



Council of the
European Union

Brussels, 25 November 2022
(OR. en)

15010/22

LIMITE

JAI 1508
COPEN 400
DROIPEN 149
CODEC 1788
ENFOPOL 598
CATS 69

**Interinstitutional File:
2022/0167(COD)**

NOTE

From: Presidency
To: Permanent Representatives Committee/Council
Subject: Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation
- Policy debate

The proposal and its examination in the competent working party

On 25 May 2022, the Commission submitted a proposal for a Directive on asset recovery and confiscation.¹ The purpose of the proposal is essentially to update the existing legal framework, so as to facilitate and ensure effective asset recovery and confiscation efforts across the Union.

The proposal has been examined in the Working Party on Judicial Cooperation in Criminal Matters (COPEN) since the month of June. The working party completed the first examination of the text of the proposal on 4 November 2022. The examination so far has shown that Member States largely support the aims of the proposal, as well as the bulk of its envisaged provisions. At the same time, given the novelty of some aspects of the provisions, it has shown that there are several aspects that need to be developed or examined further.

¹ 9598/22.

The Presidency has so far presented two redrafts² of some of the key provisions of the proposal (Chapters III-V) which were examined in the competent working party in the meetings of 10 November and 1 and 2 December.

Substantial progress with a view to reaching a compromise wording of provisions in Chapters III–V of the proposal has already been made. A redraft of the entire text of the proposal shall be presented in the month of December before Christmas.

Discussion in the CATS committee

In the light of the previous work, the Presidency has identified a few issues that appeared to merit a particular examination at a horizontal or political level. In the meeting of the Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS) on 16 November, two of these issues were examined in depth:

1. *The specific rules proposed with regard to violation of Union restrictive measures*

The Commission proposal stipulates that the Directive also establishes rules to facilitate the effective implementation of Union restrictive measures and the subsequent recovery of related property where necessary to prevent, detect or investigate criminal offences related to the violation of Union restrictive measures. This is different from the general subject matter set out in Article 1(1) of the proposal, which does not refer to any measure regarding prevention and detection and stays within the framework of proceedings in criminal matters. Further on, the proposal provides (Article 5) that the asset recovery offices, shall, *inter alia*, be empowered to trace and identify property of persons and entities subject to EU targeted financial sanctions to prevent, detect and or investigate criminal offences, as well as to take immediate action in order to preserve the property where necessary to prevent, detect and investigate criminal offences related to violation of Union restrictive measures.

² WK 13654/2022 and WK 16241/2022.

The discussion in CATS showed that, while Member States strongly favour the effective implementation of restrictive measures and efforts to prevent their violation, there is no support for the inclusion of specific Union rules on prevention and detection of criminal offences related to the violation of Union restrictive measures in this instrument. In addition, the great majority of delegations expressed the view that the competence of the Asset recovery offices should be limited to proceedings in criminal matters.

2. *Unexplained wealth*

Article 16 of the draft Directive contains one of the pillars of the Commission proposal, a provision on confiscation of unexplained wealth linked to criminal activities. Even though similar concepts are known and applied in some of the EU Member States as well as third countries, this provision represents a novelty in Union law.

The conclusion of the discussions in CATS was that a broad majority support the proposed Article in principle and that certain modifications of the proposed wording are needed in order to clarify the scope of the provision, applicable procedural rights and the proposed standard of proof.

Issue to be debated in Council

The Presidency considers that sufficient guidance for the work at expert level on the issues described above has been gained through the discussion in CATS, and would submit an equally important question to ministers, namely on the issue of applicable safeguards and legal remedies.

Certain measures proposed by the Directive, in particular the freezing and confiscation orders, substantially affect rights of suspected and accused persons, and in specific cases also of third parties who are not under investigation or prosecuted. Some provisions of the proposal, including Article 16 on confiscation of unexplained wealth, enable confiscation of certain property without conviction for any criminal offence. They also provide for the possibility of proceedings directed only against the property (*in rem*), *i.e.* not against any suspected or accused person.

The proposal provides for an array of safeguards and legal remedies for all persons affected by measures according to the proposal, including for persons who are not suspects or accused persons.

In particular, Article 23(1) of the proposal stipulates that all persons affected by measures provided for under the Directive shall have a right to defence, to an effective remedy, and to a fair trial in order to uphold their rights. The right to defence (right of defence) is further developed in Articles 15(3) and 16(4) of the original Commission proposal. While the right to a fair trial and the right to an effective remedy are already laid down in the current 2014 confiscation directive³, the right to defence, from which all persons affected by measures according to the proposal would benefit, would constitute a novelty.

In line with Article 47 of the Charter of Fundamental Rights of the European Union, everyone is entitled to a fair trial and everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy.

According to Article 48(2) of the Charter, respect for the rights of the defence of anyone who has been charged shall be guaranteed.

In the European Convention for the Protection of Human Rights and Fundamental Freedoms, the right to an effective remedy is provided for in Article 13 and the right to a fair trial in Article 6, distinguishing between the civil and criminal limb, where minimum rights under the criminal limb pertain to persons charged with a criminal offence. These are interpreted by a well-established case-law of the European Court of Human Rights.

³ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014, p. 39–50

The Presidency would note that appropriate procedural rights should be guaranteed to all persons affected by the measures provided for in the proposed asset recovery and confiscation directive. The Commission has proposed rules that should ensure procedural rights also for persons that are affected by freezing or confiscation orders or other measures under the Directive without being suspected and accused. The question is whether these rules are necessary for a sufficient protection for those persons. In this light, the Presidency would kindly invite the ministers to reflect on the following questions in the light of the background outlined above:

Questions to ministers

Do ministers consider that the right to a fair trial and the right to an effective remedy, as set out in the relevant instruments, give sufficient level of protection to all persons affected by measures provided for under the proposed directive?

Would ministers consider it appropriate to also extend the rights of defence to affected persons other than accused persons, *i.e.* to guarantee the rights of defence to other persons than those charged with a criminal offence?