

Confiscation of the Proceeds of IP Crime

A modern tool for deterring counterfeiting and piracy



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United Nations
Interregional Crime and Justice
Research Institute

An ICC initiative

BASCAP

Business Action to Stop
Counterfeiting and Piracy

ICC works to promote a balanced and sustainable system for the protection of intellectual property. It believes that IP protection encourages innovation and the development of knowledge-based industries, stimulates international trade, and creates a favorable climate for foreign direct investment and technology transfer.

About BASCAP

Counterfeiting and piracy have become a global epidemic, leading to a significant drain on businesses and the global economy, jeopardizing investments in creativity and innovation, undermining recognized brands and creating consumer health and safety risks. In response, the ICC launched BASCAP to connect and mobilize businesses across industries, sectors and national borders in the fight against counterfeiting and piracy; to amplify the voice and views of business to governments, public and media; and to increase both awareness and understanding of counterfeiting and piracy activities and the associated economic and social harm.

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About The United Nations Interregional Crime and Justice Research Institute – UNICRI

UNICRI assists Governments and the International Community in tackling the threats that crime poses to peace, security and sustainable development, in particular by fostering just and efficient criminal justice systems, the formulation and implementation of improved policies, and the promotion of national self-reliance through the development of institutional capacity.

The Institute operates in specialized niches and selected fields of crime, justice, security governance and counter-terrorism, providing added value to crime prevention, advancement of the rule of law and enhancement of human rights. It also serves as a platform for consultation and cooperation on sensitive issues in security governance, crime prevention and criminal justice, acting as an honest broker in bringing together different partners — such as Member States, international organizations, research institutions, private sector and civil society — and in forging a common approach to addressing shared challenges.

UNICRI has a long tradition of research on organized crime, including its relation to counterfeiting. The topic of counterfeiting is an important part in the work of the Institute due to the growing interest of criminal organizations in this area. Counterfeiting is particularly attractive to organized crime, even if compared to other crimes such as drug trafficking, because it has a very favourable ratio between the profits that can be obtained and the risks run by who commits the crime. Consequently, counterfeiting became a huge source of money for criminal organizations which are nowadays using this illicit activity also as an important instrument for money laundering.

Counterfeiting is a complex criminal activity involving economic, social, legal and criminological aspects. Being aware of this complexity and of the need of providing an adequate response, UNICRI developed a dedicated Programme based on a multidisciplinary approach which follows two main pillars of analysis: the fight against counterfeiting as a response to organized crime and the danger posed by some specific products to consumers' health and safety.

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Acknowledgements

The United Nations Interregional Crime and Justice Research Institute (UNICRI) publication “Counterfeiting, a global spread, a global threat” revealed an alarming challenge to the global fight against counterfeiting and piracy by documenting the increasing engagement of organized criminal involvement. At roughly the same time, the United Kingdom was pioneering the Proceeds of Crime Act, aimed at ensuring that IP criminals do not profit from the illegal activities of counterfeiting and piracy. These developments did not go unnoticed by Business Action to Stop Counterfeiting and Piracy (BASCAP) of the International Chamber of Commerce (ICC), a global business organization committed to strengthening IP enforcement regimes to stop the proliferation of IP theft. The conflux of organizational missions between UNICRI and BASCAP led to collaboration on a project to broadcast the value of proceeds of crime (POC) legislation and encourage use among governments seeking mechanisms for fighting IP theft in the forms of counterfeiting and piracy.

This report is the result of these collaborative efforts by UNICRI and BASCAP, who have contributed as partners in the research and drafting. The collaboration has benefited from contributions by a variety of experts, including Australian-based IP lawyer Michael Blakeney, who prepared the original scoping paper; and from John Anderson, Chairman of The Global Anti-Counterfeiting Group (GACG), who rigorously reviewed early drafts and contributed to the finalization of the Report. In addition to these expert contributions, the Report would not have been possible without ancillary financial support from BASCAP.

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Executive summary

The theft of Intellectual Property (IP) in the forms of trademark counterfeiting and copyright piracy is a socio-economic problem of enormous scale that has escalated significantly in the last decade. In one country after another, the massive infiltration of counterfeit and pirated products has created an enormous drain on national economies around the world — crowding out billions in legitimate economic activity and facilitating an “underground economy” that deprives governments of revenues for vital public services, forces higher burdens on tax payers, dislocates hundreds of thousands of legitimate jobs and exposes consumers to dangerous and ineffective products. Moreover, the Internet is increasingly exploited as an illicit marketplace for counterfeiting and piracy. The latest estimate from ICC BASCAP indicates that the total global value of counterfeiting and piracy could reach a staggering peak of USD 1.7 trillion by 2015.

The emergence of organized IP Crime

IP crime has emerged as a lucrative and growing new activity for organized criminal networks. There is strong evidence that organized criminal groups are moving into counterfeiting and piracy in ever-growing numbers. The high profits and low risk associated with modest penalties and lax enforcement of intellectual property IP crime has made this a major new business opportunity for organized crime networks. Today, counterfeiting and piracy play a key role in the operations of transnational criminal organizations.

One recent example of this was the Interpol-led Operation “Black Poseidon”. The operation targeted products being traded illicitly across Eastern Europe (namely Belarus, Georgia, Moldova, Turkey and Ukraine) by transnational organized crime groups. Counterfeit products included computers, pharmaceuticals, agrochemicals, electronics, alcohol and cigarettes. The operation led to the seizure of goods worth over €120 million and 1,400 persons under arrest or investigation.

The emergence of organized IP crime accelerates the globalization of counterfeiting and piracy, helps fund other criminal activities such as extortion, illegal drugs and human trafficking, compromises the international financial system for money laundering purposes and, ultimately, makes it more difficult for existing law enforcement measures to be effective.

A modern tool for deterring counterfeiting and piracy

In response, governments have stepped up efforts to deter this illegal activity — strengthening IP laws, increasing penalties, tightening borders and writing new rules to prevent abuse of the Internet. However, despite these steps, the problem continues to grow. Clearly, more needs to be done at the local level and internationally. A transnational approach is needed to address the transnational problem of IP crime.

With the aim to strengthen the portfolio of measures governments have to fight counterfeiting and piracy, this report advocates the widespread adoption of “Proceeds of Crime” legislation and its application to IP crimes.

The rationale is two-fold:

1. Deterrence through a shift in the balance of risk and reward. The principal objective of Proceeds of Crime (POC) legislation is to reduce the profitability of crime by confiscating and thereby depriving criminals of ill-gotten profits. Depriving criminals of their illicit profits can have a much greater punitive effect than imprisonment. This is certainly the case with counterfeiting and piracy, where the rewards from criminality considerably outweigh the risks, given the fairly minor penalties which are currently imposed by the enforcement authorities.
2. Re-invest the confiscated proceeds of crime in further law enforcement activity. This defrays the expense of criminal enforcement and helps prevent IP enforcement from being compromised by competing demands on persistently overburdened government budgets.

Objectives of the report

Sound legislation on confiscation and recovery of assets has already proven to be a very effective way to fight against organized crime and its profit-driven criminal enterprises. However, despite the effective application of Proceeds of Crime (POC) legislation to traditional organized criminal activity, there has been limited application to criminals producing and trading counterfeit and pirated products.

This report aims to encourage more governments to develop and apply of “Proceeds of Crime” legislation to IP crimes. Recognizing that POC legislation is complicated and the process from drafting legislation to implementing regulations can be lengthy and difficult, the report is intended to provide a guide to facilitate the process and, consequently, achieve more rapid implementation.

To do so, the report:

1. Explains the primary provisions of POC laws relating to the process of identifying, tracing, freezing or seizing, confiscating and returning proceeds of crime to its victims, enforcement agencies or the state.
2. Examines POC legislation in four different countries (United Kingdom, Australia, Italy and Switzerland), highlighting the best practices from these countries and the most effective features of POC legislation.
3. Provides an inventory of key legislative provisions and best practices which could serve as model provisions for governments to design modern and effective POC regimes, with an emphasis on applicability to IP crime.

Toward developing model law provisions

In order to encourage the wider use of POC legislation measures to deal with IP crime, the ultimate objective of the report is to put forward an inventory of key legislative provisions and best practices which could serve as model provisions for governments to design modern and effective

POC regimes. The recommended measures presented in this report fall into 3 categories: (1) legal framework to effectively implement POC legislation; (2) institutional framework to effectively administer POC legislation; and (3) international cooperation mechanisms.

I. Legal frameworks for effective implementation of asset tracing, freezing, and seizure and confiscation proceedings

- a) **Start with non-conviction based confiscation regimes.** To ensure that confiscation regimes are enforced in the widest range of circumstances, jurisdictions are encouraged to implement measures that would enable them to carry out confiscation without the need to obtain a criminal conviction.
- b) **Introduce reversal of burden of proof as to the origin of the property.** One effective tool is to include provisions that require the defendant to prove that a particular asset, transfer or expenditure has a legitimate source and that it was not due to the criminal activities of the defendant. This reversal of the burden of proof is based on showing the “criminal lifestyle” of the defendant and allows the prosecution to put the burden of proof on the defendant with respect to the origin of their property. Similar provisions exist in Italy and Switzerland.
- c) **Strengthen tracing and investigation powers.** It is essential that appropriate procedures and legal frameworks be in place in order to allow information deemed to be useful to be shared in a timely way. Mechanisms that allow for rapid access to high quality information on the ownership and control of such property should be built into the POC laws and regulations.
- d) **Extended powers of confiscation (extended confiscation).** In order to effectively tackle organized criminal activities there may be a situation where it is appropriate that a criminal conviction is followed by the confiscation not only of property assets associated with a specific crime, but also of additional property which the court determines are the proceeds of other crimes. Thus, extended confiscation signifies the ability to confiscate assets, which go beyond the direct proceeds of a crime. This provision can be tied to the “reversal of the burden of proof” argument noted above.
- e) **Allow confiscation of assets transferred to third parties (third party confiscation).** Criminals often transfer their assets to knowing third parties as soon as they come under investigation, in order to avoid confiscation. Given that this practice is common and increasingly widespread, it is becoming more and more necessary to allow for confiscation of property transferred to third parties.
- f) **Strengthen provisional measures (freezing or seizure) to preserve the availability of property alleged to be liable for confiscation from a third country.** To prevent the dissipation of property before a freezing or seizure order can be issued by a court, jurisdictions need to be empowered to immediately prohibit the transfer, conversion, disposition or movement of property in danger of being hidden or transferred out of the jurisdiction, pending the determination by a court.
- g) **Enhance provisions on frozen/seized property management and on disposal of confiscated property.** To strengthen the effectiveness of confiscation regimes, national jurisdictions should have in place comprehensive procedures for efficiently managing frozen/seized property and adequately disposing and transferring confiscated assets to the state.

II. Proposed best practices for appropriate institutional frameworks to administer POC legislation effectively

- a) **Strengthen and rationalize the institutional structure of law enforcement.**

The growing scale of IP crime has implications not only for the administration of IP but also for enforcement against fraud, and other serious organized crime. As a consequence, a number of government enforcement agencies are likely to be involved in dealing with this form of crime. Before becoming effective, the organizational and managerial culture of the enforcement authorities has to be modified to adopt POC enforcement as a central weapon in their armory. The extension of POC to IP offences will require the same sort of capacity building effort to convince the enforcement authorities to prioritize action against counterfeiting and piracy.
- b) **Improve the knowledge and expertise of investigators and prosecutors.**

Effective confiscation operations depend on well-trained specialized investigators and prosecutors. Force-wide police training in the area of financial investigations, with a focus on confiscation, is therefore recommended. Specialized training for prosecutors in these fields is also crucial.
- c) **Promote and improve cooperation between police forces and prosecutorial investigators.** Financial investigations aimed at asset recovery are extremely complex and time consuming. The success of the investigation depends very much on proper cooperation between police investigators and prosecutors.

III. Mechanisms for co-ordinating tracing, freezing, seizure and confiscation proceedings at the international level

- a) **Establish appropriate procedures to facilitate mutual legal assistance in response to requests by foreign States.** As counterfeiting and piracy usually involve international trade, with actors in a number of countries, international co-operation between enforcement authorities is particularly important. The fight against cross border counterfeiting and piracy requires international co-operation during the tracing and freezing phases, as well as seizure and confiscation.
- b) **Improve collaboration with foreign counterparts through appropriate international agencies.** Competent authorities should engage with foreign counterparts through strengthened collaboration with law enforcement agencies and international bodies, such as INTERPOL or Egmont Group of Financial Intelligence Units. Also, the Camden Assets Recovery Interagency Network (CARIN) is an important informal international network of national experts in the field of asset tracing, seizing and confiscation administered by EUROPOL, but available to non-European States. In addition, the Financial Action Task Force (FATF) is an intergovernmental body, comprising 34 Member States and 2 international organizations as observers, whose purpose is the development and promotion of national and international policies to combat money-laundering and terrorist financing. It has published Recommendations dealing with money laundering and terrorism, as well as with assets confiscation.

Looking forward

This report highlights the growing role that organized criminal networks play in intellectual property crimes. A sampling of POC laws in place in the United Kingdom, Australia, Italy and Switzerland are put forward as examples of how the confiscation of assets under these laws can serve as an effective additional punishment and deterrent to IP criminals — leveraging existing laws to enforce the protection of IP rights and providing a valuable source of “self-funding” for further IP law enforcement activity.

It is hoped that the report generates greater awareness among policy makers in more countries of the value of this type of legislation, and that the inventory of key legislative provisions and best practices will encourage and support national government efforts to establish or enhance a proceeds of crime legal framework.

Notably, there are indications that national governments are increasingly adapting POC legislation to tackle a wider range of criminal activity. For example, a study of the 117 countries that are parties to the World Health Organisation Framework Convention on Tobacco Control (FCTC) found that 56% reported enabling the confiscation of proceeds derived from the illicit trade in tobacco products.

BASCAP and UNICRI share a common commitment to stop the infiltration of organized criminal networks into counterfeiting and piracy. That commitment led to the development of this report, and collaborative work in this area will continue.

The value of this report will benefit from additional research and cooperation in the following areas:

1. More research needs to be conducted on the actual involvement of organized crime into IP crimes at all levels. A better understanding of the number and types of organized criminal networks and the nature of their involvement in IP crimes will compel governments to prioritize law enforcement actions to deter this illegal activity. Fresh, comprehensive data on the role of organized crime in illicit trade from organizations such as INTERPOL, EUROPOL and the UN Office on Drugs and Crime would be extremely valuable and could be utilized as a supplement to this report.
2. Expanding the research to include an analysis of existing POC laws and regulations in more countries would augment the inventory of key legal provisions and best practices derived from the four national case studies presented in this report. This exercise could generate a basis for developing model law provisions to serve as a template for national governments around the world to introduce sound legislation on confiscating the Proceeds of IP Crimes. In addition, more information on implementing associated regulations and administering POC programs, including the reuse of confiscated proceeds to fund enforcement activities, would yield a useful “how to” guide, further easing the adoption and operation of POC IP enforcement regimes.

3. Involving key intergovernmental organizations in the process would help address the transnational problem of IP crimes and the international laundering of the proceeds of those crimes. Intergovernmental organizations are useful conduits to constituencies of law enforcement, customs, judiciary and other stakeholders across borders. For example, INTERPOL has recently launched a “Legal and Institutional” initiative that aims to assist member States in the development of national legislation relating to priority crime areas, such as IP crimes. The OECD regularly conducts “country reviews”, assessing how countries manage the design, adoption and implementation of regulations. These partners could be enlisted to help their government constituents to better understand and implement POC legislation and regulations.

BASCAP and UNICRI stand ready to assist in this future work.

Chapter 1: Counterfeiting and piracy: a lucrative market for organized crime

Counterfeiting and piracy have long presented a tempting target market for organized criminals, with particular emphasis in lucrative areas such as consumer electronics, footwear, pharmaceuticals, optical media, as well as luxury products like handbags and perfume. But over the last two decades the illegal practice of counterfeiting and piracy has expanded to include virtually every product sector, including fake foods and beverages, books, electrical equipment, chemicals, mobile phone batteries, spare parts and toys. The value of this underground economy has exploded commensurately.

The 2008 OECD report on the Economic Impact of Counterfeiting and Piracy¹ and a later study by Frontier Economics show that this trade is huge and growing. The Frontier Economics study, commissioned by ICC BASCAP, found that the total global economic value of counterfeit and pirated products was already in 2008 as much as USD 650 billion annually. The figure is estimated to more than double to USD 1.7 trillion by 2015, due in part to rapid increases in physical counterfeiting and piracy as measured by reported customs seizures and greater worldwide access to high-speed Internet and mobile technologies.²

The commercial value of products vulnerable to counterfeiting and piracy presents a tempting target market for organized criminals.

These trends are evidenced by customs seizures in major consumer markets. In the United States, foreign infringement of domestic intellectual property rights has risen in eight of the last ten years,³ and U.S. Customs reported a 24% increase in seizure of counterfeits from 2010 to 2011.⁴ These seized goods represented more than USD 1.1 billion in lost sales.⁵ Statistics published by the European Commission in July 2012 show a similar trend in the number of shipments suspected of violating IPRs.⁶ In 2011, more than 91,000 detention cases were registered by Customs — an increase of 15% compared to 2010. The value of the intercepted goods represented nearly €1.3 billion compared to €1.1 billion in 2010.⁷

The OECD put this market potential into perspective when it announced that the global value of counterfeiting and piracy is larger than the national GDPs of about 150 (out of 185) economies in the world.

The new face of organized crime

Given the magnitude of the underground economy for counterfeits and pirated products — and the potential profits — it is not surprising that IP crime has emerged as a lucrative and growing new activity for organized criminal networks. While the world has perhaps been slow to realize it, strong evidence now exists that organized criminal groups have deliberately and in great numbers moved into trademark counterfeiting and copyright piracy — largely due to the high profits, low risk of discovery, and inadequate or minor penalties when and if caught.⁸

IP crime has emerged as a lucrative and growing new activity for organized criminal networks.

In addition to high profits and low risk, organized crime's migration into counterfeiting and piracy has been facilitated by international networks, alliances and illegal production/distribution chains that evolved during the 1970s for trafficking black-market products, such as illicit narcotic substances and smuggling of tobacco and alcohol. The challenge of connecting production to distant consumers required criminal groups to adapt to new types of activity and trade. These new synergies not only guaranteed economies of scale and other efficiencies common to legitimate trade, but also provided an opportunity to utilize the same networks for other illicit activities, including armaments, human trafficking and now counterfeiting and piracy.

Examples of organized criminal groups involved in IP crime

Some of the most notorious criminal organizations have been found to be actively involved in counterfeiting and piracy, including the **Chinese Triads, Japanese Yakuza, Russian Mafia,** and the **Neapolitan Camorra.** The following examples illustrate how crime syndicates have become involved in the entire supply chain of counterfeit and pirated products, engaging in this criminal business alongside other criminal activities such as drugs, money laundering, extortion and human trafficking.

Investigations confirm the active involvement of organized crime of **Asian origin** into counterfeiting and piracy in different parts of the world.⁹ Asian criminal organizations have been active in the United States in this field for many years. In 1995, an undercover operation conducted by U.S. authorities, in collaboration with the Asian Organized Crime Section of the U.S. Department of State, revealed the role of a Korean criminal group in the management of significant volumes of traded counterfeit products.¹⁰ Investigations carried out in the UK at the beginning of 2000 discovered an Asian criminal group managing a significant trade of pirated CDs, distributed in the country by Afghan refugees seeking asylum, who were forced to act as street vendors by the traffickers.¹¹ The Chinese Triads also have been increasingly involved in counterfeiting and piracy. In a case investigated by the UK police, Chinese illegal immigrants conducted the retail distribution. Their illegal entry into UK territory was organized by the criminal organization itself.¹²

In 2001, in response to a significant increase in pirated CDs originating from Russia and Eastern Europe, a UK police investigation revealed a **Russian criminal network** trafficking counterfeit and pirated products. The operation also involved arms trading, pornographic materials and counterfeit credit cards. Subsequent investigations led to the arrest of several members of the organization.¹³

Italian criminal organizations are known to be actively involved in trafficking counterfeit and pirated products. Investigations confirm that the counterfeit goods are often sold at retail — not only by exploited immigrants, but also by regular retailers who buy such goods wholesale because of their low cost. According to the Italian National Antimafia Bureau, the Camorra often also controls legal commercial activities through which it introduces counterfeit goods into the market, creating a significant economic-financial web across multiple countries, particularly in Western Europe, the United States, Brazil, Canada, and Australia. This financial network allows for the accumulation of capital funds, which, after being “laundered” are reinvested in a variety of legal commercial activities, thereby increasing the organization's operational capacities. The

Italian National Antimafia Bureau also highlights the growing links between Chinese criminal organizations and the Neapolitan Camorra. Investigations conducted throughout Italy confirm the international ramifications of the traffic in counterfeit and pirated goods and the involvement of the same organizations in other forms of illegal trading and money laundering, as well as the use of corruption and intimidation to force retailers to sell counterfeit goods.

Well-known traditional criminal organizations, as those cited above, are not the only groups interested in this lucrative business. Investigations all over the world by Interpol, the World Customs Organization, and Europol provide clear evidence of the significant involvement of transnational organized crime networks in counterfeiting and piracy. Below are a few examples of major recent investigations conducted in different parts of the world.

- Operation “Maya” led by Interpol at the beginning of March 2012 across 11 countries in the Americas resulted in the seizure of fake goods, including toys, computer software, clothing, beauty products, engine oil and cigarettes worth nearly USD 30 million.¹⁴
- In May 2012, Interpol-led Operation “Black Poseidon” targeted products being traded illicitly across Eastern Europe (namely Belarus, Georgia, Moldova, Turkey, and Ukraine) by transnational organized crime groups. Counterfeit products included computers, pharmaceuticals, agrochemicals, electronics, alcohol and cigarettes. The operation led to the seizure of goods worth over €120 million and arrest or investigation of 1,400 persons.
- In October 2012, Interpol and the World Customs Organisation carried out “Operation Pangea V,” a global investigation covering 100 countries. The effort aimed at disrupting the organized crime networks involved in the illicit online sale of medicines. The operation resulted in the arrest or investigation of 79 people and the seizure of 3.75 million units of potentially life-threatening medicines worth USD 10.5 million.¹⁵
- Recently, in December 2012, an Interpol-Europol operation named “Opson II,” targeted at uncovering organized crime involvement into fake and substandard food and drink, resulted in the seizure of more than 135 tons of potentially harmful goods ranging from coffee, soup cubes, and olive oil to luxury goods such as truffles and caviar. Investigations were carried out in 29 countries from all regions of the world, through coordinated actions by customs, police, and national food regulatory bodies, as well as private sector. Raids were carried out at airports, seaports, shops, markets, and private homes.¹⁶

A problem that extends beyond the black-market profits

Efforts to control the involvement of organized in counterfeiting and piracy must include a clear understanding of the negative social impacts of the other crimes in which these networks are engaged, including drugs, money laundering, extortion, human trafficking and tobacco and alcohol smuggling. As some of the examples have shown, organized criminals use profits from IP crimes as a means to finance other serious crimes and launder the proceeds gained from their criminal activity.¹⁷

Extortion

The *modus operandi* that criminals use to safeguard their illicit activities — such as bribery and/or intimidation — is also applied in the case of counterfeiting and piracy. In Malaysia, for instance, the president of a municipal council was subject to death threats after initiating actions against those selling pirated video compact disks. In Russia, the Director of the Russian Anti-Piracy Organization (RAPO) was the victim of a murder attempt, which, according to evidence, was directly linked to an operation in which 117,000 pirated DVDs and 1,060,000 counterfeit bags were seized.

Human trafficking

One of the most appalling consequences of organized crime involvement in counterfeiting and piracy relates to the abuse of children and the local workforce. Counterfeiting and piracy are also linked to illegal immigration and human trafficking. Counterfeiters and pirates often exploit immigrants during the production and distribution phases, forcing them to endure grueling work shifts under poor hygienic and safety conditions. The same criminal organizations controlling the trafficking of human beings subsequently exploit their victims as forced labor workers in the counterfeiting business.

Recent cases concerning pirated CDs/DVDs syndicates confirm this *modus operandi*. Victims of human trafficking or smuggled migrants are very often forced by criminals to repay their alleged relocation debts through forced labor. The discovery of one such situation resulted from an investigation of pirated DVDs in the United Kingdom.¹⁸ The organization forced the victims (mainly Chinese citizens) to sell pirated DVDs to repay their “debts.” The organization imported the illicit products from Malaysia into the United Kingdom, while the victims of trafficking usually passed through a well-known route linking Beijing with England by way of France, Africa, and Spain.

Some years later, the Spanish authorities dismantled a piracy ring that was using a similar system. Also in this case, the criminal organization was exploiting Chinese citizens — victims of human trafficking — as a workforce. Further investigations discovered that the same criminal organization, after starting its activities in fake CD and DVD production, began human trafficking to obtain cheap work force for these operations.¹⁹

Tobacco and Alcohol Smuggling

Organized criminal groups have been in control of smuggling tobacco and alcohol products across international borders for many years, and this is an enormous business for them. By avoiding the high taxes on tobacco and alcohol products, the criminal networks are able to sell these products at lower prices and still reap huge profits. These profits are then invested in other criminal activities that impact on society across all spectrums. These same crime gangs have expanded their businesses to include counterfeit tobacco and alcohol products, providing the same high profits as the smuggling business but also presenting new risks to unsuspecting consumers. And, the profits continue to be used to fund corruption, extortion, human trafficking and other serious crimes.

In April 2013, French law enforcement authorities dismantled a major criminal network importing and distributing counterfeit cigarettes. The police action led to the seizure and destruction of 1.25 million fake cigarettes. The French authorities noted that the size of the criminal organization involved and their actions demonstrated that the network had adopted the same techniques used in drug trafficking to transport the counterfeits.

Money laundering

Counterfeiting and piracy serve a dual function for the organized criminal group: as a source of financing for other illegal activities, and as a tool to launder proceeds derived from various crimes.²⁰ While it is clear that the production and distribution of counterfeit and pirated goods have become today a truly global business, with sophisticated manufacturing and distribution systems successfully put in place by criminals, it is also clear that these criminals have designed equally sophisticated systems to launder their profits by disguising the true origin and ownership of the proceeds from their criminal activities.

There also are instances where the proceeds from other crimes are used to finance counterfeiting and piracy cases. This double connection can be illustrated with cases involving narcotics trafficking. In 2003, local authorities in Thailand discovered and blocked a trade of counterfeit goods and cannabis where the proceeds from the latter were re-invested in the acquisition of replicated goods intended for the French market. A similar case occurred a year earlier in the United States, where investigations into drug trafficking showed that the same criminal group was involved in the sale of counterfeit goods, financing production with revenues from drug sales. A case involving the opposite situation occurred in Mexico in 2002: Proceeds derived from the sale of pirated CDs were most likely re-invested in drug trafficking and prostitution.²¹

Organized crime and counterfeiting and piracy — the perfect blend of low risk, high profits

In order to effectively fight counterfeiting and piracy, it is essential to understand the conditions that have enabled and precipitated organized crime's involvement in this illicit activity. The problem is caused in large part by a combination of defective legal systems.

Four main factors contribute to organized crime's entry into IP crime:

1. Low risk of detection
2. Lenient, if any, legal penalties in many countries
3. Ability to use established networks and increased world trade
4. High profits

The most important reason for organized crime's interest in counterfeiting and piracy is surely the profit vs. risk ratio. Organized criminals account for the profitability attainable from any given illicit activity, as well as its level of risk.

It is relatively easy to arrange manufacture in any given geographical location and distribute almost anywhere in the world. The result of more open borders and more trade is that counterfeiters and pirates can operate more easily across borders. As discussed above, in addition to high profits and low risk, organized crime's involvement in counterfeiting and piracy has been facilitated by international networks, alliances and illegal production/distribution chains that evolved during the 1970s for trafficking black-market products, such as illicit narcotic substances.

The challenge of connecting production to distant consumers required a transformation of criminal groups to adapt to new types of activity and trade. These new synergies not only guaranteed economies of scale and other efficiencies common to legitimate trade, but also provided an opportunity to utilize the same networks for other illicit activities, including armaments, human trafficking, and now counterfeiting and piracy.

Low-cost production and allocation have rendered counterfeiting an extremely profitable industry. An idea of the profitability of counterfeiting can be obtained from cases in which law enforcement has dismantled criminal organizations and confiscated proceeds of their crimes.

Digital piracy provides an interesting example. In the U.S., Federal Authorities estimated that the revenues of a dismantled criminal organization dedicated to digital piracy could reach USD 1.2 million per year. In another case, also in the U.S., a criminal organization paid USD 9.8 million to manufacturers of counterfeit goods in Asia. Some experts estimate counterfeiting's profitability as similar to, or even higher than, that of the narcotics trade. For instance, a 2005 estimate by the UK National Criminal Intelligence Service suggested that a pirated DVD produced in Asia would cost approx. USD 0.70, while the selling price from street sellers in London would reach USD 9. This price increase is higher than 1,150%, making pirated DVDs potentially more profitable than Iranian heroine or Colombian cocaine.²²

While the profits are high, the risk involved in counterfeiting and piracy is relatively low, because usually law enforcement tends not to consider counterfeiting and piracy a top priority for action. Penalties in the majority of countries are also usually less severe compared to other "serious crimes." The perception is that counterfeiting and piracy are associated only with small-scale operations targeting luxury goods or clothing; in other words, counterfeiting and piracy do not generate sufficient concern to warrant incisive action by law enforcement agencies.

Illegal trading, which is both highly profitable and low-risk, is certainly appealing to organized crime. The activity itself is also logistically simple. In many sectors, criminals can produce fake goods with relatively small upfront capital investments due to the widespread availability of printing and other technologies that allow for high quality, inexpensive reproduction of products. In addition, criminals are able to exploit existing distribution networks to manage other types of illegal trade. The combination of these characteristics ensures that IP crime is a low-risk, high-reward opportunity that modern organized crime is sure to exploit. In 1998, former IMF Managing Director Mr. Michael Camdessus estimated the amount of money laundering to be between 2 and 5 % of the world's GDP.²³

The revenues of organized criminal groups are increasing. On a global scale, according to United Nations estimates, the total amount of criminal proceeds in 2009 was approximately USD 2.1 trillion, or 3.6% of global GDP.²⁴ There are no general estimates of the size of criminal profits in the European Union, but there are estimates for Member States.²⁵ For instance, in Italy, organized annual crime revenues were an estimated €150 billion in 2011. In the United Kingdom in 2006, organized criminal revenue was estimated at £15 billion. Another aspect of the problem is the relatively modest recovery amounts compared to the huge revenues generated by these illegal activities. For example, in 2009 confiscated assets amounted to €185 million in France; £154 million in the United Kingdom; €50 million in the Netherlands; and €281 million in Germany.

A transnational approach is needed to address the transnational problem of IP crime

Organized criminal activities, such as those linked to counterfeiting and piracy, are often transnational in nature: The assets of criminal groups are increasingly invested in countries other than those where the crimes take place. For this reason, counterfeiting and piracy require a coordinated action at bi-lateral, multi-lateral and international levels, involving cooperation and collaboration among law enforcement, Customs, the judiciary, and other stakeholders across borders.

For instance, in 2010, Europol and Eurojust supported an operation against a criminal organization responsible for the trafficking of counterfeit products originating in China.²⁶ The goods were imported in Italy through the port of Naples, and then redistributed all over the world. To minimize the risks of being detected, counterfeit labels of well-known brands were delivered separately and later affixed by the criminal gang to the unmarked counterfeit versions of the product. Once ready, the products were offered through door-to-door promotion. The profitability was extremely high. It was estimated that a team of two vendors could generate €250,000 after only two to three months of illegal activity.

The Naples criminal organization had connections all over the world. The Naples' Prosecutor's Office investigating this illicit trafficking discovered a widespread network of import-export of counterfeit goods. Close cooperation was established between the law enforcement agencies of the Czech Republic, Germany, France, Sweden, Spain, and the United Kingdom, leading to the arrest of 11 individuals and the seizure of materials and assets whose value exceeded €11 million. This action was part of a larger criminal investigation that had been running for more than two years; it had already led to the arrest of 60 individuals and the seizure of more than 800 tons of counterfeit goods, with an estimated value exceeding €12 million.

Another operation conducted in 2009 clearly shows the transnationality of the crime as well as the huge profits attainable and the exploitation of illegal immigrants in manufacturing sites. The operation was coordinated by the Italian Guardia di Finanza — with the support of Europol, Eurojust and Interpol — in close cooperation with law enforcement and judicial authorities of several countries: Austria, Belgium, France, Germany, Italy, Luxembourg, the Netherlands,

San Marino, and Spain. A criminal network linked to Chinese, Turkish, and Italian syndicates was discovered to be at the center of a production/distribution network of counterfeit clothing. Originating in Italy and Turkey, the network distributed goods throughout Europe.

The evidence collected led to the discovery of a series of connections among several transnational criminal groups operating in Belarus, Canada, China, Israel, Italy, Mauritius, San Marino, and Turkey. These groups were also involved in other crimes and were exploiting illegal immigrants in the production centers of counterfeit products. As a result of the investigations, 12 individuals were arrested in Italy and France; 16 illicit factories were dismantled in Italy; and 3 million counterfeit items were seized in Italy, Germany, and France, affecting more than 10 different brands and representing a value of more than €150 million.²⁷

Chapter 2: Proceeds of Crime laws—a deterrent tool

It is clear that well-financed, organized criminal networks are increasingly involved in the trade of counterfeit and pirated goods. Furthermore, these networks are collecting significant profits from this activity. While a country's laws and regulations to protect intellectual property rights are at the core of stopping this illicit trade, law enforcement officials in a number of countries have started to apply "Proceeds of Crime (POC)" laws as another deterrent in the fight against counterfeiting and piracy.

In most cases, such laws were written to deal with other organized crime activities, such as drug trafficking; however, the basic principle behind these laws — "follow the money" — applies equally to the trade in fakes. The "follow the money" principle means that criminal networks are dealing in the collection, banking, storage and transfer of large sums of money in conducting their businesses. At some point, these transactions generally leave a paper trail, which allows law enforcement to track the funds back to one or more individuals in the network. POC laws allow for the confiscation of the funds used for criminal activities.

In order to be effective, law enforcement and judicial authorities have to be able to trace, freeze, manage, and confiscate these proceeds of crime, a process that requires institutional setup and adequate financial and human resources.

The benefit of confiscating the assets from the criminals is that it undermines the "commercial" motive of the crime, reducing profits and preventing them from being reinvested. In this way, confiscation prevents the criminal organization from further fueling its illegal activities and from laundering the proceeds of such criminal activities into legitimate businesses.

These confiscated assets then can be used for further enforcement resources and/or for other social programs. At the same time, depriving criminals of their assets also attacks the prestige of a criminal group and undermines its grip over the given territory. For these reasons, the fight against organized crime through the confiscation of goods and assets has been a key strategy of several countries, such as Italy, for over 30 years. Similarly, other Governments have put in place mechanisms to seize criminal assets, recognizing the role these actions can play in the fight against organized crime.

Unfortunately, these types of laws have not been implemented in most countries. Even where laws do exist, law enforcement and judicial systems have not been wholly effective at depriving criminals of their wealth, especially in counterfeiting and piracy cases. Quite simply, laws either do not exist or do not work well, affording sufficient time for clever criminals to reclaim their wealth from the grasp of the courts. In many countries, law enforcement institutions and prosecution offices do not apply the laws because they do not fully recognize the role of organized crime in counterfeiting and piracy cases.

Follow the money trail

In many jurisdictions, one of the main barriers to effective law enforcement against IP crime is the lack of deterrent sentencing by the courts when infringers are brought to justice. In the UK, for example, less than half of the maximum 10-year sentence is the norm. Many repeat offenders receive a fine and a suspended sentence, or are given a community service order. Against this background, and given that the main motive for organized crime is financial gain, confiscation of proceeds of crime has a significant deterrent effect. Confiscation is, therefore, a key weapon for disrupting the activities of organized criminal groups: It deprives them of the benefits gained from criminal conduct, and prevents the re-investment of those proceeds in further criminal activities. Moreover, as a matter of criminal justice policy, criminals are shown that in a fair and just society, crime is not rewarded by profit — or more simply, “crime does not pay.”

Confiscation applies in principle to all crimes (or at least to most criminal activities in most countries). In practice, however, it is more frequently applied to serious offenses and those involving organized crime. The need for a response on a broad front to deal with organized crime was recognized by the US President’s Commission on Organized Crime as long ago as 1986.²⁸ It reported that to be successful, an attack on organized crime in our mainstream economy cannot rely solely on the enforcement of federal criminal laws but must also be aimed at the economic base of organized crime. The Commission on Organized Crime suggested that such strategy must be based upon intervention measures as broad based as the nature of the threat posed by organized crime. A strategy in this area should also rely upon civil and regulatory measures tailored to the specific problems confronted.²⁹

As mentioned above, organized crime has shown a considerable ability to adapt to current conditions, taking advantage of technologies and trends in law enforcement and policy. Sometimes even more than Governments and private enterprises, organized criminals have taken full advantage of the opportunities that arose from globalization, the fall of sovereign boundaries, and the establishment of economic and trade communities, such as the creation of the European Union.

Criminals trans-nationalized their activities and increased their spheres of action, combining illegal activities and re-investment of capital in a vicious and inseparable circle. Even during this progressive adaptation, organized crime maintained some elements of continuity:

- the pursuit of profit maximization, regardless of its derivation from licit or illicit activities;
- the use of territorial control to reassert its power; and
- its influence and its exclusivity of action.

Attacking the assets of criminal organizations, including the wide range of assets into which criminal organizations reinvested illicit funds, becomes a major element in the strategy aimed at combating organized crime. Hitting criminals from this side means undermining an element that is vital to both the criminal group’s operations and its ability to assert its prestige and territorial control.

Evolution of POC legislation

Proceeds Of Crime (POC) legislation, first introduced to deal with drug trafficking offenses, has been broadened to include the range of crimes usually perpetrated by criminal syndicates, such as money laundering, people and arms trafficking, terrorism, vice, and blackmail. More recently, a number of POC laws have included IP crime. If making money is the primary driver for counterfeiters and pirates, then confiscating illegally gained revenues emerges as a natural solution.

Indeed in some national jurisdictions, POC legislation has proven to be an effective legal instrument to fight organized crime. For example, in the United Kingdom, the Proceeds of Crime Act of 2002 continues to ensure that IP criminals do not profit from their illegal activities, including counterfeiting and piracy. According to the UK IP Crime Group Annual Report 2010-2011,³⁰ the Joint Asset Recovery Database indicates that cash forfeiture orders and confiscation orders for fraudulent activities, including IP crime, more than doubled in 2010/11 reaching £21.5 million. The London Borough of Enfield Trading Standards Department also recorded one of the largest POC confiscations in May 2010 when it obtained an order valued at £11 million. According to the Stolen Asset Recovery (STAR) Initiative by the World Bank and the United Nations Office on Drugs and Crime, “International recoveries to date, calculated by STAR on the basis of the major reported judgments, amount to a mere 4.9 billion USD over a fifteen year period. This is only a fraction of the amount lost to developing countries through corruption, conservatively estimated in the range of 20 to 40 billion USD a year.”³¹

At the international level, the importance of proceeds of crime legislation has been widely acknowledged. Over the past two decades, the international community has developed a framework of international agreements and standards to address issues related to confiscation of proceeds of crime that are instrumental in building robust asset recovery regimes. The wide adoption of these instruments is a clear sign of the acknowledgment of the important role played by sound POC legislations in countering serious crimes, such as organized crime activities. These international instruments, *inter alia*, include:

- United Nations Convention against Transnational Organized Crime (UNTOC);
- The revised Financial Action Task Force (FATF)³² International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation;
- Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198);
- United Nations Convention against Corruption (UNCAC).

The current international legal framework outlines some of the best practices that will be analyzed later in this report. The main features are summarized below.

Articles 12-14 of the United Nations Convention against Transnational Organized Crime (UNTOC) and Article 31 of the United Nations Convention against Corruption (UNCAC) establish the measures on asset confiscation that parties to the Conventions are expected to take to prevent profiting from crime. It was the UNCAC, however, that outlined detailed regulations on asset recovery issues for the first time. Art. 21 encourages states to put in place measures that would

criminalize illicit enrichment, defined as “a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.” The prosecutor is not required to demonstrate the illegal origin of the property. Rather, the illegal origin is taken on the basis of a *prima facie* standard, which — unless rebutted — would be taken as proof. The public official’s defense lies in explaining the accumulation of property from legal sources.

The UNTOC follows a similar approach. Art 12(7) asks State parties to consider “requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to forfeiture.” This approach has been applied in the asset recovery context.

The Convention against Corruption includes substantive provisions that outline specific measures and mechanisms for cooperation to facilitate the repatriation of assets derived from offenses covered by the UNCAC to their country of origin. One of the basic elements that differentiates the UNCAC from the UNTOC is the regulation of the return and disposal of assets.

While the UNTOC foresees the absolute discretion of the confiscating State party as to the ways of disposal of the confiscated proceeds of crime or property (Article 14), the UNCAC imposes the obligation for States parties to adopt such legislative and other measures that will enable their competent authorities, when acting on a request made by another State Party, to return confiscated property to the requesting State Party, depending on how closely the assets are linked to it in the first place (Article 57).

The advantages and utility of POC legislation as a means of fighting IP crime

As stated above, financial gain stands at the heart of organized crime, and the confiscation of the proceeds of crime is an important means of striking at this motivation. Targeting the top management of criminal organizations illustrates to society that nobody should benefit from criminal activities. It also prevents the reinvestment of criminal profits to other crimes. The added value of the POC legislation as a tool in tackling IP crime lies in the following areas:

1. *Deter criminality by affecting the balance of risk and reward.* The principal objective of the POC legislation is to reduce the profitability of crime by depriving wrongdoers of the profits, which they have made from their illicit activities, by going after their money. Depriving criminals of their illicit profits can have a much greater punitive effect than imprisonment. This is certainly the case with counterfeiting and piracy, where the rewards from criminality considerably outweigh the risks, given the fairly minor penalties that are currently imposed by enforcement authorities.
2. *Disrupt and prevent funding of further IP and other forms of crime.* POC laws prevent the reinvestment of illicit profits in further criminal activity, including the development of new markets for counterfeiting and piracy, and the establishment of sophisticated networks for distributing fake products. POC legislation prevents the financing not only of illegal trading activities, such as smuggling contraband, arms and illegal immigrants, but also the use of illicit profits for the corruption of public officials, particularly those involved in law enforcement.

3. *Re-use the confiscated proceeds for crime prevention initiatives or social purposes.* An important aspect of some POC regimes is that the confiscated proceeds can be distributed among the enforcement authorities, thereby defraying the expense of criminal enforcement. For example, in the UK, confiscated proceeds are shared between the police, Trading Standards Officers, and the state. In some other jurisdictions like that of Italy, the confiscated assets are directly put to social purposes (e.g. health care or education), and in some others, they are used to fund social benefits.
4. *Compensate the society and protect the legitimate IP businesses.* An important incidental effect of POC laws in the context of counterfeiting and piracy is that they compensate society and taxpayers for economic losses that have been sustained. They also deter a form of criminality that has a considerable economic impact on legitimate businesses. According to the European Commission, in 2011 alone, over 144 million articles “suspected of infringing intellectual property rights” were confiscated within the EU for a total value of €1,2 billion.³³
5. *Raise public confidence in the financial and criminal justice system.* The use of the financial system by counterfeiters and pirates to launder their profits also has the potential to undermine individual financial institutions. Unchecked piracy and counterfeiting and associated money laundering may engender contempt for the law, undermining public confidence in the legal and banking systems. Such unbridled activity may, in turn, promote further economic crimes such as fraud, exchange control violations, and tax evasion. Against this background, POC legislation helps enhance the public sentiment that financial and criminal justice systems function under the rule of law principle.

Chapter 3: What are POC laws?

Effective POC laws cover the process of identifying, tracing, freezing or seizing, confiscating, and returning proceeds of crime to its victims, enforcement agencies, or the State. This comprehensive process is called “assets recovery”³⁴ as established by the UN Convention against Corruption,³⁵ the first international legal instrument to specifically cover such a whole process. Later, legal texts of the Council of Europe³⁶ and the European Union³⁷ built on this framework and extended the term for recovering proceeds from all types of crime. The asset recovery process can be divided into three phases:

1. **Investigative phase.** This includes intelligence gathering and formal investigations aimed at identifying and tracing assets in any form that are not only direct proceeds from crime, but are also related in any way to the offender. Enforcement agencies should be able to expediently identify and trace such assets. This phase involves law enforcement investigations (usually under the coordination of a prosecutor) and requires substantial financial investigation skills.
2. **Judicial phase.** After criminal assets are located in one or more countries, judicial procedures must first freeze or seize the assets and then later confiscate them. It is in this phase that the defendant is on trial and can be convicted or acquitted. The court makes the decision regarding confiscation. Following the freezing (for bank accounts and real property) or seizure (for other moveable assets), assets should be properly managed between the time they are frozen and the time a confiscation order is issued, so their value is maintained.
3. **Disposal phase.** After a court issues a confiscation order, making it legally possible to recover criminal assets, the seized and confiscated property is, in principle, disposed of by the State, which may sell them or re-use them as appropriate.

There are **two types** of POC legislation:

1. **Conviction-based confiscation** laws treat confiscation as part of the *criminal* process and require the institution of a criminal action as a pre-requisite for the restraint of property and a criminal conviction as a pre-requisite for the confiscation of the proceeds of crime.
2. **Non-Conviction based confiscation** laws (referred to as “civil forfeiture” in some jurisdictions),³⁸ treat the issue of confiscation separately from the issue of criminal penalty. Such laws enable States to recover illegally obtained assets from the offender by means of a direct action against his or her property without the requirement of a criminal conviction. The prosecutor has still to prove within the balance of probabilities that the offender’s assets are either the proceeds of crime or represent property used to commit a crime, i.e., the so-called *instrumentalities* of the crime.³⁹

Features of the two types of POC regimes: criminal and civil

Both criminal and civil proceeds of crime laws share the same objective, namely the confiscation by the State of the proceeds of crime. Both share common, two-fold rationales. First, those who commit unlawful activity should not be allowed to profit from their crimes. Proceeds should be confiscated and used to compensate the victim, whether it is the State or an individual. Second, unlawful activity should be deterred; removing the economic gain from crime discourages the criminal conduct. Furthermore, confiscation of assets ensures that such assets will not be used for further criminal purposes.

Where conviction and non-conviction based confiscation systems differ is in the procedure used to confiscate assets.

Conviction-based confiscation regime or criminal conviction

The main feature of the conviction-based confiscation regime⁴⁰ is that of its criminal nature. Under POC legislation, confiscation regimes can be part of the sentencing procedure in criminal cases. With the exception of France⁴¹ — where confiscation is a penalty — confiscation is considered not to be an independent sanction, but incidental to criminal actions. A criminal conviction order is imposed as part of the sentence in a criminal trial, ordering the convicted defendant to disgorge the proceeds of crime, or property he or she used to commit the offense. Conviction-based or criminal conviction confiscation is an *in personam* order, an action against the person. This is why it requires a criminal trial and conviction, which is often part of the sentencing process.

With respect to burden of proof, the requirement of a criminal conviction means that the prosecutor must first establish guilt “beyond a reasonable doubt” in criminal proceedings. Conviction-based confiscation laws have been criticized as securing only a minuscule proportion, suggested as less than one percent of the billions appropriated by criminals.⁴² The main reason for this shortfall is that convictions are difficult to secure against the heads of criminal enterprises, as they are often able to distance themselves from the underlying criminal acts and to mask the origins of their assets.

Non-conviction based confiscation regime⁴³

POC laws have evolved over time, going from laws that allow only the confiscation of property involved in a criminal offense to laws that permit the confiscation of any property, upon an adequate showing. In some common law countries, proceeds can be confiscated in civil proceedings, which can be independent of, or parallel to, criminal proceedings. In these countries, non-conviction based confiscation is also known as “civil forfeiture”⁴⁴ or “civil recovery.”⁴⁵

The main feature of the non-conviction based confiscation regime is that it does not require criminal trial or conviction, only the confiscation proceedings. The objective is to recover the proceeds of the crime and the property used to acquire them. It is thus an *in rem* confiscation because the action is brought against the assets themselves and not against an individual. The Government is the plaintiff, the property is the defendant, and the persons objecting to the confiscation, namely the owner of the property, are third parties called “claimants” who have the right to defend the property.

Recommendation number 4 of the Forty Recommendations of the Financial Action Task Force (FATF)⁴⁶ adopted in February 2012 summarizes the non-conviction based approach, as follows: “Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.”⁴⁷

Non-conviction based confiscation regimes have been introduced in a number of countries to deal with the deficiencies of criminal based laws and may be brought in the following circumstances:

- a prosecution fails due to insufficient evidence or the defendant has been acquitted;
- the defendant is not within the jurisdiction or has died and is therefore beyond prosecution;
- a criminal defendant was convicted, but the confiscation hearing failed;
- the owner of the property is uncertain.⁴⁸

With advancements in technology and globalization, individuals organizing or running counterfeiting and piracy operations can distance themselves from the individual criminal acts, thereby evading conviction and placing their profits beyond the reach of conviction-based criminal laws. Thus, in many jurisdictions, non-conviction based confiscation can be established on a lower standard of proof — that property is the proceeds of crime — than the “beyond reasonable doubt” required for a criminal conviction. This lower standard eases the burden on the government and means that it may be possible to obtain a confiscation order when there is insufficient evidence to support a criminal conviction.

In Australia, Ireland, Italy, and the UK, the relaxation of the standard of proof is supplemented by a reversal of the burden of proof in counterfeiting and piracy cases, requiring, *where adequate evidence is provided*, the defendant to prove the legitimacy of the sources of property, rather than requiring the prosecution to show that the property was obtained illegally.

The trends toward non-conviction based confiscation and the reversal of the burden of proof

While the first POC laws required criminal conviction as a precondition for confiscation, they have increasingly been supplemented by stand-alone civil proceedings as a means of recovering the proceeds of crime. International and regional organizations have in recent years increasingly encouraged national legislators to amend their law. Using non-conviction based confiscation and civil proceedings is a much more expeditious and consequently powerful legal tool to reach the underlying aim of depriving criminals of the proceeds of their crime.⁴⁹ Such practice is encouraged in multilateral treaties and by international standard setters (as in, for example, Article 54(1)(c) of the UNCAC).

This type of confiscation has already been incorporated by a number of jurisdictions into their POC legislation.⁵⁰ As mentioned, the trend towards non-conviction based procedures was prompted by the nature of organized crime, where the criminals use their resources to distance themselves from the crime and mask the criminal origin of their assets.⁵¹ Thus, for example, in Australia, the Law Reform Commission recommended “the need for wider and more intrusive confiscatory reach to counter increasingly well-organized and sophisticated criminal activity,”⁵² which was reflected in the Australian Proceeds of Crime Act of 2002.

There have been some who criticize the introduction of non-conviction based regimes as “a troubling loss of faith in criminal law.”⁵³ And objections have been raised in relation to the principles of fair trial and right of defence, presumption of innocence, legality and proportionality of criminal offences and penalties, and right to property.⁵⁴ In most jurisdictions, however, great care has been taken to protect civil liberties and the rights of the accused (and third parties) in all these particulars. It is of course necessary to strike the proper balance between the responsibility of the State to deprive criminals of assets illicitly obtained, and the obligation to ensure that human rights and civil liberties of the persons involved.⁵⁵ However, recent decisions suggest a fair balance can and must be struck.

According to the jurisprudence of the European Court of Human Rights (ECtHR) and the Charter of Fundamental Rights of the European Union, fundamental rights such as the right to property are not absolute: they can legitimately be subject to restrictions provided these restrictions are provided for by law and — subject to the principle of proportionality — necessarily and genuinely meet objectives of general interest or the need to protect the rights and freedoms of others (i.e. in the prevention of organized crime).⁵⁶

In Europe, the proportionality of non-conviction based schemes has been tested in a number of jurisdictions. In *Gilligan v. The Criminal Assets Bureau*,⁵⁷ the Irish Supreme Court heard evidence of a new type of professional criminal who organized rather than committed crime and was thus immune to the ordinary procedures of investigation and prosecution. The Court concluded that, as a matter of proportionality, the legislature was justified in enacting non-conviction based confiscation legislation.

In another case,⁵⁸ an application of the UK civil confiscation regime was found not to violate the ECHR. In this specific case, the UK civil confiscation regime was upheld and considered more generally targeted at recovering criminal assets that did not lawfully belong to the applicant. Similarly, in South Africa, the High Court accepted that introduction of non-conviction based confiscation legislation in the country was justified on the basis that “its community fabric was in danger of being torn asunder by the prevalence of crime.”⁵⁹

The reasoning first adopted in *Gilligan* is also reflected in several national non-conviction based procedures that involve the confiscation of assets. Here, the European Court of Human Rights (ECtHR) upheld non-conviction based confiscation as long as it was carried out proportionally and with adequate safeguards in place for the person affected. For example, the ECtHR, in assessing the compliance of the Italian non-conviction based regime with the Human Rights Convention in *Raimondo v. Italy*,⁶⁰ acknowledged the difficulties encountered by the Italian government in the fight against the Mafia. It concluded that the use of the non-conviction based confiscation

regime to block movements of suspect capital was “an effective and necessary weapon against this cancer.”⁶¹ The European Court requested, though, that effective procedural safeguards be in place to balance the presumption that an asset is derived from criminal activities. In the case *Arcuri v. Italy*,⁶² the Court established that “the proceedings in the Italian courts afforded the applicants a reasonable opportunity of putting their case to the responsible authorities,” thus acknowledging the existence of effective judicial guarantees for the defendant.

This recognition by the ECtHR that non-conviction based confiscation of assets is oftentimes proportional has resulted in the courts reversing the burden of proof in trademark counterfeiting cases requiring defendants to establish their reasonable belief of the non-infringing nature of the goods traded by them. Thus, in *Sliney v. London Borough of Havering*,⁶³ the UK Court of Criminal Appeal, perceiving a “very strong public interest”, reversed the burden of proof on the defendant. This decision was heavily influenced by Department of Trade and Industry’s estimate in December 2001 “that counterfeiting or intellectual property crime generally was estimated to cost the UK economy some £9 billion per year and was responsible for prospective job losses in legitimate businesses of over 4,000 people.”

The House of Lords also followed this reasoning in *Regina v. Johnstone*.⁶⁴ It observed that counterfeiting was “a serious contemporary problem” with “adverse economic effects on genuine trade” [and] ... “adverse effects on consumers.”⁶⁵ The House of Lords referred to the European Commission’s characterization of counterfeiting as a “widespread phenomenon with a global impact.” In its Green Paper, *Combating Counterfeiting and Piracy in the Single Market*, the Commission calls for “urgent steps to combat counterfeiting and piracy,” concluding that the “protection of consumers and honest manufacturers and traders from counterfeiting is an important policy consideration.”⁶⁶

It follows from these judgments that national non-conviction based procedures are also likely to involve reversals of the burden of proof. Where these reversals are applied proportionately and adequately, such procedures may result in a confiscation of goods that is still fully compliant with fundamental rights. This said, it should be reiterated that according to the jurisprudence of the ECtHR, the existence of effective legal remedies is a pre-condition to ensure that fundamental rights are respected. Equally, under the Charter of Fundamental Rights, it is necessary that national legislation itself contains sufficient procedural safeguards and remedies.

Chapter 4: Model provisions of effective Proceeds of Crime legislation

Given value of the further application of POC legislation to counterfeiting and piracy, and recognizing that not all countries have POC laws or have not evolved POC laws to encompass these crimes, this report suggests a set of best practices provisions that could serve as model provisions for jurisdictions to design modern and effective POC regime applied to counterfeiting and piracy. To do so, the report examines the POC legislation of four countries — the United Kingdom, Australia, Italy and Switzerland — belonging to both common law and civil law jurisdictions. The analysis takes the following into consideration: (1) jurisdictions explicitly envisaging confiscation of proceeds of crime deriving from counterfeiting and piracy; and (2) jurisdictions with confiscation laws in place, but that do not have explicit provisions related to confiscation of proceeds of crime stemming from counterfeiting and piracy (as in the case of Switzerland). In all countries examined, the application of proceeds of crime legislation extends to the involvement of organized criminal activity in counterfeiting and piracy.

Some difficulties have been encountered in searching and analyzing official statistics related to the confiscation of assets deriving from counterfeiting and piracy in Italy and Switzerland. As different institutions and organizations collect data on the basis of their respective mandate, correlating statistics between IP crimes, organized crimes, and assets confiscation is difficult. For example, when the crime is considered as an organized criminal group offense, the statistics often do not provide the information regarding the specific criminal activities undertaken by the group, for instance whether it was counterfeiting or committing another crime.

Case study 1: The UK Proceeds of Crime Act

The impetus for the introduction of confiscation legislation in the UK stems from the outrage expressed at a ruling by the House of Lords in a 1981 case: The Misuse of Drugs Act 1971 was not intended to permit the separation of criminals involved in drug trafficking from the profits from their crimes through confiscation.⁶⁷ As a result, the United Kingdom established the Proceeds of Crime Act (a.k.a. POCA) in 2002. Five features of UK POCA are of particular note for consideration as model provisions.⁶⁸

1. Introduction of the reversal of burden of proof concerning the legitimacy of assets

The provision of the reversal of burden of proof is a powerful and expeditious tool, and should be included in national POC legislation. Reversal of burden is a key element of the UK POCA legislation, which prescribes that the burden is on the defendant to show that the assets identified and seized in the confiscation proceedings *are not* the proceeds of criminal activity. For confiscation proceedings to apply, the court has to satisfy itself that the defendant has a “criminal lifestyle.” If it decides that he or she does have such a “criminal lifestyle,” it must decide either (i) whether he ‘has benefited from his general criminal conduct;’ or (ii) either ‘he has benefited from his particular criminal conduct.’ “Criminal lifestyle” is defined by s.75 (2) POCA in one of three ways:

- The individual has been convicted of at least one offense listed in Schedule 2 of POCA;
- The individual has been convicted of conduct forming part of a course of criminal activity and obtained at least £5,000 in benefit;
- The individual has committed an offense over a period of at least six months and has benefited from it.

Among the offenses listed in Schedule 2 of POCA are offenses concerned with copyright and trademark infringements. Specifically, cl.7 of the Schedule refers to an offense under the provisions of the Copyright, Designs and Patents Act of 1988, which prohibit the making or dealing in an article that infringes copyright; making or possessing an article designed or adapted for making a copy of a copyright work; making or dealing in an illicit recording; making or dealing in unauthorized decoders or an offense under section 92(1), (2) or (3) of the Trademarks Act 1994 concerning the unauthorized use of a trademark.

If the court decides that the defendant has a “criminal lifestyle,” it must make four assumptions for the purpose of deciding whether he or she has benefited from his “general criminal conduct” and the amount of the benefit:

- (1) any property transferred to the defendant within the period of six years, ending on the day that proceedings were commenced, was obtained as a result of the defendant’s criminal conduct;
- (2) any property held by the defendant at any time after the date of conviction was obtained as a result of the defendant’s general criminal conduct;
- (3) any expenditure incurred by the defendant within a period of six years ending with the date on which proceedings were commenced was met from property obtained as a result of the defendant’s general criminal conduct; and
- (4) any property obtained or assumed to have been obtained by the defendant was free of any other interest in the property.

The court must not make these assumptions where it would be incorrect, or it risks a serious injustice. Where the “criminal lifestyle” condition is satisfied, the burden of proof in respect to the origin of the property is then effectively reversed: the prosecution has met its evidential obligation, and the defendant has to prove on a balance of probabilities that a particular asset, transfer, or expenditure has a legitimate source.

2. Extension of the financial investigation powers beyond the proceeds of the subject offense

Another valuable provision extending from POCA is that the financial investigation is not limited to the proceeds of the offense subject to prosecution. POCA permits up to six years’ worth of assets to consider when calculating the criminal confiscation order or civil recovery order.⁶⁹ If the court decides that the defendant has benefited from the criminal conduct referred to it, the court must: (a) decide the recoverable amount; and (b) make a confiscation order requiring the repayment of that amount.

The following definitions are useful for drafting legislation: The “available amount” is the aggregate of all “free property” and “tainted gifts possessed by the defendant at the time the confiscation order is made.” “Free property” is that property held by the defendant, minus the total amount of obligations, which then have priority. “Tainted gifts” include any transfer of property for a consideration of significantly less than the value of the property transferred at the time of the transfer. The Act provides for restraint orders to prohibit any person dealing with any “realizable property.” “Realizable property” is any “free property” wherever situated, held by the defendant or by the recipient of a tainted gift.

3. Introduction of a non-conviction based confiscation regime, called “civil recovery” orders under the UK POCA legislation

As discussed above, non-conviction based confiscation has emerged as a useful, powerful and expeditious tool that sidesteps the criminal process. Part 5 of POCA introduces the possibility of “civil recovery”⁷⁰ proceedings against criminally derived assets. This provision allows the enforcement authority to recover, in civil proceedings, property or cash obtained through unlawful conduct, even if no criminal proceedings have been brought for an offense in connection with the property.

Recoverable property is defined as property obtained through unlawful conduct. Unlawful conduct is defined as conduct that is unlawful under the criminal law occurring in any part of the UK, or that occurs in another country and is unlawful in that country and in the UK. Proceedings for a recovery order may be taken by the enforcement authority against any person who the authority thinks holds recoverable property and on any other person who the authority thinks holds any associated property, which the authority wishes to be subject to a confiscation order.

Recoverable property includes also property that has been disposed of to another; property that has been obtained in its place; or any accrual in the value of property that has been mixed with property obtained through unlawful conduct. Property is not recoverable where the person who obtains it does so in good faith, for value, and without notice that it was recoverable property, or obtains it pursuant to a judgment in civil proceedings. If the court is satisfied that property is recoverable, the court must make a recovery order provided that it is “just and equitable to do so.” The court must decide on a “balance of probabilities” whether it has been proven that any alleged unlawful conduct has occurred, or that any person intended to use any cash in unlawful conduct. Such action is particularly effective, as noted before, in cases where either the standard of proof is not sufficient to meet the criminal benchmark standard of “beyond a reasonable doubt,” or whether the defendant in the case has either absconded or died.

4. Imposition of prison sentences if confiscation order is not paid by the accused

In order to strengthen the effectiveness of POC legislation and the consequent penalties, the UK POCA also includes enforcement penalties. If the accused cannot or does not pay the resulting confiscation order, he or she will go to prison (e.g., for five years) and will stay there for the full term with no remission. If, upon serving the sentence, the accused fails to pay, a second (or subsequent) prison term will be levied.

5. Allocation of the confiscated assets to fund crime prevention initiatives

An important aspect of some POC regimes is that the confiscated proceeds can be distributed among the enforcement authorities, thereby “reinvesting” in and defraying the expense of criminal enforcement. To the extent that law enforcement budgets are often stretched, this is an extremely valuable provision. Under POCA, the prosecuting authority can share in the confiscated assets, thereby funding its ongoing enforcement strategy and actions against organized crime, including counterfeiting and piracy. In the period April 2007–February 2008, the courts in England and Wales made 4,504 criminal confiscation orders in sums totalling £225.87 million. During this period, the largest confiscation order under POCA was for £2,744,985 by the Sheffield Crown Court in March 2008 against a trader in counterfeit designer goods. The trader was given six months to make the payment or face 10 years’ imprisonment. On March 21, 2007, a prominent criminal from Denbighshire, was ordered to pay £2,618,874. He had been convicted of conspiracy to supply counterfeit cigarettes. The defendant was found to have led “a lavish, millionaire lifestyle and owned cars including a Bentley Continental GT, a £1.75 million pound mansion and a portfolio of sixteen other properties around the area running into millions of pounds, all funded by his criminality.”

The following table present the total value of seizures in 2008/09 by UK Serious Organized Crime Agency.

	2006/07	2007/08	2008/09	2008/09
	£	£	£	% increase over previous year
Cash seizure	3.3m	8m	9.2m	15
Cash forfeiture	2.3m	2.9m	4.5m	55
Restraint orders⁷¹	27.2m	46.8m	128.8m	175
Confiscation orders⁷²	14.5m	11.6m	29.7m	156

UK success stories of confiscating proceeds of IP crime

- A confiscation order for £550,000 was made in February 2010 against a person who had sold, among other things, counterfeit Chanel sunglasses, Links of London jewelry, Jean-Paul Gautier perfumes and other branded goods.
- Following an extensive investigation by Rochdale Trading Standards Department into sales of “designer” goods on eBay, two defendants were convicted of selling counterfeits on the Internet and were ordered to pay back more than half a million pounds. Financial investigation had revealed that they had withdrawn more than £475,000 from their on-line banking accounts over an 18-month period.
- In March 2009, confiscation orders totalling over half a million pounds were made against a businessman who was involved in the import and supply of fake Viagra and other medicines. He was part of the UK distribution arm of a global counterfeiting ring that operated from China, India, and Pakistan, and extended to the Caribbean and USA. Over £1,500,000 worth of counterfeit medicines were seized. He was sentenced to four-and-a-half years in prison and given a confiscation order for £500,000, with six months to pay or face a further six months in jail.
- A confiscation order for £585,422 in relation to sales of counterfeit branded clothing was made in May 2008 against a market trader in Bedford. In July 2007, two confiscation orders worth £238,473 were made against a married couple convicted of selling counterfeit designer clothes and shoes at a market stall in the West Midlands.
- British Phonographic Industry (BPI) and the Federation Against Copyright Theft (FACT) secured a confiscation order worth £60,681 against a person responsible for counterfeiting DVD covers.
- In December 2008, a married couple in Bolton admitted charges relating to the sale and possession of counterfeit clothing, footwear, and sunglasses. The husband was jailed for a year and was ordered to pay all his available assets of £41,235 within six months. His wife received an eight-month sentence and was suspended for two years, with a supervision order. She was ordered to pay all her available assets of £105,000 within the next six months, or face 18 months imprisonment. They were also ordered to pay £12,000 each towards prosecution costs.
- A man was prosecuted for selling counterfeit clothing at markets in Powys. He was stripped of the vehicle he traded in and sentenced in April 2008 to six months imprisonment, suspended for two years with supervision, and 250 hours of unpaid work. Following this prosecution, he appeared before the Caernarfon Crown Court, which ordered that the benefit of his general criminal conduct from selling counterfeit goods amounted to £21,765.
- In January 2008, the Royal Borough of Windsor and Maidenhead Trading Standards Department prosecuted a married couple for selling counterfeit golf clubs, clothing, jewelry, and other items on an online auction site. They were each ordered to pay £18,316 within nine months, or face a default sentence of nine months.
- In March 2007, a confiscation order worth £191,000 was secured against a person who was convicted of eight counts of possessing and offering for sale 5,572 counterfeit garments bearing a number of well-known trademarks.
- In November 2007, a Civil Recovery Order for £60,000 was made against two students who sold counterfeit designer Tiffany jewelry and high-value designer handbags on the Internet auction site, eBay. Financial investigations revealed that between October 2004 and January 2006, some £90,000 was deposited into numerous accounts directly from online payment companies.

Case study 2: Unexplained wealth laws in Australia

The emergence of organized IP crime in Australia has been repeatedly acknowledged. In 2007, the Australian Crime Commission (ACC) stated the following: “While continuing to maintain a strong presence in traditional illicit markets, organized criminal groups will remain significant facilitators of a broad range of criminal activities in Australia. These include crime types as diverse as high-tech/computer crime, intellectual property crime and environmental crime. Organized criminal groups will expand their influence by increasingly exploiting opportunities and vulnerabilities presenting in the mainstream economy.”⁷³

In 2011, the ACC made this statement: “Counterfeit and pirated goods constitute an expanding crime market in Australia. The prevalence of counterfeit goods in Australia is likely to increase in the future, driven by transnational organized crime groups capable of producing counterfeit products on an industrial scale.”⁷⁴ Technological advances also permit organized crime groups to use sophisticated techniques, including advance fee fraud, card fraud and skimming and “virtual worlds.” In some cases, virtual worlds encompass a real-cash economy and real-money transactions, estimated at up to USD 2 billion annually. They have been linked to intellectual property crime and money laundering.⁷⁵ Thus, criminal exploitation in Australia includes financial sectors, high-tech crime and intellectual property crime.

Australia’s unexplained wealth laws: undermining serious and organized crime networks

Unexplained wealth laws represent a relatively new form of criminal assets confiscation. They require people who live beyond their apparent means to justify the legitimacy of their financial circumstances.⁷⁶ In essence, individuals who cannot account for the wealth they hold may be liable for forfeiture of those assets to the State.

Unexplained wealth provisions are valuable because they can play a significant role in countering the techniques organized criminals use to insulate themselves from more traditional law enforcement techniques, which are generally aimed at securing a prosecution.⁷⁷ Thus, unexplained wealth provisions represent an important new way to protect the community from the effects of organized crime. In cases where it is not possible to catch the leaders of organized crime through traditional techniques, unexplained wealth provisions offer a way to bring these figures down — to the benefit of the wider community.

In 2008, the Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) initiated an inquiry into legislative arrangements to outlaw serious and organized crime groups pursuant to paragraph 55(1)(b) of the *Australian Crime Commission Act 2002*. In 2009, the PJC-ACC delivered its report concluding “unexplained wealth provisions appear to offer significant benefits over other legislative means of combating serious and organized crime.”⁷⁸

In addition, the PJC-ACC noted that the wider use of unexplained wealth provisions was supported by a number of agencies, including the Australian Crime Commission and Australian Tax Office, the Australian Federal Police (AFP), and police in most jurisdictions. It was suggested to the PJC-ACC that laws of this nature, if applied successfully, remove the financial incentive to commit

organized crime. These laws can be more effective than proceeds of crime laws because they do not rely on prosecutors being able to link the wealth to a criminal offense.⁷⁹

Brief overview of Australian unexplained wealth laws

Unexplained wealth or similar laws currently exist in six Australian jurisdictions: Western Australia, the Northern Territory, New South Wales, Queensland, South Australia, and the Commonwealth. Of these, the Western Australian and Northern Territory schemes are the longest running, having been established in 2000 and 2003, respectively. Other schemes are more recent, having been established in 2009 or later. As a way of illustrating some examples of unexplained wealth provisions, this report focuses on three Australian jurisdictions: Western Australia, the Northern Territory, and the Commonwealth.

Western Australia and Northern Territory approaches

Probably the most far-reaching POC acts of legislation are the unexplained wealth laws of Western Australia (WA)⁸⁰ and of the Northern Territory of Australia (NT).⁸¹ WA introduced unexplained wealth provisions in 2000 in the Criminal Property Confiscation Act 2000 (WA), and the NT followed in 2003 with the Criminal Property Forfeiture Act 2002 (NT). The following three aspects of the WA and NT legislation are particularly useful and should be included in national POC legislation.⁸²

1. Unexplained wealth declarations and the reversal of the burden of proof

Regarding the unexplained wealth declarations, the WA and NT legislation provide the following:

- the possibility for the relevant Director of Public Prosecutions (DPP) to apply to the court for an unexplained wealth declaration against a person;
- the requirement that courts make an order (with minimal discretionary authority) “if it is more likely than not that the total value of the person’s wealth is greater than the value of the person’s lawfully acquired wealth;” and
- the reversal of the burden of proof in favour of the Crown, providing that “any property, service, advantage, or benefit that is a constituent of the respondent’s wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary.”⁸³

2. Comprehensive regime regarding police/prosecutorial investigative powers

Another valuable provision extending from the POC WA and NT legislation is that the legislation in both jurisdictions sets out the following processes whereby law enforcement and prosecutors can obtain information about criminal assets:

- the DPP or police may require a financial institution to provide information about the transactions and/or assets of a particular person;
- the DPP can apply to the courts for an order allowing the DPP to conduct an examination of a suspect individual, which can require a person to furnish the court with information and/or documents;

- the DPP can also obtain documents relating to assets or property by applying for a production order;
- the DPP can apply to the court for monitoring and suspension orders which require a financial institution to monitor or suspend a person's account, and provide that information to the police or DPP; and
- the police can detain a person if they have a reasonable suspicion that the person possesses property liable to confiscation under the Act, or documents identifying or determining the value of a person's unexplained wealth.

3. Provisional measures (freezing/seizure) for preserving assets pending confiscation

In order to strengthen the effectiveness of POC legislation, provisions in both WA and NT legislations ensure that property remains available for confiscation:

- the police have the power to seize property if they reasonably believe it was derived from or used in a crime; and
- both the police and the DPP have the power to apply to the courts for a restraining or freezing order, which prevents property or assets from being used for a period of time. It is a criminal offense to deal with property otherwise than is permitted by a restraining or freezing order.

In addition to unexplained wealth declarations, the court can issue the following:

- (a) Criminal Benefit Declarations that declare that certain property is, at least in part, more likely than not to have been derived from a specific forfeiture offense committed by the suspect, or that the property was more likely than not unlawfully acquired;
- (b) Crime-used Property Substitution Declarations, which are available when the actual property used in the crime is not available for seizure, e.g., when it is no longer in the suspect's possession. These Declarations enable the state to identify equivalent property that is in the suspect's possession as a substitute.

Though the WA and NT laws are broadly similar, there are a few differences between them, including court consideration of cooperation and constitutional requirements arising from the Northern Territory's status as a territory. For example, because the NT is a territory, its constitution stipulates that property cannot be forfeited unless it is done on "just terms;" as a result, the NT statute provides that property will not be automatically forfeited after the court has made an unexplained wealth declaration until the DPP has made an application for forfeiture to a competent court.

Making a forfeiture order is an additional safeguard built into the statute, requiring judicial review of the forfeiture order and providing an opportunity for amendment or revocation of an order if new evidence or facts come into existence. This provision does not exist in the WA statute, whereby after the court has made an unexplained wealth declaration, the property subject to an order is forfeited automatically.⁸⁴

The Commonwealth scheme

The Commonwealth of Australia enacted the Proceeds of Crime Act (PoCA) in 2002. The Commonwealth PoCA is a comprehensive legislation containing a range of conviction-based and non-conviction-based forfeiture schemes including literary proceeds, pecuniary penalties, and *in rem* forfeiture proceedings. The law was amended in 2010 to introduce unexplained wealth orders (UWO) with the Crimes Legislation Amendment (serious and Organized Crime) Act.

In 2011, the Parliamentary Joint Committee on Law Enforcement⁸⁵ (the Committee) initiated an inquiry into Commonwealth unexplained wealth legislation and arrangements. The Committee is of the view that, with appropriate legislative safeguards, unexplained wealth laws represent a reasonable and proportionate response to the threat of serious and organized crime in Australia.⁸⁶

In addition, the Committee noted, in its discussion paper released in 2009,⁸⁷ that the Commonwealth unexplained wealth provisions are “a reasoned and measured approach to the problem of organized crime.” In particular, the Committee noted that the provisions are civil provisions and that no presumptions of criminal guilt or innocence are involved. Furthermore, it pointed out that existing section 198 of the Proceeds of Crime Act 2002 provides that information obtained in an examination relating to a restraining order cannot be used as evidence in criminal proceedings against the person.

As a result, the Committee concluded that unexplained wealth laws are significant and effective tools that can prevent and deter crime, disrupt criminal enterprises, target the profit motive of organized criminal groups, and ensure that those benefiting from organized crime are captured.

The following aspects of the Commonwealth confiscation regime are of particular consideration.

1. The reversal of the burden of proof

The reversal of the burden of proof is a powerful tool and should be included in the national POC legislation. As with the WA and NT unexplained wealth laws, a key feature of the Commonwealth UWOs is that they place the burden of proof on the person whose property is the subject of the order. He or she is required to appear before a court and show evidence to satisfy the court that he or she lawfully acquired the property. If the person fails to satisfy the court, the court will issue an order asking the person to pay an amount of money equivalent to the unexplained wealth to the Commonwealth. All proceedings are civil in nature and the civil standard of proof — balance of probabilities — applies.⁸⁸

2. Criminal Assets Confiscation Taskforce

In order to boost the identification of assets that should be seized, and strengthen the pursuit of wealth collected by criminals at the expense of the community, the Commonwealth formed the Criminal Assets Confiscation Taskforce (CACT) in March 2011. This important administrative arrangement is designed to provide a more coordinated and integrated approach to identifying and removing the profits derived from organized criminal activity. The funds recovered from confiscation of criminal assets are deposited into the Confiscated Assets Account, which is managed by the Insolvency Trustee Service of Australia. Such funds can be used to benefit the community through crime prevention programs or other law enforcement initiatives, including local crime prevention, law enforcement, and drug treatment.⁸⁹

Case study 3: the Italian anti-mafia legislation

Introduction: legal protection against counterfeiting and piracy in Italy

Counterfeiting and piracy constitute serious social and economic problems in Italy, and therefore, have received increasing attention from the Italian government and law enforcement agencies. According to the official data from the Italian Customs Agency, between 2008 and 2011, law enforcement agencies carried out 71,000 seizures in Italy and confiscated 228 million counterfeit products for a total estimated value of €2.2 billion.⁹⁰ The growing involvement of organized crime groups in counterfeiting and piracy in Italy has been demonstrated in several court cases and by the Parliamentary Commission on the Phenomena of Counterfeiting and Piracy established in July 2010.⁹¹

With regards to the Italian legal framework, counterfeiting and piracy are regulated by Articles 473, 474 and 517 *ter* of the Penal Code. These provide for:

- Imprisonment between six months and three years and a fine of between €2,500 and €25,000 for infringement of registered marks.
- Imprisonment between one and four years, plus a fine of between €3,500 and €35,000 for infringement of patents, designs or models.
- Imprisonment up to two years and a fine of up to €20,000 for the importation, possession for business purposes, sale or putting into circulation of goods that bear counterfeit or altered marks or distinctive signs, or otherwise violate other IP rights.
- Imprisonment up to two years or a fine of up to €20,000 for selling or putting in circulation products which bear marks that may mislead the buyer as to the origin, provenance or quality.

In 2009, Law 99/2009 introduced a specific aggravating circumstance, which increases the prison term from two to six years (art. 474 *ter* P.C.) in cases where infringements were committed *en masse* or in a continuous and organized manner. A prison term of up to two years, plus a fine of up to €20,000, is also imposed for infringements of denominations of origin on agricultural foodstuffs (Article 517 *quarter* P.C.). Administrative sanctions also apply for legal persons, i.e., companies, that have benefited or own an interest in the commission of the counterfeiting offenses.

Administrative authorities are required to seize and destroy counterfeit and pirated goods within three months from the seizure in the case of “evident infringement of registered marks, designs and models or systematic and willful counterfeiting of IP rights” (Article 146 of the Code of Industrial Property). In cases of IPR infringement,⁹² police investigations can make use of extended investigation techniques, such as undercover operations, controlled deliveries and seizure measures. These measures can be ordered by the prosecutor and are subject to confirmation by the court.

An important element of the Italian legal frameworks in relation to IPR protection was introduced in 2009, specifically providing for the confiscation of assets from criminals involved in counterfeiting and IP crimes. Law 99/2009 inserted art. 474 *bis*, establishing mandatory confiscation not only for

goods used to commit the crime or goods that are objects of the IP crime, but also of those goods that are the products, price or profits of the crime, to whomever they belong. If the confiscation of such goods is not possible, the judge can order the confiscation of equivalent value.

According to practitioners,⁹³ Law 99/2009 greatly improved the anti-counterfeiting legal framework: “Since the new rules came into force in 2009, the quality of the investigations has improved, as demonstrated by the results obtained. The number of goods seized has significantly raised and we started to use special investigative techniques such as the ‘controlled delivery’ and the ‘undercover’ agents. The possibility to seize and later confiscate all the ‘tools’ used to commit the crime, not only the machinery, but also the premises where the illegal production was carried out, has proved to be a very good deterrent to avoid repeat crimes. It is now possible to seize the machinery, the premises, and the factories even when they are registered in third persons’ names if these people are not able to clearly demonstrate that they were not aware of what was going on in their commercial premises. This measure persuades people to be more careful when renting premises to unknown companies, and, at the same time, it is decreasing the economic wealth of the criminal because he is deprived of tools for which he has spent a great amount of money.”

Brief overview of the Italian POC legislation’s main features

Italy is a party to most international legal instruments related to asset recovery, having ratified several multilateral conventions adopted in the field by the United Nations, Council of Europe, and European Union. A comprehensive anti-money laundering system is also in place, initially set up in 1991, and later revised a number of times. Law enforcement agencies are provided with ample legal means to identify, trace, and seize criminal assets — and the statistics illustrate the efficiency of the system in place.⁹⁴ The justice and law enforcement aspects of the law are based on long-standing enforcement measures designed to cut down on the economic power of mafia-type criminal organizations.

Italy has one of the most aggressive approaches to criminal asset recovery in the EU thanks to its very comprehensive anti-Mafia legislation, which was recently consolidated into the so-called Anti-Mafia Code.⁹⁵ Italy also has been one of the first countries to have enforced unexplained wealth orders (UWO) measures to undermine the financial strength of organized crime groups and target the illicitly acquired profit from criminal enterprises.⁹⁶

The Italian confiscation regime basically consists of three approaches:

- Conviction-based confiscation of assets derived from all criminal offenses (art. 240 Penal Code);
- Confiscation of assets of convicted persons who cannot justify the origin of their assets, through the alleviation of the prosecutor’s burden of proof (extended confiscation);
- Confiscation of assets in possession of persons belonging to Mafia-type organizations⁹⁷ (non-conviction based confiscation).

With regards to organized crime, Italy has adopted a wide spectrum of measures to identify members of organized crime groups, prevent their illicit activities, deprive them of their illicit revenues, and allow the social re-use of confiscated assets for the benefit of local municipalities and communities affected by the presence of organized crime.

The legal definition of “criminal association of Mafia-type” (Art. 416 bis P.C.)⁹⁸ was introduced in the Penal Code in 1982, with the enactment of Law 646/1982 (known as Law Rognoni-La Torre). The Law was introduced to counter the rising threat posed by organized crime groups like the Sicilian Mafia, which had been responsible for the murder of Parliament member Pio La Torre.⁹⁹ According to this provision, prosecutors can prosecute an individual for association with a Mafia-type organization, even without a direct link between the individual and a specific criminal act. Moreover, the range of investigative and judicial tools enforceable towards persons suspected of belonging to mafia-type organizations has been widened through the introduction of the seizure and the confiscation of assets of suspicious provenance.

The application of these different confiscation regimes has often proven in practice to be difficult and cumbersome. Financial investigations required for the identification of the assets to be confiscated are also extremely complex and require highly specialized expertise. Nonetheless, over the past 30 years, confiscation has proven to be one of the most efficient instruments for protecting the legal economic system from the infiltration of illicit revenues and for combating organized crime groups. Considering Italy’s experience with organized crime, and the growing interest by these groups in counterfeiting and piracy, the Italian POC legal framework should be considered an effective tool to be employed against counterfeiting and piracy.

Below a summary of the main features of the Italian confiscation regime:

1. Classic conviction-based confiscation

Until the early 1980s, classic conviction-based confiscation was the only confiscation regime applicable by the Italian Penal Code (Art. 240 P.C.). It basically concerns the profit of crime, for instance, any economic advantage derived from a criminal offense. Classic confiscation requires the prosecutor to prove the link between the criminal behavior and the asset to be confiscated, and it is ordered within a criminal proceeding. The conviction is a prerequisite for the confiscation.¹⁰⁰ Given that a strict link is required between the crime and the assets to be confiscated, this regime is extremely difficult to apply in practice. Especially in organized crime cases, when the offender is part of a structured group involved in different, prolonged series of crimes — often across national borders — and whose profits are laundered into legal business, he or she can disguise the illicit provenance of the profits.

2. Extended confiscation

The extended confiscation regime was approved with the above-mentioned Rognoni-La Torre Law of 1982. This regime is based on the alleviation of the burden of proof for the prosecutor in cases of persons convicted for Mafia-type crimes unable to justify the licit origin of their assets, which seem disproportionate from their legitimate income. In practice, extended confiscation applies to assets at the disposal of persons convicted for Mafia-type crimes if the value of such assets is disproportionate from the legitimate income of their owners; and if the latter cannot demonstrate the relevant legitimate origin.

3. Non-conviction based confiscation as preventive measure in case of persons suspect of belonging to Mafia-type organization

The most important innovation introduced by the 1982 Rognoni-La Torre Law has been the preventive measure authorizing seizure and confiscation of property and assets of the suspects belonging to Mafia-type organizations.¹⁰¹ Suspected *mafiosi*, as socially dangerous persons, are subject to a set of personal and financial preventive measures, regardless of the proof of a direct link with the commission of a specific offense. Such measures “are non-conviction based, administrative in nature and are enforced outside criminal proceedings by law enforcement authorities under judicial supervision under looser rules of evidence.”¹⁰²

The suspicion that a person is a member of a Mafia-type organization is sufficient to impose preventive measures. In practice, if the person is unable to justify the lawful origin of his/her assets or property, the court is authorized to order confiscation of the assets, in whole or in part, directly or indirectly, under control of the suspect. The prosecutor does not need to prove commission of a specific offense, or link assets or proceeds to a specific crime, with a partial reversal of the burden of proof to the defendant.

Before enforcing such preventive measures, the police and prosecutor are required to carefully investigate the suspect. There is no minimum value of the assets to start the investigation, but extensive financial investigation takes place before a confiscation order can be issued. The source of income of suspected *mafiosi* is assessed in terms of lifestyle, financial means, property, and economic activities. The investigation extends to family members, including spouse and children, co-habitants, and any other legal entity, company, association, or organization to whom the suspect could have disposed of his/her assets. Third parties confiscation is thus allowed under these specific cases.¹⁰³

Two conditions are required: (i) Assets must be directly or indirectly at the disposal of the suspect; and (ii-a) discrepancy between the suspect’s wealth and his or her income or sufficient evidence that the assets are the proceeds of crime, or (ii-b) there is sufficient evidence that the assets are proceeds of crime or the use thereof.¹⁰⁴

The introduction of such measures has been controversial, but the Italian Constitutional Court and the European Court of Human Rights have upheld them.¹⁰⁵

4. Value confiscation

Value confiscation is also allowed under Italian law. This measure enables the confiscation of property with value that corresponds to the original assets, in cases where such assets could not be submitted to classic and/or extended confiscation for legal and/or other reasons. In practice, nonetheless, the determination of the value of the illicit financial profit derived from counterfeiting activities is often very difficult to assess, and therefore, such possibility is not as common as for other offenses.¹⁰⁶

5. Re-use of confiscated assets for social purpose

Seizure and confiscation of illegally acquired assets and their reutilization for social and other purposes are considered important deterrent measures to illegal behavior. Unlike the UK legislation described above, the Italian legislation envisages the reutilization of assets confiscated from organized crime for social purposes (including buildings, apartments, land but also businesses). The high symbolic value of the reutilization of these assets can contribute in a positive and effective way to garnering public support for breaking the vicious circle in territories with strong criminal traditions.

In 2010, Italy established the National Agency for the Administration and the Destination of Seized and Confiscated Goods from Organized Crime.¹⁰⁷ The Agency is responsible for the administration and allocation of assets seized from organized crime. According to experts¹⁰⁸ and practitioners, however, the Agency needs to be empowered to adequately address its responsibilities. The Agency is setting up a comprehensive database, named R.E.G.I.O., connected with the Ministry of Justice and other relevant institutions, enabling the Agency to monitor each seized and confiscated asset and supporting the management of seized and confiscated assets.¹⁰⁹ The Agency is also responsible for managing assets, subject to preventive seizure pending final confiscation, in line with the European Directive on the freezing and confiscation of proceeds of crime in the European Union.¹¹⁰

Confiscated assets can be transferred to local municipalities or non-profit organizations for the implementation of public interest projects, such as schools, assistance to young unemployed people, or other social purposes, such as cooperatives in the agricultural sector. For the purpose of this report, it is interesting to note that the Italian Government has mandated UNICRI to explore a model for the re-utilisation of property and assets confiscated from organized crime groups involved in counterfeiting and piracy.

Interviewed experts¹¹¹ highlight some of the issues and problems that need to be addressed:

1. Confiscated moneys that should be destined for social programs currently are sent by law to the Common Fund for Justice, which funds the overall justice sector.
2. Limited resources are available for costly financial investigations, such as phone interceptions.
3. Mortgages on the confiscated assets frequently turn out to be over-dimensional. Statistics from the Agency show that in nearly 50% of cases, there is a mortgage on the confiscated assets.¹¹² Banks delay the re-use of the confiscated assets until the mortgage is paid back. The State finds itself in the position of having to pay back a false mortgage, to be able to assign the asset for social re-use. In addition, there is no legislation punishing the bank that has issued an over-dimensional mortgage.

4. Less than 2% of the confiscated enterprises or companies survive after the confiscation procedure. Very often when the company is confiscated, banks immediately close existing bank loans, while client orders also expire. In addition, often the guardian *ad item* nominated by the court is not able to properly manage the company, as he or she usually is not assigned to the task "full time." Furthermore, a great number of confiscated businesses are actually "empty boxes," with no real business to conduct, or they have relied on organized crime clientele or violence in its daily operations.

ANBC statistics on seized and confiscated goods from organized crime

Year	Asset investigated	Assets ordered or confiscated	Final Orders	Disposals	Recovered Value	Social Re-use* (m. euro)
2001		435	575	249	38.9	18.2
2002		203	718	231	47.4	35.4
2003		211	477	329	89.9	71.5
2004		660	328	287	47.4	27.1
2005		1,044	400	190	51.8	32.1
2006	4,427	1,566	414	172	31.8	10.0
2004		660	328	287	47.4	27.1
2005		1,044	400	190	51.8	32.1
2006	4,427	1,566	414	172	31.8	10.0
2007	8,040	1,790	325	518	97.5	38.1
2008	6,173	949	319	804	165.5	80.8
2009	12,741	2,333	380	544	101.3	60.7
TOT.	62,551	11,067	6,207	4,074	797.1	447.4

Source: Commission Staff Working Paper, Accompanying document to the Proposal for a Directive of the European Parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union, March 2012, Data from the Italian Department of Justice (2010).

Successful cases of confiscation of proceeds of IP crime in Italy

Operation "Sopra le Mura" (Over the wall)

Operation "Sopra le Mura" was one of the most important investigations in the field of illicit reproduction of audio-visual materials. The investigation revealed the direct involvement of criminal organizations related to the Camorra in this field. It also showed how these criminals are able to generate vast profits from counterfeiting, which are then reinvested in further criminal activities such as drug trafficking, extortion, or purchase of arms.

Within this operation the investigators relied on the testimony of 13 pentiti (collaborators of justice, i.e. former Mafia members). The investigation brought charges against 60 persons belonging to the Camorra, 40 of whom were arrested. The total value of "confiscated disproportionate assets" exceeded €20 million and included the seizure of more than 3 millions posters, as well as 20 companies, 26 buildings and 148 vehicles.

Operation "Maestro" (Master)

An investigation conducted in 2009 in Calabria revealed an organized crime group involved in transnational trafficking of counterfeit clothing from China. The criminal group invested the proceeds of crime in the acquisition of a tourist resort and two restaurants near Rome. As a result of the investigation, 27 persons were arrested for participation in a Mafia-type organized crime group, and assets worth €50 million were seized, on the basis of the preventive confiscation regime.

Operation "Felix"

This operation, undertaken by the financial police of Naples, is the most important anti-counterfeiting case carried out in 2010. The investigation led to 65 arrest orders. More than 600,000 goods were seized, together with 5 illegal factories and several machineries for production of counterfeit products. Of particular importance was the preventive seizure aimed at the confiscation, as disproportionate assets of motorcycles, vehicles, boats, apartments and bank accounts all related to members of criminal groups involved. The total value of the seized goods was about €1 million.

Operation "Gomorra"

In 2010, the "Gomorra" case was successfully investigated, involving the trafficking of counterfeit electric products, such as electric generators and drill hammers, produced in China and distributed all over the world via Naples. The criminal group linked to the Camorra comprised more than 60 people, mainly Italian, with cells all over Europe. Financial investigations discovered that profits were laundered also via Australia and Iceland. As a result of the investigation, 67 suspects were arrested, 143 warehouses were searched, and more than 800 tones of counterfeit products were seized (valued at €12 million). In addition, assets exceeding €16 million were recovered.

Case study 4: POC legislation in Switzerland

The protection of intellectual property in Switzerland is regulated by a series of specific laws regarding trademark, designs, patents and copyrights.¹¹³ According to the Federal Act on Copyright and Neighboring Rights,¹¹⁴ the deliberate infringement of intellectual property rights can be punished with up to one year of imprisonment or a fine of up to CHF 1,080,000. If the violator acts commercially, the punishment is up to five years of imprisonment and a fine of up to CHF 1,080,000. Counterfeiting is punishable under Article 155 of the Swiss Criminal Code with imprisonment of up to three years or a fine, with the aggravating circumstance of acting for commercial gain, which increases the custodial sentence to up to five years.¹¹⁵ Objects that are illegal can also be confiscated and destroyed as part of the criminal procedure.¹¹⁶

As a major international financial center, Switzerland has enacted far-reaching instruments to combat money laundering, including comprehensive and advanced proceeds of crime laws and mutual legal assistance provisions.

While the Swiss legislation does not specifically mention counterfeiting and piracy among the crimes for which confiscation of criminal assets can be ordered, the existing Swiss POC regime still can be applied to counterfeiting and piracy cases if an organized crime group is involved.¹¹⁷

The Swiss law provides for both conviction and non-conviction based confiscation laws. Conviction-based confiscation is mandatory and supplements the penalty imposed by the court. Alternatively, the Criminal Code initiates an independent criminal confiscation proceeding against the property *in rem* in cases where the defendant cannot be identified or has absconded. Both confiscation proceedings *in rem* and *in personam* are conducted in criminal proceedings, as Swiss criminal law does not provide for forfeiture of criminal assets in civil proceedings.

The Swiss POC legislation applies to any crime that was committed either intentionally or negligently. Confiscation applies to assets that are the proceeds of crime and to those used to commit the offense. Assets that may be confiscated under Article 70 of the Criminal Code¹¹⁸ include: (1) the objects that have been used to perpetrate the crime; (2) the proceeds of the crime; or (3) the result of the crime.¹¹⁹ Also, Articles 305 *bis* and *ter* C.C. allow confiscation of indirect proceeds of a crime if they were laundered in Switzerland. Moreover, pursuant to Swiss law, confiscation is mandatory if the assets described above constitute an unjust enrichment or are dangerous for society.

Article 70 C.C., paragraph 1, states that “the judge shall order the confiscation of assets resulting from an offense or which were intended to induce or to reward the offender, provided that they do not have to be returned to the injured party to restore his or her rights.” The code includes a set of provisions to prevent assets being confiscated when acquired by a third party unknowing of their criminal origin.¹²⁰

The following summarizes the main aspects of the Swiss POC legislation.

1. Conviction-based confiscation

Conviction-based confiscation of the proceeds of criminal law is governed by Articles 69–72 of the Swiss Criminal Code. It is mandatory and, as mentioned above, supplementary to the primary penalty imposed by the court. The right to order confiscation of assets is subject to statutory limitation of seven years, unless the offense for which the defendant is accused has a longer prescriptive period, in which case the latter applies.

After the confiscation order is issued, the court is obliged to officially announce it, whereby interested *bona fide* third parties are given an opportunity to claim their interest in the property. This right expires five years following the official announcement.

2. Non-conviction based confiscation

The Criminal Code also provides for an independent criminal confiscation against the property *in rem* when the defendant cannot be identified or has absconded. Non-conviction based confiscation is covered by Articles 69 and 70b of the Criminal Code, which specifically discipline the confiscation of proceeds resulting from commission of an offense, as well as the instrumentalities of the crime and objects used or intended to be used for the commission of the offense.¹²¹

If the criminal proceeds or assets used to commit a crime have been transferred to a third party, the third party may be liable to confiscation or ordered to pay a compensation amount. Some limitations are designed to protect the interest of *bona fide* third parties. Confiscation is not permitted if a third party has acquired assets without knowing they were proceeds of a crime or assets used to commit a criminal offense, and provided that the third has paid a consideration of equal value or that confiscation would cause him to endure disproportionate hardship (Art. 70 para. 2 of C.C.).

3. Reversal of the burden of proof in case of criminal organizations

According to the Swiss legislation, the prosecutor is required to prove the link between the offense and the proceeds of crime. Article 72 of Criminal Code, however, provides for the reversal of the burden of proof in cases related to criminal organizations. When a person is suspected to be a member of — or to have supported — a criminal organization, he or she will bear the burden to prove the lawful origin of the assets at his or her disposal. Article 260 of the Criminal Code defines participation in a criminal organization: “Any person who participates in an organization, the structure and personal composition of which is kept secret and which pursues the objective of committing crimes of violence or securing a financial gain by criminal means, any person who supports such an organization in its criminal activities.” If a person is considered related to a criminal organization, then the prosecutor does not need to prove the link between the offense and the assets considered the proceeds of crime; rather, it is up to defendant to demonstrate the legal origin of such assets.¹²²

4. Value confiscation

The court also can order compensatory claims, or payment of an equivalent value, if the actual proceeds are no longer available; have been spent; or have been otherwise disposed of by the defendant. The defendant is obliged to pay the amount set forth by the judge. From the amount received, the court may fulfil the claims of injured or interested third parties (Article 71 C.C.).

5. Preventive measure – freezing and seizure of assets

To prevent dissipation, loss, or transfer of assets to third parties, the Swiss Criminal Procedure Code sets forth provisions governing the seizure of assets (Article 65 of the Criminal Code). The investigative judge and the federal prosecutor have the power to ask the court to issue an order to seize or freeze assets. For the court to issue a seizure order, serious circumstantial evidence must exist of a direct or indirect link between the assets for seizure and an offense. Seizure can be applied to movable and immovable property or property purchased with the proceeds derived from criminal activity, even if only part of the purchase was made with the proceeds of unlawful origin. The seizure order will remain in effect until the court makes a final decision regarding the property subject to seizure.

6. Principles of mutual assistance

The legal system of Switzerland provides mechanisms of international co-operation in criminal matters aimed at recovery of the proceeds of crime, including those stemming from counterfeiting and piracy.

In 2009, Switzerland ratified the United Nations Convention against Corruption (UNCAC). Since then, it has been committed to ensuring the efficient implementation of the Convention, particularly in dealing with the assets of politically exposed persons. Mutual legal assistance (MLA) procedures for asset recovery are set forth in the Federal Act on International Mutual Assistance in Criminal Matters (IMAC),¹²³ which enables competent authorities to seize proceeds of criminal acts such as corruption, money laundering, and other forms of organized crime. Counterfeiting and piracy are not among the crimes specifically mentioned in the legislation, but whenever criminal organizations are involved, such legislation can be applied.

According to IMAC, the Swiss authorities can, upon request, surrender assets to foreign authorities so they can be confiscated by a foreign court, or returned to the rightful owner when a final, executable order has been made by a criminal, civil or administrative court in the requesting state.¹²⁴ In exceptional cases, where the origin of the funds is obviously unlawful, Switzerland is empowered to return the funds to the foreign State without a final and executable order of confiscation. This happened in the well-known *Abacha* case, where the family of the former Nigerian dictator Abacha had deposited the majority of their proceeds in Switzerland, and was later sentenced to be part of a criminal organization.¹²⁵

Swiss authorities do not require a previous criminal conviction to start the mutual legal assistance procedure. Criminal judiciary cooperation, however, can be granted only when the requesting State is handling a criminal procedure, as criminal judiciary cooperation cannot be used for civil proceedings.¹²⁶ An indictment is not necessarily required, but the requesting party must demonstrate evidence of an on-going criminal investigation.¹²⁷ In addition, according to a recent ruling by the Federal Supreme Court, the applicable statute of limitation for POC forfeiture is that of the predicate offense under the law of the jurisdiction where that predicate offense took place.¹²⁸

The assets that can be returned include the proceeds of a crime, their equivalent value,¹²⁹ or contributions that served to instigate the offense or recompense the offender. While the Swiss Criminal Code generally allows for compensatory claims or a “money value judgment” when the criminal proceeds subject to forfeiture have been discarded, the Federal Supreme Court has held that it is not possible to return assets to a foreign jurisdiction based on a money value judgment, as there is no nexus between the crime and the assets.¹³⁰

When executing mutual assistance requests, competent authorities are bound by the principles of reciprocity, dual criminality, specialty, and proportionality.¹³¹ Swiss authorities will, as a rule, only grant the request if the requesting state guarantees reciprocity (IMAC Article 8). MLA requests are enforceable only if the offense described in the request is also punishable in Switzerland.¹³² For example, Swiss banking secrecy would not hinder a foreign request for extracts from Swiss bank accounts as evidence in a corruption case. Mutual assistance, on the other hand, would not be granted if the subject of the investigation or procedure is an act regarded by Switzerland as a political offense (e.g. political opinions, race, religion or nationality) or if the subject matter is a military offense (insubordination, desertion).¹³³ MLA requests will also be denied if the requesting country displays grave defects in the foreign procedure (such as human rights violations), in instances where the defendant was acquitted, or if the sentence was served either in Switzerland or in the state where the offense was committed (in accordance to the general principle “*ne bis in idem*”).¹³⁴

IMAC Art. 67(a) also allows for unsolicited assistance for the benefit of foreign authorities conducting a criminal investigation. Under Article 67(a), Swiss competent authority may spontaneously transmit information or evidence to a foreign prosecutorial authority that it has gathered in the course of its own investigation, when it determines that this transmittal is of a nature to permit the opening of a criminal proceeding or to facilitate a pending criminal proceeding. Furthermore, competent authorities are authorized to transmit information that is normally covered by secrecy (banking documents, for example) if it would enable the foreign State to present a request for mutual assistance to Switzerland.

Chapter 5: Creating an inventory of key legislative provisions and best practices

Based on the analysis of POC legislation and the actual or possible application of this legislation to IP crimes in the four selected countries, this report suggests best practice principles that provide useful examples for jurisdictions interested in strengthening their legal framework to deter counterfeiting and piracy. The recommendations fall into three categories: (1) legal framework to effectively implement POC legislation; (2) institutional framework to effectively administer POC legislation; and (3) international cooperation mechanisms.

1. Legal frameworks for effective implementation of asset tracing, freezing, and seizure and confiscation proceedings

a) Start with non-conviction based confiscation regimes¹³⁵

To ensure that confiscation regimes are enforced in the widest range of circumstances, jurisdictions are encouraged to implement, to the greatest possible extent, measures that would enable them to carry out confiscation without obtaining a criminal conviction (non-conviction based confiscation). Non-conviction based confiscation may be implemented in the context of criminal laws and proceedings, or, in some jurisdictions, outside of criminal proceedings. In those jurisdictions where a prosecutor may commence parallel civil and criminal forfeiture actions, the US Department of Justice's Manual on the prosecution of intellectual property crimes recommends that selecting the appropriate procedure should account for the strength of the evidence and the burden of proof.

Criminal confiscation requires, as noted before, a criminal conviction as a prerequisite and thus, has to be proved "beyond reasonable doubt." Non-conviction based confiscation (also known as "civil forfeiture" in some jurisdictions), as a confiscation *in rem*,¹³⁶ does not require a conviction and may be brought against any property derived from either a specific offense or from an illegal course of conduct. It is, therefore, not limited to property involved in the offense(s) of conviction.

At a minimum, a non-conviction based confiscation would apply when property is found, but a criminal conviction cannot be obtained because the perpetrator is dead (or dies before conviction); a fugitive;¹³⁷ absent from the jurisdiction; or unknown.

Non-conviction based confiscation would be useful in several other situations, for instance, in cases where:

- the property is found but a conviction could not be obtained for procedural or technical reasons;
- substantial evidence exists to establish that the proceeds were generated from a criminal activity, but there is insufficient evidence to meet the criminal burden of proof;
- a criminal investigation or prosecution is unrealistic or impossible;
- the perpetrator has been acquitted of the predicate offense because of insufficient evidence or a failure to meet the burden of proof;

- the property was generated from other or related criminal activity of the convicted person (e.g. extended confiscation);
- the perpetrator is immune from prosecution.¹³⁸

The non-conviction based confiscation by civil standards of proof¹³⁹ offers several advantages from the law enforcement and prosecution point of view. First, the proceedings can be separate from the criminal proceedings and, therefore, can be filed before, during, or after the criminal case. Second, non-conviction based confiscation applies both to civil and common-law jurisdictions, although operating with different modalities. Third, a non-conviction based confiscation case can be filed even if a criminal conviction is unattainable. Fourth, it is perceived to yield significant results at little cost.¹⁴⁰

For example, in the United States 80% of seizures for forfeiture are uncontested. Consequently, instituting the confiscation as an uncontested civil matter against the property — rather than as a criminal action — can save substantial time and effort. In 2006, the United States Department of Justice recovered USD 1.2 billion through asset forfeiture. 38% were uncontested civil cases (USD 456 million), 29% were contested civil cases (USD 348 million) and 33% were criminal cases (USD 400 million).¹⁴¹ These statistics represent a significant feature of counterfeiting and piracy cases where defendants caught in possession of large quantities of infringing product are not inclined to incur expenses for defending the indefensible.

b) Introduce reversal burden of proof as to the origin of the property

Measures reversing the burden of proof regarding the origin of the property are essential in any effective confiscation regime. Generally, the burden of proof requires an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such requirement is consistent with the principles of their domestic law. As examined before, the UK POCA legislation provides for provision on reversal of burden of proof. Where the “criminal lifestyle” is satisfied, the burden of proof with respect to the origin of property is then effectively reversed: the prosecution has met its evidential obligation. Then the defendant has to prove a legitimate source for a particular asset, transfer, or expenditure. Similar provisions exist in Italy and Switzerland.

c) Strengthen tracing and investigation powers

At the heart of POC legislation are the investigative powers, which are conferred upon the enforcement authorities. Appropriate procedures and legal frameworks must be in place to allow timely sharing of useful information. Mechanisms that allow for rapid access to high-quality information on property ownership and control should be built into the POC laws and regulations.

For a POC system to be effective, enforcement must have additional powers to identify, trace and freeze property, which subsequently may be confiscated. Laws permitting access to bank, financial, and commercial records are important to enable the identification of the flow of money, its source, and destination. Confiscation measures also may be integrated with laws conferring special investigative powers, such as covert operations, interception of communications, access to computer systems, and the discovery or impounding of documents to assist in the identification

and tracing of criminal proceeds. These investigation measures will be subject to the protection of the rights of *bona fide* third parties.

Article 7 of the 2005 Council of Europe Convention of Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism¹⁴² specified measures for signatory States to determine whether a natural or legal person is a holder or beneficiary owner of one or more accounts in any bank in their territories, and to obtain all details of identified accounts, including all transactions during specified periods. Banks may be obliged not to disclose the fact that investigations are underway.

A 2002 EU Council Recommendation dealing with the fight against organized crime¹⁴³ proposed simultaneous investigation with the purpose of uncovering any kind of criminal assets. In a counterfeiting and piracy investigation, this would require collaboration between the law enforcement bodies, IP offices, courts, and tax authorities. Italy, for example, follows this approach.

By way of example, the UK POCA provides a comprehensive regime of five investigation powers:

- i. A production order can be served on any person or institution, for example a financial institution, requiring the production of, or allowing access to material; this may include documents such as bank statements.
- ii. A search and seizure warrant can be issued to enable the appropriate person to enter and search the premises specified in the warrant, and to seize material that is likely to be of substantial value to the investigation where: (i) a production order has not been followed, and reasonable grounds exist for believing that the material specified in the production order is on the premises specified in the search and seizure warrant; (ii) if the material under investigation can be identified, but it is not practical to communicate with the person against whom a production order might be made, or with any person against whom an order to grant entry to premises might be made, or that the investigation might be seriously compromised unless immediate access to the material is secured; or (iii) there are reasonable grounds for believing that there is material on the premises that cannot be identified precisely enough for the purposes of a production order.
- iii. A customer information order compels a financial institution covered by the application to provide any “customer information” relating to the person specified in the application.
- iv. An account monitoring order requires a specified financial institution to provide account information on a specified account for a specified period, up to 90 days.
- v. A disclosure order authorizes an appropriate officer to give notice in writing to any person requiring him or her to answer questions, to provide information, or to produce documents related to any matter concerning the investigation for which the order is sought.

All the above-mentioned investigation orders are subject to judicial approval. The UK Home Secretary has issued an investigation code of practice to provide guidance on the exercise of powers related to confiscation, civil recovery, money laundering, and detained cash investigations. The code of practice is designed to fully account for privacy and human rights, to deliver appropriate warnings, and maintain appropriate records.

Chapter 3 of the UK Serious Organized Crime and Police Act (SOCPA) 2005 gives the Serious Organized Crime Agency (SOCA) the power to apply for Financial Reporting Orders (FROs), which are a civil mechanism for restraining convicted organized criminals from using assets. FROs may be made against persons convicted of certain specified criminal offenses, including money laundering, fraud, and terrorism. The orders may cover a period of up to 15 years and ordinarily require a person to provide periodic financial statements and details to the authorities. Failure to do so is an offense. To verify the accuracy of information provided in a financial report, UK agencies can request information from any source without a production order; they may also disclose information in the financial report to any party.

d) Extended powers of confiscation (extended confiscation)

To effectively tackle organized criminal activities, situations may arise when a criminal conviction appropriately leads to the confiscation not only of property assets associated with a specific crime, but also of additional property that the court determines are the proceeds of other crimes. Thus, extended confiscation signifies the ability to confiscate assets, which go beyond the direct proceeds of a crime. This approach is referred to as extended confiscation; many jurisdictions have already incorporated extended confiscation powers in their POC legislation.

Extended confiscation can apply when a national court (based on specific facts related to the nature of the criminal offense, the legal income of a convicted person, the difference between the financial situation, and the standard of living of that person or other facts) finds it substantially more probable that the property in question has been derived from other criminal offenses, of similar nature or gravity as the criminal offense for which the person is convicted, than from other activities.

e) Allow confiscation of assets transferred to third parties (third-party confiscation)

To avoid confiscation, criminals often transfer their assets to knowing third parties as soon as they come under investigation. Given that this practice is common and increasingly widespread, it is becoming more and more necessary to allow for confiscation of property transferred to third parties.

Provisions for third-party confiscation may be appropriate under certain specific conditions, such as when the confiscation of property of the convicted, suspected, or accused person is unlikely to succeed; or in situations where unique objects must be restored to their rightful owner. To protect the interests of *bona fide* third parties, such confiscation should be possible only if the third party knew or should have known that property was the proceeds of crime or was transferred in order to avoid confiscation, and was given for free or transferred in exchange for an amount lower than its market value.

f) Strengthen provisional measures (freezing or seizure) to preserve the availability of property alleged to be liable for confiscation from a third country

Provisional measures should be provided to ensure that property remains available with latitude for possible later confiscation. Such provisional measures should be ordered by a court. To prevent the dissipation of property before a freezing or seizure order can be issued by a court, jurisdictions need to be empowered to immediately prohibit the transfer, conversion, disposition, or movement of property in danger of being hidden or transferred out of the jurisdiction. Such empowerment is particularly important in cases involving mutual legal assistance between different countries. As a matter of best practices, the mechanisms to take this action should consist of the following, as recommended by the OECD Financial Action Task Force:

- i. The executing jurisdiction is able to take freezing or seizing action on the basis of requests submitted prior to criminal charges made in the requesting state.
- ii. The executing jurisdiction has the authority to take freezing or seizing action, within the short timeframes that are necessary to be effective, upon receiving a request for provisional measures. Such requests may be enforced directly or indirectly. To the extent that it is consistent with the fundamental principles of a country's domestic law, however, direct enforcement (i.e. accepting/registering and directly instituting steps to enforce the freezing or seizing order issued by the requesting jurisdiction) is a more effective, responsive way to comply with foreign requests for provisional measures than indirect enforcement (i.e. the executing jurisdiction will obtain a domestic order using the evidence contained in the foreign request).
- iii. The executing jurisdiction has a framework in place that enables it to sustain the freeze/seizure until the requesting jurisdiction has ruled upon the fate of the property concerned (either lifting of the freeze/seizure or confiscation of the property). This practice gives the requesting jurisdiction sufficient time to lead its criminal proceeding to a confiscation decision on the property seized, pursuant to the mutual legal assistance request. It should be noted, however, that the ability to uphold a freezing/seizing action depends on how expeditiously the requesting jurisdiction can conclude its proceedings.

The European Commission in 2012¹⁴⁵ published the following suggested actions for more effective freezing/seizing of assets: a) Universal freezing providing harmonized minimum standards for freezing to ensure preservation of any assets and ease the mutual recognition of freezing orders; b) Appropriate mechanisms to ensure that assets in danger of being hidden or transferred out of the jurisdiction can be immediately frozen/seized. This would include, in appropriate circumstances, the ability to freeze/seize prior to seeking a court order.

g) Ensure that confiscation orders are effectively enforced

Once issued by courts, confiscation orders need to be properly enforced. The initial UK experience was that once an order was issued, little attention was paid to the expense of enforcing it, particularly where professional receivers (i.e. accountants) had to be paid.¹⁴⁶

In recognition of these problems, an Enforcement Task Force (ETF) was created in 2002 to enforce confiscation orders, which had been obtained but neither voluntarily satisfied by defendants, nor enforced by the authorities. The ETF is a multi-agency team consisting of staff from HMRC, the CPS, and police who work together to enforce the significant backlog of outstanding orders. After two years, it had enforced some 826 confiscation orders and obtained almost £52 million in uncollected funds.¹⁴⁷ An important initiative taken by the ETF was the publication of a national Best Practice Guide to Confiscation Order Enforcement.

h) Enhance provisions on frozen/seized property management and on disposal of confiscated property

To strengthen the effectiveness of confiscation regimes, national jurisdictions should have in place comprehensive procedures for efficiently managing frozen/seized property and adequately disposing of and transferring confiscated assets to the state. The main purpose of asset management is to preserve the value of restrained, frozen, or seized assets — or at least to minimize loss of value. The disposal process of confiscated or seized assets involves the sale of such assets or their transfer to the state or to local communities.

The UK POCA legislation provides a comprehensive management and disposal system. The UK Proceeds of Crime Incentivization Scheme was introduced for Police in 2005 and extended in the following year to other investigators concerned with POCA cases. The first 50% of confiscated proceeds goes to the Treasury, and the second 50% is shared on the basis of 40% investigation, 40% prosecution, and 20% enforcement. For example, taking a £100,000 POCA confiscation order, 50% goes to HM Treasury (£50K); the other 50% split is as follows: 20% (£10K) goes to the agency responsible for the collection of the monies (normally the Magistrates Courts); 40% (£20K) goes to the Financial Investigator (the relevant local authority); and 40% (£20K) goes to the prosecuting authority (which can be the police or the same authority as the investigator).

This is an extremely valuable resource for investigators and lends to making IP cases more viable, especially at a time of numerous competing pressures and ever-tight budgets. It also helps achieve the Government's important objective of self-financing the enforcement of IP rights.

As an example of the ways in which confiscation monies have been spent, the Court Service has funded nine Centres of Excellence, one for each court region. As an illustration of the relationship between confiscation and the self-funding of enforcement, the UK Revenue and Customs Prosecutions Office has established an Asset Forfeiture Division dedicated entirely to asset forfeiture work. In the first year of the Division's operation, receipts from confiscation orders increased from £21.45 million to £24.2 million.

In the US, the disposal of confiscated property is ordinarily a matter of statute, which may require that the proceeds of a confiscation be devoted to a single purpose, such as the support of education or deposit in the general fund. The Attorney General and the Secretary of the Treasury enjoy considerable discretion to transfer confiscated property to state, local, and foreign law enforcement agencies. The remaining balance after any transfers is deposited in special funds that can be used to pay confiscation-related expenses. The Department of Justice (DoJ) confiscated USD 1.177 billion in fiscal year 2006,¹⁴⁸ and the Treasury Department confiscated USD 245 million during the same year.¹⁴⁹

Under the Australian Proceeds of Crime Act 2002, a Confiscated Assets Account is established. The expenditure is to be approved for one or more of the following purposes:

- i. Crime prevention measures;
- ii. Law enforcement measures;
- iii. Measures relating to treatment of drug addiction;
- iv. Diversionary measures relating to illegal use of drugs.

Italy provides good example of assets management. Italian POC legislation system provides re-use of confiscated assets for social purpose. Law No. 109/1996 regulates the management and destination of seized or confiscated assets. This law introduces a set of provisions requiring the transfer to local municipalities or non-profit organizations of confiscated assets for projects of public interest, such as financing schools for education, assistance to elderly or disabled people, and other social purposes such as agricultural cooperatives for young unemployed.

2. Proposed best practices for appropriate institutional frameworks to administer POC legislation effectively

a) Strengthen and rationalize the institutional structure of law enforcement

The growing scale of IP crime has implications not only for IP administration, but also for enforcement against fraud and serious organized crime. As a consequence, a number of government enforcement agencies are likely to be involved in dealing with this form of crime. A national strategy is useful for co-ordinating IP enforcement in general, and confiscation in particular. A particular problem identified in the UK experience was that efforts to use confiscation as a mainstream weapon in the fight against crime were initially disappointing. Before becoming effective, the organizational and managerial culture of the enforcement authorities had to be modified to adopt POC enforcement as a central weapon in their armory.¹⁵⁰ The extension of POC to IP offenses will require the same sort of capacity-building effort to convince enforcement authorities to prioritize action against counterfeiting and piracy.

The following three examples illustrate best practices on how countries are organizing enforcement agencies to better utilize POC legislation and improve asset recovery:

- The UK Joint Asset Recovery Database (JARD) — established by the Concerted Inter-Agency Criminal Finance Action group (CICFA) in 2003 — seeks to improve the overall performance of the criminal justice system (CJS) in removing the proceeds of crime via better day-to-day management of asset recovery at case and order levels. It is funded from the Recovered Assets Incentivization Fund. The system — a master repository for data concerning asset recovery activity in the UK — is used by more than 2,500 officers, staff, and other agencies across the asset recovery community. The system also produces national statistics for the agencies involved. Data is drawn

from JARD for the operation of agency incentivisation schemes funded from the Recovered Assets Incentivisation Fund, discussed below. In addition, statistics from JARD enable CICFA and others concerned with CJS performance regarding asset recovery to identify where systemic problems exist, identifying projects, as well as policy or legislative changes needed to address them. The database is updated daily and any agency with access to a government-restricted network, e.g. the Government Secure Intranet (GSI), is able to access JARD to enter data about their confiscation activity and generate operational reports.

- In 2004, the UK IP crime group was founded under the auspices of the UK Intellectual Property Office to bring together government, enforcement agencies, and industry groups. The group aims to ensure a collaborative approach in addressing key IP crime issues. It discusses strategic policy issues related to IP crime; identifies strategic priorities for collaborative action; identifies and disseminates good practice; raises awareness of IP crime; produces an annual IP Crime Report, which, among other information, identifies the scope and scale of IP crime and future trends; and provides training for key actors including enforcement officials. The Crime Group consists of law enforcement and criminal justice bodies, industry associations and the UK IP Office. A key member is the Serious and Organized Crime Agency (SOCA), established in 2007 as a means of prioritizing the fight against organized crime and terrorism.
- The Irish Criminal Assets Bureau (CAB) is regarded as one of the most successful European recovery agencies. The CAB is a division of the Garda Síochána that was established by Statute in 1996. It reports directly to the Minister for Justice, Equality and Law Reform. The CAB has both investigative and enforcement powers, and operates independently of other criminal prosecution agencies. The CAB is comprised of officers from the Garda Síochána, Revenue Commissioners Taxes, Revenue Commissioners Customs and the Department of Social, Community and Family Affairs. CAB thus takes a multi-agency approach to confiscating the assets of organized criminals. The CAB is able to apply tax and proceeds of crime legislation, as well as any relevant criminal laws to its investigations and prosecutions. This multi-prong effort allows the most effective and appropriate legislation for each situation, effectively denying organized criminals of their assets. In about 60 or 70% of cases, the CAB uses tax legislation to confiscate assets suspected of being the profits of crime.

b) Improve the knowledge and expertise of investigators and prosecutors

The effective operation of confiscation depends critically on well-trained investigators and prosecutors, who need to be specialists in this area. Force-wide police training in financial investigations, with a focus on confiscation, is therefore recommended. Specialized training for prosecutors in these fields is also crucial.

Good financial intelligence forms the basis of an effective asset recovery program. The UK court service publishes full details of asset recovery performance on a quarterly basis. A valuable source of intelligence is the Suspicious Activity Reports (SARs), which are used in both the USA and the

UK. In the USA, SAR reports regarding suspicious or potentially suspicious activity are filed with the Financial Crimes Enforcement Network (FinCEN), an agency of the United States Department of the Treasury. FinCEN requires a SAR report to be filed by a financial institution when the financial institution suspects insider abuse by an employee, or transactions worth 5,000 USD or more that involve potential money laundering or violations of the Bank Secrecy Act. SAR reports are effective examples of useful intelligence to identify attempts to conceal proceeds of crime.

c) Promote and improve cooperation between police forces and prosecutorial investigators

Financial investigations aimed at asset recovery are extremely complex and time consuming. Investigation success depends on proper cooperation between police investigators and prosecutors. The UK provides a good example of collaboration in this sector. The Crown Prosecution Service (CPS) and the Asset Forfeiture Division of the Revenue and Customs Prosecutions Office are responsible for bringing confiscation actions. A close relationship exists between the investigation and prosecution of confiscation cases.

In 2002, the Police and the Crown Prosecution Service agreed to cooperate on POCA issues. They agreed that the CPS act on any application for a confiscation order and dealing with other ancillary matters. The police provide assistance to the CPS as requested, including preparation of the statement of information and attendance at court to assist in the proceedings, if required. If at any stage of a case, the CPS sees that further investigation is required to determine whether an application for a confiscation order is appropriate, the police must provide sufficient information according to a mutually agreed-upon deadline. The Assets Forfeiture Division of Customs also advises Customs and SOCA officers regarding the conduct of financial investigations.

3. Mechanisms for co-ordinating tracing, freezing, seizure and confiscation proceedings at the international level

a) Establish appropriate procedures to facilitate mutual legal assistance in response to requests by foreign States

As counterfeiting and piracy usually involve international trade, with actors in a number of countries, international co-operation between enforcement authorities is particularly important. The fight against cross-border counterfeiting and piracy requires international cooperation during the tracing and freezing phases, as well as seizure and confiscation. International cooperation may be required to identify and trace property, obtain documents, and enforce provisional measures, including freezing orders. Countries should review their laws and procedures to enhance their abilities to assist other States in tracing assets, providing evidence, and enforcing freezing and confiscation orders. States should coordinate efforts where they and other State authorities are investigating the same or related offenses. In addition, States should simplify information sharing in order to make exchanges as fast as possible.

International cooperation should cover the following three phases:¹⁵¹

- i. **Traceability.** States should have the necessary mechanisms and arrangements in place to facilitate expeditious sharing of financial information to the appropriate authorities of foreign States. Consideration of requests for assistance seeking bank records, ownership of bank accounts, bank transactions, or analogous information for the purpose of eventual freezing or seizing and confiscation of assets should be expedited to avoid dissipation of assets. States should also review their procedural frameworks for adjudication of freezing and confiscation requests — with the goal to minimize unreasonable delays.
- ii. **Freezing or seizing.** Freezing or seizing action should be available at an early point in the criminal investigation, and thus States, upon request, should maintain the confidential nature of requests for mutual legal assistance for a sufficient period of time to permit freezing or seizing. In an ongoing proceeding considering freezing or seizure in response to foreign requests, the requested State's procedure should permit — while the property continues to be held — sufficient time to obtain foreign gathered evidence to support restraint or amend minor technical errors in the request, before requiring dismissal of the proceeding and release of moveable property.

The 2003 “Council Framework Decision on the execution in the European Union of orders freezing property or evidence” establishes the procedures under which a Member State can execute a freezing order issued by another Member State. More recently, the EU is considering proposals for a European Parliament is considering a Directive on a criminal law proposal against fraud (PIF), and a second proposal (EU COM 2012/85) on freezing and confiscation of the proceeds of crime in the EU. PIF would oblige all Member States to introduce mandatory minimum and maximum prison sentences for crimes against the financial interests of the EU (COM 2012/363) — namely the EU budget. If the proposal — known as ‘PIF’ — becomes law, national governments could imprison serious criminals who evade customs duties on illicit imports into the EU. By definition, that means large scale smugglers and counterfeiters. Also under ‘PIF’, the assets of serious criminals evading customs duties could be subject to the new EU legislation on freezing and seizing, thus hitting smugglers and counterfeiters where it hurts most — in their pockets.¹⁵²

- iii. **Confiscation.** States should adopt, according the fundamental principles of their domestic law and the nature of the judicial or other proceeding, the appropriate arrangements to permit the enforcement of freezing and confiscation orders of another State, in appropriate circumstances, irrespective of whether or not a criminal conviction was obtained in the requesting State. States should also enter into asset-sharing agreements with other countries, which will allow the sharing of confiscated assets with the countries that have provided assistance in the process. Asset-sharing agreements should not be a pre-requisite for cooperation, but can have a significant bearing on the resources allocated to facilitate asset-tracing requests. Additionally, the existence of an asset-sharing agreement is often a significant incentive for the executing jurisdiction to execute requests for asset tracing.

b) Improve collaboration with foreign counterparts through appropriate international agencies

Competent authorities should engage with foreign counterparts through strengthened collaboration with law enforcement agencies and international bodies, such as the INTERPOL or Egmont Group of Financial Intelligence Units. Moreover, the Camden Assets Recovery Interagency Network (CARIN) is an important informal international network of national experts in the field of asset tracing, seizing and confiscation which is administered by EUROPOL, but which is also available to non-European States.

In addition, the Financial Action Task Force (FATF) is an intergovernmental body, comprising 34 Member States and two international organizations as observers, whose purpose is the development and promotion of national and international policies to combat money-laundering and terrorist financing. It has published Recommendations dealing with money laundering and terrorism, as well as with assets confiscation.¹⁵³

Chapter 6: Looking forward

This report highlights the growing role that organized criminal networks play in Intellectual Property crimes. A sampling of POC laws in place in the United Kingdom, Australia, Italy and Switzerland are put forward as examples of how the confiscation of assets under these laws can serve as an effective additional punishment and deterrent to IP criminals — leveraging existing laws to enforce the protection of IP rights and providing a valuable source of “self-funding” for further IP law enforcement activity.

It is hoped that the report generates greater awareness among policy makers in more countries of the value of this type of legislation, and that the inventory of key legislative provisions and best practices will encourage and support national government efforts to establish or enhance a proceeds of crime legal framework.

Notably, there are indications that national governments are increasingly adapting POC legislation to tackle a wider range of criminal activity. For example, a study of the 117 countries that are parties to the World Health Organisation Framework Convention on Tobacco Control (FCTC) found that 56% reported enabling the confiscation of proceeds derived from the illicit trade in tobacco products.

BASCAP and UNICRI share a common commitment to stop the infiltration of organized criminal networks into counterfeiting and piracy. That commitment led to the development of this report, and collaborative work in this area will continue.

The value of this report will benefit from additional research and cooperation in the following areas:

1. More research needs to be conducted on the actual involvement of organized crime into IP crimes at all levels. A better understanding of the number and types of organized criminal networks and the nature of their involvement in IP crimes will compel governments to prioritize law enforcement actions to deter this illegal activity. Fresh, comprehensive data on the role of organized crime in illicit trade from organizations such as INTEROPL, EUROPOL and the UN Office on Drugs and Crime would be extremely valuable and could be utilized as a supplement to this report.
2. Expanding the research to include an analysis of existing POC laws and regulations in more countries would augment the inventory of key legal provisions and best practices derived from the four national case studies presented in this report. This exercise could generate a basis for developing model law provisions to serve as a template for national governments around the world to introduce sound legislation on confiscating the Proceeds of IP Crimes. In addition, more information on implementing associated regulations and administering POC programs, including the reuse of confiscated proceeds to fund enforcement activities, would yield a useful “how to” guide, further easing the adoption and operation of POC IP enforcement regimes.

3. Involving key intergovernmental organizations in the process would help address the transnational problem of IP crimes and the international laundering of the proceeds of those crimes. Intergovernmental organizations are useful conduits to constituencies of law enforcement, customs, judiciary and other stakeholders across borders. For example, INTERPOL has recently launched a “Legal and Institutional” initiative that aims to assist member States in the development of national legislation relating to priority crime areas, such as IP crimes. The OECD regularly conducts “country reviews”, assessing how countries manage the design, adoption and implementation of regulations. These partners could be enlisted to help their government constituents to better understand and implement POC legislation and regulations.

BASCAP and UNICRI stand ready to assist in this future work.

Appendix 1: Definitions

For the purposes of this report, the following terminology reflects language used in international conventions and treaties, such as the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime,¹⁵⁴ 2004 United Nations convention against Corruption,¹⁵⁵ and 2005 Council of Europe Convention of Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism.¹⁵⁶

- **“proceeds of crime”** means any economic advantage, derived from or obtained, directly or indirectly, from criminal offenses.
- **“property”** means property of any description, whether corporeal or incorporeal, movable or immovable, as well as legal documents or instruments evidencing title to, or an interest in such property.
- **“instrumentalities”** means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offense or criminal offenses.
- **“confiscation”** means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offense or criminal offenses resulting in the final deprivation of property.
- **“forfeiture”** is synonymous with “confiscation” in civil procedure but also in criminal procedure,¹⁵⁷ especially when it refers to the removal of direct advantage.
- **“freezing”** or **“seizure”** means temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property, or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.

The 2005 EU Convention determined that the **property** embraced by **freezing, seizure and confiscation measures** should also encompass:

- (i) the property into which proceeds were transformed or converted;
- (ii) the property acquired from legitimate sources, if proceeds have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds;
- (iii) income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds.¹⁵⁸

Appendix 2: Origins of POC legislation

National standards

Acts of *asset forfeiture, confiscation of assets and confiscation of proceeds of crime* are collectively referred to here as “Proceeds of Crime legislation” (POC) laws. POC laws were first introduced to deal with drug trafficking offenses, but they have been broadened to include a range of crimes usually perpetrated by criminal syndicates, such as money laundering, people and arms trafficking, terrorism, gambling and blackmail. They have been governments’ response, particularly when these activities threatened its revenue interest, created substantial public nuisance, or threatened public health or morals.¹⁵⁹

- The United States was one of the first countries to introduce comprehensive civil forfeiture laws to attack organized crime. The effort began in 1963 with the enactment of the federal Racketeer Influenced and Corrupt Organisations (RICO) statute.¹⁶⁰ The movement continued in 2000 with the Civil Asset Forfeiture Reform Act (CAFRA), which makes forfeitable the proceeds from any of the crimes upon which a money laundering or RICO prosecution might be based.¹⁶¹
- In UK, the Proceeds of Crime Act 2002 was enacted following the publication on 14 June 2000 of new government policy as set out in the Performance and Innovation Unit’s report, “Recovering the Proceeds of Crime.” It deals with a wide range of matters relevant to UK law on proceeds of crime issues. The Act has been amended since 2002, particularly by the Serious Organized Crime and Police Act 2005 and the Serious Crime Act 2007. Since March 2008, the Assets Recovery Agency, created by the 2002 Act, has become part of the Serious Organized Crime Agency (SOCA).
- Western Australia was the first Australian jurisdiction to introduce unexplained wealth laws in 2000. The Criminal Property Confiscation Act 2000 (WA) provides that the WA Department of Public Prosecutions can apply to the court for an unexplained wealth declaration, which the court must grant if it is more likely than not that the total value of the person’s wealth is greater than the value of the person’s lawfully acquired wealth. The effect of such an order is that the subject person then becomes liable to pay the amount of his or her unexplained wealth to the state.
- Ireland was one of the first countries to introduce Asset Forfeiture in the form of the Criminal Assets Bureau, which initiates civil forfeiture proceedings and the Director of Public Prosecutions who initiates confiscation proceedings. It was set up under the Criminal Assets Bureau Act of 1996 by the Irish Government in response to the murder of investigative journalist Veronica Guerin, who was actively investigating the Irish Criminal Underworld.
- In South Africa, the Prevention of Organized Crime Act (second amendment) was introduced in 1999. The Asset Forfeiture Unit (“AFU”) was established in May 1999 to amplify certain provisions in the Prevention of Organized Crime Act, allowing for the criminal or civil seizure (and subsequent forfeiture to the State) of assets belonging to perpetrators of crime. Once forfeited, these assets are realized and utilized to compensate the victims of crime and/or are funnelled back into law enforcement.

International standards

- The first international instrument that provided for confiscation was the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). The Convention established the obligation of States to adopt measures to enable the confiscation of proceeds from drug-related criminal offenses or property of equivalent value and measures to identify, trace, and seize the proceeds of crime. It also formulated rules for international cooperation in the enforcement of confiscation orders. The Convention also suggested that States impose upon defendants the burden of proving the lawful origin of property.
- Effective POC laws cover the process of identifying, tracing, freezing or seizing, confiscating, and returning proceeds of crime to its victims, enforcement agencies, or the state. This comprehensive process is called “assets recovery” as established by the UN Convention against Corruption, one of the early international legal instruments to specifically cover such a whole process.
- In 1990, the Council of Europe introduced a Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds of Crime¹⁶² which, among other initiatives, required signatory States to enact proceeds of crime laws and cooperate in the tracing and seizure of proceeds across national boundaries.
- The 2000 United Nations International Convention against Transnational Organized Crime¹⁶³ required that signatories should adopt, to the greatest extent possible within their domestic legal systems, necessary measures to enable confiscation of the proceeds of crime derived from offenses covered by the Convention (generally crimes punishable with up to four years imprisonment) or property of equivalent value; and property, equipment, or other materials used in or destined for use in offenses covered by the Convention.¹⁶⁴
- In 2000, the European Council approved an action plan to develop legislation dealing with tracing, freezing, and confiscation of the proceeds of crime.¹⁶⁵
- Following a number of interim measures, the Council Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property of 24 February 2005¹⁶⁶ called for EU Member States to establish effective rules governing the confiscation of proceeds from crime, *inter alia*, in relation to the onus of proof regarding the source of assets held by a person convicted of an offense related to organized crime.
- In May 2005, the Council of Europe promulgated a Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism,¹⁶⁷ which proposed confiscation as a means of dealing with terrorism.

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- ⁵³ Refer to: Corker D. (2002), "Developments in Criminal Liability and the Proceeds of Crime Bill", in *Anti-Money Laundering Bulletin*, page 8.
- ⁵⁴ Recently the European Fundamental Rights Agency has been requested by the European Parliament to "provide advice on the extent to which confiscation could go without breaching fundamental rights" in relation to the European Commission proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union. A detailed opinion on the point was thus submitted on 4 December 2012. Refer to: FRA (2012), *Opinion of the European Union Agency for Fundamental Rights on the Confiscation of proceeds of crime*, Vienna, 4 December, available at: http://fra.europa.eu/sites/default/files/fra-opinion-3-2012_confiscation-of-proceeds-of-crime.pdf
- ⁵⁵ Refer to: Atisso, K. (2010), *The Recovery of Stolen Assets: Seeking to balance fundamental human rights at stake*, Basel Institute on Governance, International Centre for Asset Recovery, Switzerland, May, page 7 and following. Available at: http://www.baselgovernance.org/fileadmin/docs/publications/working_papers/WP_8_AR_and_human_rights_ENGLISH.pdf
- ⁵⁶ Refer to: European Commission (2012), *Proposal for a Directive of the European Parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union*, [2012], 12 March, page 12. Available at: http://ec.europa.eu/home-affairs/news/intro/docs/20120312/1_en_act_part1_v8_1.pdf.
- ⁵⁷ Refer to: *Gilligan v Criminal Assets Bureau* (IE)(1998) 3 HCIR 185.
- ⁵⁸ Refer to: *Judgment Walsh v. Director of the Asset Recovery Agency* (United Kingdom) (2005).
- ⁵⁹ *National Director of Public Prosecutions v. Meyer* (SA) High Court of South Africa, 29 July 1999. 87 [2002] EWCA Crim 2558. Available at: <http://www.saflii.org/za/cases/ZASCA/1999/101.pdf>
- ⁶⁰ Refer to: *Raimondo v. Italy* (1994) 18 EHRR 371, (22 February 1994).
- ⁶¹ Refer to: European Commission proposal for a "Directive of the European Parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union" 85 final, p. 9, Brussels, 2012. Available at: http://ec.europa.eu/home-affairs/news/intro/docs/20120312/1_en_act_part1_v8_1.pdf#zoom=100.
- ⁶² *Arcuri v Italy* [2001] ECHR. No.52024/99, 5 July 2001.
- ⁶³ *Sliney v. London Borough of Havering* [2002] EWCA Crim 2558. Available at: <http://court-appeal.vlex.co.uk/vid/-52565211>
- ⁶⁴ Refer to: *Regina v. Johnstone* (Respondent) (On appeal from the Court of Appeal (Criminal Division) [2003] UKHL 28. Available at: <http://www.bailii.org/uk/cases/UKHL/2003/28.html>
- ⁶⁵ *Ibid.* para 52.
- ⁶⁶ *Ibid.*

- ⁶⁷ Refer to: *R v May* (Appellant) (On Appeal from the Court of Appeal (Criminal Division) [2008], UKHL 28. Available at: <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080514/may-1.htm>
- ⁶⁸ Refer to: European Commission *Assessing the effectiveness of EU Member States' practices in the identification, tracing, freezing and confiscation of proceeds of crime*, previously cited work.
- ⁶⁹ Under the UK POCA legislation, the non-conviction based confiscation order is called "civil recovery" order. See the Proceeds of Crime Act (UK) [2002]. Available at: <http://www.legislation.gov.uk/ukpga/2002/29/contents>
- ⁷⁰ Refer to: European Commission, *Assessing the effectiveness of EU Member States' practices in the identification, tracing, freezing and confiscation of proceeds of crime*, previously cited work.
- ⁷¹ Before or during the criminal trial, restraint orders are issued to ensure that assets that may be subject to confiscation remain available. Under the POCA, there is no requirement for the suspect to be charged with any offense prior to issuance of a restraint order; indeed, the court needs only to be satisfied that there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct. See Proceeds of Crime Act (UK) [2002]. Available at: <http://www.legislation.gov.uk/ukpga/2002/29/contents>
- ⁷² *Ibid.* After a guilty verdict, action would come via confiscation order as part of the sentence. A confiscation order is required if the prosecution requests one, or, in the absence of a prosecution request, if the court judges that the convicted individual led a "criminal lifestyle."
- ⁷³ Refer to: Australian Crime Commission (ACC) (2007), *Inquiry into the future impact of serious and organised crime on Australian Society*, page 7. Available at: http://www.crimecommission.gov.au/sites/default/files/files/other/submissions/2007_pjc_submission_tor_a.pdf
- ⁷⁴ Refer to: Australian Crime Commission (ACC) (2011), *Organised Crime In Australia 2011*, page 74. Available at: <http://www.crimecommission.gov.au/sites/default/files/files/OCA/2011/oca2011.pdf>
- ⁷⁵ Refer to: Australian Crime Commission (ACC) (2011), *Organised Crime In Australia 2011*, page 24. Available at: <http://www.crimecommission.gov.au/sites/default/files/files/OCA/2011/oca2011.pdf>
- ⁷⁶ Refer to: Booz, Allen, Hamilton (2011), "Comparative Evaluation of Unexplained Wealth Orders," US Department of State and National Institute of Justice. Available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf>
- ⁷⁷ Refer to: Parliamentary Joint Committee on Law Enforcement, *Inquiry into Commonwealth unexplained wealth legislation and arrangements*, March 2012, page 8. Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=le_ctte/completed_inquiries/2010-13/unexplained_wealth/report/index.htm
- ⁷⁸ Refer to: Inquiry into the Legislative arrangements to outlaw serious and organized crime groups, 2009, [5.66]. Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=acc_ctte/completed_inquiries/2008-10/laoscg/report/index.htm
- ⁷⁹ Refer to: Inquiry into the Legislative arrangements to outlaw serious and organized crime groups, 2009, [5.50]. Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=acc_ctte/completed_inquiries/2008-10/laoscg/report/index.htm
- ⁸⁰ Criminal Property Confiscation Act 2000 (AUS) (WA). Available at: http://www.austlii.edu.au/au/legis/wa/consol_act/cpca2000333/
- ⁸¹ Criminal Property Forfeiture Act 2002 (AUS)(NT). Available at: <http://web2.gov.mb.ca/laws/statutes/ccsm/c306e.php>
- ⁸² Refer to: Australian Institute of Criminology (2010), *Trends and issues in crime and criminal justice —Unexplained Wealth laws in Australia*, Australian Government. Available at: http://www.aic.gov.au/documents/2/0/D/%7B20D3B223-C146-4E10-B05F-B30D9E8F59D4%7Dtandi395_001.pdf
- See also Bartels L. (2010), *A review of confiscation schemes in Australia*, Australian Institute of criminology, Australian Government, Australian Institute of Criminology, p.18 and page 22. Available at: <http://www.aic.gov.au/documents/1/6/E/%7B16E448C6-C50B-487A-A68E-A1E89A7EB28F%7Dtbp036.pdf>.
- See also Bartels L., (2010), "Unexplained wealth laws in Australia", Australian Government, Australian Institute of Criminology, July. Available at: <http://www.aic.gov.au/publications/current%20series/tandi/381-400/tandi395.aspx>
- ⁸³ Criminal Property Forfeiture Act 2002 (AUS)(NT). Available at: <http://web2.gov.mb.ca/laws/statutes/ccsm/c306e.php>
- ⁸⁴ Refer to: Booz, Allen, Hamilton (2011), "Comparative Evaluation of Unexplained Wealth Orders," US Department of State and National Institute of Justice, page 103. Available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf>
- ⁸⁵ The Committee's name changed on 25 November 2010 with the commencement of the Parliamentary Joint Committee on Law Enforcement Act 2010 to become the Parliamentary Joint Committee on Law Enforcement (formerly the Parliamentary Joint Committee Australian Crime Commission).
- ⁸⁶ Refer to: Parliamentary Joint Committee on Law Enforcement, *Inquiry into Commonwealth unexplained wealth legislation and arrangements*, March 2012, page 10. Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=le_ctte/completed_inquiries/2010-13/unexplained_wealth/report/index.htm
- ⁸⁷ Refer to: Inquiry into the Legislative arrangements to outlaw serious and organized crime groups, 2009, [5.84]. Available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=acc_ctte/completed_inquiries/2008-10/laoscg/report/index.htm

⁸⁸ Refer to: Booz, Allen, Hamilton (2011), "Comparative Evaluation of Unexplained Wealth Orders," US Department of State and National Institute of Justice, page 83. Available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf>

⁸⁹ Refer to: Australian Federal Police, *Proceeds of Crime*. Available at: <http://www.afp.gov.au/policing/proceeds-of-crime.aspx>

⁹⁰ Refer to: Ministry for Economic Development (2012), *La contraffazione in cifre. La lotta alla contraffazione in Italia nel quadriennio 2008-2011*. Available at: http://www.uibm.gov.it/iperico/Report_Iperico_2012/ABSTRACT_REPORT_IPERICO_2012_brief.pdf

⁹¹ For an in-depth analysis of organized crime networks in counterfeiting in Italy, refer to: UNICRI (2012), *Counterfeiting as an activity managed by organized crime. The Italian case*, Ministry for Economic Development: Rome.

⁹² For a broader overview of the main IP laws in Italy, refer to: WIPO Resources. Available at: <http://www.wipo.int/wipolex/en/profile.jsp?code=IT>

⁹³ Interview with Mr. Fausto Zuccarelli, District Antimafia Prosecution Office, Naples.

⁹⁴ Refer to: International Monetary Fund, Monetary and Financial Systems Department, "Detailed Assessment of Report on Anti-Money Laundering and Combating the Financing of Terrorism" IMF Italy, 2006. Available at: http://www.bancaditalia.it/vigilanza/analisi-sistema/assessment-fmi/5_ROSC_Anti_Money_Laundering_publico.pdf and Vettori B. (2006), *Tough on Criminal Wealth. Exploring the Practice of Proceeds from Crime Confiscation in the EU*, Springer, Dordrecht.

⁹⁵ The Italian Antimafia Code, enacted with Legislative Decree 159 of 2011, is available at: <http://www.leggioggi.it/allegati/codice-antimafia/>

⁹⁶ Key features of the UWO laws are no necessity of proof of property being connected to a crime and a reversal of the burden of proof. Refer to: Booz, Allen, Hamilton (2011), "Comparative Evaluation of Unexplained Wealth Orders", US Department of State and National Institute of Justice, page 1 and page 50. Available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf>

⁹⁷ Refer to: European Commission (2009) "Assessing the effectiveness of EU Member States' practices in the identification, tracing, freezing and confiscation of proceeds of crime," [2009] Matrix Insight, June. Available at: http://ec.europa.eu/home_affairs/news/intro/docs/20120312/final_asset_recovery_report_june_2009.pdf#zoom=100

⁹⁸ Refer to: Italian Criminal Code (MAFIA-TYPE UNLAWFUL ASSOCIATION) Article 416 bis

"1. Any person participating in a Mafia-type unlawful association including three or more persons shall be liable to imprisonment for 5 to 10 years.

2. Those persons promoting, directing or organizing the said association shall be liable, for this sole offense, to imprisonment for 7 to 12 years.

3. Mafia-type unlawful association is said to exist when the participants take advantage of the intimidating power of the association and of the resulting conditions of submission and silence to commit criminal offenses, to manage or in any way control, either directly or indirectly, economic activities, concessions, authorizations, public contracts and services, or to obtain unlawful profits or advantages for themselves or for any other persons, or with a view to prevent or limit the freedom to vote, or to get votes for themselves or for other persons on the occasion of an election.

4. Should the association be of the armed type, the punishment shall be imprisonment for 7 to 15 years, pursuant to paragraph 1, and imprisonment for 10 to 24 years, pursuant to paragraph 2.

5. An association is said to be of the armed type when the participants have firearms or explosives at their disposal, even if hidden or deposited elsewhere, to achieve the objectives of the said association.

6. If the economic activities that participants control in the said association are funded, totally or partially, by the price, the products, or the proceeds of criminal offenses, the punishments referred in the above paragraphs shall be increased by one-third to one-half.

7. The offender shall always be liable to confiscation of the things that were used, or meant to be used, to commit the offense and of the things that represent the price, the product, or the proceeds of such offense or use thereof.

8. The provisions of this article shall also apply to the Camorra and to any other associations, whatever their local titles, seeking to achieve objectives that correspond to those of Mafia-type unlawful association by taking advantage of the intimidating power of the association."

⁹⁹ Refer to: Law 13 September 1982, 646 (aka Law Rognoni-La Torre). Available at: <http://www.altrodiritto.unifi.it/ricerche/law-ways/tancredi/cap1.htm>

¹⁰⁰ Interview with Ms. Barbara Vettori, Assistant Professor of Criminology at the Catholic University of Milan.

¹⁰¹ Refer to: Italian Criminal Code (MAFIA-TYPE UNLAWFUL ASSOCIATION) Article 416 bis Paragraph 7, cited above.

¹⁰² Refer to: Booz, Allen, Hamilton. "Comparative Evaluation of Unexplained Wealth Orders," previously cited work.

¹⁰³ Refer to: Vettori B. (2006), *Tough on Criminal Wealth. Exploring the Practice of Proceeds from Crime Confiscation in the EU*, Springer, Dordrecht,

¹⁰⁴ Interview with Ms. Barbara Vettori, Assistant Professor, of Criminology at the Catholic University of Milan.

¹⁰⁵ Interview with Dario Caputo, National Agency for the Administration and the Destination of Seized and Confiscated Goods from Organized Crime. Refer also to European Commission (2009), "Assessing the effectiveness of EU Member States' practices in the identification, tracing, freezing and confiscation of proceeds of crime," [2009] Matrix Insight, June 2009, pg151 ff. Available at: http://ec.europa.eu/home-affairs/news/intro/docs/20120312/final_asset_recovery_report_june_2009.pdf#zoom=100

¹⁰⁶ Interview with Mr. Fausto Zuccarelli, District Antimafia Prosecutor, Naples.

¹⁰⁷ The Agency has been established by Law 50 of 31 March 2010 Refer to: National Agency for the Administration and the Destination of Seized and Confiscated Goods from Organized Crime (ANBSC) (2012), *2° Relazione sull'attività svolta. 1 gennaio-31 dicembre 2011*. Available at: http://www.filleacgil.it/News_2011/File2/OSS_legalita/ANBSC%20-%20RELAZIONE%202011.pdf

¹⁰⁸ Interview with Ms. Barbara Vettori, Assistant Professor of Criminology, at the Catholic University of Milan, and interview with Mr. Roberto Forte, President of the International Network of Civil Society Organizations for the Social Struggle Against Transnational Organized Crime (Flare). For the FLARE activities, refer to: <http://www.flarenetwork.org/report/report.htm>

¹⁰⁹ Interview with Mr. Dario Caputo and Mr. Luca D'Amore, National Agency for the Administration and the Destination of Seized and Confiscated Goods from Organized Crime.

¹¹⁰ Refer to: Council of Europe (1990), *Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime*, 8 November. Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/141.htm>

¹¹¹ Interview with Mr. Roberto Forte, President of the International Network of Civil Society Organizations for the Social Struggle Against Transnational Organized Crime (Flare).

¹¹² Interview with Mr. Dario Caputo and Mr. Luca D'Amore, National Agency for the Administration and the Destination of Seized and Confiscated Goods from Organized Crime.

¹¹³ For a broader overview of the main IP laws in Switzerland, refer to: <http://www.wipo.int/wipolex/en/profile.jsp?code=CH>

¹¹⁴ Refer to: Loi fédérale du 9 octobre 1992 sur le droit d'auteur et les droits voisins. Available at: <http://www.admin.ch/ch/fr/rs/2/231.1.fr.pdf>

¹¹⁵ Refer to: Swiss *Criminal Code* of 21 December 1937. (Status as of 1 October 2012). Available at: <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf>

¹¹⁶ Refer to: STOP Piracy, Swiss Anti-Counterfeiting and Piracy Platform. Available at: <http://www.stop-piracy.ch/en/candp/cap50.shtml>

¹¹⁷ Interview with Mr. Jean-Bernard Schmid, Public Prosecutor, Geneva and Interview with Mr. Lukas Luethi, Legal Advisor, Swiss Federal Institute of Intellectual Property & Managing Director, Stop Piracy, Swiss Anti-Counterfeiting and Piracy Platform.

¹¹⁸ Article 70 the Swiss Criminal Code (Forfeiture of assets. Principles)

1 The court shall order the forfeiture of assets that have been acquired through the commission of an offense, or that are intended as commission for an offense or as payment; therefore, unless the assets are passed on to the person harmed for the purpose of restoring the prior lawful position.

2 Forfeiture is not permitted if a third party has acquired the assets ignorant of the grounds for forfeiture, provided he has paid a consideration of equal value therefore [this transition doesn't make sense, as in 1 above] or forfeiture would cause him to endure disproportionate hardship.

3 The right to order forfeiture is limited to seven years; if, however, the prosecution of the offense is subject to a longer limitation period, this period also applies to the right to order forfeiture.

4 Official notice must be given of forfeiture. The rights of persons harmed or third parties expire five years after the date of official notice.

5 If the amount of the assets to be forfeited cannot be ascertained, or may be ascertained only by incurring a disproportionate level of trouble and expense, the court may make an estimate.

See <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf>

¹¹⁹ Interview with Mr. Lukas Luethi, Legal Advisor, Swiss Federal Institute of Intellectual Property & Managing Director, Stop Piracy, Swiss Anti-Counterfeiting and Piracy Platform. Refer also to: Houston Journal of International Law, "The confiscation of criminal assets in the United States and Switzerland," Houston, 1990, volume 13, page 8. Available at: http://heinonline.org/HOL/Page?handle=hein.journals/hujil13&div=6&collection=journals&set_as_cursor=0&men_tab=srchresults&terms=Houston|Journal|of|International|Law|The|confiscation|of|criminal|assets|in|the|United|States|and|Switzerland|Houston,|1990,|volume|13.&type=matchall

¹²⁰ Interview with Mr. Jean-Bernard Schmid, Public Prosecutor, Geneva.

¹²¹Art. 69 of the Swiss Criminal Code (Forfeiture. Forfeiture of dangerous objects)

1. The court shall, irrespective of the criminal liability of any person, order the forfeiture of objects that have been used, or were intended to be used, for the commission of an offense, or that have been produced as a result of the commission of an offense in the event that such objects constitute a future danger to public safety, morals, or public order.

2. The court may order that the objects forfeited be rendered unusable or be destroyed.

Refer to: <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf>

¹²² Refer to: Greenberg T. S., et al. (2009), *Stolen asset recovery: a good practices guide for non-conviction based asset forfeiture*, cit. page 61.

¹²³ Refer to: "Federal Act on International Mutual Assistance in Criminal Matters (IMAC)" (CH) of 20 March 1981 ('IRSG', SR 351.1) and Ordinance to IMAC of 24 February 1982 ('IRSV', SR 351.11) Available at :<http://www.unodc.org/unodc/search.html?q=Federal+Act+on+International+Mutual+Assistance+in+Criminal+Matters+%28IMAC%29>

¹²⁴ Refer to: IMAC, Article 74a para. 1. Previously cited work.

¹²⁵ Interview with Mr. Jean-Bernard Schimid. Also refer to: Gossin P., *International Mutual Legal Assistance In Switzerland*, Federal Office of Justice, Swiss Confederation. Available at: http://www.unafei.or.jp/english/pdf/RS_No77/No77_07VE_Gossin.pdf

¹²⁶ Refer to: Greenberg T.S., Samuel L.M., Grant W., Gray L., *Stolen Asset Recovery – A good practices guide for non-conviction based asset forfeiture* ATF 126 II 258, ATF 113 Ib 257 consid. 5 page 270.

¹²⁷ *Ibid.* The Federal Supreme Court decision in *A Company v. Federal Office of Justice*, ATF 132 II 178 addressed the issue of criminal judiciary cooperation in NCB asset forfeiture between the United States and Switzerland, where the United States was pursuing an NCB asset forfeiture case with no intention, at the time, to initiate criminal proceedings.

¹²⁸ Refer to: Decision 6B_688/2011 of 21 August 2012. Available at: <http://www.icc-ccs.org/home/news/98-legal-developments/781-21-august-2012>

¹²⁹ Replacement value should not be understood as a substitute asset or a "compensatory payment." A replacement value requires that the link between the offense and the value must still exist (paper trail).

¹³⁰ Refer to: Greenber T.S., Samuel L.M., Grant W., Gray L., "Stolen Asset Recovery – A good practices guide for non-conviction based asset forfeiture" ATF 133 IV 215; ATF 129 II 453. Previously cited work.

¹³¹ Refer to: Chaikin D. "The Impact of Swiss Principles of Mutual Assistance on Financial and Fiscal Crimes," (2006) in *Revenue Law Journal*, Vol. 16: Iss. 1, Article 9. Available at: <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1173&context=rj>

¹³² Refer to: Federal Act on International Mutual Assistance in Criminal Matters (IMAC) (CH) of 20 March 1981 ('IRSG', SR 351.1) and Ordinance to IMAC of 24 February 1982 ('IRSV', SR 351.11).

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ Refer to: OECD Financial Action Task Force (FATF), *Best practices Paper on Confiscation (Recommendations 3 and 38)*, 2010, page 7. Available at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Best%20Practices%20Confication%20R3%20and%20R38%202012.pdf>

¹³⁶ Refer to: FRA (2012), *Opinion of the European Union Agency For Fundamental Rights on the Confiscation of proceeds of crime*, cited, page 10.

¹³⁷ *Ibid* page 72. For example, under the US POC legislation, confiscation is available against the assets that a fugitive leaves behind.

¹³⁸ Refer to: FATF (2012), *Best Practices Paper On Confiscation (Recommendations 4 And 38) And A Framework For Ongoing Work On Asset Recovery*, cited, page 6.

¹³⁹ For an in-depth analysis of criminal vs. non criminal standard of proof, refer to: Greenberg T. S., et al., (2009), *Stolen asset recovery: a good practices guide for non-conviction based asset forfeiture*, cited above, page 58 and following.

¹⁴⁰ *Ibid.* Page 72.

¹⁴¹ Refer to: Cassella S.D. (2007), *The Case for Civil Forfeiture: Why In Rem Proceedings are an Essential Tool for Recovering the Proceeds of Crime*, Cambridge International Symposium on Economic Crime 7 September, 5. Available at: http://www.emeraldinsight.com/journals.htm/journals.htm?articleid=1642150&show=html&WT.mc_id=alsoread

¹⁴² Refer to: Council of Europe (2005), *Convention of Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism*, (EC) CETS no. 198, 16 May, Warsaw. Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/198.htm>

¹⁴³ Refer to: European Council Recommendation (EC) 2002/C 114/01 on Improving Investigation Methods in the Fight Against Organized Crime Linked to Drug Trafficking By Criminal Organizations and Their Finances/Assets [2002] OJ C 144/1.

¹⁴⁴ For example, extended confiscation powers are already provided in the EU legislation. Framework Decision 2005/212/JHA obliges Member States to allow the confiscation of assets belonging directly or indirectly to persons convicted of certain serious crimes (related to organized crime and terrorism activities). See Council of Europe, *Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime – Related Proceeds, Instrumentalities and Property*, previously cited work.

¹⁴⁵ Refer to: European Commission (2012) *Proposal for a Directive Of The European Parliament And The Council on the freezing and confiscation of proceeds of crime in the European Union. Commission Staff Working Paper*. Brussels, 12 March. Available at: http://ec.europa.eu/home-affairs/news/intro/docs/20120312/1_en_act_part1_v8_1.pdf

¹⁴⁶ Refer to: Levi M., Osofsky L., “Investigating, Seizing and Confiscating the Proceeds of Crime”, in Police Research Group, *Crime Detection and Prevention Series: paper no. 61*, London, Home Office Police Department, 1995. Available at: <http://library.npia.police.uk/docs/hopolicers/fcdps61.pdf>

¹⁴⁷ Refer to: The Assets Recovery Agency (2005), ‘*The enforcement task force - two years on and £52 million recovered*’, *Proceeds of Crime Update*, London, Assets Recovery Agency, 20 January.

¹⁴⁸ Refer to: U.S. Department of Justice (2006), *Asset Forfeiture Fund and Sized Assets Deposit Fund Annual Financial Statement Fiscal Year 2006*, Office of the Inspector General, Audit Division, Audit Report 07-15. Available at: http://www.justice.gov/jmd/afp/01programaudit/fy2006/fy06_afs_report.pdf

¹⁴⁹ Refer to: United States Department of the Treasury. Treasury Forfeiture Fund for FY’ 2006, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 2008: Appendix*, at 854 (2007). Available at: <http://www.treasury.gov/about/organizational-structure/ig/Documents/oig09022.pdf>

¹⁵⁰ Refer to: Povey K., Wooler S., Dixon S. (2004), *Payback Time: Joint Review of Asset Recovery Since, the Proceeds of Crime Act 2002*, London, HMSO, 11 November. Available at: http://www.hmcpso.gov.uk/documents/reports/CJJI_THM/BOTJ/PaybackTime_Rep_Nov04.pdf

¹⁵¹ Refer to: Council Decision (EC) 2005/212/JHA on the “Confiscation of Crime-Related Proceeds, Instrumentalities and Property,” [2005] OJ68/49. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:en:PDF>

¹⁵² Refer to: Council Decision (EC) 2003/577/JHA on the “Execution in the European Union of Order Freezing Property or Evidence,” OJL 196, L196/45. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0045:0055:en:PDF>

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DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on freezing and confiscation of the proceeds of crime in the EU COM 2012/85. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0085:FIN:EN:PDF>

¹⁵³ See footnote 32 above.

¹⁵⁴ Refer to: Council of Europe (1990), *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, Strasbourg, 8 November. Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/141.htm>

¹⁵⁵ Refer to: United Nations, *United Nations Convention Against Corruption*, previously cited work.

¹⁵⁶ Refer to: Council of Europe (2005), *Convention of Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism*, previously cited.

¹⁵⁷ Refer to: Golobinek R. (2006), *Financial Investigations and Confiscation of Proceeds from Crime. Training Manual for Law Enforcement and Judiciary*, Council of Europe, Department of Crime Problems. Available at: http://www.coe.int/t/dghl/cooperation/economiccrime/SpecialFiles/CARPO-ManualFinInv_eng.pdf page 12. The terminology used in different jurisdictions varies significantly. Some jurisdictions use the term “confiscation” instead of forfeiture for both criminal and civil procedures, where others use the term “forfeiture,” referring to criminal and civil forfeiture. In any event, both terms refer to the final deprivation of assets/property in the context of “Proceeds of Crime legislation.”

¹⁵⁸ Refer to: Council of Europe, *Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime and on the financing of Terrorism*, previously cited work, Art.5.

¹⁵⁹ Refer to: Doyle C., *Crime and Forfeiture*, previously cited work.

¹⁶⁰ Refer to: US Department of Justice, *Selected Federal Asset Forfeiture Statutes*, previously cited work.

¹⁶¹ Refer to: US Department of Justice, *Civil Asset Forfeiture Reform Act of 2000*, previously cited work.

¹⁶² Refer to: Council Decision (EC) 2003/577/JHA on the “Execution in the European Union of Order Freezing Property or Evidence,” OJL 196, L196/45, previously cited work.

¹⁶³ Refer to: *United Nations convention against Transnational Organized Crime*, previously cited work. Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12&chapter=18&lang=en

¹⁶⁴ Refer to: Council Decision (EC) 2003/577/JHA on the Execution in the European Union of Order Freezing Property or Evidence’, OJL 196, L196/45, previously cited work.

¹⁶⁵ Refer to: Council of Europe (2000), “The prevention and control of organized crime: a European Union strategy for the beginning of the new millennium”, in *Official Journal of the European Communities*, OJ C 124, 3 May. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:124:0001:0033:EN:PDF>

¹⁶⁶ Refer to: Council Decision (EC) 2005/212/JHA on Confiscation of Crime— Related Proceeds, Instrumentalities and Property’ [2002] OJL 68/15, previously cited work.

¹⁶⁷ Refer to: Council of Europe (2005), *Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime and on the financing of Terrorism*, previously cited work, CETS 198, 16 May.



