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From Loss to Gain

Unlocking the Potential of Equivalent
Value-Based Measures in Asset Recovery

Stefano Betti

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Stolen Asset Recovery Initiative

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StAR—the Stolen Asset Recovery Initiative—is a partnership between the World Bank Group and the United Nations Office on Drugs and Crime (UNODC) that supports international efforts to end safe havens for corrupt funds. StAR works with developing countries and financial centers to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets.

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Abbreviations

CEMAC	Economic and Monetary Community of Central Africa
EGM	expert group meeting
EU	European Union
EVB	equivalent value based
FATF	Financial Action Task Force
HMRC	His Majesty's Revenue and Customs
MER	mutual evaluation report
MLA	mutual legal assistance
NAB	National Accountability Bureau (Pakistan)
NAO	National Accountability Ordinance (Pakistan)
NCB	non-conviction based
OECD	Organisation for Economic Co-operation and Development
StAR	Stolen Asset Recovery Initiative
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
UWO	unexplained wealth order
VAT	value added tax

About the Authors

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Input from asset recovery experts across 26 jurisdictions and 1 nongovernmental organization was gathered through multiple channels: an expert group meeting held in Washington, DC, February 13–14, 2023; written replies to a survey; face-to-face discussions on the margins of the Fourth Plenary Meeting of the GlobE Network (Vienna, July 11–13, 2023); phone interviews with individual experts; and feedback on the draft publication. The authors wish to extend a special thanks to all the practitioners from the following jurisdictions who provided their insights, perspectives, and drafting suggestions throughout the process: Argentina; Bosnia and Herzegovina; Botswana; Brazil; France; Hong Kong SAR, China; India; Indonesia; Israel; Italy; Jersey; Kenya; Republic of Korea; Lebanon; Nigeria; Pakistan; Panama; Portugal; Romania; Singapore; Slovakia; South Africa; Spain; Switzerland; United Kingdom; United States; International Association of Judges; and International Association of Prosecutors.

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Executive Summary

Financial resources lost to corruption are estimated at about 5 percent of global Gross Domestic Product (GDP), according to United Nations estimates. Recovering even a fraction of those assets could provide resources for priority public investments. A recent Stolen Asset Recovery (StAR) Initiative study reviewing seizure and confiscation of proceeds of corruption over the past decade shows that the number of countries involved in corruption-related asset recovery continues to grow. However, the overall proportion of successful confiscation and return of stolen property remains acutely insufficient, compared with the estimated total proceeds of corruption. Jurisdictions face a range of challenges in pursuing asset recovery. A central one is the requirement to

“A central challenge in pursuing asset recovery is the requirement to link assets derived from corruption to criminal activity.”

link assets derived from corruption to criminal activity. This requirement can hamper a jurisdiction’s ability to seize and confiscate proceeds of crime in a timely manner, thus allowing for the dissipation of tainted property.

Equivalent value-based (EVB) measures encompass a variety of domestic legal mechanisms that enable the restraint or confiscation of property of equal value to the proceeds of crime (or its instrumentalities). Unlike domestic measures that limit seizure and confiscation action to property linked to crime, EVB measures can be a solution to address the issue of the dissipation

of illicit assets. EVB measures allow authorities to freeze, seize, and confiscate property equal in value to proceeds of criminal activity, regardless of its origin. However, despite the potential usefulness of EVB measures as an effective asset recovery tool, such measures are underused, insufficiently understood, and poorly employed.

Findings

International legal framework

The primary, globally relevant instrument governing confiscation in corruption cases is the United Nations Convention against Corruption (UNCAC). Under UNCAC, States parties are required to implement two approaches: (a) proceeds-based measures, linking assets to specific offences; and (b) EVB measures, allowing confiscation of property equivalent in value to proceeds.

EVB measures can be domestic measures, or those taken at the request of other States parties. Beyond UNCAC, other treaty frameworks, including the United Nations Convention against Transnational Organized Crime and regional conventions, contain unambiguous requirements for EVB measures. For example, the Organisation for Economic Co-operation and Development, the Council of Europe and the European

Union have requirements for such measures. EVB measures may also overlap with other legal tools crucial for achieving asset recovery goals, such as, unexplained wealth orders, monetary sanctions or damage compensation. It is essential to understand both the distinctions and the similarities between these various tools to enable practitioners to optimize their chances of recovering illicit assets.

Country findings

This guide is informed by a survey of 22 jurisdictions on the use of EVB measures. All 22 jurisdictions appear to have in place at least some embryonic legislation enabling EVB measures. However, not all jurisdictions make full use of them. In about one-third of the surveyed jurisdictions, EVB measures are well known and regularly used, while the remainder of the surveyed jurisdictions experience some type or degree of practical challenges despite having provisions available. In addition, jurisdictions use varied terminology to describe EVB measures and this lack of uniformity in terms may create misunderstandings among practitioners and pose challenges in international cooperation, potentially leading to rejections or delays in executing mutual legal assistance (MLA) requests.

Most surveyed jurisdictions do not collect data on the percentage of EVB confiscation orders that are made, compared to total confiscation orders, making it challenging to assess the extent to which EVB measures are used.

Challenges identified include a lack of familiarity with EVB measures, difficulties in calculating the benefits derived from an offense, lack of a comprehensive legal framework, and limitations in executing MLA requests (including those created due to the use of different terminologies to define EVB measures across different jurisdictions). Overall, challenges in EVB implementation likely affect asset recovery and hinder the timely sharing of information.

Primary or subsidiary tool

EVB measures can be employed either as subsidiary or primary tools in confiscating assets. Subsidiary use in this context means restraining or confiscating assets of equivalent value only when the proceeds of crime, that is, those that can be linked to crime, are unavailable. Primary use in this context means that EVB measures can be ordered regardless of whether proceeds of crime are available. When EVB is construed as a primary measure versus as a subsidiary tool, practitioners have greater latitude regarding which assets to seize. The choice of which assets to seize will depend on various factors, including asset manageability and the ease of seizure. Using EVB measures as primary tools can enhance efficiency in financial investigations by allowing law enforcement agencies to seize the relevant assets immediately, thereby avoiding spending valuable time and resources on investigating and establishing links between assets and offenses before being able to attach assets of equivalent value. Surveyed jurisdictions were almost equally split between the two approaches.

EVB provisional measures

A point of particular interest concerns the use of EVB provisional measures, which allow for freezing and seizure of assets before confiscation. They play a crucial role in preventing the dissipation of assets to enable future confiscation. Jurisdictions vary significantly in the degree to which EVB provisional measures are available and commonly applied. Some of them use EVB provisional measures frequently, while others lack the necessary legislation.

Benefit calculation

An EVB approach can only function if there are clear ways of establishing what exactly constitutes the benefit that a perpetrator has enjoyed. Generally, common law systems are more prescriptive in this area, offering specific guidance on how such benefit is to be arrived at during the confiscation stage. Some jurisdictions, especially those with civil law legal systems, provide significant discretion to courts in this respect. Overall, benefit calculations follow either a “net gain” or a “net gross” approach. Under the former, legitimate expenses or costs incurred in generating the criminal proceeds may be deducted from the total amount gained; under the latter, any expenditure made in connection with the offense is not subtracted from the overall gain. Challenges in benefit calculation include poor familiarity with assessment processes and limited accounting expertise, inconsistencies in case law, cost of specialized expertise, and difficulties in valuing assets in noncooperative jurisdictions.

Summary of Recommendations

It is critical to make relevant international treaties effective by ensuring the EVB provisions are fully reflected in domestic legal frameworks. Jurisdictions need to establish or strengthen enabling legislation and practice as follows:

- 1. Domestic international treaty provisions dealing with EVB measures.** Even for jurisdictions that view international treaties as being automatically incorporated in their legal framework following ratification, provisions dealing with EVB measures are not self-executing.
- 2. Adopt EVB measures as a primary measure.** Jurisdictions should consider adopting legislation to enable EVB measures as primary rather than subsidiary tools. When financial investigators can rely on EVB provisional measures (freezing or seizure) as a primary tool, they can broadly assess all assets held by the defendant and are free to focus their efforts on identifying which assets are the most appropriate to freeze or seize, particularly from a long-term management perspective.
- 3. Ensure provisional measures can also be taken on assets of equivalent value.** The dearth of legislation regarding EVB provisional (freezing or seizure) measures is a significant gap because it directly hampers the efficacy of the EVB tool as a whole and critically affects jurisdictions’ ability to provide and request international cooperation.
- 4. Employ EVB measures routinely as a tool for asset recovery purposes.** This guide shows that practitioners from several surveyed jurisdictions are insufficiently knowledgeable on the degree to which they can employ EVB measures, which can be improved by the following:
 - a. Raise practitioners’ awareness of EVB measures* as a prerequisite for their effective use (for example, through the organization of training seminars). For jurisdictions that lack adequate legislation on EVB measures, seminars should offer technical guidance on drafting/improving relevant legal provisions.
 - b. Develop an understanding of EVB terminologies used in foreign jurisdictions.* The domestic terminology associated with EVB measures varies significantly. Poor knowledge regarding foreign terms related to EVB measures and their correct interpretation can present a significant obstacle to international cooperation, especially in the context of MLA exchanges, impeding the timely sharing of information and the overall effectiveness of international efforts to combat cross-border crime.

1 Introduction

1.1 Current gaps in asset recovery efforts

Figures released in 2023 by the United Nations (UN) put the volume of financial resources lost to corruption at 5 percent of the global gross domestic product (GDP).¹ And yet, only a small fraction of the vast amount of assets resulting from corrupt practices are effectively confiscated. Global recovery efforts continue to encounter significant institutional, legal, and practical obstacles, which also stand in the way of achieving the Sustainable Development Goals by 2030. As such, the proportion of procedures leading to the successful confiscation and ultimate return of these illicit assets remains acutely insufficient in comparison to the total proceeds of corruption and other financial crimes circulating worldwide.

This gap emphasizes the pressing need to step up efforts to recover stolen property using all available legal tools. In recent years, much of the discussion in international fora has focused on how to increase the effectiveness of criminal confiscation by using legal enhancements such as non-conviction-based mechanisms, unexplained wealth orders, and civil measures. However, comparatively less attention has been placed on the potential for using equivalent value-based (EVB) measures. These measures enable authorities to freeze/seize and eventually confiscate property that is of an equal value to the proceeds of criminal activity and, consequently, these measures significantly expand the scope of assets realizable for recovery.

1.2 The case for EVB measures

Most multilateral and regional treaties in criminal matters unequivocally require that States parties be in a position to order EVB measures. Article 31 of the UN Convention against Corruption (UNCAC) notably requires that “each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of: (a) Proceeds of crime derived from offences established in accordance with this Convention or *property the value of which corresponds to that of such proceeds*.”² The UNCAC sets out the same requirement for provisional (freezing/seizure) orders.

In practical terms, there are two overarching reasons for employing EVB measures (figure 1.1): the first lies in the often insurmountable obstacle in connecting certain property to a specific criminal offense, a frequent challenge in the context of complex financial crime and in undocumented transactions or cash-intensive economies. This was highlighted by a 2022 Stolen Asset Recovery (StAR) Initiative survey aimed at assessing the potential barriers to asset recovery. This survey found that one of the five main barriers mentioned by more than 80 countries was the difficulty in proving the link between the asset and the criminal offense.³ The complexities associated with complying with the evidentiary requirements linking proceeds to a certain offense thus make EVB measures an attractive option to uphold the principle that “crime should not pay.”⁴

A second advantage of a more systematic use of EVB measures is that the inherently lengthy nature of financial investigations and trials, tainted property has often dissipated by the time the defendant has been brought to justice. As such, authorities should be in a position to attach—notably via EVB provisional orders—any other assets held by the offender, whether these assets have a legal or illegal origin.

Figure 1.1. Benefits of EVB versus Non-EVB Systems: A Brief Comparative Analysis

Background

Mr. X is suspected of a bribery offense and is believed to have profited to the tune of US\$10 million. He owns/effectively controls the following assets (equivalent to US\$10 million): a large house, bank accounts.

Scenario 1

All the assets *cannot* be linked to the bribery offense

Country A has a full EVB system

All the assets can be restrained and confiscated

Country B has a non-EVB system

No assets realizable for restraint or confiscation

Scenario 2

Bank accounts are not linked; house can be linked because it was purchased with proceeds of bribery offense. House is registered to Mr. X and siblings; and family resides in the house.

Country A has a full EVB system

Liquid assets are prioritized and seized and ultimately confiscated at trial's conclusion.

Country B has a non-EVB system

House is restrained, however seizure is litigated for years against third-party claims, and only small portion of house is potentially confiscated. Liquid assets are not confiscated.

Scenario 3

Same as scenario 1, all the assets cannot be linked to the bribery offense. However, country B implements only partially the EVB system (only EVB confiscation).

Country A has a full EVB system (seizure and confiscation)

All the assets are seized and confiscated

Country B only has EVB confiscation

By the time the trial concludes, at the confiscation stage, all liquid assets have dissipated and the house remains (see scenario 2).

Source: Original figure for this report.

1.3 Rationale for this guide

Although EVB confiscation is generally part of practitioners' toolkits through international treaties and national legislative frameworks, this mechanism is either poorly implemented or employed with an unclear success rate. According to the 2017 report *State of Implementation of the United Nations Convention against Corruption* by the United Nations Office on Drugs and Crime (UNODC), "in a considerable number of countries, the confiscation of property corresponding to the value of the proceeds of corruption-related crime does not appear to be covered or is covered only in relation to particular offenses (especially money-laundering). In some of those cases, the national laws are based on the principle of proceeds-based confiscation and do not recognize value-based confiscation. Therefore, if the exact property in question has been spent or cannot be traced, there is no immediate redress available."⁵

Against this backdrop, this guide seeks to fill the existing knowledge gap by

- Explaining in detail the requirements for EVB measures as laid down in the UNCAC and other relevant international treaties;
- Examining how EVB measures are translated into domestic legislation by a sample of 22 selected jurisdictions;
- Exploring in what circumstances and to what extent EBV measures are used in criminal proceedings, both in terms of provisional measures and at the final confiscation stage; and
- Delivering a set of recommendations as a blueprint for strengthening EVB-related legislation, in particular EVB provisional measures, and ensuring practitioners leverage the potential of this powerful tool both in domestic and mutual legal assistance (MLA) proceedings, at the request of overseas partners seeking assets held outside their own jurisdictions.

“Although EVB confiscation is generally part of practitioners' toolkits through international treaties and national legislative frameworks, this mechanism is either poorly implemented or employed with an unclear success rate.”

1.4 Methodology

The surveyed jurisdictions were selected based on several criteria, including whether they are home to major financial centers and their current levels of engagement in international asset recovery efforts. To ensure a diverse and comprehensive analysis, care was taken to include jurisdictions that were representative of different legal systems and geographic regions.⁶

The team employed a hybrid approach, combining a desk review of domestic legislation with the collection and analysis of relevant information via an expert group meeting (EGM) and subsequent targeted interviews. The desk reviews focused on

the collection and analysis of legislation, case law, legal commentaries, and scholarly articles pertaining to equivalent value-based confiscation in selected jurisdictions. The EGM, held in Washington, DC, February 13–14, 2023, provided the impetus and guiding framework for the development of a questionnaire, which was sent to key asset recovery experts in selected jurisdictions. The questionnaire aimed to gain further insights into domestic experiences in applying EVB measures, including case studies, good practices, and information about implementation challenges. Experts in the jurisdictions that accepted to be surveyed were asked to either respond to the questionnaire in writing or engage in in-person interviews. In some cases, initial answers provided via questionnaire were supplemented by phone or video conference conversations.

1.5 The guide's audience and its uses

It is expected that this guide will

- Raise awareness of and focus policy makers' attention on EVB measures as a key mechanism within domestic asset recovery policies and strategies;
- Facilitate the initiation of legislative reviews aimed at introducing EVB measures into domestic legal frameworks or strengthening existing regimes; and
- Enhance practitioners' familiarity with EVB measures and their ability to use them as part of their set of tools in asset recovery efforts, including in executing foreign requests.

Anticipated benefits from this guide extend to a wide range of stakeholders actively involved in asset recovery efforts from both a policy-making and operational perspective, including government officials in charge of legislative drafting, academics involved in researching asset recovery theory and policy, financial investigators, prosecutorial agencies, judicial authorities, specialized asset recovery units, attorney general's offices and departments within ministries of justice in charge of mutual legal assistance in criminal matters, and financial intelligence units.

Notes

- 1 UN Economic and Social Council, "Special Meeting on Unleashing the Transformative Power of SDG16: Improving Governance and Reducing Corruption," May 2, 2023, <https://webtv.un.org/en/asset/k1p/k1p0dvsg5j>.
- 2 Italics added.
- 3 World Bank and UNODC (United Nations Office on Drugs and Crime), "Mapping International Recoveries and Returns of Stolen Assets under UNCAC," International Expert Meeting on Asset Return, Nairobi, November 28–29, 2022, https://www.unodc.org/documents/corruption/NairobiEGM2022/Session_I_-_StAR.pdf.
- 4 According to South Africa's Constitutional Court, "the mechanism of a civil judgment sounding in money may well have been selected by the legislature to avoid the difficulty of tracing particular assets which may have been the proceeds of crime and so to facilitate the recovery of the value of the proceeds." (*S v. Shaik and Others* [CCT 86/07] [2008] ZACC 7, Section 24.)
- 5 United Nations Office on Drugs and Crime (UNODC), *State of Implementation of the United Nations Convention against Corruption* (United Nations, 2017), https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf.
- 6 Surveyed jurisdictions are as follows: Bosnia and Herzegovina; Botswana; Brazil; France; Hong Kong SAR, China; India; Indonesia; Israel; Italy; Jersey; the Republic of Korea; Lebanon; Nigeria; Pakistan; Panama, Romania, Singapore; South Africa; Spain; Switzerland; the United Kingdom; and the United States.

2 EVB Measures and International Legal Frameworks

2.1 The UN Convention against Corruption (UNCAC)

2.1.1 UNCAC approach to EVB measures

The universal standard on anti-corruption is laid down in the UNCAC currently ratified by 190 states. The UNCAC defines corrupt acts and lays down what modalities of international cooperation its States parties are to extend to each other, and what measures to impose on those found guilty of corruption, including confiscation measures. Equivalent value-based (EVB) confiscation is a fundamental tool that UNCAC's States parties are required to have in place and use in combination with other key legal mechanisms with a view to making asset recovery actions more agile and efficient.

The UNCAC notably recognizes two broad approaches regarding freezing, seizure, and confiscation measures:

- **Proceeds-based measures.** This approach enables the confiscation of assets because they are linked to an offense as either instrumentalities¹ or proceeds. According to the UNCAC, "each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of . . . property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention."²

Proceeds-based confiscation regimes are predicated on the connection between the offense and certain assets, allowing for the taking of provisional measures or confiscation of "any property derived from or obtained, directly or indirectly, through the commission of an offence."³

- **EVB measures.** The alternative approach enables the freezing, seizure, and confiscation of property of equivalent value to that of criminal proceeds.⁴ The focus is on identifying the value that has been gained through the offense and attaching that value to any assets held by the offender (either owned or under their control). The assets potentially subject to confiscation do not have to originate from or be associated with the offense because they can be legitimately held (for example, through inheritance or previous property paid for by legitimate income).

“The UNCAC notably recognizes two broad approaches regarding freezing, seizure, and confiscation measures: Proceeds-based measures and EVB measures.”

Under article 31 of the UNCAC, the approaches described above both constitute measures that the States parties must have in their legislation and be in a position to execute. To comply with these requirements, it is necessary for the States parties to enact the appropriate domestic legislation. This applies not only to “dualist” jurisdictions, but also to “monist” ones.⁵ Although in monist jurisdictions the text of a ratified international treaty is considered an integral part of the domestic legal system, UNCAC provisions on EVB measures—and confiscation in general—still need the adoption of dedicated implementing legislation to ensure that they are applicable. . In other words, UNCAC provisions on confiscation do not appear to be self-executing and require domestic implementing legislation.⁶

2.1.2 UNCAC and EVB freezing/seizure orders

UNCAC requirements on EVB measures cover provisional orders. Under article 31(2), “each State Party shall take such measures as may be necessary to enable the identification, tracing, *freezing or seizure of any item referred to in paragraph 1 of this article* [proceeds, property of equivalent value to proceeds, and instrumentalities] for the purpose of eventual confiscation.”

2.1.3 UNCAC and EVB measures in international cooperation

UNCAC article 55(1)(2) demands that the parties, to the greatest extent possible within their domestic legal systems, be in a position to freeze, seize, or confiscate, at the request of other parties. In addition to proceeds of crime, this encompasses “property the value of which corresponds to that of such proceeds.”⁷

2.2 Other international standards

Provisions on EVB measures are well-rooted in the treaty frameworks adopted by several regional and subregional organizations. The most comprehensive and articulated legal regimes are found in the European space.

In recommending the adoption of provisional and confiscation measures over “property of corresponding value,” the Financial Action Task Force explicitly encourages the adoption of measures similar to those set forth in a number of UN treaties, including the UN Convention against Transnational Organized Crime (UNTOC).⁸

It is worth noting that although the different treaty frameworks mentioned in the following sections vary in the amount of detail with which they set out requirements for EVB measures, they do not appear to conflict with one another in this regard. As a result, in the implementation phase, States parties bound to two or more such legal frameworks can rely on homogeneous provisions.

2.2.1 Council of Europe

2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention)

Under the 2005 Warsaw Convention,⁹ “each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property.”¹⁰

Article 4 of the Warsaw Convention specifies that “property which is liable to confiscation” (including property of equivalent value) shall be the object of investigative and temporary measures, notably freezing and seizing.

On international cooperation, the Warsaw Convention requires that its States parties be in a position to comply with requests “(a) for confiscation of specific items of property representing proceeds or instrumentalities, as well as for confiscation of proceeds

consisting in a requirement to pay a sum of money corresponding to the value of proceeds; (b) for investigative assistance and provisional measures with a view to either form of confiscation referred to under a above.”¹¹

Although they employ different formulations, the Warsaw Convention and UNCAC lead to the same results in terms of requirements for adopting and using EVB measures.¹² The explanatory report to the Warsaw Convention explicitly recalls United Nations conventions when it clarifies that “the expression ‘property the value of which corresponds to such proceeds’ refers to the obligation to introduce measures which enable Parties to execute value confiscation orders by satisfying the claims on any property, including such property which is legally acquired. Value confiscation is, of course, still based on an assessment of the value of illegally acquired proceeds.”¹³

Where the Warsaw Convention goes beyond UNCAC is in its provision whereby “if the confiscation consists in the requirement to pay a sum of money, the competent authority of the requested Party shall convert the amount thereof into the currency of that Party at the rate of exchange ruling at the time when the decision to enforce the confiscation is taken.”¹⁴ Although this provision is only applicable between States parties to the Warsaw Convention, it can nevertheless offer interpretative support in the context of article 55 of the UNCAC (international cooperation for purposes of confiscation), which is silent on this point.

2.2.2 European Union (EU)

2014 Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime (2014 Directive)

The 2014 Directive¹⁵ requires that “member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds.”¹⁶ Article 7 of the 2014 Directive sets down that assets of equivalent value shall also be subject to freezing measures, including “urgent action to be taken when necessary in order to preserve property.”¹⁷

The main element of differentiation between the UNCAC and the 2014 Directive is that the latter extends the scope of EVB measures to property the value of which corresponds to instrumentalities. EU member states shall, thus, be in a position to confiscate assets equivalent to instrumentalities, which neither the UNCAC nor the Warsaw Convention mention. The preambular part to the 2014 Directive also mentions “proportionality” as a criterion that the competent authorities may apply when deciding on the confiscation of assets equivalent to instrumentalities. Also, in the preambular part to the 2014 Directive, as an additional criterion, “Member States may also take into account whether and to what extent the convicted person is responsible for making the confiscation of the instrumentalities impossible.”

2018 Regulation on the Mutual Recognition of Freezing Orders and Confiscation Orders (2018 Regulation)

The 2018 Regulation¹⁸ complements the 2014 Directive, which focuses on the establishment of domestic powers for freezing and confiscation, by applying the principle of mutual recognition to freezing and confiscation decisions among EU member states. This principle is explicitly extended to requests targeting assets whose value is equivalent to that of proceeds and instrumentalities.¹⁹

2024 EU Directive on Asset Recovery and Confiscation

In 2024, the EU adopted a new normative instrument²⁰ replacing the 2014 Directive. Under the new text member states are required to enable the confiscation of both proceeds and instrumentalities and property of equivalent value when criminal proceedings have been instituted but could not continue on one of the grounds listed in article

15(1).²¹ This provision will effectively make it compulsory to introduce EVB measures in the context of domestic non-conviction-based (NCB) statutes.

2.2.3 Organisation for Economic Co-operation and Development (OECD)

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Foreign Bribery Convention)

The 1997 OECD Foreign Bribery Convention²² establishes an obligation of seizure, confiscation, or “monetary sanctions of comparable effect” for the bribe, its proceeds, or “property the value of which corresponds to that of such proceeds.”²³

2.2.3 African Union

2003 Convention on Preventing and Combating Corruption

The need for enabling legislation for provisional and confiscation measures is set out in article 16(1)(a)(b) of the Convention on Preventing and Combating Corruption,²⁴ according to which: “Each State shall adopt such legislative measures as may be necessary to enable:

- (a) its competent authority to search, identify, trace, administer and freeze or seize the instrumentalities and proceeds of corruption pending a final judgement;
- (b) confiscation of proceeds or property, the value of which corresponds to that of such proceeds, derived from offenses established in accordance with this convention.”

A literal reading of the provision suggests that EVB-based confiscation is provided for, but EVB-based temporary measures are not. At the same time, it could be argued that a requirement to adopt EVB temporary measures stems from the notion that freezing/seizing action is what practically enables confiscation to occur in most cases.

2.2.4 Economic and Monetary Community of Central Africa (CEMAC)

2016 Regulation on the Prevention and Suppression of Money Laundering and the Financing of Terrorism and Proliferation in Central Africa (2016 Regulation)

The 2016 Regulation²⁵ defines confiscation as the “permanent deprivation of a person’s assets related to one of the offenses provided for by these regulations or a national law, or assets of equivalent value.”²⁶

The adoption of EVB measures is also specifically mentioned in article 151, which deals with mutual legal assistance. The same article recognizes that foreign confiscation orders may target “an asset that constitutes the proceeds or instrument of one of the offenses covered by these regulations and is located within the territories of the requested state or involve the obligation to pay a corresponding sum of money equal to the value of that asset.”

2.3 EVB measures in the context of other asset recovery legal tools

EVB measures intersect with other legal mechanisms that are also instrumental in achieving asset recovery objectives. Because EVB measures present several similarities with those mechanisms and are sometimes erroneously mixed up with them,

it is important to appreciate differences and commonalities. Doing so ensures that practitioners can maximize their chances of building successful cases by leveraging all available tools to their full potential.

In addition, as the same defendants may be ordered to pay sums of money based on multiple rationales (EVB confiscation, monetary penalties, damage compensation), many jurisdictions have established rules to avoid unfair duplication by considering the specific facts and circumstances of the case.²⁷

2.3.1 Unexplained wealth orders

While domestic approaches vary, unexplained wealth orders (UWOs) identify a type of legal mechanism used to target and investigate individuals whose wealth and assets appear to be disproportionate to their known income. Typically, once the prosecutor has shown the existence of a discrepancy between a person's assets and their declared revenue, the burden of proof shifts to the person to provide a legitimate and reasonable explanation as to how they acquired those assets. Failure to do so may result in the assets being considered "recoverable property."

While UWOs are most often investigative measures that may enable subsequent confiscation action, EVB measures are intrinsically asset recovery tools. Similar to EVB measures, UWOs may lead to the confiscation of assets, irrespective of their origin. However, in the case of EVB measures, prosecutors need to calculate the benefit stemming from criminal behavior; whereas in the case of UWOs, failure to justify the legitimate provenance of assets may suffice for confiscation.

The conceptual differences between these tools, however, does not mean that one excludes the other. In fact, they can be employed in a complementary manner.

As highlighted in a recent StAR study, "in terms of modalities, the UWO is most often value based. . . . Thus, the UWO may be enforced against property that has been restrained or potentially against other property using civil debt recovery powers (similar to other types of value-based confiscation orders)."²⁸ Moreover, when UWO systems allow for EVB measures, they may replace the need to resort to MLA when the assets are located abroad and instead enable the attachment of substitute assets present in the enforcing jurisdiction. The design of the UWO system can potentially mitigate this challenge if there is value-based confiscation.²⁹

2.3.2 Illicit enrichment

The UNCAC defines illicit enrichment as "a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."³⁰

While UWOs are typically construed as investigative and/or confiscation measures, illicit enrichment normally identifies a type of criminal offense. This is the case for the UNCAC, which frames illicit enrichment as a conduct that States parties consider criminalizing. Moreover, "another difference is that illicit enrichment offenses often concentrate on public officials, whereas UWOs may cover any person with unexplained wealth."³¹

However, both legal mechanisms deal with wealth increases and can result in the adoption of confiscation measures, including over assets the value of which corresponds to that of the proceeds of the crime.

2.3.3 Extended confiscation

In criminal proceedings, extended confiscation permits authorities to recover proceeds or benefits that derive from criminal conduct that is not part of the crime for which the defendant was convicted. While domestic legal statutes vary in language and requirements, the recovery is always based on some evidence or information that criminal conduct occurred but was not established to the same degree of specificity or standard required for criminal conviction.

Although there is no specific legal basis for extended confiscation in the UNCAC, the concept is envisaged in the 2014 EU Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime.³²

In some jurisdictions, both EVB measures and extended confiscation are ordered on assets belonging to a person following their conviction for a criminal offense. The main point of difference between the two is that extended confiscation targets assets that have been deemed, including through the use of presumptions, to be connected to the defendant's criminal conduct. By contrast, EVB measures may be ordered regardless of any established or presumed connection between the property in question and the crime for which the person was convicted or other criminal conduct.

2.3.4 Monetary sanctions

As illustrated in section 3.6, to enforce EVB confiscation measures, several jurisdictions use the same procedures applicable for the enforcement of monetary sanctions, that is, those envisaged for the recovery of civil debts owed to the state.

The similarities between EVB orders and monetary sanctions are even more pronounced when the former are construed as penalties themselves (such as in France, Italy, Pakistan), which notably constrains courts' ability to apply them retroactively. For example, in Italy, both the Constitutional Court and the Court of Cassation have reiterated that the punitive nature of EVB confiscation implies its inapplicability to acts committed before the entry into force of the legislative provisions that establish it (that is, principle of non-retroactivity).³³ Moreover, certain jurisdictions, such as the Republic of Korea,³⁴ calculate fines against individuals or corporations on the basis of the value of the advantage gained or intended to be gained. Therefore, these jurisdictions also must identify and quantify the proceeds stemming from the underlying offenses.³⁵

However, despite these common aspects and the fact that monetary sanctions and EVB confiscation often achieve the same practical effects, the two mechanisms are structurally different from one another. Crucially, while the amount to be paid based on an EVB confiscation order strictly reflects the assessed benefit deriving from an offense (see section 3.5 on benefit calculation), the amount of a monetary sanction is typically determined by courts on the basis of the nature and severity of the offense within the minimum and maximum amounts set forth in legislation.³⁶

2.3.5 Damage compensation

Defendants may be ordered to pay a sum as compensation for damage caused by the offense being adjudicated. The key difference with a payment order as an EVB measure is that, in the former case, the amount is calculated based on the assessed damage suffered by the victim and not the extent of the benefit generated by the underlying offense.³⁷ Compensation also may be awarded when the offense has not generated any benefit. In certain cases, the profit may be greater than the damage suffered.

Notes

- 1 The UNCAC mentions, in particular, "property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention." UNCAC, Article 31(1)(b), accessed 2024, <https://www.unodc.org/corruption/en/uncac/learn-about-uncac.html>.
- 2 UNCAC, Article 31(1)(b), accessed 2024, <https://www.unodc.org/corruption/en/uncac/learn-about-uncac.html>.
- 3 UNCAC, Article 2(e), accessed 2024, <https://www.unodc.org/corruption/en/uncac/learn-about-uncac.html>. For the sake of brevity, we note that a proceeds-based system may also include, when appropriate, instrumentalities of the offense.
- 4 UNCAC, Article 31(1)(a), accessed 2024, <https://www.unodc.org/corruption/en/uncac/learn-about-uncac.html>.

- 5 Under dualist legal systems, the validity of international law is determined by a rule of domestic law authorizing the application of that international norm. By contrast, in monist jurisdictions, the text of duly ratified international treaties is directly applicable as an integral part of their domestic legal systems.
- 6 It should be noted that the UNCAC does not set any obligation to either freeze, seize, or confiscate assets of equivalent value to the *instrumentalities* used or destined to be used for the commission of an offense (however, as set out in section 2.2.2 of this guide, such an obligation does exist in the 2014 EU Directive).
- 7 UNCAC, Article 31(1)(a).
- 8 Recommendation 4 of the Financial Action Task Force, <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html>.
- 9 Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CETS 198, 16.V.2005, <https://rm.coe.int/168008371f>.
- 10 Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Article 3(1) [hereinafter Warsaw Convention]. Under article 1(a) of the convention, "proceeds" are defined as "any economic advantage, derived from or obtained, directly or indirectly, from criminal offences."
- 11 Warsaw Convention, Article 15. The explanatory report to the Warsaw Convention clarifies that "Parties must, for purposes of international co-operation for the confiscation of proceeds, be able to apply both the system of property confiscation and the system of value confiscation. . . . It may imply that Parties which have only a system of property confiscation in domestic cases have to introduce legislation providing for a system of value confiscation of proceeds, including the taking of provisional measures on any realisable property, in order to be able to comply with requests to that effect from value confiscation countries. On the other hand, Parties which have only a system of value confiscation of proceeds in domestic cases must introduce legislation providing for a system of property confiscation of proceeds in order to be able to comply with requests to that effect from property confiscation countries." (Council of Europe, "Explanatory Report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism," 16.V.2005, para. 174 [hereinafter Explanatory Report to the Warsaw Convention]).
- 12 With regard to EVB measures, the Warsaw Convention reproduces almost verbatim those provided for in the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention).
- 13 See the Explanatory Report to the Warsaw Convention, para. 63, <https://rm.coe.int/16800d3813>.
- 14 Warsaw Convention, Article 14(4).
- 15 European Parliament and Council of the European Union, Directive 2014/42/EU on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime, 2014, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0042>.
- 16 European Parliament and Council of the European Union, Directive 2014/42/EU, Article 4(1). Under article 2 of the Directive, "proceeds" are defined 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."
- 17 European Parliament and Council of the European Union, Directive 2014/42/EU, Article 7(1), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042>.
- 18 European Parliament and Council of the European Union, Regulation (EU) 2018/1805, 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1805>.
- 19 European Parliament and Council of the European Union, Regulation (EU) 2018/1805, Articles 2, 7, and 18.
- 20 European Parliament and Council of the European Union, Directive 2024/1260/EU on Asset Recovery and Confiscation, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401260.
- 21 These grounds include, among others, illness, absconding, and death of the suspected or accused person.
- 22 OECD (Organisation for Economic Co-operation and Development), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD/LEGAL/0293, accessed 2024, <https://legalinstruments.oecd.org/public/doc/205/205.en.pdf>.
- 23 OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 3, Sanctions.
- 24 African Union, Convention on Preventing and Combating Corruption, 2003, <https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>.
- 25 Economic and Monetary Community of Central Africa, Regulation No. 01/CEMAC/UMAC/CM, Prevention and Suppression of Money Laundering and the Financing of Terrorism and Proliferation in Central Africa, 2016, https://gabac.org/wp-content/uploads/2022/03/14-reglement_anglais.pdf.

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- 26 Economic and Monetary Community of Central Africa, Regulation No. 01/CEMAC/UMAC/CM, Article 1.
- 27 Notably, "some courts or competent authorities will take into account the earliest imposed remedies and exercise discretion in imposing later ones where the remedies are similar in nature. In some jurisdictions, the principle will be first to award compensation to the victims, either directly or through a confiscation order upon conviction, then to consider other remedies." See OECD (Organisation for Economic Co-operation and Development) and World Bank, *Identification and Quantification of the Proceeds of Bribery* (OECD, 2012), 24, <https://star.worldbank.org/sites/star/files/Quantification.pdf> [hereinafter, *StAR Identification and Quantification of the Proceeds of Bribery* 2012].
- 28 Jean-Pierre Brun et al., *Unexplained Wealth Orders* (World Bank, 2023), 17 and 75, <https://star.worldbank.org/sites/default/files/2023-06/StAR-wealth-report-08.pdf> [hereinafter, *StAR Unexplained Wealth Orders* 2023].
- 29 *StAR Unexplained Wealth Orders* 2023 at 77.
- 30 UNCAC, Article 20.
- 31 *StAR Unexplained Wealth Orders* 2023 at 24.
- 32 Under article 5(1) of the Directive, "Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct." European Parliament and Council of the European Union, Directive 2014/42/EU.
- 33 See, for example, "Cassazione penale, sez.III, 08/09/2021, n.39350."
- 34 Information obtained via expert survey.
- 35 *StAR Identification and Quantification of the Proceeds of Bribery* 2012.
- 36 In some cases, fines are calculated on the basis of benefit.
- 37 For additional information regarding reparation of damages to victims of corruption, see Felipe Freitas Falconi et al., *Victims of Corruption: Back for Payback* (World Bank, 2023), <https://star.worldbank.org/publications/victims-corruption-back-payback>.

3 Features of EVB Measures in National Experiences and Related Challenges

3.1 General considerations

3.1.1 Main domestic approaches to EVB measures

All surveyed jurisdictions are technically able to employ some type of equivalent value-based (EVB) measures to confiscate assets following a criminal conviction for at least some offenses. This finding is in line with the Financial Action Task Force's (FATF's) overview of mutual evaluation reports (MERs) from 2022, according to which 93 percent of surveyed countries have measures for EVB confiscation within their domestic legal frameworks.¹ However, as illustrated in section 3.1.4, a number of jurisdictions examined for this guide do not appear to make full use of EVB measures in practice, despite having the enabling legislation in place.

Depending on the legislation, EVB confiscation orders may be satisfied through the payment of a sum of money and/or the national authorities taking ownership of specific assets for a value that corresponds to that of the proceeds of crimes or instrumentalities.

Confiscation as an EVB and proceeds-based measure

In several jurisdictions under review, confiscation measures can be taken on both proceeds of criminal offenses and assets of equivalent value. Which path is followed depends on the domestic legislation of each jurisdiction, the chosen prosecutorial strategies, and the particulars of each situation. As discussed in section 3.2, domestic legislation may assign EVB confiscation measures either a subsidiary or primary role depending on whether equivalent value assets can be attached on an equal footing as proceeds or only as a "second choice" when proceeds are unavailable.

These jurisdictions belong, for the most part, to the "civil law" tradition and include

“Misunderstandings in international cooperation arising from the use of different terminologies can lead to delays or rejections in the execution of MLA requests.”

Brazil, Bosnia and Herzegovina, France, Italy, Romania, and Spain, though some “common law” jurisdictions also allow for such an approach.

- In **France**, the criminal code envisages various hypotheses of proceeds-based confiscation—over instrumentalities, object, and direct and indirect proceeds—while at the same time enabling the competent courts to order EVB confiscation “on any asset, whatever its nature, that belongs to the defendant.”²
- In **Bosnia and Herzegovina**, “all the money, valuable objects and every other material gain acquired by the perpetration of a criminal offence shall be confiscated from the perpetrator, and in case the confiscation is not feasible—the perpetrator shall be obliged to pay an amount of money which corresponds to the acquired material gain.”³
- In the **United States**, the forfeiture of substitute assets is mandatory when the government cannot be executed against the original property subject to forfeiture as a result of any act or omission of the defendant.⁴

Confiscation as inherently EVB

By contrast, in other surveyed jurisdictions, confiscation is inherently value-based because, by definition, confiscation orders consist of an obligation to pay a sum of money corresponding to the estimated value of the proceeds. Thus, the convicted person is required to extinguish their civil debt toward the state by paying the set amount, which can be done through the sale of any of the assets they hold. The state may, nevertheless, seize any of those assets to guarantee the payment.⁵ This approach is followed by jurisdictions such as Botswana; Hong Kong SAR, China; Jersey; Nigeria; South Africa; and the United Kingdom.

- In **South Africa**, confiscation orders are construed as civil judgments on the basis of the assessed benefit the defendant has obtained from criminal activities, and any realizable property of the defendant (including legitimately obtained and untainted property) may be realized to satisfy the order.⁶
- In **Jersey**, after the competent court has determined that the defendant has benefited from any relevant criminal conduct and the amount to be recovered, it “makes a confiscation order to the effect that the defendant pay that amount.” Seized items may then be realized against the confiscation order.⁷

3.1.2 Use of different terminology to describe domestic EVB measures

The jurisdictions surveyed for this guide feature considerable variations in the terminology employed to identify the EVB measures available under domestic legislation. The lack of uniformity is also noticeable in jurisdictions that broadly belong to the same legal system (civil law or common law).

- The term “forfeiture” is illustrative of the widely different concepts and measures associated with this notion. In **Jersey, Nigeria, and the United Kingdom**, the term is employed in the context of non-conviction-based (NCB) *in rem* proceedings and does not envisage the possibility of attaching equivalent value assets. By contrast, in the **United States**, “substitute property” may be attached as part of criminal forfeiture proceedings.⁸ Similar to Nigeria and the United Kingdom, in **Botswana**, “forfeiture orders” cannot be made for assets of equivalent value. However, they presuppose a criminal conviction.
- In **Switzerland and Indonesia**, the expression employed to refer to EVB measures is “compensatory claim” and “compensation,” respectively. In both cases, the terminology is potentially misleading because practitioners in foreign jurisdictions might be misled into believing that it refers to victims’ compensation measures.

Table 3.1. EVB-Specific Terminology in Domestic Legislation

Bosnia and Herzegovina	EVB confiscation possible under the heading “Ways of confiscating material gain” (Criminal Code)
Botswana	“Pecuniary penalty order” (upon criminal conviction) and “civil pecuniary order” (non-conviction based) The term “forfeiture” is reserved for post-conviction court orders on proceeds or instrumentalities (Proceeds and Instruments of Crime Act).
Brazil	EVB confiscation possible under the heading “Effects of conviction” (Criminal Code)
France	EVB confiscation possible under the heading “Content and modalities of application of certain penalties” (Criminal Code)
Hong Kong SAR, China	“Confiscation orders” (requirement to pay a sum of money) (Organised and Serious Crimes Ordinance)
India	EVB confiscation possible under the heading “Final confiscation” (Prevention of Money Laundering Act) The definition of “proceeds of crime” encompasses equivalent value property, which may be subject to both provisional measures and confiscation.
Indonesia	“Payment of compensation” (Law on the Eradication of Corruption)
Israel	EVB confiscation possible under the Penal Law (“bribery offenses”) as well as the Prohibition on Money Laundering Law
Italy	EVB confiscation possible under the heading “Confiscation” (Criminal Code)
Jersey	“Confiscation orders” (requirement to pay a sum of money) “Instrumentalities forfeiture orders” encompass orders to pay an amount of money equivalent to the value of property used or intended to be used in the offense (Proceeds of Crime Law).
Republic of Korea	EVB confiscation possible under the heading “Collection of equivalent value” (Proceeds of Crime Act)
Lebanon	EVB confiscation possible under the heading “Accessory and complementary penalties” (Criminal Code)
Nigeria	“Confiscation orders” (requirement to pay a sum of money) The term “forfeiture” is used in non-conviction-based proceedings (Proceeds of Crime Act).
Pakistan	EVB confiscation possible under the heading “Punishment for money laundering” (Anti-Money Laundering Act)
Panama	EVB measures are not envisaged except for a limited hypothesis of embezzlement of public funds (Law 67/2008).

Romania	EVB confiscation possible under the heading “Special confiscation” (Criminal Code)
Singapore	“Confiscation orders for benefits derived from criminal conduct” and “Substitute property confiscation order” (Corruption, Drug Trafficking and Other Serious Crimes [Confiscation of Benefits] Act 1992)
South Africa	“Confiscation orders” (requirement to pay a sum of money) The term “forfeiture” is used for civil recovery/non-conviction-based proceedings (Prevention of Organized Crime Act).
Spain	EVB confiscation possible under the heading “Accessory consequences” (Criminal Code)
Switzerland	“Compensatory claim” (Criminal Code) The term “forfeiture” is used for the confiscation of proceeds of crime.
United Kingdom	“Confiscation orders” (requirement to pay a sum of money) The term “forfeiture” is used in the context of <i>in rem</i> /NCB proceedings.
United States	“Money judgments” [a sum that the defendant is ordered to pay representing the proceeds of the defendant’s crime(s)] and “substitute assets” (when the government cannot reach tainted property initially subject to forfeiture, US law requires a court to substitute assets for the unavailable tainted property) (21 U.S.C. § 853)

Source: Original table for this publication.

Note: EVB = equivalent value based; NCB = non-conviction based.

- Unlike other surveyed jurisdictions, India includes EVB properties in its definition of “proceeds of crime” under the Prevention of Money Laundering Act.

The main challenges related to the use of different terminologies in different jurisdictions are in international cooperation, where misunderstandings may lead to delays in the execution of MLA requests and to outright rejections.

Table 3.1 provides a snapshot of the main terms adopted by each of the surveyed jurisdictions in the EVB landscape.

3.1.3 Availability of EVB measures under specific statutes or for specific offenses

In some cases, EVB measures are available only under certain pieces of proceeds of crime legislation and not others, which restricts the applicability of EVB measures to a narrower list of offenses.

- In **Israel**, EVB measures are currently restricted to money laundering cases and other selected predicate offenses, including bribery.⁹

- The experience of **Italy** offers an example of EVB measures having been introduced in the domestic legal system incrementally over several years. Historically, EVB confiscation emerged in connection with the crime of usury and was subsequently extended to other offenses, becoming applicable to virtually any criminal conduct. Moreover, EVB confiscation is now applicable to any criminal offense, provided it has a “transnational” character (as defined under the UN Convention against Transnational Organized Crime [UNTOC]).¹⁰ In the Republic of **Korea**, a literal reading of the Proceeds of Crime Act suggests that instrumentalities cannot be the object of EVB measures. Under the Criminal Act, however, it does appear possible to confiscate assets the value of which corresponds to that of the instrumentalities. This difference of treatment may potentially influence prosecutors’ strategic choices as to the statute on which to base their confiscation requests.
- In **Panama**, EVB measures are only available within the limited scope of a non-criminal proceeding handled by an administrative tribunal (“Juridiccion de cuentas”) for embezzlement of public funds. At the same time, when EVB measures are only envisaged under domestic money laundering legislation, countries may find themselves unable to apply EVB measures to the full range of criminal conduct set forth in the UN Convention against Corruption (UNCAC) and other relevant treaty frameworks.

3.1.4 EVB measures in practice

Most surveyed jurisdictions do not collect data on the number of EVB confiscation orders taken as a percentage of the overall number of confiscation orders, making it difficult to obtain a precise idea of the extent to which EVB measures are used in practice. Research and interviews conducted for the preparation of this guide, however, reveal that many of the surveyed jurisdictions apply EVB measures routinely as an integral part of their asset recovery strategies, confirming the findings contained in evaluation reports produced in the context of relevant peer-review mechanisms (such as the UNCAC and FATF). Some national experts mentioned that the number of confiscation actions carried out in their jurisdictions over assets of equivalent value is significant and, in some cases, higher than the number of proceeds-based actions.

- Reportedly, the systematic use of EVB measures in **France** has been the result of an enabling legal framework as much as ongoing efforts to create a “culture of confiscation” among practitioners, sustained by adequate human and financial resources. According to interviewed experts, statistical data in France between 2017 and 2020 show that 46.7 percent of the seizures ordered at the request of the national financial prosecutor were executed on assets of equivalent value.
- Interviewed experts from **India**, the Republic of **Korea**, and **Spain** indicated that EVB measures are well-known and regularly applied by the competent domestic authorities.
- Jurisdictions where confiscation regimes are inherently value based and have been part of domestic law for several years, notably the **United Kingdom**, confirmed having a high level of familiarity with this type of measure.

A number of jurisdictions, however, do not appear to make full use of EVB measures despite having the enabling legislation in place. The reported reason for this underutilization is overwhelmingly associated with practitioners’ lack of familiarity with such measures and their underlying concept.

- In **Bosnia and Herzegovina**, the confiscation of property of corresponding value is expressly provided for under the multiple criminal codes in force in the country, but it is scarcely employed.¹¹ Interviewed experts noted that prosecutors refrain from requesting the confiscation of equivalent value assets because judicial authorities

may not be fully familiar with the concept and typically request evidence of a link between the offense and the property in question.¹² Nonetheless, the problem in Bosnia and Herzegovina may potentially be confined to lack of familiarity with EVB measures and not necessarily involve all asset recovery mechanisms. Interviewed experts mentioned, for example, that unlike EVB measures, extended confiscation is used frequently and with some degree of success, suggesting that increased training and awareness-raising focused on EVB measures may be beneficial.

- Although EVB confiscation is envisaged under **Brazil's** criminal code, the measure is not commonly used for criminal proceedings. By contrast, EVB confiscation appears to be used much more frequently under civil proceedings providing for the liability of legal persons for acts of corruption.
- Experts from **Lebanon** confirmed the findings contained in the Middle East and North Africa–FATF 2023 mutual evaluation report that “the Lebanese authorities have not confiscated properties of equivalent value for domestic or foreign crimes, whether through criminal or civil proceedings.”¹³ The current lack of practice in using EVB measures is attributed to the absence of a general policy for identifying, freezing, and confiscating proceeds on a regular basis.
- According to interviewed experts, in **Nigeria**, EVB measures have not been used yet and no relevant court case is known. Arguably, practitioners’ inexperience stems from the fact that new sophisticated provisions on EVB confiscation have only recently been introduced by the Proceeds of Crime Act 2022. Thus, specific knowledge and expertise in the application of the new statute have yet to be developed.
- The mutual evaluation report of **Pakistan** by the Asia/Pacific Group on Money Laundering (APG) found¹⁴ that “the confiscation of property of corresponding value, while available under the Anti Money Laundering Act and the National Accountability Ordinance, has not been used.”¹⁵

3.1.5 Summary of reported challenges in using EVB measures

Some jurisdictions under review mentioned challenges in confiscating both proceeds of crime and assets of equivalent value.

- In **Brazil**, a general obstacle is identified in investigators’ lack of practice in pursuing financial investigations separate from the investigation of the predicate offense.
- Practitioners from **Singapore** emphasized the significant costs incurred in investigating, identifying, and assessing the property or interest in property of defendants as well as sources of income. These assets and income streams tend to be concealed or layered because of the nature of the economic crimes concerned.

Other sets of challenges were specifically reported in the application of EVB measures, including the following:

- A dearth of case law providing guidance on the application of confiscation regimes. Even when EVB-enabling legislation has been applied in a few cases, there is not sufficient volume to generate a substantial body of court decisions. This is accompanied by a limited pool of expertise (Singapore).
- Instances in which defense lawyers attempt to stall proceedings on grounds that seized assets are not linked to the offense in question despite the fact that domestic legislation enables the taking of EVB measures. Although it appears that in most cases defendants fail to use this argument successfully, the fact that the nexus argument is still put forward routinely suggests that many countries’ EVB measures, while clearly part of domestic legislation, are not yet fully entrenched in legal discourse and

judicial practice (Indonesia and Hong Kong SAR, China).

- Lack of practitioners' expertise and familiarity with EVB measures, especially when sophisticated legal frameworks have only recently been introduced (Bosnia and Herzegovina, Nigeria).
- Defendants seeking to distance themselves from the assets by arguing that the identified assets liable for confiscation do not belong to them, or that they are not the beneficial owners (Hong Kong SAR, China).
- A perceived drawback of EVB systems is that defendants have the possibility to take a loan to pay the value of confiscation orders, while retaining possession of their assets (for example, a car or real estate property). The possibility for offenders to take loans and thereby retain their valuable assets can be perceived as circumventing the impact of confiscation or weakening its deterrent effect. (United Kingdom).

3.2 EVB measures as subsidiary or primary tools

3.2.1 Overview

EVB measures can be construed as either subsidiary or primary tools. They are “subsidiary” if the competent authorities can restrain or confiscate property of equivalent value only on condition that the proceeds of crime (or instrumentalities) are unavailable. This approach is predicated on the notion that the assets deriving, directly or indirectly, from the offense are “tainted” and, thus, where possible, need to be confiscated as a matter of priority.

By contrast, if EVB is a “primary” tool, the restraint or confiscation of assets of equivalent value is possible without any precondition, that is, the value approach may be used even if direct or indirect proceeds are readily available for confiscation. Using EVB measures as a primary tool has the advantage that law enforcement authorities may choose either to search for and seek restraint of tainted property or to direct efforts at a defendant's available assets, whether they are of illegal origin.

The surveyed jurisdictions appear to be almost equally split among those following a subsidiary approach and those that place proceeds and equivalent value assets on an equal footing.

3.2.2 EVB measures as a subsidiary tool

Among the jurisdictions that follow a subsidiary model, the principle is not applied uniformly across the board. Some laws are also more specific than others in outlining the criteria that must be fulfilled before resorting to EVB measures.

- **Bosnia and Herzegovina** enables EVB measures when the confiscation of proceeds is not “feasible.”¹⁶
- In **Brazil**, utilization of EVB as a subsidiary measure is explicitly allowed in its Criminal Code, when, among others, proceeds of a crime are not found or located abroad.¹⁷
- In the Republic of **Korea**, grounds for resorting to EVB confiscation include the “impossibility” to attach proceeds as well as situations where “it is deemed to be inappropriate to confiscate the property in light of the nature of such property, the conditions of its use, the existence of a right of any person other than the parties to the offense to such property, or other circumstances.”¹⁸
- **Lebanon's** legislation subordinates the order to pay a sum equivalent to proceeds or instrumentalities to the fact that the item subject to confiscation had not been seized and that the period granted to the convicted person to present such item has expired.¹⁹

Table 3.2. EVB Measures as Primary or Subsidiary Tools

Country	Primary Tool	Subsidiary Tool
Bosnia and Herzegovina	●	
Botswana		●
Brazil	●	
France		●
Hong Kong SAR, China		●
India ^a	●	●
Indonesia		●
Israel		●
Italy	●	
Jersey		●
Republic of Korea	●	
Lebanon	●	
Nigeria		●
Pakistan		●
Panama		●
Romania	●	
Singapore		●
South Africa		●
Spain	●	
Switzerland	●	
United Kingdom		●
United States ^b	●	●

Source: Original table for this publication.

a In India, even though there are internal guidelines to strive to identify direct proceeds of crime before going for value-based properties, there is no legal impediment to do so.

b In the United States, EVB measures can take the form of both “money judgments” (primary tool) and the forfeiture of substitute property (subsidiary tool).

- Under **Spain's** Criminal Code, confiscation can be ordered on assets of equivalent value if “for whatever circumstance confiscation . . . is not possible.”²⁰
- In **Switzerland**, the competent courts may uphold a claim for compensation in respect of a sum of equivalent value “if the assets subject to forfeiture are no longer.” The Swiss legal system, however, places a limitation on the applicability of EVB measures when “the claim is likely to be unrecoverable or if the claim would seriously hinder the rehabilitation of the person concerned.”²¹
- In the **United States**, when the government seeks the forfeiture of substitute property (that is, assets held by the defendant up to the value of proceeds), it has to prove that the proceeds (a) cannot be located on the exercise of due diligence; (b) have been transferred or sold to, or deposited with, a third party; (c) have been placed beyond the jurisdiction of the court; (d) have been substantially diminished in value; or (e) have been commingled with other property that cannot be divided without difficulty.²²

Where domestic legislation is vague, the task of determining when proceeds are deemed to be unavailable—thus, enabling the authorities to attach equivalent value assets—usually falls on the investigative and judicial authorities in charge of the case.

- In **Romania**, EVB confiscation depends on the condition that the proceeds of crime are not found.²³ The law, however, does not clarify whether this means that proceeds have been dissipated and/or cannot be traced. According to interviewed national experts, there must be proof that concrete steps were taken by the competent authorities, which failed to identify the proceeds. The attachment of equivalent value assets can be more or less challenging to justify depending on the dynamics of the investigation and whether financial investigations have been pursued.
- Some jurisdictions would consider that the fact that proceeds are located abroad would be a sufficient condition for the application of EVB measures, although this condition may not be spelled out in legislation.

In some jurisdictions, the requirement that proceeds must be deemed to be unavailable before resorting to EVB confiscation is interpreted flexibly.

- In **Italy**, EVB confiscation is technically a subsidiary tool²⁴ but in practice it is used almost interchangeably with proceeds-based confiscation whenever the proceeds cannot be easily identified or traced.
- Interviewed experts from **India** observed that, although internal guidelines from the Directorate of Enforcement stress that the investigators should strive to identify proceeds before invoking provisions allowing for the attachment of property of equivalent value, in practice they find it easier and more expedient to resort to EVB measures.

3.2.3 EVB measures as a primary tool

Several jurisdictions under review can take EVB measures regardless of whether proceeds are available.

Using EVB provisional measures as a primary tool can significantly enhance efficiency and reduce resource utilization in financial investigations. Implementing EVB as a primary measure allows law enforcement to avoid spending valuable time and resources on establishing links between assets and offenses. Instead, they can broadly evaluate all available assets and make determinations based on relevant and timely considerations. For instance, assets jointly owned by multiple third parties, private homes with family members residing in them, and luxury items (such as yachts and cars, which rapidly depreciate in value and require substantial upkeep) may be less ideal to seize. With all

assets accessible (as long as they are owned or effectively controlled by the suspect), law enforcement can prioritize identifying the most suitable assets for restraint, particularly from a long-term perspective.

Where confiscation consists, by definition, of a requirement to pay a sum of money—and, thus, convicted persons can satisfy their debt to the state by selling any asset(s) they hold—EVB measures are inherently a primary tool. This possibility is notably enshrined in the legal framework of jurisdictions such as Botswana, Jersey, Nigeria, and Singapore.

- Through successive reforms of its Criminal Code starting in 2007, **France** switched from a system in which EVB measures were a subsidiary tool to one in which they can be ordered as a primary measure. Interviewed experts reported that the reform has provided the competent authorities with a significant degree of flexibility because the authorities are no longer required to prove that proceeds of crime are unavailable to be able to attach assets of equivalent value.
- When the **United States** seeks a money judgment, it does not need to show that the requirements for forfeiting substitute assets have been fulfilled. Money judgments are ordered as a request to pay a sum of money (equivalent to proceeds) even if proceeds are available and forfeitable.
- Under **Pakistan's** Anti-Money Laundering Act, “whoever commits the offence of money laundering . . . shall also be liable to forfeiture of property involved in money laundering or property of corresponding value.”²⁵ A literal reading of the provision suggests that property linked to the offense and EVB confiscation are placed on an equal footing.

When EVB confiscation and proceeds-based confiscation are placed on an equal footing, the choice of which route to follow is based on various factors of a strategic and operational nature. The overarching consideration appears to be the ease with which equivalent value assets can be managed as opposed to proceeds. In practice, some of the surveyed countries have indicated that

- Whenever possible and when they are confronted with multiple options, cash (including bank accounts) is the preferred asset for seizure or confiscation actions.
- When the management of proceeds present technical challenges, both the asset(s) that constitute proceeds and property of equivalent value are attached to keep all options open and decide at a later stage.
- When proceeds are difficult to maintain or there is a risk of depreciation, defendants may be requested to place a deposit for an equivalent value.
- If the proceeds are located in a foreign jurisdiction and the concerned person holds “legal assets” of equivalent value at home, the latter are targeted as a matter of priority.

3.2.4 Assets of equivalent value offered as a replacement

In some jurisdictions, the defendant may be allowed to offer assets of equivalent value in lieu of those identified by the authorities for restraint or confiscation purposes.

- Experts from **Romania** mentioned the example of abuse of office cases, in which a company is investigated for having offered or paid a bribe. In that scenario, the investigative authorities would usually seize the company’s bank account, but they may accede to the company’s request to target alternative assets. This may be done for various reasons, such as allowing the company in question to continue carrying out its business activity and avoid prejudicing employees who might not have been involved in the underlying offense.

- In **Hong Kong SAR, China**, it was reported that defendants frequently offer cash (bank accounts) to avoid the restraint of real estate properties and that the authorities have a large degree of flexibility to accept this type of arrangement. By contrast, the authorities would be much less inclined to accept restraining a real estate property instead of a bank account because of the risks of depreciation of the real estate and the illiquid nature of the asset. It is not uncommon for defendants to sell the restrained real estate property to fulfill the confiscation order with the money obtained from the sale.
- **Pakistan's** National Accountability Ordinance (NAO) provides a modality for the accused to voluntarily come forward, before the authorization of the investigation, and return the “assets or gains acquired or made by him in the course, or as a consequence, of any offence” established under the NAO. If the offer is accepted, the country’s anti-corruption agency, the National Accountability Bureau (NAB), may discharge the accused from all his liability in respect of the matter.²⁶ According to interviewed experts, the above-mentioned mechanism allows the accused to offer assets of equivalent value in return.
- In **Singapore**, prosecutors would first seek to restrain assets to prevent dissipation. If the defendant offers alternative assets—of which the investigative authorities were not previously aware—in exchange for the release of certain restrained assets, this may be considered on a case-by-case basis.

Overall, in evaluating which assets to “accept” instead of the originally targeted assets, priority is given to those that are easiest to manage.

- Experts from **France** mentioned that sometimes it is the authorities themselves who propose a replacement, including when the management of the seized assets is deemed to be challenging.
- According to experts from the **United Kingdom**, an important criterion for “accepting” assets in replacement of others is whether the former would expose the government to a higher risk of litigation.

3.3 EVB provisional measures

3.3.1 Overview

The ability to take EVB provisional measures is often a critical precondition to enable subsequent confiscation because those involved in complex corruption, or other serious financial crime schemes, typically seek to rapidly dissipate their property. Considering the highly mobile nature of assets and the sophisticated laundering schemes, it is often difficult—if not impossible—to locate, in a short window of time, the exact proceeds or instrumentalities that are part of the offenses being investigated. To minimize the risk of asset dissipation during the investigation, preserving the availability of property through value-based provisional measures is paramount.

As opposed to EVB confiscation, a review of the surveyed jurisdictions provided a more varied picture regarding their capacity to implement EVB provisional measures. While some jurisdictions make frequent—and robust—use of EVB provisional measures, other jurisdictions clearly lack the necessary legislation to implement them. At the same time, not all jurisdictions that are equipped with EVB powers for provisional measures appear to apply them in practice as part of their investigative routine.

3.3.2 EVB provisional measures in domestic legislation and practice

Various jurisdictions enable EVB provisional measures as a prerequisite to order confiscation at a later stage (see box 3.1). Domestic legislation often does not specify that temporary measures may be ordered on all assets held by the defendant, including on property that is not linked to the offense in question. Arguably, however, this possibility is implicit in the fact that such measures are a necessary precondition to preserve assets that may be subject to later EVB confiscation.

- In **Spain**, “in order to ensure the effectiveness of the confiscation [which can be ordered on equivalent value assets], the assets, means, instruments, and profits may be seized or embargoed and placed in custody by the judicial authority from the proceedings’ early stages.”²⁷
- In **Switzerland**, “the investigating authority may seize assets of the person concerned with a view to the enforcement of an equivalent claim.”²⁸
- **Jersey** has a value-based confiscation regime and as such enables EVB provisional measures. Provisional measures, known as “Saisie Judiciaires” are available once a criminal investigation has been started, but only when there is reasonable cause to believe that the defendant has benefited from the criminal conduct; and there is reasonable cause to believe that the property was used in, or intended to be used in, the alleged criminal conduct or any criminal conduct that occurred in Jersey.²⁹

Box 3.1. Case Study 1: EVB Provisional Measures in Brazil: The Jonck Case

The appellant was charged with offenses related to selling illegally imported agrochemicals. He argued that the funds from his bank account that were subject to the restraint orders were from legitimate professional activity and hence should not be restrained. He added that the investigators had not concluded that he was involved in the criminal organization accused of the above-mentioned trafficking scheme.

The court did not accept his arguments that aimed to have the temporary measure lifted. The fact that the funds under restraint had a prima facie lawful origin was not considered an obstacle to the maintenance of the measure in question. The court cited article 91, paragraph II, sections 1 and 2, of Brazil’s Criminal Code, which envisages the confiscation of equivalent assets or values when the proceeds are not found or are located abroad. The Criminal Code further states that precautionary measures may encompass assets or values equivalent to those of the person under investigation or accused, for subsequent confiscation.

Source: Regional Federal Court of the 4th Region, Criminal Appeal No. 5003407-06.2022.4.04.7017/PR (communicated to the authors by the interviewed expert).

Among the jurisdictions that are able to provisionally attach property of equivalent value, some reported doing so routinely or at least being fully familiar with its practical application.

- According to interviewed experts from **India**, assets of equivalent value are easily and frequently the target of provisional measures because those assets are subsumed under the notion of “proceeds of crime” under section 5 of the Prevention of Money Laundering Act.
- In **Israel**, the majority of assets are frequently seized via EVB provisional measures through the Prohibition on Money Laundering Law (see box 3.2).³⁰ Data show that about 70 percent of properties subject to provisional measures are eventually subject to confiscation.³¹ One factor that arguably contributes toward this outcome lies in the conduct of early-stage financial investigations, which include a “financial mapping” of all assets held by the suspect that can be seized either as proceeds or equivalent value assets. This approach ensures that assets are realizable for future confiscation while minimizing the risk of third-party challenges.
- In **Italy**, the taking of EVB provisional measures is a common practice starting from the very beginning of the criminal proceeding. This is notably highlighted by the large amounts and variety of assets seized, both proceeds and equivalent value assets.³²

- In line with its confiscation regime, criminal restraint in the **United Kingdom** is inherently value-based. The country is active in restraining assets that may be subject to confiscation to preserve the property prior to a decision on confiscation. The Proceeds of Crime Act sets out broad provisional measures, which can be ordered at any time following commencement of a criminal investigation.³³
- In the Republic of **Korea**, courts rarely refuse applications for preservation orders and typically issue them for high-value proceeds or assets of equivalent value.³⁴
- Interviewed experts from **Singapore** noted that EVB provisional measures are common for cases involving large amounts of criminal benefits and for cases where high-value assets have been seized. Reportedly, this is the outcome of sustained efforts over the past 15 years to push law enforcement agencies to pursue criminal benefits over and beyond merely securing a criminal conviction.

Another group of surveyed jurisdictions comprise those that enable at least some form of EVB confiscation but feature no legislation for EVB provisional measures. Arguably, in some cases the absence of legal provisions enabling EVB provisional measures may reflect a more limited scope for EVB confiscation itself, leading to a situation whereby the introduction of EVB provisional measures was not deemed to be necessary.

- The legal frameworks of both **Lebanon** and **Bosnia and Herzegovina** do not envisage the possibility to apply provisional measures on assets of equivalent value.
- In **Panama**, while limited scope for EVB confiscation is available in relation to the mismanagement of public funds under Law 67/2008, the same cannot be said of EVB provisional measures.
- In **Pakistan**, temporary measures cannot in principle be ordered on assets of equivalent value—they can only be ordered on property linked to the offense. However, interviewed experts shared information on the use of an informal mechanism that in practice ensures that once property belonging to an individual's property under investigation has been flagged by NAB, the authorities in charge of transfer or sale of said property will put on hold any transactions until the individual receives a "No Objections Certificate" from NAB.
- While the **United States** has a robust EVB confiscation regime in the form of money judgments and substitute asset orders, there is no general power to obtain an order to seize or freeze property of equivalent value that may become subject to a value-based forfeiture order prior to conviction. However, under the appropriate circumstances, the United States may be able to enforce foreign orders of EVB seizure.³⁵

Box 3.2. Case Study 2: Use of EVB Provisional Measures under Israel's Money Laundering Law

In the context of a broad financial investigation, the Israeli police investigated a group of individuals suspected of illicitly transferring real estate property via acts of forgery, fraud, and money laundering, upon which they received court approval of transfer of ownership without the owners' knowledge. Thereafter, the suspects sold the properties to unsuspecting parties.

In one case, the suspect, AS, stole real estate property through forged documents, and transferred the property to an unsuspecting third party, X. The investigation focused on a property that was worth approximately NIS 2.5 million—though sold for much less than its worth (approximately NIS 500,000). These acts fit the criteria of article 4 of Israel's Prohibition on Money Laundering Law – Transacting in Forbidden Property. The Israeli authorities could not seize the property because of the original owner's bona fide title. However, owing to an early-stage financial investigation of the suspect's assets, a property owned by AS that was worth approximately NIS 2.5 million was identified. As such, during the investigation, the district court issued an equivalent value-based (EVB) provisional order, and the asset was restrained. AS was ultimately convicted of money laundering and forgery charges, and the property was successfully forfeited on an equivalent value basis. It should be noted that there remain third-party challenges to the confiscation order.

Source: Interviewed expert.

3.4 EVB and instrumentalities of crime

3.4.1 Overview

Whereas virtually all the jurisdictions under this survey are legally empowered to confiscate assets the value of which is equivalent to proceeds, the same cannot be said of instrumentalities (that is, property used or intended to be used to commit the offense).

- The possibility to confiscate assets corresponding to the value of instrumentalities is not envisaged in the legal systems of **Bosnia and Herzegovina, Brazil, Nigeria, and Switzerland**.
- In the **United Kingdom**, the confiscation of instrumentalities as such is possible under specific legislative schemes³⁶ and is relatively unusual. Instrumentalities can, however, be realized to pay a confiscation order.

By contrast, other jurisdictions are clearly able to take EVB measures with regard to instrumentalities.

- In **Botswana**, the competent court can make an “instrument substitution declaration” when it considers that “it is not appropriate to make a forfeiture order in respect of property used or intended to be used in connection with the offence, because the person who was convicted of the confiscation offence has no interest in that property.” The substitute property must be property in which the person had an interest at the time that the confiscation offence was committed and that is of the same general nature or description as the property being replaced. The rationale arguably lies in protecting instrumentalities owned by unwitting third parties when they have been used by the defendant (for example, the defendant has used a rented car to commit the offense).³⁷
- **France, Italy, Romania, Spain**, and European Union (EU) member states in general are bound by the EU 2014 Directive (see section 2.2.2), according to which “member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or *property the value of which corresponds to such instrumentalities or proceeds*” (emphasis added).³⁸
- Under **Israel’s** Prohibition on Money Laundering Law, the competent court can order the confiscation of the defendant’s property having the same value as property “which was used or intended to be used to either commit the offence or facilitate the commission of the offence.”³⁹
- In **Singapore**, a “substitute property confiscation order” can be made when the defendant had used or intended to use any property for the commission of the offense and that property is not available. The law contains detailed provisions as to when an instrumentality shall be regarded as not available (for example, the instrumentality cannot be found, or it is not held by the defendant, or it is held by the defendant and ordered to be released or disposed of in favor of any other person).⁴⁰
- A similar rationale is present in the legal system of **Romania**, where assets, the value of which corresponds to the instrumentalities, can be confiscated if, inter alia, “the instrumentality does not belong to the offender, and the person owning it was not aware of the purpose of their use.”⁴¹
- In the **United States**, when “the person’s property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of (the prescribed offenses)” is no longer available, the competent court may forfeit substitute property up to its value.⁴² Regarding “money judgments,” although they normally take into account the

value of the proceeds that the defendant obtained, they may also consider the value of the instrumentality. Case law mentions, for example, orders to pay money judgments for the value of assets spent to facilitate the offense, including rents and hotel rooms.⁴³

- In **Jersey**, the competent court may make an “instrumentalities forfeiture order” for the forfeiture of a sum of money of equivalent value to the value of the property used in or intended to be used in the offense for which the defendant has been convicted.⁴⁴

3.4.2 Instrumentalities and proportionality assessments

In relation to instrumentalities, some jurisdictions require that the competent courts run a proportionality assessment, which may lead them to choose to confiscate equivalent value assets for a lower amount than their full value.⁴⁵

- Notably, the issue has been adjudicated by the Court of Cassation of **France**. The court stated that “it is the responsibility of the judge to verify that the value of the seized property does not exceed that of the instrument of the offence, and finally, when such a guarantee is invoked, to assess the proportionality of the violation of the property rights of the individual to the concrete gravity of the facts and his/her personal circumstances.”⁴⁶
- In **Jersey**, the competent court can make “instrumentalities forfeiture orders” by requesting that the defendant pay a sum of money equivalent to the value of the property used or intended to be used to commit the offense and subject to a proportionality assessment.⁴⁷

3.5 Benefit calculation

3.5.1 Overview

Once courts have determined that the defendant has benefited from an offense, they must calculate the amount of such benefits. This presupposes an activity aimed at the quantification of the full amount of cash and non-cash value that flowed to the defendant. Such assessment is an indispensable stage in all proceedings aimed at the implementation of an EVB approach to asset recovery.⁴⁸ That being said, the benefit calculation stage becomes relevant at the final stage and is less so at the provisional measure stage, when it generally suffices to establish “reasonable suspicion,” or a similar evidentiary threshold.

There may be a discrepancy between the assessed value of the benefits and the value for which the confiscation order is made.

- In **Jersey**, the sum the defendant is required to pay under a confiscation order is the amount assessed to derive from relevant criminal conduct (the “assessed amount” or benefit). Relevant criminal conduct includes offenses for which the defendant appears to be sentenced, together with any other offenses that the court may take into consideration in sentencing the defendant, providing the court with a wide remit. If the defendant’s available assets are less than the assessed amount, the confiscation order will be made in the amount that appears to the court might be realized (“realizable amount”). In instances where the court is satisfied that a victim has instituted or intends to institute civil proceedings against the defendant in respect of loss, injury, or damage sustained in connection with the defendant’s offending, any confiscation order may be of such lesser amount as the court thinks fit.⁴⁹ If additional assets become available after the original confiscation order has been made, the realizable amount can be recalculated and the original confiscation order revisited and increased.

- The **United Kingdom**, for example, envisages the possibility for law enforcement authorities to reinvestigate and look for new assets when there is a gap between the amount of available assets at the time when the confiscation order is made and the assessed criminal benefits. If these come to light as being available to the defendant (such as, a matured pension), even if years later, a new restraint and confiscation order can be made on reconsideration by the court of the original order, up to the full amount of the total criminal benefit. The Crown Prosecution Service can support if needed, such as in making an application for an enforcement receiver or requesting MLA to a foreign jurisdiction in the territory of which more assets are held.

3.5.2 Definition of benefit

The term “benefit” is generally given a broad interpretation, encompassing, *inter alia*, financial assets as well as any increase in value resulting from their appreciation and all forms of rewards accrued directly or indirectly as a result of the offense (for example, a lavish holiday, an entertainment event). All surveyed jurisdictions agreed on the importance of accounting not only for the bribe paid to a public official but also the gains, direct and indirect, accrued to the corrupting agent, which confirms the challenging nature of the benefit calculation exercise. Typical scenarios are those in which an act of corruption results in a business competitor being driven out of the market, or in the corrupting agent avoiding certain tax-related expenses because of the paid bribe.

- **Botswana’s** legislation explicitly includes in the notion of “benefit” any profits derived from an expression of the respondent’s thoughts, opinions, or emotions contained in such means of communication as videos, books, newspapers, radio or television production, and live entertainment.⁵⁰
- Scholars in **Italy** debate whether “savings” should be included among the benefits. While the case law is still fluctuating, the courts have in some cases ordered the confiscation of sums saved due to the nonpayment of taxes or from a failure to adopt safety measures in the workplace.⁵¹

3.5.3 Extent of legislative guidance on benefit calculation

The jurisdictions under review feature significant variations in the normative details with which domestic legislation guides courts in the benefit calculation exercise. As a rule of thumb, common law systems set forth more specific rules than civil law systems.

- In **India**, the methodology for benefit calculation typically involves assessing the overall financial gain from illegal activities, encompassing direct and indirect profits, savings, and other forms of economic advantages. Furthermore, when assessing the value of a specific asset, the approach is as follows: if the defendant acquired the property at a below-market price, the benefit stemming from the offense is calculated on the basis of that property’s market value, which is understood as the fair market value of any property on the date of its acquisition by any person, or if such date cannot be determined, the date on which such property is possessed by such person.⁵² The calculations are carried out by the investigators based on the facts of the case and the values are ascertained through official valuation panels.
- **Nigeria’s** legislation sets forth the criteria for determining the value of gifts given to third parties depending on whether, at the time of making the confiscation order, the receiver was holding the property in question.⁵³
- In the **United States**, case law shows that district courts have broad discretion in calculating illicit gains based on the circumstances of a case; courts need only make a reasonable estimate of the loss and may make reasonable extrapolations from evidence established by a preponderance of the evidence at sentencing.⁵⁴

Unlike most common law jurisdictions, civil law systems tend to address benefit calculation by employing flexible assessment procedures and entrust their courts with wide discretion. Many such jurisdictions do not even spell out any guiding principle and simply require that courts conduct the calculation.

- In **Israel**, no specific methods or guidelines are employed for benefit calculation.
- Under **Lebanon's** Criminal Code, the tribunal can, when necessary, designate an expert to assess the amounts to be paid.⁵⁵
- In **Romania**, specialists in the financial investigation unit of the Anti-Corruption Department have the task to evaluate and determine the benefits that suspects obtained from the offense. In doing so, they do not rely on any legal instrument or guideline.
- **Switzerland's** Criminal Code provides that if the amount to be confiscated cannot be ascertained or may be ascertained only with a disproportionate level of effort and expense, the court may make an estimate.⁵⁶

3.5.4 Net gain versus gross gain

Benefit calculation often entails a determination as to whether to account for the “costs” the defendant incurred to acquire the proceeds of their crimes. The rationale for upholding a “net gain” principle usually lies in the observation that “to treat the gross proceeds as a benefit would result in the State being unjustly enriched at the expense of the respondent and this would be disproportionate and result in the respondent paying more than the amount which he benefited from”⁵⁷ (see box 3.3).

By contrast, the “gross gain” principle postulates that any expenditure the defendant has made in connection with the offense shall not be subtracted from the benefit calculation. This approach is predicated on the need to keep the calculation effort straightforward and simpler, improving deterrence (by discouraging individuals from engaging in illegal activities if they know that the entire financial benefit they derive could be subject to confiscation), as well as restoring a sense of justice and preventing offenders from enjoying the fruits of their illegal activities.

Some jurisdictions follow—or tend to follow where case law is not fully settled—a net gain approach.

- In **Switzerland**, while courts have traditionally followed a gross gain approach, recent case law is switching toward the other approach, following a recent Federal Supreme Court judgment, which confirmed the use of net income in corruption matters.⁵⁸
- **Botswana** has not been confronted yet with the need to choose between a net gain or a gross gain principle. Interviewed experts pointed to persuasive case law from neighboring jurisdictions, according to which only the benefit accrued to the individual would stand to be forfeited. As an example, if a construction tender was awarded through bribery, the profits would exclude the expenses realized for the related construction work.

For the most part, the courts of the jurisdictions under survey implement a gross gain approach.

- In the Republic of **Korea**, costs or taxes are not deducted when courts determine the amount for equivalent value-based confiscation.
- The **United States** has witnessed substantial litigation on whether the government is entitled to forfeit the gross proceeds of the offense or is limited to the defendant's net profit. Case law, however, generally appears to be mostly in favor of a gross gain approach.⁵⁹

Box 3.3. Case Study 3: United Kingdom's Supreme Court Judgment on EVB Confiscation and VAT

In the case of *R v. Harvey*, the Supreme Court addressed the issue of whether value added tax (VAT) accounted for and paid to His Majesty's Revenue and Customs (HMRC) should be deducted from a defendant's turnover when calculating the "benefit" of criminal activity. Mr. Harvey, a majority shareholder in a VAT-registered company, was convicted of handling stolen goods related to his equipment hire business.

Both the Crown Court and the Court of Appeal initially included output VAT in the turnover, following the principle that confiscation should identify what was obtained regardless of expenditures such as income or corporation tax. The appellant argued that this inclusion violated domestic principles and article 1 of the First Protocol (A1FP), which protects property rights.

The majority of the court recognized VAT as different from other taxes and found it disproportionate to include it when it had been accounted for to HMRC. The court held that such inclusion, as traditionally interpreted under the Proceeds of Crime Act, would be inappropriate. Nonetheless, dissenting judgments argued that input tax belonged to the defendant and was not merely held temporarily for the state. This approach, they argued, was consistent with the law and not disproportionate. The court left open the position regarding unaccounted-for VAT.

Ultimately, the judgment clarified that VAT should be treated differently in confiscation calculations when it had been accounted for, avoiding double recovery and ensuring fairness to defendants.

Source: *R v. Harvey* [2015] UKSC 73, <https://www.supremecourt.uk/cases/uksc-2013-0249>.

- In **South Africa**, the "gross value" principle was held by the Constitutional Court in 2007 based on the argument that domestic legislation regards a person to have benefited from unlawful activities if he or she has received or retained any proceeds of unlawful activities. What constitutes a benefit, therefore, is defined by reference to what constitutes "proceeds of unlawful activities," and it is not possible in the light of this definition to give a narrower meaning to the concept of benefit.⁶⁰

3.5.5 Use of presumptions

For benefit calculation purposes, some of the surveyed jurisdictions use presumptions. This is when EVB measures intersect with other asset recovery mechanisms, such as extended confiscation and unexplained wealth orders (UWO) (see section 2.3.1). For example, if the authorities decide to go for extended confiscation, in addition to valuing the actual benefit from the offense of conviction, those stemming from related criminal activity are also accounted for.

- Under **South Africa's** legislation, when defendants are unable to justify their interest in a certain property with legitimate income, it is presumed that such interest forms part of the benefit derived. The calculation of benefit value is also subject to the presumption that interests held in property at or since conviction and transferred to the person within a certain period, as well as expenditure incurred in such period, are presumed to be the value of the benefit derived.⁶¹
- In the **United Kingdom**, if the court establishes that the defendant has a "criminal lifestyle," it shall apply four assumptions to determine the amount of benefits obtained from their general criminal conduct. According to these "lifestyle assumptions," any property held by the defendant at the date of their conviction and any transfers to or expenditure by the defendant in the six years leading up to the commencement of proceedings are regarded as having been obtained or met from property obtained

as a result of criminal conduct. Jersey operates a similar extended conviction-based confiscation regime.⁶²

3.5.6 Observed challenges in benefit calculation

The task of valuing the benefits stemming from an offense is often a complex one. A major challenge highlighted by several jurisdictions is practitioners' poor familiarity with the assessment process, which also requires solid accounting expertise.

- The example of **Nigeria** is instructive. According to experts interviewed for this guide, the previous asset recovery legislation contained virtually no provision on benefit calculation. In the absence of guidelines, the task was left to experts specifically recruited for consultation by the government for this purpose. By contrast, the new provisions introduced under the Proceeds of Crime Act in 2022 contain extensive regulation of, among others, benefit calculation. While this represents an overall improvement, it also introduces a complex legal framework that practitioners may not be fully familiar with, potentially leading to challenges in the consistent application of the new rules.

Other challenges highlighted by surveyed jurisdictions include the following:

- Dearth of and inconsistent case law
- Cost and limitations in the availability of specialist accounting expertise needed to undertake the concealed income analysis (Singapore)
- In the case of financial crimes such as stock manipulation, frequent instances in which equivalent value-based confiscation cannot be achieved because of challenges in determining the value of the proceeds of crime. (the Republic of Korea)
- Challenges related to calculating the value of assets located in noncooperative jurisdictions

3.6 Enforcement modalities

3.6.1 Overview

Once an EVB confiscation order has been issued, it must be enforced. In case the order consists of an obligation to pay a sum of money, it is commonly enforced via domestic procedures aimed at collecting civil debts owed to the state. Those reached by an order to pay a sum of money are free to determine which asset(s) to sell to comply with the order. At the same time, if any assets have been restrained by the authorities, they are used as a guarantee for the payment of the order. Domestic legislation may also envisage the possibility to directly attach restrained assets toward the realization of the confiscation order.

- Under the legal system of **France**, in the absence of properties seized during the investigation phase, the enforcement of EVB confiscation orders follows the legal procedure used by the state to collect debts that are owed to it, which is managed by public accountants acting on behalf of the public prosecutor. By contrast, when properties have been seized, the enforcement of the confiscation order involves a mission of valuation and disposal of these properties by the Agency for the Management and Recovery of Seized and Confiscated Assets (AGRASC).⁶³
- Under **Lebanon's** Criminal Code, confiscated amounts are enforced via the same procedure applied for the enforcement of monetary penalties.⁶⁴
- In **Italy**, a new system has been in force since 2022 for executing EVB confiscation orders. When the assets have already been identified and preventively seized, it is

possible to proceed directly to their confiscation for an amount equivalent to the profit derived from the offense. In cases where this has not occurred, the procedure for the execution of pecuniary penalties is used. Under this procedure, the public prosecutor issues an order instructing the convicted person to make the payment. This order must specify the amount of the pecuniary penalty owed and the payment methods. The order also includes a notice to make the payment within 90 days of notification and a warning that, in the absence of payment, the pecuniary penalty will be converted into imprisonment.⁶⁵

- Under **Nigeria's** Proceeds of Crime Act, "a confiscation order against a person may be enforced, as if it were an order made in civil proceedings instituted by the relevant organisation against a person to recover a debt due by that person to the Federal Government of Nigeria."⁶⁶
- In **Singapore**, EVB confiscation orders are enforced against defendants' realizable assets, which include their house, securities, and bank account. In this regard, the competent court may appoint a public trustee or any person as receiver to realize the assets, including liquidating the property. If there are insufficient realizable assets, the balance is enforceable as a fine.

Box 3.4. Case Study 4: Application of Default Imprisonment Sentences in a UK VAT Fraud Scheme

Geoffrey Johnson left the United Kingdom in 2014 after being convicted in absentia and sentenced to 10 years' imprisonment. He and his son had orchestrated an elaborate scheme that involved a network of businesses falsely claiming to import and sell mobile phones. These fraudulent transactions spanned multiple jurisdictions, with money laundered through various global accounts.

In March 2016, a confiscation order of £109 million was issued against them, with an ultimatum that they should immediately pay or face a 14-year default sentence. In July 2016, Geoffrey Johnson was apprehended while attempting to enter the United Arab Emirates with a fake passport. UK authorities collaborated with the United Arab Emirates to ensure his deportation back to the United Kingdom. Upon his return, he faced the 14-year default sentence for nonpayment, in addition to his original 10-year prison term.

Sources: FATF (Financial Action Task Force), "Anti-Money Laundering and Counter-Terrorist Financing Measures, United Kingdom, Mutual Evaluation Report," 2018; Pat Sweet, "Fugitive £109 Million Tax Fraud Ringleader Returned to UK," *Accountancy Daily*, July 14, 2017, <https://www.accountancydaily.co/fugitive-ps109m-tax-fraud-ringleader-returned-uk>.

Note: VAT = value added tax.

- In **Switzerland**, orders for EVB confiscation (known as claims for compensation) are enforced through the Law on Debt Collection and Bankruptcy.

3.6.2 Penalties in default of payment

Some jurisdictions reported challenges in the fulfillment of orders to pay a sum of money, which may result in judicial cases remaining open indefinitely and the amounts never recovered. Although other remedies may be available and deserve consideration, many jurisdictions envisage the application of prison terms if the person fails to comply with the request to pay the sum of money (see box 3.4), and some jurisdictions indicate that imprisonment in default of payment is resorted to frequently.

- In **Hong Kong SAR, China; Nigeria; and Singapore**, the severity of the imposed prison sentences in default of payment is proportional to the amount set forth in the confiscation order.
- In **Indonesia**, "in the event that the accused does not have adequate wealth to pay the (value-based confiscation order) the accused is merely sentenced to a period that does not exceed the maximum sentence for the main crime, in accordance with the provision in this law, with the period of the sentence having been determined in the court verdict."⁶⁷ Serving the imprisonment term does not necessarily extinguish the debt owed to the state.
- In **Jersey and the United Kingdom**, even when a term of imprisonment in default is served, the defendant remains liable to pay the confiscation order.⁶⁸
- In the **United Kingdom**, a major reported challenge is that few alternatives are left to have the EVB

order paid if, after having served the sentence, the defendant is still unable to honor it. Interviewed experts suggested that in similar cases, defendants may be convicted to an additional prison term on grounds that they have failed to pay the interests accrued on the outstanding amount.

3.6.3 Mechanisms to facilitate the fulfillment of EVB measures

While imprisonment in default of payment remains the standard mechanism in place in many surveyed jurisdictions to spur compliance with EVB confiscation orders, alternative solutions are often explored to address situations in which EVB confiscation orders cannot be promptly fulfilled.

- In **Brazil**, when a bank account has been confiscated, the competent authorities can attach any subsequent amount deposited into that account to the extent needed to satisfy the confiscation order (after deducting what is deemed necessary to ensure the person's living expenses).
- In considering whether to activate the term of imprisonment in default, courts in the **United Kingdom** must be satisfied that the nonpayment is due to the offender's willful refusal or culpable neglect and that all other methods of enforcing payment of the sum are inappropriate or have been unsuccessful.

3.6.4 Property "held" by the defendant

As a rule, EVB confiscation orders may only be enforced on property—regardless of how it was acquired—that is held by the defendant. The possibility to attach equivalent value property that is in third-party hands is normally excluded, with the notable exception of assets that represent gifts from the defendant or gifts that were otherwise transferred to the third party on a gratuitous basis.

Although the scope of the notion "held by the defendant" varies from one jurisdiction

Box 3.5. Case Study 5: EVB Seizure of Property under the Defendant's "Free Disposal" in France

In the context of a high-profile international tax fraud case revealed by the press, an investigation was launched and determined that the main suspect had obtained several million euros from his fraudulent activities. To prevent the individual from benefiting from the proceeds of his crimes and to potentially compensate any victims, a criminal seizure was considered. The suspect did not own any assets in his name. Nonetheless, a source informed the investigators that a high-value real estate property located in France belonged to the suspect through a foreign-registered company.

The investigation revealed that the suspect was the majority shareholder of the foreign company that owned the real estate property. The suspect had also financed the acquisition through bank accounts opened in his name abroad. Furthermore, he had carried out significant renovation work and had been the sole point of contact for the companies involved in the project. Finally, he resided in the property with his family without paying rent to the owning company.

Based on the body of evidence, it was determined that the suspect was indeed the "true owner" of the identified real estate property. Since its value was estimated as being lower than the sums obtained by the suspect from the offenses he committed, it was decided to proceed with its confiscation as an asset of equivalent value to the proceeds of the crime.

Source: Tribunal de Paris, https://www.tribunal-de-paris.justice.fr/sites/default/files/2022-09/La_pratique_des_saisies_penales_aux_fins_de_confiscation_au_PNF.pdf.

to another, the concept generally extends to property that—short of official ownership—is “effectively controlled” by the defendant.

- **Israel's** Prohibition of Money Laundering Law allows for the confiscation of “any property in his possession, under his control or in his account.”⁶⁹
- Legislation in **Italy** prescribes that “the judge orders the confiscation of *sums of money, assets, or other benefits that the defendant has at their disposal, even through a natural or legal person acting on their behalf*, for a value corresponding to such proceeds, profits, or prices” (emphasis added).⁷⁰ According to a judgment rendered by the Court of Cassation in an EVB seizure case, such a seizure “must still pertain to assets over which the accused ‘has control’, which does not occur when the measure is imposed on sums of money deposited in a bank account in the name of a third party unrelated to the crime, even if the defendant has the authority to operate on that account. When the defendant is not authorized to independently determine the destination, use or allocation of the funds, i.e. exercising *de facto* powers corresponding to the right of ownership, but he/she is only given permission to perform administrative functions on behalf of third parties, there is no traceable connection between the funds and the economic or personal interests of the defendant.”⁷¹
- In **France**, realizable property includes assets of which the concerned person can “freely dispose” (see box 3.5). At the same time, the law requires that the official owner or the person who claims to be the official owner shall be entitled to present their observations for the purpose, notably, of asserting the right they claim and their good faith.⁷²
- **Nigeria's** Proceeds of Crime Act specifies that realizable property includes not only that held by the defendants but also that “subject to the effective control of the defendant.”⁷³
- In **Switzerland**, the concept whereby “assets held by the defendant” encompass those “under the effective control” is expressed by way of judicial interpretation through the “transparency doctrine” (“Durchgriff”). This doctrine holds that the assets of a legal person that are controlled by the defendant can be attached using an EVB seizure order when two conditions are fulfilled: (1) there is an economic overlap between the legal entity and the defendant/shareholder, and (2) the legal duality is exploited in an improper manner to evade legal or contractual responsibilities. In such a scenario, the legal entity is unable to rely on its good faith to avoid the imposition of the seizure order.⁷⁴
- In **Hong Kong SAR, China**, the Organized and Serious Crimes Ordinance (OSCO) specifies that realizable property includes any property held by the defendant, any property held by a person to whom the defendant has directly or indirectly made a gift caught by this ordinance, and any property that is subject to the effective control of the defendant.
- **India's** Directorate of Enforcement has internal guidelines to address the challenges arising from the taking of value-based measures on properties mortgaged by a bank or otherwise subject to third-party interests under the Prevention of Money Laundering Act.⁷⁵

3.6.5 Time at which the property has been acquired

Some of the jurisdictions under review have delved into whether EVB measures can be enforced (a) over property acquired before the entry into force of the enabling legislation or before the commission of the benefit-generating offense; and (b) over future assets.

- A recent verdict from **India's** Supreme Court gave a positive ruling to the first question. In so doing, the Supreme Court reversed a high court decision that held that properties purchased before the commencement of the Prevention of Money Laundering Act (PMLA) or before the commission of the predicate offense or scheduled offense could only be attached if the alleged proceeds of crime were held outside India.⁷⁶ This ruling has the effect of rendering all assets, even those acquired prior to the legislation of the PMLA, subject to temporary measures or confiscation.
- With regard to “future assets,” **Italy's** Court of Cassation declared legitimate the taking of provisional measures over equivalent value assets that have not yet materialized at the time when the order is made (for example, retirement benefits). In particular, the court made a distinction between confiscation and seizure by arguing that while the former can only target assets that exist at the time when the measure is ordered, the same does not apply to seizure. As a precautionary measure, seizure may encompass assets that come into existence after the seizure itself and up until the moment when confiscation is ordered.⁷⁷

3.6.6 Joint versus separate liability

Jurisdictions vary in their approach to situations where the offense has been committed by two or more persons.

Under a “joint liability” approach, each defendant is held individually liable for returning the entire amount of the assessed benefit deriving from the offense, even though individual defendants may not have concretely benefited from the proceeds of the crime (for example, their assets have not increased as a result of the act of corruption). In this case, the apportionment of the confiscation measure is left to internal relations—which

Box 3.6. Case Study 6: Shifting from Joint to Separate Liability: US Supreme Court in *Honeycutt v. United States*

Terry oversaw sales and inventory at a hardware store in Tennessee, which belonged to his brother, Tony. They faced federal drug-related charges, including conspiracy to distribute a substance used in methamphetamine production. The government sought judgments of US\$269,751 against both brothers, invoking the Comprehensive Forfeiture Act, which mandates the forfeiture of “any property that constitutes, or is derived from, proceeds acquired by the individual as a direct or indirect result of certain drug-related crimes.”

Tony pleaded guilty and agreed to forfeit US\$200,000, while Terry was convicted. Despite acknowledging that Terry had no significant ownership stake in the store and would not personally benefit from selling the illicit substance, the government requested the court to hold him jointly responsible for the profits generated from illegal sales. It sought a judgment of US\$69,751.98, representing the remaining conspiracy profits.

The Sixth Circuit concurred that the brothers, as coconspirators, bore joint and several liability. However, the Supreme Court overturned this decision by arguing that the forfeiture under section 853(a)(1) is limited to property that the defendant personally acquired as a result of the crime. This provision does not allow for forfeiture in Terry’s case. The inclusion of the adverbs “directly” and “indirectly” in describing how a defendant acquires the property does not eliminate the requirement that the defendant must “obtain” it. Congress did not include the principle that conspirators are legally responsible for each other’s foreseeable actions in advancing its common plan within this section.

While the case concerns drug trafficking offenses, the reasoning of the court and the legislative provisions invoked may well be of general applicability under Title 21 of the US Code on “criminal forfeitures.”

Source: *Honeycutt v. United States*, 581 U.S. ____ (2017), <https://supreme.justia.com/cases/federal/us/581/16-142/>. a. 21 U.S.C. § 853(a)(1).

at times leads to litigation—among co-perpetrators based on the perpetrators' respective role in and effective gain stemming from the offense.⁷⁸

By contrast, a “separate liability” approach considers that each codefendant is only responsible for returning the portion that has been made available to them individually. This approach, therefore, involves the apportionment of the confiscation measure among the various codefendants based on their actual enrichment.

The rules for determining the apportionment of confiscation orders in case of co-perpetrators are usually elaborated by courts and debated by scholarly commentary, which sometimes results in fluctuating interpretations and some degree of uncertainty as to whether a joint or a separate liability approach is effectively followed in a given jurisdiction. In some cases, one approach appears to be followed as a general rule while admitting the possibility to apply the other in specific circumstances.

- In **India**, it is possible to identify and attach properties from one perpetrator despite multiple people being involved. However, efforts are first made to identify the properties in the name of all the perpetrators vis-à-vis the role played by them and if they had actually been enjoying or been in possession of proceeds of crime.
- **Italy's** Court of Cassation has been arguing in favor of a joint liability approach as a matter of principle. Nonetheless, some scholars have suggested that the liability of individual co-perpetrators to return the entire amount should be admissible only when it is practically impossible to proceed with proportional confiscation or when it appears appropriate, considering the peculiarities of the case, to take action against only one of the codefendants.
- In the Republic of **Korea**, the principle is to allocate the individual benefits acquired by co-perpetrators and have them share the responsibility accordingly (separate liability). However, when the individual values cannot be determined, an equal amount is divided and subject to confiscation from all perpetrators.
- The **United States** offers an example of a change over time in the approach followed by its courts. Before 2015, it was consistently held that all individuals found guilty of a specific crime were collectively responsible for surrendering the gains from that offense, irrespective of the varying amounts they personally acquired. In 2017, however, the Supreme Court argued that no provision in applicable legislation enabled joint and several liability, and that each codefendant was liable to forfeit only the amount of money that he or she personally obtained (see box 3.6).⁷⁹

While some of the surveyed jurisdictions have not yet dealt with the issue of whether to enforce confiscation orders via a joint or separate liability approach, practitioners from other jurisdictions have confirmed having limited knowledge or practice of the matter.

- **Botswana's** experts indicated that if the scenario is brought to the attention of a competent domestic court, inspiration will be drawn from the case law of neighboring jurisdictions, which suggests that only the benefit that accrued to the individual stands to be forfeited.
- In **Singapore**, the applicability of a joint versus separate liability model has not been explicitly discussed in court. The issue has been, however, the object of a legislative provision in relation to instrumentalities. Accordingly, “if a substitute property confiscation order is made against 2 or more defendants in respect of the same instrumentality, the defendants are jointly and severally liable to pay to the Government the amount specified in the order.”⁸⁰
- In **South Africa**, case law has emerged supporting a joint benefit approach, but it does not have national application and it is limited to provisional orders.

3.7 EVB measures and mutual legal assistance

3.7.1 Overview

Overall, among the surveyed jurisdictions, the challenges of applying EVB via MLA procedures appear to be greater than those found in purely domestic cases. Most jurisdictions under review have enabling provisions in their MLA legal framework allowing them to assist foreign jurisdictions in the confiscation of assets of equivalent value. However, only some of those jurisdictions can count on practitioners that are familiar with the concept of EVB confiscation and easily or frequently execute MLA requests on assets of equivalent value based within their territories.

- Jurisdictions with inherently value-based regimes, such as the **United Kingdom** and **Jersey**, seemingly have no problem enforcing foreign EVB requests.
- Since **India's** legislation allows for EVB confiscation of proceeds of crime without placing any restrictions on its application, incoming requests are executed without making any distinction between direct and value-based assets, if the request is made for asset recovery under an ongoing money laundering investigation in the requesting country.
- Experts from **France** and **Italy** confirmed the ease with which they are in a position to execute incoming requests on assets of equivalent value.
- **Hong Kong SAR, China** can provide MLA for EVB restraint and confiscation measures by virtue of various legal provisions contained in the Mutual Legal Assistance in Criminal Matters Ordinance and the Drug Trafficking (Recovery of Proceeds) Order.
- Under the Republic of **Korea's** legislation, "when a foreign country has requested cooperation [...] in the execution of a finally binding adjudication of confiscation or collection of equivalent value or in the preservation of property for the purpose of confiscation or collection of equivalent value, mutual assistance may be provided."⁸¹
- Under its enforcement statute, Title 28 of the US Code, section 2467, the **United States** has been able to execute orders restraining or confiscating specific assets identified by a foreign order, where the order itself restrains all assets belonging to a charged defendant and ultimately where the foreign order establishes a pecuniary benefit amount that a defendant has derived from the alleged criminal activity. As a general matter, courts have interpreted the statute authorizing enforcement as providing for broader authority than is authorized under domestic law because it is intended to enforce US treaty obligations to enforce foreign court orders.

Jurisdictions that do not have enabling provisions for EVB measures in their MLA legislation may find alternate solutions. Israel, for example, lacks the necessary legislative provisions to enforce EVB MLA requests.⁸² In light of this challenge, it may engage in alternative solutions such as opening domestic investigations when there is an indication of domestic offenses, which allows it to seize domestically on an EVB basis.

Conversely, the fact that some jurisdictions have provisions in place to execute foreign confiscation requests on EVB assets does not mean that they use them in practice. This is mainly because they have not (yet) received such requests, or they have received them only on rare occasions. At the same time, it could not be determined whether the low number of incoming requests for EVB assets stems from countries not knowing that they can effectively use MLA channels to confiscate EVB assets abroad, or that EVB property has not been identified in certain foreign countries and thus no specific MLA request was lodged.

- It is unclear how extensively EVB measures are used in **Brazil** in criminal cases, and how deep is the corresponding level of practitioners' awareness of those measures.

This may be a function of the fact that EVB is still poorly used in the criminal context.

- Experts from **Romania** confirmed that while there would be no legal obstacles in executing MLA requests on EVB assets, they had no knowledge of such incoming requests (except from other EU countries under mutual recognition legal schemes).
- Despite the presence of an enabling legal framework, practitioners from **Botswana** did not indicate familiarity with case examples of MLA requests targeting EVB assets.
- Although the legal framework of **Bosnia and Herzegovina** allows for the confiscation of “objects resulted from the commission of an offence or their equivalent value” and “proceeds of crime or their equivalent value,”⁸³ interviewed experts had no knowledge of any incoming requests in this regard.

The research conducted for this guide revealed a challenge to international cooperation, namely that practitioners from some jurisdictions may not be fully aware of the existence of—at least some—enabling provisions for EVB measures in their domestic legal frameworks, which leads them to assume mistakenly that requesting jurisdictions need to provide proof of a link between the property and the offense in question. As such, this lack of awareness resulted in requested jurisdictions not providing MLA for requests for EVB-based seizure/confiscation.

- For example, interviewed experts from **Israel** reported a case in which the same requested jurisdiction executed a restraint order on an EVB asset, but later refused to execute a similar type of request as it required proof of a nexus between the asset and the offense. This discrepancy may suggest practitioners’ lack of awareness or knowledge of the nature of EVB measures and/or of their own domestic provisions. The same experts also noted lack of clarity regarding requested jurisdictions’ capacity to provide assistance regarding EVB measures as another challenge.

Box 3.7. Case Study 7: Israel’s Successful MLA Requests for EVB Assets

In the framework of a widespread investment fraud scheme, in which dozens of victims were defrauded hundreds of millions of New Israeli Shekels, Israeli law enforcement authorities identified bank accounts maintained by the suspect, or through companies in his effective control, in three different countries (A, B, and C). Although funds had flowed from Israel to those accounts, it could not be shown that the funds were proceeds of the crime. As such, Israel sent mutual legal assistance (MLA) requests to countries A, B, and C to restrain the funds on the basis of EVB. Countries A, B, and C successfully registered Israel’s EVB restraint order, and ultimately most of the funds were repatriated to a receiver account to compensate the harmed investors and victims.

Source: Interviewed expert.

3.7.2 Reliance on measures for the direct enforcement of foreign confiscation orders

Some jurisdictions are in a position to attach assets of equivalent value on behalf of another jurisdiction by directly enforcing a foreign confiscation order.⁸⁴ Such mechanisms typically allow for the registration of foreign orders based on a review of the request that is strictly limited to verifying that (a) the foreign order is in force; (b) it is not subject to an appeal; and (c) the person in relation to whom the order was taken had the opportunity to defend themselves in the requesting jurisdiction. This means that, in practice, requested jurisdictions are bound to register the foreign order without inquiring whether the property in question is linked or not to the underlying offense.

Examples of jurisdictions that can effectively confiscate EVB assets via domestic legal channels designed for the direct enforcement of foreign confiscation orders include Botswana,⁸⁵ Jersey,⁸⁶ Singapore,⁸⁷ the United Kingdom,⁸⁸ and the United States.⁸⁹

3.7.3 Outgoing MLA requests and EVB measures

In terms of outgoing MLA requests, the examination of surveyed jurisdictions provides a mixed picture. Among

those that have requested the attachment of EVB assets located abroad (see box 3.7), approximately one-half of those jurisdictions either pointed to challenges affecting MLA in general⁹⁰ or did not report any EVB-specific issue.⁹¹ The other half⁹² reported challenges in having requests executed due to foreign jurisdictions requiring that a link be established between the property and the assets in question.

3.8 EVB measures in non-conviction-based proceedings

NCB proceedings enable the confiscation of property even when no conviction has been obtained in relation to criminal conduct. The action is directed toward the asset itself and not a person. Typically, the underlying criminal conduct in NCB proceedings needs to be proven based on a lower standard of evidence than that required for a criminal conviction. This lower threshold can lessen the government's burden to secure confiscation.⁹³ Because NCB proceedings are civil, in rem actions, they are traditionally construed as proceeds-based in the sense that they aim at the confiscation of proceeds of crime, or any other property directly or indirectly derived from proceeds.⁹⁴

However, several jurisdictions that were reviewed for this guide—belonging to both civil law and common law systems—appear to be in a position to apply EVB measures in the framework of NCB proceedings. This feature usefully expands the range of legal mechanisms that can be employed to attach property that is not connected to criminal conduct. Examples of jurisdictions where assets of equivalent value can be confiscated in proceedings that do not lead to a criminal conviction include the following:

- **Botswana:** Its legal system envisages a specific type of proceeding resulting in a “civil penalty order” that can be imposed regardless of whether the person has been criminally charged. The order requires payment to the government “of an amount assessed by the court as the value of the benefits derived by the respondent from a serious crime related activity that took place not more than twenty years before the making of the application.”⁹⁵
- **Brazil:** The taking of EVB measures is possible in the context of both criminal and non-criminal proceedings. Whereas the confiscation of equivalent value assets is little employed in the former, it is used routinely under the law on the liability of legal persons for acts of corruption.
- **Italy:** EVB confiscation is possible under “preventive confiscation” proceedings, during which it is not necessary to prove that the person has committed an offense. It must only be established that the person is habitually engaged in criminal activities or is living, even in part, from the proceeds of criminal activity.⁹⁶
- **Spain:** EVB confiscation is explicitly envisaged under “autonomous confiscation” proceedings. These

Box 3.8. Case Study 8: Interbank Accounts: Forfeiting Equivalent Value Assets under the US Non-Conviction-Based Procedure

In 2011, the United States took legal action against Lebanese Canadian Bank (LCB) because of its involvement in laundering money from an international drug trafficking network. The United States sought to seize US\$430 million, representing a portion of the funds used to acquire LCB's assets by another Lebanese financial institution. Because Lebanese law does not permit the seizure or repatriation of funds in Lebanon through civil forfeiture actions, corresponding accounts in the United States were seized, eventually leading to the forfeiture of US\$102 million.

Sources: FATF (Financial Action Task Force), *Anti-Money Laundering and Counter-Terrorist Financing Measures – United States, Fourth Round Mutual Evaluation Report* (FATF, 2016), <https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/MER-United-States-2016.pdf>; and US Attorney's Office, Southern District of New York, “Manhattan U.S. Attorney Announces \$102 Million Settlement of Civil Forfeiture and Money Laundering Claims against Lebanese Canadian Bank,” Press release, June 25, 2013, <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-102-million-settlement-civil-forfeiture-and-money>.

proceedings are typically used when the person has absconded, but they can also be relied upon in all circumstances in which the investigating authorities consider that the chances of obtaining a criminal conviction are too low.⁹⁷

Other jurisdictions, where NCB proceedings cannot be used to attach assets of equivalent value, provide for some limited exceptions.

- **Panama:** A limited scope for EVB measures is available under Law 67/2008 in relation to cases of mismanagement of public funds. This law envisages a hybrid, NCB proceeding that allows the attachment of peoples' assets, regardless of their legal or illegal origin, including in case of death of the person under investigation. The adjudicating court is mandated to investigate alleged irregularities in the handling of public funds and assets by governmental employees.⁹⁸
- **United States:** In limited circumstances, assets of equivalent value can be seized and/or forfeited in the case of interbank/correspondent accounts. Accordingly, "if funds are deposited into an account at a foreign financial institution, and that foreign financial institution has an interbank account in the United States with a covered financial institution, the funds shall be deemed to have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant in rem regarding the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign financial institution, may be restrained, seized, or arrested."⁹⁹ A practical application of this provision has occurred in the case of the Lebanese Canadian Bank (see box 3.8).

Notes

- 1 The percentage takes into account information contained in 59 country mutual evaluation reports, of which 29 are by FATF and 30 are by FATF-style regional bodies. See FATF, *Report on the State of Effectiveness and Compliance with the FATF Standards* (FATF, 2022), <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Report-on-the-State-of-Effectiveness-Compliance-with-FATF-Standards.pdf.coredownload.pdf>.
- 2 France, Criminal Code, Article 131-21, para. 9.
- 3 Criminal Code of Bosnia and Herzegovina, Article 111(1), 2003, <https://rm.coe.int/bih-criminal-code-consolidated-text/16806415c8>.
- 4 Under 21 U.S.C. § 853(p), to forfeit untainted assets as substitute assets, the government must demonstrate that the original assets sought for forfeiture (a) cannot be located on the exercise of due diligence; (b) have been transferred or sold to, or deposited with, a third party; (c) have been placed beyond the jurisdiction of the court; (d) have been substantially diminished in value; or (e) has been commingled with other property that cannot be divided without difficulty.
- 5 The attachment of specific assets that constitute proceeds of crime typically remains possible on the basis of non-conviction-based, civil/in rem proceedings.
- 6 South Africa, Prevention of Organised Crime Act 121 of 1998, Part Two: Confiscation Orders, <https://www.justice.gov.za/legislation/acts/1998-121.pdf>.
- 7 Proceeds of Crime (Jersey) Law 1999, Sections 3 and 17.
- 8 In the context of US criminal forfeiture legislation, "substitute property" refers to assets that can be confiscated when proceeds of crime or instrumentalities are unavailable or cannot be located. See 21 U.S.C. § 853, para. 2.
- 9 See Article 297, Penal Law, as well as the Prohibition on Money Laundering Law.
- 10 See Article 3 of the Law of 16 March 2006, n. 146, on the "Ratification and Execution of the UN Convention and Protocols against Transnational Organized Crime."
- 11 Bosnia and Herzegovina has a complex legal system, with four criminal codes in force reflecting its decentralized structure.
- 12 MONEYVAL (Committee of Experts on Anti-Money Laundering Measures and the Financing of Terrorism), *Report on Fourth Assessment Visit of Bosnia and Herzegovina* (MONEYVAL and Council of Europe, 2015), para. 280 ("Despite the fact that the confiscation of assets of corresponding value is permitted under all four legal systems, no cases in which this had happened in practice were

- identified except in the RS [Republika Srpska]. The President of the Supreme Court of the F BiH [Federation of Bosnia and Herzegovina] indicated that he had never seen a reference to equivalent value in a judgement, and that in addition, the widespread failure to apply provisional measures effectively would undermine enforcement of value based confiscation even were it to be sought.”).
- 13 MENA (Middle East and North Africa) and FATF (Financial Action Task Force), “Anti-Money Laundering and Counter-Terrorist Financing Measures, Republic of Lebanon, Mutual Evaluation Report,” 2023, https://www.menafatf.org/sites/default/files/Newsletter/Lebanon%20MER_E.pdf.
 - 14 The assessment relates to the years before 2019, when the report was issued.
 - 15 APG (Asia/Pacific Group on Money Laundering), “Anti-Money Laundering and Counter-Terrorist Financing Measures, Pakistan, Mutual Evaluation Report,” 2019, <https://www.fatf-gafi.org/content/dam/fatf-gafi/fsrb-mer/APG-Mutual-Evaluation-Report-Pakistan-October%202019.pdf>.
 - 16 Bosnia and Herzegovina, Criminal Code, Article 111.
 - 17 Brazil, Criminal Code, Article 91, § 1o.
 - 18 Korea, Proceeds of Crime Act, Article 10.
 - 19 Lebanon, Criminal Code, Article 69.
 - 20 Spain, Criminal Code, Articles 127, and 127.3.
 - 21 Switzerland, Criminal Code, Article 71(1)(2).
 - 22 21 U.S.C. § 853(p).
 - 23 Romania, Criminal Code, Article 112(5).
 - 24 Italy, Criminal Code, Article 240(1-bis).
 - 25 Pakistan, Anti-Money Laundering Act of 2010, Section 4, Punishment for money laundering.
 - 26 Pakistan, National Accountability Ordinance, Section 25(a) [Section 25 updated by Ordinance No. CXXXIII of 2002]. The defendant can also seek to voluntarily return the assets at a subsequent stage of the criminal proceeding. In that case, however, if the NAB accepts the offer, the case is sent to the court for approval. See Section 25(b) of the NAO [as updated in 2002].
 - 27 Spain, Criminal Code, Article 127 octies.
 - 28 Switzerland, Criminal Code, Article 71(3).
 - 29 However, when proceedings are to be instituted in Jersey (typically when a defendant is charged or summonsed to attend court in respect of an offense carrying a sentence of one year or more) and there is reasonable cause to believe that the defendant has benefited from the criminal conduct. Property held under a Saisie Judiciaire is managed by the Viscount’s Department (the asset management office in Jersey) and typically used to satisfy any subsequent confiscation order. See Articles 15 and 16 of the Proceeds of Crime (Jersey) Law 1999.
 - 30 Israel, Prohibition on Money Laundering Law (PMLL) 2000, Article 22. EVB provisional measures are also available for some selected predicate offenses set forth in the Criminal Code, including bribery. In this latter case, EVB provisional measures can only be ordered on the money given by the briber. If the bribe was not given in the form of money, it cannot be seized on assets of equivalent value. If, however, the proceeds of bribery were laundered, then they can be seized on an equivalent-based value as well.
 - 31 FATF (Financial Action Task Force) and Council of Europe, “Anti-Money Laundering and Counter-Terrorist Financing Measures, Israel, Mutual Evaluation Report,” 2018, para. 225.
 - 32 FATF (Financial Action Task Force), “Anti-Money Laundering and Counter-Terrorist Financing Measures, Italy, Mutual Evaluation Report,” 2016, para. 178.
 - 33 United Kingdom, Proceeds of Crime Act 2002, Sections 40–41.
 - 34 FATF (Financial Action Task Force) and APG (Asia/Pacific Group on Money Laundering), “Anti-Money Laundering and Counter-Terrorist Financing Measures, Korea, Mutual Evaluation Report,” 2020, para. 212.
 - 35 In *United States v. Chamberlain*, the court overruled its early precedent and held that 21 U.S.C. § 853(e) does not expressly authorize pretrial restraint of untainted, substitute assets; untainted assets may not be restrained pretrial to be used as substitute assets. *United States v. Chamberlain*, 868 F.3d 290 (4th Cir. 2017). For enforcement of foreign requests, see 28 U.S.C. § 2467.
 - 36 For example, the Misuse of Drugs Act 1971, the Powers of Criminal Courts (Sentencing) Act 2000, and the Customs and Excise Management Act 1979.
 - 37 Botswana, Proceeds and Instruments of Crime Act, Sections 20 and 21.
 - 38 European Parliament and Council of the European Union, Directive 2014/42/EU, Article 4(1), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042>.
 - 39 Israel, Prohibition on Money Laundering Law (PMLL) 2000, Article 21(a)(1).
 - 40 Singapore, Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992, Section 34.
 - 41 Romania, Criminal Code, Article 136(1)(b).
 - 42 21 U.S.C. § 853 (criminal forfeitures).
 - 43 See, for example, *United States v. Peithman*, 2017 WL 1682778 (D. Neb. May 1, 2017); *United States v. Ford*, 296 F. Supp. 3d 1251 (D. Or. 2017).
 - 44 Proceeds of Crime (Jersey) Law 1999, Article 28B(3)(d).

- 45 ECHR (European Court of Human Rights), Key Theme, Article 1 of Protocol No. 1, Confiscation/ Seizure of Assets, last updated August 31, 2024, <https://ks.echr.coe.int/documents/d/echr-ks/confiscation-seizure-of-assets> (According to the ECHR, a proportionality assessment entails that a "fair balance be struck between the demands of the general interest and the interest of the individuals concerned. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden [B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v. Slovenia, 2017, §§ 47 and 52].").
- 46 France, Court of Cassation, Criminal Chamber, November 6, 2019, No. 19-82.683.
- 47 Proceeds of Crime (Jersey) Law 1999, Article 28B.
- 48 Detailed guidance on benefit calculation can be found in the 2012 OECD/STAR study *Identification and Quantification of the Proceeds of Bribery*. The study focuses on different types of proceeds of active bribery, namely: (a) proceeds from contracts obtained through bribery; (b) business authorizations, permits, or licenses to operate; (c) expenses or losses avoided; (d) expedition of delays; and (e) gains from using lax internal controls and inaccurate or incomplete books and records. Each type of proceeds can be identified and quantified by using different methods depending on the legal framework, for example, confiscation/disgorgement, damages, or restitution. The quantification methods are illustrated through case examples.
- 49 Defendant's realizable property includes any property held by the defendant, any property to which he is beneficially entitled, and any gifts made directly or indirectly after the commission of the offense(s) for which he has been convicted, or if a gift into a trust, five years before the commission of an offense. See Proceeds of Crime (Jersey) Law 1999, Part 2, Section 4.
- 50 Botswana, Proceeds and Instruments of Crime Act, 2014, Section 16(1)(e).
- 51 The article, available only to subscribers, can be found at <https://ius-giuffrefi-it.ezproxy.unicatt.it/dettaglio/6287689/confisca-per-equivalente>.
- 52 India, Prevention of Money Laundering Act, 2002, Section 2(1)(zb).
- 53 Nigeria, Proceeds of Crime Act 2022, Section 47(2)(3).
- 54 See, for example, *United States v. Mathieu*, 853 F. App'x. 739, 742 (2d Cir. 2021); see also *United States v. Prather*, 456 F. App'x. 622, 626 (8th Cir. 2012) (the law does not require "mathematical exactitude" in calculating the amount subject to forfeiture; rather, court may make "reasonable extrapolations" from the facts, including defendant's admission as to the amount of drugs sold).
- 55 Lebanon, Criminal Code, Article 69.
- 56 Switzerland, Criminal Code, Article 70, para. 5.
- 57 Supreme Court of Appeal of South Africa, *National Director for Public Prosecutions v. Ramlutchman* (677/15) [2016] ZASCA 202.
- 58 Sandrine Giroud, "Snapshot: Asset Confirmation in Switzerland," LALIVE, Lexology, October 3, 2022, <https://www.lexology.com/library/detail.aspx?g=6e5f7cd2-2a40-458e-a727-e4c9fb518509>.
- 59 See, for example, *United States v. Beecroft*, 825 F.3d 991 (9th Cir. 2016) (the proceeds of a fraudulently obtained loan are the amount of the loan, not the loss suffered by the lender).
- 60 *Shaik and Others v. The State* 2008(2) SA 208 CC.
- 61 South Africa, Proceeds of Crime Act 1996, Section 22.
- 62 Proceeds of Crime (Jersey) Law 1999, Article 5.
- 63 France, Code of Criminal Procedure, Article 707-1; Circular of July 16, 2012, "on the illustration of provisions related to the execution of confiscation penalties contained in Law 2012-409 of 27 March 2012" (Official Bulletin of the Ministry of Justice, JUSD1229412C), <https://www.justice.gouv.fr/documentation/bulletin-officiel/circulaire-du-16-juillet-2012-relative-presentation-dispositions-relatives>.
- 64 Lebanon, Criminal Code, Article 69.
- 65 Italy, Code of Criminal Procedure, Article 660.
- 66 Nigeria, Proceeds of Crime Act, Article 52(2).
- 67 Indonesia, Eradication of the Criminal Act of Corruption 1999, Article 18(3).
- 68 According to the interviewed expert from Jersey, this is rarely used because the Viscount's Department enforces any confiscation order made using assets already held by it under a Saisie Judiciaire.
- 69 Israel, Prohibition on Money Laundering Law (PMLL) 2000, Article 21(a)(b).
- 70 Article 11(1), Law 146/2006, Italy.
- 71 Italy, Court of Cassation, n. 15047, 2021, <https://www.giurisprudenzapenale.com/wp-content/uploads/2021/06/Cass.-n.-15047-21.pdf>.
- 72 France, Criminal Code, Article 131-21. The provision on the rights of the owner to present observations was added to the Criminal Code in 2022 following a judgment of the French Constitutional Council, which argued that the rights of the defense had not been sufficiently protected in the original text of the law, in violation of the 1789 Declaration of the Rights of Man and of the Citizen. See Constitutional Council, Decision no. 2021-932 QPC, September 23, 2021.
- 73 Nigeria, Proceeds of Crime Act 2022, Section 48(1)(c).
- 74 The "transparency doctrine" has been reiterated in a judgment by the Swiss Federal Tribunal (6B 993/2019, June 15, 2020).

- 75 In one scenario, identifiable and available properties representing the equivalent value of proceeds of crime have been acquired before the commission of the predicate offense and before third parties have acquired an interest in these properties. In this situation, the time frame of the third-party interest acquisition in such properties (equivalent value) necessitates an investigation by the appointed officer to verify the following aspects: Did the third party acquire an interest before the offense was committed? If the answer is yes, the confiscation or attachment claim might only extend to the property's residual value after accounting for the third party's claim. Did the third party acquire an interest following the commission of the offense? If affirmative, the intention behind the third party's interest acquisition, as well as the due diligence they exercised before acquiring an interest in such property, should be scrutinized by the appointed officer.
- 76 Vijay Madanlal Choudhary & Ors. v. Union of India & Ors. [2022] SCC Online SC 929.
- 77 Italy, Court of Cassation, n. 36369, October 7, 2021.
- 78 Nevertheless, under a joint liability model, the total amount of confiscated assets can never exceed the value of the benefit obtained from the crime. If that were the case, the confiscation action would turn into an unjust enrichment in favor of the state.
- 79 21 U.S.C. § 853(a). See also Stefan D. Cassella, "Criminal Forfeiture: Current Issues," *Asset Forfeiture Law, LLC*, October 30, 2019, <https://assetforfeiturelaw.us/wp-content/uploads/2019/10/Criminal-Forfeiture-Update-2019.pdf>.
- 80 Singapore, Corruption, Drug Trafficking and Other Serious Crimes Act 1992, Section 34(5).
- 81 Korea, Proceeds of Crime Act, Article 11.
- 82 An amendment to domestic legislation to allow for MLA EVB measures is currently at an advanced stage.
- 83 Bosnia and Herzegovina, Law on Mutual Legal Assistance in Criminal Matters, Article 20.
- 84 The requirement for states parties to enable the direct enforcement of foreign confiscation orders is mandated by article 55(1)(b) of the UNCAC. For a thorough examination of this channel for international asset recovery requirements and its advantages, see Stefano Betti, Jean-Pierre Brun, and Vladimir Kozin, *Orders Without Borders: Direct Enforcement of Foreign Restraint and Confiscation Decisions* (World Bank, 2021), <https://star.worldbank.org/publications/orders-without-borders-direct-enforcement-foreign-restraint-and-confiscation-decisions>.
- 85 Botswana, Mutual Assistance in Criminal Matters Act, Section 29.
- 86 Proceeds of Crime (Jersey) Law 1999, Part 4, External Confiscation Orders.
- 87 Singapore, Mutual Assistance in Criminal Matters Act 2000, Sections 29 to 32.
- 88 United Kingdom, Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, Sections 20–27.
- 89 28 U.S.C. § 2467, Enforcement of foreign judgments.
- 90 For example, experts from the United Kingdom noted the difficulty in providing data regarding the inability of countries to execute such EVB MLA requests because many of those jurisdictions simply failed to respond to those requests.
- 91 For example, no specific challenges were observed by Jersey; Hong Kong SAR, China; and the Republic of Korea in relation to their outgoing EVB-based MLA requests.
- 92 For example, France, India, Israel, and the United Kingdom.
- 93 The UNCAC refers to NCB confiscation in the context of mutual legal assistance for asset recovery. Accordingly, "each State Party ... shall, in accordance with its domestic law... [c]onsider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases." UNCAC, Article 54(1)(c).
- 94 For additional information regarding NCB proceedings, see Theodore S. Greenberg et al., *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (World Bank, 2009), https://star.worldbank.org/sites/default/files/2023-11/Stolen_Asset_Recovery_A_Good_Practices_Guide_for_Non_Conviction_Based_Asset_Forfeiture_%28Stolen_Asset_Recovery_Initiative_2009%29.pdf.
- 95 Botswana, Proceeds and Instruments of Crime Act, Section 11(1).
- 96 Italy, Legislative Decree 306/1992, modified and converted into Law 356/1992, Article 12-sexies.
- 97 Spain, Criminal Procedure Act (Ley de Enjuiciamiento Criminal), Articles 803 ter e) to ter u).
- 98 Panama, Law 67/2008, Articles 27 and 81.
- 99 18 U.S.C. § 981(k), Civil forfeiture.

4 Recommendations: Leveraging EVB Measures to Their Full Extent

4.1 Adopt or strengthen EVB-enabling legislation based on international treaty requirements

It is critical to give teeth to relevant international treaties by ensuring the EVB provisions are fully reflected in domestic legal frameworks. Jurisdictions need to establish or strengthen enabling legislation to allow for both EVB confiscation and provisional orders, including when EVB measures are requested by a foreign jurisdiction via MLA channels.

4.1.1 Domesticating international treaty provisions dealing with EVB measures

EVB measures are coercive measures that require the adoption of specific enabling legislation. Domestic legal frameworks should notably ensure that EVB measures can be ordered in relation to property obtained from the widest range of criminal offenses, and not be limited, for example, to money laundering offenses. This also applies to jurisdictions that view international treaties as being automatically incorporated in their legal framework following ratification. Although certain treaty provisions might be regarded as containing sufficient details to be directly applied, the provisions that deal with EVB measures are not self-executing.

Legislation incorporating treaty-based requirements could be usefully supported by circulars or guidelines, issued by relevant ministries, for the purpose of explaining to practitioners the technical issues and advantages involved in applying EVB measures, as well as familiarizing them with the methods used for benefit calculation.

Additionally, as recommended in a StAR Initiative study on unexplained wealth orders (UWOs), EVB measures should be enabled in the context of UWOs “rather than only property-based confiscation, in the event that the original assets are no longer available, and use value-based confiscation if the respondent has other assets in the enforcing jurisdiction.”¹ It is further recommended that review processes such as the United Nations Convention against Corruption (UNCAC) Intergovernmental Review Mechanism be leveraged as a platform to monitor jurisdictions’ progress regarding the implementation of EVB measures.

4.1.2 Consider adopting EVB measures as a primary measure in routine asset recovery practice

Jurisdictions should consider adopting legislation to enable EVB measures as primary tools rather than subsidiary tools.² For example, when financial investigators can rely

on EVB provisional measures (freezing or seizure) as a primary tool, they do not have to expend precious time and resources on first attaching proceeds and then, only at a later stage—if proceeds are not found or are unavailable—consider assets of equivalent value. Rather, they can broadly assess all assets held by the defendant and they are free to focus their efforts on the next tier of considerations—identifying which assets are the most ideal for restraint, particularly from a long-term management perspective. Thus, using EVB provisional measures as a primary tool can be instrumental in streamlining and increasing the efficiency of investigations.

4.1.3 Ensure, to the greatest extent possible, that provisional measures can be used in respect of assets of equivalent value

The dearth of legislation regarding EVB provisional (freezing or seizure) measures is a significant gap because it directly hampers the efficacy of the EVB tool. Indeed, EVB confiscation comes into play only on a final decision—which often takes place after a lengthy investigation and trial. At that point, however, the scope of the assets available for realization often has been drastically diminished. This gap in legislation also critically affects jurisdictions’ ability to provide and request international cooperation. Because jurisdictions largely align their MLA legislation with their domestic legislation, measures that limit the scope of EVB measures often carry over to similar restrictions on the enforcement of foreign EVB restraint and confiscation orders. Potentially this is a major barrier to asset recovery since inherent in corruption and other serious economic offenses is that illicit funds are laundered and frequently located in foreign jurisdictions.

EVB provisional measures should thus be seen as the logical precursor to EVB confiscation, providing the correct platform for critical enforcement measures that counteract offenders’ attempts to immediately dissipate their illicit assets. Considering the aforementioned

challenges, it would be clearly beneficial to broaden practitioners’ “toolbox” via an expansion of EVB orders to also cover provisional orders.

“using EVB provisional measures as a primary tool can be instrumental in streamlining and increasing the efficiency of investigations.”

4.2 Employ EVB measures routinely as a tool for asset recovery purposes

This guide shows that practitioners from several surveyed jurisdictions are insufficiently knowledgeable on the degree to which they can employ EVB measures on restraint and confiscation based on their domestic legislation, including during their MLA exchanges. In other cases, it was mentioned that despite the existence of legislation enabling EVB measures, in practice these are not implemented because of lack of familiarity. In light of this, it is critical to ensure that asset recovery practitioners develop the knowledge and skills necessary to employ to the full extent the EVB tools available within their legal frameworks. This may include the use of financial experts or analysts supporting investigators or prosecutors in the task of asset assessing the value of proceeds (or instrumentalities) of crime, ideally at an early stage of the investigation. In jurisdictions that have established asset management offices, such agencies could potentially be used as well for these purposes.

4.2.1 Raise practitioners' awareness of EVB measures

To effectively contribute to awareness-raising efforts, the organization of training seminars is recommended for a wide range of stakeholders involved in the application of EVB measures, including investigators, prosecutors, and judicial authorities. These seminars would benefit from the expertise of and partnership with appropriate international bodies that provide technical assistance in the field of asset recovery, such as the StAR Initiative, the United Nations Office on Drugs and Crime (UNODC), and the Basel Institute on Governance. For jurisdictions that lack adequate legislation on EVB measures, these seminars should offer technical guidance on drafting and improving EVB legislation, as well as training regarding the active implementation of EVB measures.

In this context, tools may be created to support these training activities, for example, a collection of best practices of jurisdictions' implementation of EVB measures, or through the establishment of a dedicated working group in international fora such as the Financial Action Task Force (FATF). Possible criteria in selecting beneficiary jurisdictions include the presence of prominent financial centers within their territories or critical volumes of MLA requests on asset recovery that have not been executed. Existing national risk assessment can also be used as parameters for determining participants in training events. These could be organized on a multilateral or bilateral basis, potentially involving experienced countries sharing best practices with less experienced ones and providing real-case examples to illustrate tool utility and success in asset recovery. Specific thematic focuses—such as on EVB provisional measures, EVB as a primary tool for asset recovery, or practical advice on the benefit calculation process—should be considered as an integral part of training events.

4.2.2 Develop an understanding of EVB terminologies used in foreign jurisdictions

The domestic terminology associated with EVB measures can vary significantly and legal professionals and law enforcement agencies from different jurisdictions may struggle to understand each other's legal frameworks. Notably, poor knowledge regarding foreign terms related to EVB measures and their correct interpretation can present a significant obstacle to international cooperation, especially in the context of MLA exchanges, which impedes the timely sharing of information and the overall effectiveness of international efforts to combat cross-border crime. Thus, it is important for practitioners to familiarize themselves with how EVB-related terminology is used in foreign jurisdictions, especially before submitting MLA requests and in preparing to execute incoming requests. The use of different terminologies in the EVB landscape can also be the object of specific sections of awareness raising and training events.

4.2.3 Consider developing distinct sets of statistical data that cover EVB measures, both domestically and in the MLA context

Jurisdictions with solid data collection systems should be encouraged to collect and report specifically on EVB measures taken during judicial proceedings. This could assist jurisdictions in evaluating the extent to which EVB measures are effectively used and the degree to which they facilitate asset recovery. Such data may also serve to encourage other jurisdictions that lack the necessary enabling legislation to consider amending their legislation to allow for EVB measures.

Notes

- 1 Jean-Pierre Brun et al., *Unexplained Wealth Orders* (World Bank, June 2023), 101, <https://star.worldbank.org/sites/default/files/2023-06/StAR-wealth-report-08.pdf#page=20&zoom=100,0,0>.
- 2 As discussed in section 3.2, EVB measures are a primary tool when assets of equivalent value can be attached on an equal footing as proceeds of crime. By contrast, they are a subsidiary tool when equivalent value assets can be attached only when proceeds are not found or are unavailable.

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Appendix A: United Nations Convention against Corruption (UNCAC) Provisions (Excerpts)

Article 2. Use of terms

For the purposes of this Convention:

[...]

(d) "Property" shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets;

(e) "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

(f) "Freezing" or "seizure" shall mean temporarily prohibiting the transfer, 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;

(g) "Confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

Article 31. Freezing, seizure and confiscation

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences established in accordance with this Convention or **property the value of which corresponds to that of such proceeds**;¹

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

Article 55. International cooperation for purposes of confiscation

1. A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

- (a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or
- (b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party.

2. Following a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

Notes

- 1 Bold and italics added.

Appendix B: EVB Measures: Checklist for Policy Makers

1. Does your legal framework enable equivalent value-based (EVB) measures as a tool for criminal asset recovery?

YES

1A Check if the existing framework includes any of the following features, and consider possible amendments if answer to any of the following is “NO”:

1A1 Do EVB measures apply to a wide range of offenses (as opposed to only some categories (e.g., money laundering)?¹

YES NO

1A2 Do EVB measures apply to both provisional measures (freezing/seizure orders) and confiscation?

YES NO

1A3 Are instrumentalities of crime (in addition to proceeds) subject to EVB measures?²

YES NO

1A4 Can EVB measures be ordered on legally acquired assets even when the proceeds of crime are available (i.e., can EVB measures be applied immediately, or must you first determine availability of proceeds of crime)?³

YES NO

1A5 Is there an effective mechanism for enforcing EVB orders (e.g., in case of nonpayment of the requested sum of money)?

YES NO

NO

1B Prioritize the introduction of EVB powers in your domestic legal framework by considering the following steps:

1B1 Form a group of experts, including asset recovery practitioners, to plan the elaboration of new EVB-related legislation.

1B2 If necessary, seek the advice of technical assistance providers (e.g., StAR Initiative).

1B3 Assess the level of implementation of EVB-related requirements in international treaties to which your country is a party.

1B4 Take stock of findings and recommendations on EVB measures elaborated in the context of relevant peer-review mechanisms (e.g., UNCAC, FATF, OECD, GRECO).

1B5 In determining the structure and scope of the draft legislation, consider the points listed under 1A1 to 1A7.

1B6 Reach out to relevant international organizations (e.g., StAR Initiative) for technical assistance in crafting the necessary language.

1B7 Make passing the EVB-related normative framework a priority through the legislative process.

1A6 Does legislation (or other official normative text) include sufficient guidelines to perform benefit calculation?

YES NO

1A7 Can you execute MLA requests for the freezing/seizure and confiscation of EVB assets?

YES NO

Note: FATF = Financial Action Task Force; GRECO = Group of States against Corruption; MLA = mutual legal assistance; OECD = Organisation for Economic Co-operation and Development; STAR = Stolen Asset Recovery (STAR) Initiative; UNCAC = United Nations Convention against Corruption.

2. Are data collected and disseminated about the proportion of assets recovered via EVB measures and/or EVB measures taken during domestic proceedings?

YES

2A Consider appropriate changes if answer to any of the following is "NO":

2A1 Is the existing data collection system effectively employed to determine the extent of application of EVB measures as well as to identify potential challenges and room for improvements in the use of EVB measures?

YES NO

2A2 Are data collected and processed in relation to EVB measures that have been ordered in execution of MLA requests?

YES NO

What is practically done with the data to ensure the data are effectively processed/made actionable?

NO

2B Consider establishing such a system by following points 2A1 and 2A2.

3. Are practitioners and asset recovery specialists generally aware of and trained in the use of EVB measures?

YES

3A Check if practitioners receive training in the following thematic areas, and consider relevant updates to available programs if answer to any of the following is “NO”:

3A1 Trainings on strategies and practical considerations for EVB asset identification, freezing/seizure, and confiscation¹

YES NO

3A2 Use of EVB measures before courts

YES NO

3A3 Practical advice on the benefit calculation process

YES NO

3A4 EVB and international cooperation

YES NO

NO

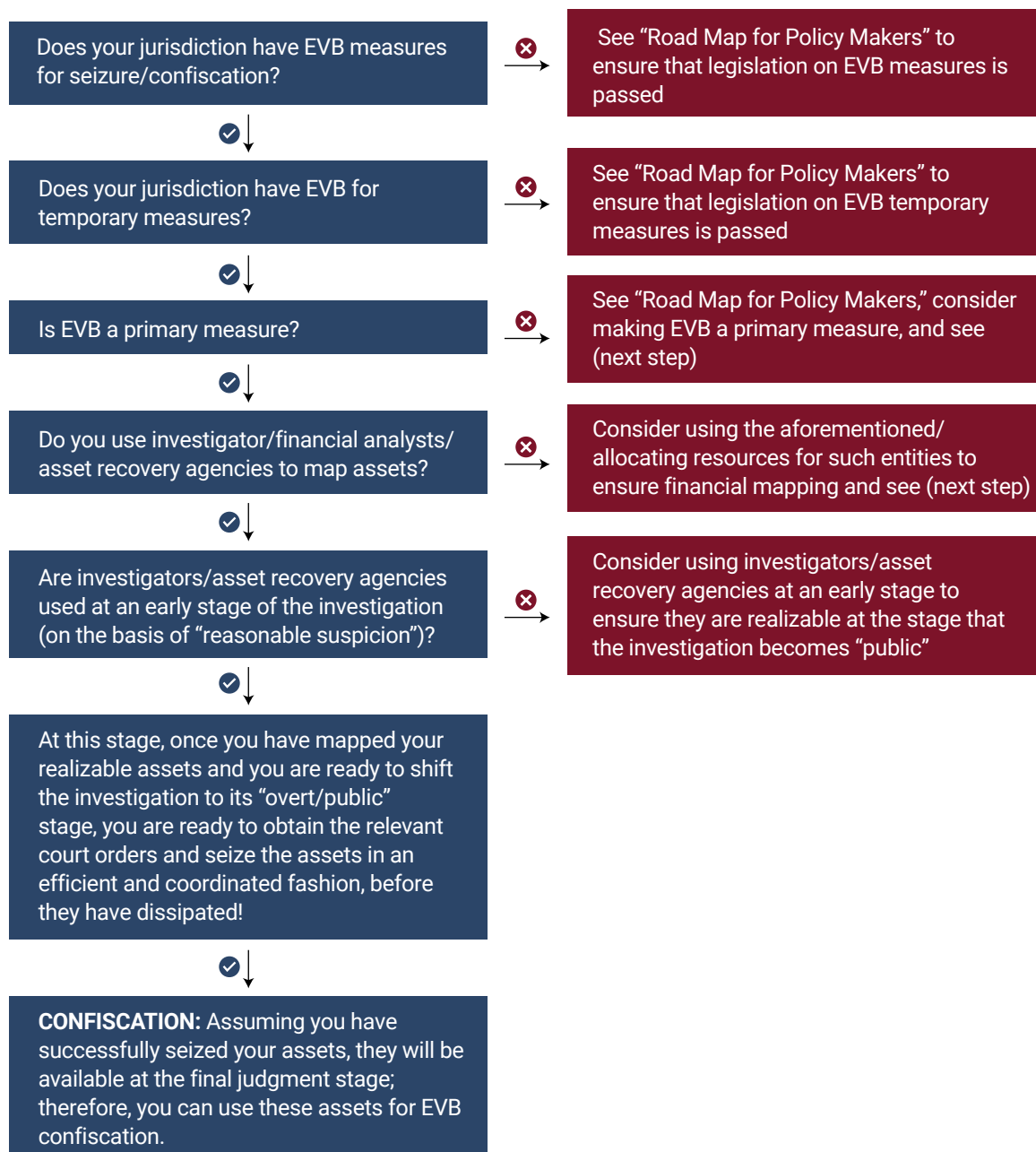
3B1 Consider establishing general awareness-raising and training programs on the application of EVB measures, including by requesting the support of relevant technical assistance providers (e.g., StAR Initiative).

3B2 Consider establishing focused awareness-raising and training programs on the topics listed under 3A1, 3A2, 3A3, 3A4.

Notes

- 1 The UNCAC requires that EVB measures be available in relation to the offenses established in accordance with it.
- 2 The UNCAC does not require that instrumentalities of crime be subject to EVB measures.
- 3 The UNCAC does not specify whether EVB measures shall be established as primary or subsidiary measures.

Appendix C: EVB Measures: Checklist for Practitioners



Appendix D: Questionnaire for National Experts

The Role of Equivalent Value-Based Confiscation in Recovering the Proceeds of Corruption

Data Collection Questionnaire

According to a recent study carried out by the Stolen Asset Recovery (StAR) Initiative on international efforts to recover assets and proceeds of corruption between 2010 and 2019, significant inroads have been made both in terms of total volumes recovered and numbers of countries involved. However, only a small fraction of the assets resulting from corrupt practices are effectively confiscated, which points to an ongoing need to step up efforts to recover stolen property through all available legal tools. Among these tools, equivalent value-based confiscation (VBC) does not appear to have been thoroughly discussed despite its potential to make asset recovery actions more agile, efficient, and broader.

StAR aims to encourage the adoption and use of VBC as a mechanism that can facilitate the recovery of assets that are not linked to a corruption offence but whose value corresponds to the proceeds derived from the offence (or related instrumentalities). In this regard, StAR is developing a new knowledge product related to VBC as an asset recovery tool.

As part of the drafting process, the following questionnaire seeks to collect information on how jurisdictions understand VBC measures and put them into practice. The answers to this questionnaire will be collated to identify common trends, legal and practical challenges, as well as good practices, including in executing foreign requests.

Please provide your personal expert opinion, when possible. We aim to create a practitioner-oriented knowledge product and request you to express your views as candidly as possible. Please be assured that no statement will be attributed to a specific individual/country official.

Please refer to relevant legislation and jurisprudence/case law to answer the following questions, by providing direct links (if possible, in English) or by attaching them to your responses.

1. Equivalent Value-Based Confiscation (EVBC): Domestic Mechanisms

Hypothetical Scenario: For the purposes of this questionnaire, we would like for you to consider the following scenario:

Mr X is convicted of a bribery offense and judged to have profited to the tune of US\$1 million. The bribe proceeds have dissipated or cannot be traced. However, Mr X does have a large house, securities portfolio, and bank account, all of which **are not related to** the bribery offense (hereinafter “**the unrelated assets/EVBC**”).

a. Legal Mechanisms: Under this scenario, can a confiscation judgment be executed against the (a) house (real estate), (b) securities, and (c) bank account?

Please check: Yes _____ No _____

Only specific assets. If so, why? _____

i. Does such execution depend on proving that the proceeds themselves are no longer available (i.e., is it subsidiary in nature)?

ii. Would your answer to this question differ if the conviction were for money laundering/ embezzlement/fraud offenses, etc.?

b. What challenges do you encounter, if any, in your jurisdiction, in enforcing such legal mechanisms of confiscation of unrelated assets/EVBC?

2. Equivalent Value-Based Provisional Measures: Domestic Mechanisms

Hypothetical Scenario: Consider the same scenario as above with the only difference being that the bribery case against Mr. X is still in the investigation stage.

a. Legal Mechanisms: Under this scenario, can temporary measures be taken against the unrelated assets (house/securities/bank account) with a view to ensuring that they are not dissipated?

Please check: Yes _____ No _____

Only on some of these assets. If so, why? _____

i. Does such execution depend on a showing that the proceeds themselves are no longer available (i.e., is it subsidiary in nature)?

ii. Would your answer to this question differ if the conviction were for money laundering/ embezzlement/fraud offenses?

b. What challenges do you face enforcing temporary measures on unrelated assets/ EVBC?

3. Equivalent Value-Based Seizure/Confiscation: International Cooperation

Hypothetical scenario: Consider the same scenario as above, however, proceedings are established in a foreign jurisdiction and the suspect/defendant is located abroad. The foreign jurisdiction sends you a mutual legal assistance (MLA) request for provisional measures or enforcement of its confiscation order for unrelated assets that are *in your jurisdiction*.

Incoming MLA Request: Can your jurisdiction execute the request (for either the temporary measure or the confiscation)?

Please check: Yes _____ No _____

a. If yes, are there any conditions? (For example, would your jurisdiction require the foreign jurisdiction to show that it cannot satisfy the verdict with assets that are available domestically before you would entertain such a request?)

b. If not, why? (For example, because your jurisdiction requires a link between the assets and the offense)

4. Benefit Calculation

a. How do you calculate the amount of the benefits stemming from a corruption offense? (For example, do you consider the gross or only the net benefits? How about the indirect gains made by the corrupting agent? Are codefendants found jointly or separately liable?)

b. Is there any specific or explicit guidance for the benefit calculation or do the courts have wide discretion? What are the key challenges faced in the calculation effort?



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