

## Section 2-2 Provisional measures and Forfeiture

*This Sub-section deals with action necessary to temporarily “block” a certain category of funds, i.e. those that have been specifically used or allocated for the commission of an offence set forth in the present Model Provisions. By so doing, it implements the requirements of article 8 of the Terrorist Financing Convention aiming at the preservation of the availability of certain funds for possible forfeiture at a later stage.*

*The present Section refers to the concepts of “freezing” [“seizing”], reflecting alternative language contained in the Financing Convention. What these two notions have in common is that they are both based on an action initiated by a competent authority or a court prohibiting the transfer, conversion, disposition or movement of funds.*

*In this regards, it can be noted that FATF Interpretative Note to Special Recommendation 3 on terrorist financing suggests to distinguish between the two notions as follows: whereas “freezing” action entails that the targeted funds will continue to be administered by the financial institution or other arrangements designated the persons or the entities that held an interest in such funds prior to the initiation of a freezing action, under a “seizure” scheme the competent authority will take over possession, administration or management of such funds.*

*Some jurisdictions might prefer to use the term “restrain orders”, if necessary attaching to them an order whereby the competent State agency takes control and administration of targeted funds. States could use any wordings depending on the procedural powers concretely available under their domestic law. Whatever language is adopted, what is important is that the targeted funds are temporarily “blocked”, whether they are managed by the State or remain under the control of its owner, short of being permanently transferred to the State.*

*In most cases, States will already have in place legislation against money laundering, or dealing with proceeds of crime, which will already include powers, authorities and procedures that could be extended (with the necessary adjustments) to the context of terrorist financing.*

### Article 34 Provisional measures

- 1) The [competent authority] shall, either at its own initiative or at the request of the [public prosecutor’s office/ other competent authority], order the freezing [seizing] of those funds that there are reasonable grounds to believe have been used or allocated for the purpose of committing any of the offences set forth in [these Model Provisions].
- 2) The order referred to in para.1 extends to proceeds derived from the commission of the offences set forth in [these Model Provisions].

*As mentioned above, this Model Provision takes into account the need to preserve the availability of funds that might, upon conviction, become the object of a forfeiture order, in accordance to article 8(2) of the Financing Convention and article 36 of these Model Provisions.*

*It is noted that the freezing [seizure] action extends to funds that are simply intended to be used for certain criminal purposes, even if they have not been actually used.*

*National authorities may decide to introduce appropriate procedures through which a person or entity whose funds or other assets have been frozen can challenge that measure with a view to having it reviewed.*

### Article 35 Revocation of provisional measures

The freezing [seizing] order shall be revoked at any time by the [competent authority] at the request of the [public prosecutor’s office/ other competent authority], or of any other

person claiming to be affected by such measures, when there are no longer any reasonable grounds to believe that the frozen [seized] funds have been used or allocated for the purpose of committing an offence related to terrorism.

*This article sets out the possibility for all persons or entities claiming to be affected by the freezing [seizing] order to ask for a review of that measure at “any time”. A review might be requested for the purpose of having the measures modified or discontinued. This may be the case when, for instance, a person can produce new evidence that was not available at the time of the hearing when the measure was first imposed.*

*The freezing [seizing] order will obviously also be discontinued to the extent that, following criminal conviction, a forfeiture measure is imposed upon all or part of the funds that were the object of the order.*

*States may also consider setting time limits beyond which the freezing [seizing] order is automatically discontinued, for instance when formal proceedings against the person whose funds have been frozen [seized] have not been instituted. Such possibility would add an additional safeguard ensuring that persons affected by the freezing [seizing] order do not have to suffer the consequences of an excessively slow administration of justice. As a guidance, States might refer to the IMF Model Law on the financing of terrorism, which indicates a period of 6 months after which the funds have to be “unblocked”.*

## **Article 36 Forfeiture**

- 1) Where a person is convicted for an offence under [these Model Provisions], the [competent authority] shall order the following funds to be forfeited to the State:
  - a) funds used for or allocated for the commission of such offence; and
  - b) funds obtained as proceeds from the commission of such offence, including property intermingled with such proceeds.
- 2) When the funds to be forfeited cannot be produced, forfeiture may be ordered for their value.
- 3) Before making a final order in respect of para.1 above, the [competent authority] shall give every person reasonably believed to have an interest in the funds an opportunity to appear and present evidence.

*The purpose of this model article is to provide national bodies with the authorities to forfeit terrorism-related funds. The term “forfeiture” is used in the Terrorist Financing Convention, with reference to property liable to be transferred as such to the State. Some jurisdictions prefer to use the term “confiscation” instead of “forfeiture”. The measures envisaged by this article shall cover the permanent transfer of the ownership of the targeted funds to the State.*

*The scope of the forfeiture order should be broad enough to encompass property that was previously the object of provisional measures under article 34 of this Model Provisions.*

*Para 2 covers what is known as “value confiscation”, namely the requirement to pay a sum of money based on an assessment of the value of the funds specifically used or destined to be to commit a certain offence (or proceeds). As a result of a value confiscation, the State can make a financial claim against the person in relation to whom the order is made, which, if not paid, may be realized in any property (whether legally or illegally acquired) belonging to that person.*

*It is up to the adopting States to determine the availability of legal processes for the review of forfeiture orders. As a rule, the forfeited funds accrue to the State when the period provided for lodging an appeal has ended without such an appeal having been lodged, or, if an appeal against the order has been lodged, the appeal lapses or is finally determined.*

*States may also wish to strengthen the protection of “bona fide” third parties that had not been notified*

*before the adoption of the forfeiture order, and that could therefore not be heard. Such third parties might be allowed to apply to the competent authority within a certain period of time for an order declaring the nature, extent and value of their interest, with a view to having the property returned.*

*Whereas this model article proposes the adoption of a conviction-based forfeiture regime, States may also consider introducing civil non-conviction-based schemes, allowing for the recovery of property using, normally, a lower threshold of evidence than that available under criminal trials*

*As to the disposal of forfeited assets, the State might wish to reserve part of those assets for “public purposes”, including allocating them to a fund for law enforcement. The 1999 Terrorist Financing Convention suggests the compensation of victims as a possible destination of those assets (Article 8 (4)).*