

EVALUATION OF LAWS AND SYSTEMS IN FATF MEMBERS DEALING WITH ASSET CONFISCATION AND PROVISIONAL MEASURES

Introduction

1. This paper presents an analysis of members' responses to a questionnaire on measures taken by FATF members regarding the laws and systems they have in place as at 1 March 1997¹ in relation to confiscation and provisional measures, both under their domestic systems and pursuant to international mutual legal assistance. In addition responses were sought on the position of FATF members on three other topics - confiscated asset funds, co-ordination of seizure and confiscation proceedings, and asset sharing. Attached to this paper is Appendix 1, which sets out a table of the principal attributes or characteristics of members confiscation systems.

2. Confiscation is an important topic in relation to money laundering. The criminals' concern that their proceeds of crime may be confiscated is a major factor in motivating them to launder the proceeds of crime. An effective confiscation system is a necessary component of the anti-money laundering measures taken by any country. A considerable amount of qualitative information and a limited amount of quantitative information were provided in the answers to the questionnaire. This paper seeks to describe in general terms the nature of the systems which FATF members have adopted in regard to confiscation and associated provisional measures, both as regards domestic proceedings and in proceedings brought in response to a request for international mutual legal assistance. It will examine the results obtained from these confiscation systems, seek to identify areas of difficulty as well as fundamental strengths and weaknesses of various approaches. Finally there will be a similar description and analysis of any measures members have taken regarding confiscated asset funds, co-ordination of seizure and confiscation proceedings, and asset sharing.

I. DOMESTIC CONFISCATION SYSTEMS

3. All member countries have legislation providing for the confiscation or forfeiture of the proceeds or instrumentalities of some or all crimes, as well as provisions providing for the seizing or freezing of assets which may be subject to future confiscation. Money laundering is a criminal offence in all members, and it is also possible to confiscate the proceeds of that crime. There is a wide range and variety of confiscation laws and systems. Most members have enacted new confiscation legislation or made significant amendments in the last five years, such Switzerland in 1994, Greece in 1995, Ireland in 1994 and 1996, and Austria in 1997. Often, such members also still have older and more simply worded legislation which allows a court to confiscate the proceeds or instrumentalities of crime. Other countries such as Denmark have confiscation and ancillary provisions which are part of their general criminal code and have been in force without substantial amendment for many years.

Confiscation/forfeiture systems

4. A summary of the major features of members confiscation laws is set out at Appendix 1. For the purpose of this report the major characteristics of the confiscation or forfeiture provisions were whether :

- a) the system was property or value based or both;

¹ National laws and procedures are subject to change, and if information is sought on the laws of particular FATF members, then the national government of that country should be contacted

- b) it applied only to drug trafficking offences or all serious crimes;
- c) a conviction is required for the confiscation provisions to apply;
- d) the standard of proof used in the proceedings was a criminal or civil (or some other easier) standard;
- e) the burden of proof could be reversed so as to place an onus on the defendant to show that property was legitimately obtained or that he did not benefit from his criminal activity;
- f) if a conviction is required, the confiscation or forfeiture order could be made in respect of the proceeds of crimes committed (but not prosecuted) before the offence of which the defendant is convicted or against assets acquired prior that time;
- g) property owned by third parties (persons who are not defendants to the criminal proceedings) can be confiscated; and
- h) property which is or is intended to be an instrumentality of the offence can be confiscated.

Property or Value

5. All members except Italy and Spain (which have only property based systems²) have systems which allow both for the confiscation of specific items of property which are found to be the proceeds or instrumentalities of a crime, and for the making of an order³ based on the value of the proceeds of crime received. A large majority of the remaining members have systems where the principal method of confiscation is property based, but which allow for a value order to be made if that piece of property is not available for confiscation for certain reasons e.g. the defendant has removed it from the country and it cannot be located. With the exception of the Netherlands and Austria, the seven countries which have a value based system as their principal method of confiscation have a legal system based on English common law. Three members have systems which rely equally on property and value confiscation.

Drug trafficking offences or all serious crimes

6. Those members which have confiscation provisions which are part of the sentencing alternatives under their general criminal law normally have systems which cover all serious crimes, indeed all crimes. However, in addition, in certain countries the confiscation procedures are facilitated by laws such as reversing the burden of proof, which apply only to limited categories of more serious offences. Another group of members, such as the United Kingdom and the Netherlands has specific confiscation legislation which applies to all serious offences, whilst some others such as the United States and Canada have a list of more serious offences to which their confiscation legislation applies. Singapore has confiscation legislation which is limited to drug trafficking offences (including drug money laundering), and Luxembourg has specific confiscation legislation for drug trafficking and drug money laundering.

Necessity for conviction

7. All members have confiscation laws which are part of the sentencing proceedings of the defendant, and therefore a conviction is required. However, even though conviction based confiscation may be the normal type of confiscation used in a large majority of members, some

² Italy introduced value based confiscation for the offence of usury in 1995.

³ Any reference to confiscation order is to be read as also referring to any decision or judgement of confiscation.

members can also confiscate or forfeit property even though no conviction has been obtained. This can take place in two ways :

(a) confiscation within the context of criminal proceedings but without the need for a conviction or finding of guilt. For example, in England and Wales a confiscation order can be made if the defendant has absconded for at least two years, there is proof to the civil standard he has benefited from drug trafficking, and reasonable steps to contact him have been made. Similar, though not identical, provisions exist in most of the common law based countries. Other legislation in the United Kingdom provides a civil procedure within criminal proceedings whereby cash which is the proceeds or instrumentality of drug trafficking, and which is being imported or exported can be forfeited. In Austria, a confiscation order can be made in independent penal proceedings, where there is no formal finding on the guilt of the person;

(b) confiscation entirely outside criminal proceedings e.g. through civil or administrative proceedings. For example, in the United States, Germany or Ireland separate proceeding can be commenced provided the pre-conditions are met and a confiscation order made, even though there is no conviction. Provided there is a statutory basis to do so, a separate civil forfeiture proceeding may be brought in the United States provided there is probable cause to believe that property represents the proceeds or instrumentalities of crime. The civil forfeiture proceeding can occur independent of or parallel to related criminal proceedings. In addition, the United States has administrative, non-judicial forfeiture. In Ireland, civil proceedings can be brought to restrain and eventually confiscate property worth at least £10,000 which represents the proceeds or instrumentality of any offence. Italy also can bring non-criminal confiscation proceedings “in absentia” against the alleged offender on the authority of the court.

Standard of proof

8. Confiscation is normally regarded as part of the punishment of the defendant, although there are arguments which can be made that it also has a non-punitive purpose in some cases⁴. Being part of the penal proceedings it is therefore not surprising that the standard of proof applicable in most members is the criminal standard applicable to a sentencing hearing in their country⁵. In those eight members which follow an English common law system it is possible for the government to prove its case to the civil standard of the proof, which is easier to prove. In these countries it was felt that the criminal standard was too difficult to prove for serious crimes such as drug trafficking which have no victim who can readily identify the profits made by the criminal. Interestingly the Norwegian system requires that the prosecution must prove to the criminal standard that the defendant obtained proceeds from the offence, but is allowed to prove the value of those proceeds to the civil standard. In Denmark, if the amount of the proceeds cannot be sufficiently established then a sum thought to be equivalent to that amount may be confiscated. It should be noted that for some members which have a continental legal system their civil standard may be more difficult to prove.

⁴ Contrast the decision of the European Court in Welch v. United Kingdom, where the Court held that a particular confiscation under the Drug Trafficking Offences Act 1986 in England and Wales was punishment and a penalty, with the decision of the United States Supreme Court in United States v. Ursery which found that the civil forfeiture provisions in the United States are not punishment for double jeopardy purposes.

⁵ This can vary considerably e.g. in the United Kingdom and the United States the normal criminal standard for either conviction or sentence is “proof beyond reasonable doubt” (though the standard in a criminal drug forfeiture hearing in the United States is “the preponderance of the evidence”), whilst in France the normal criminal standard is the need for an “intime conviction”.

Reversal of burden of proof

9. In the majority of members the burden of proving that assets are the proceeds of crime or that the defendant has derived a certain value amount as his proceeds of crime is placed on the prosecutor or the lawyer who represents the government. All but three of those ten members which allow the burden of proof to be placed on the defendant have legislated this power as a discretionary power which is held by the court, and which may usually be exercised when the government has presented some evidence to suggest that the asset may be criminally derived or that the defendant could not have acquired his assets taking into account his legitimate income. The United Kingdom requires the court to make wide-ranging assumptions about the illicit origin of property upon the request of the prosecutor in drug trafficking cases, and Hong Kong gives the court a discretion to do so. However, at present, there is no discretion to make these assumptions in drug money laundering cases. Australian legislation provides for automatic statutory forfeiture of the defendant's assets in drug trafficking or money laundering cases six months after conviction if the defendant does not prove they were legitimately acquired i.e. if the defendant does nothing the property is confiscated. Germany has a concept of extended forfeiture whereby for certain offences the State can seek to forfeit property of the defendant or an accessory, which is not directly linked to a specific offence, but which is subject to a justifiable assumption that it was acquired for or from illegal activity. In Austria the onus of proof may be partially reversed in cases where there has been repeated commissions of crimes over a period or where the defendant is a member of a criminal organisation.

10. France has two provisions which are potentially far reaching. The first relates to a person convicted of drug trafficking or drug money laundering, and it allows the court to confiscate all the defendant's property, whether legitimately acquired or not. The second provision was introduced in May 1996 and makes it a criminal offence for a person who carries on habitual relations with a drug trafficker or user to be unable to provide evidence of a legitimate source of funds commensurate with his lifestyle. If convicted then the person's property would be subject to confiscation. In this second case the burden of proof is thus reversed for the criminal offence itself, rather than in relation to the sentence. Italy also has provisions which ease the burden on the prosecutor. These provide that the property of a person who has been convicted of certain offences which relate to the Mafia, such as drug trafficking or extortion, can be liable to confiscation if the person cannot justify the origin of the property and it is disproportionate to the person's legitimate income. The confiscation proceedings can run parallel to the criminal proceedings or not, and the court can order that the amount which is disproportionate to legitimate income can be confiscated. Denmark has introduced a bill to require the defendant to render probable that his assets are legitimately acquired in cases of serious offences. Other members such as Belgium and Iceland are currently considering whether similar legislation should be introduced.

Link between conviction and confiscation

11. The issue is whether members can obtain an order for confiscation which only relates directly to the proceeds of crime from the criminal offence of which they have been convicted, or whether the confiscation order can also be sought in relation to the proceeds of previous crimes of which the person has not been convicted. Many countries, whether with a property or value system, which allow the burden of proof to be reversed can make a confiscation order which confiscates the proceeds of crimes other than for the offences of which the defendant is currently convicted. Some members which have a value based system of confiscation, whether as the primary or secondary system, indicated that they could enforce a monetary value order against any property, whether legitimately acquired or not. However this is an issue related to the enforcement of the confiscation order rather than the extent of the order itself. Canada and the Netherlands are unique in having a post conviction system which allows the confiscation of property which is the proceeds of previous crimes for which confiscation is allowed and which have not been prosecuted, but yet not having a provision which allows the burden of proof to be reversed. By contrast, France can confiscate such

property for serious offences relating to drug trafficking, including drug money laundering, even if the property is legitimately acquired.

Third party property

12. A large majority of members have laws which, whilst respecting the rights of bona fide third parties, allow the confiscation of the proceeds of crime, or property of equivalent value in a value based system, from third parties who are not themselves defendants. Many members, for example France and Luxembourg, are able to seek confiscation of property held by persons who are accomplices or associates of the perpetrator of the predicate offence, for example, because they participated in, or hold the product of, that offence. However, such persons are not regarded as third parties for the purpose of this paper, since they are defendants in criminal proceedings. Examples of categories of situations where property held by third parties who are not charged with a criminal offence may be subject to confiscation are : where the person knew⁶ that the property was derived from crime, where it was a direct or indirect gift from a defendant, or where the property was still subject to the effective control of the defendant. Turkey only confiscates property where it is owned by the criminal defendant.

Instrumentalities

13. The ability to confiscate the instrumentalities or products of a money laundering offence exists in almost all members, and is normally part of the general criminal law of the country. The only exceptions are Canada which cannot confiscate property used in the commission of a money laundering offence. Several members are unable to confiscate property which is intended to be used, rather than actually used, in the commission of such an offence (as required under Article 5(1) & (2) of the 1988 Vienna Convention).

Provisional measures

14. All members have legislation which provides their law enforcement agencies with the power to seize property which may become subject to a confiscation order as the proceeds of, or an instrumentality of a criminal offence. Similarly most jurisdictions have a power to freeze or obtain some form of order which secures such property, or in a value based system any property, so that a confiscation order could ultimately be enforced against the property. There does not appear to be any general difficulty with the operation of the legislation relating to provisional measures. All members are able to take provisional measures, either to seize or freeze, from the time that a person is arrested and charged with a relevant criminal offence until such time as the proceedings are concluded. Such powers can also be exercised prior to the person being arrested and charged in most members, though the seizure or freezing of the property can usually only be maintained for limited period of time if no charges are laid.

15. The power to order the seizure of the proceeds of crime is usually given to a prosecutor or investigating magistrate, and in some countries to a law enforcement official in exceptional circumstances. However, law enforcement officials are often empowered to seize property which is the direct proceeds or an instrumentality of the offence. The power to freeze, restrain or secure property is a judicial power which is normally reserved to the relevant court. To obtain such an order it is normally necessary to have sufficient evidence to satisfy the court that the person committed the offence and the person benefited from the offence or that the property is the proceeds of that offence. In a significant number of members it is also necessary to show that the freezing of the property is necessary in order to ensure that it will be available if a confiscation order is made i.e. a need to show a risk of dissipation.

⁶ Some countries may also have standards other than knowledge e.g. belief, suspicion, could not ignore etc.

Operational aspects

16. Approximately half the FATF members have dedicated financial investigation units within the police or another law enforcement agency which have a particular responsibility to investigate the financial aspects of crime (including money laundering), including asset identification and tracing with a view to confiscation. A proportion of these members also created further legislative powers to enable their law enforcement agencies to make the necessary financial investigations, usually because the existing powers to obtain information were limited to things which related to the offence itself and did not extend to what happened to the proceeds of the offence. Most law enforcement agencies engaged in investigating the financial position of the suspect conduct checks on the defendant's bank accounts, as well as checking public records relating to matters such as land ownership, companies, and motor vehicles. In many cases they are also able to obtain the person's tax records - this being important evidence to help in determining the person's legitimate income. The efficiency and speed with which the necessary financial inquiries can be done tends to depend on the degree to which public records are computerised - the ideal situation being that the investigating agency has on-line computer access to public records such as company or land records.

17. There are generally two possible purposes for these enquiries. One is to seek to prove that the property is the proceeds of the crime charged or some other illegal activity, or in a value system, that the defendant derived a certain benefit value from the offence. The other, which applies where the legislation allows the onus of proof to be reversed, is that investigator seeks to determine whether the defendant has assets the value of which are inconsistent with his known legitimate income.

18. There are a range of methods by which confiscation orders are enforced. In a majority of members the order operates to divest title to the asset from the previous owner and vest such ownership in the state. In other cases, such as with value orders, an agency of government has to take further steps to enforce the order against assets which can be used to satisfy the order. There are generally few difficulties as regards enforcement laws and procedures as the assets have normally been seized or frozen at an early stage of proceedings. The major problem area appears to arise when the assets are located outside the country, and mutual legal assistance is required to identify and freeze or seize the assets. However timely enforcement of confiscation orders can also be a problem.

Problems, proposed changes and aspects of the system that work well

19. One of the aspects of a confiscation system which was said to be very important is the issue of easing the burden of proof for the prosecutor. The issue here is the difficulty : (a) in proving to the criminal standard that the defendant has engaged in prior criminal conduct from which he has profited or obtained certain property, (b) linking the proceeds to specific prior criminal activity. This might not be difficult where the offence is one which has a readily identifiable victim, but most drug trafficking offences and many other serious offences have no direct victim who can give evidence, and moreover the many such offences involve the defendant being caught committing the crime, so that he has made no profit from that offence even though he may have been engaged in criminal activity for many years. The ability to reverse the burden of proof is regarded as a very important element of the systems in Australia, Hong Kong and the United Kingdom, whilst correspondingly Denmark, Germany, Iceland, Luxembourg, Norway and Sweden all consider the burden of proof to be a problem and some of them are considering reversing the burden for certain offences. Of interest are recent amendments to the law in Austria and Switzerland which allow the property of criminal organisations to be confiscated provided one can prove the organisation controls the property. It is not necessary to prove the illegal origins of the property.

20. A number of countries had a problem with the payment of legal expenses out of money which was frozen. The difficulty was reconciling the principle of the defendant's legitimate right to be legally represented using property which belonged to him with the practise whereby defendant's lawyers had in some cases used most or all of the frozen money on unmeritorious defences after

which the defendant pled guilty. Some of the methods being considered to control the use of frozen money include : ensuring there is no other property available which could be used for this purpose, taxing the lawyers bills, preventing the use of assets which are actually the proceeds of crime, and requiring defendant's lawyers to be paid at legal aid rates.

21. Several countries also felt that they had benefited from an organisational structure where there was either a multi-disciplinary body or close co-operation between the relevant government departments or agencies. Canada, Finland, New Zealand, Norway and Singapore had all benefited from such arrangements, whilst one member indicated that there were some problems in the area of co-ordination which it would like to rectify. Similarly it was felt that an effective confiscation regime often requires prosecutors and investigators who are dedicated to this type of work.

22. In addition to the matters mentioned above, some members such as Luxembourg, Norway and Iceland were conducting a more general review of their confiscation laws. More than half the members consider that there are no problems with their system and are not proposing to make any changes.

Results obtained

23. Only 12 members kept statistics, and of these only nine had statistics on a year by year basis. Although a significant amount of money has been seized and confiscated in several countries, it is difficult to discern any clear trends on the statistics available. The statistics also have to be read with caution since countries may measure the number of confiscation/freezing orders in different ways, and one must also take into account the time lag between the commencement of a case (when the money is frozen) and its conclusion (when the money is confiscated). Many cases where property has been seized/frozen are still continuing, and a confiscation order cannot be obtained until after conviction.

II MUTUAL LEGAL ASSISTANCE

24. FATF members are at differing stages of development as regards their systems of mutual legal assistance in relation to confiscation and provisional measures. Two members cannot provide assistance in this area, whilst other members are limited to drug trafficking or drug money laundering. Another two members cannot provide assistance on a full faith and credit basis, but have to commence their own domestic proceedings, whether a criminal prosecution for money laundering or civil in-rem confiscation for drugs and a range of other serious offences linked to terrorism or fraud.

25. Traditionally, mutual legal assistance in relation to confiscation can be divided into three broad areas: (a) investigative assistance to identify and trace property and obtain documents, (b) the ability to freeze or seize property pursuant to a request based on a confiscation order which will be obtained in the foreign jurisdiction, and (c) the ability to register and enforce that foreign confiscation order. Most members have had a number of requests for investigative assistance, whether requiring the use of coercive measures or not. Usually a formal request is required if coercive action is to be taken, however some members such as the United Kingdom can obtain search warrants or production orders for documents on a law enforcement agency to agency basis. Most members however, have had very little experience in relation to freezing, seizing and confiscation assistance. In some cases information is not available because statistics are not kept - only 6 members have information on the number and value of mutual legal assistance requests made and received. However, many members have simply not made or received requests for mutual assistance to freeze or confiscate property. Given this limited experience, few problems have been identified and not many members are currently considering changes.

Conduits for assistance

26. Leaving to one side traditional methods of assistance such as letters of request, most of which relate to the obtaining and taking of evidence for criminal proceedings, and informal assistance between law enforcement agencies whether on a bilateral basis or through organisations such as Interpol or World Customs Organisation, there are three principal methods by which members are able to give assistance :

(a) multilateral conventions -

- the 1988 Vienna Convention (the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances)[19 members have ratified and three intend to do so within the near future];
- the 1990 Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime [ten members have ratified and six more intend to do so within the near future];
- the 1970 European Convention on the International Validity of Criminal Judgements;
- the 1959 European Convention on Mutual Assistance in Criminal Matters;

(b) bilateral agreements - usually to ensure that the bilateral partner can offer reciprocal assistance;

(c) pursuant to their own domestic laws whether on the basis of reciprocity, dual criminality or otherwise.

Types of assistance

27. **Investigative** - all members are able to provide assistance in money laundering cases in taking coercive measures to search for and seize documents and records, whether held by financial institutions, companies or individuals. This covers identifying and tracing the proceeds of crime with the ultimate object of confiscation. Apart from Italy these members can also obtain an order which requires documents to be produced, although such documents can be obtained in Italy by seizure. One unusual investigative tool, which is probably of more value to a criminal prosecution for money laundering than for the confiscation aspect of the case is a monitoring order. In Australia, Hong Kong and New Zealand the authorities can apply for an order in relation to drug trafficking and money laundering offences which allows them to obtain not just historical information (a production order) but also current and future (yet to be created) banking documents and information. Such an order is a form of financial surveillance which can compel a financial institution to provide information and documents about a particular person or account as and when those documents are created for a future period of up to three months, and could be a useful tool in determining when criminality is about to take place.

28. There is no common set of conditions under which assistance can be provided, and members did not indicate that there are particular difficulties which prevented or inhibited assistance in this area. However two issues which appear to be a problem for some countries are : (a) many members require a multilateral or bilateral basis to provide assistance, and insufficient countries are able to take action pursuant to these channels, and (b) insufficient information is provided to the requested country to satisfy its criteria i.e. the request appears to be “fishing” for information. An aspect that appears to be working well in the United Kingdom and Hong Kong is the capacity in drug cases for law enforcement agencies to obtain production orders and search warrants on behalf of foreign law enforcement agencies and provide them with copies of documents without the need for a formal request under a convention or agreement, dual criminality, reciprocity or many of the other usual preconditions. At an investigative level this allows documents to be obtained expeditiously allowing complicated international money laundering inquiries to proceed much more quickly.

29. **Freezing/Seizing** - a request for assistance in relation to one of these two types of provisional measures, or for an order for security to be obtained over the property in question can be acted upon in 22 members. The United States and Canada may also be able to assist using their own domestic confiscation proceedings. New Zealand is able to register and enforce a foreign freezing order, but other members act upon the request, and if the necessary conditions are fulfilled they can take action to freeze or seize on the basis of their own legislation, which does not require any provisional measure to have been taken in the foreign jurisdiction. Examples of conditions commonly necessary to give effect to such requests are :

- the need for a multilateral or bilateral conduit under which the request can be made;
- dual criminality - the conduct must amount to a criminal offence in both countries;
- that the relief sought could also be obtained if those proceedings had been brought in the requested country;
- there is sufficient evidence to show that a confiscation order could ultimately be made in the requesting country.

However some members such as Denmark, France or Portugal can provide assistance for provisional measures even though there is no bilateral or multilateral agreement, provided the necessary criteria are met.

30. An interesting feature of co-operation between Luxembourg and the United States has been the freezing of assets held in Luxembourg, with the subsequent repatriation of those assets to the United States where they have been forfeited. Also of note is the ability of several FATF countries to order repatriation to the requesting country of any assets held in the requested country that are an object of the offence (including those held in bank accounts) and which are controlled by the person who is being extradited.

31. **Confiscation** - A number of members have limitations to their ability to assist in enforcing a foreign confiscation order. Seven members cannot register and enforce a foreign confiscation order. Spain is unable to register a foreign value confiscation order, though it can register a property based order relating to the direct or indirect proceeds or instrumentalities of the crime as well as any income earned from the offence. Hong Kong, Luxembourg, Japan and Singapore are currently limited to drug offences. Once the foreign confiscation order is registered it is enforced in the same way as a domestic order, whether by enforcing a property confiscation order directly (since the title to the property passes to the State with the confiscation order) or by appointing receivers or using some other method of civil or criminal enforcement for value based orders. In 15 members the confiscated monies are paid into General Revenue, whilst in seven members the money is either paid into an asset forfeiture fund or may be available to share with the requesting country in certain circumstances. In addition to the conditions mentioned in paragraph 29 above, other common pre-requisites in order to register a foreign confiscation order are :

- (a) the order must be final and not subject to any appeal;
- (b) the defendant must have had an opportunity to appear at the proceedings in the requesting country and be legally represented there;
- (c) it must not be contrary to any other fundamental principles of justice in the requested country.

Problems, proposed changes and aspects of the system that work well

32. Members were unable to identify many specific problems that they had with their systems of mutual legal assistance. However, given the limitations of one type or another which apply to most of the members systems, the lack of problems may be due more to lack of experience (and thus not having cases from which problems arise) than necessarily having a perfect system. Some of the fundamental problems for members appear to be :

(a) not having ratified the multilateral conventions or agreed to bilateral agreements under which they could make requests for assistance and not having the necessary domestic legislation in place. The 1988 Vienna Convention, which is limited to drug offences, has been ratified by 19 members but it is important that all members ratify it promptly. The 1990 Council of Europe Convention, has been ratified by only a limited number of FATF members. Given the comprehensive and recent nature of this Convention it is very desirable that members which are able to do so, should take early steps to sign and ratify it. A limited number of members use bilateral agreements to any great extent, and even those which do, such as Australia and the United Kingdom, have had very few confiscation cases. Similarly France, which relies on multilateral and bilateral agreements for confiscation had few cases requesting confiscation related mutual legal assistance in 1995. However, the extension of the money laundering offence in France to cover all crimes means it is now able to provide assistance on a much wider basis.

(b) the limitations of domestic legislation are recognised as being problems. Canada and the United States have noted that the need for them to commence their own domestic prosecution or confiscation case is a problem. The United States is therefore proposing measures to allow foreign governments to enforce their own value confiscation orders in United States courts. It also proposes creating a power to freeze property for thirty days if it is owned by a defendant charged in a foreign country, when the property could be forfeited under United States law. Correspondingly, the United States is concerned that some FATF members may not be able to enforce a civil forfeiture order made in the United States, since there is no conviction. This may be the case in members which require all the pre-requisites for domestic confiscation (including conviction) to be met. A number of members are taking or considering further steps - Belgium has introduced legislation to allow mutual legal assistance in relation to confiscation and related matters, Hong Kong is preparing legislation for full mutual legal assistance for all serious crimes, France is now able to provide assistance in relation to confiscation for non-drug money laundering, whilst Norway and Iceland will both be reviewing their current legislation.

33. Some of the other problems identified were - some countries were concerned about the speed at which requests for assistance were actioned, thus giving the criminals the opportunity to transfer the property to another country and avoid it being frozen or seized. Australia recognised that it could not freeze property prior to charge and is thus making the necessary amendments, whilst Canada felt that pre-charge restraint orders created problems for countries which required any request to issue from a judicial authority. Generally however, despite the lack of cases and statistics and the problems identified above, most members did not feel that their systems had any problems and were not proposing to make any changes.

Results

34. What is noticeable is that most members have had no or very few requests for assistance even when they have the necessary legislation in place. The available statistics do not allow any particular conclusions to be drawn. In those members which have received or made requests the reduction from the amount frozen/seized to the amount confiscated or realised may be due to the fact that cases are ongoing, and that the confiscation stage has not been reached.

III CONFISCATED ASSET FUNDS, CO-ORDINATED ACTION AND ASSET SHARING

Confiscated Asset Funds

35. Only seven members - Australia, Canada, Italy (for the proceeds of drug trafficking only), Luxembourg, Spain, the United Kingdom and the United States have confiscated asset funds. These are specific funds held by the government into which the amounts realised from the sale of confiscated assets are paid. The monies held by the fund can then be used for purposes such as sharing with other countries or provincial governments within the country, law enforcement projects,

and drug rehabilitation and education. The United Kingdom only deposits monies received from international cases into its fund i.e. those obtained when a foreign confiscation order is registered and enforced or gifts from overseas countries in connection with joint investigations where confiscation has resulted. This amounted to some £ 4.7 million over the last six years. The other four countries put all their confiscated assets in the fund. All these members thought that their funds were working well and were very helpful in promoting international and inter-agency co-operation. The remaining members did not have such a fund, and except for Belgium and the Netherlands are not considering one. The main reason for not having a fund in almost every member is that it is contrary to the normal budgetary principles of government and leads to a hypothecation of revenue. The normal principle of course being that all monies raised by government are put into general revenue and all disbursements are then made from there.

Co-ordination of seizure and confiscation proceedings

36. The issue is whether a member can liaise and co-ordinate with another jurisdiction usually prior to, but occasionally after proceedings commence, so as to take the most effective action to freeze and seize as well as confiscate the proceeds of crime. In most cases this will simply be an extension of members ability to conduct co-operative investigations, which is something that all members can do, and will involve making a decision as to where a person will be prosecuted or the confiscation proceedings brought. At least 20 members have the ability to co-ordinate their proceedings, as well as having policies and procedures in place. At least half of these either required this co-ordination to take place pursuant to mutual legal assistance arrangements, or felt that it was desirable that it should do so. However only two members have specifically had cases where they have had to co-ordinate their seizure and confiscation proceedings with another jurisdiction, and thus members did not have any specific problems which they were aware of.

Asset Sharing

37. Sixteen members can share confiscated assets, whilst seventeen are able to receive such assets. In a large majority of these countries there is no specific law which allows this, but on the other hand there is nothing to prohibit it. Most countries do however require such sharing or receipt of confiscated assets to be made pursuant to a mutual legal assistance agreement. Some of the other preconditions which are necessary before sharing can take place are :

(a) a restriction which applies to Australia and presumably most other members is that sharing and receipt of assets applies only to cases where the assistance is pursuant to a request to freeze/seize or confiscate assets. It does not extend to situations where the only assistance provided is investigative assistance. However, the United States and the Netherlands do share for cases of both judicial and investigative assistance;

(b) as a matter of policy one member will only consider sharing in cases where the assets are worth more than US\$ 1.3m;

(c) another member can only share if property is confiscated and not in relation to cash (value) confiscation.

Outside the United States there has been little actual experience of asset sharing, though Luxembourg, the United Kingdom and Switzerland have both received and shared assets.

IV CONCLUSION

38. It has been said that certain criminals and criminal organisations do not mind convictions or prison sentences provided they are able to retain their ill-gotten gains. An effective confiscation system, both domestically and internationally, is therefore a very important deterrent to criminal

activity, as well as being cost effective. As can be seen from Appendix 1 there are a diversity of confiscation systems, with many different features. This fact, combined with a lack of statistics, and a lack of experience in many countries, makes it difficult to isolate problems let alone identify desirable attributes of an ideal system. Two points which are important to consider though are that :

(a) many forms of profit making crime, and particularly drug trafficking, are engaged in by criminals as a long term business activity. Only confiscating the proceeds of the crime for which they are actually caught is unlikely to deprive them of a substantial proportion of their illegal profits;

(b) for most serious offences such as drug trafficking, organised crime or complex fraud it will be difficult, if not impossible, to prove to the normal criminal standard the extent to which a defendant has benefited financially from his criminality.

39. Most countries have had confiscation laws for many years, but these are limited systems of “classic” seizure and confiscation laws. They are able to deal with simple cases where, for example, the drug trafficker is caught with the drugs and the proceeds of his most recent sale, but it is questionable whether older, simpler laws of this nature are sufficient. There are a number of additional measures which governments should consider if they want to effectively confiscate, seize and freeze laundered proceeds and deal with the considerations mentioned in paragraph 38 above. Some measures should be implemented in all members : (a) an effective confiscation scheme should extend to a range of serious offences and not just drug trafficking, especially to prevent the defence argument that the property is the proceeds of another form of crime than drugs; (b) it should also be possible to take action in appropriate cases to confiscate the proceeds of crime (or property of an equivalent value) even if it is in the name of third parties, and countries which require such laws could consider some of the alternative methods for dealing with this issue set out at paragraph 12 above. Although the United States has a powerful and effective tool in its civil forfeiture proceedings, most countries require a conviction before they can take action to confiscate property. Members should give consideration to non-conviction based confiscation or the more limited alternative that where confiscation is conviction based, members consider laws which allow them to take freezing and, where possible, confiscation action against absconders or fugitives from justice. A defendant who is a fugitive should not also have the benefit of retaining the proceeds of criminal conduct.

40. Probably the single most important issue though for most members is the question of the burden of proof upon the government and whether it can be eased or reversed. Integrally linked is the question of depriving a defendant of proceeds of offences other than those for which he is immediately convicted. If the aim of governments is to strip a convicted defendant of all his criminal proceeds, then they should seriously consider measures to make the task easier for the prosecutor. Measures that should be considered include:

- applying an easier standard of proof than the normal criminal standard to the confiscation proceedings;
- the more effective alternative of reversing the burden of proof and requiring the defendant to prove that his assets are legitimately acquired;
- if a conviction is required for confiscation, enabling the court to confiscate the proceeds of criminal activity other than the crimes of which the defendant is immediately convicted.

Subject to the fundamental principles of each country’s domestic law, and to a need to preserve the rights of victims, members should consider enacting such measures in relation to serious criminal activities such as drug trafficking or organised crime. Another option, as enacted in France, is to give the court a discretionary power to confiscate the assets of a person convicted of serious offences relating to drug trafficking, or as in Italy, to require the court to order the confiscation of all assets which are disproportionate to the person’s legitimate income.

41. There is generally no particular difficulty with provisional measures, though the issue of release of funds for the defendant's legal expenses does raise difficult questions of public policy, and it is questionable whether prosecutors should be required to prove a risk of dissipation. In order to ensure that any confiscation order which is ultimately made can be enforced against available assets members should be able to freeze/seize all types of property from the earliest stage of the criminal proceedings until they are concluded. As regards operational issues an effective confiscation regime will usually require prosecutors and investigators who are dedicated to this type of work. Lack of dedicated resources will always mean that there will be more urgent priorities elsewhere since asset confiscation is often regarded as ancillary to mainstream prosecutions.

42. As regards mutual legal assistance the primary difficulties seem to be that insufficient members have ratified the Vienna or Strasbourg Conventions, or they do not have the necessary domestic legislation in place. International drug trafficking clearly generates a large amount of money as can be seen from the amount confiscated in some countries, however there has been very limited mutual assistance experience amongst members in the confiscation field. Since international co-operation is the focus of a lot of work amongst law enforcement agencies, the capacity to take the necessary legal and judicial steps must keep pace. Asset sharing and co-ordinating seizure and confiscation proceedings are also aspects of international co-operation which are in their infancy at present. A majority of members can share assets and co-ordinate proceedings, but very few have any practical experience. International co-operation generally should be subject to further detailed study in the future.

43. In conclusion, steps need to be taken both to ensure that an effective domestic confiscation regime is put in place which strips criminals of the proceeds of all their criminality, wherever they may have put it, and that increased efforts are made to improve the level of mutual legal assistance.

CHARACTERISTICS OF NATIONAL LEGAL SYSTEMS FOR CONFISCATION

Explanation

- Year: -The year of enactment of the confiscation legislation or the last major amendment
- Drugs or Serious Crime: - Does the legislation apply only to drugs or to all serious crime
- Property or value: - Does the confiscation law principally confiscate items of property (Property) or does it provide that the person pay a sum of money (Value) [principal and most used method is in bold type]
- Conviction required: - Is a conviction required before confiscation can be sought, or is it possible to confiscate without a conviction (either in a wide or limited range of cases)
- Reverse burden of proof: - Is it mandatory or discretionary for the court to reverse the burden of proof so that the defendant or owner of the property to be confiscated must prove that the property (or the alleged benefit from the crime in a value system) is not acquired from crime
- Proceeds linked to conviction: Does the confiscation law allow a person to be deprived only of the proceeds of crimes for which he is convicted?
- Third party property: - Many countries prosecute an accomplice or associate of the defendant who commits the predicate offence, but criminal dfts are not included as “third parties” in this annex. This column sets out three categories of situation (this is not an exhaustive list) where property which is owned or held by third parties can be confiscated or made subject to the confiscation order.
- (i) gift - property is given to the 3rd party by the defendant for little or no real consideration;
- (ii) knowledge - if the 3rd party knew, believed, suspected, could not ignore etc., that the property was the proceeds of crime;
- (iii) effective control - the defendant still effectively controlled the property at the time of the confiscation proceedings, whoever the nominee owner is.

Country	Year	Drugs (D) or serious crime (SC)	Property or value confiscation	Conviction required?	Criminal or civil (or other easier) standard of proof	Reverse burden of proof ?	Proceeds must be linked to conviction	Third party property
Australia								
- Customs Act	1979	D	PV	no	civil	no	no	eff. control
- POCA	1987	SC	PV	yes ⁷	civil	yes	no	eff. control
Austria	1997	SC	PV	no	criminal	yes ⁸	no	gift
Belgium	1990	SC	PV	yes	criminal	no ⁹	yes	yes

⁷ Australia and New Zealand - except for persons who die or abscond prior to conviction, who may be deemed convicted for confiscation purposes.

⁸ Austria - the onus of proof may be partially reversed in cases where there has been repeated commissions of crimes over a period or where the defendant is a member of a criminal organisation.

⁹ Belgium - considering whether to reverse burden as part of measures to be taken against organised crime.

Country	Year	Drugs (D) or serious crime (SC)	Property or value confiscation	Conviction required?	Criminal or civil (or other easier) standard of proof	Reverse burden of proof ?	Proceeds must be linked to conviction	Third party property
Canada	1989	SC	PV	yes	both possible	no	no	yes
Denmark	1930s	SC	PV	yes ¹⁰	criminal	no ¹¹	yes	all categories
Finland	1994	SC	PV	yes	criminal	no	yes	yes
France		SC	PV	yes	criminal	yes (drugs) ⁵	no (drugs) ¹²	knowledge
Germany	1975	SC	PV	no	criminal	no ¹³	yes ⁶	yes
Greece	1995	SC	PV	no	criminal	yes	no	gift
Hong Kong	1995	SC	PV	yes ¹⁴	civil	yes	no ⁸	gift/eff. ctrl
Iceland	1940s	SC	PV	no	criminal	no ⁴	yes	knowledge
Ireland	1994 1996	SC SC	PV P	yes no	civil civil	yes yes	no no	gift yes
Italy	1950	SC	P	yes ¹⁵	criminal	yes ¹⁶	no ⁹	eff. control
Japan - Penal Code	1908	SC	PV	yes	criminal	no	yes	knowledge
- Anti drug law	1992	D	PV	yes	criminal	yes ¹⁷	yes	knowledge
Luxembourg	1989	SC	PV	no	criminal	no	yes	yes

¹⁰ Denmark - an order can be made w/o conviction if there is no prosecution because the limitation period for the offence has expired.

¹¹ Denmark has introduced a bill and Iceland is considering whether to introduce a bill which requires the defendant to render probable that his property was legitimately acquired for serious offences.

¹² France - the court can order that a defendant's property is confiscated (whether acquired before or after the time and whether legitimate or not) if the defendant is convicted of a drug trafficking or drug money laundering offence. The property is confiscated without need for the prosecution to do more than obtain a conviction.

¹³ Germany - if the defendant is convicted of certain offences the court may assume that assets of the defendant were acquired from illegal activity if the circumstances justify this, and may thus confiscate them.

¹⁴ Hong Kong and United Kingdom - a confiscation order can be made without conviction where the defendant absconds or dies prior to conviction. In addition, cash which is imported or exported and is the proceeds or instrumentality of drug trafficking can be forfeited without a conviction.

¹⁵ Italy - in certain cases one can have confiscation without conviction.

¹⁶ Italy - for drug trafficking and organised crime the onus of proving the assets are legitimate can be placed on the defendant if his assets are not commensurate with his income. In such cases it applies to any assets, and not just those which are the proceeds of the offence of which he is convicted.

¹⁷ Japan and New Zealand - for drug offences if the property was obtained during the period of the offences and the value of the property is not commensurate with the defendant's legitimate income.

Country	Year	Drugs (D) or serious crime (SC)	Property or value confiscation	Conviction required?	Criminal or civil (or other easier) standard of proof	Reverse burden of proof ?	Proceeds must be linked to conviction	Third party property
Netherlands	1993	SC	PV	yes	other ¹⁸	no	no	yes
Neths. Antilles		SC	PV	yes	criminal	no	yes	yes
Aruba		SC	PV	yes	criminal	no	no	yes
New Zealand	1992	SC	PV	yes ¹	civil	yes ¹⁰	yes	eff. control
Norway	1985	SC	PV	no	criminal/civil	no	yes	gift/knowledge
Portugal	1995	SC	PV	yes	criminal	no	yes	knowledge
Singapore	1993	D	PV	yes	civil	yes	no	gift/eff. ctrl
Spain	1996	SC	P	yes	criminal	no	yes	yes ¹⁹
Sweden	1940s	SC	PV	yes	criminal	no	yes	yes
Switzerland	1994	SC	PV	no	criminal	yes	no	yes
Turkey	1920s	SC	PV	yes	criminal	no	yes	no
United Kingdom	1995	SC	PV	yes ⁸	civil	yes	no ⁸	gift
United States - civil forfeiture - crim. forfeiture	1986 1984	SC SC	P	no yes	civil criminal ²⁰	yes ²¹ no	no yes	know/eff. ctrl gift/eff. ctrl
TOTALS		D: 1 SC: 25	P: 16 V: 6 PV:4	Yes: 17 No: 7 Both: 2	Criminal: 16 Civil: 6 Both: 3	Yes: 11 No: 13 Both: 2	Yes: 13 No: 12 Both: 1	Yes: 25 No: 1

¹⁸ Netherlands - the standard of proof is slightly easier than the full criminal standard.

¹⁹ Spain - property can be confiscated where it is a gift and the third party knew or suspected that it was the proceeds of crime. Similarly, a confiscation order can be executed against property subject to the effective control of the defendant if the third party is a bare nominee titleholder who is acting in bad faith.

²⁰ United States - in criminal cases, the standard of proof is that appropriate to a sentencing hearing, namely the preponderance of the evidence.

²¹ United States - in civil cases, if the government shows that there is probably cause to bring the proceedings, then the burden shifts to the defendant to show that he or she did not know that the property was acquired illegally or did not consent to the use of the property in an illegal manner.