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Analytical Study on Mechanisms for Asset Recovery and Confiscation in Moldova

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INTERNATIONAL CENTRE FOR
ASSET RECOVERY

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The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the UNDP, the financing institution or the Government of Moldova.

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List of abbreviations

1988 Vienna Convention	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
1990 Convention	CoE Convention on laundering, search, seizure and confiscation of the proceeds of crime
AMO	Asset Management Office
ARO	Asset Recovery Office
CCECC	Centre for Combating Economic Crime and Corruption.
CoE	Council of Europe
EBRD	European Bank for Reconstruction and Development
EU	European Union
FATF	Financial Action Task Force
FD	Framework Decision
FRSB	FATF Regional Style Body
Interpol or ICPO	International Criminal Police Organisation
MDL	Moldovan Leu (plural: Lei).
MLA	Mutual legal assistance
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
NAC	National Anti-Corruption Centre
NAC	National Anti-Corruption Centre of Moldova
NCB	Non-conviction based
SIRENE	Supplementary Information Request at the National Entries

SIS	Schengen Information System
SPCSB	Office for Prevention and Fight against Money Laundering (FIU of Moldova)
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNTOC	United Nations Convention against Transnational Organised Crime
VLAP	Visa Liberalisation Action Plan

1 Executive summary

The present report has been drafted based on deskwork research and on on-site missions to Chisinau, Moldova, conducted between October 2015 and January 2016. A first draft of the report was circulated with the Moldovan authorities for further input and commenting in December 2015. A final version of the report was discussed with the Moldovan authorities and presented through validation workshops.

1.1 Background

In order to propose practical recommendations on effective mechanisms for asset recovery and confiscation, it was necessary to review the current legal and regulatory framework on Moldova, as well as to interview with the institutions directly responsible for implementing the asset recovery process in the country, in order to understand the practices in the country.

Furthermore, in order to review the asset recovery system in Moldova, the establishment of an asset recovery office (ARO) and types of confiscation available, the study first presented the applicable international and regional standards, in order to benchmark the Moldova system.

1.2 Aim

The present report is a result of the revision of the asset recovery process in the country, conducted by the Basel Institute, with a view to strengthening the legal and operational capacity in Moldova in the said field.

The report follows the methodological approach proposed in Section 2 below. The study sought to identify the following elements:

- The structure of the current Moldova asset recovery model;
- The strengths and weaknesses of the said model;
- The role and functions of an ARO within the context of the Moldova asset recovery model, and its placement within the system.
- The types of seizure and confiscation available under Moldovan law.

1.3 Report structure

- Section 1 is the executive summary of the report, containing a short summary of the key finding and recommendations contained in more detail throughout the report.
- Section 2 provides the methodological approach used in undertaking the project.

- Section 3 contains the international and European standards applicable to the asset recovery process.
- Section 4 provides a description of the Moldovan asset recovery system, including the current legislative and regulatory framework, as well as the institutions responsible for implementing the asset recovery process in the country.
- Section 5 discusses the roles and functions of an ARO in the context of the Moldovan asset recovery system.
- Section 6 contains the conclusions of the project.

1.4 Recommendations

Establishment of an Asset Recovery Office

Pursuant to the regulation of the European Union, an Asset Recovery Office (ARO) is a body tasked with the facilitation of the tracing and identification of proceeds of crime and other crime related property that may become the object of a freezing, seizure or confiscation order made by a competent judicial authority. It is an intelligence body which complements and coordinates its activities with other financial and police intelligence units.

While Moldova is not part of the European Union, it is considering establishing an ARO in accordance with the EU regulation. While said regulation establishes the possibility of a country having more than one ARO, consideration should be given as to whether more than one ARO is indeed needed in Moldova, given the size of the country, and whether the creation of more than one ARO may impact on the overall effectiveness of the asset recovery system of Moldova.

Notwithstanding the above, it should be noted that there is currently a misunderstanding among the Moldovan agencies as to the exact role and responsibility of such a body in the country. Thus, it is necessary to first determine the scope of activity of an ARO in order to facilitate the discussion at the national level.

Establishment of an asset recovery policy

There is a lack of an integrated asset recovery policy in Moldova. As a result, the actions, which are carried out by the numerous stakeholders (National Anti-Corruption Centre, Ministry of Internal Affairs, General Prosecutor's Office of Moldova, Courts and Tax Inspectorate) responsible for collecting evidence, seizing, confiscating and realising proceeds and instrumentalities of crimes, are disjointed.

It is through a cohesive asset recovery policy that it will be possible for the relevant stakeholders to fully assess the limitations and redundancies in the asset recovery system in Moldova, and to establish goals that will allow them to overcome the challenges currently faced in the system.

Furthermore, by creating an asset recovery policy, the stakeholders will enable themselves to more proactively co-ordinate their actions at an operational level.

Increase of the active sharing of information between the relevant stakeholders at a system-wide level

Preventing and combating crime requires a proactive approach to sharing the available information. Moldovan agencies do not appear to, for the most part, take a proactive stance in information sharing. This can be observed at the operational level, for example, in the disjoined efforts of combating economic crimes (generally under the responsibility of the Ministry of Internal Affairs) and linking the predicate offence to money laundering (generally under the responsibility of the National Anti-Corruption Centre). In this regard, there is a need for the agencies to share the information produced in a timely manner, taking into consideration the sensibilities of a criminal investigation and the seizure of proceeds and instrumentalities of crime. As such, if administrative information is available, and if it should be sent to the law enforcement authorities for verification of the occurrence of criminal activity, the person under administrative or criminal investigation should not be made aware of this transfer of information until the appropriate time.

Also, there does not appear to be neither a follow-up nor feedback system between the agencies that are sharing information amongst themselves. The agencies receiving the information produced by another should inform the latter as to whether the quality of the information produced was satisfactory, and whether the information is meeting the expectations of the receiving agency. This process of feedback will allow for the verification of the information production mechanisms and the quality of information produced, with a view to improving the effectiveness of the information being produced, as well as the management and sharing of information amongst the agencies.

Finally, the agency that has produced the information should follow-up with the receiving agency on the actions that have been taken. This is of fundamental importance in order for the producing agency to assess its internal procedures and identify potential gaps that need to be reviewed.

Insufficient knowledge of financial investigation techniques

There is currently a lack of financial investigative capacities with the criminal investigative bodies. It has become apparent that the law enforcement and prosecutorial authorities focus on the criminal investigation, giving little attention to the financial investigation. Even when attention to the financial investigation is given, there are limited capacities to undertake any relevant investigative tasks.

There is a need, therefore, for the establishment of a body of dedicated financial investigators within the law enforcement bodies of Moldova (Ministry of Internal Affairs and National Anti-Corruption Centre), who will be tasked with conducting the financial investigations. Furthermore,

a financial profiling of perpetrators should become part of every criminal investigation relating to serious, organised or financial crimes. The financial investigation should take primary role in such cases, and done in connection and in parallel to any criminal investigations.

Clarification on the responsibility for, and the actual management of seized assets

Currently, the Moldovan judicial authority that has issued an order for seizure of assets is generally responsible for the seized assets. The management is normally conducted by the agency which has seized the asset, and will generally keep the assets in deposit pending a final confiscation order. Upon the confiscation order, the assets are generally handed over to the Tax Inspectorate for realisation of the property.

It should be noted that there is no body responsible for the management of seized assets in Moldova. As a result, using the current model, the assets are dispersed for management throughout the country. The management of assets should not be the responsibility of law enforcement, prosecutor or Courts. These should have the ability to transfer these assets to a centralised asset management agency, to place them under receivership, or to have the option to anticipate the sale of seized assets, placing the funds into an escrow account. Moreover, the current model does not take into consideration the cost of management and the depreciation of the assets. As a result, once a final judgement is received, the best value for money may not be observed.

Lack of experience in the enforcement of Moldovan confiscation orders abroad

Moldova does not have experience in the confiscation of assets abroad. Thus, the national model for the confiscation and realisation of assets does not seem prepared to undertaken the necessary steps for the enforcement of Moldovan orders abroad.

Given that proceeds of crime are generally laundered out of the country where the predicate offence has been committed, it is necessary to review the confiscation and realisation/enforcement policies and legislation in the country to verify its effectiveness in realisation in property abroad.

2 Methodology

The benchmarking of the Moldovan asset recovery framework with international and European standards, sought to assess the legal and regulatory framework capabilities in preventing and fighting economic and financial crimes. It furthermore enabled to review the establishment of an asset recovery office (ARO) in Moldova.

The project has been executed through the methodology described below:

1) A desktop study to:
   a) Define the exact operational and institutional scope of "asset recovery" as considered for the purpose of current project in the Moldovan context;
   b) Analyse laws, regulations, strategies, court decisions, etc. relevant to the asset recovery process in Moldova;
   c) Review the current regulatory framework of Moldova and to identify the key institutions that play a role in the asset recovery process of Moldova;
2) On-site data collection and analysis through two on-site missions to Chisinau;
3) Final report containing findings and recommendations with regards to the Moldovan asset recovery regime and its ARO. This final report has been subject to discussion and validation with the relevant stakeholders (step 4);
4) Validation on-site mission with a view to discuss the findings and recommendations of the report, and validating the work undertaken during the project.

Steps (1) and (2) above refer to the retrieval and analysis of relevant data sets of the asset recovery regime in Moldova, and will further prepare the experts for the on-site mission. Together with step (3) they will notably also enable the mapping of the asset recovery process in Moldova).

Step (1) will look at the asset recovery process, institutions and regulations both from a theoretical point of view, e.g., based on European and international practices and standards, and from a practical point of view looking at the reality of these processes, institutions and laws as now in operation in Moldova. It will notably identify the key thematic streams of an asset recovery system that will form the basic structure for the following analysis.

Step (1) will furthermore develop a working hypothesis (or theoretical model), which will enable the identification of strengths and possible shortcoming in the existing system in Moldova vis-à-vis the European and international standards and practices, and potential avenues for enhancement of the system. This working hypothesis shall be comprised of the actual requirements needed for an efficient asset recovery model.

Step (2) will consist of an extended series of interviews and stakeholder consultations in Moldova with a view to reviewing and validating the working hypothesis and generating support for any recommendations arising from step (1) above. This step will be the crucial stage of the methodology as it will allow engaging all key stakeholders and testing the feasibility of ideal-type reforms within the political, institutional and structural realities of Moldova.

Step (3) will comprise the drafting the final report based on the information collected during the on-site visit. It will also provide a set of findings and recommendations. The final report will be subject to discussions regarding the findings and recommendations, as well as its validation through step (4).

2.1 Scope

The analysis and evaluation of the asset recovery regime of Moldova and the confiscation powers available in its legal system will be done by first conducting a mapping of the asset recovery regime of Moldova with a view to understanding its operational capacity. While it should be underscored that the definition of asset recovery and the asset recovery regime in Moldova is ultimately dependant on its legal and regulatory framework, the asset recovery process itself can be perceived as a multi-phase process comprising the (ICAR 2009 page 20):

1) Pre-investigative or intelligence gathering phase, during which the analyst verifies the source of the information initiating the investigation and determines its authenticity. If there are inconsistencies in the intelligence or incorrect statements and assumptions, then the true facts must be established.
2) Investigative phase, where the proceeds of crime are located and identified in the pre-investigative phase and evidence of ownership is collated covering several areas of investigative work in more formal processes, for example through the use of requests for mutual legal assistance to obtain information relating to offshore bank accounts and other records, and financial investigations to obtain and analyse bank records. This phase involves substantiating the veracity of the intelligence and information and converting it into admissible evidence. The result of this investigation can therefore only be a temporary measure – e.g., seizure – in order to later secure a confiscation order through the court.
3) Freezing or seizure phase, in which orders seeking the restraint of assets is ordered by the responsible authority, with a view to ensuring that the proceeds and instrumentalities of crime are not dissipated, and that they may be realised during the disposal phase.
4) Asset management phase, where the assets that have been restrained are managed in order to preserve their value and ensure the best value-for-money during the disposal phase.
5) Judicial phase, where the accused person/defendant is tried and convicted (or acquitted) and the decision on confiscation is determined.
6) Disposal phase, where the property is actually confiscated and disposed of by the State in accordance with the law, whilst taking into account any applicable international asset

sharing obligations in appropriate cases, as well as compensation for victims and determinations on what to do with the confiscated assets.

Therefore, in order to effectively assess the asset recovery regime in Moldova, it was necessary to have a complete overview of the legal and regulatory framework enabling the asset recovery process. The legal and regulatory framework was subsequently benchmarked with European and international standards, as well as best practices found in other similar jurisdictions. Furthermore, it was necessary to review both the interactions of the institutions compounding the asset recovery regime in Moldova and the capacities available within.

By reviewing both the legal and regulatory framework, as well as assessing the capacities available, it was possible to identify potential elements that may play a role in reducing the overall effectiveness and efficiency of the asset recovery process and regime in Moldova. These hurdles may include:

- Systemic hurdles (weak job scope and responsibility definitions; uncertain chain of command from within the structures; deficient or lacking communication protocols; problematic workflow processes);
- Institutional and capacity hurdles (lack of performance indicators; lack of an integrated strategy for human resources management, recruitment, capacity building, knowledge retention, performance evaluation and incentives; and lack of a mechanism or institution with the overarching responsibility for co-ordination of the asset recovery process);
- Legislative and procedural hurdles (regulatory hurdles that limit the use and potential of the structures responsible for the asset recovery process; lack of procedures that ensure maximum benefit from formal and informal collaboration between the several institutions comprising the asset recovery regime in Moldova).

2.2 Data collection and analysis

For the purposes of the project, the current asset recovery regime underwent an extensive and comprehensive mapping process, as described below:

- Topic mapping: comprising the definition of ‘asset recovery’ for the purposes of the project, and the criminal activities that are part of the said definition (e.g., financial-related offences, predicate offences to money laundering, etc.). These definitions are further important for the identification of the thematic streams which comprise the project;
- Source mapping: comprising the collection of legislation, regulation, reports, strategies, etc. Source mapping will further include the identification of good practices in Moldova;
- System mapping: seeking to identify the inter-institutional interactions of the institutions which comprise the asset recovery regime in Moldova;
- Institutional mapping: which seeks to identify the intra-institutional interactions of the relevant departments within the institutions comprising the asset recovery regime in Moldova;
- Capacity mapping: seeking to identify the institutional and human capacities within the relevant departments within the institutions comprising the asset recovery regime in Moldova, as well as the knowledge and information retention within these departments

and institutions.

Once the identification and collection of data, its processing and the revision of primary and secondary sources, they will be allocated to the respective thematic streams. The following is a draft list of potential thematic streams that may be relevant in the Moldovan context:

1. Intelligence gathering: This thematic stream is responsible for assessing the capabilities, capacities and workflow in the Moldovan asset recovery model.

   This thematic area will also be responsible for assessing, where applicable, the interaction of the Moldovan intelligence gathering institutions and its ability, and quality thereto, to interact amongst themselves, and with its counterparts at the international level, where applicable.
2. Criminal Justice System: This thematic stream includes the pre-trial investigation, prosecution and adjudication of asset recovery cases in Moldova. It will, in particular, focus on the financial investigation, seizure, management, confiscation, repatriation and final destination of proceeds and instrumentalities of crime given by the Moldovan asset recovery regime.
   2.1. Investigation and Prosecution, subdivided into:
      2.1.1. Criminal investigation, comprising an analysis into the evidence gathering methods used by law enforcement and its ability to cover the required elements of the offence in order to ensure an effective prosecution and adjudication, respecting the necessary elements of fundamental and human rights, as well as the due process requirements. This section also comprises an assessment of the interaction of the criminal investigation with the financial investigation, with a view to securing the proceeds and instrumentalities of crime.
      2.1.2. Financial investigation, comprising elements of the financial investigation necessary to ensure the identification and tracing of proceeds and instrumentalities of crime, as well as the assistance to the criminal investigation and the prosecution to obtain the necessary seizure of proceeds and instrumentalities of crime in a timely fashion, taking into consideration the principle of opportunity in investigations.
3. International Co-operation. This thematic stream shall focus on the elements that are needed to ensure proper and effective international co-operation (in particular mutual legal assistance and joint investigation teams) to gather evidence and to seize and confiscate proceeds and instrumentalities of crime.
4. Seizure and management of seized assets. This thematic stream comprises of the pre-confiscation areas that have a direct link with the criminal investigation and the financial intelligence and investigation areas above. It will focus on the presentation of evidence leading to the seizure of assets, its effects, as well as the need to have seized assets managed throughout the criminal proceeding leading to the confiscation of assets, in order to preserve their value.
5. Confiscation, repatriation and final destination of assets. This thematic stream shall focus on the confiscation order issued by courts (linking with the thematic stream on seizure and

management of seized assets), the co-ordination of such order with foreign jurisdictions (if applicable, and linking with the international co-operation thematic stream) for the repatriation of assets. Where applicable, an analysis of the final destination of the confiscated and repatriated assets will also be taken into account and assessed.

3 International and regional standards

There is a comprehensive international and regional framework in relation to the asset recovery process. These can be found in, among others, the Financial Action Task Force (FATF) and the Egmont Group; the United Nations (UN) criminal law treaties;[1] as well as regulations from the European Union (EU). The present section seeks to highlight the most relevant international and regional regulation applicable to the context of the asset recovery process.

3.1 Financial Action Task Force 40 recommendations

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

At the structural level, FATF is comprised of 36 country members and 8 associate members. These associate members are the FATF Regional Style Bodies (FRSBs), which include the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL). MONEYVAL was established in September 1997 by the Committee of Ministers of the Council of Europe to conduct self and mutual assessment exercises of the anti-money laundering measures in place in Council of Europe member states, which are not members of FATF. The aim of MONEYVAL is to ensure that its member states have in place effective systems to counter money laundering and terrorist financing and comply with the relevant international standards in this matter.

Additionally, FATF has a number of international organisations with observer status. These include, but are not limited to, the World Bank, the International Monetary Fund (IMF) and European Bank for Reconstruction and Development (EBRD). These are also important international and regional standard setters, responsible for establishing standards for many of the predicate offences to money laundering, e.g., organised crime, trafficking in drugs and

[1] While there are several criminal law treaties established by the United Nations (1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, United Nations Convention against Transnational Organised Crime and United Nations Convention Against Corruption), focus will be given to the latter in the context of these international legal instruments.

corruption-related offences. For the purposes of the present assessment report, focus has been given to the above-mentioned organisations, given their work in the region and with Moldova.

3.1.1 Recommendation 2 - national cooperation and coordination

FATF Recommendation 2 requires countries to have in place national anti-money laundering (AML) policies which are informed by the identified risks. This risk analysis should be regularly reviewed, having a designated authority or mechanism that is responsible for such policies. FATF Recommendation 2 further requires countries to put in place effective mechanisms enabling the co-operation and co-ordination amongst policymakers, FIUs, law enforcement, supervisors and other relevant authorities responsible for the prevention and combating or money laundering, among others.

This recommendation is to be understood as the legislation and other mechanisms of the country should be viewed as facilitating co-operation among the competent authorities, as well as facilitating their co-ordination (Schott 2006 pages VI-26 and VI-27).

3.1.2 Recommendation 3 – money laundering offence

FATF Recommendation 3 requires countries to criminalise money laundering on the basis of the United Nations Convention against Transnational Organised Crime (UNTOC) and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention) (FATF 2012a pages 12 and 34).

The widest range of serious offences should be applied as predicate offences to the money laundering offence – this may be done making reference to all offences, a threshold linked either to a category of serious offences; or to the penalty of imprisonment applicable to the predicate offence, a list of predicate offences, or a combination of these offences (FATF 2012a page 34).

Where countries apply a threshold approach, predicate offences should, at a minimum, comprise all offences that fall within the category of serious offences under their national law, or should include offences that are punishable by a maximum penalty of more than one year's imprisonment, or, for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences that are punished by a minimum penalty of more than six months imprisonment (FATF 2012a page 34).

Whichever approach is adopted, each country should, at a minimum, include a range of offences within each of the designated categories of offences. The offence of money laundering should extend to any type of property, regardless of its value, that directly or indirectly represents the proceeds of crime. When proving that property is the proceeds of crime, it should not be necessary that a person be convicted of a predicate offence (FATF 2012a page 34).

Countries should ensure that (i) The intent and knowledge required to prove the offence of money laundering may be inferred from objective factual circumstances; (ii) Effective, proportionate and dissuasive criminal sanctions should apply to natural persons convicted of money laundering; and (iii) Criminal liability and sanctions, and, where that is not possible (due to fundamental principles of domestic law), civil or administrative liability and sanctions, should apply to legal persons. This should not preclude parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which more than one form of liability is available. Such measures should be without prejudice to the criminal liability of natural persons. All sanctions should be effective, proportionate and dissuasive; (iv) There should be appropriate ancillary offences to the offence of money laundering, including participation in, association with or conspiracy to commit, attempt, aiding and abetting, facilitating, and counselling the commission, unless this is not permitted by fundamental principles of domestic law (FATF 2012a pages 34-35).

3.1.3 Recommendation 4 – confiscation and provisional measures

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

Such measures should include the authority to: (a) identify, trace and evaluate property that is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the country's ability to freeze or seize or recover property that is subject to confiscation; and (d) take any appropriate investigative measures.

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. In this regard, attention should be given to the fact that Moldova does not have non-conviction based confiscation. Furthermore, while FATF Recommendation 4 does not necessarily refer to the reversal of the burden of proof, the interpretation of such recommendation must observe article 46(3) of the Constitution of Moldova.

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

and pursuant to requests by foreign countries (FATF 2012a page 36). In this regard, Moldova does not currently have an asset management system in place. It does have mechanisms for the disposal of assets, although their efficacy is currently severely limited.

A core element of Recommendation 4 is that there should be measures in place to identify, trace and evaluate property that is subject to confiscation (FATF 2012b page 1). Countries should ensure that appropriate procedures and legal frameworks are in place to allow informal exchanges of information to take place, including prior to mutual legal assistance (MLA), as this practice may help to focus efforts and resources before the request reaches a formal stage (FATF 2012b page 2). Competent authorities should also engage with foreign counterparts, from a bilateral or regional perspective, and utilise appropriate international bodies such as the Egmont Group, INTERPOL, Europol and Eurojust (FATF 2012b page 2).

Furthermore, countries should ensure that foreign counterparts can easily identify appropriate points of contact (FATF 2012b page 2). Moreover, at the national level, mechanisms should be in place to allow the coordination between those responsible for asset tracing and those responsible for financial investigations with a view to ensuring that such efforts are not impeded by regionalised or fragmented systems, or competing local priorities (FATF 2012b page 2). Mechanisms should be in place in a way that would allow for rapid access to high quality information on the ownership and control of such property (e.g., land, vehicles, legal persons). Ideally, such information should be available without the need for a formal request (FATF 2012b page 2).

3.1.4 Recommendation 29 – Financial Intelligence Units

FATF Recommendation 29 establishes that FIUs should act as the national centre for receiving and analysing suspicious transaction reports (STRs) and other information relevant to money laundering and their predicate offences. FIUs are also responsible for disseminating the results of such analysis. Under FATF Recommendation 29, FIUs should be able to obtain and use additional information from reporting entities in order to perform their analysis (FATF 2012a page 95), as well as to have the access to relevant financial, administrative and law enforcement information. This should include information from open or public sources, as well as relevant information collected or maintained by, or on behalf of, other authorities and, where appropriate, commercially held data (FATF 2012a page 95).

Information received, processed, held or disseminated by the FIU must be securely protected, exchanged and used only in accordance with agreed procedures, policies and applicable laws and regulations. An FIU must, therefore, have rules in place governing the security and confidentiality of such information, including procedures for handling, storage, dissemination, and protection of, as well as access to such information. The FIU should ensure that there is limited access to its facilities and information, including information technology systems (FATF 2012a page 95).

FIUs should apply for membership in the Egmont Group (FATF 2012a page 96). Under FATF Recommendation 29, FIUs should furthermore have regard to the Egmont Group Statement of Purpose and its Principles for Information Exchange Between Financial Intelligence Units for Money Laundering and Terrorism Financing Cases.

The FIU in Moldova is the Service for Prevention and Combating Money Laundering (SPCSB), established in 2002 and member of the Egmont Group since May 2008.

3.1.5 Recommendation 30 – responsibilities of law enforcement and investigative authorities

Countries should ensure that designated law enforcement authorities have responsibility for money laundering and terrorist financing investigations within the framework of national AML/CFT policies. At least in all cases related to major proceeds-generating offences, these designated law enforcement authorities should develop a pro-active parallel financial investigation when pursuing money laundering, associated predicate offences and terrorist financing. This should include cases where the associated predicate offence occurs outside their jurisdictions. Countries should ensure that competent authorities have responsibility for expeditiously identifying, tracing and initiating actions to freeze and seize property that is, or may become, subject to confiscation, or is suspected of being proceeds of crime. Countries should also make use, when necessary, of permanent or temporary multi-disciplinary groups specialised in financial or asset investigations. Countries should ensure that, when necessary, cooperative investigations with appropriate competent authorities in other countries take place.

There should be designated law enforcement authorities that have responsibility for ensuring that money laundering, predicate offences and terrorist financing are properly investigated through the conduct of a financial investigation. Countries should also designate one or more competent authorities to identify, trace, and initiate freezing and seizing of property that is, or may become, subject to confiscation (FATF 2012a page 96). In this regard, the National Anticorruption Centre (NAC) of Moldova is the responsible authority in the country for processing financial intelligence and conducting financial investigations into money laundering. Notwithstanding, the remaining criminal investigation units in the country may also conduct financial investigations, when the predicate offence to money laundering or other financial crimes fall under their competence to investigate.

Countries should consider taking measures, including legislative ones, at the national level, to allow their competent authorities investigating money laundering and terrorist financing cases to postpone or waive the arrest of suspected persons and/or the seizure of the money, for the purpose of identifying persons involved in such activities or for evidence gathering. Without such measures the use of procedures such as controlled deliveries and undercover operations are precluded (FATF 2012a page 96).

Recommendation 30 also applies to those competent authorities, which may not law enforcement authorities but which have the responsibility for pursuing financial investigations of predicate offences, to the extent that these competent authorities are exercising functions covered under Recommendation 30 (FATF 2012a page 96).

Anti-corruption enforcement authorities with enforcement powers may be designated to investigate money laundering and terrorist financing offences arising from, or related to, corruption offences under Recommendation 30, and these authorities should also have sufficient powers to identify, trace, and initiate freezing and seizing of assets (FATF 2012a page 96).

The range of law enforcement agencies and other competent authorities mentioned above should be taken into account when countries make use of multi-disciplinary groups in financial investigations (FATF 2012a page 96).

3.1.6 Recommendation 31 – Powers of law enforcement and investigative authorities

When conducting investigations of money laundering and associated predicate offences, competent authorities should be able to obtain access to all necessary documents and information for use in those investigations, and in prosecutions and related actions. This should include powers to use compulsory measures for the production of records held by financial institutions, DNFBPs and other natural or legal persons, for the search of persons and premises, for taking witness statements, and for the seizure and obtaining of evidence.

Countries should ensure that competent authorities conducting investigations are able to use a wide range of investigative techniques suitable for the investigation of money laundering, associated predicate offences and terrorist financing. These investigative techniques include: undercover operations, intercepting communications, accessing computer systems and controlled delivery. In addition, countries should have effective mechanisms in place to identify, in a timely manner, whether natural or legal persons hold or control accounts. They should also have mechanisms to ensure that competent authorities have a process to identify assets without prior notification to the owner. When conducting investigations of money laundering, associated predicate offences and terrorist financing, competent authorities should be able to ask for all relevant information held by the FIU.

In this regard, Moldova has enacted legislation enabling, under certain conditions, its law enforcement bodies to conduct special investigative techniques (Law 59 of 29 March 2012 on special investigation activity).[2]

[2] Available in Romanian at: http://lex.justice.md/md/343452/.

3.1.7 Recommendation 37 – mutual legal assistance

Countries should rapidly, constructively and effectively provide the widest possible range of mutual legal assistance (MLA) in relation to money laundering, associated predicate offences and terrorist financing investigations, prosecutions, and related proceedings. Countries should have an adequate legal basis for providing assistance and, where appropriate, should have in place treaties, arrangements or other mechanisms to enhance cooperation. In particular, countries should:

- Not prohibit, or place unreasonable or unduly restrictive conditions on, the provision of mutual legal assistance.
- Ensure that they have clear and efficient processes for the timely prioritisation and execution of mutual legal assistance requests. Countries should use a central authority, or another established official mechanism, for effective transmission and execution of requests. To monitor progress on requests, a case management system should be maintained.
- Not refuse to execute a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.
- Not refuse to execute a request for mutual legal assistance on the grounds that laws require financial institutions to maintain secrecy or confidentiality.
- Maintain the confidentiality of mutual legal assistance requests they receive and the information contained in them, subject to fundamental principles of domestic law, in order to protect the integrity of the investigation or inquiry. If the requested country cannot comply with the requirement of confidentiality, it should promptly inform the requesting country.

Countries should render mutual legal assistance, notwithstanding the absence of dual criminality, if the assistance does not involve coercive actions. Countries should consider adopting such measures as may be necessary to enable them to provide a wide scope of assistance in the absence of dual criminality.

Where dual criminality is required for mutual legal assistance, that requirement should be deemed to be satisfied regardless of whether both countries place the offence within the same category of offence, or denominate the offence by the same terminology, provided that both countries criminalise the conduct underlying the offence.

Countries should ensure that, of the powers and investigative techniques required under Recommendation 31, and any other powers and investigative techniques available to their competent authorities:

- All those relating to the production, search and seizure of information, documents or evidence (including financial records) from financial institutions or other persons, and the taking of witness statements; and

- A broad range of other powers and investigative techniques;

are also available for use in response to requests for mutual legal assistance, and, if consistent with their domestic framework, in response to direct requests from foreign judicial or law enforcement authorities to domestic counterparts.

To avoid conflicts of jurisdiction, consideration should be given to devising and applying mechanisms for determining the best venue for prosecution of defendants in the interests of justice in cases that are subject to prosecution in more than one country.

Countries should, when making mutual legal assistance requests, make best efforts to provide complete factual and legal information that will allow for timely and efficient execution of requests, including any need for urgency, and should send requests using expeditious means. Countries should, before sending requests, make best efforts to ascertain the legal requirements and formalities to obtain assistance.

The authorities responsible for mutual legal assistance (e.g. a Central Authority) should be provided with adequate financial, human and technical resources. Countries should have in place processes to ensure that the staff of such authorities maintain high professional standards, including standards concerning confidentiality, and should be of high integrity and be appropriately skilled.

3.1.8 Recommendation 38 – mutual legal assistance: freezing and confiscation

Countries should ensure that they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered; proceeds from money laundering, predicate offences and terrorist financing; instrumentalities used in, or intended for use in, the commission of these offences; or property of corresponding value. This authority should include being able to respond to requests made on the basis of non-conviction-based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law. Countries should also have effective mechanisms for managing such property, instrumentalities or property of corresponding value, and arrangements for coordinating seizure and confiscation proceedings, which should include the sharing of confiscated assets.

A robust system of provisional measures and confiscation is an important part of an effective anti-money laundering system. Recommendation 38 requires that there be authority to take expeditious action in response to requests by foreign countries to identify property which may be subject to confiscation (FATF 2012b page 1).

Recommendation 38 requires countries to have authority to take expeditious action in response to requests by foreign countries, and arrangements for co-ordinating freezing, seizure and confiscation proceedings, which should include the sharing of confiscated assets, particularly

when confiscation is directly or indirectly a result of co-ordinated law enforcement actions (FATF 2012b page 3).

Recommendation 38 requires countries to have authority to take expeditious action in response to requests by countries to identify, freeze and seize property laundered, proceeds from money laundering or predicate offences, instrumentalities used or intended for use in the commission of these offences, or property of corresponding value (FATF 2012b page 5).

3.1.9 Recommedation 40 – other forms of international cooperation

FATF Recommendation 40 requires states to ensure that their competent authorities can rapidly, constructively and effectively provide the widest range of international co-operation in relation to money laundering and its predicate offences. In this regard, countries should provide such co-operation both spontaneously and upon request. There should be a lawful basis for providing co-operation. Furthermore, competent authorities should use clear channels or mechanisms for the effective transmission and execution of requests for information or other types of assistance. Competent authorities should have clear and efficient processes for the prioritisation and timely execution of requests, and for safeguarding the information received.

FIUs should exchange information amongst themselves, regardless of their respective status. To this end, FIUs should have an adequate legal basis for providing co-operation on money laundering and its predicate offences (FATF 2012a page 105). FIUs should have the power to exchange all information required to be accessible or obtainable directly or indirectly by the FIU under the FATF Recommendations, in particular under Recommendation 29; and any other information which they have the power to obtain or access, directly or indirectly, at the domestic level, subject to the principle of reciprocity (FATF 2012a page 105).

Requests for co-operation between countries should be made providing complete factual and legal information (FATF 2012a page 105). The information exchanged for the purposes of international co-operation should be used only for the purpose for which the information was sought – or provided, in the event of spontaneous information (FATF 2012a page 104). Any dissemination or use of the information provided to other authorities other than 3rd parties, or beyond the scope originally approved, should be subject to prior authorisation by the requested FIU (FATF 2012a page 104).

Countries should maintain appropriate confidentiality for any request for co-operation and the information exchanged, in order to guarantee the integrity of the inquiry or of the investigation (FATF 2012a page 104). Competent authorities should protect exchanged information in the same manner as they would protect similar information received from domestic sources (FATF 2012a page 104).

3.2 The Egmont Group

The Egmont Group sets out the standards for intercommunication between FIUs. The exchange of information between FIU and reporting entities, law enforcement and prosecutorial authorities, as well as among FIUs is necessary given the ease in transferring monies across different jurisdiction. This information exchange must be done swiftly and securely between the involved FIUs. This information exchange must also be at an early point after possible detection of a crime – during the intelligence gathering stage. At the same time, the information on innocent individuals and businesses must at all times be protected.

The Egmont Group has two documents which are binding, and have to be observed by all its members. These are the Charter of the Egmont Group of Financial Intelligence Units, and the Principles for Information Exchange between Financial Intelligence Units. The Operational Guidance for FIU Activities and Exchange of Information, on the other hand, is not binding, although Egmont member FIUs are encouraged to implement those guidelines to the greatest extent possible.

The Egmont Group also hosts the Egmont Secure Web (ESW), whose purpose is to: (i) provide a secure and reliable channel of communication for the members of the Egmont Group; (ii) function in accordance with the mandate of the Heads of FIU; and (iii) adhere to the standards of security, reliability, efficiency and effectiveness specified by the Heads of FIU.

In order to become a member of the Egmont Group (Egmont Group, 2013c, p. 9), eligible candidates must (i) meet the definition of an FIU; (ii) have full operational status; and (iii) have willingness and legal capability to exchange information with all counterpart FIUs according to the Charter and the Principles. All members of the Egmont Group must exchange information with one another, consistent with the Charter and the Principles. They must also endorse the Operational Guidance for FIU Activities and the Exchange of Information, and support the Egmont Group Support and Compliance Process (applicable to all members).

3.2.1 Charter

The charter of the Egmont Group is a binding document for all Egmont Group members (Egmont Group, 2013c, p. 5). Non-Egmont Group members seeking to become members need to comply with the principles contained therein. The charter is an all-encompassing document containing the obligations and duties of Egmont Group members, and the present assessment report will only focus on those relevant to the aim of the present assessment report. The charter defines a Financial Intelligence Unit (FIU) as the one stated in FATF Recommendation 29 and its interpretative note (Egmont Group, 2013c, p. 5).

Regarding co-operation, the Charter sets out that all members should foster the widest possible co-operation and exchange of information to one another on the basis of reciprocity or mutual agreement, following the following basic rules (Egmont Group, 2013c, p. 8): (i) free exchange of

information for the purposes of analysis at the FIU level; (ii) no dissemination or use of the information for any other purpose without prior consent of the providing FIU; and (iii) protection of the confidentiality of the information.

3.2.2 Principle for information exchange between FIUs

Pursuant to the Egmont Group principles for information exchange, The Egmont Group seeks to pursue the stimulation of information exchange and to overcome the obstacles preventing cross-border information sharing (Egmont Group, 2013a, principle 2). Therefore, the Egmont Group encourages information sharing arrangements should aim to foster the widest possible co-operation between FIUs (Egmont Group, 2013a, principle 5).

The Egmont Group indicates that international co-operation among FIUs should be based upon a foundation of mutual trust (Egmont Group, 2013a, principle 7), allowing for case-by-case solutions to specific problems (Egmont Group, 2013a, principle 8). Furthermore, information sharing with foreign FIUs should be done regardless of their status (Egmont Group, 2013a, principle 9). FIUs should use the most efficient means to co-operate – if bilateral or multilateral agreements or arrangements, such as a Memorandum of Understanding (MOU), are needed, these should be negotiated and signed in a timely way with the widest range of foreign FIUs in the context of international co-operation to counter money laundering and its predicate offences (Egmont Group, 2013a, principle 15).

Information exchange should be done freely, spontaneously and upon request, on the basis of reciprocity between the involved FIUs. FIUs should ensure that they can rapidly, constructively and effectively provide the widest range of international co-operation to counter money laundering and its predicate offences, and there should be a legal basis for providing co-operation (Egmont Group, 2013a, principles 10 and 11). FIUs should be able to conduct queries on behalf of foreign FIUs, and exchange with these foreign FIUs all information that they would be able to obtain if such queries were carried out domestically (Egmont Group, 2013a, principle 16). At the local level, FIUs should have the power to disseminate, spontaneously and upon request, information and the results of their analysis to relevant competent authorities (Egmont Group, 2013a, principle 14).

Information received, processed, held or disseminated by FIUs must be securely protected, exchanged and used only in accordance with agreed procedures, policies and applicable laws and regulations (Egmont Group, 2013a, principle 28). FIUs must, therefore, have rules in place governing the security and confidentiality of such information, including procedures for handling, storage, dissemination and protection of, as well as access to, such information (Egmont Group, 2013a, principle 29). At a minimum, exchanged information must be treated and protected by the same confidentiality provisions that apply to similar information from domestic sources obtained by the FIU receiving the request (Egmont Group, 2013a, principle 33).

The Principles of Egmont require that the exchanges of information among FIUs should take place in a secure way, and through reliable channels or mechanisms (Egmont Group, 2013a, principle 34). One of such channels is the Egmont Secure Web (available for Egmont Group members) or other recognised networks that ensure levels of security, reliability and effectiveness at least equivalent to those of the Egmont Secure Web (for example, the FIU.NET) (Egmont Group, 2013a, principle 35).

3.2.3 Operational guidance for FIU activities and the exchange of information

Unlike the charter and the Principles for information exchange between FIUs, The Operational Guidance of the Egmont Group is not a binding document (Egmont Group, 2013b, p. 5), although Egmont Group members are encouraged to implement them to the greatest extent possible (Egmont Group, 2013b, p. 5 and 9).

The Operational Guidance informs that FIUs should strive for the free exchange of information between FIUs, irrespective of differences in the definition of the predicate offences (Egmont Group, 2013b, guidance 6). Whenever possible, exchanges of information should take place without the need for a Memorandum of Understanding (MOU) (Egmont Group, 2013b, Guidance 10). When confronted with obstacles for co-operation, FIUs should identify alternative means to co-operate with one another (Egmont Group, 2013b, Guidance 7).

However, in cases where FIUs are required by domestic legislation to enter into MOUs in order to exchange information, FIUs should consider: (i) not imposing undue impediments or limitations on the exchange of information, and (ii) making all efforts to enter into such MOUs before co-operation is requested by foreign counterpart FIUs (Egmont Group, 2013b, Guidance 11).

Finally, the Operational Guidance for FIUs indicate that FIUs should be able to provide financial, administrative and law enforcement information and make use of the powers available for domestic analysis in order to obtain the requested information. FIUs involved in the exchange do not need to have access to, and the capacity to exchange, the same information (Egmont Group, 2013b, Guidance 31).

3.3 The United Nations Convention Against Corruption

Prosecution, adjudication and sanctions

The United Nations Convention Against Corruption (UNCAC) does not specify the sanctions that States Parties must provide for in their national legislation to punish corruption-related offences. Notwithstanding, it provides some guidance when article 30 of the UNCAC prescribes that States Parties are to have sanctions that are proportionate to the gravity of the offence, and that they must be sufficient to act as a deterrent.

Article 30(1) of the UNCAC requires sanctions to be effective and dissuasive. while article 30 (1) prescribes the need for taking into account the gravity of the offence, article 30 (6) UNCAC allows for additional procedures with a view to protecting the national administration from corrupt public officials. Under this article, States Parties should consider establishing procedures through which a public official may, where appropriate, be removed, suspended or reassigned from their position, or be disqualified for a period of time if convicted of corruption. These are commonly referred to as administrative sanctions. There must be clear guidelines and rules pertaining to the removal, suspension or reassignment from office of public officials: while they provide a useful tool prevent the maintenance of the public official in the position being held by him or her, it also may become an instrument of manipulation of the system, through which a public official who does not conform with the corrupt practices of a senior public official and may be immobilised or neutralised, as he or she may be considered to be a threat (UNODC, 2009).

Seizure and confiscation of assets

Key elements of punishing corruption-related offences are, on the one hand, to sanction the involved public official and the person that has corrupted or requested to corrupt the public official with prison terms and/or monetary fines and, on the other, to deprive the criminals of the illegal gains (these may be of monetary nature or other properties such as houses, private jets, etc.) arising from the corruption. Thus, investigations and prosecutions must not only track down the offenders but also trace and identify the assets which have been illicitly obtained by the offenders (article 31(2) of the UNCAC) to ensure they will not be able to benefit from the crimes committed, including after a potential prison term has expired.

Thus, seizure and confiscation are legal remedies to remove criminal assets from the hands of the criminals. Several challenges, however, arise in the context of these processes:

- In corruption-related offences, the assets subject to seizure and confiscation are seldom found in only one jurisdiction. Rather, the offender launders the proceeds and instrumentalities by way of money laundering, dispersing the assets in several different jurisdictions and to hide their true origin, nature and ownership. The investigation and prosecution depends heavily on tools for international co-operation for the seizure of assets, and on the procedures within the asset recovery process for their confiscation and return.
- Moreover, the complexities of the criminal process itself come into play. Since the seizure and confiscation are attached to the criminal proceeding, e.g., for criminal confiscation a court must have lawfully convicted the offender, the prosecution must use the criminal threshold (beyond a reasonable doubt) to prove that the assets are not legitimate; however, identifying the criminal assets is highly complex and linking them to the crime for which the criminal has been prosecuted is sometimes extremely difficult.
- Another difficulty relates to the administration of the seized assets during the duration of the criminal process that can take years to conclude. This can present law enforcement with

considerable challenges (e.g., if the seized property includes immovable assets. Questions arise such as, e.g., who will pay the property tax or maintain the property). If the seized property is movable assets (e.g., a vehicle, livestock, etc.), keeping them in storage could considerably depreciate the value of the assets and supplemental costs could arise. These costs can easily overburden the financial costs of the prosecution.

- To remedy these problems, some countries allow for the anticipated sale of the seized assets, especially of movable assets. The money that arises from the sale of these assets is then put into an escrow account pending a final judgment from the court. Other countries also allow for the use of the seized assets by law enforcement, though it has been found that this opens opportunities for corruption (the manager of the seized assets may seek undue advantages to allow third parties to use the assets) or can cause excessive depreciation of the asset if it is not maintained properly by those utilising the seized property). Other countries, finally, opt for leaving the asset with the offender, with the strict provision that he or she will not destroy or sell the asset and will maintain it throughout the course of the criminal proceedings.
- Seizing assets after the investigation has been brought to the attention of the defendant may, and often does reduce the possibility of seizing the assets – as the defendant will be in a position to transfer such assets to a different location and reducing the overall effectiveness of the financial investigation, which will have to be reinitiated with regards to the new location of the assets. Appropriate regulation must also be put in place to ensure compliance with the international standards set out in article 31(2) of the UNCAC and ensure the identification, tracing or seizure of the proceeds and instrumentalities of crime, as well as intermingles and transformed assets.

Statutes of limitation

Statutes of limitation are the legal time limits within which the investigation and prosecution will have to carry out the investigation and prosecution. This is done to ensure due process and human rights of the defence, as a person cannot be held liable for the commission of an offence indefinitely. This legal time limit is prescribed by each legal tradition and state party and, for this reason, cannot be objectively identified in UNCAC.

UNCAC does however provide guidance for States Parties in this matter. For this reason article 29 of the UNCAC informs that sufficiently long statutes of limitation must be put in place, which take into account the difficulties which arise from the investigation and prosecution of corruption. Moreover, said article also provides for the possibility of allowing that statutes of limitations be suspended whenever the offender has evaded justice.

While it is not possible to assess whether these statutes of limitation are sufficiently long – as the average time for investigation of criminal offences in Moldova would have to be considered, as well as the effectiveness of such investigations

Knowledge, intent and purpose as elements of an offence

Article 28 of the UNCAC requires States Parties to require, as an element of the offence of corruption- related offences, knowledge, intent or pupose, which may be inferred from objective factual circumstances. This provision relates to the use of circumstantial or indirect evidence. Indirect evidence is to be understood as circumstances which are known and proven, and which, by induction, are possible to conclude for the existence of another or other circumstances. This is of particular importance to corruption-related offences in which it is difficult to use direct methods of proof (e.g., a recording or a public official receiving monies for a person), in order to prove the commission of an offence.

With regards specifically to money laundering, it should be noted that FATF Recommendation 3 also requires States to ensure that intent and knowledge required to prove the offence of money laundering is consistent with the standards set forth in UNTOC and UNCAC (among others), including the concept that such mental state may be inferred from objective factual circumstances.

Asset recovery

Article 52 UNCAC highlights the need to closely co-ordinate anti-corruption initiatives with measures against money laundering. State parties are to oblige their financial institutions to take the necessary steps to verify the identity of their customers (especially those which may represent high risk to the financial institution, such as high-ranking public officials, cabinet ministers and heads of government and state), maintain an adequate record and accounting system, and take reasonable steps to determine the beneficial owners of highly valued accounts. Under article 52, financial institutions are also to conduct enhanced scrutiny of accounts maintained by politically exposed persons (PEPs). The effectiveness of article 52 is dependent on: (i) the efficiency of the measures taken by the financial institutions to comply with article 52 of UNCAC; and (ii) the co-ordination role that the Financial Intelligence Unit (FIU) will have to undergo with the authorities combating corruption.

Once the assets have been confiscated in the foreign jurisdiction, the last step is to actually return the assets to the requesting country which will normally also be the victim country. In this context, article 57 (2) informs that the States Parties must adopt the appropriate legislative measure to enable the return of the assets to the requesting country. The provisions under article 57 are important, as no previous international treaty contained such provisions. States so far ultimately depended on a case-by-case decision. Moreover, cases were normally understood as money laundering cases (regardless of the predicate offence), and the international rule in that regard (contained in the national legislation of several countries) was that the requesting country would receive 50% of the total assets laundered to the requested country, while the latter would keep 50%.

In UNCAC, it is understood that the requesting country is the victim of a corruption offence and that thus, according to article 57(3)(a), in cases of embezzlement (article 17 UNCAC) or money laundering (article 23 UNCAC), the entirety of the assets shall be returned to the victim country, minus reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the confiscation of the assets (article 57 (4) UNCAC) in the requested country.

3.4 European standards in asset recovery and confiscation

The European Union (EU) has a comprehensive set of regulations pertaining to the asset recovery process. These are:

- The Recommendation R(88)18 of the Committee of Ministers from the Council of Europe, concerning liability of enterprises having legal personality for offences committed in the exercise of their activities;
- Joint Action 98/699/JHA, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime
- FD 2001/500/JHA, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime;
- FD 2003/577/JHA, on the execution in the European Union of orders freezing property or evidence;
- FD 2005/212/JHA, on confiscation of crime-related proceeds, instrumentalities and property;
- FD 2006/783/JHA, on the application of the principle of mutual recognition to confiscation orders;
- FD 2006/960/JHA, on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union;
- The Council Decision 2007/845/JHA, concerning co-operation between AROs of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime.
- Directive 2014/42/EU, on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

While Moldova is not a member of the EU, the abovementioned European standards have been used as benchmarks in the context of the Visa Liberalisation Action Plan (VLAP), signed on 24 January 2011. In particular, the benchmarks within the VLAP are:[3]

- Preventing and fighting organised crime, terrorism and corruption (Action 2.3.1): requiring the adoption of legislation on preventing and fighting corruption and the consolidation of

[3] Available in: http://urm.lt/uploads/default/documents/uzienio_politika/Rytų%20partnerystė/Moldova%20VLAP.pdf

the anti-corruption function of the CCECC; as well as strengthening the coordination and information exchange between authorities responsible for the fight against corruption.

- Judicial co-operation in criminal matters (action 2.3.2): adoption of a legal framework on MLA; accession to the 2nd Protocol to the European Convention on MLA and the conclusion of an agreement with Eurojust; Implementation of international conventions concerning judicial cooperation in criminal matters (in particular the CoE conventions).
- Law enforcement co-operation (action 2.3.3): establishment of an adequate coordination mechanism between relevant national agencies and a common database and conclusion of an agreement with Europol ensuring an adequate level of data protection.

Thus, the European standards applicable to the asset recovery process have been reviewed to identify any potential shortcomings in relation to these and the Moldovan legislation. A brief overview of the main EU regulation shall be presented in the current subsection.

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

Criminal liability of legal persons is an important component for the effective combating of financial and organised crime. Whether corporate entities engage in criminal activity (e.g., corruption of public officials and foreign public officials), or whether legal persons are used by criminals to hide the true nature, origin and ownership of their unlawful activities (e.g., shell corporations created for purposes of laundering the proceeds of crime), it is an important component of modern criminal law to hold these entities criminally liable for actions committed by and through them.

As the initial European standard in the field of criminal corporate liability, Recommendation R(88)18 set out a number of principles to guide the Member States. Section 1 of its appendix states that legal persons (referred to in the text of the Recommendation as 'Enterprises') should be made liable for offences committed in the exercise of their activities, even where the offences are alien to their purposes. Section 2 also informs that the legal person is to be held liable, regardless of whether the natural person who committed the acts or omissions constituting the criminal offence can be identified. Furthermore, Section 5 of the appendix to this Recommendation puts forward the imposition of criminal liability of natural persons implicated in the offence, in particular persons performing managerial functions.

The provisions contained in the Criminal Code of Moldova are applicable to both natural and legal persons (article 21(3) and (4) Criminal Code Moldova). In this regard, art. 63 of the Criminal Code establishes the categories of punishments applicable to legal entities. Moreover, criminal liability of legal persons in Moldova does not exclude the criminal liability of natural persons who may have contributed to the commission of the criminal offence (article 21(5) Criminal Code Moldova). This provision is in line with the above mentioned Recommendation R(88)18 of the Committee of Ministers.

3.4.2 Joint Action 98/699/JHA

The Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, sought to improve the cooperation between the EU Member States in the fight against organised crime. Article 1(2) of the Joint Action 98/699/JHA indicates that each Member State is to ensure that its legislation and procedure on the confiscation of the proceeds of crime shall also allow for the confiscation of property the value of which corresponds to such proceeds, both in purely domestic proceedings and in proceedings instituted at the request of another Member State.

The Joint Action sought to prepare user-friendly guides on identifying, tracing, freezing or seizing and confiscating the instrumentalities and proceeds of crime (art. 2(a) Joint Action 98/699/JHA). The guides were to include information on: (i) where to obtain assistance; (ii) the assistance a country is prepared to provide and restrictions thereto; and (iii) the information the requesting country must supply in the request in order to obtain assistance.

The Joint Action 98/699/JHA also established that Member States are to ensure that their legislation and procedures enable it to permit the identification and tracing of suspected proceeds of crime at the request of another Member State. Such legislation and procedures should enable assistance to be given at the earliest possible stages in an investigation (art. 1(3) Joint Action 98/699/JHA). Thus, pursuant to the Joint Action, Member States were to consider restricting their use of the optional grounds for refusal in respect the provisions contained in art. 18(2) and (3) of the 1990 Convention.

3.4.3 Council Framework Decision 2001/500/JHA

Seeking to further enhance the effectiveness of the CoE Convention on laundering, search, seizure and confiscation of the proceeds of crime (1990 Convention), FD 2001/500/JHA worked towards better coordinating the approach regarding the confiscation of proceeds and instrumentalities of crime by Member States. It expressly mentions the need for effective combating of serious and organised crime through combating money laundering – by depriving perpetrators of their unlawful gains.

FD 2001/500/JHA further sought to make the money laundering offence uniform and sufficiently broad by requiring Member States not to make or uphold reservations to the 1990 Convention with regards to:

- The adoption of confiscation of the proceeds and instrumentalities of crime (article 2 of the 1990 Convention);
- The money laundering offence, which under the 1990 Convention is to be punishable by deprivation of liberty or a detention order for a maximum of more than one year (article 6 of the 1990 Convention).

The 1990 Convention, however, presented tax-related offences as an exception to the implementation of its above mentioned article 2 (confiscation measures). FD 2001/500/JHA, however, informs that in such cases as deemed appropriate, tax-debt recovery legislation shall be applicable.

This FD raised two other elements to ensure more effective mechanisms to combat money laundering and serious and organised crime. Member States were required to put in place systems of value-based confiscation (foreseen and required by article 2(1) of the 1990 Convention) for both domestic proceedings and those stemming from another Member State. In accordance to second report on FD 2001/500/JHA, value-based confiscation appears to be available in varying degrees among Member State, at least as an alternative measure.

In the specific case of Moldova, the second part of article 106(1) (Special Confiscation) of the Criminal Code provides for the value-based confiscation of the instrumentalities of crime (articles 106(2)(b) Criminal Code), although not for the confiscation of the proceeds of crime (article 106(2)(a) and (d) Criminal Code). Value-based confiscation appears to be an alternative measure under the Criminal Code of Moldova, pursuant to its art. 106(4).

Member States were also required to receive requests from one another through mutual legal assistance (MLA) seeking to identify, trace, freeze, seize or confiscate assets. These requests for MLA were to be given the same priority as that given to domestic measures. Thus, under FD 2001/500/JHA, Member States were still required to issue requests for MLA to ensure the confiscation of the proceeds and the instrumentalities of crime.

The first and second reports on FD 2001/500/JHA indicate that, among others, Member States have largely complied with the penalty requirements under article 2, and that value-based confiscation has been made available to varying degrees, at least as an alternative measure. These reports conclude, however, that the information provided by Member States was considered "relatively vague".

3.4.4 Council Framework Decision 2003/577/JHA

FD 2003/577/JHA came as a response to the special meeting held by the European Council on 15-16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the EU. The meeting endorsed the principle of mutual recognition of judicial decisions and judgements, as well as the approximation of legislation, in order to facilitate "co-operation between authorities and the judicial protection of individual rights." It also addressed the need for applying the principle of mutual recognition to "pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there." Thus, the purpose of this FD is to establish the rules under which a Member State shall

recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings.

This FD thus enables competent judicial authorities (judges or prosecutors, where applicable) to secure evidence and to seize the proceeds and instrumentalities of crime. It provides for rules of procedure pertaining to the transmission of freezing orders directly between competent judicial authorities, the duration of the freezing order, the grounds for non-recognition, non-execution or postponement of the request, as well as the subsequent treatment to be given to the seized property. It also introduces a list of criminal offences in article 3 – amongst which organised crime, money laundering and corruption are included – for which dual criminality checks are to be abolished, as per article 10(3).

In accordance to this FD, such requests would no longer require the use of MLA. This came as a direct consequence to the principle of mutual recognition of judicial decisions and judgement, and sought in order to ensure the rapid response by Member States to collect evidence and seize proceeds and instrumentalities of crime.

Under FD 2003/577/JHA, a freezing order issued by the judicial authority of the issuing State would be directly transmitted to the judicial authority of the executing State, without the formalities MLA. Thus, while the confiscation of proceeds and instrumentalities of crime still required — at the time of the issuing of this Council Framework Decision — the use of formal MLA channels (under FD 2001/500/JHA), the execution of seizure orders (as well as other interim measures to secure evidence) would no longer require the use of such mechanism.

The report regarding the implementation of FD 2003/577/JHA concludes that the level of execution of this FD has not been satisfactory, drawing its conclusion from the low number of notifications and the numerous omissions and misinterpretations in the national legislations. In a more recent report, Eurojust indicated that this FD had few examples of use in Eurojust's casework, and that judicial authorities continue to use traditional forms of MLA to make request for freezing orders.

3.4.5 Council Framework Decision 2005/212/JHA

FD 2005/212/JHA acknowledges that the existing EU instruments are insufficient to ensure an effective cross-border co-operation regarding the confiscation of proceeds and instrumentalities of crime. It further states that the main motive for cross-border organised crime is financial gain. The main aim of this instrument is to ensure that all Member States have effective rules on the confiscation of the proceeds and instrumentalities of crime, especially in relation to the burden of proof regarding the source of assets held by a person convicted of an offence related to organised crime.

This instrument enables the confiscation, wholly or in part, of instrumentalities and proceeds from criminal offences punishable by imprisonment for more than one year, or property the value

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

The threshold for applying confiscation under FD 2005/212/JHA is the same as in FD 2001/500/JHA, but the possibility of maintaining reservations in respect of the confiscation of the proceeds for tax offences was abolished. Nonetheless, it is innovative with regards to its provisions regarding extended confiscation, provided for under article 3. It provides for three situations in which Member States can seek extended confiscation:

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

A fourth non-mandatory situation foreseen is to allow for the confiscation of property acquired by the "closest relations of the person concerned and property transferred to a legal person in respect of which the person concerned [...] has a controlling influence."

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

Extended confiscation is foreseen in the Moldovan Criminal Code under art. 106^1 Criminal Code. However, it allows for the application of value-based confiscation, as well as the confiscation of not only proceeds of crime, but also intermingled or transformed assets. In this regard, Moldova has introduced enabling legislation for the value-based confiscation of intermingled and transformed assets, as contained in article 106 Criminal Code.

In that regard, the report on FD 2005/212/JHA expressed the concern of the Commission on the little progress that had been made in transposing the instrument in the Member States.

3.4.6 Council Framework Decision 2006/783/JHA

FD 2006/783/JHA applies to the principle of mutual recognition of confiscation orders issued by a court competent in criminal matters for the purpose of facilitating enforcement of such confiscation orders in a Member State other than the one in which the confiscation order was issued. It applies to all offences in relation to which confiscation orders can be issued and it has further abolished dual criminality requirements in relation to offences listed in its articles.

This instrument seeks to establish the rules under which a Member State should recognise and execute a confiscation order issued by a court competent in criminal matters of another Member State directly, without the need for MLA. Article 6 defines offences which give rise to confiscation orders. Articles 8 and 10 extended the list of reasons for non-recognition or non-execution and for postponement of execution, respectively, compared to the 2003 Framework Decision. Member States had to comply with this Instrument by 24 November 2008.

FD 2006/783/JHA also contains specific provisions pertaining to the disposal of confiscated assets – an area not covered by any of the previous FDs. Article 16 (disposal of confiscated assets) provides that when confiscation does not exceed EUR 10,000, the value of the confiscation is to remain with the executing Member State, while a 50 per cent sharing agreement is to be considered for cases in which the amount is higher than the previously mentioned threshold.

3.4.7 Council Framework Decision 2006/960/JHA

FD 2006/960/JHA (also known as the Swedish Initiative), pursuant to its article 1(1), seeks to establish the rules under which law enforcement authorities of Member States may exchange existing information and intelligence effectively and expeditiously for the purpose of conducting criminal investigations or criminal intelligence operations. It does not impose an obligation in the part of the Member States to provide information and intelligence to be used as evidence before a judicial authority nor does it give any right to use such information or intelligence for that purpose (art. 1(4) FD 2006/960/JHA).

FD 2006/960/JHA defines in its art. 2(a) a competent law enforcement authority as: (i) a national police, customs or other authority; which is (ii) authorised by national law to (iii) to detect, prevent and investigate offences or criminal activities and to exercise authority and take coercive measures in the context of such activities. In accordance to art. 56(1) of the Criminal Procedure Code of Moldova, criminal investigative bodies are: (i) the Ministry of Internal Affairs; the National Anti-Corruption Centre (NAC); and (iii) the Customs Service.

Thus, any of the criminal investigative bodies of Moldova are, for the purpose of the FD 2006/960/JHA, competent to exchange existing information and intelligence. Each of these bodies will be responsible for sharing and exchanging information and intelligence within their legal competences under Moldovan law, and will utilise the appropriate means for exchange of communication.

FD 2006/960/JHA, its art. 2(d) defines intelligence as:

- Any type of information or data which is held by law enforcement authorities;
- Any type of information or data which is held by public authorities or by private entities and which is available to law enforcement authorities without the taking of coercive measures.

Art. 3(2) of FD 2006/960/JHA establishes that information and intelligence is to be provided at the request of a competent law enforcement authority, acting in accordance with the powers conferred upon it by national law, conducting a criminal investigation or a criminal intelligence operation.

A Manual of Good Practices concerning the International Police Co-operation Units at National Level (2008 page 38), was prepared by Europol with a view to establishing good practices in the context of the above mentioned FD. The manual embraces the fact that there are different intelligence units (e.g., police intelligence, financial intelligence, asset recovery intelligence, etc.) each with its own communication channels.

The good practice that stems out of the said manual is that countries should have a central management structure for the contact points for the different communication channels. The manual goes as far as indicating the ideal structure and composition of such unit:

1) It gathers under the same management structure the different national offices or contact points for, among others:
   a) Europol National Unit (ENU)
   b) The Interpol National Central Bureau (NCB)
2) The SIRENE (Supplementary Information Request at the National Entries) Bureau in relation to the Schengen Information System (SIS)
3) Contact point for national liaison officers posted abroad;
4) Contact points designated under the FD 2006/960/JHA
5) Contact points for the Schengen III Agreement (Decisions 2008/615/JHA and 2008/616/JHA);

The coordination unit should be set up through national legislation or regulation, to both empower the unit to meet is responsibilities but also to clarify how (and the limits to) the intelligence sharing among the different agencies would take place (Council of the European Union 2008 page 38).

3.4.8 Council Decision 2007/845/JHA

This instrument has sought to build on the informal co-operation that has taken place within the CARIN network. This Council Decision obliges Member States to set up or designate a national ARO, which should co-operate with other national AROs by exchanging information and best practice spontaneously, upon request.

EUROPOL would play an important role under this Council Decision, as it has been established as the secretariat of the CARIN Network. It further established the Europol Criminal Assets Bureau (ECAB), which supports Member States in the identification and confiscation of criminal proceeds. Another initiative from EUROPOL that would strengthen communication exchange between AROs is the so-called Secure Information Exchange Network Application (SIENA),

which would also provide the Member States the ability to cross-reference and match their data with EUROPOL's database.

AROs seek to facilitate the tracing of criminal assets, participate in confiscation procedures, ensure the proper management of the seized assets and act as a central contact point for confiscation activities at the national level. They should have a multidisciplinary structure comprising expertise from law enforcement, judicial authorities, tax authorities, social welfare, customs and other relevant services. This is so because organised crime, corruption, money laundering and other crimes seeking financial gain are multifaceted in nature, and require a co-ordinated effort and response from states at both the preventive and enforcement levels. Thus, these representatives should be able to exercise their usual powers and to disclose information within the ARO without being bound by professional secrecy.

AROs should have access to all relevant databases to identify and trace assets, including financial information, and should have coercive powers to obtain such information. They should have the power to provisionally freeze assets in order to prevent dissipation of the proceeds of crime between the moment that the assets are identified and the execution of a temporary or permanent seizure order issued by the court. They should also be able to conduct joint investigations with other authorities.

The main challenges identified by the European Commission in relation to the AROs are that, while the key function of the ARO is to trace and to identify assets on their national territory, most AROs do not have access (directly or indirectly) to all relevant databases that would allow them to perform their task more effectively (European Commission 2011 page 8). Also, given the sensitive information that AROs may exchange, they should benefit from a fully secure information exchange system (European Commission 2011 page 8). While Moldova does not have an ARO at present, consideration should be given that the ARO be placed within an existing law enforcement unit in the country, which has real-time access to all the necessary databases.

AROs may also wish to consider being involved in the management of frozen assets, and should have access to judicial statistics on freezing and confiscation of assets (European Commission 2011 page 8). It should be noted, however, that reports on Council Decision 2007/845/JHA informs that only a few AROs actually are involved in the management of seized assets.

Notwithstanding, in the EU Internal Security Strategy in Action (European Commission 2010 page 6), the European Commission established that Member States were to make the necessary institutional arrangements (e.g., asset management offices), to ensure that frozen assets do not loose their value before they are eventually confiscated.

3.4.9 Directive 2014/42/EU

The Directive 2014/42/EU focuses on the seizure, management and confiscation of property in criminal matters. For the purpose of the Directive, 'proceeds' is understood as any economic

advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits (art. 2(1) Directive 2014/42/EU).

Directive 2014/42/EU sought to, among others, clarify the existing concept of proceeds of crime to include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds. It aims to amend and expand the provisions of FDs 2001/500/JHA and 2005/212/JHA. It also provides for a broad definition of property (art. 2(2) Directive 2014/42/EU) that can be subject to freezing (art. 2(5) Directive 2014/42/EU – temporary prohibition of the transfer, destruction, conversion, disposal or movement of property or temporarily assuming custody or control of property) and confiscation (art. 2(4) Directive 2014/42/EU – final deprivation of property ordered by a court in relation to a criminal offence) , which includes legal documents. The Directive 2014/42/EU also establishes that freezing and confiscation under the Directive are autonomous concepts.

Freezing is understood by Directive 2014/42/EU as a measure to preserve property for the purpose of possible subsequent confiscation (art. 7 Directive 2014/42/EU). Property should be frozen even if in possession of a third party, as referred to in article 6.

Art. 4 of Directive 2014/42/EU establishes that Member States are to take the necessary measures to enable confiscation, in whole or in part, of the instrumentalities and the proceeds of crime, or property the value of which corresponds to such instrumentalities or proceeds. This is the equivalent of confiscation and special confiscation, as provided by articles 106 and 106^1 of the Criminal Code of Moldova. Furthermore, art. 4(1) Directive 2014/42/EU establishes the possibility for NCB confiscation, where the underlying facts would constitute a criminal offence and the suspect or accused person could have been criminally convicted if the person had stood trial.

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

Directive 2014/42/EU also contains for the first time in the European Union, provisions related to the confiscation of property transferred to third parties. The reasoning behind this is given the fact that property can be acquired, directly or indirectly, through an intermediary. Thus, confiscation should be possible when the accused person does not have any property to be confiscated and when third parties knew or should have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer

was carried out free of charge or in exchange for an amount significantly lower than the market value.

Article 6(1) Directive 2014/42/EU stipulates that confiscation from a third party (both object- and value-based) of the proceeds of crime which were transferred by a suspect or an accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least of those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value. It should be noted that the rights of bona fide third parties are preserved (art. 6(2) Directive 2014/42/EU). Is there third-party confiscation in the Moldovan system? Or does everything require the civilly responsible person to be affected?

Article 9 Directive 2014/42/EU also indicates that Member States should enable the detection and tracing of property to be frozen and confiscated even after a final conviction and to ensure the effective execution of a confiscation order.

Article 10 also establishes that Member States should set up, e.g., centralised offices, a set of specialised offices or equivalent mechanisms to ensure the adequate management of property frozen with a view to possible subsequent confiscation. It is the first time that the European Union provides for the existence of asset management offices (AMO).

Finally, while art. 12 indicates that the provisions of Directive 2014/42/EU should be placed into force by 4 October 2015, this deadline has been extended to 4 October 2016.

4 The Moldovan asset recovery model

The Moldovan asset recovery model is comprised of several institutions at the Executive, Parliamentary and Judiciary branches. These include:

1) Financial Intelligence Unit
2) The National Anti-Corruption Centre
3) The General Directorate of Police within the Ministry of Internal Affairs
4) Judicial bodies
    a) General Prosecutor's Office
    b) Courts
5) State Fiscal Service within the Ministry of Finance

The asset recovery system of Moldova is centred in the General Prosecutor's Office, which is responsible for leading the investigation, seizing assets, issuing requests for MLA and initiating the prosecution. Thus, intelligence produced by the relevant intelligence body is to be shared with the General Prosecutor's Office, who will be responsible for the processing of the information.

During the on-site missions to Moldova, several interviewees indicated that asset recovery is new in Moldova, and there is little expertise on the topic in the country.

4.1 Definitions

Relevant regional and international instruments were utilised as benchmarks for the present study, where applicable. These have been reviewed in the Section above. A key component to the study is to define the asset recovery process in Moldova in order to adequately benchmark the definitions given in Moldovan law with the international requirements Moldova has subscribed to.

The definitions below are components of the asset recovery process and are necessary to define the operational and institutional scopes of the thematic stream 'asset recovery'. When no other definition is compared with the main definitions below, it shall mean that there is either a match to the definitions between one or more of the instruments, or that no direct definition was found between the international instruments applicable to Moldova.

'Crime' is defined by art. 14(1) Criminal Code Moldova as a prejudicial act (action or inaction) set forth in criminal law committed with culpability and subject to criminal punishment.

'Property' includes property of any description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and legal documents or instruments evidencing title to or interest in such property, which is considered the proceeds or the instrumentalities of crime, pursuant to the definitions in article 1 of the Framework Decision 2001/500/JHA; article 1(b) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(b) of the CoE Convention on Laundering, search, seizure and confiscation of the proceeds of crime – CETS No. 141. The definition contained in European regulation is broader that the one found in article 2(d) of both the UNTOC and the UNCAC, as these do not make specific reference to tangible or intangible assets.

'Proceeds' are any economic advantage from criminal offences. It may consist of any form of property as defined in: article 1 of the Framework Decision 2001/500/JHA; article 1(a) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(a) of the CoE Convention on Laundering, search, seizure and confiscation of the proceeds of crime – CETS No. 141.

'Proceeds of crime' are, pursuant to article 2(e) of both the UNCAC and the UNTOC, any property derived from or obtained, directly or indirectly, through the commission of an offence.

'Instrumentalities' are any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences, pursuant to: article 1 of the FD 2001/500/JHA; article 1(c) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(c) of the CoE Convention on Laundering, search, seizure and confiscation of the proceeds of crime – CETS No. 141.

'Financial investigation' means an enquiry into the financial affairs related to a criminal activity, with a view to: (i) identifying the extent of criminal networks and/or the scale of criminality; (ii) identifying and tracing the proceeds of crime, terrorist funds or any other assets that are, or may become, subject to confiscation; and (iii) developing evidence which can be used in criminal proceedings (FATF 2012a page 96).

'Parallel financial investigation' refers to conducting a financial investigation alongside, or in the context of, a (traditional) criminal investigation into money laundering, terrorist financing and/or predicate offence(s). Law enforcement investigators of predicate offences should either be authorised to pursue the investigation of any related money laundering and terrorist financing offences during a parallel investigation, or be able to refer the case to another agency to follow up with such investigations (FATF 2012a page 96).

'Freezing' or 'seizure' is 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, pursuant to article 1(g) of the CoE

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198.

The FD 2003/577/JHA, on the other hand, defines a 'freezing order' as any measure taken by a competent judicial authority in the issuing State in order to provisionally prevent the destruction, transformation, movement, transfer or disposal of property that could be subject to confiscation or evidence. Article 2(f) of both the UNTOC and the UNCAC differ from the above-mentioned definitions, as they do not contain in their definition what is meant by the act of 'destruction'.

'Confiscation' or 'forfeiture' is a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property, pursuant to article 1 of the Framework Decision 2001/500/JHA; article 1(d) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(d) of the CoE Convention on Laundering, search seizure and confiscation of the proceeds of crime – CETS No. 141.

'Value confiscation' or 'value-based confiscation' is when legislative provisions allow for alternative procedures on the confiscation of the proceeds of crime, in cases where these proceeds cannot be seized, for the confiscation of property the value of which corresponds to such proceeds, both in purely domestic proceedings and in proceedings instituted at the request of another Member State, including requests for the enforcement of foreign confiscation orders, pursuant to article 3 of the Framework Decision 2001/500/JHA. Notwithstanding the above, Member States may exclude the confiscation of property the value of which corresponds to the proceeds of crime in cases where that value would be less than EUR 4,000.00.

'Extended confiscation' or 'extended powers of confiscation' is when a court based on specific facts finds that the property has been derived from the criminal activities of the convicted person during a period prior to conviction, which is deemed reasonable by the court in the circumstances of the particular case, or where the court is convinced, to the requisite legal standard, that the value of the goods are disproportionate to the known income of the convicted person, pursuant to the Framework Decision 2005/212/JHA. FATF describes extended confiscation as a useful tool in cases in which "property [...] was generated from other or related criminal activity of the convicted person."

'Third-party confiscation' involves the confiscation of assets that have been transferred by an investigated or convicted person to third parties, in accordance to the EU Internal Security in Action.

'Non-conviction based confiscation, or forfeiture' is where confiscation is ordered but does not derive from a criminal conviction. Council Framework Decision 2005/212/JHA refers to NCB confiscation in its article 3(4) ("procedures other than criminal procedures to deprive the perpetrator of the property in question").

'Compensation of Victims.' For the purposes of the present study, 'victim' shall mean a natural or legal person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State, in accordance with article 1(a) of the FD 2001/220/JHA on the standing of victims in criminal proceedings. Compensation of victims is defined in Directive 2004/80/EC as relating to compensation to crime victims. According to this Directive, compensation has to be "fair and appropriate".

4.2 Legislative overview

Moldova has comprehensive legislation to with regards to the asset recovery process. Seizure and confiscation of assets is provided for in both the Criminal Code and the Criminal Procedure Code of Moldova. Some obligations of Moldova concerning the asset recovery process also stem from international law.[4]

The Criminal Code, for example, is to be applied in compliance with the Constitution of Moldova and the international acts to which Moldova is party to (art. 1(3), 1st part, Criminal Code Moldova). In the event that there are discrepancies between the Criminal Code and international acts on fundamental human rights, the international regulation is to take precedence (art. 1(3), *in fine* Criminal Code Moldova).

The Constitution of Moldova provides for two types of acts: (i) acts of government, which can be divided into decisions, ordinances and regulations (art. 102 Constitution Moldova); and (ii) acts of parliament, which can pass laws, decisions and motions (art. 65 Constitution Moldova). Laws are subdivided into constitutional, ordinary and organic laws (art. 72 Constitution Moldova).

4.2.1 Basic definitions under the Criminal Code of Moldova

The Criminal Code of Moldova contains the main body of criminal legislation in Moldova and is applicable, as stated earlier in this report, to both natural and legal persons. The Criminal Code is the only source of criminal law in the country, although it is defined not only as the Criminal Code itself, but also the 'norms of law that set general and special principles and provisions of criminal law, determines the acts that constitute crimes, and set the penalties applied to criminals (art. 1(2) Criminal Code Moldova).

Under the Criminal Code Moldova no person can be declared guilty on the commission of a crime nor be subject to criminal punishment other than on the basis of a decision from a court and in strict compliance with criminal law (art. 2 Criminal Code Moldova), and unfavourable

[4] In accordance with the hierarchy of laws under the Moldovan constitution, the pyramidal structure of laws has the Constitution as the supreme law of the land, followed by laws and regulations. Pursuant to art. 8 of the Constitution and to art. 19 of Law 595 of 24 October 1999, on international treaties, Moldova is to observe the principle of pacta sunt servanta and execute international treaties in good faith. Moldova cannot invoke the provisions of its internal law as justification for non executing a treaty it has ratified (NEGRU et al. 2012 page 52).

extensive interpretation and the application of criminal law by analogy are forbidden (art. 2(2) Criminal Code Moldova).

Application of criminal law in time and space

The Criminal Code of Moldova also contains the rules for application of criminal law in space and in time. The Criminal Code is applicable to all the territory of Moldova (art. 11(1) Criminal Code Moldova) to all persons who are held criminally liable. The criminal legislation is furthermore applicable for citizens of Moldova and stateless persons with permanent domicile in Moldova, but which commit the crime outside Moldova will also be held liable under the criminal laws of Moldova (art. 11(2) Criminal Code Moldova) – extraterritorial application of the law.

There are also exceptions to the application of the Criminal Code of Moldova. In the event that the crime is committed by diplomatic representatives of foreign states or by other persons who under international law are not subject to the criminal jurisdiction of Moldova (art. 11(4) Criminal Code Moldova). It is, however, unclear from the text of the law whether the diplomatic immunity would be applicable only when the diplomat has been accredited as such in Moldova, or whether being one (e.g., travelling under a diplomatic passport) would be sufficient to conform with the article of the law.

For the purposes of the Criminal Code of Moldova, the place of the commission of the criminal offence is to be considered, irrespective of the time when the consequences occurred (art. 12(1) Criminal Code Moldova). It is considered to be a transnational crime when the crime was committed in at least one jurisdiction and in the territory of Moldova (art. 12(2)(a) Criminal Code Moldova); or when a substantial part of the organisation and control of the crime took place in Moldova on ir another jurisdiction (art. 12(2)(b) Criminal Code Moldova); or when the crime was committed in Moldova with the involvement of an organised criminal group or a criminal organisation what is involved in criminal activity in more than one state (art. 12(2)(c) Criminal Code Moldova); or when the crime was committed in Moldova but had serious consequences in another state and vice-versa (art. 12(2)(d) Criminal Code Moldova).

The application of criminal law in time in Moldova must observe art. 8 Criminal Code Moldova where the criminal nature of the act (and its punishment) come into force when the act was committed. The time for the commission of the act is considered the time when the prejudicial action or inaction was committed, irrespective of the time of when the consequences occurred (art. 9 Criminal Code Moldova).

The Criminal Code of Moldova also provides that legislation which eliminates the criminal nature of an act, that makes the punishment milder or in any other way improves the situation of the person who committed the crime shall have retroactive effect, extending to person who committed such an act prior to the date when the changes come into effect, including persons who are serving sentences or who served sentences but have criminal backgrounds (art. 10(1) Criminal

Code Moldova). On the other hand, criminal law that increases the punishment or worsens the situation of a person guilty of a commission of a crime shall not have retroactive effect (art. 10(2) Criminal Code Moldova).

Definition and categories of criminal punishment

Criminal punishment is a measure of state force and a means of correction and re-education of a convict which is applied by the courts in the name of the law to persons who commit crimes by which certain deprivations and restrictions of their rights are caused (art. 61(1) Criminal Code Moldova).

The purpose of criminal punishment is to restore social equity, to rehabilitate the convict, and to prevent the commission of new crimes both by convicts and other persons. The execution of the punishment must neither cause physical suffering nor humiliate the dignity of the convict (art. 61(2) Criminal Code Moldova).

The following punishments may be applied to individuals who commit crimes:

- Fines (art. 62(1)(a) Criminal Code Moldova);
- Deprivation of the right to hold certain positions or to practice certain activities (art. 62(1)(b) Criminal Code Moldova);
- Annulment of military rank, special titles, qualification (classification) degrees, and state distinctions (art. 62(1)(c) Criminal Code Moldova);
- Community service (art. 62(1)(d) Criminal Code Moldova);
- Imprisonment (art. 62(1)(e) Criminal Code Moldova);
- Life imprisonment (art. 62(1)(f) Criminal Code Moldova).

The following are categories of punishment which are to be applied only to legal entities:

- Fines (art. 63(1)(a) Criminal Code Moldova);
- Deprivation of the right to practice certain activities (art. 63(1)(b) Criminal Code Moldova);
- Liquidation (art. 63(1)(c) Criminal Code Moldova).

Seizure and confiscation under Moldovan law

The Criminal Procedure Code of Moldova provides for two types of provisional measures: seizure (articles 126-132 and 159 to 162) and sequestration (art. 203 to 210). The first is more concerned in securing items necessary for the investigation or illegally acquired assets. The second is more useful for the purposes of securing the proceeds of crime with a view to their confiscation (MONEYVAL 2007 paragraph 124).

Seizure refers to the securing of tangible items (objects or documents) being important for the criminal case either as pieces of evidence or items that have been illegally acquired and hence

subject to confiscation (European Commission 2013 paragraph 243). Sequestration is, however, the measure that can actually be applied to secure the instrumentalities as well as proceeds of crime with a view to their confiscations (European Commission 2013 paragraph 244).

Art. 204 Criminal Procedure Code provides that assets that constitute property of the defendant or the civilly liable party[5] can only be subject to sequestration including assets being common property of the defendant and his or her spouse or other family members (European Commission 2013 paragraph 245). The notion of civilly liable party is different from that of the person who knows (or ought to have know) the origin of the proceeds of crime (art. 106(3) Criminal Code Moldova).

Article 126 provides that the prosecution authority is entitled to seize assets that are material to the criminal proceedings. Article 55(4) states that the prosecution authority must take the necessary measures to ensure the seizure of illegally obtained assets (MONEYVAL 2007 paragraph 125). Pursuant to art. 57 Criminal Procedure Code, it is the law enforcement authorities who request the prosecutor to apply to the court for an order for sequestration of the assets seized and for seizure of assets held by 3rd parties (MONEYVAL 2007 paragraph 126).

Confiscation of the proceeds and instrumentalities of crime are not defined by the Criminal Code of Moldova as a category of criminal punishment. Rather, it is seen as a security measure that aims at eliminating the danger and preventing the commission of criminal acts (art. 98(1) Criminal Code Moldova). Confiscation is therefore seen in the legislation as a predominantly preventive tool or as a means of securing reparation for damage suffered (MONEYVAL 2007 paragraph 120). Thus, even when the criminal punishment does not foresee the confiscation of assets, it is still possible to apply the provisions of special seizure[6] (art. 106(4) Criminal Code Moldova).

The Criminal Code provides for several security measures, among which are: (i) special seizure (confiscation of the proceeds of crime), contained in art. 106 Criminal Code Moldova; and (ii) extended confiscation (art. 106^1 Criminal Code Moldova). The application of extended confiscation in Moldova requires fulfilling several legal conditions set forth in art. 106^1 Criminal Code Moldova:

- The criminality of the assets derive from one of the criminal offences subject to extended confiscation – money laundering (art. 243); creating or leading a criminal organisation (art. 284); corruption-related offences (art. 324-329; 330^2 and $330\text{-}335^1$);

[5] A civilly liable party is an individual or legal entity that based on the law or the civil action filed during a criminal proceeding may be materially liable for material damage caused by the acts of the accused or defendant (art. 73 Criminal Procedure Code Moldova). In essence, and based on the interviews, any third person who possesses an asset for the real beneficial owner must be qualified as a civilly liable person in order for the court to be able to seize the alleged proceeds or instrumentalities of crime.

[6] It should be noted that, despite the English version of the text of the Criminal Code indicate that art. 106 is special seizure, it is in fact a form of confiscation. This is because the article is providing for the permanent deprivation of property.

- When these offences are prosecuted and when the offence was committed with a pecuniary interest (art. 106[1](1) *in fine* Criminal Code Moldova).

The Criminal Code additional requires that certain requirements are met for the application of extended confiscation:

- The value of assets acquired by the convicted person, within 5 years prior and after the commission of crime, before adopting the judgment, substantially exceeds the income legally obtained by this person (art. 106[1](2)(a) Criminal Code Moldova);
- The court finds based on the evidence presented in the case that the assets have been generated from criminal activities referred to in paragraph (1) (art. 106[1](2)(b) Criminal Code Moldova).
- The court must also the value of the assets transferred by the convicted person or by a 3rd party to a family member, legal entities to which the convicted person has control over, or to other persons who knew or should have known about the illegal acquisition of the assets (art. 106[1](3) Criminal Code Moldova).

Art. 106[1](5) also provides for value-based confiscation when the assets no longer exist, or if they were intermingled with property acquired from legitimate sources. In such cases money and other assets can be confiscated to cover the value. The same rule applies with proceeds or instrumentalities of crime have been transformed or converted, as well as income or profits arising from those assets (Art. 106[1](6) Criminal Code Moldova).

Parties in a criminal proceeding

The criminal procedure in Moldova has several actors:

- The victim: any individual or legal entity that suffers moral, physical, or material damage due to a crime (art. 58 Criminal Procedure Code of Moldova). A victim has the right to have his or her complaint immediately registered, to be settled by a criminal investigative body and to be thereafter notified about the results of such a settlement (art. 58(2) Criminal Procedure Code of Moldova).
- The injured party: an individual or a legal entity that has suffered moral, physical or material damage as a result of a crime acknowledged as such in line with the law and upon consent of the victim (art. 59(1) Criminal Procedure Code of Moldova).
- The civil party: an individual or a legal entity that files with a criminal investigative body or a court a civil action against a suspect or accused or defendant or persons who are materially liable for their actions provided that there are sufficient grounds to consider that the individual or the legal entity has suffered material or moral damage as a result of a crime. A civil action shall be heard in court as part of a criminal proceeding should the extent of the damage be unquestionable (art. 61 Criminal Procedure Code of Moldova).

A civil party shall be acknowledged by an order of the criminal investigative body or by a ruling of the court (art. 61(2) Criminal Procedure Code of Moldova).

- Suspect: person whom certain available evidence indicates committed a crime prior to charges being brought (art. 63(1) Criminal Procedure Code of Moldova).
- Accused person: individual against whom charges have been filed (art. 65(1) Criminal Procedure Code of Moldova). An accused person whose case has gone to court is called a defendant (art. 65(2) Criminal Procedure Code of Moldova).
- A civilly liable party: individual or legal entity that based on the law or the civil action filed during a criminal proceeding may be materially liable for material damage caused by the acts of the accused or defendant (art. 73(1) Criminal Procedure Code of Moldova).
  A civilly liable party shall be designated by a decision of the criminal investigative body or the court (art. 73(2) Criminal Procedure Code of Moldova).

4.3 Key Institutions

The present section seeks to provide an overview of the functions carried out by the different stakeholders within the asset recovery process in Moldova. They are subdivided in the present subsection within their context in the asset recovery process.

4.3.1 Intelligence - Office for Prevention and Fight Against Money Laundering (NAC)

The Office for Prevention and Fight against Money Laundering (SPCSB) is the FIU of Moldova, pursuant to article 13^1 of Law No. 190. The law defines the SPCSB as a specialised and independent division of the NAC.

The SPCSB has, among others, the following attributions (art. 13^2 of Law No. 190):

- Receiving, analysing, processing and transmitting information on suspicious activities and transactions, submitted by reporting entities under the provisions of this Law;
- Transmitting information and documents to criminal investigation authorities and to other competent authorities, when there are reasonable suspicions on money laundering and financing of terrorism or other crimes that generate illicit income;
- Requesting and receiving of information and necessary documents from the reporting entities, public authorities for assessing the suspect nature of the transactions;
- Cooperating and exchange information with similar foreign authorities, international organisations dealing with money laundering and financing terrorism issues;

Based on a decision by the SPCSB, it has the powers to oblige reporting entities to freeze the transactions for a period of up to 5 working days (article 14(1) of Law 190). The SPCSB may request an investigating magistrate, before the expiration of the initial term of 5 days, to freeze or seize the suspicious activities or transactions. The period for the freezing term under these circumstances cannot exceed 30 days (article $13(1^1)$ Law 190). It should be highlighted that the

SPCSB is a police-type FIU. As it is part of (but independent to) the NAC, it derives the same investigative powers from the NAC.

4.3.2 Prosecution and investigation – General Prosecutor's Office

The prosecutor is the state official who (i) conducts a criminal investigation in the name of the state, (ii) represents the prosecution in court, and (iii) performs other duties as provided by the Criminal Procedure Code (art. 51(1) Criminal Procedure Code of Moldova).

The prosecutor is also legally entitled to submit a civil action against the accused or defendant, or the person materially liable for the act of the accused or defendant: (i) in the interest of an injured party who is incapable or who is dependent on the accused or defendant or who, due to other reasons, cannot exercise his or her right to submit a civil action; (ii) in the interest of the state (art. 51(2) Criminal Procedure Code of Moldova). The prosecutor is responsible for carrying out its activity based on the principles of legality, transparency, independence and autonomy.

The public prosecution is responsible for representing the general interests of the society, defending the rule of law and the citizen's rights and liberties. It is furthermore responsible for the supervision and exercise of the criminal prosecution and bringing forth the criminal accusations before a court of law (art. 124(1) Constitution Moldova).

Thus, the prosecutor is responsible for opening a criminal case or archiving it: the prosecutor is the leader of the investigation. While an investigative body may initiate an investigation in certain cases, it must inform the prosecution so that a formal decision to initiate the case is made.

The General Prosecutor's Office may also determine the investigative body with competence to investigate a case. While the competences of the investigative bodies is established by law, the law itself has an exception which allows the General Prosecutor's Office to establish which investigative body will be responsible for an investigation.

4.3.3 Investigative bodies – National Anti-Corruption Centre

The National Anti-Corruption Centre of Moldova (NAC) was established through Law 1104 of 6 June 2002. The law has been amended several times over the years, with the latest legislative amendment taking place on 22 October 2015. It is one of three investigative bodies in Moldova: art. 4(1) of Law 333 of 10 November 2006 establishes that the following Moldovan bodies are responsible for active criminal investigations: (i) the Ministry of Internal Affairs; (ii) the Customs Service; and (iii) the NAC.

NAC is an independent agency (art. 1(4) Law 1104 of 6 June 2002) subject only to the law, and accountable to Parliament. The NAC (then called the Centre for Combating Economic Crime and Corruption) originally had the attribution of preventing, detecting, investigating and suppressing economic and financial crimes, corruption and money laundering (art. 1(1)(a)-(c) of the original

text of the law 1104 of 6 June 2002). Its legal attributions changed with Law 120/2012, which further specialised the competence of the NAC to include only preventing and combating corruption and money laundering (art. 1(1) Law 1104 of 6 June 2002). The competence for investigating all predicate offences to money laundering (with the exception of corruption-related offences) is of the General Inspectorate of the Police at the Ministry of Internal Affairs.

Independence is a pre-requisite for the effective functioning of an anti-corruption body. Such independence is prescribed in both articles 6 and 36 UNCAC. It is the responsibility of the state to protect independent bodies from undue actions of any third parties, and from the state itself in interfering with the independent bodies (Hussmann et al. 2009 page 12). Moreover, an independent body must have clear and operational autonomy and a clear legal mandate. Independence, however, cannot mean total autonomy – an independent body must be subject to a degree of checks and balances. This ensures that independent bodies operate within the legal framework and abide by the rule of law, all while nurturing public trust and credibility. Independence thus does not amount to lack of accountability or external control (OECD 2008 page 6 and Sousa 2010 page 3).

The purpose of the NAC is, among others, to prevent, discover, investigate and counteract administrative and criminal offences of corruption and related offences, as well as corrupt conduct (art. 4(1) (a) Law 1104 of 6 June 2002), as well as to prevent and combat money laundering and terrorism financing, pursuant to the provisions contained in Law 190-XVI of 26 July 2007 on preventing and combating money laundering and terrorism financing (art. 4(1)(c) Law 1104 of 6 June 2002). It should be highlighted that the functions of the NAC are exhaustively listed in the Law 1104 of 6 June 2002 (Art. 4(2) Law 1104 of 6 June 2002).

Furthermore, the NAC has the following rights, among others:

- To request and to receive from public authorities and from natural and legal persons, any documents, records, information and data necessary for the NAC to be able to exercise its duties of preventing and analysing acts of corruption and related acts, as well as of examining requests or reports, registered in the manner prescribed by the law, which report administrative or criminal offences that fall under its jurisdiction (art. 6(e) Law 1104 of 6 June 2002);
- To perform forensic and other expert examinations as well as investigations that fall under its competence (art. 6(f) Law 1104 of 6 June 2002).

At the operational level, the NAC has operational access to all digital databases of Moldova. These provide extensive information to the investigator. Where additional information is needed, the investigator may request the paper-based files to the appropriate authority. This request takes on average 30 days to be complied with.

4.3.4 Investigation – General Inspectorate of Police (Ministry of Internal Affairs)

Law 320 of 27 December 2012, on the work of the police and police status. The police is defined under the said law as an institution of the state, subordinated to the Ministry of Internal Affairs, which has the mission to defend the fundamental rights and freedoms of individuals through, among others, the prevention, investigation and discovery of the commission of offences or contraventions (art. 2 Law 320).

The Police under the Ministry of Internal Affairs is required by law to cooperate with other law enforcement agencies (art. 6(1) Law 320). It also can cooperate with other similar organisations in other countries, the International Criminal Police Organisation (Interpol) (art. 6(4) Law 320). The Ministry of Internal Affairs houses the National Criminal Bureau of Interpol for Moldova. The General Directorate of the Police at the Ministry of Internal Affairs has within a specialised police unit responsible for combating crime (Criminal Police), responsible for conducting investigations into the commission of criminal offences, as provided by law (art. 11(1)(a) Law 320). Law 333 of 10 November 2006, on the status of the investigating officers (Criminal Police) determines that the criminal police is responsible for the investigations on behalf of the state and within the competence of the Criminal Police (art. 1(1) Law 333). Law 333 establishes that the police investigator, in the exercise of his or her functions, is independent and subject only to the law, the written instructions of the prosecution and court rulings (art. 3(1) Law 333).

The General Inspectorate of Police is responsible for conducting investigations in relation to several financial criminal offences, such as fraud, tax evasion, etc. These criminal offences are predicate to money laundering, which is under the competence of the NAC. This division of competences between to agencies inevitably results in inefficiencies, regardless of the level of interaction between the institutions. This additionally places added pressure and burden to the prosecutor, which – as the leader of the investigation – must either contend with having the same investigation duplicated into two agencies; seek to transfer all of the investigation into one agency; or create a joint investigation team with the national agencies involved.

4.3.5 Disposal – State Fiscal Service

The State Fiscal Service is an agency subordinated to the Ministry of Finance. The State Fiscal Service, through Government Decision 972 of 11 September 2001, carries out the sale and realisation of confiscated assets.

Decision 972/2001 contains thorough rules for the sale of assets. Certain assets, once confiscated, go to the state reserves (e.g., petrol, gas, timber, real estate, etc.). These assets are normally transferred for free to the municipalities where the asset is found. For assets which are to be sold, the State Fiscal Service can either be sold directly, through a commissioner or through an auction. The values derived from assets that are sold are placed into a general treasury account of the State, making it difficult to trace the use of the confiscated assets.

It is up to the State Fiscal Service to also valuate the confiscated asset. Thus, they work together with public and private entities in order to valuate an asset.

It was informed that at present there is no unified database for the seized and confiscated assets in the country. All information pertaining to the sale of confiscated assets is maintained at the local level, paper based. There is thus a need – particularly if the ARO is established – to centralise and digitise the database for the seized and confiscated assets.

Lastly, the Moldovan authorities in general indicated that they have had no experience to date in enforcing a Moldovan confiscation order abroad and returning assets found abroad. It is thus hard to gauge what approach should be taken. Nevertheless, there is a need to review the current regulation to ensure that there are mechanisms in place which clarify which authority is responsible for communicating with the foreign authority to enforce the Moldovan confiscation order, and to allow for the disposal of confiscated assets.

5 Establishment of an ARO in Moldova

Moldova does not currently have established an ARO. During the on-site missions, it was possible to identify that different Moldovan bodies had different understanding of the roles and responsibilities of an ARO, and many understood that the functions of the ARO would be best suited within their institution. Thus, the first element needed is to define what an ARO is, and what its main functions are.

Asset Recovery Offices (AROs) facilitate the tracing of criminal assets, participate in confiscation procedures, ensure the proper management of the seized assets and act as a central contact point for confiscation activities at national level (Commission of the European Communities 2008 page 7). Thus, an ARO should at a minimum be (i) an intelligence office with the responsibilities of collecting, sharing and processing information related to assets (other than those already undertaken by SPCSB); which can also have (ii) financial investigation powers; and additionally (iii) powers to manage seized assets. Under the definitions of an intelligence body as contained in the Swedish initiative vis-à-vis the Moldovan legislation, only the investigation bodies (NAC, General Directorate of Police and Customs authorities) could house the ARO.

In relation to item (i) from the preceding paragraph, AROs should have access to all databases to identify and trace assets. This appears to be the case at the NAC, where it currently has ample electronic access to databases in order for the NAC to conduct its preliminary analyses and investigations.

An element that appears to be missing in Moldova is the figure of the financial investigator – item (ii) above. Both national legislation and practice seem to focus heavily in the collection of evidence for the purposes of the criminal investigation (e.g., determination of guilt of a suspect) but not in the identification of the proceeds and instrumentalities of crime. The recent reforms made on the Criminal Code and the Criminal Procedure Code allow for the seizure and confiscation of proceeds of crime, although it appears that they are used not for the deprivation of the illegal profits generated by the criminal activity, but rather to ensure the compensation for the damages incurred by the victim. It is for this reason that the establishment of an ARO in Moldova should also include within a team of financial investigators.

The EU, in its document COM(2008) 766 final indicates that AROs could additionally have the power to freeze assets for a limited time (e.g., similar to that power conferred to SPCSB). The administrative freeze is a legislative option that Moldova has taken previously and conferred to the head of the SPCSB. Appropriate legislative changes could be done to ensure that such power were to be conferred to the head of the ARO. However, given that the administrative seizure would take place in relation to proceeds and instrumentalities of crime, in the short to medium

term such powers would not be needed as the head of the ARO could easily coordinate with the Head of the SPCSB for obtaining such seizures.

Finally, and regardless as to whether the ARO should have seizure powers, proper attention should be given to the actual management of assets. Because the Criminal Code and Moldovan practice still focuses on seizing assets to be used as evidence in court, they are not managed. Rather, they are generally placed in deposit (in relation to movable assets) or made unavailable (in relation to real property) awaiting a final judgement. This approach, when considering the proceeds of crime, is costly to the State, which must now manage an asset that will depreciate in value, as it is not being properly managed.

Ideally, AROs should have a multidisciplinary structure comprising expertise from law enforcement, judicial authorities, tax authorities, social welfare, customs and other relevant services. These representatives should be able to exercise their usual powers and to disclose information within the ARO without being bound by professional secrecy. AROs should be adequately resourced and provide a central point for all incoming requests of assistance from other countries. They should collect all relevant statistics on asset freezing and confiscation. Where AROs do not directly manage seized assets, they should at least collect information on seized assets from the authorities managing them (Commission of the European Communities 2008 page 8).

It should be noted that the Council Decision 2007/845/JHA allows for the establishment of multiple AROs within the same country and, upon inspection, many EU Member States do indeed have more than one ARO. Given that Moldova has more than one investigation body, it may wish to establish more than one ARO. However, this option does not seem to be the most financially viable or efficient for the State.

Rather, Moldova should strive to have one ARO as an intelligence body, and financial investigation departments in each of the investigation bodies. Given that the ARO will deal with foreign authorities, and that most (if not all) of the requests and information dealt by the ARO will have a money laundering component, the ARO – as an intelligence body – should be placed within the NAC given that it currently is responsible for investigating money laundering, that it houses the Financial Intelligence Unit; and that it has access to the electronic databases of the country.

6 Conclusions and recommendations

Insufficient mechanisms for the co-ordination, co-operation, communication and sharing of information

In order to ensure the efficiency and effectiveness of the Moldovan asset recovery system, there is a need to define clear and unambiguous rules for the actions to be carried out by each of the institutions. While rules exist, the exceptions to them currently make the chain of command and general competencies of the institutions unclear.

The effectiveness of the system may further be hampered by the fact that current legislation and regulation may not encompass all of the institutions involved in the asset recovery process. Legislative amendments should be sought where the law is unclear or ambiguous with regards to the function of particular institutions. Where the law is clear, but potential interference to the institution may exist, arrangements should be made to clarify the objective criteria under which circumstances and to which extent interferences are possible. Attention to the current legislative practice should be observed. The anti-corruption and money laundering legislation in Moldova have evolved through separate but interconnecting laws. As such, to ensure legislative coherence, a separate law on asset recovery, where the ARO would be contained, should be pursued.

Furthermore, these amendments should strive to clarify the channels of communication within the Moldovan government, and how information is to be shared among the institutions. The current lack of clarity places too heavy a burden on the individual operator who must determine – with a personal risk of leaking information – to whom what should be shared.

Insufficient knowledge of financial investigation techniques

During the on-site missions to Moldova and interviewing with the different agencies that form part of the asset recovery system of the country, it was possible to identify that the knowledge on conducting financial investigations is generally limited. They generally lack understanding in critical theories of financial investigations, in particular the importance of financial profiling of perpetrators and their accomplices, and are thus unable to ascertain a complete picture of the nature and extent of the illegal assets that may be held in a particular case.

The investigative bodies of Moldova do not appear to have at this time a dedicated team devoted to conducting financial investigations in parallel to the criminal investigations. Such financial investigations would enable to carry out an analysis of the sources of income of the alleged perpetrators, determining their unlawful wealth and the persons associated to the perpetrators in the commission of criminal offences. At present, however, the investigation bodies have limited capacity to conduct a thorough financial analysis of acquired information, and therefore cannot

reach conclusions about the legality of particular assets or connect them with the alleged perpetrator and facts of the crime.

Mechanism for the management of seized assets is inadequate

At present there is no policy on the management of assets. While there exists regulation for the final disposal of assets, there is no clear guidelines for the management of the assets which have been seized. Moldova thus needs a policy on the management of seized assets. This is so as to ensure that these assets do not excessively depreciate over time, and can be returned in good condition to the alleged criminal, if acquitted, or sold at a maximum value, in case of confiscation of the assets. It should be noted, however, that not all assets should be seized, due to the intricacies and the costs incurred during the management of the assets.

Appropriate procedures and guidelines should be established with regards to which assets should be seized by the competent authorities. Furthermore, a policy on the management of assets should be created, with a view to: (i) centralise the information regarding the assets seized, their value, the responsible authority which has order the seizure of the assets and the criminal proceedings to which the seized assets are attached to; (ii) establishing guidelines for the management of seized assets, determining under which conditions the assets should be stored and under which the assets will require a court-appointed receiver, etc.; and (iii) if applicable, establishing an authority responsible for the management of the assets within government.

With regards to item (ii), an assessment should be carried out by the seizing authority with regards to the expected costs of management and the expected final value of the seized assets. A cost-benefit approach to the seized assets should be taken into consideration, so as to avoid stressing resources (financial and human) which could otherwise be used for other purposes within the asset recovery process. This assessment, in turn, should be turned into guidelines to be taken into consideration and used by the seizing authorities in order to make an informed decision prior to issuing the seizure orders.

Finally, with regards to item (iii), Moldova should consider establishing an authority responsible for the management of seized assets. In order to do so, several steps should be taken:

- The creation of a database identifying all the assets seized in connection to the commission of a criminal offence. This database should include enough information in order to identify the asset, the seizing authority, the proceedings in which the seizure order has been issued, and the underlying criminal offence which gave rise to the issuance of the seizure order. The creation of such a database not only would facilitate the overview of the assets currently seized in Moldova, but would also enhance transparency in the seizure process and accountability of the seizing authority, avoid dissipation of the seized assets throughout the criminal process, and allow for the production of reliable statistics to verify the efficiency of the asset recovery process in Moldova.

- The establishment of the previously mentioned guidelines for seizing assets. This approach would seek to enhance knowledge of the steps needed to be taken to more effectively seize assets and the costs attached to it, as well as the verification of all available methods (e.g., deposit, receivership or anticipated sale of the seized assets) for the actual management of seized assets.
- Revision of the legislation and regulation pertaining to the seizure of assets, taking into consideration a balance between the right to property of the defendant, the costs of management of seized assets, and the establishment of a managing authority, where appropriate.
- The establishment of a managing authority within an existing body (e.g., NAC, State Fiscal Service) or the establishment of a new agency for the management of seized assets. Prior to the actual establishment of the managing authority, a thorough revision of the steps that need to be taken prior the management authority and after it, as well as whether the managing authority will be given powers to enforce the seizure orders or, rather, be responsible for the management of the assets without, however, having powers to enforce the seizure orders.

Finally, the Moldovan authorities should consider attaching the asset manager at the beginning of the case. The asset manager will be able to better support the financial and criminal investigation team to make the determination of which assets should in fact be seized taking into consideration the cost/benefit of such an action.

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