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# **Reversal of the burden of proof in confiscation of the proceeds of crime: a Council of Europe Best Practice Survey**

**(Best Practice Survey No. 2)**

**EUROPEAN COMMITTEE OF CRIME PROBLEMS**  
**(CDPC)**

**Group of Specialists on Criminal Law and**  
**Criminological Aspects of Organised crime**  
**(PC-S-CO)**

**Reversal of the burden of proof in confiscation of the proceeds of crime:  
a Council of Europe Best Practice Survey\*\***

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## 1. Introduction

Any discussion of reversal of the burden of proof is likely to generate controversy in systems that seek to uphold the principle of the Rule of Law and Human Rights. This may be true even where there has been a criminal trial which has adjudicated the conviction of the person on a 'normal' burden of proof, and certainly where a civil burden of proof is applied to seek to confiscate the property of someone who may never have been charged with a criminal offence. Reasonable people can have legitimately different jurisprudential principles and emotional concerns about (i) the risk of loss of property rights by the innocent and (ii) abuse of power, which give them reason to resist even the pressures towards European harmonisation, and the more or less coinciding political pressures from the OECD and the UN. The purpose in conducting this study was not to push every or indeed any member State of the Council of Europe into adopting a particular view of how to organise the pursuit of proceeds, profits or instrumentalities of crime: it was to explore the ways in which three member states with different legal traditions approached the problems of taking more money away from suspected and convicted criminals, and how they sought to resolve these problems within a Human Rights framework. To date, none of these approaches has been ruled inappropriate by the European Court of Human Rights: until that date, which may never arrive, one has no difficulties in describing any of them as 'best practice'.

In introducing this subject matter, it is important to place confiscation procedures in perspective. Traditional approaches – even those which have in place post-conviction reversal of the burden of proof – have produced far less income than had been anticipated compared with either proceeds of crime or profits from crime: this is so even if one exercises more caution than is customary in estimating what these proceeds or profits are<sup>1</sup>. Particular difficulties have been experienced in proving, beyond reasonable doubt, the criminal origin of assets owned (or apparently owned) by legal persons (corporations, trusts, etc. and other equivalents) that are domiciled in offshore finance centres, and conventional criminal procedures are unlikely to penetrate these major cases<sup>2</sup>. The financial 'take' (let alone the profit to local/central government net of enforcement costs) from asset forfeiture has been modest hitherto in every country<sup>3</sup> except for the United States, where a significant amount of the income from forfeiture comes from (i) the liability (including corporate criminal liability) of third parties such as financial intermediaries rather than from the

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<sup>1</sup> It is important to distinguish profits from proceeds confiscated: the former – profit – is the amount obtained net of financial disbursements by the offender(s) including legal and laundering costs; while the latter is the gross amount obtained by criminals, which may have to be distributed among different levels of offender and among third parties to pay for sometimes legitimate, innocent third party costs such as transportation, housing and financial services. Those countries looking to this area to fund financial investigation should be cautious, since unless the targets are wealthy anyway, only the profits from crime can normally be recovered and even many of the profits from crime will have been spent on conspicuous consumption. In practice, only offenders' gifts, investments, property and savings are available for confiscation.

<sup>2</sup> *Draft Report of Informal Money Laundering Experts Group*, 12706/98, CRIMORG 173, MDG, Brussels, 6 November 1998.

<sup>3</sup> In the Netherlands, for example, between 1993-97, according to a recent Ministry of Justice report by Dr. Hans Nelen, deprivation orders amounted to some 20 million guilders, about 18 per cent of the estimated proceeds of crime during that period. But although the Dutch put substantial resources into their financial investigation and confiscation units, the remainder of the system did not yet adjust to the legislation or the best practice.

'primary' offenders such as narcotics traders, and (ii) the civil and criminal forfeiture provisions attached to the particular form of conspiracy law known as the Racketeer Influenced Corrupt Organization law of 1970<sup>4</sup>. It is a matter for speculation how dramatic the change would be if all countries were to reverse the burden of proof at some stage *and* were to train their police, prosecutors and judges properly to apply the new legislation: professional training tends to be neglected or only partially implemented. But the most radical shift of the trio of jurisdictions examined here is the Republic of Ireland, where there is a process for asset freezing and confiscation *independent of conviction*. Of course, confiscation is not the only way of depriving offenders of 'their' proceeds: taxation authorities too can and sometimes do become involved in that role, as in the Netherlands, where in one celebrated case, 150 million guilders was taken from a corporation allegedly involved in fraud. As we shall see, the Irish tax authorities play an active role in their system, though tax payments are usually confidential and may not show up in indicators of effectiveness.

In order to obtain a broad spectrum of Council of Europe members, the Survey team chose Ireland as a common law country with the most 'advanced' forfeiture regime in Europe to date; Denmark as a civil code country with a tradition of low banking secrecy; and Switzerland as a civil code Federal jurisdiction with a tradition of high banking (or, perhaps more literally, customer) secrecy. The Survey team's visits took place over an intensive week, and the members of the team are extremely grateful for the high level of co-operation and thoughtful communication by officials in all three jurisdictions, which testifies to the very considerable strides that they have been making in dealing with this important subject in their different ways. In all three cases, legislation was no longer than five years old and both the long time taken to investigate and prosecute complex money-laundering cases and the consequent lack of case law meant that this new legislation was in a state of open interpretation by the courts. Consequently, the team's own interpretation of events is less settled than one might expect in some other areas of law and practice familiar to Council of Europe member states.

What factors influence the shape of legislation? In general, as with money laundering, it appears to be specific scandal events, taken up by some politicians and the media, and whipped up into a call for strong action. In Ireland, the EC directive was implemented by the enactment of the Criminal Justice Act, 1994. That Act also made provision for the making of an order, by the trial court, for the confiscation of goods on the conviction of an offender, which was seldom used but which was considered adequate to deal with what were described to us as 'second tier criminals'. The legislation was similar to that in England and Wales, allowing post-conviction reversal of the burden of proof in drugs trafficking cases. However, members of the public as well as the police noted that several people without any apparent lawful occupation were getting wealthy, buying substantial homes and cars and enjoying an affluent lifestyle, but the authorities had insufficient information to prosecute them successfully for involvement in major crime. The political and social impetus to do something about that came in the aftermath of the murder in 1996 of Veronica Guerin,

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<sup>4</sup> Although after a lengthy political struggle, the United States enacted the Civil Asset Forfeiture Reform Act 2000 to reign back some of these forfeiture provisions. Note that the US calls 'forfeiture' those proceeds that Europeans would call 'confiscation', because of their constitutional doctrine known as 'relation back' that no unlawful benefits ever belonged to the offender and therefore the offender is merely forfeiting what never belonged to him or her.

a specialist organised crime newspaper -reporter. (A police officer had earlier been killed, but this did not generate the same media concern.) The Irish legislation was passed in 1996.

In the Swiss case, the growing international concern about the role of the Swiss banks as intermediaries in trans-national crime and the growing activism of Swiss prosecutors against money-laundering whose proceeds derived from crimes committed outside the jurisdiction generated a need for dynamic governmental action within the fundamental framework laid down by the predominantly decentralised cantonal government, which is a jealously guarded Swiss tradition. The point was that it was rare for the Swiss to have major cases in which all the international evidence required to prove the predicate offence was available to the Swiss courts in a timely fashion. This led to the enactment of Article 260 (ter) in 1994, providing special powers to deal with the criminal organisations and the proceeds of their crimes, without having to prove a specific predicate that, say, the funds were derived from drugs trafficking.

In the Danish case, the *timing* was motivated by the biker wars and killings (though as early as 1993, a package of measures had been introduced to deal with organised crime, including witness protection and the ability to make secret searches not revealed immediately to suspects). During the 1990s, shortly before the S.76a law was passed, the Danish authorities had to return 2-3 million Danish Kroner found in France, Gibraltar and Spain to a drugs trafficker sentenced to 7 years' imprisonment because they could not prove that the funds were proceeds of crime<sup>5</sup>. Although it will take years before the courts can be certain that none of the defendants' assets were acquired before this law came into effect – a general problem for all governments introducing such legislation<sup>6</sup> – the public frustration of the authorities and the media gave impetus to the introduction and passing of the new law, just as it did in the UK.

One final introductory point (which is also a point to be recalled as a conclusion) seems to us to be of great importance. Proceeds of crime only rarely fall into the lap of the courts or government like ripe fruits from the tree or vine. What is not investigated by financial intelligence or other personnel may never be learned about at all, for it is very difficult to reconstruct financial flows from crime long after they have occurred, and harder still to get the money back. Thus, while one may be convinced that someone has made a lot of money from crime, one may have no idea where – if at all – most of the proceeds actually are. Although there have been useful improvements in this area as a result of trans-national information flows – through the Egmont Group of approved Financial Intelligence Units (FIUs), for example – the amount of skilled resource devoted to financial investigation will determine the outer limits of what cash and non-cash assets are discovered beyond what is picked up from the suspect's home or other properties searched as part of the main arrest process.

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<sup>5</sup> This sense of impotence in being unable to deal with unjust enrichment was paralleled in the UK during the 1970s when the requirement (because there was at that time no confiscation of the proceeds but merely forfeiture of the instrumentalities of crime) to return millions in the aftermath of the 'Operation Julie' LSD case in the UK led to widespread pressure for reform there. When it reported in 1978, the Hodgson Committee established to remedy this problem did not even recommend reversal of the burden of proof post-conviction, nor were they under much pressure to do so: this illustrates the shift in attitudes in the intervening two decades.

<sup>6</sup> For a ruling against retrospective application, see *Welch v. UK*, E.C.H.R. Series A, vol. 307 -A, para. 33, 9 February 1995.

Passing laws which change the burden of proof – whether post-conviction or as part of a separate civil process – will not *ipso facto* lead to a substantial increase in recoveries from offenders or third parties. This extra recovery can happen only if unspent assets can be found and can be attributed to the possession or control of someone against whom an order can be made. One way of comprehending this clearly is to show it as series of stages in a contingent process:

- I. Financial investigation (by regulated person and/or domestic or overseas law enforcement body)
- II. Suspicious transaction report (in some jurisdictions)/Request to freeze
- III. Freeze assets – by court order or automatic (short term, in some jurisdictions following the making of a suspicious transaction report by a regulated institution)
- IV. Court hearing on final confiscation – post-conviction or independent civil process
- V. Order sum of money (or actual property *in rem*) to be confiscated/forfeited
- VI. Funds/property actually confiscated/forfeited and returned to possession or control of the State or victim(s).

## 2. Human rights and reversal of the burden of proof

In the European context, the question must first be addressed of the interaction between confiscation, the burden of proof, and the European Convention on Human Rights. In the case of *in rem* forfeitures, which arise in the context of Customs apprehensions that may be limited in scope, the position of third parties is not well protected<sup>7</sup>. Does confiscation count as deprivation of property, contrary to Article 1 of the First Protocol to the ECHR? This reads:

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 by law and by 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.

The more general claim – that there is no justification for *in rem* forfeitures of instruments of crime whose possession is not itself unlawful – is too large a question for this review, but may reach the ECHR at some future stage<sup>8</sup>. In decisions to date,

<sup>7</sup> In *Agosi v. UK*, E.C.H.R., Series A No. 108, para. 65 (1986), the company AGOSI unsuccessfully sought restitution for confiscated Krugerrands valued at £120,000 which were illegally imported into the UK, arguing that it should be compensated for its loss in selling them for an insufficient funds cheque to the two smugglers who were arrested. It is possible that the court was influenced by the fact that the smuggling happened the same day that the Krugerrands were bought. Likewise in *Air Canada v. UK*, E.C.H.R. Series A, No.316-A, it was held that UK customs could lawfully hold an aircraft and require the airline to pay £50,000 after drugs were found on board, showing security weaknesses but without having to prove criminal intent by the owner or possessor of the plane. The basis was that to forfeit the aircraft, Customs would have to bring the airline before a court and the ‘fine’ was in principle subject to judicial review. The action by Customs did not amount to a criminal charge under Article 6, being undertaken in pursuance of a law ‘necessary to control the use of property’ in Article 1 of the First Protocol of the ECHR.

<sup>8</sup> There are some jurisdictions in which the money with which dealers buy their stock is regarded as instrumentality of crime and is forfeitable directly on those grounds: for an English case, see *R v.*

the key to determination of this question appears to be whether or not the acts had a preventative purpose and impact. Thus, the confiscation of proceeds of crime under Italian anti-Mafia legislation on a reversed burden of proof does not amount to a criminal penalty<sup>9</sup>. Another key conceptual question is whether the imposition of confiscation of criminally derived profits or proceeds counts as a ‘criminal’ issue under Article 6 of the ECHR, as it has sometimes been held to *do where the imposition of confiscation requires persons to be found guilty of a criminal offence*<sup>10</sup>. If it is not a criminal sanction, then it is not obvious what the justification might be for imposing prison sanctions on a sliding scale for failure to pay a confiscation order. Some European scholars consider that such acts do constitute criminal penalties and deprivations of property contrary to the European Convention on Human Rights<sup>11</sup>, though there is no problem of placing the issues before an administrative authority provided that it decides cases consistent with Article 6 principles. In *Ozturk v. Germany*<sup>12</sup>, which dealt with the classification of ‘regulatory offences’ as criminal, the Court held that this depended on:

1. whether the text defining the offence belongs to the criminal law of the respondent State;
2. on the nature of the offence; and
3. on the nature and degree of the severity of the penalty that that could be incurred.

The second and third factors were to be given greater weight. In *Bendenoun v France*<sup>13</sup>, four factors in particular suggested that the proceedings were criminal rather than administrative:

- (a) the rules applied to all citizens *qua* taxpayers, and not only to a particular group;
- (b) the penalties were intended not as compensation for damages to the revenue but as punishment to deter re-offending;
- (c) the purpose of the general rule under which they were imposed was both deterrence and punishment; and
- (d) there were substantial penalties and failure to pay exposed the offender to punishment.

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*O’Farrell* (1988) 10 CAR (S) 74. For sceptical US approaches to *in rem* forfeiture, see D. Fried, ‘Rationalizing Criminal Forfeiture’, (1988) 79 *J. Crim. Law and Criminology* 328, and L. Levy (1996) *A License to Steal: the Forfeiture of Property*, Chapel Hill, University of North Carolina Press.

<sup>9</sup> *Raimondo v. Italy* E.C.H.R. Series A, No.281-A (1994); *M v. Italy* European Commission on Human Rights, Application No.12386/86, Decisions and Reports (1991), 59.

<sup>10</sup> See *A.P., M.P. and T.P. v Switzerland*, E.C.H.R. Reports of Judgments and Decisions (1997-V), 1447 para.48. This case held that there was an obligation not to pass on punitive sanctions to the heirs of the deceased alleged offender.

<sup>11</sup> J. Vervaele ‘Les sanctions de confiscation en droit pénal: un intrus issu du droit civil? Une analyse de jurisprudence et de la signification qu’elle revêt pour le droit (procédural) pénal néerlandais’ *Revue Science Criminelle*, 1 (1998) 41; Stessens, G. (2000) *Money Laundering*, Cambridge, Cambridge University Press.

<sup>12</sup> (1984) E.H.R.R. 409.

<sup>13</sup> (1994) 18 E.H.R.R. 54.

Although the Convention does not regulate the allocation of the burden of proof as between prosecution and defence, it is not indifferent to it. In the context of a civil dispute, a presumption of responsibility on the defendant may be regarded as infringing the fairness of a trial under Article 6 only inasmuch as it can result in an unacceptable imbalance between the parties<sup>14</sup>. In the context of criminal proceedings, the Convention does not prohibit in principle presumptions of fact or law in national criminal laws. However, it does require each Contracting State to confine such presumptions within *reasonable limits* which take into account *the importance of what is at stake* (the proportionality principle) and *maintain the rights of the defence* (the principle often described as ‘equality of arms’). This logically requires judgment about the weighting of confiscation in relation to what is at stake: *provided that it is deemed to constitute a penalty rather than, say, restitution*, the heavier the confiscation order in effects upon the accused, the greater the entitlement to protection.

The Human Rights Commission and Court also required consideration of whether the reasonable limits are applied to the applicant in a manner compatible with the presumption of innocence: thus, a presumption must not be an *irrefutable* one<sup>15</sup>. There appears to be no problem of principle in reversing the burden of proof: the ECHR has upheld convictions in cases where people have smuggled drugs of which they claimed to have no knowledge<sup>16</sup> and where there is a presumption that a man living with a prostitute is living on her earnings<sup>17</sup>, *provided that there is some possibility of rebuttal, even though that rebuttal requires the accused to defend himself or herself*. Csonka<sup>18</sup> points out that in confiscation cases, “the criminal or quasi-criminal nature of confiscation proceedings and the focus on the *res* rather than the defendant, creates an ambiguity that undermines the presumption of innocence. Under civil forfeiture laws, the property is presumed guilty; but under criminal forfeiture, the property ought to be presumed innocent.” This would imply that *in rem* civil forfeiture might not be viewed as criminal legislation. Even in the latter case, however, Article 5 paragraph 7 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances explicitly permits States to ensure that the onus of proof be reversed in alleged proceeds of drugs trafficking cases, even though this may require defendants to prove a negative in a way that is difficult to do. This has been given some limited support by the European Court ruling in *Murray v. UK*<sup>19</sup>, which observed that ‘evidence against the accused ‘calls’ for an explanation which the accused ought to be able to give....a failure to give any explanation ‘may as a matter of common sense allow to draw the inference that there is no explanation and that the accused is guilty.’

To date, a refutable reversal of the burden of proof in confiscation cases seems likely to be upheld as lawful by the ECHR, especially if the refutation does not require self-incrimination: in order to avoid losing the deemed proceeds of crime, under all -

<sup>14</sup> No. 1194/86, Dec. 5.10.88, D.R. 57, p.100.

<sup>15</sup> *Pham Hoang v France*, E.C.H.R., 25 September 1992, Series A, no.243, pp.21-22. The Dutch Supreme Court, in *N.J.* (1996), No.411 considered that the prosecution was entitled to confiscation where they had demonstrated that the criminal origin of funds was probable and the defence was unable to satisfy the court that this was not the case.

<sup>16</sup> *Salabiaku v. France*, ECHR, 7 October 1988, Series A, no.141, pp.15-18, paras. 28-30.

<sup>17</sup> *X v. UK* 5124/71, 42 CD 135 (1972).

<sup>18</sup> Unpublished Paper, Council of Europe, 1997.

<sup>19</sup> (1996) H.R.L.J. 39, judgment of 8 February 1996, para. 51.

crimes confiscation regimes, the explanation would normally have to be self-exculpatory rather than self-incriminatory. Indeed, an increasing number of jurisdictions have adopted such reverse onus procedures, with the trend accelerating in recent years to include Belgium, for example<sup>20</sup>. If seized funds were not allowed to be used for paying lawyers *and if competent lawyers were not otherwise available*, this might be treated as contrary to the ‘equality of arms’ principle, but no European jurisdiction yet has proposed following the US example in this respect. On the other hand, there is no consistency in Europe as to whether or not offenders should be allowed to deduct expenses from the proceeds that may be ordered to be confiscated, making them the confiscation of *profits* rather than *proceeds* of crime: this deduction of expenses is allowed in the Netherlands, but not in Ireland or the UK.

A final human rights issue relates to compensation for actual and, perhaps even more importantly, collateral loss for those whose assets are frozen but who are not subsequently found guilty personally or whose assets are not in the end deemed to be proceeds of crime (*in personam* and *in rem* seizure respectively). This is an underdeveloped area of both jurisprudence and practice. In Switzerland, where funds are seized, the authorities invest in risk-free funds to avoid actual loss, though this still poses opportunity costs on suspects. The Swiss Banking Association has a Code of Conduct agreement with the Cantons, but it is not clear what the liabilities would be there; in Denmark and some other jurisdictions such as the UK, there are remedies for ‘innocent suspects’ and ‘innocent property’ only in the event of bad faith by the authorities, which may be hard to demonstrate. In Ireland, if property is frozen but no subsequent interlocutory is made or finalised, then other than in exceptional circumstances, the subject of the interim order is entitled to compensation if the property is not proceeds of crime on a civil burden of proof. In Switzerland, under Article 95 (1), some third parties who have to surrender gifts may consider themselves victims of deprivation of property, since unless they can prove that they gave full value for the goods, they have to lose what they thought was theirs.

### 3. The impact of reversal of the burden of proof: what should we measure?

In terms of evaluating the *impact* of reversal of the burden of proof, it is a little early to tell at present what the general effects will be. In any event, this would require to define what effects were the correct ones to examine. Financial seizures and final confiscations (i.e. not just the amount ordered to be confiscated but the amount *actually* confiscated) would be key measures, certainly, but one might also

<sup>20</sup> Belgian Supreme Court, judgement of 18 February 1998, *Proces & Bewijs* (1998). On the other hand, in *Kebele* [1999] 4 All ER 801, some of the English House of Lords appellate judges considered that reverse onus provisions might be unlawful on ECHR criteria, and the English Court of Appeal in *Benjafield* (unreported, 21 December 2000) concluded that the confiscation procedure “has to be considered on the assumption that it is subject to the requirements of both article 6(1) and (2) taken together”, though “if properly applied”, the reverse onus in confiscation did not contravene article 6. However, in a closely reasoned judgment in *McIntosh* (5 February 2001), the Lords of the Judicial Committee of the Privy Council determined that in the case before them, the confiscation order amounted to a penalty under ECHR principles but only in relation to its retrospective application “and does not call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking.” As for reversal of the burden of proof, the Privy Council shared the view that this depended on “wh at public threat the provision is directed to address, what the prosecutor must prove to transfer the onus to the defendant and what difficulty the defendant may have in discharging the onus laid upon him.....The right to fair trial...will ensure that any reverse onus provision is fairly applied....”

review the impact of raising the financial risks from crime upon the local level of crime and upon its level of organisation. Thus, if criminals scaled down their ambitions or moved elsewhere, then this might count as a benefit (at least to the individual jurisdiction if not globally since *their* scale of organised crime might increase unless they took equivalent measures), though it might take some detailed research to discover these effects in a reliable form. Alternatively, if freezing of assets occurred earlier in the investigation process, this ought to increase the proportion of realisable assets that were actually confiscated.

#### 4. Mutual Legal Assistance and international asset sharing agreements

Member countries all experienced difficulties in obtaining evidence from abroad, especially from countries where there was suspected high-level corruption and narcotics production. This is a particular problem with post-conviction asset confiscation, since the evidence may be necessary for the substantive conviction. They experienced also difficulties in counterfeit documentation and evaluating the truth of testimony from overseas, especially that arising years after the initial report.

The countries selected for this survey were representative in the absence of consistency in asset sharing agreements. Denmark and Ireland have no asset sharing provisions in place and under those circumstances, any assets they confiscate on behalf of foreign prosecutors and courts stay where they are. Furthermore, in Ireland, the seven year gap between the making of a s3 Interim Order and a s4 Disposal Order under the Proceeds of Crime Act makes asset sharing a much delayed process. In the civil process of the Irish Criminal Assets Bureau – discussed later – there is no conviction upon which to base mutual legal assistance requests. Moreover, they cannot utilise mutual legal assistance where the requested country requires a rogatory letter from the Director of Public Prosecutions and there is no *criminal* investigation in Ireland that could form a proper basis for issuing one. Nevertheless, some requested countries will permit mutual legal assistance for the purposes of civil confiscation. Switzerland, on the other hand, commonly freezes on behalf of other countries and, where property or proceeds that can be traced to the original owner have been stolen, returns the funds or property to the other party, though there may sometimes be difficulties in ascertaining that a third party has a legitimate claim to the property or funds. They have recently sent \$550 million back to The Philippines in connection with the Marcos case (though pending final determination of that long-running case, it remains in escrow in a UBS bank branch there rather than being returned to the government<sup>21</sup>), and hundreds of millions of dollars have been seized in the Abacha, Bhutto and other high profile alleged money-laundering cases. Switzerland has a formal treaty with Canada and the US (with whom it has shared some S.Fr. 300 million), but in other cases, it needs a formal Memorandum of Understanding. (Alternatively, perhaps as part of a plea agreement elsewhere, the offender may simply agree informally to leave funds with the Swiss authorities: in 1999, Ms. Sheila Arana ‘donated’ half of her funds in Swiss banks – \$75 million – to the Swiss government. Such informal agreements are unlikely to show up in statistics on confiscation of proceeds, either at Cantonal or Federal level.) There is no domestic

<sup>21</sup> Though the Marcos problem relates to the legal basis of the claim, the difficulty of deciding when proceeds of corruption ought to be returned to a government whose integrity and democratic credentials are uncertain is a serious one, and will become more common as more action is taken against trans-national bribery and corruption world-wide.

law on asset-sharing, but the practice of the Swiss is to tell the authorities overseas about offences in which the third party has an interest, and the latter may then claim the money. Before returning it, the Swiss authorities normally require a foreign confiscation or forfeiture order or a 'clear' indication that the funds constitute proceeds of crime. Under Article 64a, such co-operation is an act of assistance, but under Article 94a the Swiss are permitted to return the funds because this is merely the restitution of criminal funds without a need for formal asset-sharing. The ability to open domestic money-laundering investigations facilitates the freezing of assets on behalf of overseas governments and victims, as does the principle of reciprocity. An illustration of how Switzerland goes about its business may be seen below:

On 30 September 1999, Nigeria, acting through a Swiss attorney, requested that the Federal Office for the Prevention of Money Laundering (FOPM) take the provisional measure of freezing all assets of Abacha – who died in 1998 – and of members of his family, and that it obtain bank documents concerning such assets. The request for provisional measures also applies to Alhaji Ismaila Gwarzo, Mr. Abacha's former security advisor, and to former minister Abubakar Attiku Bagudu, to four Nigerian businesspeople, and to a series of companies accused of a series of property crimes (including: embezzlement, fraud, forgery and money laundering).

On 13 October 1999, the FOPM froze the accounts mentioned in the request. Four banks in Geneva and one in Zurich were affected. In addition, the FOPM stipulated that the Nigerian authorities must file the announced request for mutual legal assistance within three months. The request was required specifically to indicate the relationships between the criminal proceedings in Nigeria and the assets frozen in Switzerland. Following a formal preliminary examination of the request, the FOPM decided which authorities will be required to provide the mutual legal assistance. A treaty on mutual legal assistance does not exist between Switzerland and Nigeria. However, Switzerland can provide assistance based on national law and a declaration of reciprocity.

To date, US\$ 645 million has been frozen in Switzerland. The Federal Office for Police (FOP) examined the formal request for mutual legal assistance from Nigeria and decided that such assistance is admissible in this case. Furthermore, the FOP has ordered the additional freezing of bank accounts and the production of bank documents.

The Nigerian authorities are asking that assets held in Switzerland be frozen, that bank documents be handed over and that the assets be returned. The FOP itself is deciding on the execution of mutual legal assistance. The revised mutual legal assistance act authorizes the FOP to handle itself cases which are complex or particularly important. In the Abacha case, the FOP is working closely together with the Geneva investigating magistrate's office, which has already initiated criminal proceedings for money laundering and which has frozen some US\$ 645 million to date. This amount may increase, as Article 9 of the Federal Act on the Prevention of Money Laundering requires the banks and other financial intermediaries to report any cases where they have grounds to believe that assets deposited with them originate from criminal sources, are held by a criminal organization or could be connected with money laundering. In view of the sums involved, which Nigeria claims have been embezzled, the banks will probably investigate not only members of the Abacha family, but also third parties not directly mentioned in the Nigerian request for mutual legal assistance.

On 13 October 1999, the FOP extended the provisional freezing of accounts until the end of the mutual legal assistance proceedings. The US\$ 80 m in assets frozen as a result of these provisional measures are part of the assets also frozen in connection with the Swiss proceedings. Furthermore, the FOP ordered that additional accounts be frozen; this concerns three banks in Geneva and four in Zurich. The FOP further asked the Geneva investigating magistrate to obtain the relevant bank documents and to question officers of these banks as witnesses. The investigating magistrate was also requested to hand over to the FOP information from his criminal proceedings which could be useful in the further mutual legal assistance proceedings.

## 5. The Organisation of Proceeds of Crime Confiscation and Forfeiture Systems

In Denmark, there is a centralised prosecution system, and confiscation occurs at local, regional and central levels, including the Office for Serious Economic Crime. In Ireland, the Director of Public Prosecutions handles all serious cases and acts post-conviction in those cases in which the government seeks conventional confiscation of proceeds (with reverse onus of proof assumptions post-conviction in drugs trafficking); in other cases, the Irish Criminal Assets Bureau brings the civil cases before the court. In Switzerland, there is a Canton-based system of investigating judges, with small units of the Federal Police and Ministry of Justice to deal with international cases such as the one set out above. Under Article 10 of the Money Laundering Act, which came into force in April 1998, assets held by a financial intermediary which are the subject of a suspicious transaction report (whether or not made by that intermediary) must be frozen immediately until a decision is made by the competent prosecution authority or for five business days following the filing of the report, *whichever is the sooner*. In all countries, there are prohibitions on ‘tipping off’ others, including customers whose accounts have been frozen. This gives rise to a problem that no jurisdiction has solved (either in our sample or generally): how is it possible to freeze an account for more than a very short period without *unintentionally* alerting the customer? Of course, if the customer does not want to take out of transfer any substantial funds during the period when, after all, s/he may have no reason to suspect that a report has been made, then there is no problem. However, five days is a long time for a Swiss or other bank to defer a withdrawal without giving grounds for natural suspicion by the customer. If a customer draws such a conclusion from delays in a normally efficient banking relationship, then this does not constitute ‘tipping off’.

There is substantial variation also in the period for which proceeds of crime can be frozen, and this depends also on whether the property is forfeitable or confiscatable. In Denmark, for example, large amounts of cash found on suspect premises are not confiscatable but are forfeitable to the Treasury if not claimed within 20 years. Innocent owners of seized assets have up to seven years in Ireland and five years in Switzerland to make their claim, though in Ireland (and in the UK), commodities whose value is likely to decline (including a sinking boat) are sold by the Receiver as commercially appropriate. (In several large cases, the suspected offenders have fled the country and have left their assets to be handled by the Receivers after undefended cases rather than face public exposure. In other cases, receivers have acted speedily to stop funds leaving the country.) In practice, judges are reluctant to turn children out of family homes and to grant possession to Receivers, even though this may result in allowing the families of major offenders to enjoy the fruits of crime. In Switzerland, to avoid the administrative burdens of dealing in property, electronic goods may be retained unused even though they are likely to be out of date by the time that any claim succeeds or does not happen at all.

### *Denmark*

The Danish judiciary has become more active and independent of government, possibly influenced by the international courts, especially Strasbourg. However, the Ministry of Justice can give instructions to DPP not just in general guidelines but also

in specific cases and in all extradition cases. The prosecutors, police and the Bar & Law Association were all consulted about the proposed legislation on confiscation. The drafting was strongly influenced by the Norwegian model legislation published in September 1996 (for the Danish Committee had not got beyond the ideas stage), though this has still not been passed in Norway, and by the Strasbourg case of *Welch v. UK*<sup>22</sup> which affirmed the reverse onus principle though not retrospective to the passage of the legislation, while also affirming that such orders were punitive rather than, as English law had assumed, reparative. Because of the ongoing Biker war, and the murders which (as in Ireland) shifted public opinion in favour of legislation, the political momentum was greater in Denmark than in Norway. The Danish Justice Ministry also wanted to be prepared for 'invasion' by Russian, Japanese and Chinese organised crime groups by having legislation in place that would enable them to be dealt with efficiently. Offshore finance centres were not controllable domestically. To go further, the legislators would have to justify very clearly the inadequacy of existing procedures. As things stand, any conviction for drugs trafficking under s.191 of the Danish Penal Code will in principle attract s.76 confiscation provisions, whether or not the actual sentence is higher than the trigger threshold of 6 years.

There was no support among police, prosecutors or officials interviewed in Denmark for measures stronger than s.76a, and certainly not for the Irish civil forfeiture model: in this sense, national culture and political traditions influence the level of burdens on the citizen and State respectively. But the general view from officials was that it was best to start with something modest but acceptable and to review progress in the light of their impact. If the defendant argues that the goods came from other, less serious crimes (carrying maxima of less than 6 years), then the property is still confiscatable unless he can show that they came from non-criminal sources (other than tax evasion, which would be criminal). By the date of our visit in May 1999, the highest section of the Danish DPP's Office had dealt with no confiscation cases under the new law: they only deal with appeals before the Supreme Court, and it takes time for the cases to reach that stage. There is as yet no major published evaluation of the impact of the legislation, but it has never been viewed as a major money-earner for the State and there has been little result-oriented budgeting for the police, either generally or in relation to asset forfeiture.

The Danish police have very few cases under new laws, and no large theft cases (though they seldom see much money in drugs cases, and consider that criminals know better than to deposit funds in Danish banks, which are extremely transparent - probably more so than in any other European country - informing tax authorities of all deposits and securities transactions by both natural and legal persons. The police report all vehicle ownership to the tax authorities also, so any 'unusual assets' can be investigated and dealt with by the tax authorities. Danish drugs traffickers tend to use banks in France, Gibraltar, Andorra, Switzerland and Luxembourg (30-40 million DK in one case alone).

Typical of problems is the major hashish importer from Morocco who has been charged, but whose money or assets cannot be located, perhaps because other European countries have lower transparency levels to tax authorities than the Danes do. (This reinforces the importance of equivalence on standards.) In many domestic

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<sup>22</sup> E.C.H.R. Series A, vol. 307-A, para. 33., 9 February 1995.

cases, they simply discover cash in substantial sums that is left or is buried in the premises in open places that are not even attributable to any one family, in areas such as the free city of Christiania. (Presumably this is not just an artefact of anti -laundering laws but a product of tax transparency plus police/tax liaison which is very close and seamless). Such unattributable moneys are seizable but not forfeitable immediately: they are invested and the interest is rolled up for up to 20 years. If unclaimed by then, it all goes to the Treasury. No money or other property (such as cars) goes directly or even indirectly to the police, and every party (including the police) regarded the US system with some horror as placing improper enthusiasm on the police, with implications for human rights and policing priorities. All agreed that there was little 'really organised' crime: bikers and Christiania residents were in loose groups and dealt in drugs to fund an 'alternative lifestyle'. Bikers tended simply to extort money for licensing drug dealers in their areas rather than to deal in drugs personally.

As for cash, if one cannot satisfy the police that 100,000 DK was legitimately obtained, then even if they cannot confiscate it, the police will call the tax authorities, who do not have any investigation resources themselves, but who will immediately assess the persons as liable for taxation on the sum (perhaps with penalties if they can sustain the argument that it should have been declared previously). However, this will not work with foreigners, whose tax records are inaccessible.

In Denmark, civil debts rank higher than public debts, so offenders sometimes create fake civil debts to outrank the government, but there is a public register of debts to stop this being done too easily.

As for heavier laundering, there was one case where someone bought for an apparent DK10 million a property worth up to twice that amount, the remainder being paid in cash to the (presumably tax evading) vendor. The money came from a typical 'loan-back' construction, to make it look like legitimate official financing. All their other cases to date had a maximum 2-300,000 DK, so they were not very serious, and there were no cases to date where drugs traffickers have owned and used genuine businesses to launder their funds: all the detected cases were simple fronts by hedonists who do not have the discipline or business skills to operate a genuine firm.

It is very rare for any cases to start with financial intelligence (through disclosures or any other source). No cases were produced just by suspicious transaction reports – which were about 380 per year – but such reports are used mainly to add to existing data, including tax and social security data. Most organised crime cases start with informants, supplemented by telephone tapping authorised by courts on a 'probable cause' basis and backed up by several informants and lifestyle evidence. If the suspect cannot satisfy the police that funds over 100,000 Kr. were legitimate, then the police will pass the information to the tax authorities, which do not have any investigation resources themselves.

The Biker gangs license drug dealers to operate in 'their' territory rather than dealing in drugs directly (making it harder for them to be connected in the courts to a major substantive offence). There was no indication that a small number of people organise and control the drugs market: the market consists of very diverse, small-scale enterprises.

The authorities have seized a number of ships, but all the cannabis was smuggled in ships that were barely seaworthy, so they were worth nothing on the resale market: as one interviewee expressed it, 'they never own anything.' One ship was sold for 100,000 DK but they considered themselves fortunate to obtain even that sum. To avoid having to pay mooring charges for seized vessels, they go to the civil court and ask them to scrap or sell the ships<sup>23</sup>. Almost all cars used by criminals are rented or leased, offering opportunity to spend money but no risk of confiscation, since innocent third party rights are respected. Alternatively, criminals may use foreign registered cars that have no value in the Danish second hand market since the purchaser would have to pay the very high import tax. The cars that they do confiscate are often sold for scrap.

Mutual assistance cases are dealt with by the Serious Economic Crime Office and by the local police: there are currently no asset sharing agreements, and the DPP's Office did not ask for any stronger legislation on this occasion, though they may do in the future. They were concerned about difficulties in obtaining mutual assistance from East Asia, especially Pakistan, and were concerned that defendants and their relatives might claim that any goods they owned had been bought from a foreign country such as Pakistan within the past five years, and about not being able to refute this. (This reflects judicial attitudes towards the credibility of such accounts.) The police have few cases and seldom see much money in drug cases that they deal with.

### Difficulties in court

The new Danish confiscation laws were reluctantly applied by judges (who were sceptical about the laws when they were consulted before the legislation), though to date, there was little experience and no special training for judges on s.76a. By mid-1998, there were two cases in which the confiscation hearing has been delayed, and the judge hearing the confiscation proceedings can be a different judge from the one hearing the main trial. In one case, someone charged with smuggling cannabis had an expensive Audi, but remained silent throughout. At sentence, he claimed that the car was not his but his brother-in-law's. Despite being on the indictment, the judge postponed the case and gave counsel time to check the story: defence counsels try to get the prosecution to specify what proof they want, though prosecutors are not obliged to provide them with this under law. One interpretation is that the objective is delay, causing an administrative burden that will deter authorities from pursuing proceeds vigorously. On the other hand, because defendants are legally liable to pay for their defence costs (unless acquitted), a persistent offender coming to court will probably have some past legal costs to repay as well as maybe tax and child support, so funds may be forfeited anyway. One weakness of the present law is that if the defendant dies, the courts can continue the confiscation, but if he absconds, the assets just remain frozen. However, although that is a burden for

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<sup>23</sup> This is an important issue, for some jurisdictions such as England and Wales have difficulty in disposing of perishable assets such as racehorses, while others such as Ireland do not. Ideally, suspects or defendants should be in no worse position if the case is determined in their favour than they would have been anyway, though difficult issues such as collateral damage in opportunity costs may have to be considered for compensation. Specific legislative guidance for the courts would be helpful when legislation is drafted: otherwise, this creates too much uncertainty in the law and may deter prosecutors from acting.

the authorities, the frozen funds are of little use to the defendant except, perhaps, in symbolic terms.

If the defendant argues that the funds in his or her possession came from other, less serious offences (involving a maximum penalty of less than six years), then the funds are still confiscatable unless they come from non -criminal sources (excluding tax evasion, which would be criminal).

One Serious Economic Crimes Office case almost led to confiscation, though problems of determining what portion of the fraud arose before the legislation came into effect in 1997 led them not to bother pursuing the case under that heading. The Danish Serious Economic Crimes Office considered that although about 10 m Kr. was defrauded from investors *after* the law had been passed, it was too much trouble to split this off from the amount taken *before* the law came into effect. In another case, they had seized DK 50 m. in a smuggling of licit commodities case: however, smuggling to evade taxes has a maximum of 4 years in prison, so they could not use the s. 76a provisions. At the time of our visit, with the permission of the court, they currently had DK 80 m. seized informally pending a formal request from Russia, in relation to securities sold in the US.

There are difficulties experienced not just in Denmark but by other member states in mutual legal assistance – for example in assuring that information coming to and from some Eastern European countries is correct and is used for the legally appropriate purpose involving dual criminality. There is also a problem in testing defendants and witnesses' accounts. Property acquired more than five years before is not liable to confiscation, but this gives rise to difficulties in relation to gold jewellery acquired from foreign countries, where mutual assistance from South Asia, especially Pakistan, is modest and it is difficult to verify or falsify accounts. The tendency was to err on the side of caution.

Another difficulty arises in relation to money laundering. Laundering the proceeds of one's own crimes is not a predicate for reversal of the burden of proof in Denmark, nor have the courts accepted the tax authorities' claim that if one has assets and no admissions of tax liability in relation to them, then the assets should be liable to confiscation unless the person can prove that the funds were legitimate.

Not all initiatives are dependent on reversal of the burden of proof, at least in a confiscation-friendly country like Denmark. For example some years ago, a Swede smuggled cannabis in a Danish vessel from Colombia to the US. The Danes tried to extradite him but failed; though they seized a great deal of money in a Danish bank. He died in Venezuela and his widow then tried to get the money unfrozen and returned to her. However, the prosecutor managed to demonstrate that it was proceeds of drugs trafficking and the funds were confiscated even without the conviction of the suspect. (He was never convicted anywhere.) The Danish authorities were not certain that this case would have succeeded under the new legislation, since the latter requires conviction before being triggered: hence, such a case arising today would be dealt with under the old legislation.

If someone is acquitted, the property is automatically returned. Under Danish law, defendants have to pay the costs of their own case, and the courts can confiscate

their property to pay for any unpaid contribution to the costs of any *previous* court case. (In the old days, they used to have to pay for their imprisonment costs also.) It costs about 10-12,000 Kroner per case, including VAT for defence costs. On the other hand, if public defender is chosen, this will be at the expense of the public.

From mid-1998-99 s.76a was used about 42 times, more than half of which were for drugs trafficking. The expectation of the government was that there might be some 2 cases annually for s.76a confiscations, and they had an operational guideline of 50,000 Kr. for triggering the powers, though no numbers were mentioned in Parliament. (The Norwegian draft legislation had a lower threshold for repeat offenders who were reconvicted within two years.) This too is a common experience, since the latent demand for confiscation is high unless it is choked off by inadequate provision of staff and funds to implement the law. There is no procedural bar on bringing further knowledge about assets before the court afterwards, to increase the size of the confiscation order. Formally, confiscation is not categorised as a penalty but as another consequence of the crime. It is only expected to supplement other measures.

### ***Switzerland***

Any analysis of criminal procedure in Switzerland is complicated by the fact that – although reform is pending – there are 26 Criminal Procedure Laws at the Cantonal level and three more at the Federation level. Confiscation law is essentially catered for in Articles 58 and 59 of the Federal Criminal Procedure Code. Article 58 provides for ‘security’ confiscation of ‘dangerous’ objects. Article 59 provides for value confiscation, including substitute assets on an ordinary criminal burden of proof. Since 1994, it has been possible for a judge to freeze suspected crime proceeds to cover a future substitute assets claim, without having to trace the funds directly back to the specific crime: this can be done on a civil burden of proof and third parties are protected only if they have purchased property in good faith and have paid at market rates. What is new since 1994 is that Article 59(3) introduced a new form of confiscation of property over which a criminal organisation exercises a power of disposition, extending the legal theory underlying Article 58 to situations in which the possession of large amounts of money by a criminal organisation itself constitutes possession of a dangerous object, since money is the tool of organised crime and can be used to exercise social power and therefore harm. There is a legal presumption that all of the assets of someone who supports or belongs to a criminal organisation will be confiscated unless he proves the contrary. It is no defence for someone to argue that the property belongs to someone else, for he has to prove that organised crime does not have *control over* the asset, not that organised crime does not *own* the asset. A third party claim confers no rights to property. Thus in theory, a bank could be confiscated if it could not demonstrate that it was *not* under the control of organised crime, and such disproof may be analytically difficult to do. However, the prosecution must first prove beyond reasonable doubt that the person supports or belongs to a criminal organisation, and this is very difficult: there are few High Court decisions on what sort of methodology to employ in ascertaining membership, especially when the suspect – as often happens – is not a Swiss. For example, is it sufficient if a Russian prosecutor (or an Irish senior police officer) testifies that according to his information, the defendant is an organised criminal? (If it was sufficient, this would make such cases much easier to prosecute, but it would also

provide great opportunities for extortion by corrupt overseas officials.) Given the narrowness of mutual legal assistance conventions, abstract dual criminality would have to be proven before Italian evidence could convict, for example, in a Swiss court. There is no need for prior conviction under Article 260 (ter) of the Penal Code, but if not, the judge must prove in a preliminary hearing that X is an organised criminal. At the time of the team's visit, there had been no cases that had succeeded in the last instance under Articles 260 (ter) or 59(3), though cases had been initiated in Geneva and Zurich and there were ten convictions under Article 260 (ter) between 1995 and 1997. (These were nearly all drug cases in which an organised crime charge had been tagged along.) In one spectacular case, information requested from a third country had not arrived in time, and the suspect had to be released from his substantive money-laundering charge and other charges under Articles 59(3) and 260 (ter), and his assets released despite strong suspicion. A further difficulty is that under Vaudois Cantonal law, a third party can have a prior claim over the State on substitute assets. One response to this has been for offenders to plan ahead and establish offshore companies to lay claim to the assets; if the alleged offender agrees the claim, the property goes to the offshore company. However, it remains easier in practice to follow the money trail than to prove personal criminality for money laundering. Moreover, there is a five-year statute of limitations on confiscation following the *organised crime offence*. Where a conviction occurs, the statute of limitations depends on the individual offence maximum, so some are longer while others are shorter. Although the Swiss have the right to confiscate funds three years after the conviction, they have to give back many suspected proceeds. For confiscation as well as for a substantive offence, the Federal Statute of Limitations is five years for minor and 10 years for most major offences. An early switch to substitute assets can cause difficulties because the prosecutor may have to prove that the third party received actual assets from crime. It is not very unusual for millions of dollars to be seized from a suspected international fraud, but no victims or affected parties come forward to claim it. All that needs to be proven is that what happened was either a crime, an offence or a contravention *or* that there has been an offence under Article 59(3). Once the judge rules that the funds are proceeds of crime, third parties are allowed five years to demonstrate that they belong to them. The Bank will then show the judge's decision to the account-holder and there can be a complicated series of appeals.

Seizure of suspected proceeds of crime may come about in three principal ways: following a domestic prosecution request, following a suspicious transaction report, and following a request for mutual legal assistance from overseas. As in many other Continental European jurisdictions, the seizure of assets is comparatively easy but the final confiscation of assets is very difficult. There is currently no centralised register of seizures and confiscation, and it is difficult to separate out data that contain international mutual legal assistance cases and those that are local. However, during the period 1993-96, the Geneva Canton seized about S.Fr. 25 million from primarily local cases; Vaux, S.Fr. 250 million; and Zurich S.Fr. 1 billion (half of which relates to the Marcos case and has technically been repatriated). (Ticino data are unavailable.) On the other hand, there remains in Switzerland and all other European countries the issue of attrition between the seizure and the final confiscation: in Zurich, excluding the Marcos case which is in a special category, only about S Fr 20 million had been finally confiscated.

A great deal of effort in recent years has gone into improving the Swiss system of money-laundering reporting and investigation. It is not appropriate in this Best Practice study to review all these changes, but some are relevant to proceeds of crime since they indicate the range of people who must report 'founded suspicions' and thus freeze funds or other assets. All financial intermediaries who are not directly regulated as members of their Self-Regulatory Bodies - though lawyers can only be members of their own professional association since only lawyers can supervise them - must obtain their license to act. From April 1999, the Self-Regulating Body has had to apply to the Money-Laundering Control Authority (in the Federal Finance Office) for recognition; from April 2000, any intermediary has to join an SRB or be supervised directly by the MLCA. The MLCA has only some 10 staff (by end 1999), but they can require those who wish to be supervised directly to hire (at their own substantial cost) an independent auditor. Unlike some other regimes - in the UK, for example - the regulation of money-laundering is entirely separate from the regulation of financial services competence, but the MLCA can de-authorise intermediaries, dissolve them and require publicity for their dissolution.

Under Article 9 of the Money Laundering Act 1998, intermediaries are required to report any 'founded suspicion that funds derive from crime' where that crime has a maximum penalty of over three years' imprisonment: if they fail to do this or to enforce other money-laundering requirements, there are maximum fines of S.Fr. 200,000. Under the previous purely 'right to report' regime, they reported only to the Cantonal prosecutor, but since 1998, they have been required to make their report to the Federal Office, except on the rare occasions where they are not sure whether or not the suspicion is 'founded' and are exercising their right to report to the Cantonal prosecutor under the Penal Code. If a client is turned away because the lawyer or other intermediary is not comfortable with them without knowing enough about them to form a concrete suspicion, then there is a right but arguably not a duty to report the case as a founded suspicion: the predicate for a duty to report is a cash transaction or other business relationship (though the Swiss Banking Commission considers that the intermediary should report even a prospective client that they turn away). Under Article 10 of the Money Laundering Act, assets held by any financial intermediary which are reported in a suspicious transaction report must be frozen immediately until five business days later or until a decision is made by the competent prosecution authority to freeze funds for longer, whichever is the earlier date. (It is forbidden to tip off the customer, which raises practical difficulties in explaining why requests to transfer or withdraw funds are not complied with by normally efficient institutions: the banker may have to give a reason such as the inability to contact the asset manager.) When reporting was voluntary (under Article 305b of the Swiss Penal Code), there were only some 40 reports prior to April 1998; but after the requirement to report suspicions was introduced, in the year following, there were 160 reports, involving assets totalling over S.Fr. 330 million. In 1997, the Swiss created a Federal Financial Investigation Unit, to which cantons must report their suspicious transactions: to mid-1999, they had received 200-300 reports, which they considered to be about the right amount in relation to their resources. The wholesale banking sector is now under the supervision of the Ministry of Finance, which can give them the right to self-regulate. Between 1991 and 1997, there were 243 convictions for money-laundering in Switzerland and, excluding Mutual Legal Assistance cases, the Zurich police alone investigated 208 money-laundering cases under Article 305 (bis) and one case (for failure to identify a client) under Article 305 (ter).

## *Ireland*

### The background to the present legislation

The Proceeds of Crime Act, 1996 and the Criminal Assets Bureau Act, 1996 constitute a comprehensive package of measures on the seizure of criminal assets and may provide a model for adoption in other European jurisdictions. Those measures are supplemented by the Disclosure of Certain Information for Taxation and Other Purposes Act, 1996 which authorises the exchange of information between the Revenue Commissioners and An Garda Síochána (the Irish police). Since 1983, the profits or gains from what the Irish term 'miscellaneous income' (including crime) have been liable to taxation, but until the 1996 Act, the Revenue were unable lawfully to pass any information about such income onto the police. To obtain either a s2 Interim or a s3 Interlocutory Order, the CAB must first establish on the civil burden of proof that specified property is the proceeds of crime. Under s8, the belief of a Chief Superintendent or an authorised Revenue officer – accompanied by reasons – can contribute to that judgement, unless the defendant can prove that the property is *not* proceeds. In summary, the legislation provides for the making of applications to the High Court to seize assets that are suspected to be derived from criminal activity. Seizure can be and is ordered without a prior conviction or proof of criminal activity on the part of the (civil) respondent, who to defeat the claim, is required to establish the innocent origins of his suspicious and hitherto unexplained wealth. Under the ordinary criminal statutes, the forfeiture of the instrumentalities of crime has no reverse burden of proof: the prosecution would have to prove beyond reasonable doubt that the property had been used or was intended to be used for a criminal purpose.

### The criteria for invocation of powers

There are no formal criteria which govern the discretion to proceed (other than the legal prerequisites). Historically, in Ireland as in most countries, financial investigation has been primarily for the purpose of proving the crime rather than for asset confiscation. Both CAB and ordinary criminal investigations require all the targets for action to meet the *prima facie* standard of criminality. In formal terms, there is a preference to take confiscation action under the Criminal Justice Act 1994, which requires conviction for a predicate offence, but surveillance and other issues discussed in the Council of Europe Best Practice Survey No.3 may not yield sufficient evidence for a conviction or even proper prosecution. Prosecution followed by acquittal may leave the suspect 'politically' stronger than not being prosecuted at all. Even if there is insufficient evidence to bring civil proceedings under the 1996 CAB Act, where there remains suspicion of criminality, the tax regime may still be applied to the person or the property, though when the tax determination is made, the origin of the funds – licit or illicit – is disregarded. Since the 1994 Act, there has been only one case in which substantial funds have been obtained from confiscation. Section 3 of the Proceeds of Crime Act 1996 never brings the case on the basis of police beliefs alone: there has to be a judicial function to merit public confidence. The CAB brings to the Court on affidavit evidence including flow charts of substantial funds showing that specified property (in excess of IR£10,000) are more likely than not to be the proceeds of crime. This often involves demonstrating that large amounts of property are in the possession or control of persons who have no occupation, or no occupation

that would *prima facie* merit such income and wealth as they have been able to show. Once the case passes this threshold of reasonable suspicion, the burden shifts to the defendant to demonstrate that the funds or the property are the proceeds of legitimate activity. If the case involves fraud or other instances in which specific victims have been deprived of their property, then the victims can apply to the court to receive restitution from the deemed proceeds.

The main feature of the Act is that it employs the civil law to secure the seizure of criminal assets or substitute assets. Instruments that are familiar to commercial lawyers – receivership, restraint orders, injunctions, et cetera – are central to the fight against organised crime. The right to legal defence is mandated. However, once a legal aid certificate is granted, there is no legal structure within which the State or prosecution can conduct meaningful enquiries into the assets of the legal aid applicant. Although s6 of the Proceeds of Crime Act does contemplate the payment of legal fees out of frozen funds, the Irish Courts were uncomfortable with this. Consequently, the government introduced a free Legal Aid scheme where the defendant could satisfy the Court that the payment of state legal aid was essential in the interests of justice. The Courts have determined that defendants are not entitled to use frozen funds to ‘top up’ the fees of ‘lawyers of first choice’ who are unwilling to act for the normal state legal aid fees. Defendants are required to pay for all legal and accounting advice and in one case, the CAB used the fact that – as they proved - the defendant had transferred £800,000 out of the jurisdiction to convince the Court to deny the Legal Aid applied for. If the Court is satisfied that all assets belonging to the defendant have been frozen, free Legal Aid is granted: the effect of this is to pay the defence lawyer at the same rate as the prosecution lawyer, rather than higher rates payable to private defences. Thus there is equality of arms. However, the efficacy of the Act depends on the manner in which it is implemented and upon the culture and variety of the agencies charged with its implementation: at the time of the team’s visit, there were about 100 substantial cases being processed through the courts. The Criminal Assets Bureau (CAB) is characterised by its multi -agency nature, being staffed by officers from An Garda Síochána, the Revenue Commissioners and the Department of Social Welfare, *all using the powers granted to them by virtue of their original departmental tasks*. There are no additional powers vested in the Criminal Assets Bureau officers as such, with the important exception of the s14 Search Warrant which enables officers to search for assets or the evidence of assets or their whereabouts: this is a valuable power. Information comes from the public as well as informants and police, but there is general data matching and crosschecking between the different agencies, including police, tax and social security.

The Act provides for

- Interlocutory freezing orders for specific proceeds greater than IR£10,000
- Civil procedures in the High Court
- Civil standard of proof of criminal activity
- The belief of the Chief Superintendent of police or authorised officer of the Revenue that the funds and/or property are proceeds of crime is admissible evidence (though this does not mean that it will always be believed)
- Property not held to be innocent is frozen for seven years before disposal for the benefit of the Central Fund.

The Act does not apply to the direct instrumentalities of crime, thereby avoiding some of the difficulties that may arise over the forfeiture of ‘innocent’ instrumentalities owned by third parties but used in the crime: instrumentalities of crime are forfeitable as part of the Irish criminal process.

The Criminal Assets Bureau Act 1996 has as its objectives (S.4):

- (a) the identification of the assets, wherever situated, of persons which derive or are suspected to derive, directly or indirectly, from criminal activity;
- (b) the taking of appropriate action under the law to deprive or deny those persons of the assets or the benefit of such assets, in whole or in part, as may be appropriate, and
- (c) the pursuit of any investigation or the doing of any preparatory work in relation to any proceedings arising from the objectives mentioned in paragraphs (a) and (b).

On the *ex parte* application of a designated officer, the High Court has to decide (on the balance of probabilities) that the property *in rem* valued at not less than IR £10,000 is directly or indirectly, proceeds of crime, or was acquired directly or indirectly with property that was the proceeds of crime.

This constitutes in effect a civil trial by affidavit, with evidence being sworn about (a) the possession of substantial wealth without any visible lawful means of generating it, and about (b) previous convictions and associates. As in a civil case, if the defendant chooses not to contest the allegations (for example by fleeing the country), s/he forfeits the case: note that it is the defendant who has to satisfy the court on the balance of probabilities that the *property* is innocent. *Prima facie*, being a voluntary appearance, there is no ‘human rights’ reason why statements made in court in relation to such a claim should not be admissible in any future case. However, if the defendant contests the case and is being prosecuted for an offence, the CAB will postpone its proceedings (other than restraining the alleged proceeds) until after the completion of the criminal case, so as to avoid undue prejudice.

The Irish Proceeds of Crime Act 1996 does not seek to make anyone guilty of a crime, nor is it even necessary to show that someone has behaved immorally: it is quite conceivable that a guiltless person who has possession of the proceeds of crime should receive a Disposal Order. Nor is there any risk of imprisonment or even of pecuniary penalties provided that the person conforms. As Mr. Justice O’Higgins observed<sup>24</sup> (p.42):

“A person has no title to stolen goods and no punishment therefore accrues.... Even if a thief sells goods on, he can have the proceeds of crime taken from him.... The Act makes no provision for the finding of guilt by anybody. It is clear that the Act envisages that property could be taken from people who were innocent of any wrongdoing as well as people who were guilty of wrongdoing.”

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<sup>24</sup> *Michael F. Murphy and GM PB PC Limited and GH* 4 June 1999

This describes adequately the Anglo -Irish situation but elsewhere (as in stolen art), there are some countries that permit valid title to be passed on to third parties who then, in a sense, validly own the property.

The legislation states that the Court shall make a Disposal Order unless, subject to subsections 6 and 8, it has been shown to its satisfaction that a particular property “does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime.” Subsection 6 allows any person claiming ownership of a property to be heard prior to the making of a Disposal Order; and subsection 8 provides that the Court shall not make Disposal Order if it is satisfied that there would be a serious risk of injustice (whatever that means in practice). The Irish Courts have affirmed that the standard of proof is the balance of probabilities rather than a *prima facie*, statable case, when the prosecution has to prove that the property is in the possession or control of the defendant. Once the Court is so satisfied, the onus of proof is on the defendant to show that that they are not proceeds of crime or arise therefrom. The Court held (pp.83 -84) that the “Opinion of an authorised officer [the Criminal Assets Bureau chief] simply becomes a dismissible as part of the evidence and only if the Court is satisfied that there are reasonable grounds for such a belief [about the criminal origins of the property]”. Later (at p.97)

“the admission of hearsay and opinion evidence in a section 3 application do not offend against the principle of equality of arms since...the weight attaching to such evidence is likely to be greatly diminished if contradicted on oath or even challenged in cross -examination. Moreover, it must be taken into account that the Respondent in most, if not all, cases is in a unique position to account for property in his possession or control.”

A number of elements of the Irish legislation may give some people cause for concern: the confiscation without compensation of property in the absence of a prior conviction; the reversal of the onus of proof combined with the requirement to produce evidence to rebut the suspicion that the property constitutes the proceeds of crime; the extent of the powers of search; and the anonymity of Criminal Assets Bureau officers. For reasons of personal safety, all officials and informants operate anonymously as the Criminal Assets Bureau, with elaborate procedures for ensuring that only a senior designated officer (usually the Chief Bureau Officer or the Bureau Legal Officer) appears on Court affidavits and other disclosable material. This is an important practical issue for all countries when faced with action against people who may be involved in violent crime and extortion: for whereas police and customs officers are usually trained to deal with such threats and to expect them, revenue and social security officials do not reasonably expect to have to deal with such risks when they take a job. In the particular case of Ireland, the risk arises not merely because of drugs traffickers but also because of the IRA and other groups<sup>25</sup>. The Irish courts have rejected constitutional challenges to the legislation, as shown in the case above and principles developed in *Clancy v. Ireland*<sup>26</sup>. However, the classification of criminal asset proceedings as being ‘non -criminal’ may be disputed, given the

<sup>25</sup> A social security officer who had denied Martin ‘the General’ Cahill social benefits had earlier been shot, though it is not argued that Cahill was personally responsible for this.

<sup>26</sup> [1988] I.R. 326.

publicity attached to the findings that property represents the proceeds of crime: such stigma, however important politically to the public and to the agencies themselves, might be viewed as being socially equivalent to a finding of criminal guilt. The Irish courts have previously ruled that a disciplinary charge of plagiarism against a student is “criminal in nature”<sup>27</sup>, and – despite the acknowledgement above that wholly innocent third parties can be in receipt of Disposal Orders – it might be considered ironic if less seriousness was attached to a charge of having proceeds of drugs trafficking than to plagiarism.

Although the vast majority of cases have involved drugs trafficking to date, the legislation encompasses all crimes. For example, £1 million has been frozen in a conspiracy to defraud in Australia involving construction workers. The nexus with Ireland can be quite modest: in one drugs case, an ocean going tug was purchased in the Netherlands with the proceeds of drug trafficking in Canada for drug purchases or deals which were intended to occur at sea near the Azores. The boat got into difficulties near the Irish coast and was brought in by the rescue services, and was then subjected to civil freezing orders at the behest of the CAB. Where the assets are not in Ireland, actions are more problematical. Drugs traffickers were caught in Ireland and their assets there were frozen, but the CAB discovered £650,000 in an Austrian account. There was no way in which they could get the funds from Austria, but the CAB gave information through official channels to the Austrian authorities and they used this to freeze assets there. The key principle is that the offenders should not profit from their crimes: it is a bonus if one can get the funds back to the ‘home state’. In another case, an Irish person was acquitted elsewhere of drugs trafficking charges, claiming that the funds were the proceeds of product counterfeiting. The CAB looked at the evidence in this case denying drugs trafficking but admitting to other uncharged offences as the source of the income: the Irish Court confiscated the Irish assets of the acquitted defendant. Team members were informed that ‘he arrived by jet and departed from Ireland as a foot passenger’.

One of the more ambivalent issues relates to publicity. On the one hand, this is a valuable source of deterrence, but on the other, it could be argued that in practice, it leads to the branding of an apparently innocent person (on the presumption of innocence principle) as a criminal. Taxation payments are publicised, but asset freezing is not: nevertheless, in a small population country with a high density in Dublin, the news is likely to get out. Another issue relates to the risk of self-incrimination in the course of self-defence in a confiscation case. In one such case, the High Court (civil) judge requested that the Director of Public Prosecutions agree not to use testimony directly in any further criminal prosecution: after consultation with the Attorney-General, this was agreed. So direct use immunity can be granted. A third issue relates to the adjudication of third party claims. In one case, the brother of a drugs trafficker serving a lengthy sentence of imprisonment claimed that he had put his own money (in cash) into a pizza business: a compromise was reached whereby the building was confiscated but the brother was allowed to continue to run his business there, even though initially, they had claimed no interest in the property at all.

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<sup>27</sup> *Flanagan v. University College Dublin* [1988] I.R. 724 at 731 *per* Barron J.

Compared with post-conviction remedies, which were difficult to implement, the CAB appears to be effective, though this is not reflected in huge sums confiscated in the current year. The majority of sums confiscated are done through the revenue process. In 1998, orders under s.2 of the Act were taken to freeze assets totalling IR£1.682 million; £6.544 million in income tax was assessed; and £10.794 million in tax and penalties was demanded. The latter came from persons who had not been prosecuted or convicted, but who had been strongly suspected of being involved in drugs trafficking and who had no obvious means of substantial legitimate income. Several suspected major offenders moved overseas, for example to the Netherlands or England, and though it is believed that they became less active in Ireland and that general drugs supplies were reduced, the trans-national displacement risk is a serious one. Whether early gains will be sustained in the longer term is more open to question, not least because in its early years, those offenders who had assumed on the basis of historical protections that the Irish legal system would never countenance such measures were caught short by the sudden shift. On the other hand, the negative ‘demonstration effect’ of criminal role models on criminal ‘upcomers’ and on young people contemplating a life of crime should be reduced by the measures. In the future, it seems likely that the more devious will try to cover their tracks in more complex ways, depending on what happens more generally to anonymous accounts, International Business Corporations, and offshore finance centres (of which Dublin is one, though not in relation to domestic crime). Whatever the standard of proof, if one cannot trace assets because of nominee ownership, proceeds are very difficult to confiscate.

## **6. The nature of seizures and confiscations in the three jurisdictions**

What gets seized? The evidence to date suggests that the financial investigation picks up at best the layering and usually the placement stage. Even in Switzerland, it is very rare for physical objects or current businesses to be seized. In Ireland, by value, the principal thing that gets seized is real property – land, houses apartments, and to a lesser extent businesses – followed by cash in accounts or investments in shares and bonds. There can be a mixture: in one case, £47,000 in cash was confiscated; £443,000 cash was frozen, along with three houses, five cars, and other cash items in the possession of relatives. However, there are occasional cases such as one pub in which a live business is seized, and this is handed over to professional managers (or ‘receivers’) as soon as possible. In one complicated case still the subject of legal action, an Equestrian centre’s race horses, furniture, etcetera were seized by the Sheriff for non-payment of tax and the entire property – lands, the dwelling house and a very large indoor arena have been made the subject of Section 2 Interim and Section 3 Interlocutory orders. The Courts have yet to determine the appointment of a receiver as we write. Despite the 7-year period for appeal, it is the custom of the Irish Criminal Assets Bureau (CAB) to sell perishable assets or assets whose value may change rapidly as soon as possible. This is not simply a question of the risk of legal liability of the Receivers, which probably will arise (as in the UK) only in cases of bad faith<sup>28</sup>. It is also a question of public confidence in the propriety of the process, which can change quickly if the media and/or politicians begin to criticise the agency for ‘abuses of power’, as has happened in the US<sup>29</sup>. This process

<sup>28</sup> The bad faith requirement does not apply to compensation for unsuccessful confiscations on the part of CAB.

<sup>29</sup> See the competing legislation currently under review in the US Senate and House of

– which we would like to call ‘informal accountability’ – is a key part of the legitimacy of the financial crime strategy.

What happens to the proceeds of crime? In none of the jurisdictions did funds go directly to the authorities: a prospect which was viewed with great reservation by all people interviewed as leading to the less attractive features of the American regime. In both Geneva and Vaux, the funds go the struggle against drugs, via the ordinary Cantonal or Federal budget, though there is a tendency for them to go to law enforcement or police training or prevention activities. The importance of transparency of expenditure was stressed, to avoid unjustified rumours of self-dealing. In Switzerland, for example, there was an unfounded rumour that a police retirement home had been built with confiscated funds. Because of the requirement that they wait five years before disposing of products it is difficult for the Swiss police to be able to use any confiscated products, even electronic ones. (This contrasts with the situation in Ireland, where the 7-year freezing rule nevertheless allows such disposals, though not use by the authorities of frozen items such as cars or boats for official purposes.)

## Conclusions

It should be stated clearly that in no country has confiscation been without serious problems. In strict financial terms, the US is universally acknowledged as the cynosure of the ‘crime control’ model of stripping criminal proceeds. However, this is achieved not without serious costs to the poorer defendants, nor is there any evidence that the consumption of illegal goods and services has declined as a consequence. To give some context to the modesty of successes in financial terms, only in two cases in 1998 did the Dutch system – in many ways the most resourceful of the European systems for financial investigation – generate more than 1 million guilders. The European Union’s Informal Money-Laundering Experts Group comments in its Draft Report for 1998 that “it became clear that Member States had hardly any information available at national level about the seizure and confiscation of criminal proceeds”. By contrast, in the US, the Justice Department Asset Forfeiture Fund (established in 1984) had \$418 million in deposits (including \$2 million on interest on BCCI funds) in 1998, compared with \$445.6 million in 1997 and \$334.1 million in 1996. In 1984, the device of ‘equitable sharing’ was introduced into the US, and this had a highly stimulating effect on the use of forfeiture. One reason was because the Justice Department guaranteed to return to the local and State agencies all but 10% (now slightly higher) of the funds. – equitable sharing totalled \$196 million in 1998. Even though substantial sums may result from the legal structure of third party (including corporate criminal) liability in the US, sums such as these are tiny compared with the volume of proceeds (and even profits) of crime in circulation in the US.

Of the countries in this Best Practice Survey, the largest sums have been seized by the Swiss, because of that country’s global central role in banking and its reputation for accessibility, confidentiality, stability and trustworthiness, which historically have given it a comparative advantage. Since Switzerland has

comparatively little domestic organised crime (outside of its role in intentional and unintentional money laundering), most of these seizures come from foreign crimes or suspected crimes. In the absence of a civil ‘balance of probabilities’ confiscation system, final confiscation in Switzerland often depends on proof through the mutual legal assistance system, even where a criminal investigation has been pursued for money laundering or for organised crime domestically. In the absence of that co-operation, whether for reasons of corruption, politics or resource constraints, many such cases will remain in limbo or the funds will have to be returned to their suspected criminal owner. A ‘loose-coupled’ legal system based upon highly varied local traditions has many virtues but it creates many opportunities for appeals, delays and ‘regulatory arbitrage’ – that is, jurisdiction-shopping - which are being addressed to the extent that the constitutional system and financial/staffing resources permit. However, the centralisation of information and decision-making is valuable and Switzerland has made some impressive efforts in trying to deal with the proceeds of corruption and organised crime committed abroad, even though its domestic ‘organised crime’ legislation is very difficult to work in practice without opening up the risk that large financial institutions could be labelled legally as supporters or members of ‘criminal organisations’.

Neither the Danish nor the Irish systems have had to deal with proceeds of crimes committed overseas to anything like the same extent. In the Irish case, it is least problematic because once a judge is satisfied on a balance of probabilities that the funds are proceeds of crime, they will be frozen and eventually confiscated unless “any person” applies to the Court to show that they are proceeds of crime or a valid third party claim is made. The Irish system offers opportunities for rebuttal and a Legal Aid system for reasonable ‘equality of arms’, and decisions are taken through the judicial process. Arguably, it is proportionate, in the sense that it takes only property that has been shown not to belong to the civil defendants. As a matter of legal form, the proportionality issue is reinforced by provisions that Section 3 Interlocutory Orders and Section 4 Disposal Orders should not be made if “it would be unjust to do so”: the conditions under which the latter judgement might be made are capable of flexible determination. More contentious, perhaps, is the argument that the law is proportionate because of the difficulties in affecting the power of organised crime bosses through the ordinary criminal prosecution process. But the fact remains that if the property has been acquired through legitimate means and can be shown by the defendant to be so, it will be returned unless it can be shown to be ‘substitute assets’ for proceeds of crime held outside the jurisdiction. The system also works through its use of taxation demands on domestic income that has not been declared to the authorities: it can be expected to exercise a sanitising effect by presenting criminals with the dilemma that if they do not report income from crime, such income will be taxed with penalties. Judicial creativity has also remedied some of the defects in the original legislation, which was drafted very quickly with almost no Parliamentary debate: the latter scrutiny might have given opportunity for more analysis of potential flaws. However, there remain difficulties in applying mutual criminal assistance. In one case, because the Irish confiscation system was civil, the Dutch authorities were unable to hand over information requested even though the person was in reality a criminal suspect. So anyone contemplating such an approach should try to take into account such international complexities. The Danish approach offers a more traditional way of applying reversal of the burden of proof post-conviction, with none of the tortuous difficulties of applying ‘organised crime’

legislation as in Switzerland. However, though they do have some serious international frauds, the Danish authorities have not been confronted with especially severe difficulties of dealing with major drugs trafficking syndicates.

The team's interviews and what little organised research there has been on this subject suggests that not only legal changes but also cultural and organisational changes are essential prerequisites of successful proceeds of crime confiscation. Unless appropriate resources and training to enhance the competence levels of key decision-makers – investigators, prosecutors, defence lawyers and judges – occur, legislative changes to the burden of proof will make only the most modest difference.

