POLICY PAPER

CONFISCATION OF CRIMINAL AND ILLEGAL ASSETS: EUROPEAN PERSPECTIVES IN COMBAT AGAINST SERIOUS CRIME

TRANSPARENCY INTERNATIONAL
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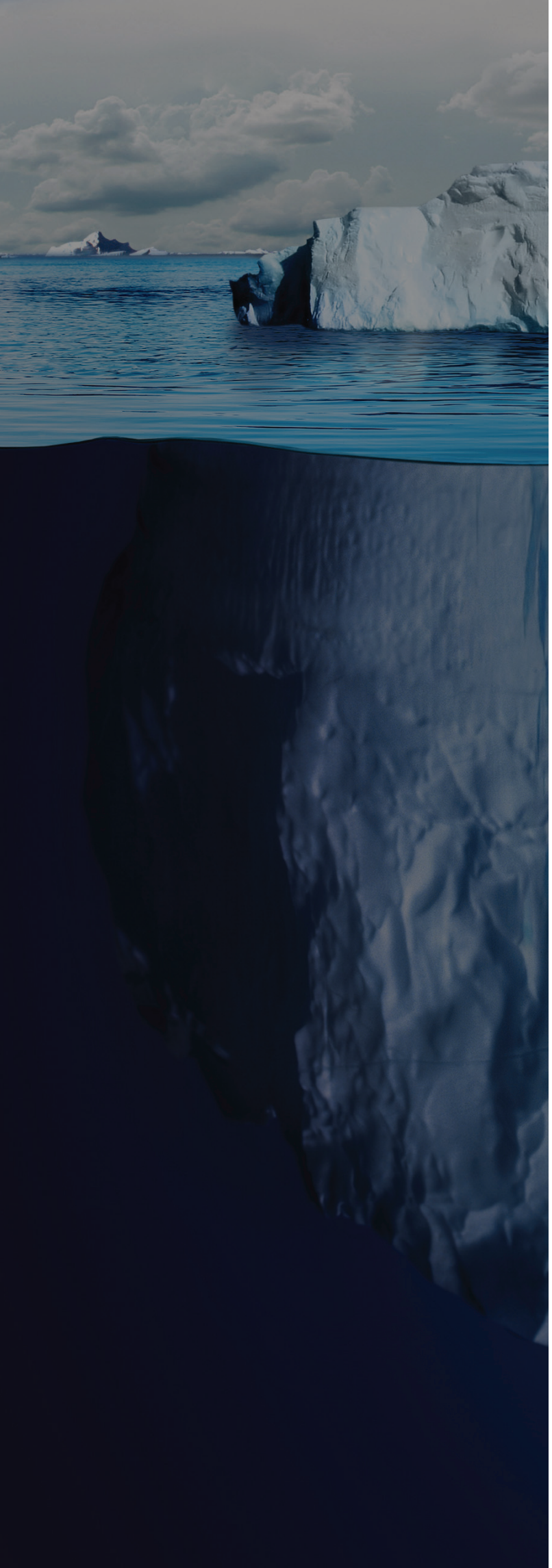


CONFISCATION AND FORFEITURE OF ASSETS: THE CONTEXT [1]

In order to disrupt organised crime activities it is essential to deprive criminals of the proceeds of crime. Organised crime groups are building large-scale international networks and amass substantial profits from various criminal or illegal activities. The proceeds of crime are laundered and re-injected into the economy in order to be legalised. **The confiscation/forfeiture of criminal or illegal assets is considered as a very effective way to fight organised crime, which is essentially profit-driven.** Seizing back as much of these profits as possible aims at hampering activities of criminal organisations, deterring criminality and providing additional funds to invest back into law enforcement activities or other crime prevention initiatives.

The relevance of this issue is in removing the economic gain from serious crime (including, but not limited to drug trafficking, corruption, money laundering, organised crime) in order to discourage the criminal and illegal conduct.

The confiscation/forfeiture of assets has been in the focus of the attention of the European Union (EU) for quite some time now, but since 2001 there are documents that can indicate developments in the concept on behalf of European institutions.

Confiscation of criminal assets and Illegal asset forfeiture policy follows the course set forth by the common EU policy in the area of justice and home affairs. This course is demonstrated by the special focus on corruption and organised crime in the Lisbon Treaty and the Stockholm Programme alike[2].

The EU strategic vision on these issues is reflected in the Stockholm Programme which sets down the priorities of the European Union in the area of justice, freedom and security for the period 2010 – 2014. Building on the achievements of past programmes, namely the Tampere and Hague Programmes, it aims at meeting future challenges and strengthening this area by measures focused on citizens' interests and needs.

[1] In view of the different models existing in EU Members States the Policy paper will use the broadest possible description and terms, related to the different approaches - confiscation and forfeiture of criminal or illegal assets.

[2] The Stockholm Programme – An open and secure Europe serving and protecting citizens, Official Journal C115 of 4 May 2010, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF.

The existing EU model takes account of the peculiarities of the models for confiscation of proceeds of crime (criminal assets). However, it almost entirely ignores the models based on the concept of illegal asset forfeiture, since they do not require a link between a specific crime and assets deriving from it.

NATIONAL APPROACHES FOR CONFISCATION/FORFEITURE: THE NEED OF COMMON STANDARDS

Within the EU, every single Member State decides, in accordance with its individual legal system, how to combat serious, often organised crime and corruption. **Problems in this field have long ago transcended national borders and need to be addressed on supranational level.** These problems have been resolved or are being resolved in international and European conventions (e.g. Council of Europe conventions against organised crime, to which the EU is a party, conventions concerning trafficking, terrorism and corruption). Next to harmonisation of national legal norms in these areas, solutions are sought such as joint investigative teams involving individual states and several states. Eurojust operates on EU level.

This is not the case as regards asset confiscation/forfeiture, as stated above. The topic is important in the context of various models and approaches in the different Member States and the essential deficits in their implementation due to supranational obstacles.

Three EU Member States that experience similar problems regarding serious crime, but apply different asset forfeiture models, come to serve as a case in point. These models differ not only in terms of their specific characteristics but their logic as well. **At their heart, however, these three models appear not so different, in particular regarding identification and freezing of assets, the required judicial forfeiture proceedings and the execution of court judgments: they confront common problems.**

Bulgaria, Italy and Romania serve as a good example of three asset confiscation/forfeiture models. Bulgaria applies a model where illegal asset forfeiture is sanctioned by a civil court and does not require a final conviction of the person involved. Italy's mixed model relies on its special legislation in relation to the mafia, while Romania applies a model of extended confiscation of proceeds of crime.

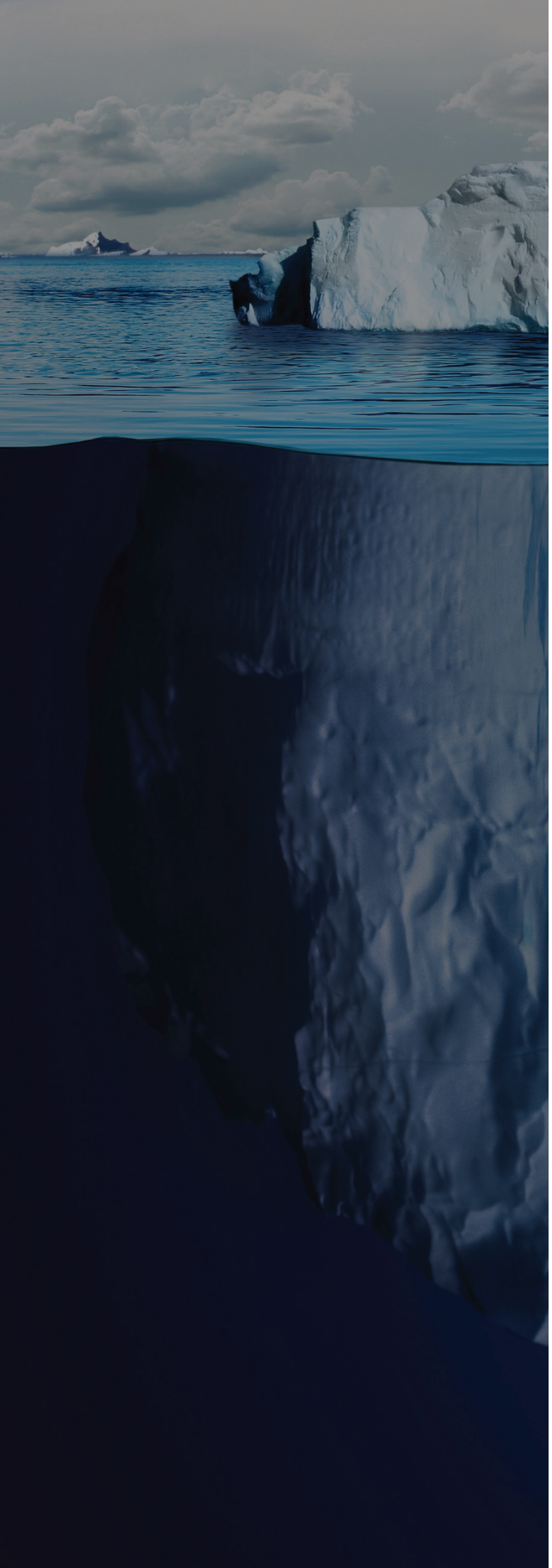
These models have their own positive features and deficiencies. The analysis of the national legislation in the field of confiscation/forfeiture of assets, as well as the monitoring of its implementation, provides the opportunity for making specific recommendations for improvement. **Based on this, an ideal model (minimum common standards) could be designed.** The model contains all the advantages of existing national models, which have proven their efficiency, and tends to avoid their weak points. **In a best case scenario, an ideal model of confiscation/forfeiture of assets should involve a well-balanced set of all features mentioned bellow.**

IDEAL MODEL (COMMON STANDARDS) FOR NATIONAL PROCEDURES FOR CONFISCATION/FORFEITURE OF ASSETS

INSTITUTIONALLY STRENGTHENED (AUTONOMOUS, INDEPENDENT, SPECIALISED, COMPETENT) NATIONAL AUTHORITIES WITH POWERS TO TRACE, IDENTIFY, FREEZE, SEIZE, AND CONFISCATE/FORFEIT DERIVED PROPERTY

This is a basic requirement for Member states where serious crime leads to accumulation of criminal and illegal assets. Such authorities should be independent, competent and highly motivated to achieve the specific goals of confiscation: deprive the criminals from the economic profit of their criminal/illegal activities.

Effective freezing and confiscation of criminal and illegal assets, just like an adequate and practically feasible legal regulation, depend largely on the implementing national authorities in the Member States, their powers and the modalities of their cooperation.



Establishing national structures with individual organisation and competence in the area of confiscation, in addition to expanding their current powers, where necessary is a prerequisite for a more successful and effective work of these bodies. Extension of powers could cover not only the initial stage of confiscation proceedings, but also as regards tracing and identification of proceeds of crime in the next stages, including judicial proceedings.

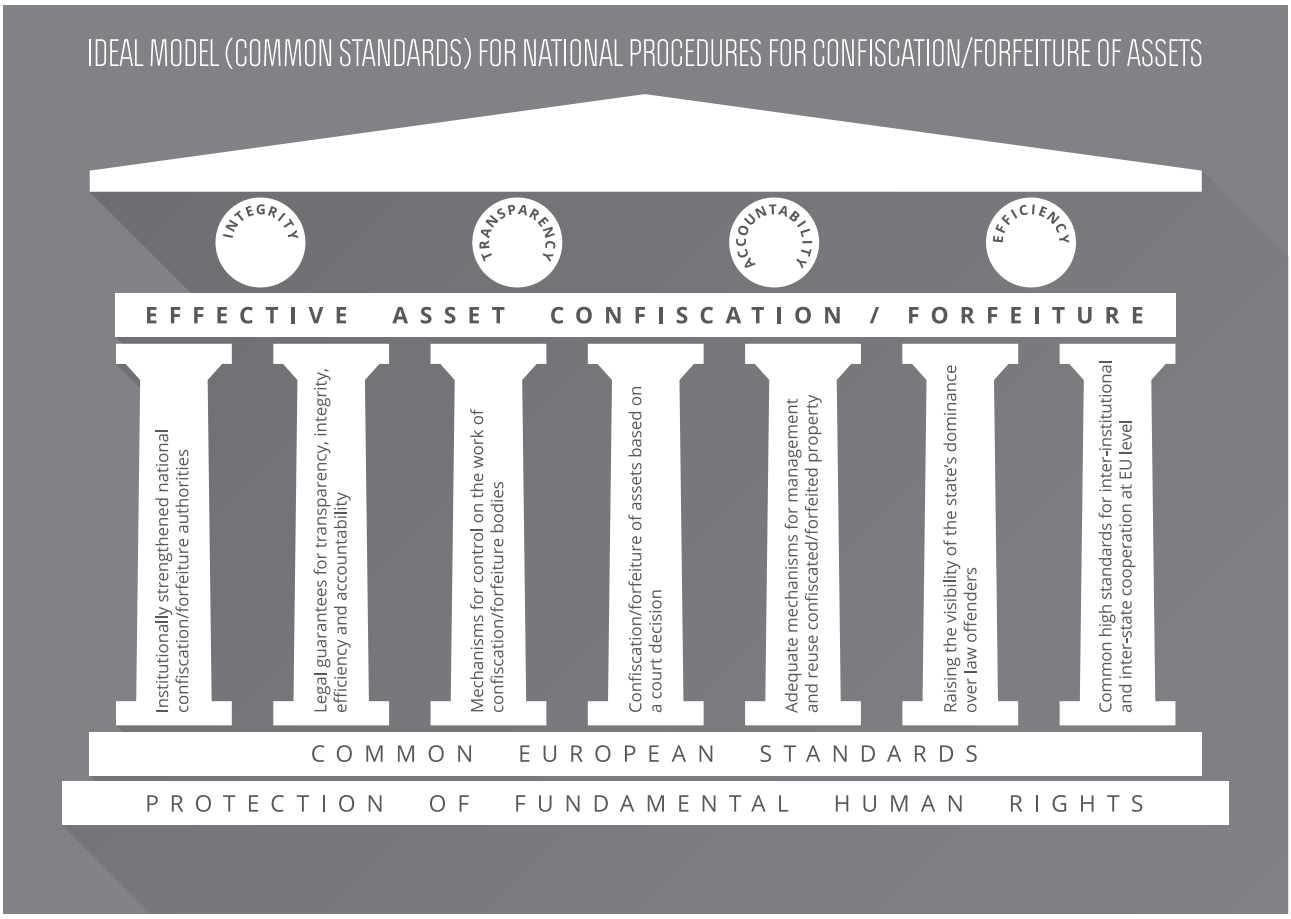
GUARANTEES IN THE LAW FOR TRANSPARENCY, INTEGRITY, EFFICIENCY AND ACCOUNTABILITY OF THE CONFISCATION/FORFEITURE AUTHORITIES AND PROCEDURES

The significant powers of confiscation or forfeiture authorities require a level of transparency, integrity and accountability that goes beyond the usual general standards.

Transparency is a characteristic of the public policies achieved by building a sustainable and widely shared understanding of the work of public institutions. In this sense, in the context of confiscation and forfeiture authorities' specific functions and role, transparency should be perceived as a question of an additional and targeted effort.

Transparency should provide for good access to information to the procedures, documents, confiscated assets as well as their management and further use. Implementing transparency policies is instrumental also for raising general public awareness regarding management of assets, strictly meeting tax and other statutory obligations and rejecting to be involved in operations that promote the so-called informal sector. It is precisely through these transparency policies that the preventive effect of the law could be achieved.

Integrity is indicative of the level of correspondence between the statutory powers, objectives and approach to public interest protection, structure and functional specificity of the confiscation/forfeiture authorities, on the one hand, and the actual actions of the management and its staff members, on the other hand. Integrity should be related to effective management of conflict of interests, declaration of assets of confiscation/forfeiture authorities and high ethical standards in their personal and professional life.



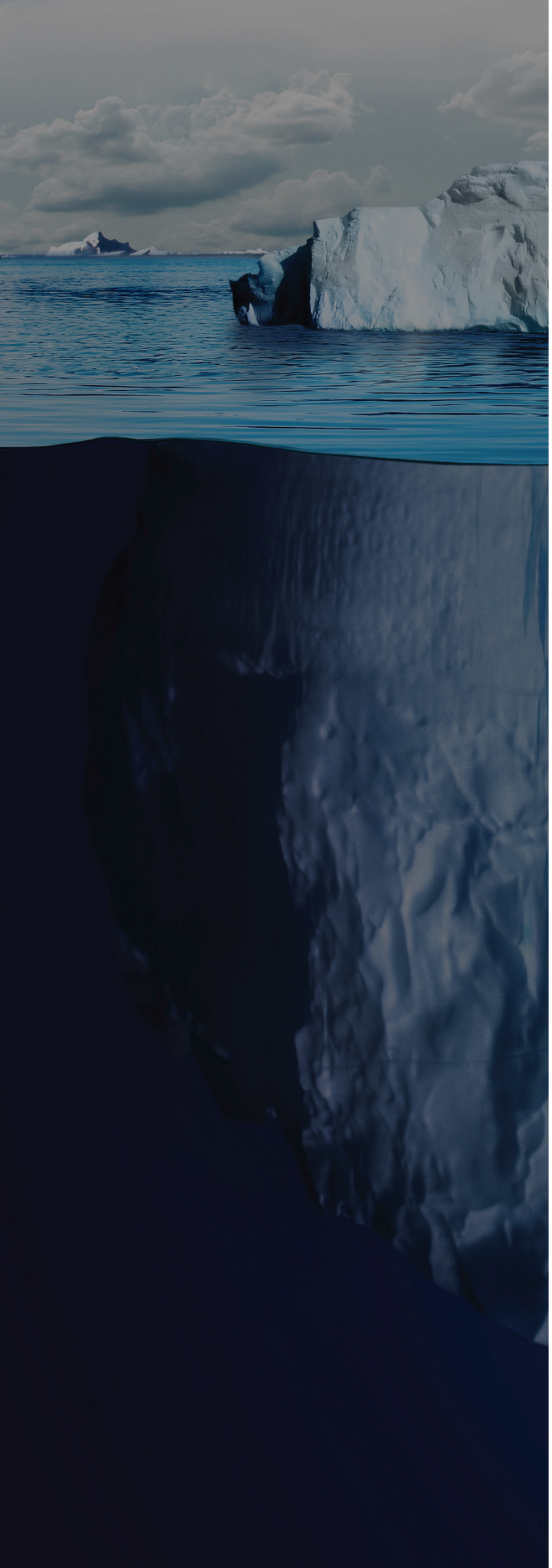
Accountability is essential in relation to public spending. Such accountability largely deals with the correspondence between the objectives set and the public funds spent to attain these objectives. Regarding public spending and resources used in accordance with the attained objectives, accountability is the conduct due by the institutions and their staff members.

Efficiency is related to the achievement of the main objective of confiscation/forfeiture: deprivation of criminals from the assets deriving from criminal activities or forfeiture of assets whose legal origin cannot be proven. **An important aspect of efficiency is the existence of swift procedures, both in the pre-trail and the trail phase. In this respect, the non-conviction based forfeiture indicates significant advantages compared to criminal confiscation. The main advantage is in the fact that the forfeiture procedure is not dependent on the completion of the criminal case and on the proof of the guilt of the defendant for the crimes committed. This allows the civil court to start the forfeiture procedure upon completion of the check of the assets of the defendant by the confiscation authorities.**

MECHANISMS FOR CONTROL ON THE WORK OF CONFISCATION/FORFEITURE BODIES

A very important characteristic of a well-functioning model is to have independent and reputable institutions dealing with the confiscation/forfeiture of assets. However, strengthening national authorities and reinforcing their powers regarding confiscation/forfeiture procedures should go hand in hand with establishing legal guarantees for transparency, integrity and efficiency in exercising these powers, including adequate mechanisms for supervising their work.

Such institutions should be subject to both institutional and public control. By taking into consideration the specifics of the national models, the institutional control could be established by the Parliament or the President. It is essential to also have efficient mechanisms for public control, exercised by civil society. This is crucial in view of the significant powers focused in confiscation authorities and the need for them to be accountable for their work. This involves official public annual reports of the confiscation authorities, public



debates on the report in Parliament, press conferences with information on confiscated/forfeited activities, oversight over the management and use of confiscated/forfeited assets.

Judicial control over the acts of confiscation/forfeiture authorities is an important guarantee as well.

CONFISCATION/FORFEITURE OF ASSETS SHOULD BE BASED ON A COURT DECISION, ISSUED EITHER AS A CRIMINAL CONVICTION OR AS A CIVIL SANCTION IN A CASE THERE IS A SIGNIFICANT DIFFERENCE BETWEEN THE ASSETS ACQUIRED AND THE LEGITIMATE OR THE LEGALLY PROVED INCOME OF A PERSON

Such an approach would facilitate mutual recognition of freezing and confiscation/forfeiture orders between Member States that have established such procedures in their domestic laws. Judicial procedures should be marked with the highest standards for transparency, fair trial and human rights protection. Special guarantees for avoiding excessively long judicial procedures, conflict of interest prevention and application of high ethical standards should be introduced.

STANDARDS TO ENSURE HUMAN RIGHTS PROTECTION IN ASSET CONFISCATION/FORFEITURE PROCEEDINGS THROUGH JUDICIAL CONTROL AND ADEQUATE AND EFFECTIVE LEGAL REMEDIES FOR JUDICIAL PROTECTION

Establishing such standards is **mandatory,** especially with a view that human rights could be seriously infringed during confiscation/forfeiture procedures. Human rights that should be protected include: right to an effective remedy and to a fair trial; communicating the freezing order to the affected person as soon as possible after its execution; possibility for the person whose property is affected to challenge the freezing order before a court; immediate return of the frozen property which is not subsequently confiscated; giving reasons for any confiscation order and communicating the order to the person affected, as well as effective possibility for a person in respect of whom confiscation is ordered to challenge the order before a court; right of access to a lawyer throughout the confiscation/forfeiture proceedings; effective possibility to challenge the

circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct; measures to ensure that the confiscation/forfeiture measure does not prevent victims of a criminal offence from seeking compensation for their claims.

The human rights protection should also cover third parties affected by confiscation/forfeiture procedures.

ADEQUATE MECHANISMS FOR MANAGEMENT OF FROZEN AND SUBSEQUENTLY CONFISCATED PROPERTY WITH A VIEW TO RE-USING IT FOR PUBLIC INTEREST

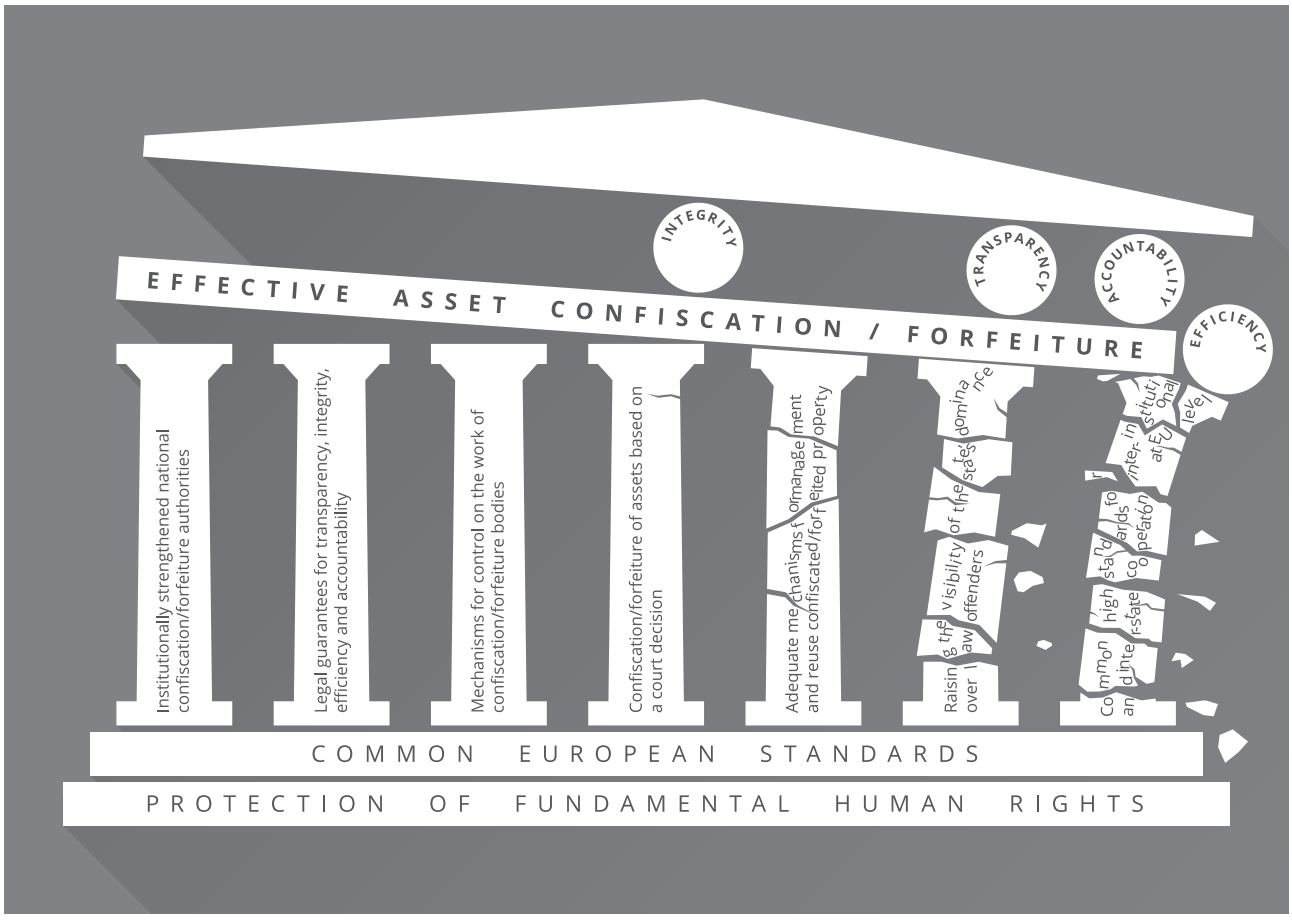
The European standard as far as the management of confiscated/forfeited assets is concerned is clearly presented in the Directive 2014/42/EU of the European Parliament and the Council of 3 of April 2014.

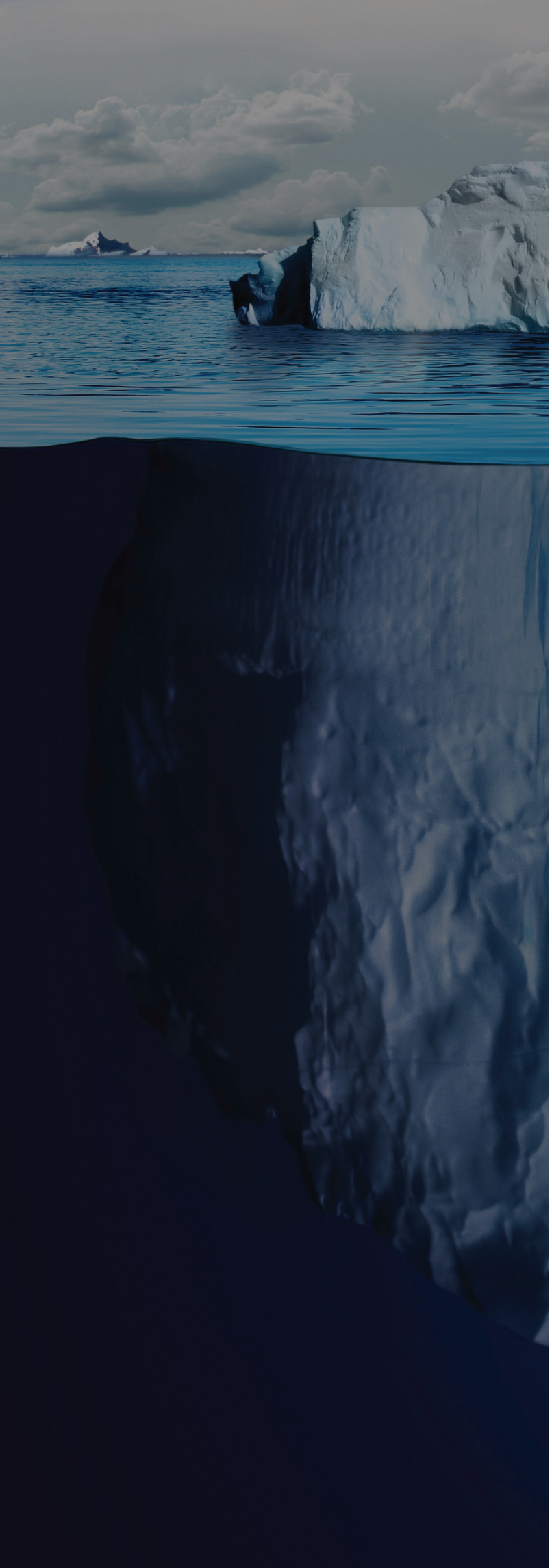
As regards management of frozen property, the Directive envisages establishing centralised offices, a set of specialised offices or equivalent mechanisms, to ensure the adequate management of property frozen with a view to possible subsequent confiscation, including the possibility to sell or transfer property where necessary. **Regarding the management of already confiscated property, the focus is on measures allowing it to be used for public interest or social purposes** (Article 10).

Member States shall regularly collect, possibly at a central level, and send to the Commission, **comprehensive statistics** about the number of freezing and confiscation orders executed, the estimated value of the frozen property at the time of freezing, and the estimated value of the recovered property at the time of confiscation.

Member States shall also send statistics to the Commission, if they are available at a central level, of the number of requests for freezing and confiscation orders to be executed in another Member State as well as of the value or estimated value of the property recovered following execution in another Member State (Article 11).

On the one hand such measures would facilitate future confiscation of frozen property since





it would largely prevent its destruction and dissipation. On the other hand, risk would be reduced (in cases of selling the property) that property would be reused for criminal purposes. In this respect establishment and maintenance of national e-registers with information on confiscated/forfeited assets in EU member states have significant importance.

It is important to identify the most appropriate model for management of confiscated/forfeited assets and accredit it to one institution, marked with integrity, accountability, transparency and efficiency. Procedures should be adopted to manage the risk that confiscated assets could return into criminal hands. Last, but not least, the efficient management of confiscated/forfeited assets at national level should be based on the principle "less cost – better use".

RAISING THE VISIBILITY OF THE STATE'S DOMINANCE OVER LAW OFFENDERS AND INTRODUCE MANDATORY MEASURES TO ENSURE TRANSPARENCY (E.G. PUBLIC REGISTER OF CONFISCATED ASSETS; SIGNS FOR CONFISCATION/FORFEITURE ON THE ASSETS; STRATEGY FOR PUBLIC OUTREACH)

In order to focus the public attention on the measures taken by the Member States in relation to managing confiscated/forfeited property, **these measures should become visible to the general public.** In this way their deterring effect is enhanced and it is reiterated that property acquired through criminal (illegal) activity is always confiscated/ forfeited by the state. **The idea is to show that crime does not pay.**

Visibility is a tool that ensures transparency in all the activities of the state, but it is also a tool that enables public control. In this respect the one side of visibility could be related to the establishment of public e-register with confiscated/forfeited assets in each Member State.

The other aspect of visibility is related to the need to make obvious the state's dominance over the law offenders. This type of visibility is important in order to attain dissuasive and preventive effect and to disrupt future criminals from committing economic crimes. **This is the most important outcome of all the procedures in view of showing that the state is stronger than criminals and offenders of the laws.** In this respect confiscated assets, especially buildings and cars, should be marked in such a way as to

announce the fact of their confiscation/forfeiture. This could be made by special stickers or posters "confiscated/forfeited by the state" or by making public events to declare the fact of confiscation.

COMMON HIGH STANDARDS FOR INTER-INSTITUTIONAL AND INTER-STATE COOPERATION AT EU LEVEL

Interinstitutional cooperation is essential for the efficient confiscation/forfeiture of assets. This usually entails the need of common and often urgent actions, exercised by the institutions involved in the procedures for tracing and freezing of criminal/illegal assets. **Access to different databases with information on assets and swift exchange of information is sometimes decisive for the success or the failure of confiscation procedures.**

Interstate cooperation at EU level is extremely important for all EU Member-states, especially in the context of tracing and seizure of assets located on the territory of another Member state. **Mutual recognition of judicial acts is also crucial element of efficient confiscation procedures.**

The issue is resolved as far as the conviction based (criminal) confiscation is concerned, but remains unaddressed as far as the judicial decisions for forfeiture of illegal assets are at stake.

EU REGULATIONS IN THE FIELD OF CONFISCATION/FORFEITURE OF ASSETS

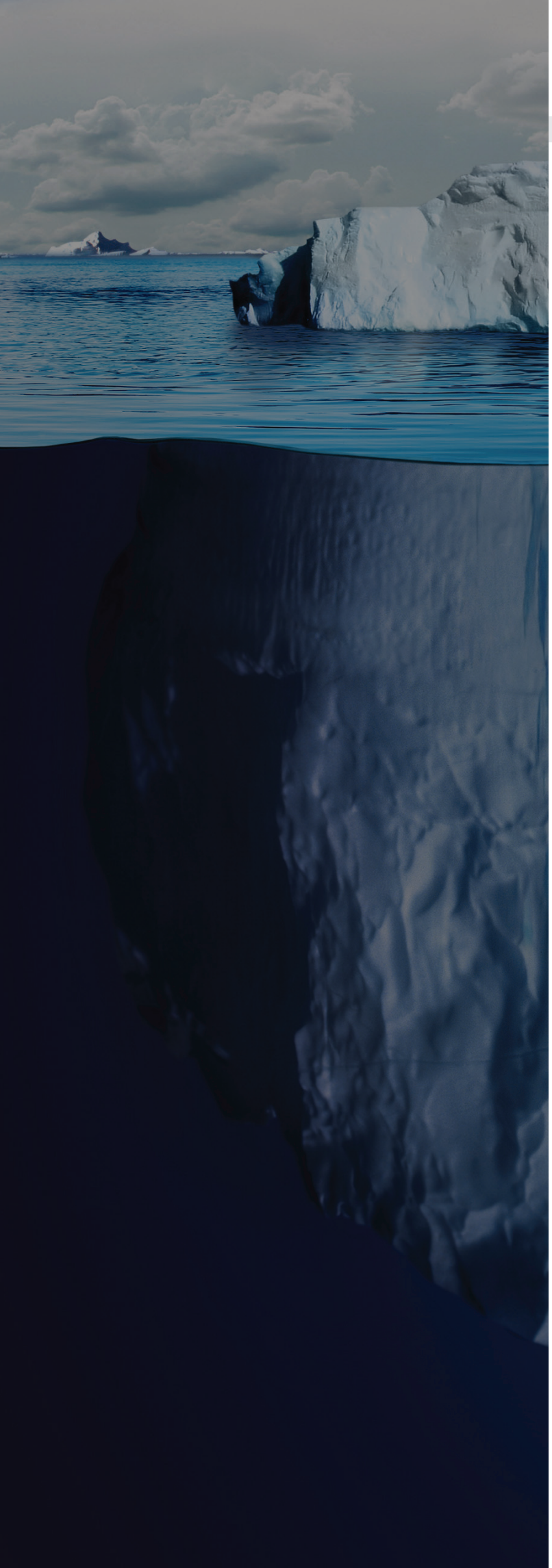
EU law in the field of confiscation and asset forfeiture should be considered in the context of the reform brought along by the Lisbon Treaty that repealed the three-pillar structure and created a single subject, the European Union. Regardless of this change, we should nevertheless remember that both criminal and illegal asset forfeiture go hand in hand with crimes such as organised crime and corruption, crimes that have been dealt with until recently under the so called third pillar of the EU[3]. In this pillar the Union and the Member States share joint competence and interstate cooperation[4].

This means that both before and after the Lisbon Treaty reform, Member States are competent to take decisions insofar as the EU has not acted on a particular matter. The EU for its part is competent to take decisions in this area respecting the principle of subsidiarity[5]. In the field of serious and transnational crime, at EU level, legislative initiative on national level has priority, unless the EU decides that a certain matter can be effectively dealt with at EU level. The Communication from the Commission to the European Parliament and the Council "Proceeds of organised crime: ensuring that "crime does not pay"[6] determines the added value that the EU can provide in confiscation of proceeds of crime through:

- making the EU legal framework more coherent and further improving it;
- promoting coordination, exchange of information and cooperation among national agencies;
- assisting in the creation of new tools related to the identification and tracking of assets;
- facilitating the enforcement of freezing and confiscation orders;
- facilitating cooperation with third countries through the ratification of conventions and the promotion of asset sharing agreements;
- assisting partners to develop new initiatives through EU funding programmes.

Currently no new Stockholm Programme is expected. Some of the issues dealt with in it may be found in the European Council Conclusions of June 26 and 27, 2014, which set forth future key priorities of the Union policy. The key priorities of the Stockholm Programme in the area of freedom, security and justice regarding protection and promotion of fundamental rights, building a European area of justice, safeguarding the Union security etc. are reiterated. Issues such as confiscation and forfeiture of illegal assets have been left out. However many EU

[3] The other two pillars of the European Union were respectively the European Economic Community and the Common Foreign and Security Policy.
[4] Article 2.2 of the Treaty on the Functioning of the European Union, accessible at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN.
[5] Article 5.3 of the Treaty on European Union accessible at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN.
[6] Cf. Communication from the Commission to the European Parliament and the Council of 20 November 2008 – Proceeds of organised crime: ensuring that "crime does not pay" COM (2008) 766 final, accessible at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0766&from=EN.



Member States apply illegal asset forfeiture as a specific means for counteracting serious crime. **Therefore, progress made so far by Directive 2014/42/EU, which appears to be the maximum that Member States have achieved regarding mutual consent on the topic, seems to need further development.**

It should be noted that confiscation and asset forfeiture fall under criminal law, a sensitive area for the Member States. This circumstance largely explains the difficult and generally slow progress in developing standards and norms that harmonise national legislations.

Another reason certainly is the various confiscation and asset forfeiture models that largely differ from one another. **Member States with functioning confiscation and asset forfeiture models encounter similar problems in their application.** These problems are largely due to the fact that, in the modern world of globalised and transnational crime, tracing and freezing of assets as well as execution of judgments often requires interstate cooperation. **These problems may and should be resolved on EU level as far as Member States are concerned.**

Article 83 of the Treaty of Functioning of the European Union (TFEU) is exemplary of the new EU approach and different attitude towards grave and transnational crime. It allows minimum rules to be established for the harmonisation of national legislations. **Opportunities for further and deeper regulation of the problematic issues regarding illegal asset forfeiture that European states experience should be viewed in the context of this new EU vision.**

Despite the slim chances of progress on this issue before 2020, we should nevertheless acknowledge that problems encountered by Member States persist. **These problems should be addressed to allow for a more effective cooperation among them and for greater efficiency of the different national models in the event of transnational obstacles.**

A number of Framework Decisions have been adopted to regulate the issue of confiscation/ forfeiture of assets at EU level. These framework decisions aim at setting up an effective legal framework and standards for confiscation/ forfeiture of proceeds of crime. The principle endorsed in the above-mentioned framework decisions is that confiscation/forfeiture is possible in the framework of criminal proceedings, by a

competent criminal court, after a final conviction, and in relation to proceeds of crime[7].

The Framework decisions have significantly improved the concept on confiscation of assets since 2001. They set forth the substantial prerequisites for Member States to initiate confiscation of crime-related proceeds. In addition, they regulate the procedures for or establish the procedural means whereby final confiscation orders may be executed.

It is the Framework Decision 2005/212/JHA that introduces for the first time an exception to the principle that confiscation is only possible within the scope of criminal proceedings. Thus Article 2 (2) stipulates that in relation to tax offences, Member States may use procedures other than criminal procedures to deprive the perpetrator of the proceeds of the offence.

The 2005/212/JHA Framework Decision provides for the first time for extended powers for confiscation or the so called extended confiscation in case of expressly set forth grave offences committed within the framework of a criminal organizational covered by the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (Article 3).

What is characteristic of this type of confiscation is that where such offences have been committed, it is possible to also confiscate property that has not been derived directly from the criminal activity in question, thus a link between the assets acquired through the convicted person's criminal activities and the specific offence is not required.

The Framework Decision provides for another exception to the above mentioned principle and allows Member States to use procedures other than criminal procedures to deprive the perpetrator of the property in question. For the first time Member States are granted the discretion to confiscate property acquired not by the convicted person, but by third parties. These include the closest relations of the person concerned as well as legal persons in respect of which the person concerned, either alone or in conjunction with his closest relations, has a controlling influence.

This approach can be found in Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. The purpose of both Framework Decisions is to establish the rules under which a Member State shall recognise and execute in its territory a confiscation order issued by a court competent in the criminal matters of another Member State.

The existing legal framework was complemented by a new Directive 2014/42/EU of the European Parliament and the Council of 3 of April 2014 which was expected to overcome some of the existing problems[8]. It further extends the exceptions outlined above and introduces basically new rules in this area. The purpose is to facilitate confiscation of property in criminal cases.

The process of elaboration of this Directive brought high expectations going as far as considering introducing non-conviction based confiscation of property at EU level. Such an expansion of the concept was supported during meetings of the Council of Ministers at the end of 2011 and the beginning of 2012 by Bulgaria, Italy and Ireland.

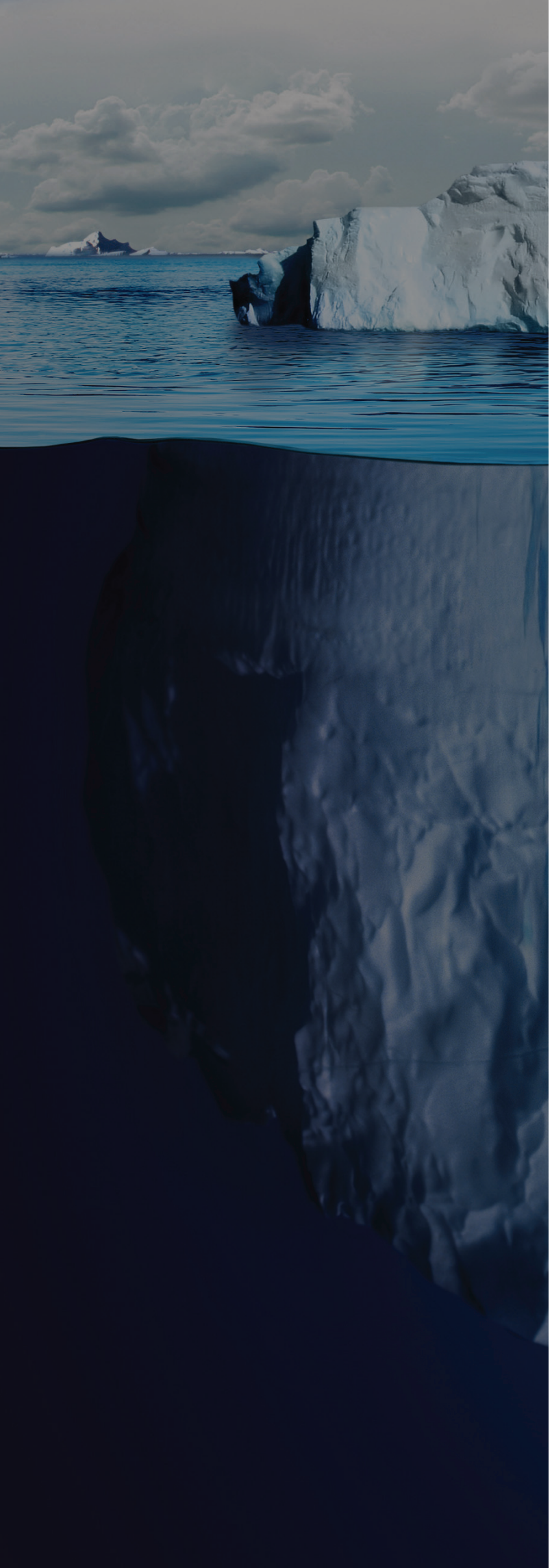
The possibility to expand the scope of the Directive to include non-conviction based confiscation was discussed also in the beginning of the Irish Presidency of the Council of European Union, during the informal meeting of the Ministers for Justice in January 2013 in Dublin.

The proposal of the European Commission for a Directive of the European Parliament and of the Council for freezing and confiscation of proceeds of crime in the European Union aimed precisely at introducing such possibilities. The principle of confiscation of property subject to a final conviction for a criminal offence is largely observed, in compliance with the existing rules (Articles 1 and 4).

Nevertheless, an exception to this principle is envisaged by introducing non-conviction based confiscation. It is however only possible if a number of conditions set forth in Article 4 (2) are

[7] Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (2001/500/JHA); Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders; Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to crime.

[8] The Directive could be found at: http://eur-lex.europa.eu/legal-content/BG/TXT/?qid=1422500268788&uri=CELEX:32014L0042.



met, namely where confiscation on the basis of a final conviction is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.

Although much narrower in scope that initially expected, the Directive provides for some important developments. Such is the case of the definition of „proceeds". It includes not only any economic advantage derived from a criminal offence but also any subsequent reinvestment or transformation of direct proceeds and any valuable benefits.

The scope of freezing and confiscation of proceeds of crime within the meaning of the Directive is determined by reference to specific EU acts regarding particular areas of crime set forth in Article 83 (1) of the Lisbon Treaty.

Rules regarding extended confiscation are amended and a uniform minimum standard is set forth instead of the existing system of optional rules. Discrepancy between the value of the property and the lawful income of the convicted person is expressly laid down as a fact to be considered by the court when issuing extended confiscation orders (Article. 5). The criminal offences in relation to which extended confiscation is applicable are also laid down.

Rules regarding confiscation from a third party that were set forth for the first time by Framework Decision 2005/212/JHA are built upon and fine-tuned. Unlike the non-binding nature of Article 3 (3) of the Framework Decision, which leaves it to the Member States' discretion whether or not to adopt measures to enable confiscation of property from third parties, the Directive requires that Member States take the necessary measures to enable such confiscation (Article 6).

What is meant are proceeds, or other property the value of which corresponds to proceeds, which were transferred by a suspected or accused person to third parties. Confiscation of such proceeds is possible on the basis of concrete facts and circumstances, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation. The fact that the transfer or acquisition was carried out free of charge or in exchange for an

amount significantly lower than the market value is explicitly mentioned.

Confiscation from third parties should not prejudice the rights of bona fide third parties (Article 6 (2)).

Freezing of property with a view to possible subsequent confiscation is also envisaged. Property in the possession of a third party can also be subject to freezing measures for the purposes of possible subsequent confiscation (Article 7).

A series of minimum guarantees (safeguards pursuant to Article 8) are introduced to protect the rights of affected persons in confiscation proceedings[9]. Their purpose is to guarantee the presumption of innocence, the right to a fair trial, available effective remedies and the right to be informed of these remedies.

To ensure effective confiscation and to facilitate the execution of confiscation orders in practice, the Directive provides for the detection and tracing of property to be frozen and confiscated even after a final conviction for a criminal offence or following proceedings in application of Article 4 (2) (non-conviction based confiscation) (Article 9).

As regards management of frozen property, the Directive envisages establishing 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, including the possibility to sell or transfer property where necessary. As regards management of already confiscated property, the focus is on measures allowing it to be used for public interest or social purposes (Article 10).

Member States shall regularly collect, possibly at a central level, and send to the Commission comprehensive statistics about the number of freezing and confiscation orders executed, the estimated value of property frozen at the time of freezing, and the estimated value of property recovered at the time of confiscation.

Member States shall also send statistics to the Commission, if they are available at a central level, of the number of requests for freezing and confiscation orders to be executed in another Member State as well as of the value or estimated value of the property recovered following execution in another Member State (Article 11).

The difficulties in effectively applying the European legal framework in the area of confiscation of instrumentalities and proceeds of crime are generally rooted in the following legal propositions:

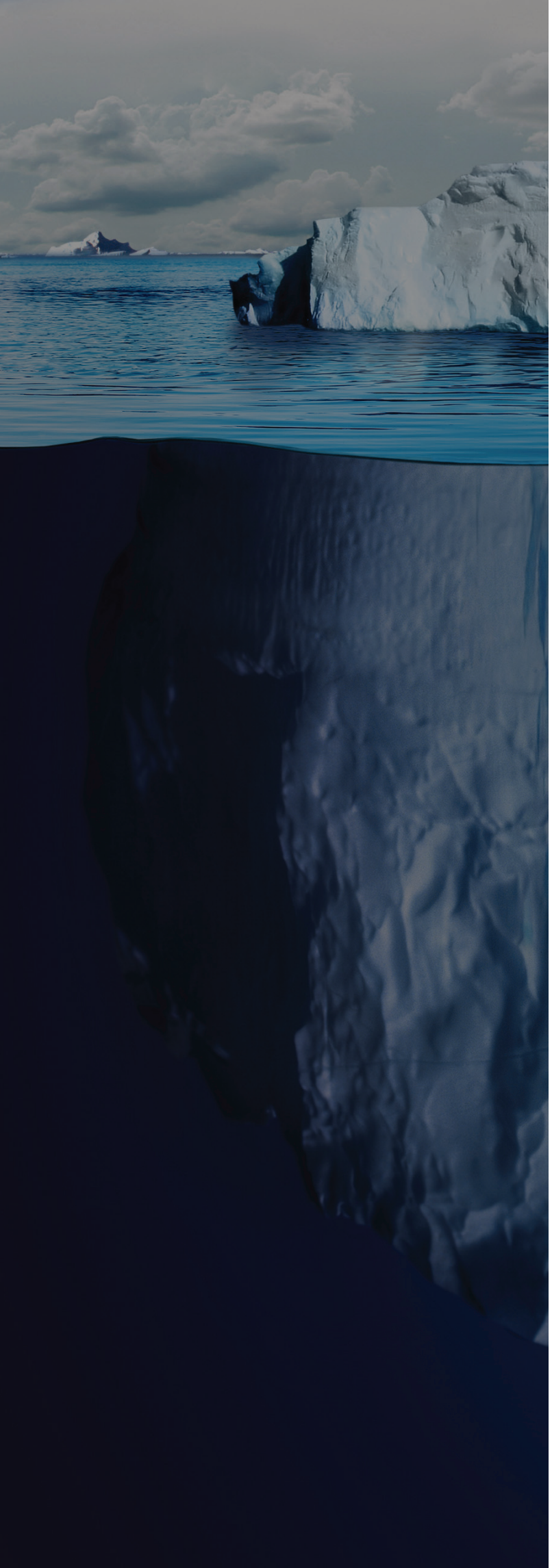
- The endorsed principle of binding the confiscation of property to a final criminal conviction.
- The applicability of the rules for mutual recognition and execution of freezing or confiscation orders – only in relation to those orders issued by courts in the Member States in criminal cases.
- The powers of the asset recovery offices that concern mostly tracing and identification of proceeds of crime, as well as the nature of the data exchanged between these offices – largely operative data, which cannot serve as evidence in confiscation proceedings in court.

COMMON STANDARDS AT EU LEVEL: RECOMMENDATIONS

As obvious from the above, the development of the EU regulation in the field of confiscation of assets is not yet completed as it is not ready to address some of the more advanced confiscation/forfeiture models, not related to criminal conviction.

Some recommendations could be made in view of overcoming some of the above-mentioned deficiencies in the EU regulations. Their aim is to contribute to the future elaboration of common standards at EU level and to improve the tracing, seizure and confiscation of assets, subject to confiscation at national level. **This is especially needed as far as the European cooperation is concerned in cases of transnational crimes and of assets that are located outside the boundaries of the confiscating state. Bellow, are recommendations of some general nature, which**

[9] Right to an effective remedy and to a fair trial; communicating the freezing order to the affected person as soon as possible after its execution; possibility for the person whose property is affected to challenge the freezing order before a court; immediate return of the frozen property which is not subsequently confiscated; giving reasons for any confiscation order and communicating the order to the person affected, as well as effective possibility for a person in respect of whom confiscation is ordered to challenge the order before a court; right of access to a lawyer throughout the confiscation proceedings; effective possibility to challenge the circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct; measures to ensure that the confiscation measure does not prevent victims of a criminal offence from seeking compensation for their claims.



could adapt to EU Member states irrespective of their model of confiscation/forfeiture of assets.

REGARDING THE INSTITUTIONAL FRAMEWORK

- Envisage standards that would allow for the institutional strengthening of the asset recovery offices acting in the Member States in three aspects: increasing their autonomy, independence and specialisation; expanding their powers regarding the identification, freezing and confiscation of proceeds of crime; and reinforcing the cooperation between them.
- Putting in place mechanisms for supervising the work of the confiscation bodies.
- Legal guarantees for transparency, integrity, effectiveness and accountability of the confiscation bodies and the confiscation procedures followed.
- High common standards for interinstitutional and interstate cooperation on EU level.

Effective freezing and confiscation of illegal assets, just like an adequate and practically feasible legal regulation, depend largely on the implementing national authorities in the Member States, their powers and the modalities of their cooperation.

In this regard, neither the proposal for a directive nor the finally adopted act contains any provisions pertaining to these authorities. What is more, the Directive description of the legal framework currently in force in the Union in the area of freezing, forfeiture and confiscation of assets fails to make a reference to Council Decision 2007/845/JHA, which calls upon the Member States to establish or determine national Asset Recovery Offices (recital 7 of the Preamble)[10].

Establishing national structures with individual organisation and competence in the area of confiscation, in addition to expanding their

[10] In this regard, in its opinion the EESC voices its regret that the proposal does not incorporate the *acquis communautaire* in relation to judicial cooperation and cooperation between investigative authorities. It also notes down that identifying and tracing the proceeds of crime requires strengthening the powers of the Asset Recovery Offices and Eurojust. Thus, apart from the necessary coordination and the systematic exchange of information between national Asset Recovery Offices, the EESC believes that it is necessary in the long term to consider centralisation at European level in this area, whether through a new, dedicated organisation or directly through Eurojust. The findings of the Committee of the Regions should also be borne in mind. In its opinion on the proposal for a directive it notes down that not all Member States have implemented Council Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices. Therefore the measures mentioned above are justified.

current powers not only in the initial stage of confiscation proceedings, but also regarding tracing and identification of proceeds of crime in the next stages, including judicial proceedings, predetermines a more successful and effective work of these bodies.

In addition to that, expanding the powers of these authorities would allow using information and data exchanged between them in confiscation proceedings in court.

REGARDING THE SCOPE OF THE NON-CONVICTION BASED CONFISCATION AND THE MANAGEMENT OF FROZEN AND CONFISCATED PROPERTY

- Encourage expanding the scope of non-conviction based confiscation, including issuing such in the framework of civil proceedings; the approach endorsed in relation to the extended confiscation should be followed here, i.e. focusing on the discrepancy between a person's property and lawful income, and not just on the impossibility to have a final conviction for the criminal offence committed by that person.

Such approach would facilitate mutual recognition of freezing and confiscation orders in those Member States that have established such a procedure in the national laws.

- Standards guaranteeing protection of human rights in the confiscation proceedings by means of judicial review and effective remedies, especially regarding non-conviction based confiscation.
- Analysis and evaluation by the Member States of the efficiency of the rules applicable at the national level for managing frozen and confiscated property with a view to their improvement.
- Adequate mechanisms for managing frozen and subsequently confiscated property, in particular for the purpose of its reuse in the public interest, including for social needs.
- The measures taken by the Member States in relation to managing confiscated property should be visible to the general public in order to have a deterring effect and to demonstrate that property acquired through criminal activity is always forfeited by the state. In other words to show that crime does not pay.
- Promoting publicity about the measures taken by the government in relation to criminal offenders and ensuring transparency through statutory measures (e.g. a public register of the confiscated property; a strategy for working with the public).

REGARDING MUTUAL RECOGNITION OF 'CIVIL CONFISCATION' ORDERS WITHIN THE EU

- Consider possibilities to expand the scope of the two Framework Decisions making their provisions applicable to judicial acts for freezing and confiscation of proceeds of crime issued in civil cases as well.
- Consider the idea of adopting a directive replacing the Framework Decisions and establishing minimum rules for the execution of orders for freezing and confiscation of proceeds of crime within the European Union.

The present Policy paper is based on the following documents of Transparency International – Bulgaria, Transparency International – Italy and Transparency International – Romania: national legal reports "Forfeiture of Illegal Assets: Challenges and Perspectives of the Bulgarian Approach", "Illicit Assets Recovery in Italy", "Extended Confiscation Procedure in Romania", and final comparative report "Legislation Meets Practice: National and European Perspectives in Confiscation of Assets". These documents can be found on the targeted website of the initiative: www.confiscation.eu

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