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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2024) 177 final
Subject:	Recommendation for a COUNCIL DECISION authorising the European Commission to participate, on behalf of the European Union, in negotiations on an additional protocol to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)

Delegations will find attached document COM(2024) 177 final.

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EUROPEAN
COMMISSION

Brussels, 17.4.2024
COM(2024) 177 final

Recommendation for a

COUNCIL DECISION

**authorising the European Commission to participate, on behalf of the European Union,
in negotiations on an additional protocol to the Council of Europe Convention on
Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the
Financing of Terrorism (CETS No. 198)**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE RECOMMENDATION

This recommendation is submitted to the Council in order for the Commission to receive authorisation to participate in negotiations on behalf of the European Union on an additional Protocol (the 'Protocol') in the area of criminal asset recovery to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198).

Reasons for and objectives of the recommendation

Serious and organised crime is a major threat to security within and beyond the EU as well as the functioning of our economy. A major feature of organised crime is that it is profit driven. The revenue obtained through illicit activities is used for other criminal activities or invested to infiltrate the legal economy. This has far-reaching and destabilising consequences for society, the rule of law and trust in public authorities.

Approximately EUR 4.1 billion of criminal assets were frozen on average per year in 2020 and 2021 in EU Member States. This represents an increase compared to earlier years, but it still remains less than 2% of the estimated yearly proceeds of organised crime¹.

Depriving criminals of their ill-gotten gains is essential for effectively fighting organised crime. Effective asset recovery deters criminal activity by removing its main driver, while protecting the integrity of the financial system and broader economy through reducing the circulation of assets from illicit origin. Moreover, asset recovery allows for the compensation of the victims of crime, supporting social cohesion and justice. In addition, effective application of asset recovery measures, including tracing, freezing, confiscation, asset management and disposal of assets, is proven to be a key tool in uncovering and dismantling the criminal networks operating at an international level.

The European Union signed the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) ('Warsaw Convention' or 'Convention')² on 2 April 2009. The European Union has not ratified the Convention yet. As of 18 December 2023, 25 Member States³ have signed the Convention, 23 of which⁴ have ratified it.

The Warsaw Convention, adopted on 16 May 2005, covers multiple aspects of the prevention and the combatting of money laundering and the financing of terrorism. The Warsaw Convention builds on the Convention on laundering, search, seizure and confiscation of the proceeds from crime (CETS No. 141) ('Strasbourg Convention')⁵.

¹ Europol (2023), European Financial and Economic Crime Threat Assessment 2023 - The Other Side of the Coin: An Analysis of Financial and Economic Crime, Publications Office of the European Union, Luxembourg.

² Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CETS No. 198, adopted on 16 May 2005.

³ All EU Member States except Czechia and Ireland have signed the Convention No. 198.

⁴ All EU Member States except Czechia, Finland, Ireland and Luxembourg have ratified the Convention No. 198. A number of Member States have made reservations with regard to individual provisions of the Convention.

⁵ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS No. 141, adopted on 8 November 1990. The Union is not a Party to this Convention which does not contain a clause allowing the Union to become a party to the Convention.

The Convention criminalises money laundering (Article 9), including negligent money laundering and stand-alone money laundering. Furthermore, the Convention covers issues such as corporate liability (Article 10), Financial Intelligence Units (Article 12), investigative powers and techniques, including the tracing, freezing and seizing of assets (Article 4), international cooperation, including cooperation between Financial Intelligence Units, the exchange of information for banking data and mutual legal assistance for investigative purposes (Articles 15 to 20). Finally, and most importantly for the Additional Protocol, the Convention covers domestic rules on confiscation (Article 5), including value confiscation, extended confiscation, asset management (Article 6) and rules on confiscated property (Article 25) including the return of assets to victims and asset sharing agreements as well as rules on judicial cooperation for the purposes of asset freezing and confiscation (Articles 21 to 30) and procedural rights and safeguards of affected persons (Articles 31 and 32).

Background for negotiations for an additional Protocol for the Convention

In the area of criminal asset recovery, the criminality landscape has been evolving rapidly since the adoption of the Convention in 2005. As there are new challenges, and as criminal proceeds are not confiscated sufficiently, there is an urgent need to have a stronger legal framework and to facilitate international cooperation regarding asset recovery.

Therefore, the possible need to enhance the effectiveness of the existing legal framework on asset recovery has been discussed by experts during various initiatives. The Conference of Parties to the Warsaw Convention ('C198-COP') agreed that a new instrument could be needed to enable Parties to respond to challenges in the areas that are covered by the Convention.

In 2019, the Committee of Experts on the Operation of European Conventions on Cooperation in Criminal Matters ('PC-OC') completed a comprehensive study on the possible added value and feasibility of preparing a new binding instrument in the Council of Europe on international co-operation as regards the management, recovery and sharing of assets derived from crime.

Further to the findings of this study, the C198-COP and the PC-OC held a number of consultative meetings. These meetings culminated in the organisation of a Joint session of C198-COP and PC-OC in November 2022. That session gathered representatives from both committees and experts from around the globe, including relevant international organisations and specialised institutes, to discuss and consider the development of an additional instrument in the field of asset recovery. In the course of the discussions, experts identified the following topics as most pressing: international cooperation in management and sharing of confiscated assets (including the enhancement on asset sharing arrangements between States), the application and execution of non-conviction-based forfeiture and the effective management of seized and confiscated assets.

The Council of Europe took into account that some of these issues were, at the time, also addressed in the proposal of the European Commission for a new Directive on asset recovery and confiscation⁶. Therefore, it was also essential for the Council of Europe to integrate these elements into a wider pan-European framework in a timely manner.

At the 15th meeting of the 198-COP on 9 and 10 November 2023 the 198-COP took note of the planned set-up of a committee of experts on criminal asset recovery, working under the

⁶ Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation of 25 May 2022 (COM/2022/245 final).

authority of the Committee of Ministers and of the European Committee on Crime Problems ('CDPC')⁷. Draft terms of reference for a committee of Experts on Criminal Asset Recovery ('PC-RAC') responsible for the drafting of an additional Protocol to the Warsaw Convention had been prepared and presented at the meeting. According to these draft terms of reference, the Committee "shall ensure that the draft Additional Protocol includes, *inter alia*, the following:

- provisions to enhance certainty and consistency in the sharing of confiscated assets between States Parties in transnational cases;
- provisions to ensure efficient and effective management of seized, confiscated and repatriated assets, including the execution of confiscation decisions;
- provisions to facilitate the introduction of non-conviction-based confiscation procedures and of extended confiscation in criminal matters, including cooperation regarding and execution of requests in transnational cases;
- any other issue which it deems to be of consequence to strengthen co-operation among Parties with respect to asset recovery."

Such issues would in any case relate to the areas covered by the Convention.

On 23 November 2023, the Committee of Ministers of the Council of Europe adopted the Terms of Reference establishing the Committee of Experts on Criminal Asset Recovery. The Committee of Experts on Criminal Asset Recovery is entrusted, under the authority of the Committee of Ministers and the European Committee on Crime Problems, to elaborate an Additional Protocol supplementing the Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism, as well as a draft explanatory report. In line with the discussions held within the 198-COP, this work was proposed to start on 29 May 2024 and is expected to be completed by the end of 2025.

Specific objectives of the recommendation

This recommendation is submitted to the Council in order for the Commission to receive authorisation to negotiate, on behalf of the European Union, an Additional Protocol to the Convention, to adopt negotiating directives and to appoint the Commission as negotiator, pursuant to Article 218 TFEU.

The European Union is a signatory to the Warsaw Convention. As regards the subject matters to be covered by the envisioned Protocol, i.e., the field of asset recovery, the EU has exercised its competence by adopting common rules based on Articles 82(1), 83(1) and (2), 87(2) of the Treaty on the Functioning of the European Union ('TFEU') through in particular Regulation (EU) 2018/1805 of the European Parliament and of the Council⁸ and the new Directive on asset recovery and confiscation⁹.

The aim of the Union in the negotiations should be to ensure the effective recovery of criminal assets by parties to the Convention and to promote cross-border cooperation in the

⁷ Meeting report, 15th meeting of the conference of parties of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) on 9 and 10 November 2023, C198-COP(2023)10.

⁸ Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders (OJ L 303, 28.11.2018, p. 1–38).

⁹ Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation of 25 May 2022 (COM/2022/245 final).

area of asset recovery, to avoid any discrepancies with Union legislation and to ensure that the matters regulated in the Protocol at Council of Europe level are compatible with the rules laid down in the Union's *acquis* on asset recovery and the new Directive on asset recovery and confiscation.

The successful outcome of the negotiations is expected to lead to clearer rules on asset recovery among Members States of the Council of Europe.

Consistency with existing provisions in the policy area

The negotiations on a new Protocol to the Warsaw Convention directly relate to common EU rules on asset recovery.

The new Directive on asset recovery provides for standard forms of confiscation, including rules on extended confiscation. Furthermore, the new Directive provides for non-conviction-based confiscation in specific circumstances. The new Directive also provides for the confiscation of unexplained wealth where a conviction is not possible, but the court is satisfied that the property to be confiscated stems from criminal offences. On asset management, rules on the establishment of asset management offices and the possibility to sell frozen property before the confiscation are set out in the new Directive on asset recovery and confiscation. Joint Action 98/699/JHA¹⁰, point (a) of Article 1 and Articles 3 and 4 of Framework Decision 2001/500/JHA¹¹, and the first four indents of Article 1 and Article 3 of Framework Decision 2005/212/JHA¹², remain in force as regards Denmark.

Regulation (EU) 2018/1805 sets out rules on judicial co-operation between Member States for the purpose of the recognition and execution of freezing and confiscation orders. This includes, *inter alia*, rules on the transmission, recognition and procedure for the execution of freezing and confiscation orders, the management and disposal of frozen and confiscated property (including interlocutory sales), restitution of property to victims as well as the disposal of confiscated property or money obtained after the sale of property, including with a view to victim compensation and to regulating the sharing of assets between Member States. Moreover, the Regulation contains rules on the bearing and sharing of costs related to the execution of cross-border freezing orders and on procedural rights of affected persons, including as regards notification obligations and legal remedies. Regulation (EU) 2018/1805 replaced Council Framework Decisions 2003/577/JHA¹³ and 2006/783/JHA¹⁴, which remain in force as regards cooperation with Ireland and Denmark, who do not participate in Regulation (EU) 2018/1805.

In addition, the European Public Prosecutor's Office (EPPO) is the Union body competent to investigate, prosecute and bring to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in Directive

¹⁰ Joint Action 98/699/JHA of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (OJ L 333, 9.12.1998, p. 1).

¹¹ Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 5.7.2001, p. 1).

¹² Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property (OJ L 68, 15.3.2005, p. 49).

¹³ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, p. 45–55).

¹⁴ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59–78).

(EU) 2017/1371.¹⁵ The EPPO should be entitled to order or request the freezing of instrumentalities or proceeds of crime, including assets, that are expected to be subject to confiscation by the trial court, where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgement ordering confiscation. To perform its tasks, the EPPO should be in a position to cooperate, including in the field of asset recovery, with the competent authorities Member States that do not participate in the EPPO – and it does so on the basis of, among others, Regulation (EU) 2018/1805 – as well as with the competent authorities of non-EU countries.

Given the Union *acquis* covering the subject-matter of the negotiations, the Union should aim to ensure coherence, and, to the level appropriate, consistency, between the new rules on asset recovery at Council of Europe level and those under Union law.

2. LEGAL ELEMENTS OF THE RECOMMENDATION

• Legal basis

Article 218(3) TFEU provides that the Commission shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and nominating the Union negotiator. The Commission shall be appointed as the negotiator. According to Article 218(4) TFEU, the Council may address directives to the negotiator. The procedural legal basis for the Council Decision authorising the Commission to participate, on behalf of the Union, in the negotiations on the additional Protocol is therefore Article 218(3) and (4) TFEU.

The substantive legal basis for the envisaged Protocol can only be determined when its precise scope and content are known. According to Article 4(2)(j) TFEU, the Union has competence in the area of freedom, security and justice, which is, in principle, shared with the Member States. Article 83(1) and (2) TFEU empower the Union to establish minimum rules concerning the definition of criminal offences and the sanctions for such offences, including the freezing and confiscation of proceeds of crime. Article 82(1) TFEU empowers the Union to adopt rules in order to facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters, and the enforcement of decisions. Article 82(2) TFEU provides for the approximation of the laws and regulations of the Member States as regards certain aspects of criminal procedure, including the rights of individuals in criminal procedure and the rights of victims of crime. While the scope of Article 83(1) and (2) TFEU is limited in terms of the criminal offences covered, such is not the case as regards Article 82(1) and (2) TFEU. Measures on asset tracing and asset identification, or cooperation between asset recovery offices and asset management offices are covered by Article 87(2) TFEU.

Article 3(2) TFEU provides that the Union has exclusive competence “for the conclusion of an international agreement (...) in so far as its conclusion may affect common rules or alter their scope”. In particular, the European Court of Justice has clarified that a “finding that there is such a risk [of affectation or alteration of EU rules by international commitments] does not presuppose that the areas covered by the international commitments and those covered by the EU rules coincide fully” but that “the scope of common EU rules may be affected or altered by such commitments also where those commitments fall within an area which is already

¹⁵ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ L 198, 28.7.2017, p. 29–41).

largely covered by such rules”¹⁶. The analysis of the nature of the Union competence must take into account the areas covered by the EU rules and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the envisaged agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish.

The Union has exercised its competence in the area of freedom, security and justice by the adoption of numerous instruments on law enforcement and judicial cooperation in criminal matters and the establishment of minimum rules on measures concerning freezing and confiscation. Moreover, the Union has adopted several directives that reinforce procedural rights of suspects and accused persons. The following instruments are particularly relevant with regard to the elements being considered for the envisaged Protocol, namely the sharing and management of frozen and confiscated assets, execution of confiscation decisions, procedures for non-conviction-based confiscation and extended confiscation and cooperation in transnational cases:

- New Directive on asset recovery and confiscation, which replaces, *inter alia* Directive 2014/42 and Framework Decisions 2001/500 and 2005/212;
- Regulation 2018/1805 on mutual recognition of freezing and confiscations orders;
- Framework Decisions 2003/577 and 2006/783, which provide for mutual recognition of freezing orders and confiscation orders, respectively, remain applicable for relations between Member States not bound by Regulation 2018/1805 and for relations between the latter Member States and Member States bound by Regulation 2018/1805 (see recital 52 of Regulation 2018/1805).

In light of the above, the area of criminal asset recovery must be considered as an area which is largely covered by Union law.

Since the envisaged protocol is likely to contain rules in the area of criminal asset recovery, it must be regarded as capable of affecting or altering the scope of common rules in the area of criminal asset recovery.

Therefore, the Union has exclusive external competence based on Article 3(2) TFEU, as interpreted by the European Court of Justice, in so far as the conclusion of the envisaged protocol may affect common EU rules or alter their scope.

• **Fundamental rights**

A variety of fundamental rights and freedoms enshrined in the Charter of Fundamental Rights of the European Union (‘the Charter’)¹⁷ have to be taken into account during the negotiations on the Protocol. The rights which are particularly relevant include the rights to privacy and the protection of personal data (Article 7 and 8 of the Charter), the right to property (Article 17 of the Charter) the right to an effective remedy and a fair trial (Article 47 of the Charter), the presumption of innocence and the right of defence (Article 48 of the Charter), the principles of legality and proportionality of criminal offences and penalties (Article 49 of the Charter) and the right not to be tried or punished twice in criminal proceedings for the same

¹⁶ Case C-114/12, *Commission v. Council*, ECLI: ECLI:EU:C:2014:2151, paragraph 69-70.

¹⁷ Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, p. 389–405.

criminal offence (*ne bis in idem*, Article 50 of the Charter). As the participation in the negotiations on behalf of the European Union should not compromise the level of protection of fundamental rights in the Union, this initiative proposes to pursue a high level of protection of fundamental rights.

- **Subsidiarity (for non-exclusive competence)**

Not applicable.

- **Proportionality**

This initiative does not go beyond what is necessary to achieve the policy objectives at stake. The Union is best placed to act as the Union has already exercised internal competence in this area through the adoption of various legal instrument in the area of asset recovery.

Therefore, a common EU approach should be taken in the negotiations to avoid discrepancies between the the rules on asset recovery at Council of Europe level with Union law.

COUNCIL DECISION

authorising the European Commission to participate, on behalf of the European Union, in negotiations on an additional protocol to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 218(3) and (4) thereof,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) The Union signed the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) on 2 April 2009. As of 18 December 2023, 25 Member States¹ have signed the Convention, 23 of which² have ratified it.
- (2) On 23 November 2023, the Committee of Ministers of the Council of Europe adopted the Terms of Reference establishing the Committee of Experts on Criminal Asset Recovery. The Committee of Experts on Criminal Asset Recovery is entrusted, under the authority of the Committee of Ministers and the European Committee on Crime Problems, to elaborate an additional Protocol supplementing the Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism. This work was proposed to start on 29 May 2024 and to be completed by the end of 2025.
- (3) According to the Terms of Reference, the envisaged additional Protocol is likely to contain provisions "to enhance certainty and consistency in the sharing of confiscated assets between States Parties in transnational cases, provisions to ensure efficient and effective management of seized, confiscated and repatriated assets, including the execution of confiscation decisions, provisions to facilitate the introduction of non-conviction-based confiscation procedures and of extended confiscation in criminal matters, including cooperation regarding and execution of requests in transnational cases and any other issue which it deems to be of consequence to strengthen co-operation among Parties with respect to asset recovery".
- (4) The Union has already adopted common rules that overlap to a large extent with certain elements being considered for the content of the envisaged additional Protocol. Those common rules include in particular the Directive on asset recovery

¹ All EU Member States except Czechia and Ireland have signed the Convention No. 198 with or without reservations.

² All EU Member States except Czechia, Finland, Ireland and Luxembourg have ratified the Convention No. 198.

and confiscation and Regulation 2018/1805³ on the mutual recognition of freezing orders and confiscation orders Moreover, Framework Decisions 2003/577/JHA⁴ and 2006/783/JHA⁵ remain applicable in the relations between certain Member States. Therefore, the area of criminal asset recovery is an area already covered to a large extent by Union rules which risk being affected or altered in scope by the elements being considered for the envisaged additional Protocol.

- (5) Therefore, the Union should participate in the negotiations on an additional Protocol supplementing the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198).

HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to negotiate, on behalf of the Union, the additional Protocol of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198).

Article 2

The negotiating directives are set out in the Annex.

Article 3

The negotiations shall be conducted in consultation with the [*name of the special committee to be inserted by the Council*].

Article 4

This Decision is addressed to the Commission.

³ Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders (OJ L 303, 28.11.2018, p. 1, ELI: <http://data.europa.eu/eli/reg/2018/1805/oj>).

⁴ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, p. 45, http://data.europa.eu/eli/dec_framw/2003/577/oj).

⁵ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59, ELI: http://data.europa.eu/eli/dec_framw/2006/783/oj).

Done at Brussels,

*For the Council
The President*