

# Revision of the EU rules on asset recovery and confiscation

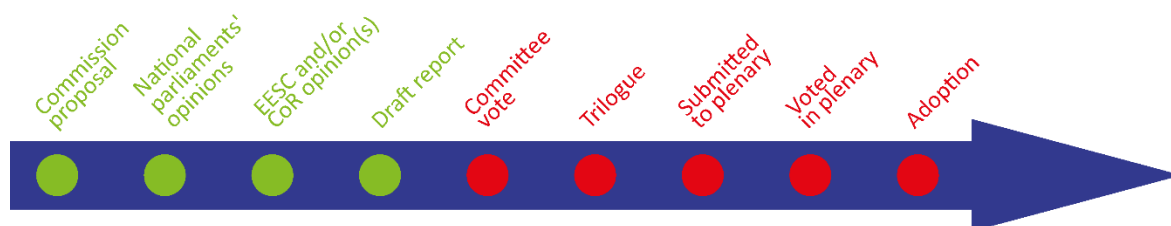
## OVERVIEW

The confiscation of criminals' illicit profits is considered an effective tool in the fight against organised crime, identified as a major threat to EU security. However, despite the comprehensive set of EU rules on asset freezing and confiscation, there are still obstacles on the path to recovering criminal assets, as shown by the European Commission's June 2020 evaluation of the 2014 directive on freezing and confiscation of instrumentalities and proceeds of crime and the 2007 Council decision on asset recovery offices (AROs).

To address this situation, in May 2022 the European Commission adopted a proposal to amend the 2014 directive with a view to strengthening the EU's asset recovery and confiscation rules and reinforcing the powers of AROs.

The European Economic and Social Committee adopted its opinion on the proposal on 14 December 2022. In the European Parliament, the Committee on Civil Liberties, Justice and Home Affairs is in charge of the file and published its draft report on 14 February 2023.

<b>Proposal for a directive of the European Parliament and of the Council on asset recovery and confiscation</b>		
<i>Committee responsible:</i>	Committee on Civil Liberties, Justice and Home Affairs (LIBE)	COM(2022) 245 final 25.5.2022
<i>Rapporteur:</i>	Loránt Vincze (EPP, Romania)	2022/0167(COD)
<i>Shadow rapporteurs:</i>	Caterina Chinnici (S&D, Italy) Malik Azmani (Renew, Netherlands) Sergey Lagodinsky (Greens/EFA, Germany) Nicolaus Fest (Identity and Democracy Group, Germany) Assita Kanko (ECR, Belgium) José Gusmão (GUE/NGL, Portugal)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Committee vote	



## Introduction

[Serious and organised crime](#) remains a major [threat](#) to EU security. While precise statistics are lacking – both globally and at EU level – revenues generated by organised crime are substantial. A 2021 European Commission [study](#) estimated the annual revenues from the nine main criminal markets in the EU at between €92 billion and €188 billion in 2019 (a midpoint of €139 billion). Revenues from organised crime are reinvested in other illicit activities or enter the legitimate economy ([more than 80 % of organised crime networks](#) active in the EU use legal business structures for their criminal activities). Therefore, organised crime not only [affects](#) its victims but also undermines the EU internal market, leading to corruption and lack of trust in institutions and affecting economic growth.

As financial gain is the main motivation for engaging in organised crime, an effective mechanism to deter criminal activity would be to confiscate criminals' profits. However, reports point to low freezing and confiscation rates in the EU. In 2016, [Europol](#) estimated that only 2.2 % of proceeds of crime had been frozen in the EU over the 2010-2014 period and only 1.1 % of these proceeds had been confiscated. While confiscation [levels](#) have increased since 2014 in some EU countries, possibly thanks to improved institutional frameworks in the area of asset recovery, the lack of reliable and comparable statistics on frozen and confiscated assets makes it difficult to measure the rate of confiscation at EU level. Furthermore, the confiscation rate depends on the effectiveness of the previous stages in the asset recovery process (identification and tracing of assets; asset freezing and seizure; management of frozen and seized assets). According to Commission [estimates](#) from 2022, only one third of frozen assets were confiscated in the EU in 2019 (€1 billion of criminal assets confiscated out of €3 billion frozen). Against this background, on 25 May 2022 the Commission proposed a [new directive](#) on asset recovery and confiscation, with the aim of strengthen the EU rules by amending [Directive 2014/42/EU](#) on the freezing and confiscation of instrumentalities and proceeds of crime in the EU and by reinforcing the powers of the asset recovery offices (AROs), established pursuant to [Council Decision 2007/845/JHA](#).

### Glossary

**Freezing:** a measure to prevent the dissipation, transformation, movement or destruction of criminal assets to avoid confiscation during the investigation process.

**Ordinary confiscation:** a confiscation measure directed against an asset that is the direct proceed or the instrumentality of a crime, following a criminal conviction for that crime.

**Value-based confiscation:** a confiscation measure by which a court imposes an order corresponding to the value of proceeds or instrumentalities of a crime, enforceable against any property of the individual.

**Extended confiscation:** a confiscation measure following a criminal conviction that goes beyond the direct proceeds of the crime for which a person was convicted, where the property seized is derived from criminal conduct. A direct link between the property and the offence is not necessary if the court concludes that part of the person's property was obtained through other unlawful conduct.

**Third-party confiscation:** a confiscation measure depriving someone other than the offender (a third party) of criminal property, where that third party possesses property received from the offender.

**Non-conviction based confiscation (NCBC):** a confiscation measure taken in the absence of a conviction and directed against an asset of illicit origin. It covers cases where criminal conviction is not possible because the suspect has become ill or has fled the jurisdiction, has died, lacks legal capacity, has immunity from prosecution, etc., but also cases where action is taken against the asset itself (*in rem* proceedings, generally civil proceedings), regardless of the person in possession of the property.

Data source: European Commission impact assessment accompanying the proposal for a regulation on the mutual recognition of freezing and confiscation orders, SWD (2016) 468 final, 21 December 2016, pp. 8-9.

## Existing situation

Adopted in 2014, [Directive 2014/42/EU](#) is a harmonisation instrument covering both freezing and confiscation of instrumentalities and proceeds of crime in the EU. It replaced the 1998 [Joint Action 98/699/JHA](#) (the first measure adopted at EU level on the freezing and confiscation of criminal instrumentalities and proceeds), and, in part, two Council framework decisions (FD) from 2001 and 2005. Council FD [2001/500/JHA](#) of 26 June 2001 required that confiscation requests from other Member States be given the same priority as domestic requests and introduced rules on value-based confiscation. Council FD [2005/212/JHA](#) of 24 February 2005 required Member States to confiscate criminal assets or their value from offences punishable by deprivation of liberty for more than one year. It also provided for extended confiscation in relation to six offences defined by EU law, when these offences had been committed in the framework of a criminal organisation,<sup>1</sup> but also in relation to terrorism, for offences punishable with a minimum of between 5 and 10 years of imprisonment. Money-laundering offences punishable by a custodial sentence of at least 4 years were also covered by extended confiscation.

Directive 2014/42/EU has aimed to fill the significant gaps hindering freezing and confiscation in cross-border cases linked to criminal proceedings. The directive covers the 'eurocrimes' defined in [Article 83\(1\) of the Treaty on the Functioning of the European Union](#) (TFEU) (except illegal arms trafficking), but also crimes defined in other legal instruments, if those instruments provide specifically that the directive applies to the offences harmonised therein. The directive provides for extended confiscation, which is limited to corruption offences, participation in a criminal organisation, sexual abuse and exploitation of children and IT crimes. Extended confiscation also covers the other eurocrimes listed in Article 3 of the directive, if the offence is punishable by a custodial sentence of at least 4 years. It also introduces third-party confiscation and a limited form of non-conviction based confiscation (NCBC) in relation to criminal proceedings involving a suspect who is permanently ill or has fled. However, the provisions on standard and value confiscation have a broader scope covering all offences punishable with imprisonment for at least 1 year. The directive establishes safeguards for those targeted by freezing and confiscation measures and for victims of criminal offences. Other provisions concern the management and disposal of frozen and confiscated assets and the collection and transmission of statistical data by Member States. The directive does not apply to Denmark, which remains bound by the 2005 framework decision.

[Council Decision 2007/845/JHA](#) of 6 December 2007 (the ARO Council Decision) requires Member States to establish up to two national AROs in order to improve cross-border cooperation on identifying and locating criminal assets. AROs must exchange information and best practices, on request or spontaneously. The rules and time limits applicable for the exchange of information are those set by Council [FD 2006/960/JHA](#) (the Swedish Initiative): 8 hours for urgent cases and 1 week for non-urgent ones. [Directive 2019/1153](#) on the use of financial information by law enforcement authorities grants AROs direct access to bank account information in the Member States.

In 2018, [Regulation \(EU\) 2018/1805](#) on the [mutual recognition](#) of freezing and confiscation orders replaced two instruments: Council FD [2003/577/JHA](#) on freezing orders from 2003 and Council FD [2006/783/JHA](#) on confiscation orders from 2006. Since December 2020, it has applied to all Member States except Denmark and Ireland, which remain bound by the two FDs. The [regulation](#) covers all forms of confiscation harmonised by Directive 2014/42/EU, but goes even further to cover all criminal offences and other types of NCBC, as long as the orders are issued in the framework of proceedings in criminal matters. It introduces tight deadlines for the recognition and execution of freezing and confiscation orders, as well as standard certificates to ensure speedy procedures. Moreover, it prioritises [victims' rights](#) to compensation/restitution in cross-border cases.

## Main challenges

Since the adoption of Directive 2014/42/EU, the EU framework on asset recovery has [evolved](#) significantly, and most Member States have adopted new legislation leading to improved national

frameworks. Yet, confiscation rates remain low. In its recent [evaluation](#) of Directive 2014/42/EU and the ARO Council Decision, the Commission gives three main reasons for this: i) national authorities have limited capabilities to swiftly identify, trace and freeze assets; ii) inefficiencies in asset management deter the opening of asset recovery procedures; and iii) existing confiscation instruments fail to address all high-revenue criminal markets and criminals' *modi operandi*.

As the first step in the asset recovery process, criminal assets must be swiftly identified and traced, and then frozen to prevent their dissipation. Yet, only 11 EU countries launch financial investigations automatically in parallel with the investigations for all forms of crime, while another eight only do this for specific crimes. In the rest of the Member States, financial investigations are optional. Moreover, the heterogeneity of AROs across the EU affects cross-border cooperation. In line with the 2007 Council Decision, all Member States set up at least one ARO,<sup>2</sup> but the [status and competences](#) assigned to these offices vary. A majority of AROs are law enforcement authorities, others have an administrative (BG, MT, RO) or mixed status (CY, DK, IE) and nine are judicial authorities. Moreover, while almost all AROs are involved in asset tracing and identification, less than half have a role in asset freezing and less than a quarter can issue urgent freezing orders. In addition, the lack or limited [access](#) to national databases or registers to support investigations, coupled with the insufficient resources allocated to them, hamper their work and cross-border cooperation.

A second [challenge](#) relates to the management of frozen and confiscated assets. The purpose is to preserve the value of the assets pending the decision to confiscate or return to the owner in the case of frozen property or to return to the state budget or as compensation for victims in the case of confiscated assets. Some assets, such as e.g. livestock, cryptocurrencies, confiscated companies etc., require specific measures to prevent their deterioration and to maintain their value. Inadequate [management](#) measures have been found to thwart the entire asset recovery process: anticipated high management costs may act as a disincentive for decisions to freeze or confiscate, including in cross-border cases; moreover, inefficient management may result in few or no criminal assets being returned to victims or state budgets. Part of the problem is the variety of national asset management frameworks. Current EU legislation only encourages Member States to ensure adequate management of assets, including by setting up specialised Asset Management Offices (AMO), without specifying what adequate management should entail. Only 13 Member States have established an AMO of their own, while the rest of the Member States entrust the management of frozen and confiscated property to various bodies, thus hampering cross-border cooperation (e.g. difficulty to identify the counterparts in other Member States). Moreover, some management techniques, considered more efficient, such as pre-seizure planning (assessing what property is most suitable for confiscation, when and how to freeze or confiscate it) or interlocutory sales (selling or transferring frozen property prior to confiscation), are insufficiently used.

The limited use of confiscation mechanisms that are presently considered to be more effective in disrupting criminal activities is yet another challenge. Some Member States have introduced more far-reaching national measures, in particular on extended confiscation and NCBC, yet most others predominantly use standard confiscation. Stakeholders argue that NCBC systems are more effective in recovering criminal assets, including in depriving the high echelons of organised crime of their profits; they thus expect that expanding the rules on NCBC at EU level would increase the recovery rate. In addition, due to its narrow scope in terms of the offences covered for value-based, third-party, extended confiscation and NCBC, the 2014 Directive fails to address a wide area of criminal profits (the Commission estimates that €50 billion per year fall outside the directive's scope).

A final element relates to the absence of a strategic approach to asset recovery, which is reflected, among other things, in the lack of shared objectives by all players involved and of comprehensive and comparable statistics on assets frozen and confiscated at national level.

## Comparative elements

The first measures at EU level in the area of asset recovery were based on Council of Europe (CoE) conventions, in particular the [Convention](#) on laundering, search, seizure and confiscation of the

proceeds from crime (1990), ratified by all CoE Member States. In 2005, the CoE adopted the [Convention](#) on laundering, search, seizure and confiscation of the proceeds of crime and on the financing of terrorism, in force since 2008; however, not all EU Member States have signed and/or ratified it. Several other international treaties aim to encourage cooperation in the area of asset freezing and confiscation. These include three United Nations (UN) conventions: [against illicit traffic in narcotic drugs and psychotropic substances](#) (1988); [against transnational organized crime](#) (2000) and [against corruption](#) (2003).<sup>3</sup> Whereas the CoE conventions have facilitated the exchange of information and cooperation in cross-border cases, both include many grounds for refusing to execute freezing and confiscation orders. Furthermore, the mutual legal assistance procedures under the CoE and UN conventions are cumbersome, leading to long [delays](#) in the asset recovery process. The informal Camden Asset Recovery Inter-Agency Network ([CARIN](#)), through its law enforcement and judicial contact points in the member countries, provides support through all the stages of the asset recovery process.

## Parliament's starting position

Following the adoption of Directive 2014/42/EU, the Parliament and the Council called on the Commission in a [joint statement](#) to 'analyse ... the feasibility and possible benefits of introducing further common 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'.

In its [resolution](#) of October 2016 on the fight against corruption, Parliament called for the swift transposition of Directive 2014/42/EU and asked the Commission and Member States to: strengthen EU measures on asset recovery, also by providing for confiscation in the absence of a final conviction or by criminalising the transfer of ownership of capital or property to avoid freezing or confiscation; promote the management of frozen and confiscated property and its re-use for social purposes, and as compensation for families of victims and businesses affected by loan-sharking and racketeering; and develop cooperation between AROs and give them adequate resources.

In its [resolution](#) of 10 July 2020 on a comprehensive Union policy on preventing money laundering and terrorist financing, Parliament expressed its concern at the low rates of confiscation in the EU and called on the Commission to include in its future legislative proposals 'rules on the use of confiscated assets for public interest or social purposes and to work towards ensuring the return of confiscated assets to [victims in countries outside the EU](#)'. Parliament also requested that the Commission update the data on seized and confiscated assets.

In its January 2021 [resolution](#) on monitoring the application of EU law 2017, 2018 and 2019, Parliament welcomed the Commission's pledge to review the EU asset recovery framework and to analyse the need for 'further common rules, with particular attention to the seizure or confiscation of criminal proceeds in the absence of a conviction, and the management of such assets'.

In two resolutions of 15 December 2021 (on [avoiding corruption](#) and on the [impact of organised crime on own resources of the EU](#)), Parliament underlined that 'the fight against organised criminal groups also requires enhanced rules and measures regarding the freezing and confiscation of assets, including, where appropriate, the temporary seizure of property of equivalent value to the criminal proceeds in order to prevent the transfer or disposal of those proceeds of crime before criminal proceedings have been concluded'. Parliament also invited the Commission to assess the possibility of 'an EU-wide body in charge of ensuring the timely and effective recovery of EU funds'.

## Council starting position

In its [conclusions](#) of June 2020 on enhancing financial investigations to fight serious and organised crime, the Council called on the Commission to consider 'strengthening the legal framework on the management of property frozen with a view of possible subsequent confiscation, include the principle of pre-seizure planning, grant AROs additional powers, for example precautionary urgent



temporary freezing powers, in order to prevent the dissipation of assets'. The Council also concluded that AROs could be granted access to various public registers, such as land or company registers.

In its 2021 [conclusions](#) on the EU priorities for the fight on serious and organised crime for [EMPACT 2022-2025](#), the Council stated its aim to 'facilitate asset recovery in view of effectively confiscating criminal profits, especially by supporting the automatic launch of financial investigations and developing a culture of asset recovery through training and financial intelligence sharing'.

## Preparation of the proposal

Following the request of the Parliament and the Council, the Commission published in April 2019 a [report](#) that gave an overview of the existing NCBC measures in the Member States. It showed that Member States' legal frameworks on NCBC had changed significantly in the past years, with important differences between the models implemented. Underlining the general support among stakeholders for harmonising national legislations in the area of NCBC, the report concluded that 'hybrid models that include successful aspects of different approaches are of particular interest'. Nevertheless, the report acknowledged that compliance with fundamental rights was the main challenge to any NCBC regime; therefore, 'any reinforced non-confiscation based confiscation model at EU level would have to be accompanied by strong procedural safeguards'.

In June 2020, the Commission published a [report](#) on [asset recovery and confiscation](#), which assessed the national transposing measures related to Directive 2014/42/EU, with an added focus on AROs and international cooperation. The report concluded that the implementation of the directive had been satisfactory and that the Member States' legal frameworks on asset recovery had improved in general, yet argued that further progress could be achieved through greater harmonisation.

The Commission stated its plans to review the rules on freezing and confiscation in the [EU security union strategy \(2020-2025\)](#) of July 2020 and the [EU strategy to tackle organised crime](#) (2021-2025) of April 2021. The review of Directive 2014/42/EU and of Council Decision 2007/845/JHA – by means of a legislative proposal – was included in the Commission's [2021 work programme](#). Initially scheduled for the fourth quarter of 2021, the proposal was postponed until the second quarter of 2022. On 9 March 2021, the Commission launched a public consultation on the [inception impact assessment \(IIA\)](#) that closed on 6 April 2021. From 21 June to 27 September 2021,<sup>4</sup> the Commission held a [consultation](#) on current problems and the future of EU asset recovery and confiscation.

The Commission included the [evaluation](#) of the existing legal framework in Annex 7 of the [impact assessment](#) accompanying its legislative proposal for a directive on asset recovery and confiscation, published on 25 May 2022. The evaluation concluded that the ARO Council Decision had achieved its objectives by increasing the rate of cross-border information exchange and the tracing of criminal assets. However, there had not been an equivalent increase in the asset recovery rate. Directive 2014/42/EU was assessed as moderately successful in that it had led to some approximation of the concepts of freezing and confiscation and to an increase in the freezing and confiscation rates; however, the overall results were still too modest to have a significant impact on the profits of organised crime. The reasons evoked were the limited scope of confiscation under the directive, the significant differences between Member States' legislations, and asset management inefficiencies. Moreover, data collection shortcomings hampered the emergence of a reliable picture of the asset recovery efforts in the Member States.

Building on the evaluation, on data from two studies,<sup>5</sup> on the results of the public consultations and on targeted stakeholder consultations,<sup>6</sup> the impact assessment accompanying the proposed directive analysed four main policy options: 1) non-legislative, consisting of an increased exchange of best practices and EU guidance; 2) minimum legislative measures through targeted amendments to the two acts; 3) more extensive changes to the legal framework; and 4) a maximum-level legislative intervention. For the Commission, policy option 3 would strike the best balance between effectiveness, cost efficiency and impact on fundamental rights, also bringing the most benefits, with approximately €1 billion per year in terms of additional amounts of recovered assets across the

EU. This represents a significant difference compared to policy options 2 (€100-200 million) and 4 (€50-100 million).<sup>7</sup> It would also entail lower costs than the maximum legislative intervention. Policy option 3 would expand the scope of the directive to include a wider range of crimes, as well as the provisions on NCBC. Moreover, it would set minimum rules for the tracing and management steps of the asset recovery process, and strengthen the powers of AROs. On the other hand, the Commission concluded that changing the voluntary nature of the provision on social re-use of confiscated assets would be disproportionate, as it would interfere with national competences on budgetary autonomy. As regards victim compensation, the Commission argued that any related measures should be dealt with through changes to the specific framework consisting of the Victims' Rights Directive ([2012/29/EU](#)) and the Compensation Directive ([Council Directive 2004/80/EC](#)).

The EP RS published an [implementation appraisal](#) of Directive 2014/42/EU in May 2022.

## The changes the proposal would bring

The [proposed directive](#), based on Articles [82\(2\)](#), [83\(1\) and \(2\)](#) and [87\(2\)](#) TFEU, aims to streamline the obligations on asset recovery and to introduce a more strategic approach to improving the overall efficiency of the asset recovery system. It [consolidates](#) the provisions of the ARO Decision and Directive 2014/42/EU, sets minimum rules on all phases of the asset recovery process, and applies only to proceedings in criminal matters. If adopted, it will replace Council Decision 2007/845/JHA, Directive 2014/42/EU, Council Framework Decisions 2005/212/JHA and 2001/500/JHA, and Joint Action 98/699/JHA. Denmark will not be bound by the directive and Ireland is yet to [decide](#) whether to [opt into](#) the adoption of the directive. The directive will have to be transposed within one year of its entry into force. The Commission will have to report to the Parliament and the Council on the directive's implementation and evaluation, within 3 and respectively 5 years of its entry into force.

### Scope

The proposal extends the scope of the directive to cover a broader range of crimes, namely the eurocrimes in Article 83(1) TFEU, other crimes harmonised at EU level and other serious crimes committed within the framework of a criminal organisation, as well as the [violation of Union restrictive measures](#). Therefore, in addition to the crimes already covered by Directive 2014/42/EU, the scope of the proposal (Article 2) includes:

- trafficking in firearms (eurocrime);
- all crimes harmonised at EU level, including migrant smuggling, fraud against the EU's financial interests and environmental crimes;
- the following offences committed within the framework of a criminal organisation: counterfeiting and piracy of products; trafficking in cultural goods; document fraud; murder and grievous bodily harm; organ trafficking; kidnapping; organised or armed robbery, racketeering; trafficking in stolen vehicles; and tax crimes punishable by a custodial sentence of at least one year;
- the violation of Union restrictive measures, once harmonised measures are adopted.<sup>8</sup>

The directive will also apply to other criminal offences set out in EU legal acts, if they specify that the directive is applicable to them.

### Tracing and identification

The proposal introduces requirements to enable the swift tracing and identification of criminal instrumentalities, proceeds and property, as well as to ensure that asset-tracing investigations start immediately, to address criminal offences that are likely to give rise to high benefits, or to prevent, detect or investigate the violation of EU restrictive measures (Article 4). The provisions on tracing and identification apply to all criminal offences, as defined in national law, that are punishable by a custodial sentence of at least one year, as well as to the violation of EU sanctions to the extent that such violation is a criminal offence under national law.

## Asset recovery offices

Member States are required to set up at least one ARO. The tasks of AROs (Article 5) include tracing and identification of assets in support of national authorities and in relation to a freezing or confiscation order from another Member State; and cooperation and exchange of information with other Member States' AROs, including in relation to the implementation of EU sanctions. AROs are empowered to trace and identify assets of persons and entities subject to EU targeted financial sanctions, as well as to take temporary urgent freezing measures in relation to the violation of EU restrictive measures. Member States must give AROs immediate and direct access to information necessary for tracing and identifying assets, namely fiscal data, real estate and population registers, vehicles and vessels registers, commercial databases, national social security registers, and relevant law enforcement information. They also need to ensure AROs have access to relevant information not stored in databases. In line with [Directive 2019/1153](#), such information is to be accessed only where necessary and on a case-by-case basis, in compliance with national rules on confidentiality and professional secrecy and by taking measures to ensure the security of data.

AROs may exchange any information on request or spontaneously. The categories of personal data that can be provided are those listed in Section B, point 2 of [Annex II of the Europol Regulation](#). Member States must ensure that information provided by AROs can be presented as evidence in court. AROs should get direct access to and use SIENA (Europol's secure information exchange system) for their exchange of information. AROs may refuse to provide information on grounds of national security or if doing so would jeopardise an ongoing investigation or criminal intelligence operation or pose a risk to the life or physical integrity of a person. AROs must give reasons for the refusal. In line with the [Swedish initiative](#), AROs must provide requested information stored in databases or registers within 7 calendar days for non-urgent requests and 8 hours for urgent ones. The deadline may be postponed by 3 days, if meeting it would involve a disproportionate burden (in non-urgent cases), or if the information is not directly available (in urgent cases).

## Freezing and confiscation

The provisions on freezing and confiscation apply to all criminal offences within the scope of the proposed directive, in the framework of proceedings in criminal matters.

### Freezing

Member States must ensure that illicit assets can be frozen immediately to prevent their dissipation. In addition, AROs may take temporary urgent freezing measures until a formal freezing order is issued. If it is not confiscated, frozen property must be immediately returned.

### Confiscation

Member States must enable standard and value confiscation following a final conviction, as well as third-party confiscation (current rules). Extended confiscation, allowing for the confiscation of property of a **convicted** person if the court is convinced that the property derives from criminal conduct, must be enabled for all crimes in the scope of the proposed directive (Article 14).

Article 15 of the proposal extends the coverage of NCBC, in addition to illness or absconding of the defendant already included in Directive 2014/42/EU, to death, immunity or amnesty of the suspected or accused person, or expiration of the time limits prescribed by national law for the offence. NCBC must be limited to criminal offences likely to lead to substantial economic benefit and only if the national court is satisfied that all the elements of the offence are present. NCBC applies to the criminal offences in Article 2 when punishable by deprivation of liberty of at least 4 years. Article 16 introduces another form of NCBC based on unexplained wealth, when confiscation cannot be ordered under other provisions of the directive and if certain conditions are present: the property has been frozen; the criminal offence can give rise to substantial economic benefit; and the national court has concluded that the frozen property is derived from criminal offences committed



in the framework of a criminal organisation (such conclusion may include that the value of the property is disproportionate to the lawful income of the owner). It applies to all criminal offences in Article 2 punishable by deprivation of liberty of at least 4 years. For all forms of NCBC, the proposal mandates respect for the affected persons' right of defence and right to be heard before the conviction order is issued. Member States must also enable asset tracing and identification after a conviction has been secured or after NCBC related proceedings have been finalised.

## Social reuse of confiscated property and victims' compensation

Member States must *consider* taking measures to allow the use of confiscated property for public interest or social purposes and must ensure that confiscation measures under the directive do not affect victims' rights to obtain compensation (no change compared to Directive 2014/42/EU).

## Management of frozen and confiscated assets

Member States must ensure the efficient management of frozen or confiscated assets, including by carrying out pre-seizure planning or interlocutory sales of frozen property (if it is rapidly depreciating or perishable, maintenance costs are disproportionately high, or there are difficulties in administering the property). The owner of the assets must be notified and heard before the sale. The costs for managing the frozen property may be charged to the beneficial owner. Member States must set up or designate at least one AMO, tasked with: managing frozen or confiscated property either directly or through providing support to the competent authorities; providing support with pre-seizure planning to the competent authorities responsible for the management of frozen and confiscated assets; and cooperating with national and other Member States' competent authorities.

## Safeguards

The procedural safeguards are based on Directive 2014/42/EU. The proposal introduces the requirement to inform the affected person of the freezing or confiscation order or interlocutory sales order, and to ensure their access to legal remedies, including the right to defence, access to a lawyer, to an effective remedy and a fair trial. Confiscation should not be ordered if it is disproportionate to the offence/accusation or, exceptionally, if it poses undue hardship for the affected person.

## Strategic approach and cooperation

The proposal requires Member States to adopt a national strategy on asset recovery and to update it every 5 years; to provide AROs and AMOs with the necessary resources; to set up a centralised registry with information on frozen, managed and confiscated assets, to which AROs, AMOs and other competent authorities would have direct access; and to collect comprehensive statistics at central level and send them annually to the Commission.

The proposal requires that national AROs cooperate with the European Public Prosecutor's Office, Europol and Eurojust, as well as with their counterparts in third countries, in order to facilitate the identification of criminal assets or to prevent, detect or investigate criminal offences related to the violation of EU sanctions. AMOs must be able to cooperate with their third-country counterparts.

## Advisory committees

On 14 December 2022, the European Economic and Social Committee (EESC) adopted an [opinion](#) expressing support for the proposal. In its opinion, the EESC encourages the Commission to ensure migrant smuggling and illicit tobacco trade fall within the scope of the directive, as well as to monitor implementation by Member States in order to prevent abuses as regards NCBC measures. The EESC calls for stronger procedural rights and safeguards regarding NCBC based on unexplained wealth. Moreover, it believes that AROs should be granted the necessary resources to fulfil their roles, and that Member States should report regularly on the resources allotted. The EESC calls for

the social reuse of confiscated assets and encourages Member States to include civil society organisations and set targets in this respect. Victims' rights to compensation should be prioritised.

## National parliaments

The [deadline](#) for submitting reasoned opinions on grounds of subsidiarity and proportionality expired on 19 September 2022. The Czech Chamber of Deputies submitted a [reasoned opinion](#) arguing against the introduction of 'preventive' confiscation in criminal proceedings – i.e. the unexplained wealth provision and the generalised application of extended confiscation – unless there is a clear link to a specific proven crime. It also stated that the provisions on managing seized and confiscated assets had no legal basis. The [European Commission](#) replied that, paired with strong safeguards, the provisions on extended confiscation and unexplained wealth require the national courts to be satisfied that the property was derived from criminal offences; therefore, they are not preventive in nature. Secondly, the management of frozen assets is necessary to ensure confiscation measures are effective; thus, it is covered by Article 83 TFEU, as in Directive 2014/42/EU.

The German [Bundesrat](#) opposed giving AROs direct and immediate access to tax and fiscal information, as it contravenes German fiscal legislation. It was also against creating a central register of seized and confiscated assets, as it would overly burden prosecution authorities. The [Slovenian National Assembly](#) argued that the directive should not cover EU sanctions 'when the aim is not to detect or investigate related criminal offences'. It also opposed giving AROs a role beyond criminal law, in particular in asset freezing in the context of sanctions proceedings, or charging the costs of managing frozen property to the owner, as doing so would infringe the presumption of innocence. The assembly supported the European Data Protection Supervisor's opinion (see below) on limiting the categories of data to those necessary and asked for a clearer definition of the purpose for access to the national central registers. For the [Finnish Parliament](#), the NCBC and unexplained wealth provisions raised questions about the presumption of innocence and other procedural rights.

## Stakeholder views

The European Data Protection Supervisor, in its [opinion](#) of 19 July 2022, [recommended](#) excluding from the proposal the possibility of exchanging personal data falling under the special categories listed in Annex II.B.(2)(c) (v) of the Europol Regulation (forensic identification information such as fingerprints, DNA profile, voice profile, blood group, dental information or behavioural data), unless convincing objective arguments support the need for and proportionality of such an exchange. The directive must also clearly define the purposes for which centralised registries may be accessed and searched directly and immediately, and Member States must designate the competent authority responsible for the management of the registry of frozen and confiscated property.

Transparency International EU [welcomed](#) the proposal, in particular AROs' enhanced powers, the requirement for setting up national AMOs and the extension of NCBC rules, but also pointed to the lack of clear procedures on the return of assets to [victim populations](#) by the Member States.

In a [non-paper](#) (June 2021), the Netherlands welcomed the upcoming proposal, arguing in favour of strengthening cooperation between the Member States' authorities (including AROs) in conducting financial investigations and exchanging financial information. Moreover, national registries of frozen assets should be set up alongside an EU registry on cross-border freezing orders.

[Critics](#) have highlighted the challenges associated with the impact on fundamental rights and liberties of NCBC [regimes](#) touted as more effective than standard confiscation because they lead to [faster recovery](#) of criminal profits. Whereas the European Court of Human Rights (ECtHR) has already dealt with [various issues](#) related to confiscation, including NCBC, such as the applicability of (the stricter) criminal law safeguards or of civil law standards and the proportionality of the interference with the right to property, it has not yet 'developed a [consistent case-law](#) based on principled reasoning'. Both the ECtHR and the Court of Justice of the EU will probably have to develop stricter criteria for assessing whether the various confiscation regimes comply with fundamental rights.

The International Partnership for Human Rights published a [legal opinion](#) concluding that the proposal was generally compliant with fair trial rights. It argues that the proposal sets strict conditions for the NCBC and unexplained wealth confiscation regimes to ensure compliance with fair trial rights. In particular, it discusses the reversal of the burden of proof in cases of confiscation based on unexplained wealth, arguing this should not be problematic 'as long as it occurs within certain limits and with safeguards in order to ensure that the right to presumption of innocence remains intact'. The opinion underlines the importance of informing, as early as possible, third parties affected by a confiscation order, so that they can exercise effectively their procedural rights.

Another [analysis](#) of the proposal found it included more specific safeguards than Directive 2014/42/EU. However, more clarity was still needed on some aspects, e.g. on the application of the presumption of innocence in extended confiscation cases. In addition, the extension of the scope of the proposal to (the 10) offences committed in the framework of a criminal organisation raises the risk of an extensive interpretation of the scope of 'organised crime' as a eurocrime under Article 83(1) TFEU: whereas Recital 10 mentions that such offences would fall within the scope of the directive whenever they enable further (serious cross-border) crimes and are profit-driven, the author deplores that Article 2 of the proposal does not include these elements. Another shortcoming, according to the analysis, is the lack of minimum common rules on the [disposal](#) of confiscated assets.

Finally, extending the scope of confiscation to the **violation of EU sanctions** has been a controversial issue. For some [experts](#), extending EU criminal law measures to the violation of EU restrictive measures is a necessary step towards ending impunity. [Others](#) welcome the step but believe the impact will depend on the subsequent changes to national law and the resources allocated to investigating and prosecuting such breaches. [Critics](#) question whether 'such violations could be considered particularly serious cross-border crime under Art. 83(1) TFEU'. [Others](#) argue that a Treaty amendment is necessary to allow legislative criminal law measures in the common foreign and security policy, and [advise](#) against the 'instrumentalisation of criminal law for the purpose of political or moral justness'.

## Legislative process

The proposal was referred to the [Parliament](#) on 22 June 2022, and the file was assigned to the Committee on Civil Liberties, Justice and Home Affairs (LIBE), which appointed Loránt Vincze (EPP, Romania) as rapporteur. Both the Committee on Legal Affairs (JURI) – designated as [associated committee](#) – and the Committee on Budgets (BUDG) are to provide opinions.

The LIBE [draft report](#), published on 14 February 2023, proposes to add illicit trafficking in nuclear or radioactive materials, crimes under the jurisdiction of the International Criminal Court, unlawful seizure of aircraft or ships and sabotage to the scope of the directive. AROs should have direct or indirect access to any necessary information for asset tracing and identification, including an expanded list of registries and databases. The draft also report introduces the possibility of using confiscated property for public interest or social purposes, and proposes prioritising victims' claims for restitution. Member States having confiscated assets originating in a third country should return them to the third country based on a return agreement. Member States should consider setting up asset recovery and asset management offices within a single legal and organisational structure. A platform on asset recovery and confiscation, composed of AROs and AMOs, should advise the Commission on the implementation of the directive and assess the national strategies.

In the Council, the Czech Presidency organised a [policy debate](#) in November and ministers discussed the proposal at the JHA Council [meeting](#) of 8 December 2022. In particular, ministers focused on the procedural rights of non-suspects and discussed whether the rights to a fair trial and effective remedy as included in the proposal provide sufficient protection to all persons affected by the measures. Moreover, they pondered whether to extend the right of defence to persons who are affected but who are not suspects or accused. Previously, two issues – the proposed rules on the

violation of EU sanctions and on unexplained wealth – had been examined in depth at working level. A majority of Member States rejected the inclusion of specific EU rules on prevention and detection of criminal offences related to the violation of EU restrictive measures in this instrument, and a great majority took the view that the competence of the AROs should be limited to proceedings in criminal matters, without giving them any competence in the prevention and detection of such violations. The unexplained wealth provision received broad support in principle, but Member States said that more clarity was needed about its scope, the applicable procedural rights and the standard of proof. On 21 December 2022, the Council's Working Group on Judicial Cooperation in Criminal Matters (COPEN) [discussed](#) the latest note from the presidency on the text of the proposal.

## EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Huemer M.-A., [Revision of Directive 2014/42/EU on the freezing and confiscation of the proceeds of crime and proposal for a new directive on asset recovery offices](#), EPRS, European Parliament, 2022.

Cîrlig C.-C., [Mutual recognition of freezing and confiscation orders](#), EPRS, European Parliament, 2018.

## OTHER SOURCES

[Asset recovery and confiscation](#), 2022/0167(COD), Legislative Observatory (OEL), European Parliament.

## ENDNOTES

- <sup>1</sup> Counterfeiting currency, money laundering, human trafficking, facilitation of irregular entry or residence, sexual exploitation of children and child pornography, and drug trafficking.
- <sup>2</sup> Nineteen Member States have designated one [ARO](#) each and seven Member States (BG, DE, ES, FR, LT, NL, SE) two AROs each; Slovenia has only designated a contact point.
- <sup>3</sup> See S. Peers, *EU Justice and Home Affairs Law*, Fourth Edition, Vol. II, Oxford EU Law Library, 2016.
- <sup>4</sup> Annex 2 of the Commission's [IA report](#) accompanying the proposal includes a summary of the replies.
- <sup>5</sup> [Study on freezing, confiscation and asset recovery: what works, what does not work: final report](#), European Commission, 2022; Study to support the preparation of an Impact Assessment on EU policy initiatives on asset recovery and confiscation, European Commission, HOME/2020/ISFP/FW/EVA2/0016, 2021.
- <sup>6</sup> The Commission consulted the relevant stakeholders, in particular experts and national practitioners, through questionnaires, expert interviews and workshops.
- <sup>7</sup> See Annex 4, Commission IA report accompanying the proposal for the directive on asset recovery and confiscation.
- <sup>8</sup> Following the Council's [decision](#) of 28 November 2022 to add the violation of EU sanctions to the list of serious crimes in Article 83(1) TFEU, the Commission proposed in December 2022 a [directive](#) on the definition of criminal offences and penalties for the violation of Union restrictive measures.

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