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Technical assistance**Revised draft non-binding guidelines on the management of
frozen, seized and confiscated assets***Summary*

The present conference room paper contains a version of the draft non-binding guidelines on the management of frozen, seized and confiscated assets, which has been revised by the secretariat to include some of the specific proposals received from the States parties to the United Nations Convention against Corruption.

This conference room paper should be read in conjunction with the note transmitting the draft guidelines for the consideration by the Implementation Review Group at its second resumed ninth session ([CAC/COSP/IRG/2018/10](#)), as contained in document ([CAC/COSP/WG.2/2018/3](#)). Moreover, a second conference room paper will be made available to the Group, containing all input from States parties on this matter, in the form in which they were received ([CAC/COSP/IRG/2018/CRP.15](#)).

* [CAC/COSP/IRG/2018/1/Add.2](#).



I. Introduction

1. One of the areas for which priority needs have been identified in Conference resolution 7/3 is the implementation of article 31 of the Convention on freezing, seizure and confiscation. In response, UNODC has published a study entitled *Effective Management and Disposal of Seized and Confiscated Assets 2017*. Furthermore, in its resolution 7/1, the Conference encouraged States parties and UNODC to continue sharing experiences on the management of frozen, seized and confiscated assets, identifying best practices as necessary and building on existing resources, and to consider developing non-binding guidelines on that issue. Accordingly, the Secretariat, based on this study, developed draft non-binding guidelines on the management of frozen, seized and confiscated assets and presented them to the Group at its ninth session and the Working Group on Asset Recovery at its twelfth session ([CAC/COSP/WG.2/2018/3](#)), where many speakers welcomed the draft guidelines and expressed the view that more time should be allocated to consider them.
2. In a note verbale dated 19 July 2018, the secretariat invited the States parties to the Convention to provide their views on the draft guidelines by 31 August 2018.
3. By 15 October 2018, comments were received from the following States parties: Australia, Austria, Belgium, Chile, Germany, Guatemala, Hungary, Ireland, Malaysia, Mauritius, Poland, Portugal, Russian Federation, Switzerland, Ukraine and United States of America.
4. The draft guidelines below reflect, to the extent possible, the comments received.

II. Revised draft non-binding guidelines on the management of frozen, seized and confiscated assets

Background and Purpose

Article 31(3) of the United Nations Convention against Corruption (Convention) requires States parties to adopt, in accordance with their domestic law, such legislative and other measures as may be necessary to regulate the administration by the appropriate authorities of frozen, seized or confiscated property covered by the Convention.

The Mechanism for the Review of Implementation of the Convention revealed that several States parties faced particular challenges and noted corresponding technical assistance needs with article 31. Among them, the administration of frozen, seized or confiscated property featured prominently (23 per cent of all challenges and technical assistance needs cited). The main issues where States reported challenges were the absence of a body tasked with the management and disposal of frozen or seized and confiscated assets and the lack of an effective legal framework governing the administration of frozen or seized and confiscated assets.

In line with the UNODC Study on the “Effective management and disposal of seized and confiscated assets”, the non-binding guidelines on the management of frozen, seized and confiscated assets address arrangements (both legislative and institutional) at the domestic level to deal with the management and disposal of frozen or seized and confiscated property. The transfer or return of property of illicit origin in terms of a country’s mutual legal assistance obligations are not specifically addressed.

A. Administration of assets and, where possible, their disposal prior to a final confiscation

Guideline 1

To the degree possible, States should commit dedicated resources and adequate capacity for pre-seizure planning and should aim at making pre-seizure planning part of the routine, everyday work of law enforcement agencies

Pre-seizure planning may be described as the process of evaluating assets and confiscation scenarios prior to freezing or seizure of property. The potential for interim use or pre-confiscation sale of the asset is also considered in this context. If the asset is left in the custody of the owner, pre-seizure planning assists in devising the kind of restrictions that ought to be placed on the use of the asset, as well as the measures needed to monitor compliance with such restrictions. If the asset is to be frozen or seized, pre-seizure planning will focus on determining the best way to avoid high costs for storing it and to manage legal liabilities as well as reputational risks. The objective is for law enforcement to fully assess the options available for securing an asset in a way that best preserves its value and to evaluate and mitigate the risks associated with the freezing or seizure of that asset.

Decisions to be taken during this process include the following:

- Should interim measures be taken at all?
- Which assets should be frozen or seized?
- Should the asset be left under the control of the owner or possessor, or should the responsible State institution take it under its control (see guideline 3)?
- If the asset is left under the control of the owner or possessor, which restrictions on its use and disposal should be requested?

- If the asset is placed under the control of the responsible State institution, which administrative measures need to be prepared? Which legal liabilities and reputational risks need to be managed?
- Is there potential for pre-confiscation sale, disposal or use (see guidelines 2 and 3)?
- Does the management of the asset require a specific skill set not available within the authority responsible for the management of frozen or seized and confiscated assets, and what legal avenues are available to employ such skills, either through contractors or by applying to the court for the appointment of an asset manager?

The aim should be to draw up a logistical plan starting from the day of the seizure of the asset.

Legislation or standards of practice should define procedures for pre-seizure planning and provide criteria, guidance or minimal conditions on when to freeze or seize assets, taking into account, for example, expected resource requirements for maintenance, the estimated value of the asset to be frozen or seized and the law enforcement objectives of the interim measure. The responsibility for pre-seizure planning should generally lie with the entity responsible for the management of frozen or seized assets, in a consultative process with (other) law enforcement institutions, including the entity responsible for issuing the seizure or freezing order.

Informed decisions on the questions listed above require the capacity for detailed research into the conditions, location, ownership status, value, law enforcement benefits and specialist expertise needed for the management of the asset. Law enforcement agencies need to have access to the multidisciplinary skill set necessary to take informed decisions in the pre-seizure phase.

Guideline 2

Subject to domestic law, States should consider permitting pre-confiscation sale with or without the owner's consent in defined scenarios

Because the final determination of an asset has yet to be made in the interim phase, some jurisdictions forbid the sale of assets prior to confiscation or limit the sale to perishable goods only. However, approaches to the sale of assets pending final confiscation are evolving. Since the costs of storing and maintaining deteriorating assets over long periods of time mount, countries increasingly make provision for the pre-confiscation sale or disposal (also referred to as interim sale, interlocutory sale, early sale or anticipated sale) of assets in defined scenarios.

The ultimate goal when managing frozen or seized assets is to ensure that they are preserved at minimum cost and yield maximum return when realized. In view of the cost of asset management and the time needed until a final decision is made, when the asset does not constitute evidence in a criminal investigation, States should consider the possibility of pre-confiscation sale or disposal (also referred to as interim sale, interlocutory sale, early sale or anticipated sale), which consists in disposing of assets before a final court decision, States should strike a balance between the cost-efficiency of asset management and the legitimate interest of the owner in the preservation and return of the asset when a confiscation order is not granted.

Therefore, priority should be given to obtaining the owner's consent, which allows the costs related to interim management to be mitigated while protecting the owner's substantive and procedural rights.

Pre-confiscation sale or disposal should however also be considered without the owner's consent for certain situations and limited categories of assets, such as the following:

- Perishable assets
- Rapidly depreciating property

- Assets whose storage or maintenance cost is disproportionate to their value
- Assets that are difficult to manage, or whose management requires special conditions or expertise not readily available
- Assets that are easy to replace
- Assets whose owner has absconded

Some countries also allow the sale of assets under certain additional conditions in order to pay for the costs of legal representation and expenses incurred for other frozen or seized assets.

Proceeds from pre-confiscation sale or disposal should be secured until a final decision is reached. Legislation should also determine who receives the interest earned, if any, in case the property is returned to the owner. Steps should be taken to protect buyers from possible retaliation, including in some circumstances protecting the identity of buyers.

Guideline 3

States should consider providing for a range of choices for interim measures, which take into account the nature of the assets to be managed. These interim measures may include (a) retaining the asset in the possession of the owner or possessor; (b) the interim use of assets; and (c) the destruction of unsafe, hazardous property, or property that has no commercial value

With a view to the policy objectives of the interim stage, legislation should include the possibility of (a) retaining an asset under the custody and control of its owner or the persons or entity that held it prior to the interim order, subject to restrictions on use, together with a positive obligation to maintain its value; (b) interim use of assets, that is placing the asset in the custody of a third party, including the State and its institutions, which can ensure its productive use; and (c) destroying unsafe, hazardous property, or property that has no commercial value.

Leaving the asset under the control of the owner or possessor can be cost-effective, as expenditures such as those related to the cost of storage, maintenance and security may thereby be avoided. However, resources are required for the institutions to monitor compliance with the court's freezing or seizing order.

The interim use of assets is a controversial measure because it may cause their deterioration and depreciation, which makes it challenging to guarantee the legitimate interest of the owner in the preservation and return of the asset when a confiscation order is not granted. States that allow for interim use of assets should carefully analyse how the measure is applied in each concrete case in order to ascertain the risk of future claims for compensation and damage. They should require the recipient institution to provide appropriate guarantees that the asset will be returned in a good state, and may also require full-risk insurance coverage from the institution. A fund should be created with the objective of bearing the costs not covered by such an insurance policy. Unless there is a compelling purpose, the interim use of assets by law enforcement should be avoided because it can create incentives for law enforcement to seize assets for the purpose of benefiting from them, rather than for genuine law enforcement objectives.

When dealing with hazardous property, States should ensure that the procedure for its disposal is speedy and efficient, including when the asset is under the control of third parties.

Guideline 4

To the degree possible, States should endeavour to notify third parties of the interim measures and give them the opportunity to challenge them before a judicial authority

To the degree possible, States should ensure the protection of bona fide third parties during the period of effectiveness of interim measures (see art. 31, para. 9, of the

Convention). In this regard, States should consider adopting legislation to guarantee that (a) the interim measures are communicated to the persons or entities affected by the measures where known, as soon as possible; and (b) those persons or entities have the opportunity to challenge them before a judicial authority at an early stage.

Distinguishing, during the interim stage, a bona fide third party from persons associated with the suspect or acting at the suspect's behest may be challenging. Thus, in order to determine the nature of third-party claims, the following factors may be assessed:

- Did the third party take action to prevent the offence?
- Is the third party implicated in any other related offence?
- Does the third party have a legitimate interest in the property and have an arm's-length relationship with the suspect?
- Did the third party act diligently and in accordance with the law in the creation of the interest in the asset?

B. Enforcement of confiscation orders and the use of confiscated assets

Guideline 5

States should consider providing a range of choices for confiscation, so that practitioners can take into account the most cost-efficient and productive method for the disposal of assets when ordering confiscation

When a confiscation order is requested and entered, practitioners should be in a position to take informed decisions in order to fully implement the policy objectives of the confiscation. Confiscation systems should therefore allow for confiscation orders that are tailored to the specific confiscation case, including as follows:

- States should consider providing not only for object-based confiscation, but also for value-based confiscation that allows for the confiscation of any property the value of which corresponds to that of the proceeds of the alleged offence (see art. 31, para. 1 (a), of the Convention). Subject to domestic law, States should consider introducing value-based confiscation as an available option regardless of whether the asset constituting the proceeds of the offence is still within the property of the addressee of the confiscation order.
- When value-based confiscation orders are permissible, effective enforcement procedures beyond civil collection should be available. These could include special realization proceedings for confiscation cases, penal execution proceedings against third persons cooperating with the offender or additional periods of imprisonment for non-compliance with the order. Some States use civil collection procedures but give the asset management office specific powers, for example, the right to request information on the financial situation of the convicted person from all administrative services of the Government.
- In order to ensure the practical enforceability of value-based confiscation orders, States should ensure where possible that the confiscation order foresees that sufficient assets are frozen or seized from the outset.
- With regard to object-based confiscation orders, there should be a transparent procedure to decide whether to sell confiscated assets or retain them for use by the State, for example, by law enforcement.
- When confiscated assets are sold, steps should be taken to protect buyers from possible retaliation, including in some circumstances protecting the identity of buyers.

Guideline 6**States should articulate in their legislation their fundamental policy preferences for the allocation of confiscated assets**

There are, in particular, two options for the disposal of confiscated assets: their allocation to the national revenue fund to meet general government priorities, or to specific objectives, such as crime prevention. Allocating confiscated proceeds to the national revenue fund may be the most cost-effective form of disposal, and has the advantage that general approval and oversight mechanisms apply in its administration. On the other hand, allocating the proceeds to specific programmes creates a direct link between asset confiscation and specific policy objectives such as the compensation of victims, the benefit of communities and the fight against crime, thus adding symbolic value to the allocation. Moreover, it makes it easier to track the use of confiscated assets and makes their use concretely visible.

Guideline 7**When States allocate confiscated proceeds to specific objectives, clear rules for determining the beneficiaries should be established**

States that have opted to allocate proceeds to specific objectives should lay down clear and detailed rules on how the beneficiaries of confiscation orders are determined, which may include the following:

- Some countries have opted for the proceeds of confiscation orders to be paid into a designated fund established by law. This is an interesting option when funds to be allocated are considerable, since these funds require their own infrastructure and oversight mechanisms (see guideline 8).
- Some countries allow for a portion of the proceeds of the disposal of assets to be used to fund the asset management office. This can significantly boost the asset management programme, in particular in countries with intense competition for resources from other priorities. Such an approach can lead to wholly or partially self-funding asset management offices (see guideline 14).
- Some countries also allow the use of confiscated proceeds for specific law enforcement purposes outside of the ordinary budgetary process (see guideline 8).
- Several international instruments encourage States to prioritize the use of the proceeds of a crime to compensate its victims (e.g., art. 35 of the United Nations Convention against Corruption and art. 25 of the United Nations Convention against Transnational Organized Crime).
- Social reuse initiatives make the confiscated property available to the affected communities in an effort to restore compliance with and confidence in the rule of law. Social reuse is particularly relevant to societies in which criminal groups have become so entrenched in communities that law enforcement action against them is met with hostility, if not active resistance (see guideline 8).

Guideline 8**States should give specific consideration to transparency and accountability when managing and disposing of assets, in particular when specific funds or programmes are used**

In all cases, transparency and accountability are key factors for the effective management and disposal of assets, as well as for addressing corruption risks inside asset management offices themselves. This is of particular importance where general transparency and accountability rules have not been put in place, for example, where specific structures for disposal have been established. Specific funds for confiscated assets or specific projects need to allocate capacity and resources to ensure the

transparent management and accountability of such structures. In that regard, the following should be taken into consideration:

- If a country chooses to establish an asset recovery fund, the law should specify the persons with responsibility for making decisions regarding the fund, the purposes for which the deposited funds can be used and the fund's oversight mechanisms, including clear audit and reporting obligations. Special funds typically require infrastructure to manage and account for deposits received and outgoing transfers. Where the legislation is silent on the purposes for which the funds may be used, mechanisms should be put in place to ensure their fair and transparent allocation. After the costs associated with the management and sale of an asset are recouped and the victims' claims are satisfied, a certain amount may be retained for operational expenses, under strict auditing controls.
- If law enforcement agencies are allowed to benefit from confiscated assets, safeguards should be established to avoid any direct link between confiscated assets and rewards provided to law enforcement officials, in order to avoid creating improper incentives.
- If States institute social reuse initiatives, they should develop a coherent strategy for their implementation and verify the use to which the allocated funds or assets have been put. Moreover, States should ensure that the necessary infrastructure is in place to support, monitor and account for such projects.

Guideline 9

States should give due consideration to procedures for the prompt return of frozen or seized assets if the confiscation order is not granted

In the event that a final confiscation order is not issued, the property should ordinarily be returned as quickly as possible. The circumstances under which an owner is entitled to claim compensation may be outlined in legislation, for example, in cases where property has been lost or degraded as a result of negligence on the part of the asset manager. How such claims are to be administered should be specified in the legislation. States should ensure that the responsible authority is not exposed to incalculable risks in terms of compensation claims, either by limiting its liability to only that of gross negligence and intentional damage caused to the asset or by providing for insurance coverage against such risks.

In some States, before returning frozen or seized property to its owner, government departments that have outstanding debts owed to them by the accused are allowed to recover payment from the frozen or seized funds. This applies in particular to tax authorities and social security contributions.

Guideline 10

All persons having an interest in the assets should have an opportunity to make their claim known

Third parties should be notified of the confiscation order and have the opportunity to make their claim known during confiscation proceedings, as during the interim phase (see guideline 4).

C. Institutional structure for asset management

Guideline 11

States considering the establishment of a dedicated asset management office should take into account the volume of assets being frozen or seized and confiscated and the skill set already available in their public institutions. Should States decide to establish a dedicated asset management office, the autonomy and accountability of such an office, and the possibility for the office to participate in pre-seizure planning should be given due consideration

States have developed a variety of institutional arrangements for the cost-effective preservation of frozen or seized assets and for securing the maximum return on the confiscated assets. The following broad categories of asset management office arrangements, while not intended to be exhaustive, lend themselves to further consideration by States wishing to establish such an office:

- *Asset management offices located within an existing law enforcement agency or responsible ministry* (examples of States with such arrangements include Belgium, Czechia, the Netherlands, Thailand and the United States of America). In some of these countries, the asset management office is also responsible for promoting asset confiscation as a law enforcement tool, in addition to the usual asset management functions. For example, such offices have a role in asset tracing, training and advising other practitioners on confiscation, serving as the focal point for international asset recovery cooperation, pre-seizure planning, litigation support or distribution of proceeds.
- *Asset management offices located within public service entities with additional property management-related functions* (examples of States with such arrangements include Australia, Mexico and New Zealand). These offices make full use of the specialized and multidimensional skills typically available in property management offices.
- *Self-standing asset management offices* (examples of States with such arrangements include Canada, Colombia, France and Honduras). This option is considered particularly desirable when the scale of confiscated assets has reached a level that justifies the cost of operating such an office. The establishment of a self-standing asset management office can also be motivated by a desire to separate investigative and prosecutorial functions from asset management functions. All institutions should remain diligent in ensuring fluid communication between investigative, prosecutorial and managerial bodies.

Notwithstanding the institutional arrangements a State chooses, in some legal systems courts generally appoint the asset management office as the receiver of the assets. Furthermore, in some countries, judicial managers are appointed specifically to deal with complex assets. Alternatively, an asset management office may employ contractors from the private sector for that purpose (see guideline 12).

Guideline 12

States should equip the institutions tasked with asset management with adequate skills and capacities, as well as empower them to enter into any necessary agreements, as required for their effective functioning

The same capacities, functions and expertise are typically required, regardless of the type of asset management system in place, including the following:

- Expertise in asset inspection, appraisal and valuation
- Asset registration and data management (see guideline 13)
- Storage and transportation facilities
- Specialized skills related to the management of complex assets
- The capacity to provide pre-seizure advice to other authorities

Depending on the size of the office, the assets regularly managed and the resources available, such capacity may be developed in-house or provided by external contractors.

When deciding to use external contractors, States should consider possible risks in terms of accountability and liability. To mitigate some of these risks, States should consider awarding longer term contracts on a competitive basis for routine recurring services, such as value appraisals for real estate properties or cars, as well as asset maintenance tasks.

Institutions tasked with asset management should be able to either contract all necessary expertise or apply to the court for the appointment of asset managers with specific expertise not available in the asset management office. In addition, asset management offices should be able to enter into any contracts that make their work cost-effective, for example, to make improvements to an asset that go beyond mere maintenance, with the aim of selling the asset at a better price.

Guideline 13

States should consider investing in the resources necessary for central asset registration, databases and data management

Monitoring the location, maintenance, costs incurred and payments made with regard to an asset management order is important for the effective and accountable management of assets. Such information should be kept throughout all phases of a case, including investigation, interim measures, confiscation and disposal. Even if different law enforcement agencies own the information, it should be fed, consistently, into a centralized, structured database maintained by specialized personnel (detailed recommendations on the content of such databases have been made by the Organization of American States). Such systems can also be used to track the direct costs associated with the maintenance and disposal of assets which in turn is important information for pre-seizure planning and budgeting. Ensuring consistency may require the allocation of special resources. Many States have developed their own information technology solutions, as existing databases have not met their expectations.

Guideline 14

With regard to the funding of asset management offices, States should also consider whether these offices should be allowed to fund their operations wholly or partially from confiscated proceeds, thus over time making them economically viable by covering all or part of their own costs

The asset management office should include in its budget, inter alia, the following:

- General operating costs, including those related to the staffing of the office with the necessary skills and capacities (see guideline 11), office space and the employment of specialist contractors. These should include sufficient minimum liquid resources available to fund the work necessary to identify and restrain assets before they are sold.
- For frozen or seized assets, the costs of registration and data management (see guideline 13), storage and active maintenance incurred to maintain the value or profitability of the asset, including for improvements enabling it to be sold at a better price.
- Costs related to the monitoring of compliance with the conditions imposed in a freezing order, as well as costs related to external monitoring and auditing.
- Litigation costs.

Which funding model is employed to maintain the asset management office depends on the decisions taken with regard to the disposal of confiscated assets (see

guidelines 6 and 7), in particular whether the asset management office can also be funded from recovered proceeds.

Over time, the operating costs of asset management offices might increasingly be financed from the proceeds of the sale of confiscated property, the income earned from investments made with frozen or seized cash and the proceeds of pre-confiscation sales, fees earned from the management of productive assets and, in some countries, from fines imposed. Some asset management offices have not only become self-funded but produce net proceeds that are regularly fed into the national budget or government funds. Nevertheless, it is important to plan for sufficient external resources for the initial stages of establishing an asset management office, as well as to ensure that the function of the office is not made dependent on its economic viability.
