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**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

*Accompanying the document*

**Proposal for a regulation of the European Parliament and of the Council  
on the mutual recognition of freezing and confiscation orders**

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## 1. INTRODUCTION

*This impact assessment concerns a set of measures to strengthen the mutual recognition of freezing and confiscation orders to be executed on a cross-border basis within the European Union. Such measures aim at facilitating and enhancing cooperation between Member States as regards the mutual recognition and execution of orders to freeze and to confiscate property. This will increase Member States' abilities to seize and confiscate criminal assets in other Member States and thereby reduce the ability of organised crime groups to operate effectively.*

One of the main motives for criminal activity is financial gain. Taking away the profit of criminal activity and making sure that "crime does not pay" is therefore a very effective mechanism to combat crime. Seizing assets generated by criminal activities aims at preventing and combatting crime, including organised crime, compensating victims and provides additional funds to invest back into law enforcement activities or other crime prevention initiatives. Freezing and confiscation of assets is also an important tool to combat terrorist financing and the recent terrorist attacks in the EU and notably in France, Belgium and Germany have shown the urgent need to act.

Recent research<sup>1</sup> estimates that illicit markets in the European Union generate about 110 billion EUR, i.e. approximately 1% of the EU's GDP in 2010. However, and although existing statistics are limited, the amount of money currently being recovered from proceeds of crime within the EU is only a small proportion: 98.9% of estimated criminal profits are not confiscated and remain at the disposal of criminals. A functioning asset recovery regime is a precondition if more criminal assets are to be seized. This includes an efficient mutual recognition framework for freezing and confiscation orders. Although legislation on mutual recognition of freezing and confiscation orders does exist at EU level, it is patchy, out of date, and leaves significant lacunae which are exploited by criminals.

## 2. POLICY CONTEXT

### 2.1. Policy context and current challenges

The importance of confiscation of criminal assets has been recognised by the European Union. After the adoption in 1999 of the Tampere European Council conclusions, four legislative instruments on freezing and confiscation, including two mutual recognition instruments, were adopted between 2001 and 2006, which are all (at least in parts) still in force today.<sup>2</sup>

After the entry into force of the Lisbon Treaty, confiscation has been given strategic priority at EU level as an effective instrument to fight organised crime. Another instrument, Directive 2014/42/EU, was adopted, which establishes common minimum rules and thereby harmonises the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

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<sup>1</sup> Europol, Criminal asset recovery in the EU, Survey of Statistical Information 2010-2014, Key findings, p.4. See also Report of organised Crime Portfolio, 2015, From Illegal Markets to legitimate businesses: the portfolio of organised crime in Europe, <http://www.ocportfolio.eu/>.

<sup>2</sup> Cf. Section 3.3. on the EU legal framework.

When adopting Directive 2014/42/EU, the European Parliament and the Council, in a joint statement, called on the Commission "to present a legislative proposal on mutual recognition of freezing and confiscation orders at the earliest possible opportunity (...) considering the need of putting in place a comprehensive system for freezing and confiscation of proceeds and instrumentalities of crime in the EU"<sup>3</sup>. This call has been repeated at various occasions since in bilateral contacts and expert meetings.

In this joint statement the European Parliament and the Council also called on the Commission to analyse the feasibility, opportunity and possible benefits of introducing common rules on non-conviction based confiscation taking into account the differences between the legal traditions and the systems of the Member States. In view of delivering this analysis the Commission has organised expert meetings in September and November 2016. It envisages to issue the feasibility analysis in 2017.

The terrorist attacks in 2015 and 2016 in the European Union and beyond underlined the acute need to prevent and fight terrorism, including depriving criminals from proceeds of these crimes.

The Commission recognised in its European Agenda on Security of 28 April 2015<sup>4</sup> the urgent need for measures to address terrorist financing in a more effective and comprehensive manner and committed in its Communication of 2 February 2016 to the European Parliament and the Council on an "Action Plan for strengthening the fight against terrorist financing"<sup>5</sup>, to strengthening the mutual recognition of criminal assets' freezing and confiscation orders by the end of 2016. It was underlined that the "mutual recognition of judgments and judicial decisions is a key element in the security framework".

In October 2016, the European Parliament, in the context of a report presented by MEP Laura Ferrara on the fight against corruption, has called again on the Commission to submit a proposal on the strengthening of mutual recognition of freezing and confiscation orders<sup>6</sup>.

The current initiative is a response to identified deficiencies of the existing mutual recognition instruments<sup>7</sup> and to these policy calls. It builds on existing EU legislation on mutual recognition of freezing and confiscation orders and addresses the fact that Member States have developed new forms of freezing and confiscating of criminal assets, going beyond the traditional forms of conviction based confiscation. . It also takes into account developments at EU level, including the minimum standards for freezing and confiscation orders set out in Directive 2014/42/EU. The adoption of this Directive, combined with other factors<sup>8</sup>, contributed to a shift of positions in Member States to use confiscation more frequently as a means to fight crime more effectively. Whereas the Directive improves the domestic possibilities to freeze and confiscate assets, the current proposal aims to improve the cross-

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<sup>3</sup> Council doc. 7329/1/14 REV 1 ADD 1. In its final report of 11 June 2013, the Special Committee on Organised Crime of the European Parliament also called for European legislation providing for the full application of the existing mutual recognition instruments and the immediate enforceability of confiscation orders, cf. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0245+0+DOC+XML+V0//EN>

<sup>4</sup> COM (2015)185 final. See also the Communication on Delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union (COM(2016) 230 final, p.13).

<sup>5</sup> COM (2016)50 final, Chapter 1.3

<sup>6</sup> Ferrara Report adopted by LIBE on 7 October 2016

<sup>7</sup> Cf. Section 4 of this Impact Assessment.

<sup>8</sup> Cf. Section 3.6 of this Impact Assessment

border enforcement or freezing and confiscation orders. Together, both instruments should contribute to effective asset recovery in the European Union.

This initiative also concurs with recent activities taken beyond the EU as the Council's of Europe Action Plan of 2 March 2016, the on combating Transnational Organised Crime (2016-2020).<sup>9</sup> Pointing to the recovery of assets, where the Council of Europe also identified shortcomings both in terms of implementation of the existing conventions and of scope of these instruments. The Action Plan proposes different actions to improve recovery of criminal assets, including facilitating exchange of best practices, training, guidelines, but also reviewing if a new convention would be necessary e.g. to cover new forms of confiscation or to enhance the situation of victims in asset recovery procedures.

## 2.2. Statistical data

It has proved difficult to collect statistical data covering the number of cross-border freezing and confiscations orders, the amounts involved and/or recovered. The analysis in this Impact Assessment has constraints in data availability because:

- The enforcement of freezing and confiscation orders is not centralised in the Member States, meaning that a large number of judges and prosecutors is involved, and there is no obligation to inform a centralised organisation on when a request comes in;
- In many Member States statistics on freezing and confiscation orders are not compiled;
- There are different types of enforcement orders and they are not organised by categories;
- For cross-border cases there is no obligation to collect data neither on the number of requests to be executed in another Member State nor on the value or the estimated value recovered following the execution in another Member State.

The need for statistics has been highlighted many times over the last years. A study carried out in 2009<sup>10</sup> stated "*The majority of EU Member States do not automatically evaluate innovations like criminal asset recovery. The operating statistics necessary to measure implementation and assess effects are therefore not available. This makes it very difficult to diagnose and remedy system defects*". The lack of statistical data was also raised in the Commission's Impact Assessment accompanying the Proposal for a Directive on the freezing and confiscation of proceeds of crime in the EU<sup>11</sup>. In order to remedy this issue, Directive 2014/42/EU provides in Article 11 the obligation on Member States "*to regularly collect and maintain comprehensive statistics from the relevant authorities in order to review the effectiveness of their confiscation systems*". Concerning cross-border cases, the Directive also requires Member States to provide statistics on the number of freezing and confiscation orders to be executed in another Member State, and the value of the property recovers, **if they are available at central level**. This is an important step forward to improve data collection. However, the data gathering obligation is fully binding only from 4 October 2016 onwards. Moreover, regarding cross-border cases, the Directive creates an obligation to , to provide

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<sup>9</sup> Cf

[http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/CDPC%20documents/CDPC%20\(2015\)%2017%20Fin.pdf](http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/CDPC%20documents/CDPC%20(2015)%2017%20Fin.pdf)

<sup>10</sup> Study for an Impact Assessment on a proposal for a new legal framework on the confiscation and recovery of criminal assets, Framework Service Contract N°JLS/2010/EVAL/FW/001/A1

<sup>11</sup> SWD(2012) 31 final of 12.3.2012

statistics to the Commission only if they are already available at central level in the Member State concerned. It also requests Member States to endeavour to collect data at central level.

### 2.3. Stakeholder consultation

This report is based on a targeted consultation of relevant stakeholders<sup>12</sup>. Confiscation is a specialised and technical topic which is dealt with by a rather limited number of experts working in this area (namely prosecutors, judges, lawyers, bar associations, officials working in national Ministries of Justice or Interior or Asset Recovery Agencies, academia). Bilateral contacts, expert meetings and conferences were organised by the Commission to complement existing sources of information and provide additional data and facts. The most important ones were a large conference organised jointly by the Commission together with the NL Presidency on 20 June 2016, where about 100 experts from all Member States exchanged their views, a meeting of the Criminal Law Experts Group on 29 September 2016 and most recently an expert meeting on 17 November 2016 with experts from the national Ministries of Justice or Interior. A summary of this consultation process is provided for in Annex 2.

## 3. THE CURRENT LEGAL FRAMEWORK

### 3.1. The asset recovery process<sup>13</sup>

Asset recovery applies in principle to all crimes (or at least to most criminal activities in some Member States). However, in practice it is more frequently applied to serious cases. Typical examples are crimes generating huge income and liquidity, such as drug trafficking. The proceeds of crime are then converted into assets ranging from cash held in bank accounts to real estate, luxury vehicles such as sportcars, yachts, livestock, artworks, company shares, businesses, collector's items etc<sup>14</sup>.

**Table 1: Examples of asset confiscation in cross-border cases<sup>15</sup>**

Member State	Assets subject to confiscation with Eurojust's assistance
<b>Belgium</b>	Two boats to be confiscated in Spain
<b>Bulgaria</b>	€ 37000 in cash and real estate property confiscated in the United Kingdom
<b>Germany</b>	€100 000 000 confiscated in a large tax fraud case involving coordinated searches in 15 countries
<b>Ireland</b>	Substantial amounts of property confiscated in Spain and Ireland
<b>Spain</b>	Five cases involving confiscation of €112 000 000, €17 000 000, €1 000 000, €23 000 and €9 000 000.

<sup>12</sup> An exemption from the obligation to carry out a public consultation and an ex-post evaluation was granted by CAB VP Timmermans on 18 November 2016.

<sup>13</sup> See SWD(2012) 31 final of 12.3.2012, Chapter 3

<sup>14</sup> See Report of organised Crime Portfolio, 2015, From Illegal Markets to legitimate businesses: the portfolio of organised crime in Europe, p.154-155

<sup>15</sup> SWD(2012) 31 final of 12.3.2012

<b>Italy</b>	Provisional confiscation in the Netherlands of € 400 000. Freezing of 800kg of counterfeit products in 10 countries. Freezing of a luxury watch in Germany. Freezing of 300kg of cocaine in Belgium, Spain, Italy and Czech Republic. Freezing of documents related to the registration of 100 vehicles in Germany. Freezing of 700 kg of hashish, one pc, mobile telephones and documents in France, Spain and the United Kingdom. Freezing of one server in Austria.
<b>France</b>	Property and vehicles confiscated in Italy, one ship and the freezing of 1400 kg of cocaine.
<b>Sweden</b>	€ 1 685 800 confiscated in Sweden and a ship in another country.
<b>UK</b>	All property and money of a main suspect (incl. a house, a speedboat and money with a total value in excess of €1 200 000). Several luxury vehicles in Spain.

The recovery of criminal assets is a legal process whereby criminal assets are recovered in favour of victims, deprived communities or the State. At the heart of this process lies the determination by a court that particular assets derive from criminal activity and are, thereby, liable to confiscation. This typically takes the form of a confiscation order.

The process is illustrated in table 2 below<sup>16</sup>.

**Table 2: The steps in the asset recovery process in Europe**

1. **Identification/tracing:** Regardless of the nature of the confiscation order, criminal assets can only be confiscated once they have been identified.
2. **Freezing:** during the investigation process, criminal assets subject to confiscation must be secured to avoid dissipation, movement or destruction. The typical mechanism is freezing.
3. **Confiscation:** The confiscation is the final deprivation of property of criminal assets ordered by a court.
4. **Enforcement:** When a court has ordered the confiscation, the order makes it legally possible to recover criminal assets. The confiscation order is enforced against particular assets. The person subjected to the measure loses all rights to the confiscated asset, steps must be taken to enforce the order
5. **Return of Assets:** Recovered assets may be returned to victims or deprived communities or they may revert to the State.

The first stage in the asset recovery process is the tracing and identification of assets. This phase involves law enforcement investigations (usually under the coordination of a prosecutor) and requires substantial financial investigation skills. As assets are often hidden abroad, it

<sup>16</sup> See Asset Recovery Handbook, a guide for practitioners, Jean-Pierre Brun, Larissa Gray, Clive Scott, Kevin M. Stephenson, 2011, Chapter 1: Overview of the Asset Recovery process; The Portfolio of organised crime in Europe, Report 2015, p.225



requires cross-border cooperation. National Asset Recovery Offices (AROs) play a key role in expediently providing information to other AROs on the assets located in their territory.<sup>17</sup>

After criminal assets are located in one or more countries, judicial procedures are needed to first freeze them and subsequently to confiscate them. Following their freezing, assets should be properly managed between the time when they are seized and the time when a confiscation order is issued, so that their value is maintained. In principle assets become the property of the executing State, which may sell them or re-use them as appropriate.

The impact assessment focuses on steps 2 and 3, being the main aspects for judicial cooperation in cross-border cases, and also covers steps 4 and 5.

### 3.2. Different types of asset recovery

Criminals attempt to conceal their illicit gains from justice, taking all measures they can to put assets beyond the scope of confiscation laws or enforcement measures.

In recent years, as a response to this phenomenon, many Member States have instituted new forms of confiscation orders in order to deprive criminals of their illegally obtained assets more efficiently. One can distinguish:

- **ordinary confiscation (conviction based confiscation)** is a confiscation measure directed against an asset which is the direct proceed or the instrumentality of a crime, following a criminal conviction for that crime;

- **extended confiscation** is 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** is a confiscation measure made to deprive someone other than the offender – the third party - of criminal property, where that third party is in possession of property transferred to him by the offender;

- **value-based confiscation** is a confiscation measure by which a court imposes an order corresponding to the value of proceeds or instrumentalities of a crime, which is realizable against any property of the individual;

- **non-conviction based confiscation** (hereafter 'NCBC') is a confiscation measure taken in the absence of a conviction and directed against an asset from illicit origin. It covers cases where a criminal conviction is not possible because the suspect has become ill or fled the jurisdiction, has died, lacks legal capacity (e.g. is a minor or of unsound mind), has immunity from prosecution or amnesty or where the statute of limitations has passed, or where a conviction is not possible for other reasons like lack of proof, but the court is nevertheless convinced in a criminal procedure that the assets are of criminal origin. It also covers the cases of action against the asset itself (so-called "proceedings *in rem*", generally in civil proceedings)<sup>18</sup>, regardless of the person in possession of the property, for example when the proceeds of crime have been identified but cannot be linked to any individual; or the suspect is

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<sup>17</sup> Cf. 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 of 18.12.2007, p. 103.

<sup>18</sup> "Proceedings in rem" means that proceedings are initiated against the property (not against a specific person). See below, section 3.5

outside the jurisdiction of the Member State considering confiscation and there is no prospect of his being brought within that Member State to face trial.

In addition several Member States provide for the right of the victim for restitution or compensation of damages from the confiscated property.

### **3.3. The EU legal framework**

The current EU legal framework consists of five main instruments. Apart from Council Decision 2007/845/JHA on asset tracing, two of them are mutual recognition instruments while two others are harmonisation measures. Both types of instruments are necessary in order to have a functioning regime of recovery of criminal assets and they complement each other.

#### **Mutual recognition**

Mutual recognition means that a decision usually taken by a judicial authority in one EU Member State is recognised, and where necessary, enforced by other EU Member States as if it was a decision taken by the judicial authorities of the latter Member States. Mutual recognition is based on mutual trust between Member States' authorities.

#### **Harmonisation**

Harmonisation in the area of EU criminal law means creating common minimum standards. It does not involve full scale unification.

The mutual recognition principle implies that a judicial decision taken by a competent judicial authority of a Member State has to be executed in another Member State without prior verification according to the national law of the executing State. The grounds on which recognition and execution can be refused are enumerated exhaustively in the instrument. A certificate to be used contains all necessary information for the executing State to take its decision.

There are a number of EU instruments in the area of judicial cooperation in criminal matters based on the principle of mutual recognition. The most successful one is probably the European Arrest Warrant<sup>19</sup>. It is difficult to deduct key success factors from an instrument like the EAW and apply them to a very different context like the freezing and confiscation of criminal assets, but the EAW example shows that mutual recognition can make judicial cooperation between Member States very efficient.

#### **Mutual recognition instruments:**

**Council Framework Decision 2003/577/JHA** of 22 July 2003 on the execution in the European Union of orders freezing property or evidence<sup>20</sup> and **Council Framework Decision 2006/783/JHA** of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders are aimed at facilitating the recovery of assets in cross-border cases<sup>21</sup>.

Both Framework Decisions are based on the principle of mutual recognition and work in a similar way. Both instruments require freezing or confiscation orders issued in one Member State to be recognised and executed in another Member State. The orders are transmitted alongside a certificate to the competent authorities in the executing State which must recognise them without further formalities and take the measures necessary for their execution.

<sup>19</sup> Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (EAW), OJ L 190 of 18.7.2002, p. 1.

<sup>20</sup> OJ L 196/45 of 2.8.2003. As regards freezing for the purpose of safeguarding evidence, Framework Decision 2003/577/JHA will be replaced by Directive 2014/41/EU on the European Investigation Order.

<sup>21</sup> OJ L 328/59 of 24.11.2006

Mutual recognition is mandatory for a list of offences punishable by at least three years of imprisonment in the issuing State. In other cases, dual criminality is necessary, which means that recognition can be refused if the crime to which the freezing or confiscation order relates is not a criminal offence under the laws of the executing Member State. The Framework Decisions allow for further grounds for refusal in certain situations.

#### **Harmonisation measures:**

**Council Framework Decision 2001/500/JHA** on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, the first instrument in this area, was soon considered not to sufficiently achieve effective cross-border cooperation<sup>22</sup> and was replaced in 2005 by the Framework Decision 2005/212/JHA. **Council Framework Decision 2005/212/JHA** of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property<sup>23</sup> requires all Member States to put in place effective measures to enable the ordinary confiscation of criminal instrumentalities and proceeds for all criminal offences punishable by detention of at least one year. It also introduced provisions on extended confiscation. However, the level of harmonisation introduced by this instrument is very low, and it has not removed the diversity of national legal confiscation regimes.

**Directive 2014/42/EU** of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the EU<sup>24</sup> had to be implemented by Member States until October 2016. It replaces certain provisions of Council Framework Decision 2005/212/JHA. Whereas Framework Decision 2005/212/JHA applies to all criminal offences punishable by detention of at least one year, the Directive could only cover the so-called Eurocrimes<sup>25</sup>.

Directive 2014/42/EU sets minimum rules for national freezing and confiscation regimes: it requires ordinary and value confiscation for Eurocrimes, including where the conviction results from proceedings in absentia. It provides rules for extended confiscation subject to certain conditions. It also enables confiscation where a conviction is not possible because the suspect or accused person is ill or has absconded. The Directive also enables for the first time the confiscation of assets in the possession of third parties. Finally, the Directive introduces a number of procedural safeguards<sup>26</sup>, such as the right to be informed of the execution of the freezing order including, at least briefly, on the reason or reasons; the effective possibility to challenge the freezing order before a court; the right of access to a lawyer throughout the confiscation proceedings; the effective possibility to claim title of ownership or other property rights; the right to be informed of the reasons for a confiscation order and to challenge it before a court.

### **3.4. The international legal framework**

Since the 1990's the confiscation of illicit money has become a political priority at international level (UN, OECD, Council of Europe, Financial Action Task Force - FATF).

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<sup>22</sup> Cf. Framework Decision 2005/212/JHA, Recital 9.

<sup>23</sup> OJ L 68/49 of 15.3.2005

<sup>24</sup> OJ L 127/39 of 29.4.2014

<sup>25</sup> According to Art. 83 TFEU, Eurocrimes are particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offenses or from a special need to combat them on a common basis. They are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Because of the legal base of Article 83(1) TFEU, the scope of Directive 2014/42/EU is limited to Eurocrimes, and does not cover other criminal offences which generate proceeds.

<sup>26</sup> Cf. Article 8

The international acquis is set out in detail in Annex 4. The international conventions are important tools in the fight against organised crime and the efforts to enhance asset recovery. They provide alternative, more traditional means of judicial cooperation compared to mutual recognition, based on mutual legal assistance (MLA).

### **Mutual legal assistance**

Mutual legal assistance consists of cooperation between different countries for the purpose of gathering and exchanging information, requesting and providing assistance in obtaining evidence located in one country to assist in criminal investigations or proceedings in another or in freezing and confiscating assets of criminal origin.

Mutual legal assistance is widely used in cross-border cooperation in criminal matters. It is based on reciprocity and involves more actors than mutual recognition: requests are generally sent by a judge to a central authority in the requesting State, then to a central authority in the requested State, then to a judicial authority for execution. It allows to combine several requests (e.g. assistance to locate an asset and then assistance to freeze the asset), which is an advantage compared to mutual recognition. However, in comparison to mutual recognition there are obvious drawbacks of the system of mutual legal assistance: the execution is not mandatory but depends on the domestic legal system of the executing State. Moreover, a mutual legal assistance procedure may be very lengthy as there are no deadlines foreseen and more actors involved (in average, mutual legal assistance requests have been found to last about a year in average).

In addition, not all of the international acquis is binding or applicable between all EU Member States. For example, the so-called "Warsaw-Convention" adopted by the Council of Europe in 2005 has been ratified only by 17 EU Member States. The Recommendations adopted by the Financial Action Task Force (FATF) have no binding character.

### **3.5. Confiscation in EU Member States**

The national confiscation systems in the EU differ substantially. Each Member State's confiscation laws have evolved in response to domestic imperatives, the respective legal traditions<sup>27</sup> and cultural differences<sup>28</sup>. By the time the EU began to act in 2001 some Member States already had potent asset confiscation regimes in place, whilst others did not<sup>29</sup>.

For efficiency reasons, some Member States have introduced confiscation systems to provide for the confiscation of property without a prior criminal conviction.

In Europe, Italy was the first country to introduce a preventative confiscation system in 1965<sup>30</sup> in order to tighten the fight against mafia organisations<sup>31</sup>. In 1996, inspired by the USA which

<sup>27</sup> For example, civil law and common law approach

<sup>28</sup> Some judges consider confiscation as an additional punishment of an already convicted person and are reluctant to apply it systematically. Meeting of Criminal Law Expert Group, 29.9.2016

<sup>29</sup> For example, substantial differences exist between the national regimes for third party confiscation and extended confiscation. Non-conviction based confiscation is heavily used in Ireland, Bulgaria and other countries, but is not so widely used in Romania (property is presumed to be of licit origin and a reversal of the burden of proof would be perceived as problematic). France introduced a new crime for "possession of unjustified assets" (in case of evident links with organised crime activities) which does not exist in other Member States.

<sup>30</sup> Act N°575 in 1965

<sup>31</sup> See evaluation of Italian system:

[https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2014-September-11-12/Combined\\_CacCosp-Wg2-2014-CRP3.pdf](https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2014-September-11-12/Combined_CacCosp-Wg2-2014-CRP3.pdf)

had introduced civil confiscation in 1970, comprehensive legislation on NCBC was developed in Ireland<sup>32</sup>. The Irish non-conviction based model acts *in rem* on property that constitutes the proceeds of crime. It applies civil law, no link to criminal proceedings is required. Several years later, similar legislation came into force in the United Kingdom<sup>33</sup>. More recently, Bulgaria<sup>34</sup>, Slovakia and Slovenia<sup>35</sup> have also introduced forms of civil NCBC in which the confiscation proceedings are initiated against the property<sup>36</sup> (see Overview of NCBC systems, Annex 5).

These systems are generally referred to as civil because they allow for the recovery in civil proceedings, where evidence of a specific crime generally follows civil law standards. Assets are taken from persons suspected of involvement in crime or illegal activity without necessarily charging the owner of the assets with an offence. Civil confiscation is directed against property, not a person.

Conviction-based confiscation in criminal proceedings	Non-conviction based confiscation in civil proceedings
Proceedings are brought by the State against an individual and form part of an action brought against a specific person ( <i>in personam</i> ).	Proceedings are initiated by the State against the property ( <i>in rem</i> ).
The confiscation usually forms part of the sentencing of the individual once found guilty (criminal conviction) in criminal proceedings.	Confiscation is imposed before, during or after criminal conviction, or even when no action is brought against a specific person.
A criminal conviction in criminal proceedings is required with clear evidence of a crime "beyond reasonable doubt."	A criminal conviction is not required. Evidence of unlawful conduct must be provided and the illegality of the assets must be decided based on the "balance of probabilities", often with a shifting of the burden of proof from the Member State to the individual/owner of the asset.
Object-based and value-based	Object-based
Criminal courts	Criminal or civil courts

Source: EUROJUST, *Report on non-conviction based confiscation, 2012, p.7*

In addition, differences between Member States also exist with regard to extended confiscation. Framework Decision 2005/212/JHA left a choice to Member States regarding the criteria for extended confiscation. Directive 2014/42/EU lays down common minimum

<sup>32</sup> Proceeds of Crime Act, 1996; for more details see Council of Europe, Impact Study on Civil Forfeiture, March 2013

<sup>33</sup> Proceeds of Crime Act, 2002

<sup>34</sup> Law on forfeiture in favour of the State of illegally acquired property, in force since 19.11.2012

<sup>35</sup> Confiscation of Assets of Illicit Origin Act

<sup>36</sup> See evaluation of confiscation practices in Bulgaria, Italy and Romania:

[http://www.confiscation.eu/site/wp-content/uploads/2015/03/Final\\_Report\\_EN\\_web.pdf](http://www.confiscation.eu/site/wp-content/uploads/2015/03/Final_Report_EN_web.pdf)

standards for extended confiscation in all Member States. In addition to the systems described above, Greece, Latvia, Lithuania, the Netherlands, Romania and Spain have introduced NCBC in the form of "unexplained wealth" in some limited cases. This means that the actual property of a person is compared to the income declared in order to identify any disparity between the two. Establishing a link to an offence is not necessary<sup>37</sup>. Also, some of the Member States apply different administrative proceedings to confiscate property obtained through unlawful conduct. For example, in Hungary any property obtained through unlawful conduct could be confiscated in tax proceedings<sup>38</sup>.

### **3.6. Recent trends in the area of freezing and confiscation**

Several years of efforts at international and EU level have led to an enhanced perception of the importance of confiscation and freezing and a more dynamic development in this area recently. This is not only due to the legal work (e.g. Directive 2014/42/EU) but also to an enhanced exchange of expertise between Member States. For example, regular meetings at expert level to exchange best practices and to enhance cooperation. For example, regular expert meetings of Member States' authorities have been organised by the Commission under the EU ARO Platform, several meetings with Europol and Eurojust have taken place to support and strengthen Member States' activities at operational level.

All these efforts have contributed to an increased awareness of the importance of confiscation and freezing in the fight against organised crime and terrorism. They have also shown that the traditional forms of criminal conviction based confiscation are rather complicated and heavy and therefore not very efficient.

It is against this background that Member States are currently revising their freezing and confiscation legislation to implement Directive 2014/42/EU<sup>39</sup>. Several Member States are using this opportunity to modernise their asset recovery regimes beyond the obligations of the Directive.<sup>40</sup> On 25 April 2015, 21 April 2016 and 17 November 2016 the Commission held experts meetings where the Member States provided detailed information on their respective systems and legislative reforms to implement the Directive 2014/42/EU.

Largely, three groups of Member States can be distinguished<sup>41</sup>:

(1) Approximately 12 Member States which have the classical conviction based approach and which aligned (or are currently aligning) their asset recovery regimes along the lines of the Directive 2014/42/EU (including extended confiscation and criminal non-conviction based confiscation in cases of illness or absconding only).

(2) Approximately 8 Member States which go beyond the requirements of the Directive 2014/42/EU and include other forms of criminal non-conviction based confiscation (in case of death of a person or where a criminal court can confiscate an asset in the absence of conviction when the court is convinced that such asset is the proceeds of crime).

(3) Approximately 7 Member States which have an asset recovery regime (or where a reform is ongoing) which includes also civil or administrative non-conviction based confiscation.

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<sup>37</sup> See Carin, Non-conviction Based confiscation Typologies, p.2; Eurojust, Report on non-conviction based confiscation, 2013

<sup>38</sup> Eurojust, Report on non-conviction based confiscation, 2013, p.11

<sup>39</sup> Transposition deadline: 4 October 2016; 9 Member States have notified complete transposition, 4 Member States have partially transposed. In several other Member States reforms are still ongoing.

<sup>40</sup> See for example in Germany "Entwurf eines Gesetzes zur Reform der Strafrechtlichen Vermögensabschöpfung" of June 2016

<sup>41</sup> Due to on-going reforms Member States are not named.

It became also clear that even though the Directive will result in greater harmonisation on many aspects of the different confiscation regimes in the EU Member States, important differences are expected to persist in areas outside the scope of the Directive, in particular regarding NCBC and the civil or administrative procedures that some Member States use .

#### **4. PROBLEM DEFINITION**

The problem definition builds on:

- the implementation reports on Framework Decision 2003/577/JHA<sup>42</sup> and Framework Decision 2006/783/JHA<sup>43</sup>;
- the 2012 Impact Assessment accompanying the Commission proposal for Directive 2014/42/EU which already concluded on the need for a legal instrument to improve mutual recognition in this area;
- a comparative law study on the implementation of mutual recognition of freezing and confiscation orders in the EU of 2013<sup>44</sup>;
- several expert meetings (including an in-depth expert meeting on 17 November 2016 with focus on non-conviction based confiscation) and conferences dedicated to the issue of mutual recognition of freezing and confiscation orders.

In view of the existing data, a separate ex post evaluation of the existing mutual recognition instruments was not carried out. The 2013 study evaluated the performance of the existing EU measures (effectiveness, efficiency). The 2012 Impact Assessment accompanying the proposal for Directive 2014/42/EU<sup>45</sup> also included an evaluation of the same measures, and reached an identical conclusion, namely that there was a fundamental problem with the scope of the existing measures and that a new mutual recognition instrument was justified. The 2012 Impact Assessment was approved by the Impact Assessment Board.

Moreover, no public consultation was carried out because of the nature of the topic and the political urgency, cf. Annex 2. For both the ex post evaluation and the public consultation, an exemption was granted.

##### **4.1. The general problems:**

Two general problems have been identified in the context of the mutual recognition of freezing and confiscation orders within the EU: (1) the insufficient recovery of criminal assets in cross-border cases; (2) the insufficient protection of victims' rights to restitution and compensation in cross-border cases. Although both problems are not directly inter-linked, the second problem depends to a certain extent on the first problem (if there is insufficient freezing and confiscation in cross-border cases, the restitution and compensation of victims will be insufficient as well).

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<sup>42</sup> Report from the Commission to the European Parliament and the Council of 22.12.2008 [COM(2008) 885 final - Not published in the Official Journal].

<sup>43</sup> Report from the Commission to the European Parliament and the Council of 23.8.2010 [COM(2010) 428 final – Not published in the Official Journal].

<sup>44</sup> Study carried out by DBB in November 2013 "*Comparative Law Study of the implementation of mutual recognition of orders to freeze and confiscate criminal assets in the EU*",

<sup>45</sup> Commission Staff Working paper accompanying document to the Proposal for a Directive of the European Parliament and the Council of the freezing and confiscation of proceeds of crime in the European Union, SWD(2012) 31 final.

#### **4.2. General problem 1: Too few criminal assets are frozen and confiscated in the European Union in cross-border cases**

The 2015 report of organised Crime Portfolio<sup>46</sup> concludes that organised crime activities are often transnational in nature and the assets of criminal groups are increasingly invested in other Member States. Illicit markets in Europe are changing rapidly in size, products, actors, routes and flows, but they remain key source of proceeds for organised crime in Europe. A significant discrepancy exists between what criminals invest and what is actually confiscated.

To tackle this phenomenon, efficient judicial cooperation is necessary. Nevertheless, Member States today make little use of judicial cooperation tools to freeze and confiscate criminal assets located in other Member States. Only very few freezing and confiscation orders are issued and executed in other Member States, in relation to the amount of criminal assets moved abroad by the offenders. According to reports by practitioners and Member States' governments, compared to some other mutual recognition instruments (such as the European Arrest Warrant (EAW)), the ones on freezing and confiscation are used very little<sup>47</sup>.

Members of Eurojust, Europol, judges and prosecutors have repeatedly pointed out during expert meetings or bilateral contacts<sup>48</sup> that confiscation is a very efficient tool, in particular in the fight against organised crime such as drug trafficking. Many have noted that confiscation procedures at cross-border level are underused and that there is an increased need for effective cross-border cooperation on asset recovery.

For some Member States, classic tools and instruments of international co-operation, i.e. requests for mutual legal assistance, have remained the most suitable route for asset recovery cases. But even if one takes mutual legal assistance into account, cross-border confiscation procedures remain underused<sup>49</sup>.

It results clearly from various studies carried out recently in this area that the main reason for this is the differences in national freezing and confiscation schemes described above<sup>50</sup>, combined with a lack of obligation to recognise many of those orders. The executing Member State may not know in its legal system the type of confiscation that is to be implemented. The proceedings may be of a different nature, the standard of proof may be different and procedural rights may vary. A significant number of Member States does therefore not recognise some types of freezing or confiscation orders issued in another Member State, be it under mutual recognition or mutual legal assistance. Moreover, the current Framework Decisions on mutual recognition have several deficiencies, described below. There are also cultural differences between Member States regarding how much confiscation is used, but this is not specifically linked to the issue of lack of cross-border confiscation and is outside the scope of this exercise.

This provides a fertile environment for criminals, including terrorists and terrorist organisations; they are able to keep the proceeds of their criminal activities and even re-use them for committing further crimes. The recent terrorist attacks in 2015 and 2016 have

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<sup>46</sup> "From illegal markets to legitimate businesses: The Portfolio of Organised crime in Europe", 2015, see executive summary, p.8

<sup>47</sup> Cf. Section 4.5.2. The scale of freezing and confiscation in the European Union.

<sup>48</sup> See also specific meeting with Eurojust members on 29 June 2016, set out in Annex 2.

<sup>49</sup> Hague Conference 2014; most recently, at the ERA Seminar on Freezing, Confiscation and Recovery of Assets, May 2016; Meeting with Eurojust experts in June 2016.

<sup>50</sup> From illegal markets to legitimate businesses: The Portfolio of Organised crime in Europe", 2015, see executive summary, p.15; Comparative Law Study of the Implementation of mutual recognition of orders to freeze and confiscate criminal assets in the European Union, 2013



underlined the urgency and the need for the Commission to act and to disrupt the ability of criminals and terrorists to keep the proceeds of crime for financing terrorism or other illicit conduct<sup>51</sup>.

Criminals are reported to target those Member States which have weak asset recovery regimes or practices as places to invest or move assets to<sup>52</sup>. Efforts made by individual Member States to strengthen their national asset recovery regimes are in vain, if criminals are able to move their assets to other Member States, making use of the facilities of the internal market, and the freezing and confiscation orders cannot follow the assets across borders.

The penetration of organised crime into the licit economy, even if it takes place in a single Member State, affects the functioning of the whole EU Internal Market, not only of that country. Even when managing licit businesses, organised crime groups, often support these activities with the recourse to intimidation and corruptions, thus altering competition and the smooth functioning of the Internal Market. The resulting loss of revenues affects both national and EU financial interests, even when it takes place in only one Member State.

The aims of asset recovery are realised not only when criminals are deprived of their illegal gains but when these are redistributed effectively. In particular, the impact of asset confiscation upon public trust in the criminal justice system may be enhanced through redistribution and restorative justice (for more details, see Annex 3).

### **4.3. Specific problems**

#### *4.3.1. Specific problem 1: Too limited scope of the current mutual recognition legal framework*

The main specific problem which has been identified is that the existing EU legislation on mutual recognition of freezing and confiscation orders has not kept up with recent developments in national legislation in some Member States and with recent EU legislation on minimum rules, notably the Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU.

In particular, the current mutual recognition instruments do not cover all the types of freezing and confiscation orders that can be adopted at national level (notably with regard to NCBC). As a result, mutual recognition is generally limited to traditional conviction based confiscation orders. Member States that have established new forms of confiscation not based on a criminal conviction, in particular criminal, civil and administrative forms of non-conviction based confiscation, to fight crime more efficiently,<sup>53</sup> are not able to ensure that those orders are recognised and executed in other Member States that don't have the same regimes, and even in Member States that have similar regimes. Mutual legal assistance has to be used when the Framework Decisions do not apply, meaning that the benefits of mutual recognition are lost for those procedures: the execution depends on the domestic legal system of the executing Member State, is not subject to deadlines and is not mandatory. Even if some Member States that only have criminal confiscation regimes might be able to execute such orders, other Member States will systematically refuse.

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<sup>51</sup> Cf. Section 2.1 Policy context and current challenges

<sup>52</sup> Meeting with Eurojust experts in June 2016.

<sup>53</sup> Cf. Annex 5 Non-conviction based confiscation systems in the EU.

### *Examples*

While France is able to execute Italian NCBC orders under mutual legal assistance<sup>54</sup>, Spain would systematically deny the execution of a civil NCBC order taken using *in rem* proceedings<sup>55</sup>. For example, Ireland may issue a civil NCBC for criminal assets located in Spain when a criminal conviction is not possible. However, as Spain does not recognize such Irish order, the property order could not be confiscated and would remain at the offender's disposal.

Another example is a case where both jurisdictions have NCBC, namely Ireland and the United Kingdom. In this case, a freezing order was obtained by Ireland. The target brought the assets across the border to Northern Ireland in an attempt to evade the order. The order could not be enforced in the United Kingdom as there exists no such mechanism even between NCBC jurisdictions.

Another example, an ongoing Bulgarian case, can be found in Annex 9.

### *- Non-alignment of current mutual recognition instruments with Directive 2014/42/EU*

While Article 5 of Directive 2014/42/EU requires all Member States to enable extended confiscation, the current mutual recognition Framework Decisions leave broad possibilities to refuse execution of orders based on extended confiscation, limiting the obligation to recognise such orders. Thus, the receiving Member State may choose whether or not to enforce freezing or confiscation orders issued with a view to confiscate proceeds that are not connected to the specific crime for which the person is being prosecuted.

Similar issues arise with the cases of illness or absconding of the suspected or accused persons which have been introduced by Article 4 of Directive 2014/42/EU. None of these cases require execution by the two Framework Decisions.

One of the benefits of harmonisation is that it increases mutual trust and facilitates mutual recognition; this benefit is lost when the mutual recognition instrument is not at least aligned with the harmonisation instrument, and the gaps in the mutual recognition rules would have a considerable negative impact and hamper the functioning of the whole system. As underlined by experts in recent meetings, now that the Directive 2014/42/EU entered into force<sup>56</sup>, there is an obvious need for reinforcing the mutual recognition system in the EU and to complement the harmonisation measures already adopted<sup>57</sup>.

### *- No coverage of more modern forms of NCBC, including notably civil and administrative NCBC*

Although a number of Member States confiscate assets outside of criminal proceedings (*see above, Section 3.5*), existing EU legislation does not require that confiscation orders issued in relation to these proceedings should be recognised. Although some international instruments,

<sup>54</sup> In the "Crisafulli case", Italy requested that France, on the basis of the Strasbourg Convention, execute a non-conviction based confiscation order ("preventive confiscation") to a villa belonging to Mr. Crisafulli. Mr. Crisafulli had been convicted in Italy of criminal association aimed at drug trafficking (Tribunale di Milano, 1999). Mr. Crisafulli owned a villa in France. The villa itself was not directly related to the drug trafficking of Mr. Crisafulli but it had been demonstrated by the Italian Court that the villa had been bought on the basis of income from drug trafficking. The French "Cour de Cassation" accepted to execute the Italian order despite not having non-conviction based confiscation in its national law (2003). The villa was seized and confiscated.

<sup>55</sup> ERA Presentation made by Rosa Ana Moran Martinez, Spanish Chief Prosecutor, 19.5.2016.

<sup>56</sup> 4 October 2016

<sup>57</sup> Expert meeting of 17 November 2016 on non-conviction based confiscation

such as the Warsaw Convention, provide a legal base for mutual legal assistance in the execution of such orders, these conventions are not applicable in all Member States, nor can they reach a similar efficiency as a mutual recognition instrument can.<sup>58</sup> In practice such orders are not routinely recognised by other countries and there is no legal instrument that would require recognition.

- *Conclusion*

The limited scope of the current legal framework affects the overall quality of justice within the EU and consequently undermines mutual trust between judicial authorities. This means that Member States are missing opportunities to seize and confiscate criminal assets, recover proceeds of crime and deprive criminals of their means to operate.

4.3.2. *Specific problem 2: The current procedures and certificates are too complex and inefficient*

Practitioners including judges, prosecutors, representatives from Member States, reported repeatedly that the mutual recognition certificates provided for in the Framework Decisions 2003/577/JHA on the execution of freezing orders and 2006/783/JHA on the mutual recognition of confiscation orders are complicated and lengthy, thereby increasing the administrative burden on the authorities and the length of the procedure<sup>59</sup>.

This problem has already been underlined in 2008 in the Commission Communication "Proceeds of organised crime".<sup>60</sup> In particular the Communication mentioned that the certificate to request the execution of freezing orders was rather difficult to complete and it did not contain the necessary fields. This has also been confirmed by the results of the 2013 Comparative Law Study and the interviews conducted with Member States' authorities<sup>61</sup>.

As a result, there is a reluctance of practitioners to use the mutual recognition instruments. They often prefer to have resort to mutual legal assistance<sup>62</sup> they are more familiar with, which continue to apply alongside the Framework Decisions on mutual recognition, provided that the Member States concerned are both parties to the relevant Conventions. Practitioners may also prefer MLA because the forms are less prescriptive compared to the mutual recognition instruments.

Moreover, although the possibility for the executing Member State to refuse recognition or execution is an important element in the operation of the principle of mutual recognition, some of the grounds for refusal leave considerable discretion to domestic judicial authorities and/or lack justification. For example, the possibility to refuse execution based on the mere fact that the underlying offence was committed in the executing State's territory lacks appropriate justification<sup>63</sup>.

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<sup>58</sup> Cf. Section 4.6 for a description of the disadvantages of mutual legal assistance.

<sup>59</sup> See also Eurojust, Report on Eurojust's experience in the field of asset recovery, including freezing and confiscation, Council document 10179/15, p.5

<sup>60</sup> COM/2008/0766 final

<sup>61</sup> DBB, Comparative Law Study of the Implementation of mutual recognition of orders to freeze and confiscate criminal assets in the European Union, p.72

<sup>62</sup> Council of Europe 1990 and 2005 Conventions, see Annex 4.

<sup>63</sup> See Art.8(2)(f) of FD 2006/783/JHA. Cf. Art 11(1)(e) in Directive 2014/41/EU on the European Investigation Order, requiring additionally that the conduct is not an offence in the executing State.

In addition, even if they contain provisions such as the obligation to execute an order "forthwith" or to inform, "whenever practicable", within 24 hours<sup>64</sup> the Framework Decisions do not prescribe strictly defined time limits for the executing authorities.

The Implementation Report from the Commission concerning Framework Decision 2003/577/JHA on the execution of freezing orders<sup>65</sup> highlighted the various inconsistencies in the implementation of Art.5(3) of Framework-Decision 2003/577/JHA in the Member States: some Member States have provided different time limits, some Member States have not laid down any concrete time limits, some Member States have not at all implemented this specific provision and other Member States have not implemented the Framework Decision at all.

These inconsistencies as regards delays, which are particularly problematic for freezing orders, have been repeatedly criticized by practitioners and identified as one of the problems which needs to be resolved.<sup>66</sup>

#### 4.3.3. *Specific problem 3: Inconsistent implementation of existing mutual recognition instruments into national law*

Another barrier to the effectiveness of the EU legal framework on mutual recognition arises from the inconsistent transposition of the existing relevant rules into national law. The legal instruments adopted in this field are not directly applicable in Member States and have to be transposed into national law before they can take effect at national level<sup>67</sup>.

The Commission issued implementation reports on Framework Decisions 2003/577/JHA on the mutual recognition of freezing orders<sup>68</sup> and 2006/783/JHA on the mutual recognition of confiscation orders<sup>69</sup>. These reports show that (i) a number of Member States had not transposed these instruments by the deadline<sup>70</sup>, and (ii) the transposition by many Member States has not complied with all of the requirements of the EU instruments<sup>71</sup>. This further hampers the possibilities of judicial cooperation and reduces mutual trust.

Before the entry into force of the Lisbon Treaty on 1 December 2009, no infringement proceedings could be initiated against Member States by the Commission for failure to transpose the Framework-Decisions into national law. The situation has improved since 1

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<sup>64</sup> Cf. Article 5 Framework Decision 2003/577/JHA: "The competent judicial authorities of the executing State shall decide and communicate the decision on a freezing order as soon as possible and, whenever practicable, within 24 hours of receipt of the freezing order."

<sup>65</sup> COM(2008) 885 final, p.4

<sup>66</sup> See Comparative Law Study of the Implementation of mutual recognition of orders to freeze and confiscate criminal assets in the European Union, p.77

<sup>67</sup> See "the *Effectiveness of EU Law: Insights from the EU Legal Framework on Asset Confiscation*", Mihaly Fazekas, Eva Nanopoulos, published in the European Journal of Crime, Criminal Law and Criminal Justice (2016), 39-64

<sup>68</sup> COM(2008) 885 final of 22.12.2008

<sup>69</sup> COM(2010) 428 final of 23.8.2010

<sup>70</sup> Some Member States transposed those even years after the deadline. Even now, the two Framework Decisions have not been transposed by Hungary and Poland.

<sup>71</sup> In some cases, Member States did not implement the definition of the terms "freezing" or "confiscation" in the Framework Decisions, maintaining instead their own national definitions. In other cases, important rules of the Framework Decisions were not transposed or additional conditions were introduced in the relevant national laws. For example, some Member States did not include the requirement that freezing orders should be recognised within 24 hours or added additional grounds for refusal/non-recognition to the list, even though it is meant to be exhaustive.

December 2014 with the Court of Justice of the European Union having full jurisdiction in matters pertaining to the former third pillar.

However, it should be underlined that the inconsistent implementation of existing instruments is only a secondary problem and that a complete and correct implementation of the existing legal framework would not be sufficient to address the problems explained above under section 4.3.1 and 4.3.2 (too limited scope of the obligation to recognise under the existing instruments and too complex and lengthy procedures and certificates); inconsistencies which exist in the current Framework Decisions<sup>72</sup> would remain.

*Overview Table: General problem 1 – Insufficient recovery of criminal assets in cross-border cases*

Elements related to the current legal framework	Elements related to the implementation of the current legal framework
<p>1. <b>Limited scope</b> of the current Framework-Decisions in terms of types of confiscation covered:</p> <ul style="list-style-type: none"> <li>- cases of illness or absconding not covered,</li> <li>- NCBC including civil and administrative not covered,</li> <li>- extended confiscation covered but subject to large possibilities to refuse execution.</li> </ul> <p>2. <b>Inefficient procedures:</b> e.g. time limits for freezing are not mandatory, no time limits for confiscation</p> <p>3. <b>Complicated certificates</b> for practitioners</p> <p>4. <b>Nature of the instrument:</b> Framework-Decisions leave large discretion to Member States and are not directly applicable</p>	<p>1. <b>Lack of transposition</b> of the Framework-Decisions by their deadlines or only <b>partial transposition</b> by Member States.</p> <p>2. <b>Compliance issues:</b> requirements of the Framework-Decisions are not always complied with (e.g. additional grounds for refusal)</p>

<sup>72</sup> Some EU legal provisions are not consistent. For example Framework Decision 2005/212/JHA establishes alternative criteria for extended confiscation as follows: i) A court is convinced that the property is derived from criminal activities of the convicted person prior to conviction; ii) A court is convinced that the property is derived from similar criminal activities of the convicted person prior to conviction; iii) The value of the property is disproportionate to the lawful income of the convicted person and the court is convinced that the property derives from criminal activity. The Framework Decision leaves Member States with the option to transpose one, two or all three criteria. This provision is not coordinated with the provisions on the grounds for refusal of mutual recognition of confiscation orders laid down in Framework Decision 2006/783/JHA. As a result, the scope for mutual recognition of confiscation orders is restricted. The authorities in one Member State are obliged to execute confiscation orders issued by another Member State only if these orders are based on the same alternative criteria applied in the Member State receiving the order.

#### **4.4. General problem 2: The current mutual recognition instruments do not contain provisions on victims' compensation and restitution**

The second general problem which should be addressed with the current initiative is related to the compensation and restitution of victims. The current European legal framework for the protection of the rights of victims in the context of freezing and confiscation proceedings is insufficient in this respect.

Without effective cross-border recovery of criminal assets, victims are denied the means to get restitution or compensation for their losses in cross-border cases in Member States where confiscation is used by the State for that purpose.

Often the victim's only possibility to get back the losses suffered is to obtain restitution or compensation directly from the confiscated property. This is because the perpetrators often do not have enough lawfully acquired assets from which the restitution or compensation to the victim could be made. It is therefore necessary to facilitate victims' access to restitution and compensation from the confiscated property also in cross-border cases. The compensation of victims of crime for losses suffered is not further harmonised across the European Union, except for general and limited in scope obligations in the Victims' Rights Directive (Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime)<sup>73</sup> and in the Compensation Directive (Directive 2004/80/EC relating to compensation to crime victims)<sup>74</sup>. The Victims' Rights Directive provides that victims of crime are entitled to obtain a decision on compensation by the offender within a reasonable time, and leaves to the Member States the organization of practicalities. Regarding restitution, the Victims' Rights Directive establishes an obligation for Member States to ensure that, following a decision by a competent authority, recoverable property which is seized in the course of criminal proceedings is returned to victims without delay. The Compensation Directive does not deal with compensation of victims from offenders but regulates compensation from the State. It requires that fair and appropriate compensation schemes are in place in all Member States to compensate victims of violent intentional crimes committed in their territories. Member States are required to cooperate in order to facilitate access to compensation for their residents who have fallen victims to crime in another Member State. However, organization and functioning of the national compensation schemes (in terms of differences in definitions, eligibility criteria, financial capacity, interdependences with civil claims against the offender and existence of advance payment to victims which later can be reclaimed/seized from the offender) are entirely governed by the national rules on compensation and fall outside the scope of the Compensation Directive.

On the other hand, none of the Framework Decisions contains any provision on victims. Framework Decision 2003/577/JHA provides only for a possibility to freeze property for purposes of confiscation, but not with a view to safeguard the victim's right to restitution. Framework Decision 2006/783/JHA on mutual recognition of confiscation orders does not address the rights of the victim either.

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<sup>73</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315 of 14.11.2012, p.57.

<sup>74</sup> Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 261, 6.8.2004, p.15-18.

In some Member States, the relevant authorities can or must take action for the purpose of restitution or compensation of victims. This may include the duty to freeze and confiscate property on behalf of the victim or granting the victim priority on the confiscated property<sup>75</sup>.

In these latter cases, the Member States concerned have experienced difficulties in cross-border cases. The general rule established by Framework Decision 2006//783/JHA is that where money is obtained from the execution of the confiscation order, the amount obtained shall be shared 50%-50% between the issuing and the executing State. For amounts of less than EUR 10.000, the money accrues entirely to the executing State. Where property other than money has been obtained, it is up to the executing State to decide what to do with the property, e.g. to sell it. In all cases, there is a possibility for issuing and executing State to agree otherwise, and this has been used in the past to compensate victims or to restitute property, but as this depends on the States' agreement on a case-by-case basis, victims have no corresponding right to enforce another repartition or solution.

In practice, this means that e.g. the authorities of Member State A are able to freeze and confiscate assets in this Member State and give them back to the victim, but if the perpetrator has hidden those assets in Member State B, the authorities of Member State A do not have the legal tools to ensure that the assets are returned to the victim. Thus the victim may be significantly worse off.

#### *Example*

9 000 euros were stolen from the victim in Finland and the offender has moved the money to Germany. The judge in Finland issues a national confiscation order for the money and orders the full amount to be restituted to the victim. The confiscation order is enforced in Germany. However, as the amount is under 10 000 euros, under the current Framework Decision 2006/783/JHA there is no duty for Germany to return the money to Finland and the victim may not receive the restitution<sup>76</sup>.

If, in the example above, the stolen amount were higher, e.g. 30 000 euros, under the current Framework Decision Germany could keep 50 % of it (15 000 euros) instead of returning the full amount to be restituted to the victim<sup>77</sup>, unless it agrees otherwise<sup>78</sup>.

## **4.5. The scale of the problem**

### *4.5.1. The scale of criminal activity*

Even if it is difficult to have precise and reliable data, one can safely assume that criminal activity generates large income, be it worldwide or in the European Union. According to estimates by the United Nations office on Drugs and Crime (UNDOC), criminal proceeds reached USD 2,1 trillion corresponding to 3.6% of global gross domestic product (GDP) in 2009<sup>79</sup>. The French body in charge of recovering and managing recovered criminal proceeds,

<sup>75</sup> Currently at least Finland, France. Germany is contemplating introducing this possibility.

<sup>76</sup> Article 16(1)(a)

<sup>77</sup> Article 16(1)(b)

<sup>78</sup> Article 16(4)

<sup>79</sup> United Nations Office on Drugs and Crime, 'Estimating illicit financial flows resulting from drug trafficking and other transnational organised crime', October 2011, p. 7.

AGRASC<sup>80</sup>, estimates that €1,2 trillion of criminal money circulates throughout the world economy each year.<sup>81</sup>

Recent research from a consortium around the Transcrime Institute (Savona & Riccardi, 2015) estimates that the main illicit markets<sup>82</sup> in the European Union generate about €110 billion per year, which corresponds to approximately 1% of the EU GDP in 2010.<sup>83</sup> Comparatively, in the United States, it is estimated that the criminal income amounted in 2010 to USD 300 billion, which represents 2% of the United States GDP<sup>84</sup>.

**Table 3- Estimate of criminal revenues in EU 28 Member States**

EU Member State	Estimate* (million euro)	% of GDP (2010)
Austria	3.246	1,1%
Belgium	2.516	0,7%
Bulgaria	565	1,6%
Croatia	134	0,3%
Cyprus	324	1,9%
Czech Republic	1.317	0,9%
Denmark	1.555	0,7%
Estonia	180	1,2%
Finland	1.084	0,6%
France	16.010	0,8%
Germany	17.645	0,7%
Greece	3.583	1,6%
Hungary	1.102	1,1%
Ireland	1.708	1,1%
Italy	15.994	1,0%

<sup>80</sup> Agence de gestion et de recouvrement des avoirs saisis et confisqués.

<sup>81</sup> AGRASC publication to be found at this web address:

[http://www.justice.gouv.fr/art\\_pix/1\\_plaquette\\_agrasc\\_fr2.pdf](http://www.justice.gouv.fr/art_pix/1_plaquette_agrasc_fr2.pdf)

<sup>82</sup> This includes trafficking in heroin, cocaine, cannabis, amphetamines, ecstasy, illicit trade in tobacco products, counterfeiting, illicit trafficking in firearms, MTIC frauds and cargo theft.

<sup>83</sup> Transcrime and others, "From illegal markets to legitimate business: the portfolio of organised crime in Europe", Final Report of Project Organised Crime Portfolio, 2015,

<http://www.ocportfolio.eu/File%20originali/OCP%20Full%20Report.pdf>

<sup>84</sup> United Nations Office on Drugs and Crime, 'Estimating illicit financial flows resulting from drug trafficking and other transnational organised crime', October 2011, p. 20.



Latvia	614	2,8%
Lithuania	455	1,6%
Luxembourg	161	0,4%
Malta	93	1,4%
Netherlands	3.427	0,8%
Poland	2.584	0,7%
Portugal	1.072	0,6%
Romania	2.308	1,9%
Slovakia	882	1,3%
Slovenia	379	1,1%
Spain	10,835	1,0%
Sweden	2.133	0,6%
United Kingdom	15.141	0,9%
EU 28	109.521	0,9%

Source: *Transcrime, From illegal markets to legitimate business: the portfolio of organised crime in Europe*", Table 6

[http://www.ocportfolio.eu/ File%20originali/OCP%20Full%20Report.pdf](http://www.ocportfolio.eu/File%20originali/OCP%20Full%20Report.pdf) (2015)

A 2015 study of project OCP examines infiltration by organised crime in seven European countries (Finland, France, Ireland, Italy, the Netherlands, Spain and UK)<sup>85</sup>. With data of only these seven Member States covered by the study, almost 5000 instances of criminal infiltrations were detected, many of them involving investments in other countries.

#### 4.5.2. *The scale of freezing and confiscation in the European Union*

There are very few data sets available which attempt to estimate assets confiscated as a percentage of criminal proceeds, and they vary significantly. The UK's National Audit Office estimated the amount confiscated for every 100 GBP of criminal proceeds to be 26 pence – i.e. according to this calculation the amount confiscated is just over one quarter of one percent (0,26%).<sup>86</sup> The NAO's head concluded from these figures that the "use of confiscation orders to deny criminals the proceeds of their crimes is not proving to be value for money."<sup>87</sup>

<sup>85</sup> "From illegal markets to legitimate businesses: The portfolio of organised crime in Europe", final report of project OCP (Organised crime portfolio), 2015

<sup>86</sup> Cf. <http://www.nao.org.uk/report/confiscation-orders-2/>

This estimation is not based on an estimation of turnover for all criminal activity in England and Wales, but only on fraud. Taking into account that all criminal activity must generate more turnover than fraud alone, the real figure should be considerably lower than 0,26%.

<sup>87</sup> <https://www.nao.org.uk/report/confiscation-orders-2/>

The results of a survey carried out by Europol on criminal asset recovery in the EU and published on 1 July 2016<sup>88</sup> conclude that 98,9% of estimated criminal profits are not confiscated and remain at the disposal of criminals. In the period analysed by Europol, 2,2% of the estimated proceeds of crime were provisionally seized or frozen, however, only 1,1% of the criminal profits were finally confiscated at EU level. That means that around 50% of all provisionally frozen assets are ultimately confiscated. The Europol study estimates that the annual value of provisionally frozen assets in the EU is around €2,4 billion, with about €1,2 billion finally confiscated each year at EU level.

Another study by *Dataninja* estimates that in 2014, goods worth €4 billion were taken away from criminal groups in the EU (or € 2 billion only for France, Italy, Germany, Spain, England and Wales)<sup>89</sup>. If compared to the estimated €110 billion of main illicit markets in the EU (see above), this corresponds to 3,6%.

**Table 4– value of confiscated goods 2014**

EU Member State	Value of confiscated goods (million euro)	Estimated criminal revenues (million euro, see table 3 above)	% of criminal revenue confiscated
France	382	16.010	2,4%
Italy	776	15.994	4,85%
Germany	251	17.645	1,4%
United Kingdom	412	15.141	2,72%
Spain	46	10.835	0,42%
EU 28	4.000	109.521	3,65%

Sources: *Confiscated Goods – The Dark Billions: A whole investigation on criminal investments seized by EU Countries*, *Dataninja.it*, 16 December 2015, <http://eu.confiscatibene.it/>; *Transcrime, From illegal markets to legitimate business: the portfolio of organised crime in Europe*", Table 6 <http://www.ocportfolio.eu/File%20originali/OCP%20Full%20Report.pdf> (2015)

This data shows that Italy and UK, which have introduced non-conviction based forms of confiscation, are more successful in confiscating criminal assets than Member States with traditional forms, even though the percentages still remain woefully low in all cases.

Despite the lack of availability of robust and comparable data sets, there are encouraging statistics which show that in many Member States, the number and/or value of assets confiscated is increasing. This is supported by the 2015 study of project OCP with a focus on 7 European countries (Finland, France, Ireland, Italy, the Netherlands, Spain and UK)<sup>90</sup>.

<sup>88</sup> "Does crime still pay?", Criminal Asset Recovery in the EU, Survey of statistical information 2010-2014

<sup>89</sup> *Confiscated Goods – The Dark Billions: A whole investigation on criminal investments seized by EU Countries*, *Dataninja.it*, 16 December 2015, <http://eu.confiscatibene.it/>

<sup>90</sup> "From illegal markets to legitimate businesses: The portfolio of organised crime in Europe", final report of project OCP (Organised crime portfolio), 2015

In the United Kingdom in 2006 £125 million were recovered by the State; in 2009, confiscated assets amounted to £154 million<sup>91</sup>. Between 2010 and 2013/2014, more than £746 million of criminal assets have been seized, and over £2,5 billion worth of assets have been frozen. £93 million have been returned to victims<sup>92</sup>.

#### 4.5.3. *Cross-border confiscation and freezing*

Data is even less systematically collected in relation to freezing and confiscation orders requested and implemented across EU borders, and the few figures available have to be interpreted with caution. A EU study of November 2013<sup>93</sup> suggested that the number of freezing and confiscation orders currently sent and implemented across Member State borders has increased in recent years, but this is against a very low starting point<sup>94</sup>.

Another indication that cross-border cooperation is increasing is that Asset Recovery Office (ARO) to ARO asset tracing requests using the secure Europol SIENA communication channel are increasing. From 2012-2015, the messages exchanged per year increased from 452 to 3703. 46% of these exchanges result in the actual identification of assets<sup>95</sup>. This increase will result in time in more cross-border freezing and confiscation, but according to Europol sources, is not yet adequately reflected by an increase of cross-border asset recovery cases.

According to a presentation made by an Adviser to the UK Crown Prosecution Service,<sup>96</sup> the trend is continuing, at least in the UK in its relations with third countries (which include EU Member States): in 2013, £3 million were returned by UK to third countries following confiscation. In 2014-2015, the amount had already increased to £16 million. In 2015-2016 (2<sup>nd</sup> quarter), the amount was £29 million. This increase reflects the particular efforts deployed by the UK to make its asset recovery system more effective<sup>97</sup>, not only in its legal provisions. Similar efforts are lacking in most other Member States.

The increase of cross-border freezing and confiscation orders shown by these figures is a positive trend; the increase in cross-border confiscation seems to be faster than the increase in cross-border criminality. However, despite this increasing tendency, requests to freeze and confiscate assets are still very low in comparison with other requests for co-operation, and there is still significant scope for improvement. In 2013, for example, the Irish Central Authority dealt with 584 requests for assistance and transmitted 200 requests. Of the 784 requests, only 5 involved requests for freezing and confiscation (all incoming).<sup>98</sup> The UK, where both Framework Decisions only came into force in 2015, received 5 confiscation requests under the Framework Decision 2006/783/JHA since. This compares to a total of 37 "old style" MLA freezing requests received in 2014, which is also quite low.

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<sup>91</sup> <http://link.springer.com/article/10.1007/s10610-014-9252-8>

<sup>92</sup> Cf. <http://www.nao.org.uk/report/confiscation-orders-2/>

<sup>93</sup> Comparative Law Study of the Implementation of Mutual Recognition of Orders to Freeze and Confiscate Criminal Assets in the European Union, 2013

<sup>94</sup> Under 100 orders to freeze criminal assets were transmitted to other Member States in 2007, two years after the date when Member States had to apply the framework decision on mutual recognition of freezing orders.

<sup>95</sup> ERA Presentation made by Frédéric Pierson, Europol, 19.5.2016.

<sup>96</sup> ERA Presentation by Jonathan Spicer, UK Crown Prosecution Service, 19.5.2016

<sup>97</sup> Cf. <https://www.nao.org.uk/report/confirmed-impacts-improving-confiscation-orders/>

<sup>98</sup> Source Dave Fennell Mutual Assistance and Extradition Division, Department of Justice & Equality, Ireland

Feedback from stakeholders consulted confirms that only very few freezing and confiscation orders are executed in other Member States, compared to some other mutual recognition instruments.<sup>99</sup>

#### *Examples*

1. Statistics on mutual recognition instruments collected by the Polish Ministry of Justice show that in 2014 there were only 2 requests for confiscation issued and no requests for freezing. In comparison, that same year Poland issued 3838 requests to EU MS to surrender a person on basis of the EAW (of which 3723 cases were settled).<sup>100</sup>
2. A similar tendency results from figures provided for by the NL. In 2014 they received 12 requests for execution of a confiscation order from another Member State whereas 832 surrender proceedings under the EAW were initiated. In the same year, the NL issued 13 requests for confiscation and 544 requests under the EAW.<sup>101</sup>

Based on this information, it is estimated that currently, there are between 168 and 280 cross-border mutual recognition requests for confiscation orders, and between 448 and 560 MLA requests in the European Union (cf. Table 6 in section 7.5 and Annex 7). Member State authorities are unlikely to send confiscation orders to another Member State if they know that they will not be executed, but this is difficult to quantify, as no Member State keeps statistics on the number of orders that they would have sent, had a different outcome been anticipated.

#### *4.5.4. Cross-border confiscation and victims compensation*

The scale of the second general problem is more limited than the scale of the first general problem. It is more relevant for those Member States where the victim's right for restitution or compensation is secured by the authorities competent in the criminal procedure or where the victim is granted priority on the confiscated property. Given the lack of data, there are, however, no concrete figures available.

#### **4.6. Baseline scenario: how would the problem evolve in the future if no EU action takes place?**

The baseline scenario or *status quo* indicates how the identified problem is likely to evolve without additional public intervention, taking into account existing and forthcoming interventions and following the entry into force of the Lisbon Treaty.

The status quo option would likely result in an increase in the assets owned or controlled by criminal organisations, as well as an increase in their acquisitions of assets in other Member States. Evidence of a progressive increase in cross-border criminality and in the cross-border acquisition of assets can be derived from recent studies and investigative sources<sup>102</sup>.

The threat assessments issued by Europol<sup>103</sup> show an increasing trend in cross-border criminal activities and in the links between criminal organisations located in different regions. The

<sup>99</sup> Hague Conference 2014; most recently, at the ERA Seminar on Freezing, Confiscation and Recovery of Assets, May 2016.

<sup>100</sup> When comparing these figures, one should take into account that the legality principle applies in Poland to issuing EAW.

<sup>101</sup> The comparison with EAW is interesting as this is considered to be the most successful mutual recognition instrument. It is also the only mutual recognition instrument for which regular statistics are collected by Member States.

<sup>102</sup> Few and Far, the Hard facts on stolen Asset Recovery, Report by the World Bank, 2014; From illegal markets to legitimate businesses: The portfolio of organised crime in Europe", final report of project OCP (Organised crime portfolio), 2015

<sup>103</sup> <https://www.europol.europa.eu/activities-services/main-reports/serious-and-organised-crime-threat-assessment>

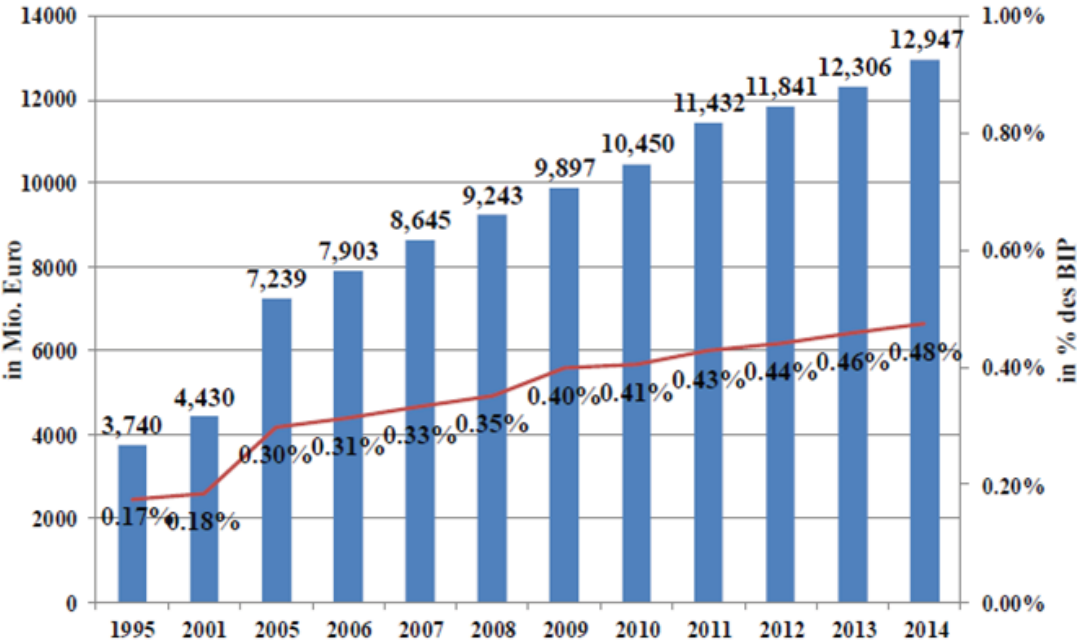
effects of globalisation in society and business have facilitated the emergence of significant new variations in criminal activity and criminal networks exploit legislative loopholes, notably in cross-border situations, to generate illicit profits.

The expected increase in the cross-border acquisition of criminal assets would be mitigated to some extent by the increase of the amounts frozen or seized, of the amounts confiscated, of the amounts recovered and of the cases where mutual recognition of orders issued in another Member State is successful.

However, even if data suggest that cross-border cooperation is increasing, it is not very likely that the number of confiscation orders issued and recognised on a cross-border basis would increase sufficiently to become a true deterrent for crime. Whereas recent figures show that the money flows from criminal activities have considerably increased over the last 10 years, the freezing and confiscation of assets notably in cross-border cases remains very low, and the existing increase is certainly not exploiting the full potential of asset recovery.

**3. Transnational Crime Proceeds and Money Laundering**  
**3.3. Nationwide Figures**

**Figure 3.3: Sum of “national” criminal money flows in Germany, in million EUR and in % of GDP (1995-2014)**



Source: Own calculations, Statistical Office of Germany, ECB Statistical Data.

Calculations of the turnover of transnational crime of 20 OECD countries using the MIMIC estimations (1995-2014)

Year	Volume of money laundering (billion USD, 20 OECD countries)	Volume of money laundering in % GDP	20 OECD countries
1995	273	1.33%	Australia, Austria, Belgium, Canada, Denmark, Germany,
2000	384	1.47%	

2001	412	1.52%	finland, France, Greece, Great Britain, Ireland, Italy, Japan, Netherlands, New Zealand, Norway, Portugal Switzerland, Spain and USA
2002	436	1.56%	
2003	475	1.63%	
2004	512	1.66%	
2005	561	1.72%	
2006	603	1.74%	
2007	646	1.77%	
2008	702	1.82%	
2009	680	1.60%	
2010	708	1.78%	
2011	741	1.96%	
2012	804	2.07%	
2013	859	2.15%	
2014	907	2.20%	

*Source: Own calculations, calibrated figures from the MIMIC estimations, Linz, November 2015, Professor Dr. Friedrich Schneider*

It is expected that the implementation of Directive 2014/42/EU across Member States will result in larger amounts of criminal assets being confiscated than at present. This effect may be even stronger if Member States go beyond the Directive when reforming their asset recovery regimes. It may also have a positive impact on cross-border cooperation for those forms of confiscation in respect of which the Directive sets common minimum standards (for example, extended powers of confiscation, third-party confiscation and the cases of illness and absconding of the suspect or accused person), but as the mutual recognition instruments are not aligned with the scope of the Directive in terms of types of confiscation orders covered, there is no obligation for Member States to recognise all confiscation orders which are now made possible by the Directive. This means an increased number of extended or other orders will be issued after transposition of the Directive, but they may remain unexecuted when assets are located in other Member States.

Moreover, the launch of infringement proceedings against those Member States that have not yet or not correctly transposed the two Framework Decisions (legally possible since 1 December 2014)<sup>104</sup>, would not address the identified problems. The scope of the two Framework Decisions does not cover more recent types of confiscation orders and certain provisions are vague, giving rise to different interpretations. Ensuring compliance with the

<sup>104</sup> Since the entry into force of the Lisbon Treaty, the Commission has the competence to ensure the transposition of ex-third pillar measures, such as framework decisions, with infringement proceedings.

current legal framework through infringement proceedings would not allow addressing the main problems which affect the proper functioning of mutual recognition of freezing and confiscation orders in the European Union.

As a consequence, the strengthening of the legal framework on mutual recognition of national freezing and confiscation orders becomes even more important and relevant.

Besides the mutual recognition instruments, as mentioned above, Member States also still make use of instruments of intergovernmental cooperation: mutual legal assistance requests, including cooperation under international conventions.<sup>105</sup> These may be very flexible, but they bring the disadvantages of intergovernmental cooperation: it is slow and depends entirely on the goodwill of the requested party. There is no obligation upon the requested authority to execute a request for mutual legal assistance. Moreover, in the area of asset recovery it is vital for States to have the ability to respond very quickly: criminals are able to move assets across borders extremely quickly, sometimes with a few clicks on a computer or a phone. By contrast, methods of obtaining Mutual Legal Assistance ('MLA') are much slower – on average, the duration for execution of a MLA request in the EU is one year -, often creating administrative burden and coupled with uncertainty because of the wide discretion States enjoy to execute a request or not.

The work of international organisations, for example the Council of Europe ('CoE') with regard to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism ('Warsaw Convention'), might slightly improve cross-border cooperation based on MLA.<sup>106</sup> This Convention obliges signatories to put in place domestic measures to criminalise certain conduct, and to adopt measures to enable the seizure of criminal assets. It also requires parties to provide judicial cooperation "to the widest extent possible (...) for the execution of measures equivalent to confiscation (...) which are not criminal sanction (...)" (e.g. civil or administrative forms of NCBC). However, because the Convention sets minimum standards, because not all Member States are signatories to this instrument<sup>107</sup>, and because there is a wide discretion to refuse requests (with the attendant reduction of legal certainty), the coverage offered by the Warsaw Convention is and will remain limited. Moreover, a drawback of international conventions such as the Warsaw Convention is the lack of mandatory deadlines. As stated above, in its Action Plan on combatting Transnational Organised Crime of 2 March 2016<sup>108</sup>, the Council of Europe proposes actions to improve implementation of this Convention, e.g. by launching training programmes covering some of the most recent forms of confiscation. Such actions would contribute to improvements in practice, but the above-mentioned limitations of the Convention would nevertheless persist.

Moreover, the parallel use of two different systems, the mutual recognition instruments and the international conventions, with different rules, forms and procedures, depending on which type of confiscation order and which executing Member State is concerned, creates additional

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<sup>105</sup> As of May 2017, the Directive 2014/41/EU regarding the European Investigation Order will replace the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and will no longer cover cooperation on freezing and confiscation orders, meaning that international conventions will be the only means available for Member States to cooperate outside of the mutual recognition instruments.

<sup>106</sup> On the use of civil cooperation convention and EU instruments for civil NCBC, cf. Annex 9.

<sup>107</sup> Currently, only 17 Member States have ratified the Warsaw Convention, cf. [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198/signatures?p\\_auth=OJliP3Cx](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198/signatures?p_auth=OJliP3Cx)

<sup>108</sup> Cf. [http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/CDPC%20documents/CDPC%20\(2015\)%2017%20Fin.pdf](http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/CDPC%20documents/CDPC%20(2015)%2017%20Fin.pdf)

complexity that does not help practitioners<sup>109</sup>. They have to get familiar with two sets of rules, procedures and forms and may continue to prefer the traditional MLA route.

As a result, chances to seize more assets from criminals and to make asset recovery a true deterrent for crime will continue to be missed. At least no significant changes to the current situation where "crime does pay" could be achieved by sticking to the status quo.

The main advantage of the baseline scenario is that there would be no additional burden on national administrations. Practitioners would not need to become familiar with new process and laws.

There would be no change concerning the fundamental rights of persons concerned by asset recovery measures.

However, looking at it from a broader perspective, this option would negatively affect the fundamental rights of persons who are or may become victims of crime. Member States would increasingly be left behind by criminals.

Under this option, there would be no impact on domestic justice systems.

#### **4.7. Does the EU have power to act?**

##### *4.7.1. Legal basis*

The power to act and, where necessary, propose EU legislation in the area of criminal law is conferred, inter alia, by Articles 82 and 83 of the Treaty on the Functioning of the European Union (TFEU).

More specifically, the legal basis to support action in the field of mutual recognition of criminal assets' freezing and confiscation orders is Article 82(1) TFEU, which specifies inter alia that judicial co-operation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions.

Measures may be adopted in accordance with the ordinary legislative procedure to lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions, and to facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

##### *4.7.2. Subsidiarity: Why is the EU better placed to take action than Member States?*

Under Article 5(3) TEU, the Union shall only act if the proposed action cannot be sufficiently achieved by the Member States. Article 67 TFEU provides that the Union shall provide citizens with a high level of security by preventing and combating crime. The assets of organised criminal groups are frequently invested in several countries. This double cross-border dimension (of organised crime activities and their multi-country investments) justifies European action.

While cross-border criminal and asset investigations may occur in several countries, prosecution and the judicial activities leading to confiscation normally take place in only one Member State and thus confiscation procedures remain essentially national. However, their cross-border dimension is evident in the enforcement of orders in other Member States. Thus, asset recovery requires effective cooperation among Member States. The most effective way of ensuring cross-border co-operation is on the basis of mutual recognition. Mutual recognition is in accordance with the principle of subsidiarity since it aims at recognising each

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<sup>109</sup> Justice Issues in Europe, Volume 2, p.55



other's decisions without full harmonisation of national rules, and cannot be achieved by Member States acting alone.

Moreover, the penetration of organised crime into the economy of one Member State affects the functioning of the whole EU Internal Market. Even when managing licit businesses, organised crime groups often support these activities with the recourse to intimidation and corruption, thus altering competition and the smooth functioning of the Internal Market. The resulting loss of revenues affects both national and EU financial interests, even when it takes place in only one Member State. More broadly, the free movement of persons and capitals within the Union entails a need for action at supra-national level in enforcing judicial decisions, including those on asset freezing and confiscation.

#### **4.8. Fundamental Rights**

Confiscation measures may have a considerable impact on the fundamental rights of the person(s) concerned, such as the right to property or the right to family and private life. Particular attention needs to be given to ensure that any interference is based on the principle of legality and proportionality and that other fundamental rights, such as procedural safeguards and the right to an effective judicial remedy, are respected (see Annex 6).

Depending on how confiscation is used<sup>110</sup> and in which setting it operates<sup>111</sup>, different fundamental rights may be relevant. Moreover, the applicable fundamental rights may also vary with regard to freezing of assets. For example, the freezing of assets is not a deprivation of property within the meaning of the first paragraph of Article 1 Protocol 1 of the ECHR, however, confiscation is. The complexity is further increased when confiscation extends to third party assets.

A balancing of rights is needed to avoid that fundamental rights, such as defence rights, are put at risk when applying confiscation measures. It is essential that any new legal instrument enhancing the mutual recognition of freezing and confiscation orders is fully in line with the ECHR, the case-law of the ECtHR and the Charter of Fundamental Rights of the European Union.

A detailed analysis of the impact of the various options on fundamental rights is carried out in the assessment of the options and their comparison (see below sections 7 and 8), the relevant case-law is set out in Annex 6. This analysis was carried out taking into account the Opinion of the European Union Agency for Fundamental rights on the Confiscation of proceeds of crime<sup>112</sup> as well as opinions and presentations made by specialists during expert meetings<sup>113</sup>.

### **5. OBJECTIVES**

Based on the problem analysis and the EU's current legal framework in the field of asset recovery and in line with relevant policy strategies (notably the European Agenda for Security of 28 April, 2015 and the Commission's Action Plan for strengthening the fight against terrorist financing<sup>114</sup>), the following general and specific objectives have been identified:

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<sup>110</sup> Confiscation can be used as a means to recover illegally obtained assets or as a penalty.

<sup>111</sup> Criminal, civil or administrative

<sup>112</sup> FRA Opinion 03/2012;

[http://fra.europa.eu/sites/default/files/fra-opinion-3-2012\\_confiscation-of-proceeds-of-crime.pdf](http://fra.europa.eu/sites/default/files/fra-opinion-3-2012_confiscation-of-proceeds-of-crime.pdf)

<sup>113</sup> Conference of 20 June 2016 on strengthening the mutual recognition of freezing and confiscation orders, Presentation by Prof. Vettori (Catholic University of Milan, Italy) on ECHR Jurisprudence on "in rem", extended and third party confiscation

<sup>114</sup> See above, Section 2.1 on Policy context

<b>Objectives:</b>	
<b>General objective:</b>	<ul style="list-style-type: none"> <li>▪ To freeze and confiscate more assets deriving from criminal activities in cross-border cases in order to prevent and combat crime, including terrorism and organised crime</li> <li>▪ To enhance the protection of victims' rights in cross-border cases.</li> </ul>
<b>Specific objectives:</b>	<ul style="list-style-type: none"> <li>▪ To improve the mutual recognition of freezing and confiscation orders in cross-border cases by extending the scope of mutual recognition instruments;</li> <li>▪ To provide simpler and faster procedures and certificates.</li> <li>▪ To increase the number of victims receiving cross-border compensation.</li> </ul>

## 6. POLICY OPTIONS

The policy options for addressing the problems as defined in part 4 of this Impact Assessment, in line with the objectives as established in part 5, are set out below.

### 6.1. Discarded Options

The following policy options have not been retained for further in-depth assessment:

a) **Codification of the existing Framework Decisions 2003/577/JHA on the execution of freezing orders and 2006/783/JHA on confiscation orders into one legal instrument:**

Although this option would lead to a consolidation and certain simplification of the existing rules it would be too limited in its scope and not take into account recent developments at EU level and at national level (see above section 3.5 and 4.2.1).

b) **Limitation of the scope to specific offences (e.g. "eurocrimes"):** As the current legal mutual recognition framework already covers cooperation in respect of all criminal offences<sup>115</sup>, it would not be coherent to limit the scope of a new legal instrument to the so-called "eurocrimes".<sup>116</sup> This would lead to different regimes (one for eurocrimes and one for other offences) for mutual recognition, which would go against the objective of simplification of the current framework. On the contrary, it would add complexity to the system and hamper its practical effectivity. Even if the Directive 2014/42 can only cover Eurocrimes, an alignment with the Directive in terms of offenses would not bring any added value for the mutual recognition legal framework. Furthermore, this would result in an exclusion of many criminal offences which are relevant for confiscation as they can generate considerable gains. It should also be recalled that the legal basis for mutual recognition (Art. 82 TFEU) is not limited to eurocrimes, contrary to the legal basis for harmonisation measures (Art. 83 TFEU)<sup>117</sup>.

<sup>115</sup> See Art.3 of FD 2003/577/JHA and Art. 6 of Framework Decision 2006/783/JHA

<sup>116</sup> According to Art.83 TFEU eurocrimes are particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offences, or from a special need to combat them on a common basis. For more details see above, Section 3.3

<sup>117</sup> See therefore Art.3 of Directive 2014/42/EU which is limited to eurocrimes.

c) **Empowering all Asset Recovery Offices to also manage** frozen assets could increase efficiency and promote best practices. However, this option is not directly linked to the strengthening of mutual recognition of freezing and confiscation orders and was discarded.

## **6.2. Description of the policy options**

### *6.2.1. Option 1: Maintaining the status quo*

See above, Section 4.6 – The size of the problem/Baseline scenario

### *6.2.2. Option 2: Non-regulatory option*

A non-regulatory option could consist of two main elements:

#### a) Periodic evaluation of judicial cooperation in the area of confiscation

There is no obligation in the current framework decisions to conduct periodic evaluations of the instruments. Under option 2 the Commission would collect in a systematic manner information on judicial cooperation and mutual recognition of confiscation orders. Directive 2014/42/EU provides for an obligation upon Member States to regularly collect and maintain comprehensive statistics on freezing and confiscation orders<sup>118</sup>. The information collected would be used to prepare periodic national and EU level evaluation reports which would go beyond the reporting obligations foreseen by Directive 2014/42/EU (which foresees in Article 13 a report on the impact of the existing national law on confiscation and asset recovery)<sup>119</sup>. These reports could also contain "general lessons learned". This could be done through a specific network of experts that would collect relevant material in each Member State, or through studies in this area. Such reports would be disseminated to stakeholders involved at policy and implementation level and would also be published on the Commission's website.

#### b) Support the training of law enforcement and judicial authorities

The Commission would enhance and intensify training measures for law enforcement and judicial authorities to promote and improve the application of relevant legislation, e.g. via the European Judicial Training Network. Regular workshops to exchange best practices and seminars would be organised and coordinated and peer review meetings with Ministries of Justice would be held. Those activities should involve key players such as Eurojust and the European Judicial Network. The information collected would be widely disseminated on a dedicated website of the Commission and through existing networks and EU dedicated agencies.

#### *- Stakeholder views*

In the recent expert meeting of 17 November 2016 Member States<sup>120</sup> have generally acknowledged the need to improve mutual recognition of freezing and confiscation orders with a new legislative instrument<sup>121</sup>. They expressed the view that neither the Status quo nor option 2 would adequately address the problems identified.

The European Parliament has also repeatedly asked for a new legal instrument and would therefore not be in favour of option 2.

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<sup>118</sup> Article 11.

<sup>119</sup> To be presented before 4 October 2018.

<sup>120</sup> Only one Member State has expressed certain doubts about the need for the Commission to act.

<sup>121</sup> This confirms the opinions expressed by Member States also at other precedent expert meetings and the Conference of 20 June on confiscation which had been organised jointly by the Commission and the NL Presidency.

There was also a large consensus on the side of practitioners (including judges, prosecutors, representatives from Europol and Eurojust) that a soft law option would be insufficient to increase cross-border freezing and confiscation.

Thus, this option would go against the expectations of stakeholders expressed in the different meetings.

### 6.2.3. Option 3 – Minimal regulatory option

Option 3 goes further than option 2 and consists of codifying the existing two Framework decisions 2003/577/JHA on the execution of freezing orders and 2006/783/JHA on confiscation orders into one legal instrument, while at the same time aligning its scope with that of Directive 2014/42/EU in terms of types of freezing and confiscation measures covered (including extended confiscation<sup>122</sup> and some limited forms of criminal non-conviction based confiscation<sup>123</sup>). Option 3 could also be combined with elements b) and c) of Option 2.

Unlike Directive 2014/42/EU, the new instrument under option 3 would cover all criminal offenses and not be limited to the Eurocrimes<sup>124</sup> as the legal basis of the new instrument would be Article 82 TFEU which does not require limiting the scope of mutual recognition to such crimes. Furthermore, such a limitation would create additional complexity for practitioners.

Option 3 would also include the introduction of simplified mutual recognition certificates and, for freezing orders only, possibly a "European Asset Freezing Order".<sup>125</sup> Such a European Asset Freezing Order would be issued specifically for the purpose of mutual recognition in another Member State without the need for issuing a national freezing order first. It would be justified by the urgent nature of freezing and the need to simplify procedures.

Option 3 would also define short mandatory deadlines for the recognition and execution of freezing orders, and introduce harmonised grounds for refusal based on fundamental rights.

Finally, option 3 could foresee specific rules on the restitution and compensation of victims. Member States would be required to duly take into account victims' rights (notably the executing State). In the case of a decision taken by the issuing Member States to reconstitute the property to the victim, the executing authority should ensure that the property is reconstituted or, where not possible, the value of the property should be returned to the victim. If a decision is taken to compensate the victim, the corresponding sum should accrue to the issuing Member State for the purpose of compensation of the victim (whereas under the current legal framework there is a 50% division between the executing and issuing State of the amount obtained from the execution of a confiscation order if the amount is over €10000).

#### - Stakeholder views

In the recent expert meeting of 17 November 2016 Member States<sup>126</sup> have generally acknowledged the need to improve mutual recognition of freezing and confiscation orders with a new legislative instrument<sup>127</sup>. Option 3 could be supported by nearly all Member

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<sup>122</sup> Article 5 of Directive 2014/42/EU

<sup>123</sup> In the case of illness and absconding, see Article 4(2) of Directive 2014/42/EU

<sup>124</sup> Cf. section 3.3.

<sup>125</sup> Comparable to the "European Investigation Order" introduced by Directive 2014/41/EU of 3 April 2014

<sup>126</sup> Only one Member State has expressed certain doubts about the need for the Commission to act.

<sup>127</sup> This confirms the opinions expressed by Member States also at other precedent expert meetings and the Conference of 20 June on confiscation which had been organised jointly by the Commission and the NL Presidency.

States<sup>128</sup> and was considered as the "absolute minimum" option to be proposed by the Commission. It would not raise any particular concerns from Member States. However, it became also clear during the expert meeting that a more ambitious approach than option 3 was generally considered as more appropriate. In particular those Member States which have more extensive forms of NCBC<sup>129</sup> would like to have their domestic freezing and confiscation orders recognised and executed throughout the EU.

The European Parliament is generally in favour of a legislative proposal to strengthen the mutual recognition of confiscation and freezing orders. This was clearly expressed already in 2014 when the Directive 2014/42/EU was adopted<sup>130</sup> and reiterated more recently in the so-called Ferrara Report of October 2016<sup>131</sup>. However, the European Parliament has never taken position on specific options.

Opinions of legal practitioners (judges, prosecutors) have diverged on what kind of measures a new EU instrument should cover. Several experts expressed that unless there is more harmonisation in this area, a mutual recognition instrument should be limited in scope (corresponding to options 3 or 4a as a maximum).

Defence lawyers were generally rather critical as regards a possibly wider scope of a new mutual recognition instrument. They spoke in favour of a more limited option which provides for appropriate procedural safeguards.

#### 6.2.4. Option 4 –Medium and Maximal regulatory option

Policy option 4 would consist in the adoption of a new mutual recognition instrument that would address most or all deficiencies identified for the existing instruments. It would notably include within its ambit all freezing orders and all confiscation measures (conviction based and non-conviction based) which meet certain stringent minimum standards, particularly including strong fundamental rights standards.

As under the minimal regulatory policy option, the new instrument would cover all criminal offenses.

Moreover, this option would also provide for simplified mutual recognition certificates and, for freezing orders only, possibly a "European Asset Freezing Order" as set out under option 3. Option 4 would also define short mandatory deadlines for the recognition and execution of freezing orders and introduce harmonised grounds for refusal based on fundamental rights..

Option 4 would also allow victims to benefit from asset recovery in cross-border cases. In this respect Option 4 would be identical to option 3.

Two sub-options can be distinguished:

##### **Sub-Option 4(a) Medium option**

Under this option, the types of freezing and confiscation orders which can be recognised would be all those which are issued in the context of criminal proceedings. This would go beyond an alignment with Directive 2014/42/EU and cover all types of criminal confiscation,

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<sup>128</sup> With the exception of Poland which expressed certain doubts on the need of new legislation.

<sup>129</sup> Or where reforms are currently on-going

<sup>130</sup> As expressed in joint statement by the European Parliament and the Council, given when adopting Directive 2014/42/EU, calling on the Commission "to present a legislative proposal on mutual recognition of freezing and confiscation orders at the earliest possible opportunity (...) considering the need of putting in place a comprehensive system for freezing and confiscation of proceeds and instrumentalities of crime in the EU", Council doc. 7329/1/14 REV 1 ADD 1.

<sup>131</sup> Adopted by LIBE on 7 October 2016

including criminal non-conviction based confiscation (such as in the case of death of a person, immunity, prescription, cases where the perpetrator of an offence cannot be identified or where a criminal court can confiscate an asset in the absence of conviction when the court is convinced that such asset is the proceeds of crime).

*Example*

The draft German law transposing Directive 2014/42/EU contains provisions for so-called "autonomous confiscation". It allows a criminal court to confiscate an object in the absence of a conviction, if, based on all circumstances of the case, the court is convinced that an object is the proceeds of a crime, even if the person affected by the confiscation cannot be prosecuted or convicted for this crime.

However, this option would not cover civil or administrative forms of confiscation.

**Sub-Option 4(b) Maximal option**

The second sub-option would extend the obligation to recognise confiscation orders beyond those covered by option 4(a) to those made in civil or administrative proceedings where it is shown that the property is the proceeds of criminal conduct.

*Example*

As a response to Mafia, Italy has introduced so-called preventative freezing and confiscation, which allows freezing and confiscation of assets without a conviction provided that the following conditions can be established: 1) previous or current dangerousness of a person; 2) availability of property without evidence of legitimate origin, when there is (a) a disproportion between the value of property and the stated income of the person or (b) sufficient evidence that the property is the proceeds of crime. The preventative confiscation is provided for in the anti-mafia code and is considered as an administrative measure, outside of the criminal code.

In order to ensure that even in these civil and administrative proceedings, the procedural rights of the persons concerned are sufficiently protected, the recognition obligation should depend on the respect of certain fundamental rights safeguards.

Such fundamental rights would include rules on the burden of proof, the right to a fair and public hearing, the potential to challenge evidence, the right of appeal and the right to an effective legal remedy.

This sub-option would cover most of the existing confiscation regimes in the EU and would in particular allow those Member States that have civil non-conviction based confiscation in place to have those orders recognised in all other Member States. If option 4(b) is retained, it would have to be ensured that the scope of the new instrument is in line with the legal basis of Article 82(1) TFEU, which covers judicial cooperation in criminal matters.

Option 4 could also be combined with elements b) and c) of Option 2.

*- Stakeholder views*

Option 4a appeared to be the most preferred option for those Member States which took the floor at the expert meeting of 17 November. Many Member States have the necessary legislation adopted or have draft laws pending. No particular concerns were raised. Some

Member States clearly indicated that this would be their preferred option and also the maximum they could envisage.<sup>132</sup>

As regards the widest option 4b, which would include civil and administrative NCBC, the picture which emerged at the expert meeting was more diverse. Option 4b is likely to be supported by at least those Member States which have already such systems in their domestic legal order: IE, UK, BG, SK, SI and IT. Furthermore, FR, and NL have expressed that they are already now able to recognise civil NCBC orders.

However, some Member States have clearly expressed that some far-reaching forms of NCBC would be more problematic, if they contravene fundamental principles of domestic law. ES has expressed constitutional issues with civil NCBC and reversal of burden of proof. EE has considered that jurisprudence by its Supreme Court sets limits to civil NCBC, however it may not oppose it in the context of mutual recognition. FI has expressed that only confiscation orders issued in criminal proceedings should be covered as criminal proceedings entail clear procedural safeguards.

The European Parliament is generally in favour of a legislative proposal. However, the European Parliament has never taken position on specific options or on the possible scope of a new instrument.

Members of Eurojust, Europol, judges and prosecutors have repeatedly pointed out during the above mentioned meetings or contacts<sup>133</sup> that confiscation is a very efficient tool, in particular in the fight against organised crime such as drug trafficking. Many have noted that confiscation procedures are underused and that there is an increased need for effective international cooperation and mutual legal assistance on asset recovery.

Opinions have diverged on what kind of measures a new EU instrument should cover. Several experts have underlined that national confiscation systems differ widely between EU Member States. Some have considered that if certain Member States do not have civil confiscation for constitutional reasons or fundamental rights reasons, it will be difficult for a judge to recognise a civil confiscation order and to execute it. Some expressed that unless we have more harmonisation in this area, a mutual recognition instrument needs to be limited. Others considered that mutual recognition is a good alternative to further harmonisation.

Defence lawyers were generally rather critical as regards a possibly wider scope of a new mutual recognition instrument (notably as regards a possible extension to civil and administrative NCBC - corresponding to sub-option 4b) and underlined the need to ensure appropriate procedural safeguards and to take into account fundamental rights concerns.

Some legal practitioners and academia from former communist countries have referred to experience from recent history where the state confiscated people's property unjustly and without ensuring fair proceedings and underlined the need for appropriate safeguards.

### **Regulation or Directive**

The new legal instrument could be adopted in the form of a directive or regulation. Article 82(1) TFEU gives the EU legislator the choice: it does not limit the possible measures to directives but also allows for the adoption of regulations.

Whereas a directive would give Member States some margin for transposition, national legislation might vary between Member States. As the proposal concerns cross-border procedures, there seems to be little need to leave this margin to Member States to adapt it to

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<sup>132</sup> CY, DE, FI, RO, CZ, EE, SE

<sup>133</sup> See also specific meeting with Eurojust members on 29 June 2016, set out in Annex 2.

their national situation. A regulation would be directly applicable, would provide greater legal certainty and would avoid the transposition problems that the Framework Decisions were subject to.

**Table 5: Overview on how the regulatory options would meet the objectives of this initiative**

<b>Specific objective 1:</b> To improve the mutual recognition of freezing and confiscation orders by extension of scope of the mutual recognition instrument		<b>Option 3</b>	<b>Option 4 a)</b>	<b>Option 4 b)</b>
Confiscation after criminal conviction		✓	✓	✓
Extended confiscation		✓	✓	✓
Confiscation from a third party		✓	✓	✓
Criminal NCBC	absconding	✓	✓	✓
	illness	✓	✓	✓
	death		✓	✓
	other forms of criminal NCBC		✓	✓
Civil and administrative NCBC (necessary link to a criminal conduct)				✓
<b>Specific objective 2:</b> faster and simpler procedures and certificates		✓	✓	✓
<b>Specific objective 3:</b> increase the number of victims receiving cross-border compensation		✓	✓	✓



General problem	Specific problems	General objectives	Specific objectives	Options
<ul style="list-style-type: none"> <li>• Too few criminal assets are frozen and confiscated in cross-border cases</li> <li>• No provisions on victims' restitution and compensation in current legal framework</li> </ul>	<ul style="list-style-type: none"> <li>• Too limited scope of current mutual recognition instruments</li> <li>• Patchy and inadequate implementation of existing legislation</li> <li>• Procedures and certificates are too complex</li> </ul>	<ul style="list-style-type: none"> <li>• To freeze and confiscate more assets deriving from criminal activities in cross-border cases in order to prevent and combat crime, including terrorism and organised crime</li> <li>• Enhance the protection of victims in cross-border cases</li> </ul>	<ul style="list-style-type: none"> <li>• To improve the mutual recognition of freezing and confiscation orders by extending the scope of the mutual recognition instrument</li> <li>• Faster/simpler procedures and certificates</li> <li>• Increase the number of victims receiving cross-border</li> </ul>	<ul style="list-style-type: none"> <li>• Non-legislative action</li> <li>• Codification of current instrument + alignment with Directive 2014/42 re types of confiscation</li> <li>• New MR instrument with extended scope and improved provisions (criminal procedure only/civil+ admin.)</li> </ul>

**Consequences**  
 - Criminals can invest proceeds of crime in other MS, terrorists can access funds  
 - Injustice for victims

**Consequences**  
 - Criminals can invest proceeds of crime in other MS, terrorists can access funds  
 - Injustice of mutual trust for victims between MS  
 - Lack of confidence in EU and internal market

**Benefits**  
 - Hostile environment for organised crime + terrorism  
 - Restoration for victims

**Benefits**  
 - Hostile environment for organised crime + terrorism victims MS  
 - Restore confidence in EU and internal market  
 - Improve mutual trust between MS

## 7. ANALYSIS OF THE IMPACTS OF THE POLICY OPTIONS

The five policy options are discussed and measured against the following criteria:

- Effectiveness: the extent to which the measure fulfils the objectives of the proposal;
- Compliance Costs;
- Impact on fundamental rights;
- Impact on legal systems/proportionality.

### 7.1. Option 1: Maintaining the status quo

See Section 4 – problem definition

### 7.2. Option 2: Non-regulatory option

- *Effectiveness*

The non-regulatory option might marginally improve the situation with regard to the base-line scenario. However, the general objective and specific objectives would not be adequately achieved.

The above identified problems arising from the too limited scope of the current legal framework, the difficulties arising from the certificates and the lack of rules for victims' compensation would not be solved (see above, Section 4).

- *Compliance Costs*

The financial and administrative burden of this option depends on the extent Member States have already implemented the Framework Decisions into national law but would be overall very limited. Certain limited costs could result from the training of law enforcement and judicial authorities to promote and improve their knowledge of the legal framework – this could be done by prioritising this topic within the EJTN and their annual operating grant and would not necessarily lead to an increase in costs - and from the organisation of workshops or meeting with the Ministries of Justice. The costs of such workshops depend on the scale on which they are organised and their usefulness would likely be proportional to their scale.

Given the current underutilisation of the existing legal framework workshops and training will have some positive impact upon the utilisation of freezing and confiscation orders. This may lead to a certain increase of frozen and confiscated assets and slightly more income for the States.

- *Impact on fundamental rights*

There would be no or only very limited impact on fundamental rights. Some improvements could be achieved by the training of legal professionals as regards their knowledge on fundamental rights, the relevant case-law of the ECtHR and their application in practice.

- *Impact on domestic justice systems*

Regular monitoring, evaluation and training activities should improve the use of the existing instruments which could lead to a slight increase in the number of freezing and confiscation orders executed on a cross-border basis. Better enforcement of cross-border procedures would likely result in a slightly increased confidence in the area of justice, freedom and security. No concrete impact on the domestic justice system is to be expected.

### 7.3. Option 3: Minimal regulatory option

- **Effectiveness**

Improving the mutual recognition instruments by codifying and consolidating the two Framework Decisions 2003/577/JHA and 2006/783/JHA into one legal instrument, aligning its scope with the Directive 2014/42/EU and introducing simplified certificates would increase to a certain extent the number of cross-border enforcement procedures and thereby also lead to an increase of the value of assets recovered.

This option would have the effect of ensuring that confiscation in the case of illness or absconding as foreseen by Article 4(2) of Directive 2014/42/EU, extended confiscation as foreseen by Article 5 of Directive 2014/42/EU and third-party confiscation foreseen in Article 6 of the Directive would be recognised in all Member States. Because all Member States have to transpose the Directive 2014/42/EU, this would benefit all Member States.

One consolidated legal instrument providing for clear rules which could possibly be directly applicable would resolve the patchy and inadequate implementation and the existing inconsistencies between the current legal instruments.

The certificates would be streamlined and simplified which would enhance the use of mutual recognition instead of mutual legal assistance by practitioners. This would also imply faster procedures and enhanced efficiency. Possible synergies with the European Investigation order or the introduction of a European Asset Freezing Order would be further explored<sup>134</sup>. Faster cross-border execution would increase the chances of successful recovery by limiting the risks for asset dissipation.

Option 3 would also result in a considerable improvement in the ability of victims to get compensation in cross-border cases for those Member States that foresee such procedures (cf. Section 4.4) as Member States would be required to duly take into account victims' rights (notably the executing State).

However, Directive 2014/42/EU provides only for minimum harmonisation and a significant number of Member States go beyond the requirements of the Directive (e.g. for example, many Member States allow for non-conviction based confiscation in the case of the death of the perpetrator.; in addition in some Member States important reforms are on-going in the context of the transposition of the Directive). Forms of NCBC of criminal, civil or administrative nature would not be covered. As a result, such newly introduced EU legislation which would (only) require the mutual recognition of the types of freezing and confiscation orders which are harmonised by Directive 2014/42/EU would leave again significant gaps and thereby hamper the effectiveness of such legislation.

This has also been underlined by many Member States during the expert meeting on 17 November 2016 which considered this option as a "minimum approach" for new legislation but largely expressed the view that a more ambitious approach would be more appropriate.

As a result, option 3 would be effective with regard to the specific objectives of consolidation of existing instruments, simplification and procedures and certificates and compensation of victims. However, option 3 could only partially achieve the objective of the extension of the scope. Its effectiveness to achieve all specific objectives and the general objective is therefore limited.

- **Compliance costs**

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<sup>134</sup> See above, Section 6.2.3

Option 3 would increase the number of cross-border enforcement procedures and, to some extent, the value of assets recovered. However, it is difficult to assess the economic added value of such an increase in the utilisation of mutual recognition instruments.

An increased utilisation of mutual recognition instruments would shift administrative costs from central authorities (in charge of mutual legal assistance) to (local) judicial authorities. As mutual recognition is less convoluted than mutual legal assistance, the administrative cost of handling requests from another Member State should in principle decrease. The extent of this slight decrease in direct costs would depend on the relative efficiency of the different parts of Member States' administration. The envisaged consolidation of mutual recognition instruments and forms and the alignment with Directive 2014/42/EU may require some training for the practitioners. These overall costs would be likely offset by the benefits in the form of increased value of assets recovered (resulting from an increased number of cross-border enforcement procedures). Concrete figures are not available. A comparison of costs based on estimates is set out below in section 7.5.

- **Impact on fundamental rights**

Option 3 would have a limited impact on fundamental rights, which would go beyond option 2 but would be less intrusive than option 4. The inclusion of some forms of criminal non-conviction based confiscation and extended confiscation should not raise particular fundamental rights concerns for the following reasons: in its case-law the ECtHR<sup>135</sup> has considered extended confiscation to be consistent with Article 6 ECHR and Article 1 of Protocol 1, if effective procedural safeguards are respected. Directive 2014/42/EU contains in its Article 8 a number of safeguards to ensure the rights to a fair trial and an effective judicial remedy.

- **Impact on domestic justice systems**

A directly applicable instrument would have the advantage that foreign orders would have to be executed like domestic ones, without the need to modify their internal legal system and their way of working. As all Member States have to transpose Directive 2014/42/EU into their national law (this option foresees an alignment with this directive), no specific impact on the domestic justice system is therefore to be expected.

#### **7.4. Option 4: Medium and Maximal regulatory option**

- **Effectiveness**

Options 4a and 4b would improve the effectiveness of a mutual recognition instrument compared to option 3 taking into account that they would cover also criminal NCBC (sub-option 4a) or criminal, civil and administrative NCBC (sub-option 4b). As sub-option 4b would have the widest scope, it would be the most effective to reach the general and specific objectives. A single instrument including all types of freezing and confiscation orders which currently exist in the Member States, including the different forms of NCBC, would considerably increase the number of cross-border enforcement procedures in the EU.

The fact that all types of orders (sub-option 4b) or a large part of orders (Sub-option 4a) would be covered by the same instrument would enhance its use, as courts and judges in the Member States will not need to make use of the traditional mutual legal assistance instruments. Hence the current double legal regime for recognition and enforcement of

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<sup>135</sup> See ECtHR, Phillips v. UK, N°41087/98.

freezing and confiscation orders would disappear and judicial authorities would apply the new instrument.

Moreover, one legal instrument providing for clear rules which could possibly be directly applicable would resolve the patchy and inadequate implementation and the existing inconsistencies between the current legal instruments.

Clear rules and simplified certificates (foreseen in both sub-options) would make the use of mutual recognition more convenient for practitioners. Option 4 (both sub-options) would also allow victims to benefit from asset recovery and thereby achieve the objective of improvement of victims' compensation in cross-border cases.

Overall, both sub-options would mean that considerably more criminal proceeds could be frozen and confiscated in a cross-border context within the EU. This will allow assets of criminals, crime organisations and terrorist groups being confiscated not only in purely domestic cases but also when they invest their illicit money in other Member States. The enhanced deprivation of criminals, criminal organisations and terrorist groups of their criminal assets will reduce the financing of criminal and/or terrorist activities. Thus, the benefits for society would be highest under option 4b, and a little bit less, but still significant, for option 4a. The reutilisation of confiscated assets for social purposes<sup>136</sup> may also have some economic benefits allowing for example NGO's to start business activities using confiscated assets which normally become profitable over time.

- **Compliance costs**

Option 4 would imply certain administrative and implementation costs resulting from the enhanced use of freezing and confiscation orders in cross-border cases, sub-option 4b to a larger extent than sub-option 4a. However, these costs would be largely offset by the expected increase in the assets recovered.

Because of the lack of data in relation to amounts frozen, confiscated and recovered, and in relation to the costs of carrying out confiscation related activities, it is not possible to provide a quantification of the overall cost of this option. In order to address the lack of data described earlier, the cost analysis is based on estimates which uses figures from the UK as only for the UK income and costs for all elements of the asset confiscation system can be estimated. A comparison of costs is set out below in section 7.5.

- **Impact on fundamental rights**

Option 4 and notably sub-option 4b) will have the most significant impact on fundamental rights.

NCBC may interfere with the right to property in the meaning of Article 17 of the Charter and Article 1 of the first Protocol to the ECHR without a previous criminal conviction. Since these measures are not taken in the procedural framework of a criminal conviction, they may affect the presumption of innocence guaranteed by Article 48(1) of the Charter and Article 6(2) ECHR<sup>137</sup>.

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<sup>136</sup> In Italy, for example, schools, kindergartens, day care centres for disabled people, cultural centres, meeting places, youth centres, restaurants, tourist centres and service desks, and social housing have been placed in confiscated properties.

<sup>137</sup> In a number of conviction-based cases, the ECtHR has treated conviction based confiscation as part of the sentencing process and therefore determined that Article 6 (2) of the ECHR – presumption of innocence – did not apply.

A NCBC system is generally based on lower requirements of the standard of proof for the nexus between crime and confiscated property<sup>138</sup> and in certain circumstances a shift of the burden of proof is possible when the State has already proved that the property constitutes the proceeds of a criminal activity<sup>139</sup>.

Shifts of the burden of proof concerning the legitimacy of assets have not been found a violation of fundamental rights by the ECtHR, as long as they were applied in the particular case with adequate safeguards in place to allow the affected person to challenge these presumptions, which should always be rebuttable (for more details, see Annex 6).

The right to be presumed innocent until proven guilty under Article 48 of the Charter applies when a person has been charged under criminal law and not where the proceedings are civil in nature. In some cases before the ECtHR defendants in NCBC proceedings have argued that these are criminal and violate the presumption of innocence, but these arguments have so far not been accepted by the ECtHR. Indeed, the rules on the burden of proof, which are an important aspect of the presumption of innocence, apply only when the purpose of the proceedings is to establish the guilt of persons.

Although the ECtHR has not ruled on the principle question of their compatibility with the ECHR, the Court has repeatedly considered NCBC and extended confiscation to be consistent with Article 6 ECHR and Article 1 of Protocol 1, if effective procedural safeguards are respected.

The question of proportionality and relevant safeguards plays also an important role in the context of third party confiscation. Where, in the case-law of the ECtHR there is an interference with the property rights of such parties, a link between the proceeds of crime and the assets in the possession of a third party has to be established. Moreover, the limitation must be proportionate to the objectives being pursued and the right to a fair hearing must be respected. It is essential that a third party has an effective possibility to claim the ownership of a seized asset and to protect her/his interests.

Confiscation from third parties should not prejudice the rights of *bona fide* third parties<sup>140</sup>. "bona fide" third parties are persons who have legitimate rights to the assets to be confiscated and who are not connected to the criminal activities. It is therefore necessary to provide for specific safeguards and judicial remedies (notably the right to be heard and the right to an effective judicial remedy) not only in domestic cases but also in cross-border context.

It results from the above analysis, that if applied with proportionality and complemented with effective procedural safeguards (the fair trial rights and the right to an effective judicial remedy), the measures in this policy option would seem to be compatible with fundamental rights requirements.

The respective impact of sub-options 4a and 4b should therefore be analysed in terms of fundamental rights safeguards that would be applicable.

As sub-option 4a would cover all freezing and confiscation orders issued within the framework of criminal proceedings, criminal law safeguards would be applicable. This would include in particular the right to a fair trial enshrined in Article 6 ECHR, not only in its civil aspect (article 6, para. 1 ECHR) but also in its criminal part which protects the rights of the

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<sup>138</sup> Generally, the civil standard of proof is called "balance of probabilities", instead of the criminal standard, which is "beyond reasonable doubt".

<sup>139</sup> E.g. Irish system. See Annex 5.

<sup>140</sup> See Article 6(2) of Directive 2014/42/EU

defence in criminal proceedings (article 6, para. 3 ECHR). Furthermore, the relevant legislation at EU level would have to be taken into account: Directives 2010/64/EU<sup>141</sup>, 2012/13/EU<sup>142</sup>, 2013/48/EU<sup>143</sup>, 2016/343<sup>144</sup>, 2016/800<sup>145</sup> and 2016/1919<sup>146</sup>, which concern procedural rights in criminal proceedings.

Concerning sub-option 4b, safeguards which correspond to the case-law of the ECtHR would also have to be defined. As this sub-option includes NCBC forms of confiscation which are outside the framework of criminal proceedings, they would offer less guarantees for the persons affected. As criminal law safeguards would not apply, the impact on fundamental rights should be higher. The applicable safeguards for sub-option 4b would also be more difficult to define, as the EU Directives on procedural rights and Article 8 of Directive 2014/42/EU would not apply.

- **Impact on domestic justice systems**

Sub-option 4a would have no specific impact or only very little impact on the domestic justice systems of Member States. When transposing Directive 2014/42/EU, Member States have to introduce certain forms of criminal NCBC (in cases of illness or absconding) into their national systems. Several Member States have gone beyond and introduced (or reforms are still pending, see above section 3.6) other forms of criminal NCBC (e.g. death). This means that the different forms of criminal NCBC are largely known in all Member States.

In addition, a directly applicable instrument would have the advantage that foreign orders would have to be executed like domestic ones, without the need to modify their internal legal system and their way of working.

The impact of sub-option 4b considerably varies depending on the respective national systems in place. In this context, and following the expert meeting with Member States on 17 November 2016, three groups of Member States need to be distinguished:

(1) Those Member States which do not foresee civil or administrative forms of NCBC in their national legal orders (AT, BE, CZ, CY, DE, EE, EL, ES, FI, HR, HU, LV, MT, PL, PT, RO, SE) would be considerably higher impacted by sub-option 4b than sub-option 4a as it would require them to enforce such orders on their territory. This means that judges and law enforcement authorities would need to execute freezing and confiscation orders they are not necessarily familiar with and they could not adopt or execute in their own legal system. This could be mitigated, to a certain extent, by a strong set of procedural rights and adequate

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<sup>141</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).

<sup>142</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1).

<sup>143</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).

<sup>144</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1).

<sup>145</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1).

<sup>146</sup> Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4.11.2016, p.1).

safeguards<sup>147</sup>. However, it became clear during the expert meeting with Member States that sub-option 4b may lead to legal and practical problems in the context of the application of a new instrument and judges or law enforcement authorities might be hesitant to apply this instrument in all cases.

(2) Member States which do not foresee civil or administrative forms of NCBC in their national legal orders but are able to recognise and execute such types of confiscation orders already now (FR, LU, NL) would not be impacted by sub-option 4b or the impact would be very limited.

(3) Member States which have a civil or administrative NCBC system in place (mainly BG, IT, LT, SI, SK, UK) should be able to recognise and execute these types of orders in their national systems without any specific difficulties<sup>148</sup>. The impact on their national systems would therefore be very low.

## **7.5. Overall comparison of costs and income of different options**

Where Member States are successful in confiscating assets, the amount gained is likely to be higher than the amount expended in the process of confiscating the assets. Therefore if an instrument is enacted and enforced, it should result in a net monetary gain for Member States.

Based on an estimated annual cost of administering confiscation orders in England and Wales in 2012-2013 of £102 million (of which 36% relates to investigations, 33% to enforcement and 31% to court hearings and appeals), and an annual number of around 6.392 confiscation orders imposed each year,<sup>149</sup> it can be estimated that the average amount of issuing and enforcing a confiscation order amounts to about GBP 16.000 or EUR 18.000. In the same time, GBP 133 million were collected by enforcement agencies, which means that for every confiscation order, costs of GBP 16.000 or EUR 18.000 are offset by an average income collected of GBP 20.807 or EUR 23.330 (which is however lower than the average value of confiscation orders imposed, as not every confiscation order is realised).

The number of cross-border confiscation orders is not known. The following figures can serve as proxy of costs of issuing confiscation orders in the EU under the different option and the income to be generated:

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<sup>147</sup> Ground for refusal based on violation of fundamental rights in the issuing Member State.

<sup>148</sup> This applies however with certain restrictions as it appears that not all civil orders are recognised between UK and IE.

<sup>149</sup> Source: UK, National Audit Office (NAO) Report on Confiscation Orders 2013. The estimations provided stem from several data sources which may not always cover the same time or be collected in the same manner, and the NAO had to make several assumptions. However, it is the best proxy that we have to estimate cost and income resulting from confiscation activities.



**Table 6: comparison of costs and income under the different options**

Option	Estimated number of intra-EU cross-border confiscation orders	of which MLA requests	of which Mutual recognition requests	Costs 28 MS in million EUR	Income 28 MS in million EUR
Status Quo	616-840	448-560	168-280	11,1-15,1	14,4-19,6
Option 2	646-882	470-588	176-294	11,6-15,9	15,1-20,1
Option 3	650-952	314-392	336-560	11,7-17,1	15,2-22,2
Option 4a	689-1036	269-336	420-700	12,4-18,6	16,1-24,2
Option 4b	730-1109	260-325	470-784	13,1-20,0	17,0-25,9

Annex 7 sets out the different assumptions made for this table.

## 8. COMPARISON OF THE OPTIONS

In the following table the results of the assessment as described above under Section 7 are compared with option 1 representing the status quo set at "0".

Impacts (applied vis-à-vis the "no change" baseline) are rated + or – for slight impacts, ++ or - - for moderate impacts, and +++ or --- for significant impacts.

<b>Objectives/Impacts</b>	<b>Option 1 Status quo</b>	<b>Option 2 Non- regulatory Option</b>	<b>Option 3 Minimal regulatory Option</b>	<b>Option 4a Maximum Regulatory Option</b>	<b>Option 4b Maximum Regulatory Option</b>	<b>Comments</b>
To improve the mutual recognition of freezing and confiscation orders in cross-border cases by extending the scope of mutual recognition instruments (specific objective 1)	0	0	+	++	+++	<p>The baseline scenario and the non-regulatory option 2 would not lead to any extension of scope of mutual recognition and would therefore not contribute to this objective.</p> <p>The regulatory Option 3 would ensure that confiscation in the case of illness or absconding, as foreseen by Article 4(2) of Directive 2014/42/EU, extended confiscation as foreseen by Article 5 of the directive, and third-party confiscation, as foreseen by Article 6 of the directive would be recognised in all Member States. It would however not cover other existing forms of confiscation, notably of NCBC.</p> <p>The regulatory Option 4 contributes to reaching this objective with the highest efficiency, sub-option 4a however more limited than sub-option 4b which ensures the widest scope.</p> <p>An estimation of the number of cases of mutual recognition under the different options is provided in Section 7.5 above.</p>
To provide simpler and faster procedures and certificates (specific objective 2)	0	0	+	++	+++	<p>Option 3 and option 4 would be equally efficient as regards the achievement of simpler and faster procedures and certificates for the cases they cover, as they would include similar provisions. They would both ensure slightly faster procedures for freezing and confiscation orders compared to the current instruments by introducing more binding requirements concerning timing. Compared to MLA requests, they would bring a significant time gain, as there are no binding requirements regarding timing for MLA procedures and they usually take very long.</p> <p>Efficiency gains are greater where they apply to a bigger number of cases. Because the three regulatory options have a different impact on the numbers of mutual recognition cases (cf. assessment of the specific</p>

							objective regarding the scope), option 3 would globally be less efficient than option 4, and sub-option 4b would be the most efficient option.
To enhance the protection of victims' rights in cross-border cases (specific objective 3)	0	0	+	++	++	++	<p>Option 3 and option 4 would be equally efficient as regards the achievement of enhanced protection of victims in cross-border cases for the cases they cover, as they would include similar provisions.</p> <p>Only few Member States currently provide for freezing or confiscation by the State in the interest of the victim, as described in section 4.4 above, and they are countries without NCBC currently. As a result, there will only be a difference between the options 3 and 4 resulting from different number of cases, but no difference between option 4a and option 4b. However, it can be argued that as far as funds deriving from confiscation go back to victims funds, there could be an indirect effect which would be biggest for option 4b.</p>
To freeze and confiscate more assets deriving from criminal activities in cross-border cases in order to prevent and combat crime, including terrorism and organised crime (general objective)	0	0/+	+	++	+++	+++	<p>Under the baseline scenario, no significant improvement compared to the current situation can be expected.</p> <p>Option 2 might marginally improve the situation with regard to the baseline scenario. However, the general objective would not be adequately achieved, specific problems would not be solved.</p> <p>Option 3 would increase to a certain extent the number of cross-border enforcement procedures and thereby also lead to an increase of the value of assets recovered.</p> <p>Option 4 and notably sub-option 4b) would be the most efficient to reach the general objective. A single instrument including all types of freezing and confiscation orders which currently exist in the Member States, including the different forms of NCBC, would considerably increase the number of cross-border enforcement procedures in the EU. This option would mean that considerably more criminal proceeds could be frozen and confiscated in a cross-border context within the EU. This will allow assets of criminals, crime organisations and terrorist groups being confiscated not only in purely domestic cases</p>

							but also when they invest their illicit money in other Member States. The fact that all types of orders would be covered by the same instrument would also enhance its use, as courts and judges in the Member States will not need to make use of the traditional mutual legal assistance instruments. Hence the current double legal regime for recognition and enforcement of freezing and confiscation orders within the European Union would disappear and judicial authorities would apply the new instrument.
Administrative costs	0	-	-	--	---		The Baseline scenario and the non-regulatory option 2 would not entail any (or only limited) administrative costs for issuing and executing authorities as the status quo would remain unchanged. The costs of non-regulatory activities such as training and evaluations would however have to be taken into account for Option 2. As regards options 3 and 4, there would be an increase of administrative costs for both issuing authorities and executing authorities, stemming from an increase of cross-border procedures and enforcement of freezing and confiscation orders. The increase of such administrative costs would be higher for option 4 than for option 3 and highest for option 4b because it would result in the highest number of mutual recognition cases.
Benefits	0	0	+	++	+++		These administrative costs described above would however be (more than) offset by the expected increase in the recovery of cross-border assets as shown by the assumptions developed under section 7.5. Concrete estimates are not available. Moreover, considerable benefits would also result from the prevention of criminal activities and terrorist attacks given that criminals would be deprived from funds. The recovery of cross-border assets and potential benefits from the prevention of criminal and terrorist activities would be considerably higher in option 4 than in option 3.
Impact	on	0	0	-	--		The baseline scenario and the non-regulatory option 2 would not (or

fundamental rights						<p>only marginally) impact fundamental rights.</p> <p>Option 3 would be the least intrusive of the regulatory options. The alignment with directive 2014/42/EU which foresees already a number of safeguards should not raise particular issues.</p> <p>As regards sub-option 4a the impact on fundamental rights should be limited as overall the safeguards of criminal proceedings would apply. Moreover, as in option 3, the alignment with directive 2014/42/EU should not raise particular issues in this respect, as the directive foresees in Article 8 explicitly a number of procedural safeguards.</p> <p>Sub-option 4b would have a very significant impact on fundamental rights. It would need to be accompanied by a strong set of procedural safeguards and an effective judicial review. How far these procedural safeguards should go (include also criminal law safeguards<sup>150</sup>) is subject to discussion.</p> <p>On the other hand, any option that would lead to a prevention or reduction of criminal and terrorist activities would also contribute to protecting fundamental rights of potential victims of such criminal activities.</p>
Impact on domestic justice systems	0	0	0	0	-	<p>The baseline scenario and the non-regulatory option 2 would not (or only marginally) have an impact on domestic legal systems.</p> <p>For the regulatory options 3 and 4a) directly applicable instrument would only need to be applied by practitioners, with the result that foreign orders would have to be executed like domestic ones, without the need to modify their internal legal system and their way of working.</p> <p>However, as regards sub-option 4b) the judicial authorities would need to enforce forms of confiscation that are not known in their domestic</p>

<sup>150</sup> In the expert meeting of 17 November 2016 some Member States considered that all procedural safeguards applicable in criminal proceedings should apply also under sub-option 4b).

						systems. This might create legal issues regarding the recognition of such orders and a certain hesitation amongst practitioners to execute such confiscation orders. Moreover, in a few Member States constitutional issues might come up <sup>151</sup> .
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<sup>151</sup> EE, CZ

## 9. THE PREFERRED OPTION

The above comparative assessment of the options and the conclusions of the expert meeting of 17 November 2016 have led to the selection of **Sub-option 4a as preferred option**.

Sub-option 4a foresees a new legal instrument with an extended scope covering all types of freezing and confiscation orders issued in the context of criminal proceedings. Thus, it will cover criminal conviction based confiscation, extended confiscation and criminal non-conviction based confiscation, thus going beyond the scope of Directive 2014/42/EU.

Article 82(1) provides for a clear legal basis for instruments for mutual recognition in criminal matters. The new legal instrument could be adopted in the form of a regulation. Article 82(1) TFEU gives the EU legislator the choice: it does not limit the possible measures to directives but also allows for the adoption of regulations. A regulation would be directly applicable, would provide greater legal certainty and would avoid the transposition problems that the Framework Decisions were subject to.

This option would sufficiently ensure fundamental rights of the persons concerned as the procedural rights standards (notably the Procedural rights directives which have been adopted between 2010 and 2016 by the EU<sup>152</sup>) are to be ensured within the framework of criminal proceedings.

It will also create specific rules for the protection of victims' rights and ensure the restitution and compensation of victims in cross-border cases.

Politically, it would be the option the most easily accepted by Member States as most of the Member States have already provisions including criminal NCBC in place or are currently reforming their respective national systems in that sense. Thus, the extension of the existing mutual recognition framework in a cross-border context to these forms of freezing and confiscation orders would be coherent and fit well with the national systems. The impact on the national systems would be limited, in particular taking into account that a Regulation could be directly applied by legal practitioners, with the result that foreign orders would have to be executed like domestic ones, without the need to modify their internal legal system and their way of working. During the expert meeting of 17 November 2016 representatives of Member States largely supported this option.

This option would complement the harmonisation measures put into place by Directive 2014/42/EU by the creation of an efficient and adequate mutual recognition system.

Moreover, this option would be fully consistent and compatible with highly important EU policy strategies, such as the European Agenda for Security of 28 April 2015 and the Commission's Action Plan on for strengthening the fight against terrorism. The preferred option would considerably strengthen the mutual recognition of freezing and confiscation orders and as a result contribute to deprive criminal and terrorist organisations from illegal gains and thereby cut off such organisations from financing.

The preferred option has a clear EU added value. Once the new legal instrument will be applied, it will lead to an enhanced and facilitated exchange and execution of freezing and confiscation orders in cross-border cases within the European Union. It will contribute to

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<sup>152</sup> Directive 2010/64/EU on the right to interpretation and translation, Directive 2012/13/EU on the right to information, Directive 2013/48/EU on the right of access to a lawyer, Directive (EU) 2016/343 on the presumption of innocence, Directive (EU) 2016/800 on procedural safeguards for children and Directive (EU) 2016/1919 on legal aid. All these directives apply to suspects and accused persons in criminal proceedings.

cross-border cooperation, have a positive impact on mutual trust between judicial authorities and strengthen the functioning of mutual recognition instruments in the EU.

## 10. MONITORING AND EVALUATION

Five years after the adoption of the legislative instrument to strengthen the mutual recognition of freezing and confiscation orders the Commission will conduct an evaluation of the effectiveness of the measures that Member States have taken to achieve the objectives set out in section 5 above. On the basis of this evaluation, the Commission will decide the appropriate follow-up.

Expert meetings will also take place to discuss problems arising in the context of the recognition and execution of freezing and confiscation orders in cross-border cases. The exchange of best practices in all the phases of the confiscation process will continue to take place within the EU Asset Recovery Offices Platform.

This impact assessment has repeatedly highlighted the lack of statistical data on asset confiscation and the poor quality of available data. As a result of these data gaps, it is currently not possible to carry out a proper evidence-based assessment of the impact of new policies/legislation at EU level or at Member State level in most countries.

For this reason, the options set out above should include the introduction of reporting obligations on the Member States in relation to cross-border asset confiscation work. Data will be collected by judicial authorities (courts, prosecution offices) asset management offices and other authorities in charge of asset disposal, at least on an annual basis<sup>153</sup>. The data so collected will feed into monitoring and evaluation activities and will allow the Commission to assess to what extent the proposed legislation achieves its objectives.

In order to evaluate the effectiveness of the legislative instrument to strengthen the mutual recognition of freezing and confiscation orders, the following indicators should be used:

- *The number of freezing and confiscation orders issued in one Member State and sent to another Member State for recognition and execution;*
- *The number of freezing and confiscation orders received from another Member State;*
- *The type of freezing and confiscation orders issued in one Member State and sent to another Member State for recognition and execution (e.g. Conviction based, Non-conviction based, extended confiscation);*
- *The number of freezing and confiscation orders received from another Member State which were refused;*
- *The number of confiscation cases where victims were compensated;*
- *Value of the assets frozen and confiscated in cross-border cases;*
- *The average duration of the execution of a freezing and confiscation orders in cross-border cases.*

A new legal instrument on the strengthening of mutual recognition of freezing and confiscation orders is part of the EU Action Plan for strengthening the fight against terrorist financing (see above section 2.1). The data collected in the context of this initiative and the evaluation of this legislative instrument will also be essential to evaluate the efficiency of the Action plan as a whole.

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<sup>153</sup> It is not yet clear whether an authority (such as the Ministry of Justice) will act as centralised national contact point for the data collection, nor whether the reporting requirement will also include a requirement to make the data publicly available.



## Annex 1 Procedural Information

Lead DG: Directorate General Justice and Consumers

### Agenda Planning

<i>Reference AP N°</i>	<i>Short title</i>	<i>Foreseen Adoption</i>
2016/JUST/024	Mutual recognition of freezing and confiscation orders	21/12/2016

The European Agenda for Security of 28 April 2015 attaches strategic importance to the need for improving the mutual recognition of freezing and confiscation orders<sup>154</sup>.

In its Communication of 2 February 2016 to the European Parliament and the Council on an "Action Plan for strengthening the fight against terrorist financing"<sup>155</sup>, the Commission committed to strengthening the mutual recognition of criminal assets' freezing and confiscation orders by the end of 2016.

### Organisation and timing

An Inter-Service Steering Group (ISSG) was set up in May 2016. The ISSG is chaired by the Directorate General Justice and Consumers (JUST) and the following Services and Directorates General have been invited to participate: Secretariat-General (SG), Legal Service (LS), Migration and Home Affairs (HOME), Economic and Financial Affairs (ECFIN), Financial Stability, Financial Services and Capital markets Union (FISMA), Internal Market, Industry, Entrepreneurship and SME's (GROW), Taxation and Customs Union (TAXUD), European External Action Service (EEAS), European Anti-Fraud Office (OLAF).

The Inception Impact Assessment was validated by the First Vice Presidents Cabinet on 6 October 2016 and published on 7 November 2016<sup>156</sup>.

The ISSG met three times before the submission of the Impact Assessment to the Regulatory Scrutiny Board in October 2016: 24 May, 29 July and 24 October 2016. The ISSG approved the Impact Assessment in principle on 24 October 2016. The ISSG did not meet separately to discuss the final version based on comments expressed from the different services during the meeting and the annexes of this Impact Assessment which were still added afterwards. Due to time constraints, ISSG members were instead consulted in a written procedure.

### Consultation of the Regulatory Scrutiny Board

This Impact Assessment Report was examined by the Regulatory Scrutiny Board on 23 November 2016. The Board gave an overall positive opinion provided the impact assessment report is adjusted with regard to the following key aspects:

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<sup>154</sup> COM (2015)185 final, Chapter 3.2. See also the Communication on Delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union (COM(2016) 230 final, p. 13).

<sup>155</sup> COM (2016)50 final, Chapter 1.3

<sup>156</sup> [http://ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_just\\_024\\_mutual\\_recognition\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_024_mutual_recognition_en.pdf)

<b>The Board's Recommendations</b>	<b>Implementation of the recommendations into the revised IA Report</b>
<p>1. The report should include additional elements on the context of this initiative, the problems that it aims to address and their urgency. It should in particular better describe the shift in opinion since 2014 and the political imperative to act now. It should also develop the relative importance of the different elements of the problem and clarify whether they are due to shortcomings of the current legal framework or to a lack of application.</p>	<p>1. The report was amended to better explain the political context of this initiative and the political imperative to act now. More systematic references to relevant policy strategies were introduced (sections 2.1, 3.6., 5).</p> <p>The structure of the problem section 4 was revised in order to clarify the importance of the different problems set out and to illustrate better that the shortcomings of the current legal framework are mostly due to its limitations. A table listing the specific issues under the general problem 1 was added in order to illustrate where each individual problem resides. The comparison of problems, objectives and options were adapted accordingly.</p>
<p>2. The issue of victims' compensation needs to be better integrated in the overall intervention logic.</p>	<p>2. The problem section, objectives and options were clarified to ensure more coherence in the intervention logic. The issue of victims' compensation was reconsidered and presented as a separate general problem (section 4.4) and its interplay with other problems was better explained.</p>
<p>3. The presentation of options needs to depict a more realistic baseline scenario fully reflecting the upwards trend in the use of confiscation and freezing orders, including cross-border cases. The report should also provide additional clarifications on the content of the other options.</p>	<p>3. The report explains more clearly the baseline scenario and reflects more realistically the current trends in the use of confiscation and freezing orders (section 4.6).</p> <p>The report clarifies how the various options differ from each other (e.g. scope) or overlap/include each other (e.g. streamlining of procedures and simplification of certificates). Possible strengthen victims' rights have been set out in more detail. Discarded options were added and explained.</p>
<p>4. The description of impacts should better specify the expected practical implications, burdens and benefits for Member States of implementing the proposed initiative, and should consider the technical and political feasibility of the different options.</p>	<p>The report has been amended to specify better the impacts of the various options on Member States. In particular option 4 has been extended and sub-options 4a and 4b have been better distinguished. The political feasibility and the impact on the domestic legal systems of Member States has been revised taking into account the discussions of the expert meeting of 17 November 2016. A differentiation between groups of Member</p>

	States, based mainly on their legal systems, was introduced. Cost calculations have been updated.
5. The outcomes of the meeting with Member States experts on 17 November 2016 as well as the different stakeholders' views should be integrated throughout the report in order to enrich the problem definition, the calibration of the different options and their likely impacts.	5. The discussions and conclusions of the expert meeting of 17 November 2016 were systematically integrated throughout the report, notably in the sections related to the recent trends (3.6), problem definition (4.3.1), Stakeholders views (6.3), Analysis of impacts of the policy options (7.4). Stakeholder views in general were integrated throughout the report.
6. In the absence of an evaluation, the report should clarify the extent to which the conclusions of the 17 November experts meeting and the wider political feasibility of the various options determine the eventual choice of a preferred option.	6. The report was amended and a preferred option was added (section 9) which is based on the comparative assessment of the options, their impacts, the conclusions of the expert meeting of 17 November 2016 and the political feasibility of the various options.

## Annex 2 Stakeholders Consultation

### Brief Summary of the consultation strategy/process

Due to the political urgencies and against the background that confiscation is a specialised and technical topic which is dealt with by a rather limited number of experts working in this area, (namely prosecutors, judges, lawyers, officials working in national Ministries of Justice or Interior or Asset Recovery Agencies), it was considered that there was no need to undertake an open public consultation. The proposed initiative is presented in response to the requests from the European Parliament and the Council from 2014 to strengthen the mutual recognition of freezing and confiscation orders, the European Agenda for Security of 2015 and the Ferrara Report of October 2016.

Due to time constraints the consultation strategy was based on a targeted consultation (bilateral contacts, stakeholder- and experts meetings and written consultations), to complement the existing sources of information and provide additional data and facts and to provide the Commission with knowledgeable and representative options.

It should be noted that already in the context of the Impact Assessment for a proposal for a directive on the freezing and confiscation of proceeds of crime in the EU, prepared in 2012<sup>157</sup>, wide consultations and discussions with experts had taken place.

Since then, under the Italian Presidency in September 2014, the Commission jointly organised a “Conference on mutual recognition of judicial decisions and confiscation” in Syracuse, during which it engaged with Member States. The first session assessed the status of Mutual Recognition of Judicial Decisions in Criminal Matters. Over 100 practitioners from 28 Member States attended.

In December 2014, also under the Italian Presidency, a meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions took place in The Hague at Eurojust. Senior lawyers from 14 Member States provided their assessments of how the existing instruments (EU and Council of Europe) were functioning, the likely impact of Directive 2014/42 on confiscation and whether further legislative or non-legislative measures were necessary.

In addition, in the context of the current impact assessment process, the Commission has sought a wide and balanced range of views on this issue by giving the opportunity to a large range of relevant parties (Ministries of Justice and Interior of Member States, national law enforcement authorities, prosecutors, judges and other criminal justice practitioners involved in the making and execution of freezing and confiscation orders, defence lawyers and bar associations, criminal law experts, national Asset Recovery Agencies and CARIN and ARO networks, EU institutions and bodies – Eurojust, EJC criminal, Europol, civil society and academia).

The consultation aimed at gathering targeted information with regard to the problem definition, possible options to tackle the problems and the impact of different policy options.

The Commission organised the following consultations throughout the impact assessment process:

#### *1. Member States and national authorities*

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<sup>157</sup> SWD (2012)31 final, see Chapter 2.1.3.

a) On 20 June 2016 the NL Presidency organised together with the Commission a conference in Brussels on the "Strengthening of Mutual Recognition of confiscation and freezing orders".<sup>158</sup> About 100 experts and stakeholders from all Member States (including Ministries, judges, prosecutors and law law enforcement authorities, lawyers and bar associations, academia etc) participated and exchanged their views on possibilities to enhance the mutual recognition of freezing and confiscation, notably including extended and non-conviction based confiscation, while ensuring appropriate procedural safeguards.

A discussion paper with targeted questions had been prepared for the purpose of this conference, and participants (as well as, potentially other stakeholders) were given the opportunity to submit written comments.

It emerged clearly from the discussions that a new instrument to strengthen mutual recognition of freezing and confiscation orders was needed. All modern forms of confiscation (notably non-conviction based confiscation) should be covered, otherwise some Member States would continue to face difficulties when trying to have their orders executed in cross-border cases. Effective remedies for third parties should be foreseen and the compensation of victims' was considered as an important aspect to be tackled.

b) Expert meeting with Member States representatives:

- Expert meeting on non-conviction based confiscation organised by DG HOME on 16 September 2016;
- Meeting of the ARO Platform Subgroup on asset management organised by DG HOME on 22 September 2016;
- Joint expert meeting organised by DG JUST and DG HOME on 17 November 2016.

The expert meeting of 17 November 2016 was dedicated to discuss NCBC in the EU. Whereas the morning session focused on the feasibility analysis for further harmonisation of NCBC, the afternoon session focused on mutual recognition of freezing and confiscation orders between Member States. Firstly, Member States reported about their experience in cross-border cases. It was generally underlined that the existing framework decisions were rarely used in practice and that the lack of an appropriate legal framework for mutual recognition caused considerable problems to cross-border cooperation.

Secondly, Member States expressed their views on possible options to strengthen the mutual recognition in this area.

- All Member States which took the floor could support option 3 (alignment with Directive 2014/42/EU) but a more ambitious approach was generally considered as more appropriate.
- Sub-option 4a seemed to be the most feasible option for all Member States that took the floor.
- As regards sub-option 4b) the picture was more scattered: whereas some Member States (having already civil and administrative proceedings) were clearly in favour of this option, other Member States clearly opposed this option as too far-reaching. Several Member States expressed the option that they could possibly support this option but only under the condition of strong procedural safeguards to be applied.

## *2. Targeted Stakeholder Consultation*

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<sup>158</sup> Cf. [http://ec.europa.eu/justice/newsroom/criminal/events/160620\\_en.htm](http://ec.europa.eu/justice/newsroom/criminal/events/160620_en.htm)

On 29 June 2016 a meeting with Senior Eurojust members and experts took place in the Hague. The meeting focussed on current difficulties encountered in cross-border cases dealing with asset recovery and possible ways forward to enhance the mutual recognition of more modern forms of asset recovery, notably extended and non-conviction based confiscation.

In addition, three meetings of individual experts (a representative from the French AGRASC<sup>159</sup>, a Judge from a UK Crown Court, a German Public Prosecutor and an Italian representative from the University of Catania) have taken place in Brussels on 7 January 2015, 30 March 2015 and 14 March 2016 to discuss specific issues related to asset recovery among EU Member States.

Members of the Commission Expert Group on EU Criminal Policy (composed of academics and practitioners such as prosecutors, judges and defence lawyers) were also consulted on selected issues. All experts underlined the effectiveness of confiscation in the fight against organised crime. However, national systems differ widely and certain forms of confiscation which do not exist in other Member States (such as non conviction based confiscation) are more difficult to execute in cross-border cases, notably because of fundamental rights concerns.

The views by the different stakeholders which were consulted are reflected under Sections 6 Policy options – Stakeholders views on the problem and the options.

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<sup>159</sup> Agence de gestion et de recouvrement des avoirs saisis et confisqués, FR.

## Annex 3 Who is affected by the initiative and how?

The initiative will improve the functioning of a common area of security and justice by improving the mutual recognition of freezing and confiscation orders within the European Union.

### *- Practical Implications of the initiative for businesses*

The initiative does not contain regulatory obligations for businesses and thus, does not create additional costs related thereto.

However, seizing of criminal assets makes it more difficult for criminal businesses to operate. Thus, on a long term basis, this initiative should help legitimate business which is adversely affected by competition of illegal actors (e.g. loan-sharing, racketeering).

### *- Practical Implications of the initiative for public administrations, courts and citizens*

With this initiative Member States will be able to bypass the traditional Mutual Legal Assistance route, which can be slow and cumbersome, and which comes with considerable legal uncertainty. The initiative is likely to reduce the administrative burdens for judges and prosecutors through the simplification of the certificates they have to fill in for the mutual recognition request. The initiative will take advantage of the modern tools available in the context of the e-Justice Portal and limit as far as possible the need for non-automatic translation. This will save both money and time. Being able to generate a request for the mutual recognition of an order within a very short time also means that assets can be dissipated less easily, with the income-generating potential of the measure being examined.

Recovering more criminal assets in favour of the State will have very positive implications as it will provide more funding for public authorities which can be used for the provision of public services (e.g. police, military services etc).

At the same time, if organised criminals, criminal organisations or terrorist organisations are deprived of assets which would otherwise go towards funding or facilitating criminal and terrorist activities, the benefits for public safety and security are significant.

Additionally, it is intended that the initiative will include provision for the mutual recognition of confiscation orders made for the benefit of victims. This would have an immediate impact on the restitution of property or provision of compensation to individual victims of crime. The initiative will also have a positive impact on the financial and psychological situation of victims of crime on a broader level because – in some Member States at least – victims' organisations will receive parts of the recovered criminal assets.

Finally, in some Member States<sup>160</sup> recovered assets are used for social purposes. Schools, kindergartens, day care centres for disabled people, cultural centres, meeting places, youth centres, restaurants, tourist centres and service desks, and social housing have been placed in confiscated properties which were once centres of wickedness and symbols of their supposedly unbreakable criminal power<sup>161</sup>.

### *- Practical Implications of the initiative for consumers*

The initiative will not create any obligations for consumers.

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<sup>160</sup> For example Italy

<sup>161</sup> [https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2014-September-11-12/Combined\\_CacCosp-Wg2-2014-CRP3.pdf](https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2014-September-11-12/Combined_CacCosp-Wg2-2014-CRP3.pdf)

## Annex 4 The International legal framework

Since the 1990's the confiscation of illicit money has become a political priority at international level. The international *acquis* has been growing steadily. The most important international conventions and agreements are the following:

- (a) The 1990 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime<sup>162</sup>;
- (b) The 2000 UN Convention against Transnational organised Crime<sup>163</sup>;
- (c) The 2003 UN Convention against Corruption (Articles 52-59) which has been ratified by the EU<sup>164</sup>;
- (d) The 2005 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime and on the financing of terrorism, so-called "Warsaw Convention" (to date ratified by 17 EU Member States and the EU)<sup>165</sup>;
- (e) The Financial Action Task Force (FATF) Recommendations/standards on combating money laundering and the financing of terrorism and proliferation (including confiscation and asset recovery) adopted on 16 February 2012, and complemented in February 2013, October 2015 and June 2016<sup>166</sup>.

The international conventions are important tools in the fight against organised crime and the efforts to enhance asset recovery. They provide alternative, more traditional means of judicial cooperation compared to mutual recognition. However, not all of them are binding and several have not been ratified by a considerable number of EU Member States. The most used in the EU are the 1990 and 2005 Council of Europe Conventions.

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<sup>162</sup> <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/141>

<sup>163</sup> <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

<sup>164</sup> [https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)

<sup>165</sup> <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198>

<sup>166</sup> <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>



## Annex 5 Non-conviction based confiscation systems in the EU

### BULGARIA

The Confiscation in Favour of the State of Illegally Acquired Assets Act (2012) governs asset confiscation that does not require a final verdict of guilt against a criminal defendant and is based only on civil court judgment<sup>167</sup>.

The Commission for Illegal Asset Forfeiture (CIAF) is the permanent independent specialised public authority in charge of the administrative proceedings to trace and identify illegal assets.

For a court to order the confiscation of assets, it is necessary that a probe by the Commission's inspectors ascertains a significant disparity between suspects' identified assets and her or his lawfully acquired net income. In value terms, the mismatch needs to exceed BGN 250,000 (EUR 125,000) over the entire period being probed. There is no requirement that the assets should be proceeds or instruments of crime. The lack of evidence that the assets derive from legal source would suffice. The procedure to confiscate assets does not depend on a criminal conviction. For this civil confiscation procedure to be initiated, it suffices that criminal proceedings are launched against a person who is accused of having committed any of the crimes set out exhaustively in the Forfeiture Act.

Civil confiscation targets any illicit proceeds and other ill-gotten property, regardless of where they are physically located (i.e. including assets located abroad) or in whose possession they may be, and also regardless of whether they have been transferred to or inherited by other persons, including legal persons.

With respect to time, are subject to confiscation any illegal assets acquired or transferred over the time period of 10 years immediately preceding the date when the probe by the CIAF commenced.

In keeping with the general rules of procedure provided for in the Code of Civil Procedure, confiscation proceedings are public and adversarial. Any party aggrieved may appeal from the judgment to an appellate court and subsequently to the Supreme Court of Cassation.

### IRELAND

In 1996, the Proceeds of Crime Act (POCA) introduced a **civil measure** targeting illegal proceeds of crime. It was created as a non-conviction based system for confiscation to be operated outside the conventional criminal justice system and acting in rem<sup>168</sup>. The POCA can be applied to proceeds of crime committed both by an entity and an individual and targets both direct or indirect assets that have been identified as proceeds of criminal activities. The standard of proof applied for confiscation is the civil one (the “balance of probabilities” standard) and it is up to the State to prove that the property constitutes the proceeds of a criminal activity. The act can target money and all other properties (movable or not), inside or outside the State, that have a value not less than EURO 13,000. The Criminal Assets Bureau (CAB), established in 1996, is the independent agency in charge of targeting and confiscating the assets obtained from the commission of criminal activities.

### ITALY

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<sup>167</sup> Comparative Report of Transparency International, *Legislation Meets Practice: National and European Perspectives in Confiscation and Forfeiture of Assets*, 2015, pp.13-19.

<sup>168</sup> Report of Organised Crime Portfolio, *From Illegal Markets to legitimate businesses: the portfolio of organised crime in Europe*, 2015, pp. 233-234.

Non-conviction based confiscation in Italy, known as **preventative confiscation**, is regulated since 2011 by the Legislative Decree 159 ("Anti-Mafia Code", AMC)<sup>169</sup>, as wholly independent from a criminal conviction. It formally remains outside of the criminal justice system and belongs to administrative (punitive) law where substantial and procedural rules are looser<sup>170</sup>.

Preventative confiscation may only be imposed against the possible targets identified by the law (an extensive list of individuals is included in the AMC, for example: suspects of belonging to mafia associations, suspects of terrorism, etc.) only when certain conditions are met: 1) property whose provenance cannot be justified and 2) it must be a) either disproportionate with regard to the declared income or the activity carried out or b) of illicit origin or the result of reinvestment of the proceeds of crime.

It is possible to impose a confiscation of property formally owned by a person different (third party) from the targeted individual. Third parties are invited to participate in the hearing with a lawyer of their own choice. They are required to prove that they legitimately acquired the property without being aware of its illicit origin. In addition, if the targeted individual conceals or sells the asset, the tribunal can seize and confiscate other properties of the person for an equivalent value.

AMC foresees the possibility of instituting or continuing proceedings for the imposition of confiscation when the individual is absent or lives abroad, but only with regard to the property for which there is reason to believe that it is the proceeds of illicit activities or their reinvestment. As regards deceased persons, once the requests for seizure/confiscation have been filed, the prevention proceedings carry on, even in the case of the death of the target. In such a case the proceedings continue against the heirs and successors in title. It is also possible to request and impose a measure against a deceased person (against universal or particular heirs) but only within five years after the deceased person's death. The five year time limit is grounded in the need to assure some degree of certainty for economic operators.

### **UNITED KINGDOM (England and Wales)**

The Proceeds of Crime Act (POCA) 2002 introduced "**civil recovery**" (confiscation *in rem*), with retrospective effect<sup>171</sup>. Given its civil nature (Supreme Court *Gal v. Serious Organised Crime Agency*, 2011) the Prosecutor does not have to show that anyone has been convicted of any criminal offence (not even that the person from whom the asset is being taken is the perpetrator of an offence). The prosecution does not have to identify a specific offence by which the money or asset was obtained; it suffices if it specifies the kind or kinds of unlawful conduct involved. The burden of proof remains with the State which must satisfy the court of its case on the balance of probabilities (civil standard of proof). Proceedings are brought before the High Court (a civil court) against the person who is thought to hold the property in question. The fact that a respondent could be charged with a criminal offence or has previously been acquitted of a criminal offence is not generally a bar to civil recovery proceedings in relation to the same subject matter. Indeed, civil recovery is not intended as a substitute for post-conviction confiscation; rather it is designed to enable the State to remove

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<sup>169</sup> The Anti-Mafia Code entered into force to replace all the previous statutory instruments. It did not bring about major innovations, but rather reorganized previous existing provisions to ensure consistency.

<sup>170</sup> Panzavolta, M., Flor, R. (2015), A Necessary Evil? The Italian "Non-Criminal System" of Assets Forfeiture. In J. Peeter Rui, U. Sieber (eds.), *Non-Conviction Based Confiscation in Europe*, pp. 111-150, Berlin, Max-Planck-Institut

<sup>171</sup> Smith, I. (2015), Civil Asset Recovery – The English Experience. In J. Peeter Rui, U. Sieber (eds.), *Non-Conviction Based Confiscation in Europe*, pp. 31-68, Berlin, Max-Planck-Institut.

from circulation the proceeds of crime. The practice is that such recovery is not pursued below a threshold of £10,000.

Civil recovery targets "recoverable property", described as property obtained through unlawful conduct (including unlawful conduct abroad) or property representing the proceeds of crime (direct proceeds converted to another asset). "Recoverable property" which is made the subject of a "civil recovery" order becomes the property of the State rather than of any victim. However, a person who has been deprived of property belonging to him by means of unlawful conduct may apply to the court. Property will also cease to be recoverable if it is disposed of and the person who obtains the property does so in good faith, for value, and without noticing that it was recoverable property. It is notable that the protection offered to innocent owners is dependent upon their ownership of the asset in question. There is no right for victims who have '*in personam*' claims to recover any part of the property made the subject of a recovery order.

Several Agencies are involved, amongst others the National Crime Agency, the Serious Fraud Office, the Crown Prosecution Service.



## Annex 6 Confiscation and fundamental rights

*"In all jurisdictions there is a potential conflict between asset confiscation processes and human rights which makes all such cases challenging to adjudicate"*<sup>172</sup>.

The main fundamental rights and principles which are at stake are the following:

- Right to property;
- Procedural rights, including in particular the right to a fair trial, the right to an effective remedy, and the presumption of innocence;
- Access to justice, notably for victims.

### 1. Right to property and the principle of proportionality

Article 17 of the Charter of Fundamental Rights of the European Union ("the Charter") guarantees the right to property<sup>173</sup>. The corresponding provision is Article 1 of the first Protocol to the European Convention of Human Rights ("ECHR")<sup>174</sup>.

The right to property is relevant in the context of freezing and confiscation orders as in the former the control over the property is altered and in the latter the ownership of the property is transferred.

The right to property is not an absolute right, it is subject to interference. According to the established case-law of the European Court of Human Rights ("ECtHR")<sup>175</sup>, an interference with property rights must be prescribed by law (**legality**) and pursue one or more legitimate aims. In addition, there must be a reasonable relationship of **proportionality** between the means employed and the aims sought to be realised. A balance has to be struck between the demands of general interest and the interest of the individual concerned.

In the case *Phillips v. UK*<sup>176</sup>, the ECtHR held that the confiscation action was not disproportionate given the importance of the aim to be pursued, which was in this case the fight against drug trafficking. The Court took good note of the fact that *"the making of a confiscation order operates in the way of a deterrent to those considering engaging in drug trafficking, and also to deprive a person of profits received from drug trafficking, and to remove the value of the proceedings from possible future use in the drugs trade"*. In addition, and although it acknowledged that the sum payable under the confiscation order was

<sup>172</sup> Matrix Insight, *Assessing the effectiveness of EU Member States' practices in the identification, tracing, freezing and confiscation of criminal assets*, Final Report June 2009, p. 13.

<sup>173</sup> "1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest."

<sup>174</sup> "1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.  
2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

<sup>175</sup> See, for example, ECtHR, *Agosi v. UK*, N°9118/80; *Raimondo v. Italy*, N°12954/87.

<sup>176</sup> ECtHR, *Phillips v. UK*, N°41087/98.

considerable, namely GBP 91,400, the Court considered that it corresponded to the amount which the Crown Court judge found the applicant to have benefited from through drug trafficking over the preceding six years and that it was a sum which he was able to realise from the assets in his possession. The Court also found that the procedure followed in the making of the order was fair and respected the rights of the defence.

In the case *Butler v. UK*<sup>177</sup>, the ECtHR allowed the State even greater latitude when ordering a preventive confiscation. The ECtHR considered that the problems faced by States combating the problem of drug trafficking justified the wide margin of appreciation accorded to them in this area and was satisfied that the applicant had been given a fair hearing in his appeal challenging the confiscation order. The ECtHR concluded that as drug trafficking is of serious concern in Member States, its policy must be capable of balancing the rights of the individual with the general interest of the community. The actions were subject to judicial scrutiny and the courts weighed the evidence before ordering seizure. The interference with his property rights was not, therefore, disproportionate.

## **2. Procedural rights, including in particular the right to a fair trial, the right to an effective remedy and the presumption of innocence**

The nature of confiscation measures is a central aspect when assessing their impact on procedural rights, such as the right to a fair trial, the right to an effective judicial remedy, and the principle of presumption of innocence. All these rights apply to confiscation measures which are of criminal nature<sup>178</sup>.

The right to a fair trial, the right to an effective remedy and the presumption of innocence are enshrined in Articles 47 and 48 of the Charter<sup>179</sup> as well as in Articles 6 and 13 of the ECHR.

Inasmuch as confiscation orders interfere with the right to property, affected parties must be able to challenge such orders under the conditions set by these articles.

In this context due account has also to be taken of the European Union directives on procedural rights<sup>180</sup> and notably Directive 2012/13/EU on the right to information in criminal proceedings<sup>181</sup> and the recently adopted Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in

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<sup>177</sup> ECtHR, *Butler v. UK*, N°41661/98.

<sup>178</sup> See European Agency for Fundamental Rights, FRA Opinion 03/2012, Confiscation of proceeds of crime, p.7.

<sup>179</sup> Article 47 - Right to an effective remedy and to a fair trial : *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*

*Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."*

Article 48 - Presumption of innocence and right of defence: *"1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.*

*2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed."*

<sup>180</sup> Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU on the right to information in criminal proceedings, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, Directive (EU) 2016/343 on the presumption of innocence, Directive (EU) 2016/800 on procedural safeguards for children in criminal proceedings, Directive (EU) 2016/1919 on legal aid in criminal proceedings.

<sup>181</sup> OJ L 142/1 of 1.6.2012.

criminal proceedings<sup>182</sup>. These directives provide for common minimum standards of procedural rights which are necessary to enhance mutual trust between Member States and to facilitate the principle of mutual recognition.

Moreover, Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union introduced in its Article 8 procedural safeguards in line with the fundamental rights enshrined in the Charter. This will lead to a minimal harmonisation in this area throughout the EU.

### ***Ordinary conviction-based confiscation***

It appears from the established case-law of the ECtHR that the ordinary conviction-based confiscation is generally perceived to be a legitimate restriction to the right to property guaranteed by Article 1, Protocol 1 of the ECHR, if the principles of legality and proportionality are respected, and if procedural safeguards such as the right of the person concerned to a fair trial and to an effective remedy provided for in Articles 6 and 13 of the ECHR are sufficiently ensured. The principle of presumption of innocence has also to be respected.

In the case *Van Offeren v. the Netherlands*<sup>183</sup> the applicant was convicted of having held and transported cocaine and of having held a cocaine-diluting substance in preparation of drug offences, but was acquitted of the remaining charges, including trafficking cocaine. An order for confiscation of illegally obtained advantage was imposed on the applicant in the amount of NLG 357,059 to be replaced, in case of lack of payment or impossibility of recovery, by thirty months detention. The applicant claimed that the confiscation order imposed on him infringed his **right to be presumed innocent** under Article 6(2) ECHR. The Court, however, held that subsequent confiscation proceedings did not amount to being charged with a criminal offence but that these were rather analogous to a penalty determining stage. Indeed, the purpose of the confiscation proceedings was not the conviction or acquittal of the applicant for any other offence, but to assess whether assets demonstrably held by him were obtained by or through drug-related offences and, if so, to assess the amount at which the confiscation order should properly be fixed. Insofar as there was no "new charge", the Court concluded, that Article 6(2) ECHR related to presumption of innocence did not apply.

On the other hand, the case *Geerings v. the Netherlands*<sup>184</sup> illustrates a case where the principle of presumption of innocence enshrined in Article 6(2) ECHR was not respected. It concerned the imposition of a confiscation order based on a judicial finding that the applicant had derived advantage from offences (thefts of lorries containing merchandise) for which he had been acquitted in the criminal proceedings brought against him. In finding a breach of Article 6(2) the ECtHR took into consideration that the confiscation order related to the very crimes for which the applicant had been acquitted, and also acknowledged that it could not be established that any advantage, illegal or otherwise, was actually obtained.

### ***Extended confiscation***

Extended confiscation (in which a criminal conviction is followed by the confiscation not only of assets associated with the specific crime, but of additional assets which the court

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<sup>182</sup> OJ L 65/1 of 11.3.2016.

<sup>183</sup> ECtHR, *Van Offeren v. the Netherlands*, N°19581/04.

<sup>184</sup> ECtHR, *Geerings v. the Netherlands*, N°30810/03.

determines as deriving from criminal conduct) may raise concerns with regard to the presumption of innocence, as confiscation is enabled without an established link between the asset and a particular criminal conviction. It may also raise issues with regard to the principle of legality, including the non-retroactivity of criminal law and the prohibition of the imposition of heavier penalties laid down by Article 49 of the Charter and Article 7 ECHR. However, the ECtHR has on many occasions concluded that extended confiscation is compatible with the ECHR, provided that certain safeguards, notably under Article 6(1), are complied with.

In the case *Phillips v. UK*<sup>185</sup>, Mr Phillips was sentenced to nine years imprisonment for the importation of cannabis resin. On the basis of the 1994 Drug Trafficking Act, an inquiry was conducted into the applicant's means that same year. The investigating officer argued that the applicant had benefited from drug trafficking and invited the Crown Court to apply assumptions foreseen by section 4(2) and 4(3) of the Drug Trafficking Act, namely that any property appearing to have been held by the defendant at any time since his conviction or during the period of six years before the date on which the criminal proceedings were commenced was received as a payment or reward in connection with drug trafficking, and that any expenditure incurred by him during the same period was paid for out of the proceeds of drug trafficking. Shortly after, the Crown Court imposed an extended confiscation order on the applicant, having assessed the illicit profits at GBP 91,400). Mr Phillips complained that the statutory assumption under the UK Drug Trafficking Act 1994 violated the presumption of innocence enshrined in Article 6(2) ECHR as well as his right to property contained in Article 1, Protocol 1 ECHR.

With regard to the alleged breach of the **presumption of innocence**, the ECtHR examined first whether the prosecutor's application for a confiscation order following the applicant's conviction amounted to the bringing of a "new charge" within the meaning of Article 6(2) ECHR. In order to address this issue, the Court applied three criteria: the classification of the confiscation proceedings under national law, their essential nature and the type and severity of the penalty at stake. The Court first looked at the first criterion and held that the application for a confiscation order did not involve any new charge or offence in terms of criminal law. The Court then examined the other two criteria. It underlined that - although the Crown Court assumed that the applicant had benefited from drug trafficking in the past - the purpose of the confiscation procedure was not the conviction or acquittal of the applicant for any other drug-related offence. The confiscation procedure was instead aimed at enabling the national court to assess the amount at which the confiscation order should properly be fixed. In this sense, the person was thus not "charged with a criminal offence" and Article 6 (2) was not applicable to the confiscation proceedings.

Furthermore, the Court found no violation of **Article 6(1) ECHR** as "the system was not without **safeguards**", in the sense that the assessment was carried out by a court following a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence, the most relevant safeguard being the opportunity for the applicant to rebut the assumption foreseen in the national legislation.

In the case *Grayson & Barnham v. UK*<sup>186</sup>, Mr Grayson was convicted with intent to supply over 28 kilograms of pure heroin and Mr Barnham was convicted of two conspiracy charges involving plans to import large consignments of cannabis. Extended confiscation proceedings

<sup>185</sup> ECtHR, *Phillips v. UK*, N°41087/98.

<sup>186</sup> ECtHR, *Grayson & Barnham v. UK*, N°19955/05 and 15085/06.



were initiated against each of them. They both alleged that the burden to prove that their realisable property was less than the amount to which they had been assessed to have benefited from drug trafficking violated their **right to a fair hearing** under Article 6 (1) of the Convention. The ECtHR, when assessing whether the way in which the statutory assumptions of the 1994 Drug Trafficking Act were applied in the particular proceedings offended the basic principles of a fair procedure inherent in Article 6(1), took well into account that the rights of the defence were protected during the confiscation proceedings by *"the safeguards built in the system. Thus, in each case the assessment was carried out by a court with a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence. Each applicant was represented by counsel of his choice"*.

As regards the burden of proof, it *"was on the prosecution to establish that the applicant had held the assets in question during the relevant period. Although the court was required by law to assume that the assets derived from drug trafficking, this assumption could have been rebutted if the applicant had shown that he had acquired the property through legitimate means. Furthermore, the judge had a discretion not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice"*. The Court concluded that *"it was not incompatible with the notion of a fair hearing in criminal proceedings to place the onus on each applicant to give a credible account of his current financial situation"* after having been proved to have been involved in extensive and lucrative drug dealing over a period of years".

### ***Non-conviction based confiscation***

NCBC enables interferences with the right to property without the property being linked to a specific criminal conviction. Since these measures do not relate to assets for which a criminal conviction has been obtained, they may raise issues with regard to the right to a fair trial, the right to an effective remedy and the presumption of innocence.

Although the ECtHR has not ruled on the principled question of their compatibility with the ECHR, the Court has repeatedly considered NCBC to be consistent with Article 6 ECHR and Article 1, Protocol 1, as long as effective procedural safeguards are respected.

In Italy, **preventative confiscation** can be ordered for alleged proceeds of crime of the presumed offender who is deemed a member of a mafia-like organisation. According to the ECtHR, such confiscation measures *"sought to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established."*<sup>187</sup> It therefore considers that the aim of the resulting interference serves the general interest." In relation to the use of presumptions, the ECtHR confirmed that *"the Convention obviously does not prohibit such presumptions in principle. However, the applicant's right to peaceful enjoyment of their possessions implies the existence of an effective judicial guarantee"*. It should be underlined that under the ECtHR case-law considerable importance is given to the fact that **effective procedural safeguards** are in place. In the case *Arcuri v. Italy*<sup>188</sup>, the Court found that the proceedings were conducted in the presence of both parties and with respect for the rights of defence before three successive courts. Those courts gave full reasons on all the points at issue, thus avoiding any risk of arbitrariness. In the case *Bocellari and Rizza v. Italy*<sup>189</sup> the ECtHR found a violation of Article 6(1) ECHR as the applicants should have had

<sup>187</sup> ECtHR, *M. v. Italy*, N°12386/86.

<sup>188</sup> ECtHR, *Arcuri v. Italy*, N°52024/99.

<sup>189</sup> ECtHR, *Bocellari and Rizza v. Italy*, N°399/02.

at least the opportunity to ask for a public hearing and in the case *Bongiorno a.o. v. Italy*<sup>190</sup> the applicants' rights to a public hearing were also violated.

The ECtHR also had the opportunity to rule on the compatibility with the Convention of **civil "in rem" confiscation**, a system existing in the United Kingdom's legislation. In the cases *Butler v. UK*<sup>191</sup> and *Webb v. UK*<sup>192</sup>, the ECtHR held that cash confiscation (forfeiture) proceedings were not criminal in nature. Cash confiscation was a "*preventive measure*" which could not be compared to a criminal sanction, since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs. The Court also considered that the proceedings did not involve the determination of a criminal charge and hence did not attract the full guarantees of Article 6 of the ECHR under its criminal head, such as the presumption of innocence.

### *Third party confiscation*

The question of proportionality and relevant safeguards plays also an important role in the context of third party confiscation. Where, in the case-law of the ECtHR, there is an interference with the property rights of such parties, a link between the proceeds of crime and the assets in the possession of a third party has to be established. Moreover, the confiscation must be proportionate to the objectives being pursued and the right to a fair trial must be respected. In any event, confiscation from third parties should not prejudice the rights of *bona fide* third parties<sup>193</sup>.

In the case *Arcuri v. Italy*<sup>194</sup> confiscation orders were issued against the property of a number of family members on the basis of the "lifestyle discrepancy" of the first applicant. There were no criminal proceedings directly related to the confiscation order. The presumption that the family's fortune had been created by the proceeds of criminal offences committed by the first applicant was supported by the first applicant's long criminal history and his involvement in organised crime. The ECtHR held that the function of the confiscation order was to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established. As a crime prevention policy, the Court accorded the State a wide margin of appreciation. In assessing the proportionality of the confiscation, the Court considered the rationale for the measure was sound, taking into account the serious nature of organised crime and the threat it posed to the rule of law in the state. Further, the applicants' right to peaceful enjoyment of their possession had not been infringed as the Italian courts had provided them with a reasonable opportunity of putting their case to the responsible authorities.

In the case *Silickiene v. Lithuania*<sup>195</sup> confiscation measures (related to shares in a telecommunication company and an apartment) were applied to the applicant, widow of a high ranking tax police officer who was charged with forming and leading a criminal organisation for smuggling. Proceedings against the husband were discontinued after he had committed suicide. At the same time, three co-accused persons were convicted. The Court upheld the confiscation of the applicant's assets because they stemmed from proceeds of criminal activities of the entire criminal organisation. The Court found no violation of Article 6(1) ECHR accepting that "*the Lithuanian authorities had de facto afforded the applicant a*

<sup>190</sup> ECtHR, *Bongiorno a.o. v. Italy*, N°4514/07.

<sup>191</sup> ECtHR, *Butler v. UK*, N°41661/98.

<sup>192</sup> ECtHR, *Webb v. UK*, N°56054/00.

<sup>193</sup> See Article 6(2) of Directive 2014/42/EU.

<sup>194</sup> ECtHR, *Arcuri v. Italy*, N°52024/99.

<sup>195</sup> ECtHR, *Silickiene v. Lithuania*, N°20496/02.

*reasonable and sufficient opportunity to adequately protect her interests*". Moreover, the Court found no violation of Article 1, Protocol 1 either. The confiscation order was prescribed by law and it pursued a legitimate aim, namely to ensure that the use of the property issue did not procure the applicant a pecuniary advantage to the detriment of the community. The Court noted that the applicant had direct knowledge that the confiscated property could only have been purchased with the proceeds of the criminal organisation's unlawful enterprise and in separate criminal proceedings had confessed to having committed crimes with a view to helping her husband escape criminal liability while he was detained. As to the way the confiscation proceedings were held, the Court noted that the judicial review was conducted by three successive courts and concerned the legality and the justification for the confiscation. Lastly, given the scale, systematic nature and organisational level of the criminal activity at issue, the Court considered that the confiscation measure complained of may have appeared essential in the fight against organised crime.

In the case *Veits v. Estonia*<sup>196</sup> the applicant's mother and grandmother were convicted for fraud and murder related to real estate transactions. The confiscation of one apartment belonging to the applicant was ordered (as property obtained through crime). The ECtHR found neither a violation of Article 6 nor of Article 1, Protocol 1. The Court held that even though the applicant was not invited to take part in the proceedings, her interests were de facto protected by her mother and grandmother and did not remain unrepresented. Moreover, domestic courts dealt with, and rejected with sufficient reasoning, the arguments by the applicant's mother and grandmother to the effect that the apartment in question had not been obtained through crime.

For the ECtHR, it is also essential that a third party has an effective opportunity possibility to claim the ownership of a seized asset and to protect her/his interests.

In the case *Denisova and Moiseyev v. Russia*<sup>197</sup> the ECtHR concluded on a violation of the rights of property of the applicants for the following reasons: the applicants were wife and daughter of Mr Moiseyev who had been confiscated a large amount of money, a pc and other assets. The spouse claimed her right to a portion of the money and the daughter asserted her ownership of the pc. The issue at stake was that the domestic courts had not provided them with an effective opportunity to claim ownership. Domestic case-law indicated that confiscation could not extend to third parties, these could be subjected to it only if it was found in subsequent civil proceedings that they acted as straw men. The applicants were not party to the criminal proceedings and had not standing to make any submissions. In the civil proceedings the civil courts refused to take cognisance of the merits of the vindication claims or make any independent findings of fact, and they merely referred back to the judgment in the criminal case.

### **3. Access to justice, in particular for victims**

In its case-law the ECtHR has recognised the applicability of the guarantees foreseen in Article 6 ECHR to proceedings in the context of which individuals claim reparation for damage caused by the offence of which they were allegedly the victims<sup>198</sup>.

Hence, the right to participate in proceedings in accordance with Article 47 of the Charter is not restricted to criminal proceedings against a suspected or accused person. It also covers

<sup>196</sup> ECtHR, *Veits v. Estonia*, N°12951/11.

<sup>197</sup> ECtHR, *Denisova and Moiseyeva v. Russia*, N°16903/03.

<sup>198</sup> ECtHR, *Perez v. France*, N°47287/99.

proceedings conducted for the sole purpose of the confiscation of proceeds of crimes and proceedings concerned with crimes that have violated rights of individual victims. The Directive on the rights of victims<sup>199</sup>, which purpose is to ensure that victims are able to participate in criminal proceedings, has also to be taken into account.

It is therefore important to effectively safeguard fair trial rights of victims of crimes in the context of confiscation proceedings.

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<sup>199</sup> Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, OJ L 315/57.

## Annex 7 Cost calculations

The estimations for the number of intra-EU cross-border confiscation orders under the different options and the resulting costs and incomes in the 28 Member States are based on the following assumptions:

### **For all options:**

An average cost per procedure has been calculated from the UK NAO figures, and used as an estimate for the cost of a procedure in the EU. To calculate the costs of the different options, this cost has been multiplied by the estimated number of cross-border cases in the EU. As UK is seizing more criminal assets than other Member States (cf. Table 4 in Section 4.3.2.), this approach seems more realistic than to multiply the global UK figure by 28.

The average costs of a single procedure have been calculated without distinguishing by type of procedure (criminal or civil, purely domestic procedure or procedure with international dimension, mutual recognition or mutual legal assistance for cross-border cases). It is assumed that the complexity of the case, the number of persons and assets involved, the degree to which these assets are "hidden" are much more important cost factors. However, the increasing replacement of MLA procedures by mutual recognition procedures should lead to faster, more efficient procedures and therefore not only cost savings, but also increased success in seizing assets, as time is of paramount importance for freezing assets.

Costs for training on a new instrument and other measures such as exchanges of best practices are not taken into account in the calculations, but should be of a comparable magnitude for all options concerned, except for the baseline scenario. Compared to the cost of confiscation procedure, they are however marginal.

Moreover, the calculation of benefits does not take into account the benefits realised by the deterrent effect of functioning mutual recognition instruments, as this is difficult to factor.

The number of confiscation orders is estimated to amount to 50% of all freezing orders, based on Europol data described in Section 4.3.2.

Projections are made for a moment in time when the new instrument has developed its full effects, in about 5-6 years. These projections assume that the number of cases will remain stable under the baseline scenario (i.e. no natural increase is factored in).

### **Regarding the baseline scenario:**

From Europol data, we know that about 1.703 (46% of 3703) ARO to ARO asset tracing requests resulted in a hit in 2015, meaning that assets were found in another Member State. The number of cross-border freezing orders issued must be lower than that, as not every discovery of assets in another Member State after an asset tracing request is followed by an order, but on the other hand, an asset tracing request is necessary in a big majority of cases before issuing a cross-border order, so this figure gives a good indication of the potential for cross-border cases. The number of confiscation orders is estimated to amount to 50% of all freezing orders, based again on Europol data described in Section 4.3.2., so the total number of cross-border confiscation orders must be lower than 851.

From figures in UK, PL and NL quoted in section 4.3.3., we estimate that the average of confiscation orders sent or received per Member State under mutual recognition per year is about 6-10, meaning between 168-280 for the EU. If one includes mutual legal assistance request, the figure must be higher. In 2014, the UK received 37 freezing orders under MLA; since this is the figure for received orders, this does not reflect the priority given by UK to

issuing freezing and confiscation orders, and one can use this as a proxy for other Member States too. One can estimate the number of confiscation orders is half of this figure, i.e. about 16-20 confiscation orders under MLA. If one adds the confiscation orders under mutual recognition, this gives a total range of 22-30 orders per year per Member State or 616-840 in total for the EU.

### **Regarding Option 2:**

The effect of non-regulatory measures targeting both the mutual recognition and the mutual legal assistance instruments will lead to a slight increase. The increase is estimated to amount to 5%.

### **Regarding Option 3:**

The effect of option 3 would be much more important than for option 2. Compared to the status quo, it is assumed the number of mutual recognition cases will double under this option (100%). On the other hand, the number of mutual legal assistance cases should decrease as some of the MLA procedures will be replaced by mutual recognition procedures, but not too the same extent, as not all types of confiscation orders are covered by this option (-30%). Overall, the number of cross-border cases should increase slightly.

### **Regarding Option 4a:**

Option 4a would lead to a bigger increase of mutual recognition cases compared to option 3. It is assumed that this increase amounts to 150% compared to the baseline scenario. The decrease of MLA procedures, increasingly replaced by mutual recognition procedures, can be estimated to amount to 40%, slightly higher than for Option 3.

### **Regarding Option 4b:**

In the United Kingdom, civil confiscation orders amounted to GBP 17,8 million or 7%, compared to GBP 247,3 million for criminal confiscation orders in 2014-2015<sup>200</sup>. For Italy, we have no comparable report, but during a presentation at ERA, it was claimed that in 2014, preventive confiscation orders were issued for a total amount of EUR 1,5 billion. This does not match the figures of Dataminja, which estimates that in 2014, the total value of confiscated goods amounted to EUR 776 million in Italy. However, one can nevertheless conclude that the portion of NCBC in Italy is much higher than the one in the United Kingdom. Because countries with NCBC use asset recovery to a stronger extent than other Member States (cf. table 4 in Section 4.3.2), the percentage of civil or administrative procedures compared to the total number of procedures is proportionally higher. It shall be assumed that Option 4b would result in an increase by 280% compared to the baseline scenario. The decrease of MLA procedures should be more limited, because many Member States currently don't accept civil or administrative confiscation orders under MLA procedures neither (-42%).

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<sup>200</sup> Cf. UK, National Audit Office (NAO) Report on Confiscation Orders 2013, p. 16, figure 3.

## Annex 8 List of abbreviations

AGRASC	Agence de Gestion et de recouvrements des avoirs saisis et confisqués, France
ARO	Asset Recovery Offices
CARIN	Camden Asset Recovery Inter-Agency Network
EAW	European Arrest Warrant
ECJ	Court of Justice of the European Union
ECFIN	European Union Directorate General for Economic and Financial Affairs
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EIO	European Investigation Order
EJN	European Judicial Network
EU	European Union
EUR	Euro
EUROJUST	European Union Judicial Cooperation Unit
EUROPOL	European Police Office
GBP	Pound Sterling
GDP	Gross Domestic Product
ISSG	Inter-Service Steering Group
JUST	European Commission Directorate General for Justice and Consumers
MEP	Member of Parliament
MLA	Mutual Legal Assistance
MS	Member States
NCBC	Non-Conviction Based Confiscation
NGO	Non-Governmental Organization
OECD	Organisation for Economic Cooperation and Development

OJL	Official Journal of the European Union (Legislation)
OJC	Official Journal of the European Union (Information and Notices)
OLAF	European Anti-Fraud Office
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNDOC	United Nations Office on Drugs and Crime
USA	United States of America
USD	United States of America Dollar
UK NAO	United Kingdom National Audit Office



## Annex 9 Bulgarian example

Source: CIAF

In Bulgaria the designated state asset recovery authority is the Commission for illegal assets forfeiture (CIAF), which is an independent administrative body. Bulgaria has a system of civil NCBC in place since 2012.

On 29.02.2016 the CIAF has submitted before the Sofia City Court a claim for illegal assets forfeiture in the amount of BGN 2 203 445 038, equal to EUR 1 126 603 558 against a Bulgarian citizen, the members of his family and the legal entities under his control. The defendants against the filed civil claim are twenty seven natural persons and legal entities, related to the majority shareholder of the capital of a bankrupted company. Some of the legal entities, which appear as defendants against the claim, are registered in different European countries and offshore zones. Subject of the forfeiture claim are assets located in the Republic of Bulgaria, the Swiss Confederation, the Grand Duchy of Luxembourg and the Republic of Greece.

Having identified assets in foreign jurisdictions the CIAF tried to impose provisional measures on them. This process was troubled by the fact that the existing EU legal framework only applies to criminal proceedings and executing confiscation orders requires a prior criminal conviction. With no possibility of using the existing legal instruments aimed at ensuring judicial cooperation in criminal matters, the CIAF had to venture into other legal opportunities.

The used legal instruments in this case are the Lugano Convention of 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (regarding jurisdictions outside of the EU, like the Confederation of Switzerland) and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The current experience of the CIAF is that the execution of freezing orders is easier outside of the EU, using the Lugano convention of 2007, rather than within the EU, applying Regulation EU 1215/2012.

The first attempt for execution of a freezing order was made in the Confederation of Switzerland, where a freezing order, issued by the Sofia City Court, was successfully executed, which led to the freezing of several bank accounts and a real estate (its value is estimated at approx. EUR 25 million).

On the other hand CIAF has tried to execute freezing orders in the Grand Duchy of Luxembourg and in Greece, but with no success so far (procedures have also been initiated in other foreign jurisdictions, which are currently pending, but due to confidentiality concerns no details can be disclosed).

Once they had obtained the documents necessary under Regulation (EU) 1215/2012, the CIAF sent a request to the Luxembourgish competent authorities for execution and imposition of freezing measures, regarding shares in companies, registered in the Grand Duchy. The Luxemburg authorities refused on the formal ground that the CIAF was not represented by a locally based lawyer or a representative ad litem. According to the procedural rules this is a mandatory prerequisite before the court proceeding could start.

According to the CIAF, this obstacle is very hard to overcome, because of the high risk which accompanies the disclosure of highly confidential information to private parties in a civil

proceeding, which the lawyers prove to be. In this case the CIAF almost risked disclosing information to lawyers, connected to the investigated person, because of their lack of capacity to trace connections between different parties outside of the territory of the Republic of Bulgaria.

Another part of the problem is strictly financial – CIAF tried to impose freezing orders on company shares, which eventually turned out to be worth less than the fee asked by the Luxembourgish law firms contacted. This makes the whole process financially disadvantageous.

For the execution of another freezing order in Greece, CIAF again needed a local lawyer, which in this case proved to be easier to overcome, having in mind that Greece is a neighbouring country. A trustworthy Greek lawyer was identified, but the procedure stumbled when the execution orders had to be inscribed in the local trade and company registers. The Bailiff failed to inscribe the freezing orders due to a change in the local legislation, which prevented him to fairly assess the value of the assets, therefore the process couldn't continue. Nevertheless CIAF is in a process of clarifying the next steps in order to overcome the obstacles, while respecting the local legal procedures.

In conclusion, this example shows that judicial cooperation on asset recovery for a Member State with NCBC is difficult, and despite the creation of a European area of Justice, Freedom and Security, Bulgaria found it easier to cooperate with a third country (Switzerland) than with EU Member States. The use of civil cooperation tools by Bulgaria may be explained by the fact that neither Luxembourg nor Greece have ratified the Warsaw Convention. It did not prove to be successful so far, and requirements of civil procedure like the obligation to designate a local lawyer don't seem adapted to asset recovery procedures. Only Option 4b would be able to improve this situation.