

THE MANAGEMENT OF FROZEN AND FORFEITED ASSETS IN BULGARIA

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Civil forfeiture of illegally acquired assets is one of the most important tools in the fight against crime. Forfeiture is used by state authorities to strip criminals of their illicit proceeds, thereby preventing them from expanding illegal activities and reinvesting their proceeds into the legal economy. A secondary benefit of forfeiture is that forfeited property, or the proceeds of its sale, may be used to provide specialised services for the benefit of victims of crime. Moreover, the social re-use of forfeited criminal assets, which are transferred to local municipal authorities or non-governmental organizations, may serve as setting a public example for crime groups and is key in achieving transparency in the fight against crime.¹

To that aim, the EU has adopted a number of policies and legislation, setting a wide range of strategic objectives before the Member States. The EU Internal Security Strategy identifies serious and organized crime as one of the biggest threats before the Community. Having regard to previous legislation on the matter, the Strategy sets as its prime objective the disruption of international criminal networks.² The elimination of the financial incentives that drive these networks is a crucial measure for combating crime.

KEY POINTS

- The effective management and disposal of illegally acquired frozen and seized assets presents a major challenge within the overall crime fighting and prevention framework in Bulgaria.
- Revenues from the public sale of forfeited illegally acquired assets remain low when compared to the respective total declared value of seized assets.
- Social re-use of forfeited property takes place rarely.
- IT solutions are not effectively applied to the process of civil forfeiture and the management of frozen and seized assets.
- The adoption of the Counteracting Corruption and Forfeiture of Illegally Acquired Property Act in 2018 preserves the status-quo of asset seizure to be institutionally detached from agencies with criminal investigative powers, such as the MoI or the Prosecution Office, which is in contrast with established best practices in leading EU states.

¹ SAPUCCA, “Organised Crime and the Fight against Crime in the Western Balkans: A Comparison with the Italian Models and Practices. General overview and perspectives for the future”, 2013, p. 42-45.

² Communication from the Commission to the European Parliament and the Council - The EU Internal Security Strategy in Action: Five steps towards a more secure Europe (COM (2010) 673 final of 22.11.2010)

Legal and Institutional Framework

The legislative and institutional setup for civil forfeiture in Bulgaria has been enduring dynamic changes and developments in recent years. Continuous efforts to increase institutional capacity and operational effectiveness in the field of asset forfeiture began with its introduction in 2005 and have presently culminated in the passing of ***Counteracting Corruption and Forfeiture of Illegally Acquired Property Act*** (CCFIAPA) in 2018. CCFIAPA brought about minor changes in the management of frozen and seized assets and instituted a new government structure that merges three previously independent bodies – the Commission for Illegal Asset Forfeiture, the Commission for Prevention and Ascertainment of Conflict of Interest and the Center for Prevention and Countering Corruption and Organized Crime.

Forfeiture was first introduced with the ***Forfeiture in Favour of the State of Property Acquired from Criminal Activity Act*** (FFSPACAA) adopted in 2005, which allowed for the freezing and seizure of assets, directly or indirectly acquired through crime. The aim of the Act was to limit the opportunities for harvesting proceeds of crime and prevent the disposal of property acquired from criminal activity. Such forfeiture was applicable even to assets and property outside of the jurisdiction of the Bulgarian court. In addition, the Act established a *Commission* with investigative mandate to apply the provisions of the law.

In 2012, the ***Forfeiture in Favour of the State of Illegally Acquired Property Act*** (FFSIAPA) introduced for the first time the procedure of civil forfeiture. The provisions of the Act stipulated that any property under investigation by the Commission could be left in the care of the investigated person. Considering similar provisions in other EU states this development is rather the norm and is applied with a view to minimise state expenses on the management of frozen and seized assets. In specific cases, for example when

freezing and seizing automobile vehicles, these are taken care of by the Traffic Police and as a rule stored at Traffic Police authorised locations. At the request of the Commission, the court may assign a custodian to the property. In any case, the person overseeing the property is under the obligation to exercise good care and to inform the Commission regarding any subsequent legal proceedings, transfer of ownership, financial burdens or damages suffered. In the case that, due to its specificities, a property could lose some or all of its value, the Commission may submit a request to the court to sell the property in order to secure its collateral value. Practice show that this option is rarely enforced and is mostly implemented for quickly perishable property.

The new law also established provisions regarding the management and disposal of seized assets, constituting an *Interinstitutional Council* to facilitate cooperation with the National Revenue Agency (NRA) and other institutions. The Council is comprised of five deputy ministers, representing all institutional stakeholders, with the deputy minister of finance serving as its chair. The Commission is under the responsibility to report to the Council on a monthly basis all court decisions on forfeited property that have entered into force. Court decisions regarding forfeiture and all accompanying documents are to be reported to the Council within three days of their issue. The Council issues proposals to the Council of Ministers of the Republic of Bulgaria, with recommendations to either sell a forfeited property or transfer it into the care of a budget organization or a local municipality. In the event that the Council of Ministers issues a decision to sell a property, it is then assigned to the National Revenue Agency, which has the responsibility to sell it in accordance with the ***Tax and Social Insurance Procedure Code***. In case the procedure fails, the NRA returns the request to the Council for a new decision regarding its further disposal.

The ***Counteracting Corruption and Forfeiture of Illegally Acquired Property Act*** (CCFIAPA) adapted the approaches of previous acts and introduced very

few changes with regard to the management of frozen or seized assets. New provisions implied that the Commission has the utmost responsibility for managing frozen assets. However, this provision lacks an imperative character, as the property could still be left in the care of the investigated person or an appointed custodian, without any clear selection criteria being applied, which would ensure that the property will be adequately handled, stored and preserved. In this sense, the management of a frozen asset under the remit of the Commission is effectively outsourced in the care of external actors.

Public debate has also risen over the lack of a provision regulating the management of forfeited assets in some specific cases, such as in the case of forfeiting securities or business enterprises, the price of which can be considerably reduced if badly managed.³ This practice is poor in precedents and proves quite problematic, as the seized companies are often shell companies of straw men, with no actual assets. Seized company shares were successfully sold by the NRA for the first time in 2016.⁴

It should be noted that the rule whereby at least 30 percent of the profit from the sale of forfeited assets should be used to achieve social goals has existed since 2016 in the regulatory framework, before it was revoked by virtue of the last amendments⁵ of the **Act on Public Finance** adopted in late 2017. The current provisions set an analogical rule,⁶ which indicates the inconsistent legislative approach to that matter.

The most innovative provision within the new law is the requirement for the implementation of *electronic registers*. In line with the national e-governance efforts, these registers should collect data regarding the revenue declarations of public servants, court decisions and administrative acts pertaining to established conflicts of interests, as well as data on frozen and forfeited property.

It remains to be seen how these registers will support the work of the Commission, the Council and the NRA and whether or not they will effectively become part of a working e-governance framework through integration with other registers and databases used in the administration.

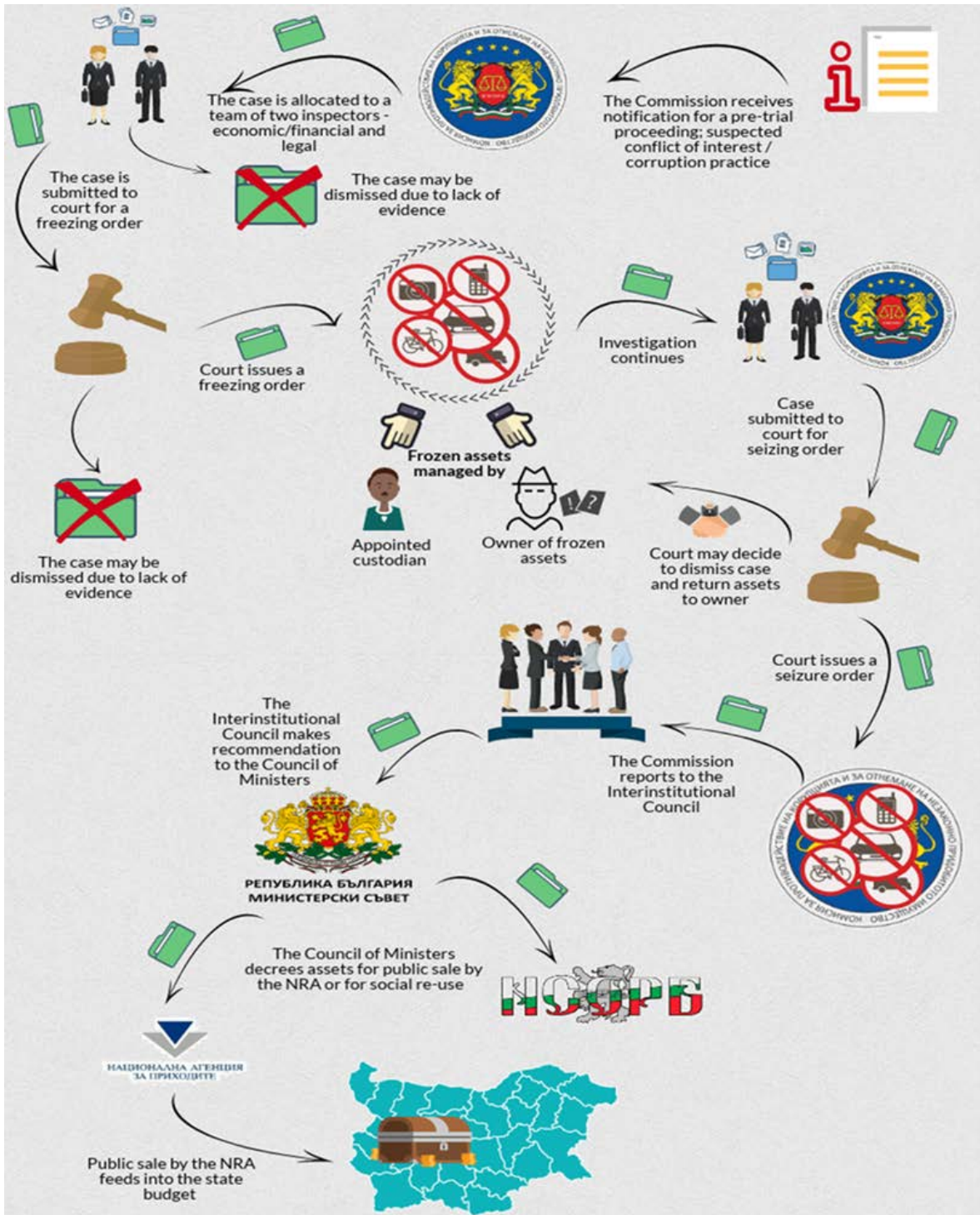
³ Motives for returning for consideration to the National Assembly of the Act on counteracting corruption and on forfeiture of illegally acquired property passed by the 44th National Assembly on 20 December 2017, Decree № 274 of the President of the Republic of Bulgaria, 29.12.2017

⁴ National Revenue Agency, Annual Report, 2016.

⁵ Act amending and supplementing the Act on Public Finance of 1 Nov 2017, § 36

⁶ CCFIAPA, Art.168. (5)

Figure 1. The current procedure for civil forfeiture and asset management



Key Challenges in the Management Process

Administrative

One of the fundamental challenges before the Commission is the lack of sufficient financial and human resources. Due to budgetary constraints, the Commission has not filled all available positions – only 206 people are currently employed out of 310 needed state-wide.⁷ This creates a significant work load for the inspectors in the regional offices, who work on an annual average of 80 cases, in addition to their duties with regard to procedural representation before the courts. This raises the question of the quality of maintenance, needed to be applied to frozen assets, especially those put in the care of a custodian whose remuneration is paid for by the Commission.

The lack of adequate selection criteria within CCFIAPA regarding the appointment of a custodian is a deficit within the law. In the event that the person responsible for taking care of a frozen property, be it its investigated owner or the appointed custodian, does not effectively perform his duties of due care, the Commission has few other options but put a request to place the property under someone else's care, without any specific liability or penalty being carried or imposed. This legal deficit may have arisen out of budgetary constraints, wherein the state does not deem it reasonable to dedicate additional targeted resources for the control over the managing and custodianship process. Nevertheless, this development creates the possibility of mismanagement and devaluation of property, resulting in damages to the social interest and the purposes of the law as a whole.

Procedural

An analysis of the procedural provisions of the law shows that they lack sufficient guarantees for their objective and impartial enforcement, which is very important in the proceedings related to the forfeiture of illegally-acquired assets since a constitutionally protected right, such as the right to ownership, may be seriously infringed. One of the two prerequisites for initiating court proceedings on freezing and forfeiting illegally acquired assets involves establishing substantial discrepancy between declared income and observed expenditure. Given that the evaluated properties may include different components and that correctly defining their value determines whether the forfeiture proceedings will be instituted or not, the legal framework should clearly specify the methods used to define the market value of the assets. This will be a sufficient guarantee that in all cases the Commission will apply the same methods to define the market price of assets, thus upholding constitutional rights.

Another procedural discrepancy may arise from the fact that in order to initiate proceedings, the Commission must find that there are legal and factual circumstances in existence up to the date of opening of the investigation. The law also provides for the Commission to open proceedings in view of the occurrence of future, anticipated legal facts. It is also possible that the Commission initiates proceedings in light of past facts that are established or claimed. However, those two hypotheses are an exception, not the rule itself. A requirement of a pending criminal procedure regarding the person, whose property is to be investigated by the Commission, is of utmost importance.⁸ It is explicitly required that the investigated person be apprehended as an accused for a particular crime (a list of which is provided within the law) and have the

⁷ CIAF, Annual Report 2017, p.5.

⁸ See for example Ruling №662 of 21 November 2017 of the Court of Appeal of Varna.

legal statute of an accused to the date of the start of the investigation. The subsequent loss of this statute - for example, due to a conviction or acquittal of the person, does not in any way affect the investigation already under way. However, in pending cases in accordance with the old provisions, it has been argued that if the person has already been acquitted, and thus the criminal proceeding has been terminated, the Commission loses its legal standing for the investigation, which needs to be accordingly terminated.⁹ As substantive ambiguity exists regarding this issue,¹⁰ the Supreme Judicial Council asked the Supreme Court to issue an interpretative ruling on the matter. The ruling is expected in April, 2018¹¹ and will have serious consequences for the judicial practice on the matter and the work of the Commission as a whole and could lead to a very high number of cases to be brought before the European Court of Human Rights, resulting in punitive damages to the state.

The practice of the Commission also shows that in some instances, the prosecuting authority does not promptly inform it of initiated pre-trial procedures. This allows for an opportunity to evade an investigation by the Commission if the criminal case is resolved in an expedient procedure, following a guilty plea. In such cases the sentenced, loses his legal statute as a defendant, thus the Commission is precluded from starting an investigation. Apart from being notified by the prosecution, the law does not envisage a way for the Commission to become aware of a criminal proceeding. As the expedient trial procedure provided for by the latest amendments to the ***Criminal Procedure Code*** is seen as a way of evading full sentences and further investigations by other state authorities, additional legislative initiative

is needed to provide the Commission with a mechanism to combat such evasion.

Interagency Communication and Cooperation

The law provides that the Commission is only responsible for the management and safeguarding of frozen assets, while management of forfeited property is wholly within the remit of the Interinstitutional Council and, subsequently, the NRA. The lack of a control mechanism and punitive measures to be applied by the Commission in the event of mala fide behaviour on part of entities or persons vested with the care for a frozen asset creates a vacuum and a high probability of mismanagement. Moreover, the Commission's duties seem effectively limited to the sale of goods with a high risk of losing substantial part of their value or subject to rapid deterioration. However, even in this case, the actual sale is executed by an enforcement agent, with the Commission only filing the necessary documentation in the court's registry. In this way the Commission is effectively precluded from exercising its role as an independent specialized authority, as envisioned in the law, since its functions are reduced to a rather administrative character, serving as an intermediary organ between other agencies and institutions.

The law stipulates that the Interinstitutional Council, which is responsible for the management of forfeited assets, is a collective body, technically supported by the administration of the Ministry of Finance. However, it is again the Commission who is under the responsibility to report on a monthly basis on all court decisions that have entered into force, to present the Council with the complete

⁹ See for example Ruling №503 of 1 December 2016 of the District Court of Pazardzhik. See also the Position of the Supreme Bar Association regarding Interpretative Case №4 of the Supreme Court (still pending a ruling)

¹⁰ As of 13 Feb 2018, there is total of 19 pending cases on the subject – 13 in the District Courts, 1 in a Court of Appeal and 5 before the Supreme Court of Cassation.

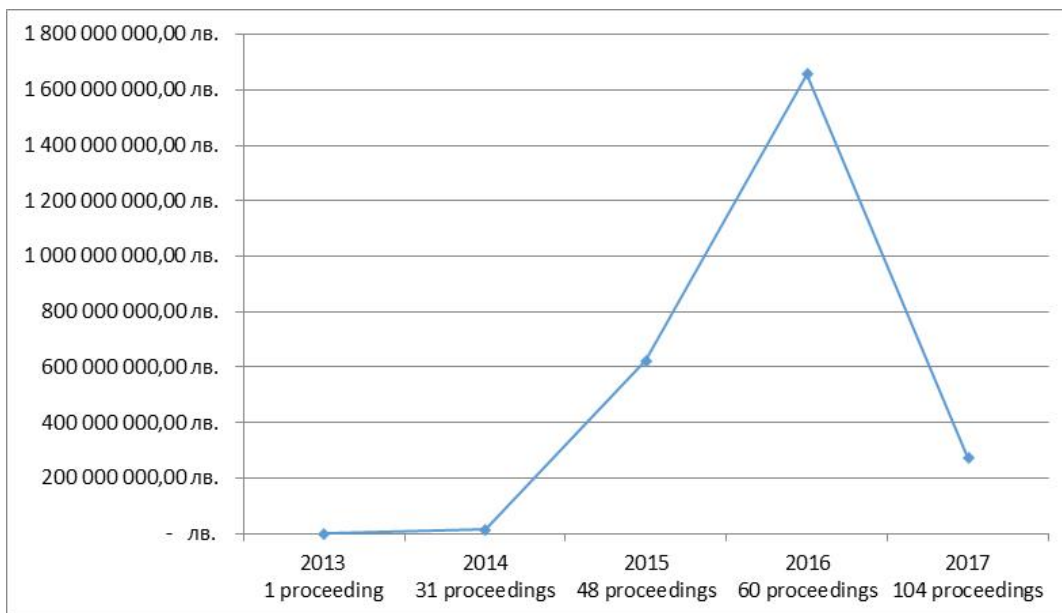
¹¹ At the end of March 2018, the District Court of Sofia referred a similar question to the European Court of Justice, whose ruling will be of substantive importance with regard to the ruling of the Supreme Court.

documentation regarding all cases it handles, and finally, prepare reports on a case-by-case basis for every meeting of the Council. These functions of the Commission underline its limited role in the management of frozen and forfeited assets.

The Council is the authority which, after deliberation on the reports prepared by the Commission, issues a recommendation to the Council of Ministers to either transfer forfeited property to a municipality or a budget organization¹² or request the NRA to sell the property.

The rationale behind involving an interinstitutional collective body in the process of managing seized assets is that it may be able to make an informed recommendation as to where a given property would be best put to use, by assuring input from a wide range of potential stakeholders. However, the Council has no oversight functions over the work of the Commission or the rest of the subject matter of the Act. The apparent ambiguity in the law and the burdensome procedure raise concerns regarding the exercise of good governance which, in accordance with the Act itself, must be accomplished through practices of accountability, publicity, transparency, integrity and efficacy.

Figure 2. Estimated value of frozen property in BGN



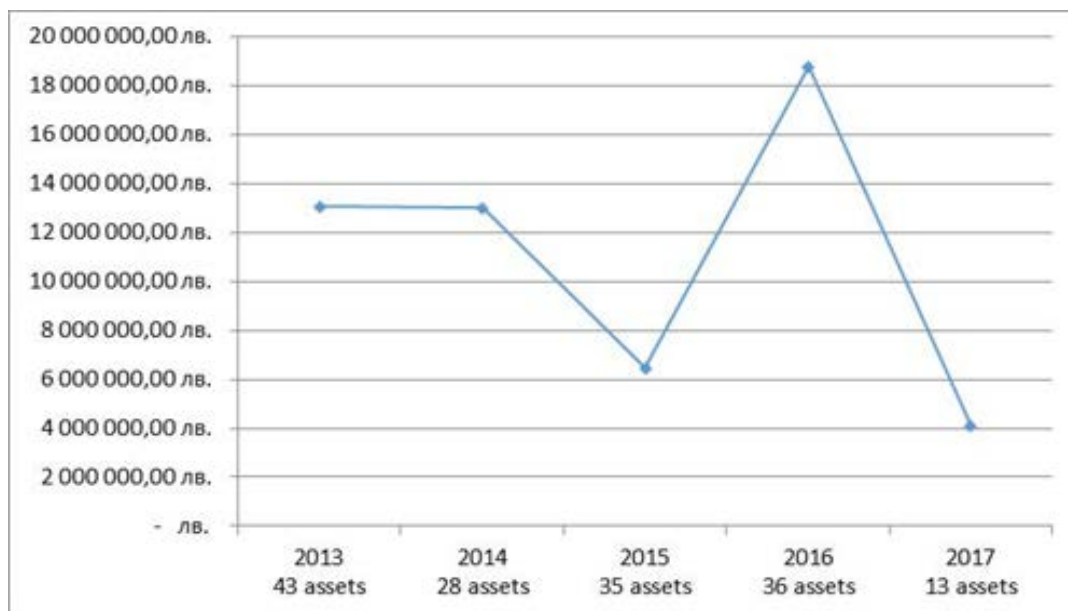
Source: CIAF, Annual reports 2013-2017

¹² For reference, please see the National Accounting Standards

Another procedural grey area is the status of an asset between the transfer of ownership, following a court ruling, and the decision of the Council of Ministers regarding its disposal. The wording of the case documentation stipulates that by the final ruling of the court on its forfeiture, the property is effectively transferred in the keeping of the NRA. The **National Revenue Agency Act (NRAA)** provides that the NRA is responsible for safeguarding, managing and selling confiscated and forfeited property.

This, however, creates a conflict with the CCFIAPA as the latter does not make any reference to the NRAA, further stating that it is the Council who is charged with managing forfeited property. This paradox creates a vacuum of legal responsibility and custodianship, thereby jeopardising the adequate management of the seized asset in the short run, while in the long term increasing the risk of diminished returns after the asset is finally disposed, in case it is damaged or depreciated during that period.

Figure 3. Estimated value of forfeited property in BGN



Source: CIAF, Annual reports 2013-2017

A comparison of the declared value of seized assets and that of the actual revenues accrued through their public sale may indicate the state of effectiveness of the overall illegal asset management framework, particularly in view of potential benefits to the national budget. A significant discrepancy exists between the value seized and the value received by the state – in 2016 the NRA sold assets seized by the Commission worth less than 2 million BGN, whereas the Commission declared value of forfeited assets at

over 18 million BGN for 2016 and just over 6 million BGN in 2015. Although given as reference, Commission numbers may not strictly correspond with NRA data, since public sale of a seized asset, from initial freezing to final disposal, may take years to finalise. Therefore, such nominal comparison should be taken cautiously and only considered as an indication.

The problem of attrition in the asset forfeiture regime, i.e. the gap between estimated criminal

profits and the actually recovered amount of money, is not restricted to Bulgaria and has been established in other EU states. Combination of factors may be considered to play a role in explaining this discrepancy. These include:

- Frozen and seized asset incur natural depreciation, devaluation, amortization and/or depletion. For example, movables, such as motor vehicles, are among the most commonly confiscated and seized assets. Automobile depreciation is contingent on brand and location. Still, research has demonstrated that a new automobile in the EU may lose from 34% to 51% of its value in the first three years. This depreciation occurs alongside normal maintenance, whereby maintenance of frozen and seized vehicles may not always be within desired standards. Therefore, depreciation rates of frozen and seized vehicles may in fact be higher than normal.
- An argument may be put forward that, unlike movables, including vehicles, land and real estate may in fact increase in value over time. This may, however, be offset by the fact that regulations governing the public sales appear to restrict the market actors who may participate in the auction process. Apart from the required deposit (20% in NRA led auctions; 10% in private enforcement agents' auctions) the potential winner of the auction has a limited amount of time to complete the full payment. As the average person may require banking services to secure such an amount for such a purchase, this segment may appear to be largely excluded from this particular market. The uncertainty of the outcome of the auction is another factor that may preclude a potential participant from pre-arranging financial services before the outcome of the auction is known. Market actors, who do not readily possess sufficient own funds for the completion of the full payment after a successful auction, may be at a disadvantage. Therefore, real-estate public sale

auctions may be viewed as being conducted in less than perfect market conditions, whereby the highest possible price may not always be achieved through means of open market competition.

- Seized assets allocated to state institutions. For example, through the NRA 45 seized/confiscated motor vehicles and one real estate property have been allocated for use by other state organisations.
- Pre-existing creditors and securing measures imposed on the frozen and seized assets when they are transferred for public sale at the NRA. These will necessarily decrease the revenue as income will be split among pre-existing creditors and the state.
- Differences in asset evaluation methods and approaches between the Commission and the NRA.

Although only cautiously indicative, comparison of the value of seized and disposed forfeited assets helps demonstrate that there is room for improvement in the overall seized assets management process that will necessarily have a positive effect on the state budget as a whole.

Improving Seized Asset Management – the Case of ICT Solutions

Asset investigations often involve tracing complex transactions and transformations of value, as well as sophisticated financial assessments in a period of up to ten years before the start of investigation. This presupposes a multidisciplinary approach backed by adequate access to all relevant information, within the boundaries of the law, in order to effectively

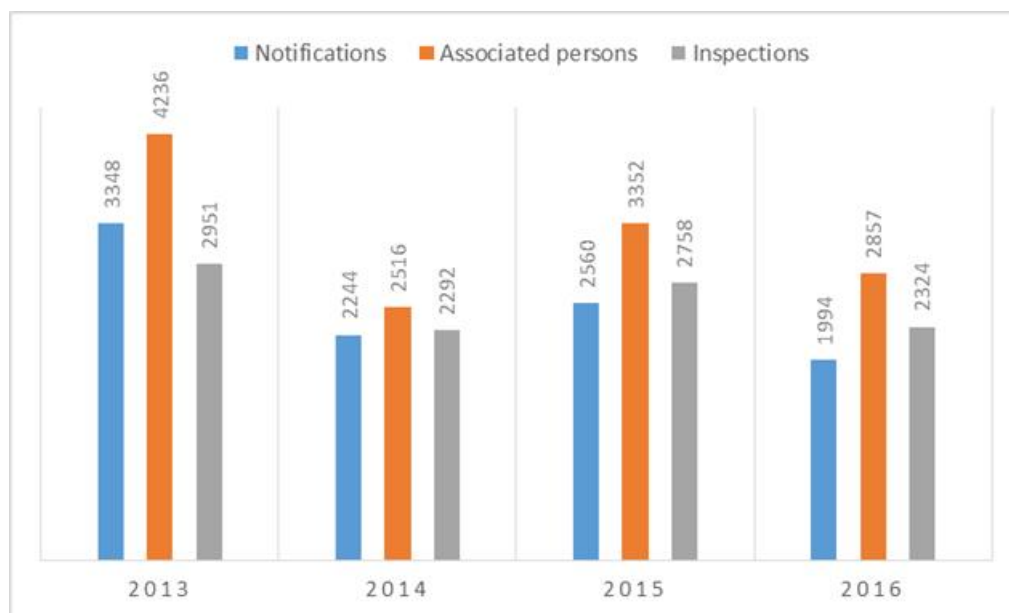
complete the intelligence cycle and produce necessary evidence for a positive court decision. With regard to inter-agency information exchange, currently, investigators in the Commission are not provided with adequate access to all relevant databases, thereby hindering the information gathering process and prolonging the intelligence cycle. Moreover, while the Commission has access to company registers, the lack of direct access to the centralized land register and the national register of bank accounts, prevents the Commission from efficiently exercising its duties.

The newly functioning Electronic Register in the Commission provides reference for seized assets as it is required by law. The Register, however, provides little to no analytical functionalities, relies on manual data entry and authorisation processes, and is not interlinked to other databases that may either source in important data or utilise data from the Register in their turn. Various functionalities provided by ICT tools and services have proven useful in the overall process of frozen and seized asset management.

For example, the development of a capability for geolocation of assets and the creation of galleries with pictures showing their exact condition will facilitate the adequate assessment of their economic value. At the same time integration between the registers of the Commission, the NRA and the Registry Agency within the Ministry of Justice would prove highly beneficial, as it would allow for triangulation of information regarding investigations by the Commission, without exceeding the limits of the law. Such triangulation would further enhance the ability of the different stakeholders to identify any criticalities that may arise during the process, such as parallel criminal or administrative procedures, joint ownership, mortgages, etc.

The Commission's inspectors handle a significant workload, which may be expected to increase with the reduction of the amount of "significant discrepancy" from 250 000 BGN to 150 000 BGN in 2016,¹³ particularly regarding the volume of filings into the courts.

Figure 4. Select indicators of workload at CIAF 2013–2016



Source: CIAF

¹³ This is expected to be reflected in the 2017 annual report of the Commission, which was not available at the time of drafting this policy brief.

The work of the Commission involves the collection and compilation of large stacks of data. Such data facilitates the work of the inspectors, while the results of its analyses are important source of intelligence to other stakeholders in law enforcement. Between 2013 and 2016 the Commission has processed 10 146 received notifications, concerning 12 961 associated entities and has conducted 10 325 inspections.

Capabilities for big data harvesting and analysis are available through ICT solutions that are increasingly cost-effective and compliant with the General Data Protection Regulation (GDPR). These may be developed independently or implemented as tools and add-ons to the existing ICT infrastructure within the Commission. Additional capabilities include delivering sophisticated automated services, such as mapping and data visualisations that may provide important insights and compliment the work of the inspectors. Deployments of such tools are best practices in a number of responsible agencies in other EU states, while a well-functioning database for seized and confiscated assets exists locally in the NRA.

International cooperation in the area of tracking and identifying proceeds from crime or other assets related to criminal activities is crucial in the fight against cross-border organized crime groups. The rapid exchange of information between competent national agencies is one of the most important tools of such cooperation.¹⁴ However, the exchange of sensitive information between the Commission and Asset Recovery Offices in other MSs is usually done via e-mail or fax and do not benefit from the support of a fully secure information exchange system. In recent years, EUROPOL has granted the asset recovery officers with access to the Secure Information Exchange Network Application (SIENA) platform, which ensures the secure exchange of sensitive and restricted information. There is however very little data

regarding the use of the platform with regard to frozen and forfeited assets across the Union.

Recommendations

The adequate management of frozen and seized assets is crucial for the overall effectiveness of civil forfeiture policies. Poor management may frustrate the efforts made by law enforcement agencies and other stakeholders to secure assets value before forfeiture. Notwithstanding this, a variety of problems arise in the management of these assets. Above all, the concept of the active management is not well-established. As a result, a great number of assets lay in bad conditions and lose value before final forfeiture.

The institutional framework of illegal asset forfeiture and management has recently evolved away from relying on a highly specialized institution with specific remits toward constructing an agglomeration of responsibilities, wherein anti-corruption and anti-conflict of interest efforts are merged with illegal asset forfeiture and management under one institutional umbrella. Certain deficiencies related to ensuring adequate management of frozen and forfeited assets remained outstanding in the new law, which may be considered as a missed opportunity. The practical effects of the new institutional setup on the regime for frozen and forfeited asset management will only manifest themselves once the new organization begins to produce results.

- There is a need to increase the **effectiveness** and **transparency** of the public sale procedures with a view to guarantee that seized assets will not be acquired by persons or entities with links to the original owner through rigged public

¹⁴ Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to crime

auctions. Data from the NRA shows that as of 7 March, 2018, 345 out of 999 confiscated and seized real estate properties have been sold in public auction procedures with closed bidding.¹⁵ A best practice identified in the Italian illegal asset disposal regime includes provisions for the authorities to **void a transaction** if there is sufficient evidence that the public sale procedure has resulted in the reclaiming of an asset by the original owner or linked entities.¹⁶

- Part of the revenue from the sale of such assets should be allocated back into the annual budgets of the Commission to provide budget appropriations for the costs of asset management.
- More **flexible measures** must be considered in preventing asset depreciation and assuring maximum economic/financial yield from the public sale. For example, a best practice identified in other EU states (France, Czech Republic) involves the public sale of the movable seized asset immediately following the court freezing order. Settlement is arranged via a type of an escrow account, which guarantees that the owner will receive the full value of the asset should it be returned by a consequent court decision. The settlement re-assures that the value of the assets is not diminished by the freezing and forfeiture process.
- Developments in **ICT solutions and services** have the **potential** for a substantial impact in the management of frozen and forfeited assets. The introduction of a system that would allow the Commission to collect, store and analyse financial and legal data regarding investigated assets and exchange information with all other stakeholders, would greatly improve the quality and effectiveness of their work.

- Further improvement in the field of **e-governance** may include expanding the scope of the existing database/register of the Commission with a view of enhancing its capabilities to provide administrative services to the public and exchange information with other institutional stakeholders.
- Regarding the issue of social re-use, the existing online register needs an update, making it possible to list all forfeited properties, deemed suitable to be used by municipal authorities, budget organizations, non-profit NGOs and, potentially, charities working with victims of crime. The purposeful delivery of any such property should be done through the means of a donation agreement, under strict and clear rules for its use. This procedure should be public and transparent, providing objective selection criteria and the possibility for public oversight and control by the executive branch, in the face of the district governors.
- Institutions involved in the management of frozen and seized assets have implemented databases specifically designed to facilitate work (e.g. NRA) and/or satisfy legal requirements for reference provisioning (e.g. the Commission). The letter of the legal provisions regulating the process have more or less streamlined the jurisprudential interinstitutional connectivity of involved stakeholders. In practice, however, despite increasingly available affordable technologies, respective databases within the stakeholder institutions, e.g. the Commission and the NRA, remain **without a functional interconnectivity**, wherein access is either absent or managed manually on a case by case basis.

¹⁵ National Revenue Agency, Annual Report 2016.

¹⁶ Center for the Study of Democracy (2014). *Disposal of Confiscated Assets in the EU Member States: Laws and Practices*. Sofia