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# REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

## Asset recovery and confiscation:

## Ensuring that crime does not pay

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# 1. INTRODUCTION

## 1.1. Objectives and main elements of Directive 2014/42/EU

Organised crime is one of the greatest threats to the security of the European Union. According to Europol, more than 5,000 organised crime groups are currently under investigation in Europe[1]. Organised crime is profit-driven and its illegal activities generate huge profits: the proceeds of organised crime within the EU are currently estimated at about €110 billion per year[2].

Europol estimates that only about 2% of criminal proceeds are frozen and 1% confiscated in the EU. This allows organised crime groups to invest into expanding their criminal activities and infiltrating the legal economy[3]. Europol estimates that between 0.7 – 1.28% of annual EU GDP is involved in suspect financial activity[4].

The confiscation of criminal proceeds is an essential component of the fight against serious and organised crime, since it deprives criminals of their financial gains and ensures that crime does not pay.

The asset recovery process includes several phases:

- **identification and tracing** of the illegally acquired assets;
- **freezing and seizure of the assets** with a view to their possible subsequent confiscation;
- **management of frozen and seized assets** to preserve their value;
- **confiscation** of the illegally acquired assets;
- **disposal of the confiscated assets**, which could include their reuse for public or social purposes.

In 2014, the European Parliament and the Council adopted Directive 2014/42/EU ('the Directive'), which sets minimum rules for the freezing, management and confiscation of criminal assets. The Directive introduced:

- provisions on **non-conviction based confiscation** (at least if the accused or suspected person absconds or is ill);
- provisions on **extended confiscation for a specific list of criminal offences**;

1 https://www.europol.europa.eu/activities-services/main-reports/european-union-serious-and-organised-crime-threat-assessment-2017

2 Transcrime, From illegal markets to legitimate businesses: the portfolio of organised crime in Europe, 2015, available at: http://www.transcrime.it/wp-content/uploads/2015/03/OCP-Full-Report.pdf

3 Europol, Does crime still pay? Criminal Asset Recovery in the EU – Survey of statistical information 2010-2014, 2016, available at: https://www.europol.europa.eu/publications-documents/does-crime-still-pay

4 Europol, From suspicion to action – Converting financial intelligence into greater operational impact, 2017, available at: https://www.europol.europa.eu/publications-documents/suspicion-to-action-converting-financial-intelligence-greater-operational-impact

- provisions on **third-party confiscation**;

- clarifications on the **freezing of property with a view to subsequent confiscation, including 'urgent' freezing**;

- **strict safeguards**, ensuring that the rights of parties, affected by freezing or confiscation proceedings are upheld;

- rules enabling the **detection and tracing of property even after a final conviction** to ensure the effective execution of a confiscation order;

- provisions on the **management of frozen and confiscated property**;

- provisions requiring Member States to **collect and maintain comprehensive statistical data on freezing and confiscation**.

In accordance with Protocols 21 and 22 to the Treaty on European Union respectively, the United Kingdom and Denmark did not take part in the adoption of the Directive and are therefore not bound by it or subject to its application. Ireland exercised its right to take part in the adoption and application of the Directive.

According to Article 12 of the Directive, Member States were obliged to transpose its provisions into national law by 4 October 2016.

### 1.2. The EU legal framework, relevant to the tracing, identification, freezing and confiscation of illegally acquired assets

In addition to Directive 2014/42/EU, the adoption of Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders[5] is another significant milestone in the area of asset recovery. The Regulation aims to facilitate cross-border asset recovery and make the freezing and confiscation of criminal assets across the EU quicker and simpler. It will apply to all freezing and confiscation orders issued within the framework of proceedings in criminal matters, thus including conviction and non-conviction based confiscation[6].

The ability to freeze and confiscate assets depends directly on the capacity to effectively trace and identify them. Council Decision 2007/845/JHA7 obliges Member States to set up or designate national Asset Recovery Offices in order to ensure the fastest possible EU-wide tracing of illicit assets.

Measures have also been taken at the EU level to ensure swifter access to information. Over the past three decades, the European Union has developed a solid framework to fight money laundering, which also establishes registers of beneficial ownership for legal

5 Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJ L 303, 28.11.2018, pp.1-38.

6 It will apply as from 19 December 2020.

7 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, OJ L 332, 18.12.2007, pp. 103–105.

entities and arrangements and central bank account registers[8]. Directive 2019/1153 on the use of financial information grants law enforcement authorities and Asset Recovery Offices with direct access to bank account information for the purposes of fighting serious crime[9].

### 1.3. Purpose and structure of the report, information gathering and methodology

In accordance with Article 13 of the Directive, section 2 of this report assesses the implementation of the Directive. Sub-section 2.1 provides a general assessment and highlights the measures, adopted by the Member States to transpose the provisions of the Directive. Sub-section 2.2 assesses each provision of the Directive. Examples throughout the report provide the reader with an overview of the way in which the Directive has been transposed across the EU. The analysis in this report is based on the information Member States provided up to 1 December 2019.

The report also follows on from the Commission staff working document on the analysis of non-conviction-based confiscation in the EU[10] that was adopted in 2019. Section 3 formally responds to a request of the European Parliament and the Council to assess the feasibility and possible benefits of introducing additional common rules on the confiscation of property deriving from criminal activities in the absence of a conviction of a specific person or persons for these activities[11].

Section 4 of this report examines the work of the Asset Recovery Offices, established by Council Decision 2007/845/JHA, and the challenges they face when carrying out their day-to-day tasks.

Criminals transfer and spread their illegally acquired assets across multiple jurisdictions and make it difficult for the competent authorities to trace, freeze and confiscate these assets. International cooperation is therefore crucial for the effective recovery of criminal assets. Section 5 provides an overview of the international instruments that are relevant to the field of asset recovery.

This report is without prejudice to any further legislative or non-legislative developments in the EU Member States. The Commission will continue monitoring whether national measures comply with the corresponding provisions in the Directive. Where necessary, the Commission will make use of its enforcement powers under the Treaties through infringement procedures.

8 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19.6.2018, pp. 43–74

9 Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA, OJ L 186, 11.7.2019, pp. 122–137

10 SWD(2019) 1050 final.

11 Council doc. 7329/1/14 REV 1 ADD 1.

## 2. ASSESSMENT OF IMPLEMENTATION OF THE DIRECTIVE

### 2.1. General assessment and impact of the Directive on the national asset recovery systems

Only 8 Member States notified the Commission of complete transposition of the Directive in their national legal orders by the transposition deadline of 4 October 2016. As a result, in November 2016 the Commission sent letters of formal notice for the non-communication of national implementing measures to 18 Member States (Belgium, Bulgaria, Czechia, Germany, Estonia, Ireland, Greece, Croatia, Cyprus, Lithuania, Luxembourg, Hungary, Poland, Portugal, Romania, Slovenia, Slovakia and Sweden). 15 of these 18 Member States subsequently notified national implementing measures to the Commission declaring the transposition to be complete. After checking the completeness of the transposition, the Commission decided to close the infringement procedures for these 15 Member States. At present, only three infringement procedures for non-communication remain open. They concern Bulgaria, Luxembourg and Romania[12].

The analysis of the national implementing measures provides the Commission with an insight into **the impact of the Directive on national asset recovery and confiscation systems**. 24 out of 26 Member States, bound by the Directive, had to adopt new legislation to transpose its provisions into their national legal orders[13]. In most cases, the national implementing measures consisted of amendments to provisions that already existed in national law. These **amendments triggered changes in the following legal concepts**:

- **definitions of 'proceeds' and 'instrumentalities'** (Bulgaria, Czechia, Estonia, Greece, France, Cyprus, Finland);
- **conviction-based confiscation** (Estonia, Ireland, Greece, Spain, Italy, Latvia, Austria, Poland, Portugal, Finland);
- **non-conviction based confiscation** (Germany, Ireland, Spain, Cyprus, Latvia, Malta, Portugal, Finland, Sweden);
- **extended confiscation and the scope of crimes, for which extended confiscation is enabled** (Belgium, Czechia, Estonia, Ireland, Greece, Spain, Italy, Cyprus, Latvia, Luxembourg, Hungary, Poland, Portugal, Sweden);
- **third-party confiscation** (Estonia, Ireland, Greece, Cyprus, Hungary, Poland, Portugal, Finland);
- **freezing** (Austria, Portugal);
- **safeguards** (Spain, France, Latvia, Portugal);
- **effective execution of confiscation orders** (Latvia, Malta, Austria, Portugal);

[12] For Bulgaria, Luxembourg and Romania, the conformity check has not been fully conducted yet and any elements contained in this implementation report concern the legislation already notified by these Member States and are without prejudice to future legislative developments.

[13] NL and SI stated that their existing rules on freezing and confiscation were in full compliance with the Directive and that no amendments were needed.

- **management of frozen and confiscated property** (Belgium, Bulgaria, Czechia, Greece, France, Croatia, Cyprus, Latvia, Hungary, Malta, Portugal, Romania).

## 2.2. Specific assessment of the transposing measures in the Member States

### 2.2.1. Definitions (Article 2)

**Article 2** defines the terms '**proceeds**', '**property**', '**instrumentalities**', '**confiscation**', '**freezing**' and '**criminal offence**'.

These definitions are not explicitly transposed in a number of Member States, but the concepts are embedded in the national legislation on freezing and confiscation.

The transposing legislation in Greece and Cyprus includes definitions of all these terms. The term 'proceeds' is defined in Bulgaria, Czechia, Estonia, Ireland, Croatia, Malta, Portugal, Finland and Sweden. 'Property' is specifically defined in Bulgaria, Czechia, Estonia, Ireland, Croatia, Latvia, Hungary, Malta, Portugal, Romania, Slovenia and Slovakia. The term 'instrumentalities' is defined in Czechia, Malta and Portugal. The term 'confiscation' is defined in Bulgaria, Latvia and Lithuania. 'Freezing' is defined in Austria, Hungary and the Netherlands.

### 2.2.2. Scope (Article 3)

**Article 3** sets out the Directive's **scope of application by laying down the offences for which freezing and confiscation are enabled**. Article 3 includes direct cross-references to other EU legal instruments (letters (a) – (k)) and the criminal offences they regulate.

The provisions of other legal instruments also provide for the freezing and confiscation of instrumentalities and proceeds of crime. For example, Article 10 of Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law[14] specifically states that the freezing and confiscation of instrumentalities and proceeds of crime should be enabled for the offences criminalised by it[15].

Most Member States (Belgium, Czechia, Germany, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Finland, Sweden) apply freezing and confiscation for all crimes. France and Malta have enabled them for all offences, sanctioned by imprisonment of at least 1 year. Bulgaria, Estonia, Greece and Spain have enabled freezing and confiscation for all intentional crimes. In Slovakia, they are enabled for all offences, particularly when the offender is sentenced to life imprisonment or to unconditional imprisonment for a serious crime. In Ireland, it is possible to freeze and confiscate assets for a list of offences.

[14] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, pp. 29–41.

[15] The scope of criminal offences, to which the Directive applies, is provided in Annex of this report.

### 2.2.3. Confiscation (Article 4)

#### 2.2.3.1. Conviction-based confiscation (Article 4(1))

**Article 4(1)** requires Member States to **enable, subject to a final conviction for an offence, the confiscation of instrumentalities and proceeds of crime or property, the value of which corresponds to such instrumentalities and proceeds**. Such **final conviction may also result from proceedings *in absentia***.

All Member States have enabled, subject to a final conviction, the confiscation of instrumentalities and proceeds of crime.

For the confiscation of property, the value of which corresponds to such instrumentalities and proceeds, national law in most Member States (Belgium, Bulgaria, Czechia, Greece, Spain, Cyprus, France, Italy, Latvia, Luxembourg, Malta, Hungary, Austria, Poland, Portugal, Slovenia, Slovakia, Finland, Sweden) provides the possibility to confiscate other assets of equivalent value to the instrumentalities and proceeds of crime. In several Member States (Germany, Estonia, Ireland, Croatia, Lithuania, Netherlands) it is possible to order the convicted person to pay an amount of money corresponding to the value of the assets subject to confiscation.

#### 2.2.3.2. Non-conviction-based confiscation (Article 4(2))

**If confiscation based on a final conviction, pursuant to Article 4(1), is not possible**, Member States must **enable the confiscation of instrumentalities and proceeds of crime at least when the initiated criminal proceedings could not proceed due to the illness or absconding of the suspected or accused person**.

The existence of proceedings *in absentia* in Belgium, Estonia, Netherlands and Slovakia suffices to comply with the requirement of Article 4(2).

In Malta and Austria, confiscation without a prior conviction is enabled in cases of illness and absconding. In most Member States (Bulgaria, Czechia, Germany, Ireland, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Poland, Portugal, Slovenia, Finland) national law goes beyond the provisions of the Directive.

In Croatia, confiscation is enabled where: (i) the accused person is either permanently unfit to plead or unavailable to the authorities; and (ii) the value of the assets exceeds HRK 60,000 (approximately €8,000 at the time of writing). Bulgaria and Slovenia have established procedures that permit the forfeiture of assets in civil proceedings when a person is charged for a set of offences determined in the legal acts. In both Member States, this type of confiscation is not dependent on a criminal conviction.

In Romania, national law provides for the confiscation from the persons holding public office of the goods whose legitimate origin cannot be explained. Court proceedings may also take place *in absentia* when the accused person has absconded or changed address.

In Sweden, the transposing legislation covers confiscation when the conviction of the accused or suspected person is not possible due to a 'permanent obstacle' (e.g. death of the perpetrator or expiry of the statute of limitations). The anti-money laundering legislation in Greece enables the confiscation of proceeds of crime if the offender has died or if the criminal proceedings ceased or were declared inadmissible.

### 2.2.4. Extended confiscation (Article 5)

#### 2.2.4.1. Extended confiscation (Article 5(1))

**Article 5** lays down provisions on extended confiscation, **requiring the Member States to enable the confiscation of property belonging to a convicted person when: (i) the crime is liable to give rise to economic benefit; and (ii) the circumstances of the case indicate that the property is derived from criminal conduct**.

The analysis suggests that there are varying standards of evidence in the Member States[16]. In Austria, extended confiscation is only allowed if it is 'reasonable to assume' that the property is derived from unlawful conduct. In Estonia, Cyprus and Netherlands the court can 'presume' that the assets are derived from illegal activities. In Czechia, extended confiscation requires the court to 'consider' that part of the property is derived from criminal activities. In Spain the court must 'decide, based on well-founded objective evidence' that the property derives from illegal activities. In Latvia, Lithuania and Malta the courts must 'reasonably believe' that the property is derived from illicit activity. In Belgium there must be 'serious and concrete indications' that the advantages arise from the offence. In Sweden, the court must consider it 'clearly more likely that it constitutes proceeds from a criminal activity than that not being the case'. In Romania, the court must be 'convinced' that the property is derived from criminal conduct.

The transposing legislation in most Member States (Belgium, Bulgaria, Cyprus, Czechia, Germany, Estonia, Spain, Croatia, Hungary, Ireland, Italy, Lithuania, Luxembourg, Latvia, Malta, Poland, Portugal, Romania) contains criteria to help the national court determine whether the assets in question originate from unlawful conduct (e.g. the existence of a disproportion between the lawful income of the affected person and the value of his/her assets or his/her financial situation and lifestyle). In several Member States, extended confiscation is not possible if the value of the property is below a certain threshold, for example, below €12,500 in Lithuania and below PLN 200,000 in Poland (approximately €47,000 at the time of writing). In Bulgaria and Slovenia, there must be a disproportion between the lawful income of the suspect or accused person and their property, amounting to at least BGN 150,000 (approximately €76,700 at the time of writing) and €50,000 respectively. The existence of a disproportion between the lawful income of the suspected person and his/her assets is also required under Slovak law and must amount to at least 1,500 times the minimum wage in the country.

Some Member States have set up time limits within which the acquired assets may be considered as originating from criminal conduct (e.g. 5 years before indictment in Belgium, Hungary, Portugal and Romania; 6 years before indictment in Cyprus and Ireland; 10 years before indictment in Bulgaria; 5 years before committing the offence in Czechia, Lithuania and Poland and 6 years before the commission of the criminal offence in Netherlands).

Bulgaria and Slovenia have transposed this provision through their legislation on civil confiscation, whereby it is possible to confiscate the property of a person not convicted of a criminal offence.

[16] A degree of caution is necessary when comparing the formulations of the various national standards as there are different interpretations domestically.

#### 2.2.4.2. Scope of criminal offences for which extended confiscation must be enabled (Article 5(2))

**Article 5(2)** provides that **extended confiscation must be available *at least* for certain expressly listed offences**[17], and **for such offences in Article 3 of the Directive which are punishable (under an EU instrument or national law) by a custodial sentence of a maximum of at least 4 years**.

Most Member States (Belgium, Bulgaria, Czechia, Estonia, Ireland, Greece, Spain, Croatia, Hungary, Austria, Portugal, Slovenia, Finland, Sweden) have drawn up specific lists of offences for which extended confiscation is enabled. In addition, in a number of Member States, extended confiscation is also enabled for all criminal offences punishable by a prison sentence of at least 3 years or more (Austria) or at least 4 years or more (Czechia, Finland, Sweden). In Germany, Italy, Cyprus, and Lithuania, extended confiscation is enabled for every offence. In Malta, extended confiscation is enabled for any crime liable to imprisonment of more than 1 year. In France, extended confiscation is enabled for crimes punishable by imprisonment of at least 5 years or more. In Ireland, Luxembourg and Romania, extended confiscation is enabled for all criminal offences sanctioned by imprisonment of 4 years or more. The transposing legislation in several Member States (Finland, France, Latvia, Luxembourg, Netherlands, Poland, Romania) contains the requirement that the criminal offence must be such as to generate a financial gain. In most cases, extended confiscation has largely been enabled for the offences, required by Article 5(2).

### 2.2.5. Confiscation from a third party (Article 6)

**Article 6** requires the Member States to **enable the confiscation of the proceeds of crime transferred to, or directly acquired by, a third party from a suspected or accused person**. According to Article 6, third party confiscation should at least be enabled in cases where the third party knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation.

Belgium, Hungary, Austria and Slovakia rely on general rules of confiscation, targeting the illicit origin of the item, and enabling its confiscation irrespective of whether it belongs to the suspect or accused person or to a third party. The rest of the Member States have put in place specific provisions on third-party confiscation.

The 'mental' requirement that the third person 'knew or ought to have known […] that the purpose of the transfer or acquisition was to avoid confiscation' has been reflected in the transposing legislation in most Member States (Bulgaria, Czechia, Germany, Estonia, Ireland, Greece, Spain, Cyprus, Lithuania, Malta, Netherlands, Poland, Portugal, Slovenia, Finland, Sweden). The transposing legislation in France, Latvia and Luxembourg refers to the confiscation of property that is 'at the disposal' of a convicted person. Italy legislation allows the confiscation of goods/benefits, of which the convicted person is the holder 'through a physical person or legal entity'. The legislation in Croatia refers to the confiscation of illicit property 'transferred to a person or not acquired in good faith'.

[17] They content of Article 5(2) is provided in Annex of this report.

Article 6 refers only to the confiscation of 'proceeds, directly or indirectly transferred to or acquired by a third party'. Nevertheless, the transposing legislation in some Member States (Czechia, Germany, Estonia, Ireland, Greece, France, Cyprus, Lithuania, Luxembourg, Netherlands, Austria, Portugal) also enables the confiscation of instrumentalities transferred to or acquired by a third party.

In Romania, national law provides for the confiscation of property from family members and legal entities. In Bulgaria, the provision has been transposed via civil confiscation law, which is applicable to a specific list of offences.

Article 6(2) provides that the rights of *bona fide* third parties should not be prejudiced. The transposing legislation in nearly all Member States conforms to this provision of the Directive and ensures that the rights of *bona fide* third parties are preserved.

#### 2.2.6. Freezing (Article 7)

**Article 7(1)** requires Member States to **take the necessary measures to enable the freezing of property with a view to its subsequent confiscation**. It also provides for the **urgent freezing of property to avoid its dissipation (i.e. it being sold, transferred, spent or wasted)**.

The freezing of property with a view to its subsequent confiscation has been enabled in all Member States. Germany, Czechia, Estonia, Ireland, Italy, Latvia, Luxembourg, Hungary, Poland, Portugal, Slovakia and Sweden have granted their prosecution and law enforcement authorities the powers to take urgent action and freeze property before judicial authorisation. In Belgium, Bulgaria, Greece, Spain, Hungary, Cyprus, Lithuania, Malta, Netherlands, Austria, Slovenia and Romania the wording of the transposing legislation could be interpreted as entailing the 'urgent' nature of the provisional measures.

**Article 7(2)** requires the Member States to enable the freezing of **the property of a third party with a view to subsequent confiscation**. This is possible in all Member States.

#### 2.2.7. Safeguards (Article 8)

The Directive affects the rights not only of suspected or accused persons, but also of third parties who are not being prosecuted. Article 8 lays down specific safeguards and remedies, aiming to guarantee that the fundamental rights of persons affected by freezing and/or confiscation measures are upheld.

**Article 8(1)** requires that the **persons, affected by freezing or confiscation measures, have the right to an effective remedy and a fair trial in order to uphold their rights.** The national implementing measures in none of the Member States reflect explicitly the wording of this provision. The Member States have addressed this requirement of the Directive primarily by means of measures in their Criminal Procedural Codes.

**Article 8(2)** requires **that any freezing order is reasoned and communicated to the affected person as soon as possible after its execution**. When necessary to avoid jeopardising an ongoing investigation, the competent authorities may postpone communication.

The national implementing measures in most Member States indicate that the freezing orders are reasoned and communicated to the affected person. In one Member State, it is not clear if the order is communicated individually to the affected person as the national implementing measures provide for the communication of the freezing order in the Government Gazette. The immediacy of communication is reflected in the legislation of half of the Member States (Belgium, Czechia, Estonia, Greece, France, Croatia, Lithuania, Luxembourg, Austria, Poland, Slovenia, Finland, Sweden). The legislation in most Member States (Belgium, Czechia, Estonia, Ireland, Spain, France, Croatia, Italy, Latvia, Lithuania, Hungary, Austria, Poland, Portugal, Romania, Slovakia, Finland) explicitly enables the postponement of the communication of a freezing order in order not to jeopardise an ongoing investigation.

**Article 8(3)** provides that the **freezing order must remain in force only for as long as necessary to preserve the property with a view to possible confiscation**. Nearly all Member States have ensured that a freezing order remains in force only for as long as necessary.

**Article 8(4)** states that the **affected person can challenge the freezing order before a court**. The obligation is transposed in most Member States by means of general rules on criminal procedure.

**Article 8(5)** requires **frozen property that is not subsequently confiscated to be returned to the affected person immediately**. This requirement is explicitly reflected in the national implementing measures of most Member States (Belgium, Czechia, Estonia, Greece, France, Italy, Latvia, Lithuania, Hungary, Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, Sweden).

**Article 8(6)** requires that **any confiscation order be reasoned and communicated to the affected person**. **The affected person must be provided with the possibility to challenge the order before a court**. The obligation is transposed in most Member States by means of general rules on criminal procedure.

**Article 8(7)** provides the **persons whose property is affected by a confiscation order with the right of access to a lawyer throughout the confiscation proceedings**. All Member States have transposed this provision for cases where the person affected by the confiscation proceedings is charged with a criminal offence. The situation is however less clear as regards other persons affected by the confiscation proceedings.

**Article 8(8)** allows the **affected person in proceedings referred to in Article 5 to challenge the circumstances of the case, including specific facts and available evidence on the basis of which the property is considered to be derived from criminal activity**. The obligation is transposed in most Member States by means of general rules on criminal procedure.

**Article 8(9)** requires **third parties to be entitled to claim title of ownership or other property rights**. In several Member States (Belgium, Cyprus, Germany, Estonia, Greece, Luxembourg, Austria, Portugal) the Criminal Procedural Code explicitly refers to the rights of third parties to participate in the confiscation proceedings. In other Member States (Ireland, Spain, France, Croatia, Italy, Latvia, Hungary, Malta, Netherlands, Slovenia, Romania, Finland, Sweden) this requirement is transposed via general rules of criminal procedure on the rights of the ‘interested’ or ‘concerned’ person

affected by confiscation to claim their property rights. In several Member States third parties are able to claim their rights in civil proceedings.

**Article 8(10)** requires **the confiscation measure to not prevent victims of crime from seeking compensation for their claims**. The transposing legislation in most Member States ensures that a confiscation measure would not prevent a victim from claiming compensation.

### 2.2.8. Effective confiscation and execution (Article 9)

**Article 9** requires the Member States to **enable the detection and tracing of property to be frozen and confiscated even after a final conviction. This is to permit the full execution of confiscation orders when no property - or insufficient property - was initially identified and the confiscation order remains unexecuted**.

Provisions in the national criminal laws of most Member States (Belgium, Czechia, Germany, Estonia, Spain, Greece, France, Italy, Lithuania, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Slovakia, Finland and Sweden) enable the competent authorities to detect and trace property of the convicted person even after a final conviction in order to fully execute an issued confiscation order. Latvia adopted new legislation to comply with this requirement of the Directive.

In Estonia, the transposing legislation requires the financial investigation to be initiated within 2 years of entry into force of the court's judgment. A similar condition exists in Slovenia, but the period of time within which the investigation has to be initiated is 1 year. In Greece, the transposing legislation explicitly enables the freezing of property or assets post-conviction. In Bulgaria, this requirement is transposed by measures in the Implementation of Penal Sanctions and Detention in Custody Act and the Tax and Social Insurance Code of Procedure. In one Member State (Belgium), the transposing legislation gives the Central Office for Seizure and Confiscation the power to trace and detect property post-conviction.

### 2.2.9. Management of frozen and confiscated property (Article 10)

**Article 10(1)** requires that all Member States ensure the **adequate management of property that is frozen with a view to subsequent confiscation**. All Member States have adopted provisions to ensure the adequate management of frozen property. 13 Member States (Belgium, Bulgaria, Czechia, Ireland, Greece, Spain, France, Croatia, Italy, Luxembourg, Netherlands, Portugal, Romania) have set up, or are in the process of setting up, Asset Management Offices (AMOs) to ensure the management of frozen property in order to preserve its economic value.

**Article 10(2)** obliges the Member States to **ensure the sale or transfer of frozen or seized property where necessary**. Nearly all Member States have adopted measures, transposing this obligation. In two Member States, the sale or transfer of frozen property has been enabled for movable property only.

**Article 10(3)** requires the Member States to **consider reusing confiscated property for the public interest or social purposes**. Despite the non-binding nature of Article 10(3), specific legislation on the use of confiscated property for public interest or social purposes exists in 19 Member States (Belgium, Bulgaria, Czechia, Germany, Greece,

Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Austria, Poland, Portugal, Romania, Slovenia)[18].

#### 2.2.10. Statistics (Article 11)

**Article 11** obliges the Member States to **collect and maintain statistics on: (i) the number of freezing and confiscation orders executed; and (ii) on the estimated value of property frozen and of property recovered at the time of confiscation**. The Member States must send this data to the Commission annually.

11 Member States (Bulgaria, Czechia, Greece, France, Italy, Cyprus, Lithuania, Malta, Portugal, Slovenia, Sweden) have explicitly transposed the requirement to collect statistics into their national legislation. The rest of the Member States have not explicitly transposed this requirement into their legislation but most of them have nevertheless sent statistical data to the Commission.

In 2017 and 2018, at the request of the Commission, most Member States sent statistical data pursuant to Article 11. The analysis illustrates that even though Article 11 has led to progress in the data collection practices for freezing and confiscation, there is still significant room for improvement, particularly with regard to data on the number of requests for freezing and confiscation orders to be executed in another Member State as well as the value of the property recovered following execution in another Member State[19]. The Member States could further improve coordination among the various authorities, involved in the asset recovery process (e.g. Asset Recovery Offices, law enforcement and judicial authorities, AMOs) to ensure that the data mirror the full picture in the Member States.

A solid statistical basis is fundamental for the proper evaluation of confiscation practices and policies. Therefore, Eurostat expertise will be required in the assessment of the availability and quality of the received data. Eurostat's association to future data collections on freezing and confiscation could lead to improved coordination in the Member States.

## 3. ASSESSMENT OF THE FEASIBILITY AND POSSIBLE BENEFITS OF INTRODUCING FURTHER COMMON RULES ON NON-CONVICTION BASED CONFISCATION

When adopting the Directive, the European Parliament and the Council issued a joint declaration calling on the Commission to "*analyse, at the earliest possible opportunity and taking into account the differences between the legal traditions and the systems of the Member States, the feasibility and possible benefits of introducing further common*

[18] It is important to highlight that recital 13 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims encourages the Member States to use the seized and confiscated instrumentalities and proceeds from the offences referred to in it to support victims' assistance and protection, including compensation of victims. Further details are included in the Second progress report of the European Commission (COM(2018) 777 final) and (SWD(2018) 473 final).

[19] Member States are currently only required to submit such data to the Commission if it is available at a central level. Article 11(3) of the Directive encourages them to collect it centrally.

*rules on the confiscation of property deriving from activities of a criminal nature, also in the absence of a conviction of a specific person or persons for these activities*."[20]

In preparing its response to this call, the Commission organised three expert meetings on the subject of non-conviction based confiscation[21] and published the Commission staff working document "Analysis of non-conviction based confiscation measures in the European Union"[22]. The analysis was considered an intermediary step in preparing the answer to the co-legislators that is provided in this report.

In the staff working document, the Commission noted that Member States apply a variety of non-conviction based confiscation regimes. These regimes range from classic non-conviction based confiscation, as provided for by Article 4(2) of the Directive, to more far-reaching measures that include: (i) proceedings directed against the illicit assets themselves (*in rem* proceedings[23]) or (ii) unexplained wealth measures[24]. While classic non-conviction based confiscation is almost exclusively based in criminal law, *in rem* or unexplained wealth proceedings are applied in proceedings of a criminal, civil or administrative nature.

Following the transposition of the confiscation Directive, one can observe more convergence between Member States' non-conviction based confiscation regimes can be observed. However, significant differences remain in the scope and design of these non-conviction based confiscation measures. As confirmed by the Commission's assessment, most Member States have gone beyond the minimum requirements set out in Article 4(2) of the Directive.

The trend in EU Member States goes towards more far-reaching systems for non-conviction based confiscation systems than provided for in Article 4(2) of the Directive. The Commission's analysis in the staff working document found that also far-reaching and robust non-conviction based confiscation regimes can satisfy the fundamental rights requirements set out by national courts and the European Court for Human Rights.

Several Member States have more robust non-conviction based confiscation regimes, relying on *in rem* proceedings or unexplained wealth procedures. These systems have proven their effectiveness in recovering criminal assets. Some experiences like the Italian and German non-conviction based confiscation procedures seem particularly promising. The Commission will further analyse to what extent such models could serve as blueprints for a potential future European non-conviction based confiscation regime. However, the Commission's analysis in this field is for the time being guided by expert meetings and theoretical considerations. Based on findings under section 2.2.10 (statistics (Article 11)), the statistical data, submitted by the Member States pursuant to Article 11 of the Directive, at present cannot be used as a reliable basis for the assessment of non-conviction based confiscation. This prevents the Commission from conducting a quantitative analysis of the effectiveness of national regimes.

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20 Council doc. 7329/1/14 REV 1 ADD 1.

21 Two meetings in 2016, on 16 September and 17 November, and one meeting in 2019 on 9 September.

22 SWD(2019) 1050 final.

23 *In rem* proceedings (action against the assets not the person) are initiated to confiscate assets obtained through unlawful conduct.

24 Unexplained wealth proceedings compare the actual property a person has acquired against income declared by that person in order to identify any disparity between the two. Establishing a direct or indirect link to a predicate offence is not necessary.

These efforts to strengthen asset recovery regimes need to be seen in their political and societal context. Organised crime remains one of the greatest threats to our security and one of the main concerns of the public. Organised crime groups easily adapt to new developments and constantly find new ways to escape detection. They are often involved in various types of serious criminal activities and external research[25] argues that the infiltration of organised crime in the economy can be considered as significant in almost half of the Member States. It is clear that the assets currently being seized in the EU not in line with the expectations of law enforcement authorities or of the public. Organised crime affects its direct victims, but its infiltration of the legal economy also threatens the EU's internal market. This in turn affects public trust in neutral and effective public institutions and the rule of law. The EU and its Member States should therefore continue working to increase freezing and confiscation levels across the EU.

The Commission considers that the introduction of further measures in the area of non-conviction based confiscation is feasible and has potential benefits in increasing the levels of freezing and confiscation of proceeds of crime.

## 4. IDENTIFYING AND TRACING ILLEGALLY ACQUIRED ASSETS

The ability to freeze and confiscate assets depends directly on the authorities' capacity to effectively trace and identify them. Council Decision 2007/845/JHA sets minimum rules requiring the Member States to set up or designate national Asset Recovery Offices in order to facilitate the tracing and identification of proceeds of crime or other crime-related property that may become the object of a freezing, seizure or confiscation order.

Since 2015, all Member States have designated their Asset Recovery Offices and the Europol SIENA has become the preferred secure information-exchange system for the Asset Recovery Offices (all Asset Recovery Offices except Cyprus, Malta, Romania and Slovenia have 'Asset Recovery Office' sub-entities in SIENA). The exchange of information between the Asset Recovery Offices has increased dramatically over the course of the past 8 years from 539 exchanges in 2012 to 7,659 in 2019.

Since 2009, the Commission has organised meetings of the EU Asset Recovery Offices' Platform in order to exchange best practices between the Asset Recovery Offices; discuss strategic and operational issues; and facilitate information sharing. Since 2011 the Commission and Europol have also organised a light 'peer review' process to review the key features of the national asset recovery systems.

With an increasing focus on asset recovery and increased cooperation between the Asset Recovery Offices, the latter are faced with an increasing number of asset tracing requests, which they must be able to handle. Several issues were widely raised by the Asset Recovery Offices in the context of the 2017 comprehensive assessment of EU security

[25] MORE - Modelling and mapping the risk of Serious and Organised Crime Infiltration in legitimate businesses across European territories and sectors, available at https://www.swp-berlin.org/en/projects/completed-projects-compl/more/

policy[26] and, more recently, during the May 2019 meeting of the Asset Recovery Offices' Platform. These issues include:

- the need to provide the Asset Recovery Offices with swift access to a minimum set of data;
- the need to exchange information via SIENA to enable the swift and secure communication of crime-related information;
- the need to enhance the Asset Recovery Offices' powers (for example, urgent freezing powers and the ability to trace assets following a final criminal conviction);
- the need to set fixed and strict time limits within which an Asset Recovery Office must respond to a request by a counterpart.

The Commission will explore possibilities to further improve the tracing and identification of illegally acquired assets.

## 5. THE INTERNATIONAL DIMENSION AND ASSET RECOVERY

The freezing and confiscation of criminal assets is also considered an effective tool against serious and organised crime at international level. The United Nations' Conventions on Transnational Organised Crime[27] (UNTOC, adopted in 2000) and Against Corruption[28] (UNCAC, adopted in 2003) contain provisions requiring their state parties to: (i) enable the tracing, freezing and confiscation of illicit assets in their territories; and (ii) exchange information and cooperate in the asset recovery process. These conventions have been ratified by both the EU and all Member States, and they have almost universal application, having both been ratified by more than 185 countries.

The Council of Europe Warsaw Convention on Money Laundering and Confiscation[29], adopted in 2005, is another important international agreement. It enables the freezing and confiscation of assets and international cooperation in asset recovery. This Convention has been ratified by most Members of the Council of Europe, including by 21 EU Member States. Its provisions on the exchange of information and mutual legal assistance have been successfully used in a number of cases related to cooperation between Member States and neighbouring countries.

In the context of the fight against money laundering and terrorism financing, the Financial Action Task Force (FATF) standards imply similar measures and require countries to put in place robust freezing and confiscation measures and to be able to cooperate to recover assets. The FATF recognises that "reducing the rewards of crime affects the balance of risk and reward, and the prospect of losing profits may deter some

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[26] Commission Staff Working Document 'Comprehensive Assessment of EU Security Policy', SWD(2017) 278 final, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:b43f3517-720a-11e7-b2f2-01aa75ed71a1.0001.02/DOC_1&format=PDF

[27] https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html

[28] https://www.unodc.org/unodc/en/corruption/ratification-status.html

[29] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CETS No. 198.

from crime. It may also allow the victim of the crime to be partially or fully compensated even when the proceeds are moved around the world. This is particularly relevant in the case of asset recovery"[30].

The mutual assistance procedures under the United Nations and Council of Europe Conventions are formalistic and may take a long time to prepare. It is therefore essential to conduct informal consultations between the authorities of the countries concerned before such procedures are launched. This will make it possible to correctly prepare all relevant information according to the requirements of the country receiving the request and avoid having to restart the procedure because of a procedural error. Significant support for these procedures is provided by networks of asset recovery practitioners such as the Camden Asset Recovery Inter-Agency Network (CARIN). These informal networks have law enforcement and judicial contact points in each member country, which helps the informal exchange of information on both: (i) the identification and tracing of assets; and (ii) the preparation of mutual legal assistance requests. Together with the associated regional Asset Recovery Inter-Agency Networks (ARINs)[31], the CARIN network covers over 150 countries and jurisdictions.

## 6. CONCLUSION AND THE WAY FORWARD

In recent years, the EU has made considerable efforts to assist financial investigations and harmonise the legislation on confiscation in the Member States. The adoption of the Directive has led to substantive progress in the Member States' asset recovery frameworks. 24 out of 26 Member States, bound by the Directive, adopted new legislation since 2014 in order to ensure that their legislation is up to the high standards, required by the Directive. The overall level of implementation of the Directive across the EU can be considered as satisfactory.

The general improvement in Member States' legal frameworks on asset recovery is also reflected in the positive rating that they received in the evaluations they underwent according to the standards of the FATF. So far, 16 Member States that had to transpose the Directive have been evaluated and they were all found to be fully or largely compliant with the standard relating to freezing and confiscation[32]. However, overall results in terms of assets confiscated are not satisfactory and the confiscation rates in the EU remain very low.

The analysis conducted in this report demonstrates that there is room for further progress in the area of asset recovery. This could be achieved by, for example, (i) extending the scope of criminal offences, to which the Directive is applicable; (ii) introducing more effective rules on non-conviction based confiscation; (iii) being more precise as regards the management of frozen assets; (iv) introducing provisions on the disposal of assets, including the social reuse of confiscated assets; (v) laying down rules on the

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30 Financial Action Task Force, Best Practices Paper – Best practices on confiscation (recommendations 4 and 38) and a framework for ongoing work on asset recovery, October 2012, available at: https://www.fatf-gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20%20Confiscation%20and%20a%20Framework%20for%20Ongoing%20Work%20on%20Asset%20Recovery.pdf

31 The regional ARINs include ARINSA (Southern Africa), RRAG (Latin America), ARIN-AP (Asia Pacific), ARIN-EA (Eastern Africa), ARIN-WA (Western Africa) and ARIN-CARIB (Caribbean).

32 For more information on the FATF/Moneyval mutual evaluations, visit http://www.fatf-gafi.org/

compensation of victims of crime and (vi) reinforcing the capacity of the Asset Recovery Offices to trace and identify illicit assets.

The Commission will therefore assess the potential for greater harmonisation of the EU asset recovery regimes. This assessment will cover both Directive 2014/42/EU and Council Decision 2007/845/JHA, because the ability to freeze and confiscate illegal assets depends directly on the capacity to trace and identify them.

The possible revision of the Directive and the Council Decision would result in a broad modernisation of the EU legislation on asset recovery and further strengthen the competent authorities' capacity to ensure that crime does not pay.