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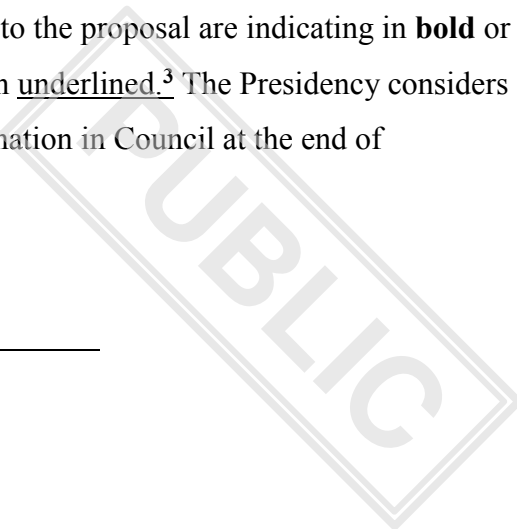
Subject: Proposal for a Directive on asset recovery and confiscation
- State of play

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 Member States have voiced their support for 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. In this light, a few important substantive issues were discussed in CATS on 16 November and by ministers in the Council (JHA) on 9 December 2022. In parallel, some tentative redrafts of parts of the texts were examined at Working Party level.

¹ 9598/22.

It is in the light of this work that the Presidency² has established the redraft of the full text of the Directive in Annex to this note. Modifications in relation to the proposal are indicating in **bold** or ~~strikethrough~~, with the latest modifications also marked in underlined.³ The Presidency considers that the text in annex expresses state of play in the examination in Council at the end of December 2022.



² The Czech Presidency collaborated with the incoming Swedish Presidency.

³ The parts of the original language of the proposal that have been reinstated are marked with underlining only. No underlining is used in Article 16, where a new approach is proposed.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on asset recovery and confiscation

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2), Article 83(1) and (2) and Article 87(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee⁴,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Europol's 2021 Serious and Organised Crime Threat Assessment (SOCTA) highlighted the rising threat from organised crime and criminal infiltration. Driven by the large revenues generated by organised crime, which amount to at least EUR 139 billion every year, and which are increasingly laundered through a parallel underground financial system, the availability of such proceeds from criminal activities poses a significant threat to the integrity of the economy and society, eroding the rule of law and fundamental rights. The EU Strategy to tackle Organised Crime 2021-2025 aims at addressing these challenges by promoting cross-border cooperation, supporting effective investigations against criminal networks, eliminating proceeds from criminal activities, and making law enforcement and the judiciary fit for the digital age.
- (2) The main motive for cross-border organised crime, including high-risk criminal networks, is financial gain. Therefore, to tackle the serious threat posed by organised crime, competent authorities should be given the means to effectively trace and identify, freeze, confiscate and manage the instrumentalities and proceeds of crime and property that stems from criminal activities.

⁴ OJ C , , p. .

- (3) An effective asset recovery system requires the swift tracing and identification of instrumentalities and proceeds of crime, and property suspected to be of criminal origin. Such proceeds, instrumentalities, and property should be frozen in order to prevent its disappearance, following which it should be confiscated upon conclusion of criminal proceedings. An effective asset recovery system further requires the effective management of frozen and confiscated property to maintain its value for the State or for the restitution for victims **or legal persons that have suffered harm caused by a criminal offence.**
- (4) The current Union legal framework on tracing and identification, freezing, confiscation and management of proceeds, instrumentalities and property, and on asset recovery offices, consists of Directive 2014/42/EU of the European Parliament and of the Council⁵, Council Decision 2007/845/JHA⁶ and Council Framework Decision 2005/212/JHA⁷. The Commission evaluated Directive 2014/42/EU and Council Decision 2007/845/JHA, concluding that the current framework has not fully achieved the policy objective of fighting organised crime through recovering its profits.

⁵ 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).

⁶ Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between asset recovery offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime (OJ L 332, 18.12.2007, p. 103).

⁷ 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).

- (5) Therefore, the existing legal framework should be updated, so as to facilitate and ensure effective asset recovery and confiscation efforts across the Union. To that end, the Directive should lay down minimum rules on tracing and identification, freezing, confiscation and management of property within the framework of proceedings in criminal matters. In this context, proceedings in criminal matters is an autonomous concept of Union law interpreted by the Court of Justice of the European Union, notwithstanding the case law of the European Court of Human Rights. The term covers all types of freezing and confiscation orders issued following proceedings in relation to a criminal offence. It also covers other types of **confiscation** orders issued without a final conviction **by a court having jurisdiction in particular in criminal matters**. Proceedings in criminal matters could also encompass criminal investigations by the police and other law enforcement authorities. **In this context, court having jurisdiction in particular in criminal matters is an autonomous concept of Union law interpreted by the Court of Justice of the European Union covering any court or tribunal which applies a procedure that satisfies the essential characteristics of criminal procedure. The Directive applies without prejudice to freezing and confiscation measures within the framework of proceedings in civil or administrative matters.** It is necessary to reinforce the capacity of competent authorities to deprive criminals of the proceeds from criminal activities. For this purpose, rules should be laid down to strengthen asset tracing and identification, as well as freezing capabilities, to improve management of frozen and confiscated property **until its disposal based on a final confiscation order**, to strengthen the instruments to confiscate instrumentalities and proceeds of crime and property derived from criminal activities of criminal organisations, and to improve the overall efficiency of the asset recovery system.
- ~~(6) Moreover, the adoption of unprecedented and far-reaching Union restrictive measures triggered by the Russian invasion into Ukraine revealed the need to step up efforts to ensure the effective implementation of both sectorial and individual Union restrictive measures across the Union. While not criminal in nature, nor requiring criminal conduct as a precondition for their imposition, Union restrictive measures also rely on freezing of funds (i.e. targeted financial sanctions) and sectorial measures, and should thus benefit from strengthened capabilities in the context of identification and tracing of property. For such purpose, rules should be established to enhance the effective identification and tracing of property owned or controlled by persons and entities subject to such restrictive measures, and to promote greater international cooperation of asset recovery offices with their counterparts in third countries. Measures related to freezing and confiscation under this Directive, notably those under Chapters III and IV, remain however limited to situations where property stems from criminal activities, such as the violation of Union restrictive measures. This Directive does not regulate the freezing of funds and economic resources under Union restrictive measures.~~
- ~~(7) Measures aiming at increasing capabilities of tracing and identification of relevant property in relation to persons or entities subject to Union restrictive measures, as well as complementary measures to ensure that such property is not transferred or hidden to evade Union restrictive measures, contribute to the prevention and detection of possible violation of Union restrictive measures and enhanced cross-border cooperation in investigations into possible criminal offences.~~

- (8) The rules should facilitate cross-border cooperation by providing the competent authorities with the necessary powers and resources to respond in a swift and effective way to requests from authorities in other Member States. Provisions laying down rules on early tracing and identification, urgent action to freeze, or efficient management contribute to improving the possibilities for asset recovery across borders. Given the global nature of in particular organised crime, cooperation with third countries should also be strengthened.
- (9) Due to the poly-criminal nature of and the systemic and profit-oriented cooperation of criminal organisations involved in a wide range of illicit activities in different markets, an effective fight against organised crime requires that freezing and confiscation measures are available to cover the profits from all offences where organised crime groups are active in. These crimes include the areas of crime listed in Article 83(1), including the illicit trafficking in weapons, munitions and explosives as defined in the Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against transnational organized crime, to which the Union is party. In addition to the crimes listed in Article 83(1), the scope of the Directive should also cover all crimes that are harmonised at EU level, including frauds against the financial interests of the European Union in light of the increasing involvement of organised criminal groups in such crime area. The scope of the Directive should further include environmental crimes, which are a core business for organised criminal groups and are often connected to money laundering or concern waste and residues produced in the context of drug production and trafficking. The facilitation of unauthorized entry and residence constitute a core business for organised criminal groups and is typically connected to the trafficking in human beings.

- (10) Other crimes committed within the framework of a criminal organisation play a pivotal role in generating revenues and in enabling further crimes, including serious crimes with a cross-border nature. Such crimes should be included in the scope of the Directive to the extent to which they are committed within the framework of a criminal organisation. The counterfeiting and piracy of products is linked to money laundering and the forgery of documents, and threatens the functioning of the single market and fair competition. The illicit trafficking in cultural goods, including antiques and works of art, is often intertwined with money laundering and constitutes an important source of financing for organised criminal groups. Forgery of administrative documents and trafficking therein, including bank documents or identification documents, is a key enabling tool for money laundering, trafficking in human beings, or migrant smuggling, and should as such be covered in the scope of this Directive. Other crimes which are often carried out within the framework of an organised crime group include murder or grievous bodily harm, as well as the illicit trade in human organs and tissue, which are a source of revenue for organised crime groups in the context of contract killings, intimidation and trafficking in human beings. Similarly kidnapping, illegal restraint or hostage taking, as well as racketeering and extortion, are utilized either as source of revenue through the collection of ransom money or as intimidation tactics against adversaries. The crime of organised or armed robbery is one of the most common forms to generate profits for organised criminal groups, and it is often committed in conjunction with other crimes, in particular the trafficking in firearms. Similarly, the trafficking in stolen vehicles cannot only generate profits but also represents an enabling crime to provide for the necessary instrumentalities to carry out further offences. In addition, it is key to include tax crimes to the extent it is committed as part of a criminal organisation in the scope of the Directive, as this specific crime is an enabling source of profits, especially when operating in a cross-border context. Typical techniques employed to commit tax fraud or evasion consist of making use of cross-border corporate structures or similar arrangements to fraudulently obtain tax benefits and refunds, hide assets or profits, merge legal with illicit profits and assets or to transfer them to other entities abroad to disguise their origins or (beneficial) ownership.
- (11) [In order to ensure the effective implementation of Union restrictive measures, it is necessary to extend the scope of the Directive to the violation of Union restrictive measures].
- (12) In order to capture property which might be transformed and transferred in order to conceal its origin, and in order to ensure harmonisation and clarity of definitions across the Union, property that can be subject to freezing and confiscation should be defined broadly. It should cover legal documents or instruments evidencing title or interest in property subject to freezing and confiscation including, for example, financial instruments, or documents that may give rise to creditor claims and are normally found in the possession of the person affected by the relevant procedures, as well as trusts. This Directive is without prejudice to the existing national procedures for keeping legal documents or instruments evidencing title or interest in property, as they are applied by the competent national authorities or public bodies in accordance with national law. The definition should cover all forms of property, including crypto assets.

- (13) In order to capture property which might be transformed and transferred in order to conceal its origin, and in order to ensure harmonisation and clarity of definitions across the Union, a broad definition of proceeds of crime should be provided for, to include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds, in line with the definitions of Regulation (EU) 2018/1805 of the European Parliament and of the Council⁸. Thus proceeds should include any property including that which has been transformed or converted, fully or in part, into other property, and that which has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds. It should also include the income or other benefits derived from proceeds of crime, or from property into or with which such proceeds have been transformed, converted or intermingled.
- (14) In order to facilitate cross-border cooperation, the tracing and identification of property at an early stage of a criminal investigation is of essence to ensure the prompt identification of instrumentalities, proceeds, or property, which might be subsequently confiscated, including property related to criminal activities located in other jurisdictions. To ensure that financial investigations are sufficiently prioritised in all Member States, so to address a crime of cross-border nature, it is necessary to require competent authorities to launch asset tracing from the moment there is a suspicion of criminal activities that are likely to generate substantial economic benefits. **To reduce the administrative burden for competent authorities and ensure proportionality between the resources needed for asset tracing investigations and the value of property to be confiscated, the obligation to launch asset tracing investigations should be limited to cases that are not minor. When implementing the Directive, Member States may decide to allow for a case-by-case assessment or to determine a threshold for the value linked to the criminal offence. Member States shall organise the asset tracing investigations in accordance with national law.**
- ~~(15) Investigations to trace and identify property should also be launched where necessary to prevent, detect or investigate criminal offences related to the violation of Union restrictive measures. For that purpose, asset recovery offices should be empowered to trace and identify property of persons or entities subject to targeted financial sanctions. Once property is identified asset recovery offices should have the power to temporarily freeze the property to ensure that property does not disappear.~~
- (15) In order to facilitate cross-border action as well as national support, Member States should consider staffing the asset recovery offices with representatives from both law enforcement and judicial authorities.**

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).

- (16) Due to the transnational nature of finances used by organised criminal groups, information that can lead to the identification of instrumentalities and proceeds of crime and other property owned or controlled by criminals ~~or by persons or entities subject to Union restrictive measures~~ should be exchanged rapidly between the Member States. For that purpose, it is necessary to empower asset recovery offices to trace and identify property which might be subsequently confiscated, to ensure they have access to the necessary information under clear conditions, and to establish rules on swiftly exchanging information with each other, spontaneously or upon request. In urgent cases where there is a risk of dissipation of the property, replies to information should be done as soon as possible and not later than 8 hours. **The requirement for asset recovery offices to trace and identify instrumentalities, proceeds, or property which may become or is the object of a freezing or confiscation order issued by another Member State aims at facilitating the preparation or execution of freezing orders from other Member States, but does not imply an obligation to recognise such orders pursuant to Regulation (EU) 2018/1805.**

- (17) In order to perform effective asset tracing investigations, and to swiftly respond to cross-border requests, asset recovery offices should have access to the information, **in so far as it is necessary for the tracing and identification of proceeds, instrumentalities and property**, that allows them to establish the existence, ownership or control of property that may become object of a freezing or a confiscation order. Therefore, asset recovery offices should have access to the relevant data such as fiscal data, national citizenship and population registries, commercial databases and social security information. This should include law enforcement information in so far as data such as criminal records, vehicles stops, property searches and previous legal actions such as freezing and confiscation orders or seizures of cash can be of value to identify relevant property. **With regard to proportionality and ongoing investigations, Member States may deny asset recovery offices access to fiscal data, social security information and law enforcement information.** Access to information should be subject to specific safeguards that prevent the misuse of the access rights. These safeguards should be without prejudice to Article 25 of Directive (EU) 2016/680 of the European Parliament and of the Council⁹. The direct and immediate access to this information does not prevent Member States from making access subject to procedural safeguards as established under national law while taking due account of the need for asset recovery offices to be able to swiftly reply to cross-border requests. The implementation of the procedural safeguards for access to databases should not affect the ability of asset recovery offices to respond to requests from other Member States, especially in case of urgent requests. Access to relevant databases and registries under this Directive should complement access to bank account information pursuant to Directive (EU) 2019/1153 of the European Parliament and of the Council¹⁰ and to beneficial ownership information pursuant to Directive (EU) 2015/849 of the European Parliament and of the Council¹¹.

⁹ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).

¹⁰ Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA (OJ L 186, 11.7.2019, p. 122).

¹¹ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, as amended by Directive (EU) 2018/843 (OJ L 141 5.6.2015, p. 73).

- (18) To ensure the security of the information shared between asset recovery offices, **all asset recovery offices should be able to directly access the use of the Secure Information Exchange Network Application (SIENA), managed by Europol in accordance with Regulation (EU) 2016/794 of the European Parliament and of the Council¹², should be mandatory for. The SIENA system or, where appropriate, other secure channels should be used for** all communications among asset recovery offices under this Directive. **It may be appropriate to use another secure channel for instance where the urgency of the request requires the temporary use of another communication channel or where the exchange of information requires the involvement of third countries or international organisations or there are objective reasons to believe that such involvement will be required at a later stage.** ~~Therefore, in order to be able to fulfil all the tasks assigned by this Directive, all asset recovery offices should be able to directly access SIENA.~~
- (19) Freezing and confiscation under this Directive are autonomous concepts, which should not prevent Member States from implementing this Directive using instruments which, in accordance with national law, would be considered as sanctions or other types of measures.
- (20) Confiscation leads to the final deprivation of property. However, preservation of property can be a prerequisite to confiscation and is often essential for the effective enforcement of a confiscation order. Property is preserved by means of freezing. In order to prevent the dissipation of property before a freezing order can be issued, the competent authorities in the Member States, including asset recovery offices, should be empowered to take immediate action in order to secure such property **until a freezing order has been issued. Member States should enable asset recovery offices to take the immediate action at least in some cases where exercising some of their tasks pursuant to this Directive. National law may determine the scope of tasks and cases in which asset recovery offices should be empowered to take such action.**
- (20a) Immediate action is a temporary urgent freezing measure, form of which is not defined by this Directive. In accordance with national law, the immediate action may also have the form of an order. National law may provide that following its validation or approval by a competent authority, the immediate action transforms into **or is considered as a freezing order. National law may limit the temporary validity of the immediate action. In such cases, if by the expiration of this period neither the freezing order is issued nor is the immediate action validated or approved by the competent authority following which it transforms into or is considered as a freezing order, the effects of the immediate action cease and the temporarily frozen property should be returned.**

¹² Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135, 24.5.2016, p. 53).

- (21) Given the ~~limitation on~~ **interference in** the right to property ~~imposed~~ **caused** by freezing orders, such provisional measures should not be maintained longer than necessary to preserve the availability of the property with a view to possible subsequent confiscation. This may require a review by the national court in order to ensure that the purpose of preventing the dissipation of property remains valid.
- (22) Freezing measures should be without prejudice to the possibility for a specific property to be considered evidence throughout the proceedings, provided that it would ultimately be made available for effective execution of the confiscation order. In the context of criminal proceedings, property may also be frozen with a view to its possible subsequent restitution or in order to safeguard compensation for the damage caused by a criminal offence.
- (22a) Where the property to be frozen consists of entities that should be preserved as a going concern, such as undertakings, the freezing order may include measures to temporarily restrict the exercise of rights to this property by the persons owning or controlling them while allowing for continued operations.**
- (23) In addition to confiscation measures that allow authorities to deprive criminals of the proceeds or instrumentalities ~~directly stemming from crimes~~, **subject to following** a final conviction, it is necessary to enable confiscation of property of equivalent value to such proceeds or instrumentalities in order to capture property of equivalent value to the proceeds and instrumentalities of a crime, whenever it is impossible to **confiscate** ~~locate~~ such proceeds and instrumentalities. Member States are free to define the confiscation of property of equivalent value as subsidiary or alternative to ~~direct~~ **confiscation of proceeds and instrumentalities**, as appropriate in accordance with national law.
- (24) The practice by a suspected or accused person of transferring property or proceeds to a knowing third party with a view to avoiding confiscation is common and widespread. Acquisition by a third party refers to situations where, for example, property has been acquired, directly or indirectly, for example through an intermediary, by the third party from a suspected or accused person, including when the criminal offence has been committed on their behalf or for their benefit, and when an accused person does not have property that can be confiscated. Such confiscation should be possible **at least** in cases where it has been established that third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer was carried out free of charge or in exchange for an amount significantly lower than the market value. The rules on third party confiscation should extend to both natural and legal persons, without prejudice to the right of third parties to be heard, including the right to claim ownership of the property concerned. In any event, the rights of bona fide third parties should not be affected.

- (25) Criminal organisations engage in a wide range of criminal activities. In order to effectively tackle organised criminal activities, there may be situations where it is appropriate that a criminal conviction for a criminal offence that is liable to give rise to economic benefits be followed by the confiscation not only of property associated with a specific crime, including proceeds of crime or its instrumentalities, but also of additional property which the court determines as being derived from criminal conduct. **Such extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities. In this context, the court has to consider the specific circumstances of the case, including the facts and available evidence based on which a decision on extended confiscation could be issued. The fact that the property of the person is disproportionate to his lawful income could be among those facts giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct.**
- (26) Confiscation should also be possible ~~where a court is satisfied that the instrumentalities, proceeds, or property in question is derived from criminal conduct but~~ where a final conviction is not possible because of illness, absconding or death of the suspected or accused person, ~~or because the suspected or accused person cannot be held liable because of immunity or amnesty as provided for under national law.~~ The same should be possible where the **limitation periods** ~~time limits~~ prescribed under national law have expired, ~~where such time limits are not sufficiently long to allow for the effective investigation and prosecution of the relevant criminal offences.~~ Confiscation in such cases should only be allowed where **the criminal proceedings could have led to a final criminal conviction should the circumstances above not have existed.** ~~the national court is satisfied that all the elements of the offence are present. For reasons of proportionality, confiscating property without a prior conviction should be limited to cases of serious crimes.~~ The right of the defendant to be made aware of the proceeding and to be represented by a lawyer should not be affected. **In cases of illness and absconding, the existence of proceedings in absentia in Member States would be sufficient to comply with the obligation to enable confiscation as set out in the first sentence.** When the suspected or accused person has absconded, Member States should take all reasonable steps and may require that the person concerned be summoned to or made aware of the confiscation proceedings. The Member States are encouraged to enable confiscation also where a final conviction is not possible because the suspected or accused person cannot be held liable because of amnesty granted before the final conviction as provided for under national law.

- (27) For the purposes of this Directive, illness should be understood to mean the inability of the suspected or accused person to attend the criminal proceedings for an extended period, as a result of which the proceedings cannot continue. **Cases, where illness only results in a temporary suspension of the criminal proceedings, which may continue after such suspension, are not concerned.**
- (28) [Due to the intrinsically opaque nature of organised crime, it is not always possible to link property derived from criminal activities to a specific criminal offence and confiscate such property. In such situations, confiscation should be possible under certain conditions including in particular: the property is frozen based on suspicion of ~~crimes~~ **a criminal offence** committed within the framework of a criminal organisation, ~~these criminal offences are~~ **this criminal offence is** liable to give rise to ~~substantial economic benefits~~ **benefit**, **the investigation into this criminal offence does not result in a judgment of acquittal** and the court is satisfied that the frozen property is derived from ~~any criminal conduct committed activities carried out~~ **any criminal conduct committed** activities carried out within the framework of a criminal organisation. These conditions should ensure that confiscation of property not linked to a specific offence for which the owner has been convicted is limited to criminal activities of criminal organisations that are serious in nature and liable to generate ~~substantial~~ benefits. ~~When determining whether the offences are liable to give rise to significant benefits, Member States should take into account all relevant circumstances of the offence, including whether the criminal activities were committed with the intention to generate regular substantial profits.~~
- (28-a) While it should not be a precondition for the national court to be satisfied that a criminal offence has been committed, **there must be sufficient facts and circumstances for the court** ~~must~~ to be satisfied that the property in question is derived from criminal **conduct** ~~offences~~. **Confiscation of unexplained wealth should be possible where a court is satisfied that the property in question is derived from criminal conduct committed in the framework of a criminal organisation. This does not mean that it must be established that the property in question is derived from such criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from such criminal conduct than from other activities.** When determining whether or not the property in question derived from criminal **conduct** ~~activities~~, the national courts should take into account all relevant circumstances of the case, including the **specific facts and available evidence, such as that the value of** ~~fact~~ that the property is substantially disproportionate to the lawful income of the ~~affected person~~ **owner**. **Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from such criminal conduct. Member States should ensure that the appropriate procedural rights of defence of the affected person are respected.** ~~Member States should then require and award an effective possibility for the owner of the property to prove that the property in question derives from lawful activities.~~

(28-b) The standard of proof as regards the origin of the property that this Directive sets out in provision on extended confiscation and in provision on confiscation of unexplained wealth is the same, in principle. The court has to be satisfied that the property is derived from criminal conduct, while there is no requirement of any conviction for such criminal conduct. However, as regards confiscation of unexplained wealth, the scope of the criminal conduct is limited to conduct committed in the framework of criminal organisation which would fall in the scope of this Directive according to Article 2 paragraphs 1 to 4 and which would be punishable by deprivation of liberty of a maximum of at least four years, would there be a conviction for such conduct. Moreover, when determining whether the property is derived from criminal conduct, in the provision on confiscation of unexplained wealth the court may consider substantial disproportionality of the property to the lawful income of the person, as opposed to any disproportionality according to the provision on extended confiscation.]

[Recitals 28, 28-a and 28-b to be aligned with Article 16.]

(28a) This Directive is without prejudice to the procedures that Member States may use to confiscate the property in question. In line with their national system, Member States may implement this Directive on non-conviction based confiscation and confiscation of unexplained wealth within the framework of either criminal law or other branches of law, as long as the proceedings fall under proceedings in criminal matters as interpreted by the Court of Justice of the European Union, notwithstanding the case law of the European Court of Human Rights.

(28b) When determining whether a criminal offence is liable to give rise to economic benefit, Member States may take into account all relevant circumstances including the modus operandi, for example if a condition of the offence is that it was committed in the context of organised crime or with the intention of generating regular profits from criminal offences.

(28c) Tracing and identification of property to be frozen and confiscated should be possible even after a final conviction for a criminal offence, or following proceedings in application of non-conviction based confiscation. This obligation does not prevent Member States from setting out reasonable time limits after the final conviction or final decision in the proceedings in application of non-conviction based confiscation, following expiration of which tracing and identification would no longer be possible.

- (29) To ensure that property that is or may become subject to a freezing or confiscation order maintains its economic value Member States should put in place effective management measures. **Such measures should apply to frozen property and to confiscated property until its disposal based on a final confiscation order. They should not apply after the disposal of the property based on a final confiscation order, where the Member States may provide for rules for applicable mechanisms by which the property, or its value, forfeit to a state or other public budget, may be used for victims' compensation, for public interest or social purposes, or for other purposes as defined by national law. This Directive does not harmonise the mechanisms following the disposal of the property based on a final confiscation order.**
- (29a) Where justified by the nature of the property, including for example its value or the need for specific management conditions or expertise implied by its nature, such** ~~Such~~ measures should include a ~~systematic~~ **an** assessment of how to best **minimise the management costs and** preserve and ~~optimise~~ the value of the property **carried out** before the ~~adoption~~ **execution** of a freezing order ~~freezing measures, also known as pre-seizure planning.~~ Member States may adopt guidance on how such assessment should be carried out taking into account the circumstances of the property to be frozen and ensuring that the assessment will not jeopardise the timely adoption **and execution of the freezing order.**
- (30) ~~In circumstances~~ **At least in situations** where it may be reasonably assumed that the property frozen is perishable, rapidly depreciating, or whose maintenance costs are disproportionate to its expected value at the time of confiscation, or that is too difficult to administer or is easily replaceable, Member States should allow for the sale of this property **before a final confiscation order. In accordance with national law, the decision on sale of a property of a specific nature may be subject to prior approval by a competent national authority.** Before taking such a decision, **where possible, the affected person** ~~owner of the property~~ should have the right to be **notified** ~~heard.~~ Member States ~~should~~ **may** consider the possibility to charge the costs of the management of frozen property to the **owner or** beneficial owner, for instance in alternative to the ordering of an interlocutory sale, and in case of a final conviction. **Member States should take appropriate measures to prevent the property from being returned, directly or indirectly, to persons convicted in the criminal proceedings in which the property has been frozen. The content of such measures is not defined by this Directive and should be determined by Member States. The obligation to take the appropriate preventative measures does not entail the obligation to prevent the concerned behaviour in each individual case.** ~~These rules, including the possibility for the costs for the management of frozen property to be charged to the~~ **owner or** beneficial owner, ~~apply to property identified in the context of the implementation of Union restrictive measures to the extent that they have been frozen in relation to criminal charges, such as violation of Union restrictive measures.~~

- (31) Member States should set up **or designate one or more competent authorities that will function as** asset management offices with the purpose of establishing specialised authorities tasked with the management of frozen **and confiscated** property in order to effectively manage the property frozen before confiscation and preserve its value, pending a final decision on the confiscation **and the disposal of the property based on such decision**. Without prejudice to the Member States' internal administrative structures, asset management offices should either be the sole authority managing frozen ~~or~~ **and confiscated** property, or should provide support to decentralised actors according to national management set-ups, and support relevant authorities with pre-seizure planning. **This Directive does not prescribe the legal or institutional nature of the asset management offices, and is without prejudice to institutional systems in the Member States, where asset management offices may also carry out tasks of asset recovery offices, or where certain tasks of asset management offices may be outsourced.**
- (32) This Directive respects the fundamental rights and observes the principles recognized by the Charter of Fundamental Rights of the European Union ('the Charter') and the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), as interpreted in the case-law of the European Court of Human Rights. This Directive should be implemented in accordance with those rights and principles.
- (33) Freezing and confiscation orders substantially affect the rights of suspected and accused persons, and in specific cases of third parties who are not being prosecuted. The Directive should provide for specific safeguards and judicial remedies in order to guarantee the protection of their fundamental rights in the implementation of this Directive in line with the right to a fair trial, the right to an effective remedy and the presumption of innocence as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.
- (34) Freezing **measures, and** confiscation, and interlocutory sales orders should be communicated to the affected **person party** without **undue** delay. **Nevertheless, the competent authorities may postpone communicating freezing measures to the affected person due to the needs of the investigation.** The purpose of communicating those **measures and** orders is, inter alia, to allow the affected person to challenge them ~~before a court~~. Therefore, such communications should, as a general rule, indicate the reason or reasons for the **measure or** order concerned. **Where the affected person or whereabouts of the affected person are unknown or where the communication to each of the affected persons would entail a disproportionate burden, the communication may be made by means of a public announcement.**

- (34a)** The affected **person party** should have the effective possibility to challenge the freezing **measures, and the** confiscation, and interlocutory sales orders. In the case of confiscation orders where all elements of the criminal offence are present but a criminal conviction is impossible, the defendant should have a possibility to be heard before the adoption of the order, **where possible**. ~~The same possibility should be provided for the owner affected by an order to sell the property before confiscation.~~ **In the case of confiscation orders pursuant to provisions on extended confiscation and confiscation of unexplained wealth, circumstances that may be challenged by the affected person when challenging the confiscation order before a court should also include specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct.**
- (35) When implementing this Directive, and in order to ensure the proportionality of confiscation measures **which are not limited to proceeds**, Member States ~~may should~~ provide that confiscation of property is not ordered to the extent it would be disproportionate to the offence in question. Furthermore, Member States ~~may should~~ provide for the possibility that, in exceptional circumstances, confiscation **of property other than proceeds** is not ordered, insofar as it would, in accordance with national law, represent undue hardship for the affected person, on the basis of the circumstances of the respective individual case which should be decisive. Such exceptional circumstances should be limited to cases where it would put the person concerned in a situation in which it would be very difficult for the affected person to survive and the circumstances of the respective individual case should be decisive.
- (35a)** While Member States are obliged to ensure that persons whose property is affected by the measures provided for in this Directive have the right of access to a lawyer throughout the freezing and confiscation proceedings, this Directive does not affect the rules applicable for legal aid provided free of charge.

- (36) This Directive should be implemented without prejudice to Directive 2010/64/EU of the European Parliament and of the Council¹³, Directive 2012/13/EU of the European Parliament and of the Council¹⁴, Directive 2012/29/EU of the European Parliament and of the Council¹⁵, Directive 2013/48/EU of the European Parliament and of the Council¹⁶, **Directive 2014/60/EU of the European Parliament and of the Council**¹⁷, Directive (EU) 2016/343/EU of the European Parliament and of the Council¹⁸, Directive 2016/800/EU of the European Parliament and of the Council¹⁹ and Directive (EU) 2016/1919 of the European Parliament and of the Council.²⁰
- (37) It is particularly important that the protection of personal data, in accordance with Union law, is ensured in connection to processing of data under this Directive. To that aim, the rules of this Directive should be aligned with Directive (EU) 2016/680. In particular, it should be specified that any personal data exchanged by Asset Recovery Offices is to remain limited to the categories of data listed in Section B point 2, of Annex II to Regulation (EU) 2016/794 of the European Parliament and of the Council. Directive (EU) 2016/680 of the European Parliament and of the Council applies to the processing of personal data by national competent authorities, notably asset recovery offices, for the purposes of this Directive.

¹³ 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).

¹⁴ 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).

¹⁵ 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, 14.11.2012, p. 57).

¹⁶ 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).

¹⁷ **Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (OJ L 159, 28.5.2014, p. 1).**

¹⁸ 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).

¹⁹ 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).

²⁰ 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).

- (38) It is particularly important that the protection of personal data, in accordance with Union law, is ensured in connection to all exchanges of information under this Directive. To that aim, insofar as the processing of personal data for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties is concerned, data protection rules as set out in Directive (EU) 2016/680 are applicable in relation to measures taken under this Directive. Where relevant, notably having regard to the processing of personal data by asset management offices for the purpose of the management of property, the data protection rules set out in Regulation (EU) 2016/679 of the European Parliament and of the Council are applicable.
- (39) An effective recovery system requires concerted efforts of a wide range of authorities, from law enforcement, including customs authorities, tax authorities and tax recovery authorities to the extent that they are competent for asset recovery, asset recovery offices, judicial authorities and asset management authorities, including asset management offices. In order to ensure coordinated action by all competent authorities, it is necessary to establish a more strategic approach to asset recovery and promote a greater cooperation between the relevant authorities, and to obtain a clear overview of the results of asset recovery. For this purpose, Member States should adopt and regularly review a national strategy on asset recovery to guide actions in relation to financial investigations, freezing and confiscation, management as well as final disposal of the relevant instrumentalities, proceeds, or property. **Member States may decide on the appropriate format of such strategy which may take into account their constitutional traditions in terms of separation of powers and competences and may be either sectorial or a part of a broader strategical document. Without prejudice to whether the Member States provide for the adoption of one or more strategies, their overall content should encompass the territory of the entire Member State.** Furthermore, Member States should provide competent authorities with the necessary resources to be able to fulfil their tasks effectively. Competent authorities should be understood as the authorities entrusted with the carrying out of the tasks as outlined under this Directive and according to national set-ups.
- (40) In order to evaluate the effectiveness and efficiency of the asset recovery, asset management and confiscation framework, it is necessary to collect and publish a comparable set of statistical data on freezing, management and confiscation of property.
- (41) To ensure consistent approaches among Member States in the collection of statistics, the power to adopt acts in accordance with Article 290 of the TFEU should be delegated to the Commission to supplement this Directive by adopting more detailed rules on the information to be collected and the methodology for the collection of the statistics.

- (42) It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making²¹. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.
- (43) To provide a more comprehensive overview of the action taken to freeze and confiscate, Member States should establish have in place a central register of frozen, managed and confiscated instrumentalities, proceeds, or property, and collect the necessary statistics on the implementation of the relevant measures. Centralised registries of frozen and confiscated instrumentalities, proceeds, or property should ~~be established~~ exist at national level for the purpose of facilitating the management of the specific file. Member States should designate authorities responsible for the management of the centralised registries. The aim of ~~establishing the~~ centralised registries ~~is~~ should be to assist all the relevant authorities responsible for the recovery of criminal property with an accessible record of the property which is frozen, confiscated, or under management, from the moment it is frozen until it is returned to the owner or it is disposed of. Information entered in the registries should be retained only for as long as it is necessary for the purposes of management of the specific case, or for the purposes of gathering statistical data collection. For case management purposes, it should not be kept for longer than after the final disposal of the property following a confiscation order, or after its return to the owner in case of acquittal. Access to the information recorded in the centralised registries should be given only to authorities responsible for the recovery of criminal property, such as asset recovery offices, asset management offices, national courts or otherwise appointed authorities according to national dispositions, for the purpose of performing their respective tasks.
- (44) Organised criminal groups operate across borders and increasingly acquire property in Member States other than those in which they are based and in third countries. Given the transnational dimension of organised crime, international cooperation is of the essence to recover the profits and confiscate the financial assets that allow criminals to operate. Member States should therefore ensure that both asset recovery and asset management offices cooperate closely with their counterparts in third countries to trace, identify and manage instrumentalities and proceeds, or property which may become or is the object of a freezing or confiscation order within the framework of proceedings in criminal matters. ~~Moreover, for the effective implementation of Union restrictive measures, it is of paramount importance for asset recovery offices to cooperate with their counterparts in third countries where necessary to prevent, detect or investigate criminal offences related to the violation of Union restrictive measures.~~ In that regard, Member States should ensure that asset recovery offices establish working arrangements with their counterparts in those third countries with which there is an operational cooperation agreement in place that allows for the exchange of operational personal data with Europol or Eurojust.

²¹ OJ L 123, 12.5.2016, p. 1.

- (45) Asset recovery offices should also closely cooperate with EU bodies and agencies, including Europol, Eurojust and the European Public Prosecutor's Office, in accordance with their respective mandates, insofar as it is necessary to trace and identify property within the cross-border investigations supported by Europol and Eurojust or within the investigations undertaken by the European Public Prosecutor's Office. **The scope of the cooperation with the European Public Prosecutor's Office is determined by the Council Regulation (EU) 2017/1939²² and may be different for Member States that participate in the enhanced cooperation on the establishment of the European Public Prosecutor's Office and for those that do not.** ~~Asset recovery offices should also cooperate with Europol and Eurojust, in accordance with their respective mandates, insofar as it is necessary to trace and identify property to prevent, detect or investigate criminal offences related to the violation of Union restrictive measures.~~
- (46) In order to ensure that there is a common understanding and minimum standards for asset tracing and identification, freezing and management, this Directive should lay down minimum rules for the relevant measures as well as related safeguards. The adoption of minimum rules does not prevent Member States from granting more extensive powers to asset recovery offices or to asset management offices, or to provide for additional safeguards under national law, provided that such national measures and provisions do not undermine the objective of this Directive.
- (46a) This Directive lays down minimum standards for confiscation within the framework of proceedings in criminal matters. It does not prevent Member States from providing more extensive powers in their national law, including, for example, in relation to their rules on evidence or in relation to the scope of applicability of extended confiscation or confiscation of unexplained wealth, or from providing for additional safeguards under national law, provided that such national measures and provisions do not undermine the objective of this Directive.**
- (47) Since the objective of this Directive, namely facilitating confiscation of property in criminal matters, cannot be sufficiently achieved by the Member States but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

²² **Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (OJ L 283, 31.10.2017, p. 1).**

- (48) As this Directive provides for a comprehensive set of rules, which would overlap with already existing legal instruments, it should replace Council Joint Action 98/699/JHA²³, Council Framework Decision 2001/500/JHA²⁴, Framework Decision 2005/212/JHA, Decision 2007/845/JHA, and Directive 2014/42/EU with regard to the Member States bound by this Directive.
- (49) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the Treaty on European Union and to the Treaty of the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.
- (50) [In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Ireland has notified its wish to take part in the adoption and application of this Directive.] [or] [In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Directive and is not bound by it or subject to its application.]
- (51) The European Data Protection Supervisor was consulted in accordance with Article 42 of Regulation (EU) 2018/1725 and delivered an opinion on **19/07/2022**. ~~XX/XX/20XX~~.

HAVE ADOPTED THIS DIRECTIVE:

²³ 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).

²⁴ Council Framework Decision 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).

CHAPTER I GENERAL PROVISIONS

Article 1

Subject matter

1. This Directive establishes minimum rules on the tracing and identification, freezing, confiscation, and management of property within the framework of proceedings in criminal matters. **These rules are without prejudice to the procedures that Member States may use to confiscate the property in question. This Directive applies without prejudice to freezing and confiscation measures within the framework of proceedings in civil or administrative matters.**

~~2. This 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.~~

Article 2

Scope

1. This Directive shall apply to the following criminal offences:

- (a) participation in a criminal organisation, as defined in Council Framework Decision 2008/841/JHA²⁵;
- (b) terrorism, as defined in Directive (EU) 2017/541 of the European Parliament and of the Council²⁶;
- (c) trafficking in human beings, as defined in Directive 2011/36/EU of the European Parliament and of the Council²⁷;

²⁵ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ L 300, 11.11.2008, p. 42).

²⁶ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L 88, 31.3.2017, p. 6).

²⁷ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.4.2011, p. 1).

- (d) sexual exploitation of children and child pornography, as defined in Directive 2011/93/EU of the European Parliament and of the Council²⁸;
- (e) illicit trafficking in narcotic drugs and psychotropic substances, as defined in Council Framework Decision 2004/757/JHA²⁹;
- (f) corruption, as defined in the Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union³⁰ and in the Council Framework Decision 2003/568/JHA³¹;
- (g) money laundering, as defined in Directive (EU) 2018/1673 of the European Parliament and of the Council³²;
- (h) forgery of means of payment, as defined in Directive (EU) 2019/713 of the European Parliament and of the Council³³;
- (i) counterfeiting currency, including the euro, as defined in Directive 2014/62/EU of the European Parliament and of the Council³⁴;
- (j) computer-related crime, as defined in Directive 2013/40/EU of the European Parliament and of the Council³⁵;

²⁸ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L 335, 17.12.2011, p. 1).

²⁹ Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ L 335, 11.11.2004, p. 8).

³⁰ OJ C 195, 25.6.1997, p. 1.

³¹ Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003, p. 54).

³² Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (OJ L 284, 12.11.2018, p. 22).

³³ Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA (OJ L 123, 10.5.2019, p. 18).

³⁴ Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law (OJ L 151, 21.5.2014, p. 1).

³⁵ Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (OJ L 218, 14.8.2013, p. 8).

(k) illicit trafficking in weapons, munitions and explosives, as defined in the Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against transnational organized crime³⁶;

(l) fraud, including fraud and other criminal offences affecting the Union's financial interests as defined in Directive (EU) 2017/1371 of the European Parliament and of the Council³⁷;

(m) environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties as defined in Directive 2008/99/EC of the European Parliament and of the Council³⁸, as well as offences related to ship pollution as defined in Directive 2005/35/EC as amended by Directive 2009/123/EC³⁹;

(n) facilitation of unauthorised entry and residence, as defined in Council Framework Decision 2002/946/JHA⁴⁰, and Council Directive 2002/90/EC⁴¹;

(o) market abuse, as defined in Directive 2014/57/EU of the European Parliament and of the Council⁴².

2. This Directive shall apply to the following offences to the extent that the offence is committed within the framework of a criminal organisation:

(a) counterfeiting and piracy of products;

(b) illicit trafficking in cultural goods, including antiques and works of art;

(c) forgery of administrative documents and trafficking therein;

³⁶ OJ L 89, 25.3.2014, p. 7.

³⁷ 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).

³⁸ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (OJ L 328, 6.12.2008, p. 28).

³⁹ Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (OJ L 280, 27.10.2009, p. 52).

⁴⁰ Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 1).

⁴¹ Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 17).

⁴² **Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) (OJ L 173, 12.6.2014, p. 179).**

- (d) murder or grievous bodily injury;
- (e) illicit trade in human organs and tissue;
- (f) kidnapping, illegal restraint or hostage-taking;
- (g) organised or armed robbery;
- (h) racketeering and extortion;
- (i) trafficking in stolen vehicles;
- (j) tax crimes relating to direct taxes and indirect taxes and as defined in the national law of the Member States, which are punishable by deprivation of liberty or a detention order of at least one year.

[Member States are kindly invited to state their position on the proposed paragraph 2, taking into account the statement of the Council Legal Service given in the working party meeting on 1 December, referring also to the previous Council Legal Service written opinion no. 13688/12, as well as taking into account the explanations given by the Commission.]

3. [This Directive shall apply to the violation of Union restrictive measures as defined in the Directive of the European Parliament and of the Council].

4. This Directive shall apply to any other criminal offences set out in other Union legal acts if they provide specifically that this Directive applies to the criminal offences defined therein.

5. The provisions on tracing and identification of instrumentalities and proceeds, or property in Chapter II shall apply to all criminal offences as defined in national law which are punishable by deprivation of liberty or a detention order of at least one year.

Article 3

Definitions

For the purpose of this Directive, the following definitions apply:

- (1) ‘proceeds’ means any economic advantage derived directly or indirectly from a criminal offence consisting of any form of property, and including any subsequent reinvestment or transformation of direct proceeds and any valuable benefits;

(2) ‘property’ means property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title or interest in such property;

(3) ‘instrumentalities’ means any property used or intended to be used, in any manner, wholly or partially, to commit a criminal offence;

(4) ‘tracing and identification’ means any investigation by competent authorities to determine instrumentalities, proceeds, or property that may be derived from criminal activities;

(5) ‘freezing’ means the temporary prohibition of the transfer, destruction, conversion, disposal or movement of property or temporarily assuming custody or control of property;

(6) ‘confiscation’ means a final deprivation of property ordered by a court in relation to a criminal offence;

~~(7) ‘SIENA’ means the secure information exchange network application, managed by Europol, aimed at facilitating the exchange of information between Member States and Europol;~~

(8) ‘criminal organisation’ means a criminal organisation as defined in Article 1 of the Council Framework Decision 2008/841/JHA;

(9) ‘victim’ means a victim as defined in Article 2(1), point (a), of Directive 2012/29/EU of the European Parliament and of the Council,⁴³ ~~as well as a legal person, as defined in national law, that has suffered harm as a result of any of the offences within the scope of this Directive;~~

[The notion of victim, as used in the Union law and as defined in particular in the 2012/29/EU Victims' Rights Directive, covers only natural persons. It is suggested to maintain this concept and to amend the related Article 18 accordingly, so that also legal persons that have suffered harm are covered to the same extent as in the original proposal.]

~~(10) ‘beneficial owner’ means a beneficial owner as defined in Article 3, point (6), of Directive 2015/849/EU⁴⁴;~~

~~(11) ‘Union restrictive measures’ means measures adopted on the basis of Article 29 of the Treaty on European Union and Article 215 of the Treaty on the Functioning of the European Union;~~

⁴³ 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.

⁴⁴ ~~Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, as amended by Directive (EU) 2018/843 (OJ L 141 5.6.2015, p. 73).~~

~~(12) ‘targeted financial sanctions’ means specific Union restrictive measures directed against certain persons or entities adopted on the basis of Article 29 of the Treaty on European Union and Article 215 of the Treaty on the Functioning of the European Union;~~

[The Presidency considered the possibility of defining the notion of affected person, as discussed in the working party. The definition of the affected person in the 2018/1805 Regulation reads as follows:

“‘affected person’ means the natural or legal person against whom a freezing order or confiscation order is issued, or the natural or legal person that owns the property that is covered by that order, as well as any third parties whose rights in relation to that property are directly prejudiced by that order under the law of the executing State”

Member States are kindly invited to consider whether such or similar definition of the affected person would be useful in this Directive, or if the notion should rather remain undefined, which is the approach of the current 2014 Confiscation Directive that uses the notion without defining it.

Covering specifically also any third parties whose rights in relation to the property are directly prejudiced by the measure or order according to this Directive would bring an obligation to apply related safeguards to a possibly broad scope of persons, including pledgees and other persons having rights in relation to the property. Such broad scope of applicability of those rights could have implications for the effectiveness of the asset recovery and confiscation system.

The Presidency would not consider such approach advisable.

If the affected person was to be defined, the scope of rights in each of the provisions using the notion of affected person would need to be carefully scrutinized. The Presidency is of the view that in case the affected person was defined, introduction of other narrower categories of persons such as the suspect or accused person, or even more specifically the person whose property is affected by confiscation of unexplained wealth, should be duly considered to prevent jeopardizing of the effectiveness of all pertaining proceedings.

The scope of the possible definition of the affected person is particularly relevant for the scope of safeguards in Chapter V.]

CHAPTER II

TRACING AND IDENTIFICATION

Article 4

Asset tracing investigations

1. To facilitate cross-border cooperation, Member States shall take measures to enable the swift tracing and identification of instrumentalities and proceeds, or property which may become or is the object of a freezing or confiscation order in the course of ~~criminal~~ proceedings **in criminal matters**.
2. Asset tracing investigations pursuant to paragraph 1 shall be carried out immediately by competent authorities whenever an investigation is initiated in relation to a criminal offence which is likely to give rise to ~~substantial~~ economic benefit, **at least in cases which are not minor**, ~~or where necessary to prevent, detect or investigate criminal offences related to the violation of Union restrictive measures.~~

Article 5

Asset recovery offices

1. Each Member State shall set up at least one asset recovery office to facilitate cross-border cooperation in relation to asset tracing investigations.
2. Asset recovery offices shall have the following tasks:
 - (a) trace and identify instrumentalities, proceeds, or property whenever necessary to support other competent national authorities responsible for asset tracing investigations pursuant to Article 4;
 - (b) trace and identify instrumentalities, proceeds, or property which may become or is the object of a freezing or confiscation order issued by another Member State;
 - (c) cooperate and exchange information with other Member States' asset recovery offices in the tracing and identification of instrumentalities and proceeds, or property which may become or is the object of a freezing or confiscation order;

~~(d) exchange information with other asset recovery offices in the Member States related to the effective implementation of Union restrictive measures where necessary to prevent, detect or investigate criminal offences.~~

~~3. Asset recovery offices shall be empowered to trace and identify property of persons and entities subject to EU targeted financial sanctions where necessary to prevent, detect or investigate criminal offences. To that effect, they shall cooperate with asset recovery offices and other relevant competent authorities in other Member States and exchange relevant information.~~

~~4. Member States shall enable asset recovery offices to take immediate action pursuant to Article 11 paragraph 2 where necessary to prevent, detect or investigate criminal offences related to the violation of Union restrictive measures. Article 11 paragraph 5 shall apply mutatis mutandis.~~

Article 6

Access to information

1. For the purposes of performing the tasks referred to in Article 5, Member States shall ensure that asset recovery offices, **provided that the information is stored in registers or databases**, have immediate and direct access to the following information to the extent that ~~it information~~ is necessary for the tracing and identification of proceeds, instrumentalities, and property:

- (a) fiscal data, including data held by tax and revenue authorities;
- (b) national real estate registers or electronic data retrieval systems and land and cadastral registers;
- (c) national citizenship and population registers of natural persons;
- (d) national motor vehicles, aircraft and watercraft registers;
- (e) commercial databases, including business and company registers;
- (f) national social security registers;
- (g) relevant information which is held by authorities competent for preventing, detecting, investigating or prosecuting criminal offences.

2. Where the information referred to in paragraph 1 is not stored in databases or registers, Member States shall take the necessary measures to ensure that asset recovery offices can swiftly obtain that information **from relevant institutions** by other means.

~~3. The direct and immediate access to the information referred to in paragraph 1 shall be without prejudice to the procedural safeguards established under national law.~~

3. By derogation from paragraph 1, Member States may deny asset recovery offices access to information referred to in paragraph 1 points (a), (f) and (g), if the access to such information would have a negative impact on ongoing investigations or if it would be disproportionate to the legitimate interests of a natural person with regard to the purposes for which access has been requested.

Article 7

Conditions for access to information by asset recovery offices

1. ~~Access to i~~Information pursuant to Article 6 shall **only be performed accessed for the purposes of performing the tasks referred to in Article 5 and** only where necessary on a case-by-case basis by the staff specifically designated and authorised to access the information referred to in Article 6.
2. Member States shall ensure that staff of the asset recovery offices comply with the rules on confidentiality and professional secrecy as provided for under applicable national law. Member States shall also ensure that staff of asset recovery offices have the necessary specialised skills and abilities to perform their roles effectively.
3. Member States shall ensure that appropriate technical and organisational measures are in place to ensure the security of the data in order for asset recovery offices to access and search the information referred to in Article 6.

Article 8

Monitoring access and searches by asset recovery offices

1. Without prejudice to Article 25 of Directive 2016/680, Member States shall ensure that the authorities holding ~~the~~ information referred to in Article 6 **that is stored in registers or databases** keep logs of all access and search activities by asset recovery offices in accordance with this Directive. The logs shall contain the following:
 - (a) the national file reference;
 - (b) the date and time of the query or search;
 - (c) the type of data used to launch the query or search;
 - (d) the unique identifier of the results of the query or search;

- (e) the name of the asset recovery office consulting the registry;
- (f) the unique user identifier of the official who made the query or performed the search.

2. The logs referred to in paragraph 1 may be used only for data protection monitoring, including checking the lawfulness of data processing, and for ensuring data security and integrity. The logs shall be protected by appropriate measures against unauthorised access and erased five years after their creation. If, however, they are required for monitoring procedures that are ongoing, they shall be erased once the monitoring procedures no longer require the logs.

[Only a few Member States have commented on this article as of yet. All of those, however, voiced concerns that it might impose an excessive administrative burden on Member States, and some suggested relying only on Article 25 of Directive 2016/680. On the other hand, the European Data Protection Supervisor (WK 10721/2022) welcomed the provisions in the article, noting that they “are without prejudice to the general rules on logging in Article 25 of the LED and compliment them in the specific context of asset recovery and confiscation”. Member States are kindly invited to reflect on the necessity and appropriateness of the article, as well as possible amendments.]

Article 9

Exchange of information

1. Member States shall take the necessary measures to ensure that their asset recovery offices provide, upon request from an asset recovery office of another Member State, any information that is necessary for the performance of their tasks pursuant to Article 5. The categories of personal data that can be provided are those listed in Section B, point 2 of Annex II to Regulation (EU) 2016/794, **with the exception of forensic identification information under Section B, point 2(c)(v).**

Any personal data to be provided shall be determined on a case-by-case basis, in light of what is necessary for the performance of the tasks pursuant to Article 5.

2. When making a request pursuant to paragraph 1, the requesting asset recovery office shall specify as precisely as possible the following:

- (a) the object of the request;
- (b) the reasons for the request, including the relevance of the information requested for the tracing and identification of the property;
- (c) the nature of the proceedings;

- (d) the type of criminal offence for which the request is made;
- (e) the link of the proceedings to the requested Member State;
- (f) details on the property targeted or sought, such as bank accounts, real estate, vehicles, vessels, aircraft, companies and other high value items;
- (g) and/or the natural or legal persons presumed to be involved, such as names, **national identification numbers or social security numbers**, addresses, dates and places of birth, date of registration, shareholders, headquarters;
- (h) where applicable, reasons for the urgency of the request.

3. Member States shall take the necessary measures to enable that their asset recovery offices exchange information with asset recovery offices of other Member States, without a request to that effect, whenever they are aware of information on instrumentalities, proceeds, or property that they consider necessary for the performance of the tasks of the asset recovery offices pursuant to Article 5. When providing such information, asset recovery offices shall set out the reasons why the information exchanged is considered necessary.

4. ~~Member States shall ensure that the information provided by asset recovery offices pursuant to paragraphs 1, 2 and 3~~ **Unless otherwise indicated by the asset recovery office providing information pursuant to paragraphs 1 or 2, the asset recovery office receiving the information shall be entitled to present the information** ~~can be presented~~ as evidence before a national court of a Member State, in accordance with procedures in national law.

5. Member States shall ensure that asset recovery offices have direct access to SIENA and use the SIENA system **or, where appropriate, other secure channels** for exchanging information pursuant to this Article.

[This would mean that all asset recovery offices need to have access to SIENA but they would not, however, be under an obligation to use it at all times. Member States are kindly asked to indicate whether this meets their need for flexibility.]

6. Asset recovery offices may refuse to provide information to the requesting asset recovery office if there are factual reasons to assume that the provision of information would:

- (a) harm the fundamental national security interests of the requested Member State;

(b) jeopardise an ongoing investigation, or a criminal intelligence operation, or pose an imminent threat to the life or physical integrity of a person.

[The proposed grounds for refusal are more limited than those of Article 10(1) of Framework Decision 2006/960/JHA, which currently applies to information exchange by ARO's. That Article also contains a subparagraph (c) reading "clearly be disproportionate or irrelevant with regard to the purposes for which it has been requested". Some Member States appreciate this limitation, while others want subparagraph (c) reinstated (possibly in addition to other amendments). As only a few Member States have expressed their preference, Member States are kindly invited to indicate whether they find the proposal acceptable.]

7. Member States shall take the necessary measures to ensure that reasons are given for refusals to provide information. Refusals shall only affect the part of the requested information to which the reasons set out in paragraph 6 relate and shall, where applicable, leave the obligation to provide the other parts of the information in accordance with this Directive unaffected.

Article 10

Time limits for provision of information

1. Member States shall ensure that asset recovery offices respond to requests for information pursuant to Article 9 paragraph 1, as soon as possible and in any event within the following time limits:

(a) ~~14 seven~~ calendar days, for all requests that are not urgent;

(b) eight hours, for urgent requests relating to information referred to in Article 6 ~~(1)~~, which is stored in databases and registers **to which they have direct access.**

2. Where the information requested pursuant to paragraph 1, point (b) is not directly available or the request pursuant to paragraph 1, point (a) imposes a disproportionate burden, the asset recovery office receiving the request may postpone the provision of the information. In that case, the requested asset recovery office shall immediately inform the requesting asset recovery office of this postponement and shall provide the requested information as soon as possible, and in any event within three days of the initial deadline established pursuant to paragraph 1.

CHAPTER III
FREEZING AND CONFISCATION

Article 11

Freezing

1. Member States shall take the necessary measures to enable the freezing of property necessary to ensure a possible confiscation of ~~that~~ property under **Articles 12 to 16 by competent authorities.** ~~Article 12. The freezing measures shall consist of freezing orders and immediate action.~~

2. ~~Freezing measures shall include immediate action to~~ **Immediate action shall** be taken when necessary in order to preserve the property **until a freezing order has been issued.** **Member States may limit the temporary validity of the immediate action.**

3. Member States shall enable asset recovery offices **to take the immediate action in the course of proceedings in criminal matters at least in some cases where they are exercising their tasks pursuant to Article 5. The scope of tasks and cases in which asset recovery offices should be empowered to take such action may be defined in national law.** ~~to take immediate action pursuant to paragraph 2 until a freezing order pursuant to paragraph 1 is issued. The validity of such temporary urgent freezing measures shall not exceed seven days.~~

[The Presidency suggests an amended wording of paragraph 3, where at least some empowerment of the AROs to take the immediate action would be retained, with additional possible limitations allowing for certain flexibility in line with comments of some Member States. This does not mean that other competent authorities could not have such powers. The only obligation contained in this provision is that at least in some cases (scope of which may be determined by national law) where exercising at least some of their tasks according to this Directive (scope of which may be determined by national law), the AROs would have the competence to take the immediate action. It is up to the Member States to decide which other competent authorities, besides the AROs, should have the powers to take the immediate action.]

4. ~~Property in the possession of a third party can be subject to freezing measures pursuant to paragraphs 1, 2 and 3 where necessary to ensure a possible confiscation under article 13.~~

5. Member States shall ensure that the freezing **measures** ~~orders pursuant to paragraphs 1, 2, 3 and 4~~ are **taken issued** by a competent authority and **that the reasons for them are set out** ~~are~~ adequately motivated.

6. The freezing order pursuant to paragraph 1 shall remain in force only for as long as it is necessary to preserve the property with a view to possible subsequent confiscation. Frozen property which is not subsequently confiscated, shall be returned to the owner of the property without **undue** delay. The conditions or procedural rules under which such property is returned shall be determined by national law.

~~7. Where the property to be frozen consists of entities that should be preserved as a going concern, such as undertakings, the freezing order shall include measures to exclude access to this property by the persons owning or controlling them while allowing for continued operations.~~

Article 12

Confiscation

1. Member States shall take the necessary measures to enable the confiscation, either wholly or in part, of instrumentalities and proceeds stemming from a criminal offence **subject to following** a final conviction, which may also result from proceedings in absentia.

2. Member States shall take the necessary measures to enable the confiscation of property the value of which corresponds to instrumentalities or proceeds stemming from a criminal offence **subject to following** a final conviction, which may also result from proceedings in absentia. **Such confiscation may either be subsidiary or alternative to confiscation pursuant to paragraph 1.**

[The last sentence added for the purpose of the previous meeting is borrowed from recital 23. The very same language as in recital 23 exists already in recital 14 of the 2014 Confiscation Directive. Since the provision on confiscation subject to a final conviction has newly been divided in 2 paragraphs in the Commission's proposal, some Member States asked for a confirmation of the relation between these two paragraphs in the Article as such. There should not be any substantive difference from what already exists.]

Article 13

Confiscation from a third party

1. Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person.

The confiscation of these proceeds or other property shall be enabled **at least** where it has been established that those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.

2. Paragraph 1 shall not ~~affect~~ **prejudice** the rights of bona fide third parties.

Article 14

Extended confiscation

1. Member States shall take the necessary measures to enable the confiscation, either wholly or in part, of property belonging to a person convicted of a criminal offence where **the offence committed** ~~this offence~~ is liable to give rise, directly or indirectly, to economic benefit, and where the national court is satisfied that the property is derived from criminal conduct.

2. In determining whether the property in question is derived from criminal conduct, account shall be taken of all the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person.

3. For the purposes of this Article, the notion of ‘criminal offence’ shall include at least the offences listed in Article 2 paragraphs 1 to 4 when punishable by deprivation of liberty of a maximum of at least four years.

Article 15

Non-conviction based confiscation

1. Member States shall take the necessary measures to enable, under the conditions set out in paragraph 2, the confiscation of instrumentalities and proceeds, or property as referred to in Article 12(2), or which was transferred to third parties as referred to in Article 13, in cases where criminal proceedings have been initiated but the proceedings could not be continued **at least** because of the following circumstances:

- (a) illness of the suspected or accused person;
- (b) absconding of the suspected or accused person;
- (c) death of the suspected or accused person;

~~(d) immunity from prosecution of the suspected or accused person, as provided for under national law;~~

~~(e) amnesty granted to the suspected or accused person, as provided for under national law;~~

~~(f) the **limitation periods** time-limits prescribed by national law have expired, where such limits are not sufficiently long to allow for the effective investigation and prosecution of the relevant criminal offences.~~

2. Confiscation without a prior conviction **under this Article** shall be limited to **cases where the criminal proceedings could have led to a criminal conviction should the circumstances according to paragraph 1 not have existed and** to criminal offences liable to give rise, directly or indirectly, to substantial economic benefit ~~and only insofar as the national court is satisfied that all the elements of the offence are present.~~

~~3. Before a confiscation order within the meaning of paragraphs 1 and 2 is issued by the court, Member States shall ensure that the affected person's rights of defence are respected including by awarding access to the file and the right to be heard on issues of law and fact.~~

4. For the purposes of this Article, the notion of 'criminal offence' shall include offences listed in Article 2 when punishable by deprivation of liberty of a maximum of at least four years.

Article 16⁴⁵

Confiscation of unexplained wealth ~~linked to criminal activities~~

1. Member States shall take the necessary measures to enable the confiscation of property **identified in the context of an investigation in relation to a criminal offence,**¹ where ~~confiscation is not possible pursuant to Articles 12 to 15²~~ **the national court is satisfied that the property is derived from criminal conduct**³ [liable to give rise, directly or indirectly, to (substantial) economic benefit]⁴ [and committed within the framework of a criminal organisation].⁵ ~~and the following conditions are fulfilled:~~

~~(a) the property is frozen in the context of an investigation into **a criminal offence** criminal offences committed in the framework of a criminal organisation;~~

~~(b) the criminal offence pursuant to point (a) is liable to give rise, directly or indirectly, to substantial economic benefit;~~

⁴⁵ In the light of the various positions expressed in the Working Party, this document proposes a new approach to Article 16, which should take the suggestions made by delegations into account in a balanced manner.

~~(c) the national court is satisfied that the frozen property is derived from criminal **conduct offences** committed in the framework of a criminal organisation.~~

2. When determining whether the ~~frozen~~ property **referred to in paragraph 1** is derived from criminal **conduct offences**, account shall be taken of all the circumstances of the case, including the specific facts and available evidence, such as ~~that the value of the property is substantially disproportionate to the lawful income~~ **the circumstances under which the property was found and the personal and economic circumstances of the affected person** ~~owner of the property.~~⁶

3. For the purposes of this Article, the notion of ‘criminal offence’ shall include offences referred to in Article 2 **paragraphs 1 to 4** when punishable by deprivation of liberty of a maximum of at least four years.

[3bis. Member States are not required to apply this Article unless the the value of the property referred to in paragraph 1 amounts to EUR X or more.]

~~4. Before a confiscation order within the meaning of paragraphs 1 and 2 is issued by the court, Member States shall ensure that the affected person’s rights of defence are respected including by awarding access to the file and the right to be heard on issues of law and fact.~~

[Explanations

The article has been redrafted to focus more on the property subject to confiscation, i.e. property derived from criminal conduct, and less on the offence that originally caught the authorities’ attention.

Recitals will be updated after discussion of the revised article.

Note 1. *This addition contains some of the conditions previously in subparagraph (a). The idea is to clarify the nature of this type of confiscation by introducing some of its basic features early in the text. A **criminal investigation** would seem to be the necessary starting point, given both the legal basis and the need for confiscation orders to be subject to mutual recognition under Regulation 2018/1805 (in which ‘confiscation order’ is defined as a final penalty or measure, imposed by a court following proceedings in relation to a criminal offence, resulting in the final deprivation of property of a natural or legal person).*

*As there must be a link between the property and the investigation, the revised text refers to property **identified** in the context of the investigation. This replaces the requirement that the property be **frozen**, which would limit the applicability of this form of confiscation to cases where there are grounds for freezing the property with a view to ensure a possible confiscation under Articles 12 to 15.*

*The condition that the offence has been **committed in the framework of a criminal organisation** has been deleted. While the original offence serves as the entry point into confiscation of unexplained wealth, it is not this offence that ultimately allows confiscation to take place. The central condition relates instead to the criminal origin of the property, providing that it must be derived from “criminal conduct” (possibly qualified in one or more ways). As the original offence might not even be part of this criminal conduct, it is suggested not to impose conditions that would make it necessary to prove various characteristics of that offence. Requiring proof of circumstances relating to the original offence would seriously lessen the efficiency of the provision. If further qualifiers are considered necessary, a way forward could be to introduce a threshold for the value of the property to be confiscated (see paragraph 3bis for an example of how this could be done, if delegations so wish). Another possibility would be to relate any qualifiers to the criminal conduct from which the property stems. Various possibilities are included in square brackets.*

***Note 2.** Whether the deleted text is intended as a condition of a clarification, it would not seem necessary.*

***Note 3.** Based on previous subparagraph (c).*

*Is suggested to retain the Commission’s proposed **standard of proof** (i.e. that the court is “satisfied”), which is a familiar concept used in the related provision on extended provision (Article 14).*

*The **origin of the property** is described as “criminal conduct,” as in the previous redraft (cf. “criminal offences” in the original text). This concept is also used in Article 14 and is wider than “criminal offence” in that it does not refer to a specific offence. The conduct in question would not have to be identical to, or even include, the offence giving rise to the investigation in the context of which the property was discovered.*

***Note 4.** From previous subparagraph (b) but now linked to the criminal conduct rather than the original offence.*

***Note 5.** From previous subparagraph (c). A condition that the conduct was **committed in the framework of a criminal organisation** would limit the scope of this provision to cases of some serious criminal activity, while excluding other crime that might be equally serious.*

***Note 6.** Compared to the previous redraft, more general language has been used for the examples. The deleted text will be incorporated into a recital.*

There may be reason to return to the use of “affected person” after a general discussion on this concept. It would seem that the most relevant person would be the natural or legal person against whom a confiscation order is requested.

Article 17

Effective confiscation and execution

1. Member States shall take the necessary measures to enable the tracing and identification of property to be frozen and confiscated even after a final conviction for a criminal offence, or following proceedings in application of Articles 15 and 16.
2. Member States shall consider taking measures allowing confiscated property to be used for public interest or social purposes.

Article 18

Victims compensation

Where, as a result of a criminal offence, victims **or legal persons, as defined in national law, that have suffered harm as a result of any of the offences within the scope of this Directive,** have claims against the person who is subject to a confiscation measure provided for under this Directive, Member States shall take the necessary measures to ensure that the confiscation measure does not affect ~~victims'~~ **their** rights to obtain compensation for their claims.

CHAPTER IV MANAGEMENT

Article 19

Asset management and pre-seizure planning

1. Member States shall ensure the efficient management of frozen and confiscated property until its disposal **based on a final confiscation order**.

[Following the clarifications of the Member States' positions in the previous working party meeting, the management of confiscated property has been reinstated in most provisions. The original Commission's proposal refers to management of confiscated property until its disposal. Original recital 31 makes clear that the purpose is to effectively manage the property before confiscation and preserve its value pending a final decision on the confiscation. In line with this original intention, the Presidency suggests amending the relevant provisions including recitals to confirm that the management rules should cover:

1) the frozen property - from the moment of freezing to the moment of issuing a confiscation order and

2) the confiscated property until its disposal based on a final confiscation order - from the moment of issuing the confiscation order to the moment of disposal based on the confiscation order after its legal force (final confiscation order). Afterwards the property may either directly forfeit to the state, be used for victims' compensation, for public interest or social purposes, or be used in other way as provided for in national law. The management rules of this Directive do not apply to mechanisms that follow the disposal of the property based on a final confiscation order.

Terminology on from which moment the property is referred to as the confiscated property may differ in Member States. All Member States would have to apply the management rules from the moment of freezing the property until the moment of its disposal based on a final confiscation order, regardless of from which moment their national law refers to the previously frozen property as to the confiscated property.]

2. Member States shall ensure that, before ~~issuing~~ **executing** a freezing order ~~within the meaning of Article 11 paragraph 1~~, **where justified by the nature of the property**, competent authorities responsible for the management of frozen ~~and confiscated~~ property **assess the specific circumstances of the property to be frozen in order to minimise its estimated management costs and to preserve** ~~carry out an assessment of the costs which may be incurred in the management of the property which may be frozen, for the purposes of preserving and optimizing the value of such property until its disposal.~~

3. Member States shall ensure that carrying out of the assessment pursuant to paragraph 2 does not result in undue delay in the adoption and execution of the freezing order.

Article 20

Interlocutory sales

1. Member States shall ensure that property frozen **by a freezing order** ~~pursuant to Article 11 paragraph 1~~ can be transferred or sold before ~~the issuing of a final~~ confiscation order **at least where** ~~in one or more of the following circumstances~~ **may be reasonably assumed:**

- (a) the property subject to freezing is perishable or rapidly depreciating;
- (b) the storage or maintenance costs of the property are disproportionate to its value;
- (c) the property is too difficult to administer, or its management requires special conditions and non-readily available expertise.

2. Member States shall ~~adopt the necessary measures to~~ ensure that the interests of the **affected person** ~~owner of the property~~ are taken into account when issuing an interlocutory sale order, including whether the property to be sold is easily replaceable. **Where possible** ~~With the exception of cases of absconding,~~ Member States shall ensure that the **affected person** ~~owner of the property that may be subject to an interlocutory sale~~ is notified and heard before the sale. The **affected person** ~~owner~~ shall be given the possibility to request the sale of the property.

3. Earnings from interlocutory sales should be secured until a judicial decision on confiscation is reached. Member States shall take appropriate measures to ~~protect third party buyers of property sold from retaliatory measures, to ensure that the property sold is not~~ **prevent the property from being returned, directly or indirectly,** to persons convicted **in the criminal proceedings in which the property has been frozen** ~~or to third parties with family or business relations to any such convicted person.~~ of the criminal offences referred to in Article 2.

4. Member States may require the costs for the management of frozen property to be charged to the beneficial owner.

Article 21

Asset management offices

1. Each Member State shall set up or designate at least one **competent authority that ~~will~~ shall function as** asset management office for the purpose of the management of frozen and confiscated property **until its disposal based on a final confiscation order**.

2. Asset management offices shall have the following tasks:

(a) to ensure the efficient management of frozen and confiscated property, either through directly managing frozen and confiscated property or through providing support and expertise to other competent authorities responsible for the management of frozen and confiscated property **and pre-seizure planning**;

~~(b) to provide support with pre-seizure planning to the competent authorities responsible for the management of frozen and confiscated property;~~

(c) to cooperate with other competent authorities responsible for the tracing and identification, freezing and confiscation of property, pursuant to this Directive;

(d) to cooperate with other competent authorities responsible for the management of frozen and confiscated property in cross-border cases.

CHAPTER V SAFEGUARDS

Article 22

Obligation to inform affected persons

Member States shall ensure that the freezing ~~measures orders~~ pursuant to Article 11, confiscation orders pursuant to Articles 12 to 16, and orders to sell the property pursuant to Article 20 are communicated to the affected person **without undue delay** setting out the reasons for the measure. **When it is necessary to avoid jeopardizing a criminal investigation, the competent authorities may postpone communication of the freezing measures to the affected person.**

Article 23

Legal remedies

1. Member States shall ensure that the persons affected by **the freezing measures pursuant to Article 11, and confiscation orders pursuant to Articles 12 to 16** ~~the measures provided for under this Directive~~ have the right ~~to defence including access to the file and the right to be heard on issues of law and fact,~~ to an effective remedy and to a fair trial in order to uphold their rights. **[Member States shall ensure that the right to defence, the access to the file and the right to be heard on issues of law and fact is guaranteed to those affected persons that are suspects or accused persons, and may provide that also other affected persons have these rights. Member States shall ensure that persons whose property is or may be subject to confiscation pursuant to Article 16, have the right (...).]**

[On 9 December 2022, the Justice ministers in the JHA Council exchanged their views on the procedural safeguards and legal remedies. Ministers clearly considered that a high level of procedural rights must be ensured to all persons affected by measures according to this Directive, in line with the standards laid down in the Charter of Fundamental Rights of the European Union and the European Convention for Protection of Human Rights and Fundamental Freedoms. While some ministers were of the view that all persons affected by those measures should enjoy certain elements of the rights to defence, others maintained that such rights should only pertain to those charged with a criminal offence and that the level of the procedural protection of other affected persons may differ.]

As mentioned above, the Presidency is of the view that this provision is closely linked to the possible definition of the affected persons (and possibly other persons).

According to the existing fundamental rights standards, the right to defence only pertains to persons that are charged with a criminal offence. These standards also stipulate which persons have the right to an effective remedy, to the fair trial, to be heard etc.

It could seem superfluous to try to repeat in the Articles of this Directive the already existing standards in a concrete manner, which could also lead to possible discrepancies and overlaps that could unintentionally hamper the related proceedings in practice.

On the other hand, it could seem worth considering to what extent the rights of the persons whose property is or may be subject to confiscation pursuant to Article 16, which is a rather new option, are already guaranteed by the existing standards.

The suggested amendments to this provision are provisional and incomplete. In view of the Presidency, this provision still requires a detailed examination, which should be carried out with regard to the possible definition of the affected person and possibly other persons.]

2. Member States shall provide for the effective possibility for the person whose property is affected to challenge the freezing **measure order** pursuant to article 11 before a court, in accordance with procedures provided for in national law. Where the freezing **measure order** has been taken by a competent authority other than a judicial authority, national law **may shall** provide that such a **measure an order** is first to be submitted for validation or review to a judicial authority before it can be challenged before a court.

3. Where the suspected or accused person has absconded, Member States shall take all reasonable steps to ensure an effective possibility to exercise the right to challenge the confiscation order and shall require that the person concerned be summoned to the confiscation proceedings or that reasonable efforts be made to make the person aware of such proceedings.

4. Member States shall provide for the effective possibility for the person whose property is affected to challenge the confiscation order **pursuant to Articles 12 to 16, and including** the relevant circumstances of the case **and available evidence on which the findings are based**, before a court, in accordance with procedures provided for in national law.

~~In the case of confiscation orders pursuant to Article 13, such circumstance shall include facts and circumstances on which the finding was based that the third party knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation.~~

~~In the case of confiscation orders pursuant to Articles 14 and 16, such circumstances shall include specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct.~~

~~In the case of confiscation orders pursuant to Article 15, such circumstances shall include facts and evidence on the basis of which the national court concluded that all the elements of the offence are present.~~

~~5. When implementing this Directive, Member States shall provide that confiscation is not ordered to the extent it would be disproportionate to the offence committed or the accusation against the person concerned by the confiscation. When implementing this Directive, Member States shall provide that, in exceptional circumstances, confiscation is not ordered, insofar as it would, in accordance with national law, represent undue hardship for the affected person.~~

6. Member States shall provide for the effective possibility for the person whose property is affected to challenge an order pursuant to Article 20 to sell the property in question. Member States shall provide for the possibility that such an appeal has suspensory effect, **at least where necessary to safeguard the legitimate interests of the affected person.**

7. Third parties shall be entitled to claim title of ownership or other property rights including in the cases referred to in Article 13.

8. Persons whose property is affected by the measures provided for in this Directive shall have the right of access to a lawyer throughout the freezing and confiscation proceedings. The persons concerned shall be informed of that right.

CHAPTER VI
ASSET RECOVERY STRATEGIC FRAMEWORK

Article 24

National strategy on asset recovery

1. Member States shall adopt by [*one year after the transposition period of this Directive is over entry into force of this Directive*] a national strategy on asset recovery and update it at regular intervals of no longer than five years.

2. The strategy shall include at least the following elements:

(a) strategic objectives, priorities and measures for the purposes of enhancing efforts by all competent national authorities involved in the recovery of property as set out in this Directive;

(b) a governance framework to achieve the strategic objectives and priorities, including a description of the roles and responsibilities of all the competent authorities and cooperation mechanisms;

(c) appropriate mechanisms for coordination and cooperation at strategic and operational levels among all competent authorities;

(d) resources made available to competent authorities, including training;

(e) procedures for regular monitoring and evaluation of the results achieved.

[Member States are invited to specify which of these, or possible other, elements of the strategy they consider useful.]

3. Member States shall communicate their strategies, and any updates of their strategies, to the Commission within three months from their adoption.

Article 25

Resources

Member States shall ensure that asset recovery offices and asset management offices performing tasks pursuant to this Directive, have appropriately qualified staff and appropriate financial, technical and technological resources necessary for the effective performance of their functions related to the implementation of this Directive.

Article 26

Establishment of centralised registries of frozen and confiscated property

1. For the purpose of managing frozen and confiscated property **until its disposal based on a final confiscation order**, Member States shall **by [one year after the transposition period of this Directive is over] ~~put~~ have** in place centralised registries containing information related to the freezing, confiscation and management of instrumentalities and proceeds, or property which ~~may become or~~ is the object of a freezing or confiscation order.

2. Member States shall take the necessary measures to ensure that asset recovery offices, asset management offices, and other competent authorities performing tasks pursuant to Article 4, 19 and 20, have, **for the purpose of performing those tasks**, the power to enter, access and search, directly and immediately, the information referred to in paragraph 3.

3. The following information shall be entered, accessible and searchable through the centralised registries referred to in paragraph 1:

(a) the property subject to a freezing or confiscation order **until its disposal based on a final confiscation order**, including details that enable the identification of the property;

(b) the estimated or actual value of the property at the moment of the freezing, **and** confiscation ~~and disposal~~;

(c) the owner of the property, including the beneficial owner **as defined in Article 3, point (6), of Directive 2015/849/EU**⁴⁶, where such information is available;

(d) the national file reference of the proceeding related to the property;

⁴⁶ **Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, as amended by Directive (EU) 2018/843 (OJ L 141 5.6.2015, p. 73).**

(e) the name of the authority entering the information in the registry;

~~(f) the unique user identifier of the official who entered the information in the registry.~~

4. The information referred to in paragraph 3 shall only be retained for as long as it is necessary for the purposes of keeping a record and overview of the property frozen, confiscated, or under management, and in any case it shall not be retained for longer than after its disposal, or to provide annual statistics as referred in Article 27.

5. Member States shall ensure that appropriate technical and organisational measures are in place to ensure the security of the data contained in the centralised registries of frozen and confiscated property.

Article 27

Statistics

1. Member States shall collect and maintain comprehensive statistics at central level on the measures taken under this Directive.

2. Member States shall ensure that the statistics referred to in paragraph 1 are collected on a calendar basis and transmitted to the Commission on an annual basis, by [1 September] of the following year.

3. The Commission may adopt delegated acts in accordance with Article 30 laying down more detailed rules on the information to be collected and the methodology for the collection of the statistics referred to in paragraph 1 and the arrangements for their transmission to the Commission.

[Member States are kindly invited to indicate whether they agree that the power to adopt delegated acts shall be conferred on the Commission (subject to the conditions in Article 30). Member States are also invited to consider, as an alternative, the mechanism of implementing acts which is used in the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC (Articles 22 and 23, in connection with Article 21; the general approach that was reached on 9 December 2022 is reflected in document 16171/22). Should majority of Member States not agree with conferring special powers onto the Commission, more rules on information to be collected would need to be provided for in this Directive.]

CHAPTER VII COOPERATION

Article 28

Cooperation with EU bodies and agencies

~~1. Asset recovery offices of Member States shall closely cooperate with the European Public Prosecutor's Office for the purposes of facilitating the identification of instrumentalities and proceeds, or property that may become or is the object of a freezing or confiscation order in proceedings in criminal matters concerning criminal offences for which the European Public Prosecutor's Office exercises its competence.~~

2. Asset recovery offices shall cooperate with Europol and Eurojust, in accordance with the areas of their competence, for the purposes of facilitating the identification of instrumentalities and proceeds, or property that may become or is the object of a freezing or confiscation order made by a competent authority in the course of ~~criminal~~ proceedings **in criminal matters**, and where necessary to prevent, detect or investigate criminal offences related to the violation of Union restrictive measures.

Article 29

Cooperation with third countries

1. Member States shall ensure that asset recovery offices cooperate with their counterparts in third countries to the greatest extent possible, and subject to the applicable data protection legal framework, for the purposes of performing the tasks pursuant to Article 5, ~~and where necessary to prevent, detect or investigate criminal offences related to the violation of Union restrictive measures.~~

2. Member States shall ensure that asset management offices cooperate with their counterparts in third countries to the greatest extent possible, **and subject to the applicable data protection legal framework**, for the purposes of performing the tasks pursuant to Article 21.

CHAPTER VIII
FINAL PROVISIONS

Article 30

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Article 27 shall be conferred on the Commission for an indeterminate period of time from [date of entry into force of this Directive].
3. The delegation of power referred to in Article 27 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.
5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
6. A delegated act adopted pursuant to Article 27 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of [two months] of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by [two months] at the initiative of the European Parliament or of the Council.

Article 31

Designated competent authorities and contact points

1. Member States shall inform the Commission about the authority or authorities designated to carry out the tasks pursuant to Articles 5 and 21.
2. Where a Member State has more than two authorities charged with the tasks pursuant to Articles 5 and 21, it shall nominate a maximum of two contact points **for the purpose of each of these tasks** to facilitate cooperation in cross-border cases. **Such contact points do not themselves have to be charged with the tasks pursuant to Articles 5 or 21.**
3. By [24 months after the entry into force of this Directive] at the latest, Member States shall notify the Commission of the competent authority or authorities as well as, **where relevant**, the contact points referred to in paragraphs 1 and 2 respectively.
4. By [24 months after the entry into force of this Directive] at the latest, the Commission shall set up an online register listing all competent authorities and the designated contact point for each competent authority. The Commission shall publish and regularly update on its website the list of authorities referred to in paragraph 1.

Article 32

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*date of entry into force* + 24 months ~~± year~~]. They shall forthwith transmit to the Commission the text of those provisions.
2. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 33

Reporting

1. The Commission shall, by [~~two years after the transposition period of this Directive is over date of entry into force + 3 years~~], submit a report to the European Parliament and to the Council, assessing the implementation of this Directive.
2. The Commission shall, by [~~five years after the transposition period of this Directive is over date of entry into force + 5 years~~], submit a report to the European Parliament and to the Council evaluating this Directive. The Commission shall take into account the information provided by Member States and any other relevant information related to the transposition and implementation of this Directive. On the basis of this evaluation, the Commission shall decide on appropriate follow-up actions, including, if necessary, a legislative proposal.

Article 34

Relation with other instruments

1. This Directive is without prejudice to Directive 2019/1153/EU of the European Parliament and of the Council⁴⁷.

Article 35

Replacement of Joint Action 98/699/JHA, Framework Decision 2001/500/JHA and 2005/212/JHA, Decision 2007/845/JHA and Directive 2014/42/EU

1. Joint Action 98/699/JHA, Framework Decisions 2001/500/JHA and 2005/212/JHA, Decision 2007/845/JHA and Directive 2014/42/EU are replaced with regard to the Member States bound by this Directive, without prejudice to the obligations of those Member States with regard to the date for transposition of those instruments into national law.
2. With regard to the Member States bound by this Directive, references to instruments referred to in paragraph 1 shall be construed as references to this Directive.

⁴⁷ Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA, (OJ L 186, 11.7.2019, p. 122).

Article 36

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 37

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President