC Country Review of Albania, p. 76.

4.2 Bosnia and Herzegovina

Bosnia and Herzegovina belongs to the continental European tradition of law, with some elements of the common law system, which were adopted after the 1995 Dayton Accords. Moreover, because of the complex constitutional structure and division of competences between states and entities it has four Criminal Codes and Criminal Procedure Codes (at the state level, entities level, as well as Brčko District).

The Constitution of Bosnia and Herzegovina informs that the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols apply directly and have priority over national law. These fundamental rights, however, are not absolute, and may be restricted under certain conditions expressly contained in the laws of Bosnia and Herzegovina. It should be noted, however, that the domestic laws may occasionally not be sufficiently precise concerning the application of seizure and confiscation measures. This may have resulted from procedures which are not consistently clarified, leaving room for discretionary interpretation of legal provisions. The discrepancies in the domestic laws of Bosnia and Herzegovina exist due to a complex constitutional structure, and a lack of effective mechanisms for harmonisation of legislation. It has been noted that the differences pertain to the scope of seizure and confiscation as defined in various laws, which raises concerns as to the scope and consistent application of provisions. The prosecution services in Bosnia and Herzegovina are responsible for leading the investigation and are in charge of all investigative actions. Moreover, the prosecution services are required to initiate a criminal investigation whenever a criminal offence is believed to have been committed.

With regards to the liability of legal persons, all four Criminal Codes have established a criminal liability for legal persons, although the codes distinguish punishments (e.g., fines, seizure of property and dissolution of the legal person) and security measures (e.g. publication of the judgement). A resulting confiscation of proceeds of crime from legal persons which have been convicted is compulsory. Moreover, there is a specific sanction which is imposed for the seizure of assets. As a result, different standards – in particular for evidentiary thresholds – may apply. This lack of internal co-ordination within in the complex criminal justice system in Bosnia and Herzegovina results in difficulties in applying a common understanding to the diverse normative acts taken in relation to seizure and confiscation.

The legislation in Bosnia and Herzegovina foresees both the seizure and confiscation of assets. Its legislation is largely compliant with the international and European standards.

Seizure is possible where a motion is made by the prosecutor to the court for the seizure of proceeds and instrumentalities of crime, and the court is satisfied that there are sufficient grounds for suspicion that a criminal offence has been committed, and that the amount of material gain resulting from the commission of the criminal offence has been quantified. Moreover, proceeds and instrumentalities of crime are subject to confiscation in all CCs. It should be noted that in accordance with all CPCs in Bosnia and Herzegovina, the prosecutor is required to both determine the material gain resulting from the commission of a criminal offence, as well as to establish the facts of the case – here meaning that the prosecutor must collect all the evidence, and examine the circumstances necessary for the court to decide on the confiscation of proceeds and instrumentalities of crime.

It should be noted that different standards of proof for imposing the measure of seizure is applicable at different jurisdictional levels (the two entities and BD), and which could invoke the problem of the principle of proportionality when courts determine provisional security measures in order to avoid extensive limitation of the right to property and other constitutional rights of suspects. The ECtHR has already stressed that each confiscation measure has to be imposed in compliance with the procedural safeguards under Art. 6, including the standard of proof or principle of legality enshrined in Art. 7 of ECHR. In addition, the *ne bis in idem* principle under Art. 4 Protocol 7 ECHR could be at stake too.

The legislation in Bosnia and Herzegovina provides four different types of confiscation: asset-based confiscation; value-based confiscation; extended confiscation; and third-party confiscation.

Regarding the latter, two conditions must be met: (i) that the transfer of assets acquired by the perpetration of a criminal offence was made without compensation or below the value of the property; and (ii) the person to whom the material gain was transferred knew or ought to have known that the material gain was acquired by the commission of a criminal offence. Thus, third-party confiscation appears to be in line with the international and European standards.

Notwithstanding, while the confiscation regime contains mandatory provisions for the instrumentalities of crime held by the perpetrator, the regime in Bosnia and Herzegovina remains discretionary when the property is held by third parties.¹⁰⁴

Where confiscation of the proceeds and instrumentalities of crime is not possible, the perpetrator is obligated to pay the amount corresponding to the value of the confiscation judgement (value-based confiscation). The legislation in Bosnia and Herzegovina also foresees the possibility of confiscating intermingled or transformed assets, up to the amount of the confiscation judgement. Confiscation of property from a legal person is also foreseen where the sentence imposed to the natural person is over five years. Finally, NCB confiscation is foreseen at FBiH and BD level when specific conditions of the law are met (death of the perpetrator; in case of absence of the perpetrator due to escape; and when there is an imminent danger of the statutes of limitation running out).

While the prosecutors are required to determine the material gain stemming from the commission of an offence, it is up to the courts to establish, *ex officio*, the gain resulting from the commission of an offence. This assessment is done by the court either on the basis of the evidence gathered by the prosecutor, or by assessing the value of the asset in the event of disproportionate difficulties or significant delay. It is unclear, however, what the role of the defence is in the assessment carried out by the court: issues with human rights – in particular the right to property and fair trial may be jeopardised where an opportunity to due process is not presented in such instances.

Statistics on the number of cases and quantities of assets seized nationally and internationally is not made publicly available. In relation to confiscation of assets, there are statistics available until 2013, while more recent has not been published since then. Finally, there appears to be no statistics in relation to international co-operation efforts. The lack of, or incomplete data in relation to, the use of the different tools made available in Bosnia and Herzegovina for the asset recovery process severely hamper the ability to determine how the law is being implemented by local authorities, and whether the measures taken have been effective.

Notwithstanding, to the extent to which it was possible to access and revise

¹⁰⁴ MONEYVAL. 2015. Report on the Fourth Assessment Visit. Anti-Money Laundering and Combating the Financing of Terrorism: Bosnia and Herzegovina, p. 66 para 239.

seizure orders (which generally are not public) and confiscation judgements, it is possible to identify a trend whereby seizure and confiscation mechanisms are generally underused in criminal proceedings.¹⁰⁵

4.3 Kosovo*

Kosovo* belongs to the continental European legal tradition. Pursuant to the Constitution of Kosovo*, the European standards on human rights are directly applicable to Kosovo* and it requires that fundamental rights be interpreted consistent with the case law of the ECtHR. It should be noted, however, that the fundamental rights afforded by the Constitution of Kosovo* are not absolute: these can be subject to restrictions when expressly foreseen in law and, subject to the principle of proportionality, when they meet the objective and the general interest of protecting the rights and freedoms of third persons.

The Prosecution service of Kosovo* is responsible for indicting perpetrators who have allegedly committed a criminal offence. The Prosecution service carries out these investigations upon the order of the state prosecutor, who has the duty to supervise the investigations undertaken by the Kosovo* police. Notwithstanding, the law enforcement agencies have some autonomy to investigate criminal offences at the initial stages of the criminal investigation.¹⁰⁶

Kosovo* also foresees the criminal liability of legal persons. For the liability to occur, it must be proven that a responsible natural person – as defined by law – acted on behalf of the legal person; and that the legal person did not have the intention, or did not have mechanisms in place, to avoid the commission of the criminal offence.

With regards to seizure, the CPC of Kosovo* has introduced three types of provisional measures: seizure, freezing and temporary measures for securing property. These provisional measures can only be ordered by the courts, upon application made by the prosecutor.

Notwithstanding, the prosecutor can order property to be restrained for up to five days in the seizure procedure and the prosecutor can order to temporarily

105 USAID. 2017. The Analysis of the System of Forfeiture of Proceeds of Crime in Bosnia and Herzegovina.

* This designation is without prejudice to positions on status, and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo Declaration of Independence

106 For example, when the police receive information and must establish whether there is reasonable suspicion that a criminal offence has been committed. Therefore, the Criminal Procedure Code of Kosovo* allows the police to locate the perpetrator, to prevent the perpetrator or his or her accomplices from fleeing and to determine and preserve any information which may be used as evidence in the criminal proceeding.

freeze assets up seventy-two (72) hours in the freezing procedure, until the court orders the application of a provisional measure. The evidentiary threshold for the provisional measures indicates that the prosecutor must satisfy the court that there is a grounded suspicion that property is either evidence of a crime or has been used for the commission of a crime (instrumentalities of crime); or is the material benefit stemming from the commission of a crime (proceeds of crime).

There is no validity period established in law for the provisional measure related to the seizure of assets:¹⁰⁷ however, court practice has established that the decision is valid until the determination of criminal proceedings and the confiscation procedure. Attention should thus be given as to whether this timeline does not impact on the need for a decision within a reasonable timeframe. The valid laws have introduced three distinct provisional measures with the intention to control and preserve assets that may be subject to confiscation. However, the criteria are not defined in order to guide the prosecutors to determine which measures to be used in a specific situation. Furthermore, the legal terminology that is used by the legislators in provisions related to the seizure and confiscation is not uniform, and as such is very confusing.

The seizure of assets is carried out in order to ensure the control and preservation of assets that may be subject to a future confiscation judgement. The provisions contained in the CPC of Kosovo* range from removing the physical possession of such property from the perpetrator and placing them in the custody of the jurisdiction, to prohibiting the disposal of property by the perpetrator, but allowing him or her to maintain physical possession of the property. Property which is subject to the seizure of assets under the CPC of Kosovo* includes any property which may be used as evidence of the crime, as well as proceeds and instruments of crime.

Concerning confiscation, the CC of Kosovo* provides for two types of confiscation: proceeds and instruments of crime. The CC of Kosovo* furthermore allows for third-party confiscation, when the confiscation of such assets is in the interest of the general security and the confiscation of the property does not affect the right of bona fide third parties to obtain compensation from the defendant.

¹⁰⁷ For the freezing of assets, the validity period of the provisional measure is 30 days. After the revision of the freezing order, the court may extend its validity until the conclusion of the proceedings.

The confiscation of proceeds and instrumentalities of crime require a criminal conviction by the court establishing guilt beyond a reasonable doubt. The, once the court established the guilt of the defendant it orders the confiscation of the proceeds and instruments of the crime as a supplementary punishment insofar as the prosecution has demonstrated and satisfied the court of the link between the assets and the criminal offence for which the defendant is convicted. To obtain a confiscation judgement, the prosecution must satisfy the court beyond reasonable doubt that the property is the proceeds or instrumentalities of crime.

It should be noted, however, that the CPC of Kosovo* has one exception to the rules indicated in the previous paragraph. Property may be subject to confiscation regardless of whether a final judgement has been obtained (Art. 281 CC Kosovo*). Such circumstance is applicable, e.g. when the perpetrator is acquitted or has been found not criminally liable. In this regard, special attention should be given as to whether such provision is in line with the ECHR and the case law of the ECtHR, given that the issuance of a confiscation order under these conditions may implicate being tried twice, due to the nature of the procedure, in contravention to Art. 4, Protocol No. 7 ECHR. Such provisions may also contradict the right to the presumption of innocence (Art. 6 and 7 ECHR).

During the preparation of this study, it has not been possible to establish the practice of Kosovo* in applying for, or receiving international co-operation in relation to the asset recovery process. It has furthermore not been possible to obtain any relevant statistical information with respect to international co-operation efforts.

4.4 Macedonia

Macedonia belongs to the continental European tradition of law. The prosecution service of Macedonia is responsible for conducting investigations and takes the leading role in the collection of evidence.

Criminal liability of legal persons is foreseen in Macedonia and is applicable for all criminal acts foreseen under the CPC of Macedonia. The criminal liability of legal persons does not preclude the criminal liability of the natural persons who committed the offences.

Unlike other Western Balkans jurisdictions, illicit enrichment has been intro-

duced as a criminal offence in Macedonia (Art. 359 CC of Macedonia). This offence starts from the assumption that the property is legally acquired by a person. However, the criminal offence occurs when a person provides false or incomplete information on his or her property, or the property of members of his or her family, which in value considerably exceeds his or her legal income. The burden of proof is reversed for the offence of illicit enrichment in Macedonia. Practice in Macedonia in conducting a criminal procedure for an illicit enrichment offence is scarce: only few criminal procedures have been initiated, but they are still pending.

Moreover, given the fact that the illicit enrichment legislation appears to be in contradiction with the Law on Prevention of Corruption of Macedonia - whereby an imposition of a 70% personal tax for the income tax is imposed - this generates uncertainty among prosecutors in the interpretation of these provisions and the application of the principle of *ne bis in idem* under Art. 4, Protocol No. 7 ECHR. Additional problems are caused by the necessity of gathering evidence from various financial organizations.

Seizure of property is allowed during the pre-trial investigation phase, whereby upon conducting a financial investigation, the proceeds of crime are established. When sufficient evidence to establish the link between the proceeds, the criminal offence and the suspect is available, a request for seizure is made by the prosecutor to the preliminary procedure judge. Notwithstanding, the prosecutor may determine the seizure of assets in urgent cases, notifying the judge within 72 hours.

Further, study findings from Macedonia indicate that the judges have to wait for an evidential initiative of the prosecutor in the cases concerning confiscation (Art. 530 para 2 of the CPC Macedonia). Common obstacles that cause delays include the poor preparation of the charges in that part and the lack of effective instruments for identification and search for criminal proceeds prior to the commencement of or during the criminal procedure; incomplete property records (cadastre, central registers); and the absence of units for financial investigation, for finding and identifying such property and close coordination with the financial organisations.

The study also shows that special investigative techniques interfere with the right to privacy, and therefore could lead to a violation of Art. 8 of the ECHR if proper safeguards are not in place.

Challenges identified above could compromise the quality of the overall investigation. The ECtHR has repeatedly emphasised the importance of conducting investigations with due diligence in order to ensure that these crimes are properly assessed, and that the proceedings duly terminated (*Forminster Enterprises Limited v. the Czech Republic*).

Confiscation is not considered to be a punishment in Macedonia; rather, it is considered a special criminal measure, in order for it not to be considered a retributive coercion. Confiscation is ordered by the courts, and can be ordered even in the event of death, flight of the suspect, or amnesty. The CC of Macedonia also defined the notion of proceeds of crime, as well as transformed and intermingled assets. However, issues remain in relation to the implementation of these provisions by national authorities.

Where the direct and indirect proceeds of crime cannot be confiscated from the perpetrator, another property that corresponds to the value of the acquired benefit shall be confiscated. In terms of the value that is taken into account, the market value at the time of the commitment of the crime is taken, revalued for the inflation rate, and when that is difficult to determine, it is carried out by a free assessment.

In third-party confiscation, the prosecution must satisfy the court of the intent of the third party: while the prosecution must demonstrate that the property stems from an offence, the burden of proof that the property has been acquired legally is borne by the third party. Notwithstanding, attention should be given to the extent of the burden imposed on the third party to determine their good faith. In this matter, see the ECtHR judgement *Vasilevski v. the former Yugoslav Republic of Macedonia*: The ECtHR noted that the applicant's grievances concern the enforcement of the confiscation order by Macedonia, which resulted in the applicant losing title to and possession of the lorry and the upgrades installed by him.

The confiscation proceedings were in no way related to the applicant who bought the lorry almost a year after the confiscation order had become final. He neither participated in the criminal proceedings, nor could he have challenged the confiscation order. The lorry was de facto confiscated from the applicant almost three years after the confiscation order had become final, and more than eight years after the crime had been committed.

No explanation was provided for this delay. Although national courts established that the applicant had been the bona fide owner of the lorry, they did not examine that fact in connection with the proportionality of the impugned measure. The Court observed in this connection that domestic legislation was subsequently amended to accommodate such considerations.

There was nothing to suggest that there were any reasons to fear that the lorry could be used again for the commission of offences. Moreover, the domestic courts did not give any weight to the argument that the applicant had been lawfully making his living by using the lorry. Lastly, the Court noted the scanty reasoning that the domestic courts gave for dismissing the applicant's alternative claim for compensation of his own investments in the lorry.

The Court noted that it was not presented with any illustration of domestic practice that showed that a claim against heirs of a deceased seller had been effective in similar circumstances to the applicant's case. In the Court's opinion, it would be an excessive burden for the applicant to seek to establish these issues in fresh proceedings. Having regard to the above considerations, and in spite of the wide margin of appreciation afforded to the jurisdiction in this domain, the Court found that the enforcement of the confiscation order, which had as a resulting effect the dispossession of the lorry from the applicant, imposed an excessive burden on him.

With regards to extended confiscation, such confiscation is possible where a prison sentence of at least 4 years has been rendered, for one of the crimes listed under Art. 98a of CC of Macedonia. In cases where the court establishes that the property acquired in the time period prior to the conviction, but not longer than five years prior to the commission of the offence, it exceeds the legal revenues of the perpetrator and thus originates from the criminal offence itself.

It appears that a large number of provisions for confiscation were adopted in Macedonia within a short time, and which were transposed directly from international documents. Some provisions are vague, confusing, with complex terminology, often not properly translated, which causes uncertainty among practitioners in their interpretation and the proper legal qualification of the concrete facts of the case.

During the preparation of this study, it has not been possible to establish the practice of Macedonia in applying for, or receiving international co-operation in relation to the asset recovery process due to the lack of adequate and easily accessible statistics (almost all information related to the mutual legal assistance requests, financial investigations and freezing of assets decisions are not electronically included in a comprehensive IT system).

4.5 Montenegro

Montenegro belongs to the continental European tradition of law, with elements of the common law system, particularly in criminal procedural law. Human rights are guaranteed by the Constitution of Montenegro and can be limited only by law, within the parameters set by the Constitution and to the extent it can be justified.

Criminal investigations are carried out by several different law enforcement agencies, which are under the direct responsibility of the prosecution.

Since the adoption of the new CPC of Montenegro in 2009, the prosecution service has taken over the responsibility of conducting criminal investigations and coordinating with law enforcement agencies (e.g., police, customs and tax authorities) the operational aspects of the investigation. The implementation of the new CPC of Montenegro showed a need to balance between the procedural formalism required for the collection of evidence in accordance with the law versus the need to conduct the investigation efficiently. Notwithstanding, it appears that such a balance has been found between the prosecution service and the law enforcement authorities of Montenegro.

Criminal liability of legal persons is foreseen in the Law on Liability of Legal Entities for Criminal Offences.

Seizure of the proceeds and instrumentalities of crime is a preparatory and preventive stage in the criminal proceedings of Montenegro, seeking to ensure that nobody may retain the benefits acquired through criminal activity. The CPC of Montenegro contains provisions for the seizure of the proceeds and instrumentalities of the crime. Extended confiscation is foreseen in the Law on Seizure and Confiscation of Material Benefit derived from Criminal Activity.

A request to seize assets must satisfy the court that there is a temporal link between the time of acquisition of the property and other concrete circumstances

of the case that justify seizing the property. The evidentiary threshold required for obtaining extended confiscation is reasonable doubt.

Confiscation of assets is foreseen in Art. 75(1) CC of Montenegro and extends to both proceeds and instrumentalities of crime, provided they are owned by the perpetrator. However, objects not owned by the perpetrator may also be confiscated when (i) required for reasons of security; (ii) for moral reasons; or (iii) there is a risk that the property may be used for the commission of an offence.

Moreover, Art. 112 CC of Montenegro establishes that no person may retain a pecuniary gain originating from a criminal offence. This gain is subject to the confiscation of such property, pursuant to Art. 113(1) CC of Montenegro. Art. 113(1) also foresees value-based confiscation, establishing that the perpetrator must pay an equivalent value to the property subject to confiscation, but which could not be confiscated.

Extended confiscation is foreseen in the Law on Seizure and Confiscation of Material Benefit derived from Criminal Activity. Extended confiscation is possible under the laws of Montenegro when: (i) the property subject to seizure may be subject to a future confiscation judgement; (ii) there is reasonable doubt that the property was acquired through criminal activity; (iii) there is a danger that confiscation will not be possible at a later stage; and (iv) if there is a danger that the value of the property will be reduced, or the property will be used for the commission of another criminal offence.

It is a precondition of extended confiscation in Montenegro that a confiscation judgement be rendered first. After that, the prosecution services have up to one year to initiate the extended confiscation proceedings.

To that end, the prosecution must demonstrate to the court that reasonable doubt exists that the property of the perpetrator is disproportionate to his or her legal income.

The financial investigation is central to the process of extended confiscation. The prosecution is required to collect evidence related to the property, legal income and the cost of living of the owner of the property, whether it is the perpetrator, or his or her legal predecessor, successor, family member or a third person to whom the property has been transferred to.

In urgent situations, the Law on Seizure and Confiscation of Material Benefit Derived from Criminal Activity also allows the prosecutor to seize property. The prosecutor must promptly inform the court about the issued order. The order is in force until the courts renders its ruling.

The law does not envisage any deadline for the prosecutor to inform the court, utilising the term “promptly.” An interim measure to secure assets can be in force until a final judgement is reached by the court. However, the seizure will be lifted if the criminal investigation does not commence within 6 months from the day of the decision for imposing the measure. It will furthermore be repealed if the indictment does not come to force within two years from the imposition of the measure.

During the preparation of this study, it has not been possible to establish the practice of Montenegro in applying for, or receiving international co-operation in relation to the asset recovery process.

4.6 Serbia

Serbia belongs to the continental European tradition of law, with some elements of the common law system introduced with the new CPC in 2012. Human and minority rights¹⁰⁸ are guaranteed by the Constitution of Serbia, and generally accepted rules of international law and international treaties on human rights ratified by Serbia are directly applied, pursuant to Art. 18 of the Constitution of Serbia. Human rights guaranteed in Serbia are in line with the European standards stipulated in ECHR.

Notwithstanding, human and minority rights may be restricted expressly by law if the Constitution allows for such restriction and for the purpose allowed for in the Constitution of Serbia, insofar as it does not encroach upon the substance of the relevant guaranteed right. The CPC of Serbia therefore allows the restriction of some human rights in relation to criminal proceedings, such as the right to freedom, privacy and tenure of property.

The new CPC of Serbia establishes that the prosecution service is responsible for managing pre-trial investigations and conducting investigations. Thus, all relevant authorities participating in the pre-trial investigation, e.g. law en-

¹⁰⁸ The Constitution of Serbia makes a distinction between human rights that are guaranteed to all citizens, and the minority rights which refer only to the rights of national minorities. Human rights are guaranteed to all citizens while persons belonging to national minorities have special individual or collective rights in addition to the rights guaranteed to all citizens by the Constitution.

forcement agencies, must notify the prosecution service of all actions undertaken by them, and are required to comply with every request issued by the competent prosecutor.

Serbia has taken measures to establish the liability of legal persons for their involvement in criminal offences. While a legal person may be held accountable criminally for any criminal offence contained in the CC of Serbia, the following conditions need to be fulfilled: the criminal offences have been committed for the benefit of the legal person by a natural person with managerial functions; and the legal person is also liable where a natural person committed the offence, because there was no appropriate supervision and control of that natural person. The criminal liability is based on the culpability of the natural person. However, the liability of the legal person is without prejudice to the criminal liability of the natural person.

Property that is subject to confiscation may be seized pursuant to Serbian law. In this regard, the Constitutional Court of Serbia has noted that the seizure of property derived from criminal activity has a preventive character that is aimed at eliminating the danger that the subsequent confiscation of such property will be made difficult or impossible. Thus, proceeds and instrumentalities of crime may be seized when three conditions are met: (i) the criminal proceeding is instituted against the owner of the property; (ii) that reasonable grounds exist to suspect that the assets derive from a criminal offence; and (iii) that there is a risk that subsequent confiscation of the property could be hindered or precluded. Thus, in relation to item (ii) above, the prosecution must demonstrate and satisfy the court that there is a manifest disproportion between the property and the lawful income of the defendant. This condition is fulfilled when the defendant does not prove that the property was acquired lawfully. It should be noted that the term "manifest disproportion" has not been defined.

Seizure of assets is possible upon a motion filed by the prosecutor. However, if the prosecutor is able to demonstrate that there is a risk that the property holder may dispose of the assets before the court decides on the motion for seizure, the prosecutor may issue an order banning the use of the assets for a period of up to three months.

Property being held by third persons may be subject to seizure, although in such cases grounded suspicion is needed, demonstrating that a certain person is the perpetrator of a criminal offence and that material gain was acquired by

the commission of that criminal offence.

The Constitutional Court of Serbia has taken the view that confiscation of property derived from criminal activity is not a punishment in its legal nature, but rather a special measure which is applied to the unlawfully gained property.¹⁰⁹ Serbian Law makes a distinction between the confiscation of property obtained by the commission of a criminal offence and confiscation of property derived from criminal activity. It should be noted, furthermore, that because property derived from a criminal offence does not represent the property acquired by the criminal offence regarding which the criminal proceedings were conducted, and regarding which the defendant has been sentenced. Therefore, the principle of *ne bis in idem* under Art. 4, Protocol No. 7 ECHR does not apply in relation to extended confiscation in Serbia.

With regards to the confiscation of proceeds and instrumentalities of crime, the formal condition is the existence of a confiscation judgement. Notwithstanding, the prosecution must still prove that there are circumstances which indicate that the property was derived from a criminal activity and that there is a manifest disproportion between that property and the lawful income of the defendant.

The first type of confiscation (in relation to property obtained by the commission of a criminal offence) indicates that such property is to be confiscated from the perpetrator. When such confiscation is not possible, the perpetrator is obliged to satisfy the value of the confiscation order (value-based confiscation). For this type of confiscation, third-party confiscation is also possible, when the property obtained by the commission of a criminal offence has been transferred to the third party without compensation for an amount adequate for the actual value of the property. In these cases, the burden of proof remains with the prosecution, who must satisfy the court of the existence of a criminal offence and the guilt of the perpetrator. While there must be a grounded suspicion for the seizure of such assets, the prosecution must prove, beyond reasonable doubt, the commission of the offence and the criminal nature of the property.

The second type of confiscation (in relation to property derived from criminal activity) is extended confiscation. This type of confiscation relates to property which is manifestly disproportionate to the lawful income of the perpetrator. In

¹⁰⁹ Ruling of the Constitutional Court uz – 1632/2010, 23 May 2012.

this instance, the prosecution does not need to prove that the property had actually been incurred by an earlier criminal offence. It is sufficient for the prosecution to prove the existence of an asset that is obviously disproportionate to the legitimate income of the owner. In this case, once the prosecution has demonstrated this discrepancy, the burden of proof shifts to the perpetrator. Insufficient information has been obtained regarding the practice of international co-operation in Serbia, and therefore, it is not possible to make an assessment concerning the effectiveness of such mechanisms at the national level.

Moreover, similar to other jurisdictions in the Western Balkans, there is a lack of publicly available statistics concerning seizure orders and confiscation judgements in Serbia. Notwithstanding, the trend shown in Serbia indicates that seizure and confiscation is not used systematically in criminal proceedings, perhaps due to the unsystematic use of financial investigations.¹¹⁰

This conclusion is further corroborated by the statistics available for 2014,¹¹¹ where, from a total of 28 ongoing cases with seizure orders, only 2 resulted in confiscation judgements. This trend has been consistent for the two prior years (2012-2013). Thus, this trend demonstrates challenges in the actual implementation of seizure orders and confiscation judgements, either because of insufficient evidence provided by the prosecution service to meet the evidentiary threshold, or due to a lack of understanding from courts on the use of financial investigations and indirect methods of proof.

110 MONEYVAL. 2016. Anti-Money Laundering and Counter-Terrorist Financing Measures Serbia: Fifth Round Mutual Evaluation Report, p. 49.

111 MONEYVAL. 2016. Anti-Money Laundering and Counter-Terrorist Financing Measures Serbia: Fifth Round Mutual Evaluation Report, p. 73-74.

5 Conclusions and recommendations

National reports have shown that, despite domestic legislation being in principle in accordance with the relevant international and European standards, seizure and confiscation are not used sufficiently and effectively in the Western Balkans region. The low implementation of these provisions are shown, on the one hand, through publicly available statistics, whereby the quantity of seizures of proceeds and instrumentalities of crime remain low, with a lower amount for confiscation judgements. On the other hand, reports indicate that the mechanisms leading to seizure and confiscation of property have been inconsistently used and implemented in domestic criminal proceedings.

One of the key obstacles to the effective implementation of seizure and confiscation measures is the lack of sufficient capacity on behalf of law enforcement agencies, prosecution and the courts. In particular, the knowledge required for the implementation of different aspects, tools and mechanisms – international co-operation; meeting the required evidentiary thresholds; seizure of proceeds and instrumentalities of crime; and the use of different confiscation mechanisms available nationally – appears to be limited. For example, it has generally not been possible to establish, based on the information which is publicly available, the level of usage of international co-operation in the Western Balkans jurisdictions. However, the trend seems to indicate a low use of international co-operation in relation to cases dealing with asset recovery.

While it is difficult to determine the causes – as statistical information is not readily available – it is assumed that it is an area which is underused by the authorities of the Western Balkans jurisdictions and that lack of familiarity with required tools and instruments plays its part. Equally, the knowledge of European legal and human rights standards, and ECHR in particular, is insufficient as demonstrated in all reports which note that European standards are used rarely before the courts.

Financial investigations have been used in all Western Balkans jurisdictions. However, the national reports seem to indicate that law enforcement agencies and prosecution services are still lacking the necessary expertise and knowledge in the area of financial investigations. The effectiveness and efficiency of the asset recovery process is directly impacted by the results obtained in seizure orders and confiscation judgements. These, in turn, rely on the quality of the financial investigations conducted in parallel to the criminal investigation.

There is, thus, a need to enhance the ability of national law enforcement agencies to utilise different financial investigation techniques to determine the true nature, origin and ownership of the proceeds and instrumentalities of crime. The national experts for the Western Balkans noted that there is an unclear use of terminology at the national, sub-national and transnational levels, despite the clear definitions contained at the international and European levels. The unclear terminology results in uncertainty in the application of such terms at the national level by the legal practitioner. At the transnational level, the lack of harmonisation (or co-ordination) of the terminology makes it difficult for the practitioner to co-ordinate jurisdictions when, e.g. applying for a request for MLA. Moreover, due to the inconsistent collection of statistics related to the asset recovery process, it is difficult to have a comprehensive overview of the effectiveness of the asset recovery process at the national and regional levels. Accurate statistics are fundamental for the effective prioritisation of actions to be undertaken at the operation level. They further support the prevention of financial crimes in general. At present, it is difficult to identify trends and patterns in the different stages of the asset recovery process, as well as relating to the process as a whole. Finally, the lack of harmonisation of terminology impairs the ability to collect and cross-verify statistics across the Western Balkans jurisdictions.

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

5.1 Knowledge and skills in areas relevant to the asset recovery process, in line with European legal and human rights standards

The study identified a need to strengthen the capacity of law enforcement agencies, prosecution and courts in order to secure effective implementation of seizure and confiscation measures in all jurisdictions under consideration, and to ensure its compatibility with applicable European standards. Specific issues that such comprehensive capacity-building measures should focus on include, amongst other:

- Evidentiary thresholds required for obtaining both the seizure and confiscation of property, in line with the applicable standards established in the ECHR and by the ECtHR;

- Application of specific confiscation mechanisms, particularly extended, third-party and non-conviction based confiscation and their impact on procedural guarantees and fair trial;
- Sufficient procedural guarantees afforded to the parties and (bona fide) third parties during seizure and confiscation proceedings, to secure compatibility with due process and fair trial under the ECHR;
- 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;
- Property guarantees under the ECHR and their applicability to the confiscation and management of seized and confiscated property;
- Assessment of the value of property subject to seizure of confiscation during the asset recovery process;
- Assessment of the amount of damage resulting from the commission of a corruption-related offence.

5.2 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 international co-operation used in asset recovery process;
- Applying tools and mechanisms available 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.

5.3 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 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.

5.4 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.

6 References

6.1 Bibliography

CoE. (1978). Explanatory Report to the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

CoE. (1990). Explanatory Report to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

CoE. (2001). Explanatory Report to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

FATF. (2012a). Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery.

FATF. (2012b). International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, The FATF Recommendations.

Gomes Pereira, P. (2016). Analytical Study on Mechanisms for Asset Recovery and Confiscation in Moldova.

Gomes Pereira, P., & Dornbierer, A. (2013). Enhancing the investigation capacities of the Romanian authorities to confiscate and recover proceeds of crime.

ICAR (2009). Tracing Stolen Assets: A Practitioner's Handbook.

ICAR (2011). Development Assistance, Asset Recovery and Money Laundering: Making the Connection.

Webb, P. (2005). The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity? *Journal of International Economic Law*, 8(1).

USAID. (2017). The Analysis of the System of Forfeiture of Proceeds of Crime in Bosnia and Herzegovina.

UNODC. (2015). UNCAC Country Review of Albania.

MONEYVAL. (2015). Report on the Fourth Assessment Visit. Anti-Money Laundering and Combating the Financing of Terrorism: Bosnia and Herzegovina.

MONEYVAL. (2016). Anti-Money Laundering and Counter-Terrorist Financing Measures Serbia: Fifth Round Mutual Evaluation Report.

6.2 International Instruments

Additional Protocol to the Criminal Law Convention on Corruption, 15 March 2003, in force 1 February 2005, ETS 191.

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 8 November 1992, in force 1 May 1997, ETS 141.

Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 05.07.2001, p. 1-2).

Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, p. 45–55).

Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ L 68, 15.3.2005, p. 49–51).

Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59–78).

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 16 May 2005, in force 01 May 2008, CETS 198.

Criminal Law Convention on Corruption, 27 January 1999, in force 1 July 2002, ETS 173.

Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.04.2014, p. 39).

European Convention on Mutual Assistance in Criminal Matters, 20 April 1959, in force 12 June 1962, ETS 30.

First Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 13 March 1978, in force 12 April 1982, ETS 99.

Joint Action 98/699/JHA of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (OJ L 333, 9.12.1998, p. 1–3).

Recommendation R(88)18 of the Committee of Ministers to the Member States Concerning the Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their Activities, adopted on 20 October 1988.

Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 8 November 2001, in force 1 February 2004, ETS 182.

UNGA Res. 55/25, United Nations Convention against Transnational Organised Crime, UN Doc. A/RES/55/25 (8 January 2001).

UNGA Res. 58/4, United Nations Convention against Corruption, UN Doc. A/RES/58/4 (21 November 2003).

6.3 Relevant case law from the ECtHR

Forminster Enterprises Limited v. the Czech Republic, judgment of 9 October 2008, no. 38238/04

Földes and Földesné Hajlik v. Hungary, judgment of 31 October 2006, no. 41463/02

East West Alliance Limited v. Ukraine, judgment of 23 January 2014, no. 19336/04

Raimondo v. Italy, judgment of 22 February 1994, no. 12954/87

Air Canada v. the United Kingdom, judgment of 5 May 1995, no. 18465/91

Phillips v. United Kingdom, judgment of 5 July 2001, no. 41087/98

Arcuri and Others v. Italy, judgment of 5 July 2001, no. 52024/99

Butler v. United Kingdom, decision of 27 June 2002, no. 41661/98

Smirnov v. Russia, judgment of 12 November 2003, no. 71362/01

YUKOS v. Russia, judgment of 31 July 2004, no. 14902/04

Adamczyk v. Poland, decision of 7 November 2006, no. 28551/04

Ismayilov v. Russia, judgment of 6 November 2008, no. 30352/03

Borzhonov v. Russia, judgment of 22 January 2009, no. 18274/04

Gabric v. Croatia, judgment of 5 February 2009, no. 9702/04

Adzhigovich v. Russia, judgment of 8 October 2009, no. 23202/05

Milosavljev v. Serbia, judgment of 22 October 2012, no. 15112/07

Varvara v. Italy, judgment of 29 October 2013, no. 17475/09

Waldemar Nowakowski v. Poland, judgment of 22 July 2014, no. 55167/11

Zaja v. Croatia, judgment of 4 October 2016, no. 3746/09

Annex 1 – List of relevant projects on asset recovery in the Western Balkans

This annex provides an overview of relevant projects pertaining to the asset recovery process which are being implemented in the Western Balkans. This list does not intend to be exhaustive. Instead, it seeks to provide a comprehensive list of relevant projects.

The list has been broken down by jurisdiction, for ease of reference.

	Project	Time period	Status	Description of the project
Albania	EU/CoE Action against Economic Crime in Albania	2016-2019	Ongoing	Improve implementation of key and recent recommendations of the Council of Europe's Group of States against Corruption (GRECO) and Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), and to further strengthen institutional capacities to counter and prevent corruption; money laundering; and the financing of terrorism in accordance with European standards.
Bosnia and Herzegovina	USAID Justice Project in Bosnia and Herzegovina	2015-2019	Ongoing	Covers two areas: 1) strengthening prosecutorial capacities in combating organised crime and corruption and 2) strengthening the integrity of the judiciary as an institution and the integrity of its individual members.
	DFID Anti-Corruption in the Federation of Bosnia and Herzegovina and Republika Srpska	2017-2018	Ongoing	Training of criminal justice professionals on asset seizure and confiscation.
	SDC Support to the Judiciary in Bosnia and Herzegovina – Strengthening the Role of the Prosecutors in the Criminal Justice System – Phase I & II	2010-2018	Ongoing	Project being carried out in collaboration with the USAID Justice Project. Project providing specialised trainings for prosecutors in Bosnia and Herzegovina.
Kosovo*	USAID Justice System Strengthening Programme	2015-2019	Ongoing	Strengthen efficiency and effectiveness in the administration of justice and delivery of quality services.
Macedonia	EU/CoE Action against Economic Crime	2016-2019	Ongoing	Project description confidential and not publicly available. Reference to the more general "Horizontal Facility for the Western Balkans and Turkey" from the EU and CoE.
Montenegro	EU/CoE Action against Economic Crime in Montenegro	2016-2019	Ongoing	Project description confidential and not publicly available. Reference to the more general "Horizontal Facility for the Western Balkans and Turkey" from the EU and CoE.
Serbia	Currently no relevant projects underway.			

Annex 2 – Comparative tables of legislation and legal tools available for the Western Balkans jurisdictions

Codified corruption-related offences in Western Balkans jurisdictions

Criminal offence / Jurisdiction	Active bribery	Passive bribery	Active bribery of foreign public officials and official of public international organisations	Passive bribery of foreign public officials and official of public international organisations	Embezzlement, misappropriation and other diversion of property by a public official	Money laundering	Obstruction of justice	Illicit enrichment
Albania	Art. 244, 245 and 319 CC	Art. 259, 260 and 319/ç CC	Art. 244/a, 319/a, 319/b and 319/c CC	Art. 259/a, 319/d, 319/dh and 319/e CC	Art. 135, 143, 256, 257 and 258 CC	Art. 287 CC	Art. 312 and 312/a CC	Illicit enrichment is not criminalised in Albania.
Bosnia and Herzegovina	Art. 218 CC BiH Art. 381 CC FBiH Art. 352 CC RS Art. 375 CC BD	Art. 217 CC BiH Art. 380 CC FBiH Art. 351 CC RS Art. 374 CC BD	Same as provisions for active bribery.	Same as provisions for passive bribery.	Art. 221-223 CC BiH Art. 384-386 CC FBiH Art. 348-350 CC RS Art. 378-380 CC BD.	Art. 209 CC BiH Art. 272 CC FBiH Art. 280 CC RS Art. 265 CC BD.		Illicit enrichment has not been implemented in Bosnia and Herzegovina. Notwithstanding, unexplained wealth deriving from criminal activity is subject to extended confiscation.
Kosovo*								
Macedonia	Art. 358 CC	Art. 357 CC	Same as provisions for active bribery.	Same as provisions for passive bribery.	Art. 353-356 CC	Art. 273 CC	Art. 368, 368-a CC	Art. 359-a CC.
Montenegro	Art. 424 CC	Art. 423 CC			Art. 420, 421 and 421a CC	Art. 268 CC	Art. 290 CC	Illicit enrichment is not criminalised in Montenegro.
Serbia	Art. 368 CC	Art. 367 CC	Same as provisions for active bribery	Same as provisions for passive bribery.	Art. 364-365 CC	Art. 231 CC	Art. 336 CC	Illicit enrichment is not criminalised in Serbia.

Legal tools for seizure and confiscation available in Western Balkans jurisdictions.

Legal tools Jurisdiction	Seizure	Confiscation	Value-based confiscation	Extended confiscation	Liability of legal persons
Albania		Art. 36 CC			Art. 45 CC and the Law on "the Criminal Liability of Legal Persons".
Bosnia and Herzegovina	Art. 73 CPC-BiH	Art. 74 and 110 CC-BiH	Art. 111 CC-BiH; Art. 115 CC-FoBiH; Art. 95 CC-RS Art. 115 CC-BD.	Art. 110a CC-BiH extended confiscation.	Art. 122-144 CC-BiH Art. 126-146 CC-FoBiH Art. 125-146 CC-RS Art. 126-148 – CC-BD
Kosovo*					
Macedonia	Art. 100-a CPC	Art. 100-a CPC Art. 98 CC	Art. 98 CC	Art. 98-a CC	Art. 28-a CC
Montenegro					Law on Liability of Legal Entities for Criminal Offences
Serbia					Art. 2 of the Law on Liability of Legal Entities for Criminal Offences