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2022/0167 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on asset recovery and confiscation**

{SEC(2022) 245 final} - {SWD(2022) 245 final} - {SWD(2022) 246 final}

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE PROPOSAL**

#### **• Reasons for and objectives of the proposal**

Organised crime is one of the highest threats to the European Union's security. The transnational reach of organised crime, its systematic use of violence and corruption, and its unprecedented degree of economic infiltration was exposed in the EncroChat, Sky ECC and ANOM<sup>1</sup> operations carried out in 2020-2021. On the basis of the follow-up investigations launched by Member States as well as Europol and Eurojust (more than 2,500 investigations from EncroChat only), national authorities have carried out more than 10,000 arrests, apprehended almost 250 tonnes of drugs, and seized more than EUR 600 million in cash as well as other assets, including hundreds of vehicles, vessels, aircraft and luxury articles.

Criminal organisations deploy sophisticated means to launder their vast revenues, which are estimated at least at EUR 139 billion every year<sup>[1]</sup>. As underlined in the EU Strategy to tackle Organised Crime (2021-2025)<sup>2</sup>, depriving criminals of these illicit profits is essential to disrupt the activities of criminal groups and to prevent their infiltration into the legal economy. As the main motive for organised crime is financial gain, asset recovery is a very effective mechanism to deter criminal activity. In order to ensure that crime does not pay, the Commission announced in its EU Strategy to tackle Organised Crime the intention to strengthen the rules on asset recovery and confiscation, taking into account the 2020 Commission report "Asset recovery and confiscation: Ensuring that crime does not pay"<sup>3</sup>.

The 2007 asset recovery offices Council Decision<sup>4</sup> requires Member States to set up asset recovery offices to facilitate the tracing and identification of the proceeds of crime, and establishes minimum requirements to facilitate their cooperation across borders. The 2014 Confiscation Directive<sup>5</sup>, partially replacing prior legislative instruments, sets minimum rules for the freezing, management, and confiscation of criminal assets. Despite this, Member States' asset recovery systems are not well equipped to effectively address the complex modus operandi of criminal organisations. National authorities have limited capabilities to swiftly trace, identify and freeze assets, the inefficient management of frozen assets means they lose value before a decision on their confiscation is taken, and existing confiscation tools do not cover all high revenue-granting criminal markets and do not address the complex

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<sup>1</sup> Europol, "[Dismantling of an encrypted network sends shockwaves through organised crime groups across Europe](#)", 2 July 2020; "[New major interventions to block encrypted communications of criminal networks](#)", 10 March 2021; "[800 criminal arrested in biggest ever law enforcement operation against encrypted communication](#)", 8 June 2021.

<sup>2</sup> Commission Communication on the EU Strategy to tackle Organised Crime 2021-2025 (COM(2021) 170, 14.4.2021).

<sup>3</sup> Report from the Commission to the European Parliament and the Council on Asset recovery and confiscation: Ensuring that crime does not pay (COM(2020) 217, 2.6.2020).

<sup>4</sup> 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.

<sup>5</sup> 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.

structures and methods of criminal organisations. The need to reinforce the EU asset recovery regime has long been recognised by EU Institutions. In June 2020, the Council called on the Commission to consider strengthening the legal framework on the management of property frozen and granting asset recovery offices additional powers, for instance to urgently freeze assets, and access to a set of public registers<sup>6</sup>. The European Parliament has called for enhanced asset recovery rules<sup>7</sup>. These calls complement the previous request by both co-legislators to analyse the feasibility of introducing further common rules on the confiscation of property deriving from criminal activities, also in the absence of a conviction<sup>8</sup>.

Therefore, the proposed Directive on asset recovery and confiscation shall strengthen the capabilities of competent authorities to identify, freeze and manage assets, and reinforce and extend confiscation capabilities so as to cover all relevant criminal activities carried out by organised crime groups, thereby enabling confiscation for all relevant assets. Lastly, the Directive shall improve the cooperation between all authorities involved in asset recovery and promote a more strategic approach to asset recovery through a greater commitment from these authorities to the achievement of common goals in this area.

Moreover, in response to Russia's military aggression against Ukraine, the European Union has adopted restrictive measures against Russia and Belarus building on and expanding the restrictive measures initially established in March 2014 in response to the illegal annexation of Crimea and Sevastopol by Russia. These measures, adopted on the basis of Article 29 of the Treaty on European Union (TEU) and of Article 215 of the Treaty on the Functioning of the European Union (TFEU), include sectorial measures and individual measures in the form of asset freezes and restrictions on admission as well as anti-circumvention clauses, which prohibit knowing and intentional participation in activities that seek to circumvent these measures, and other obligations, in particular to report on steps taken to implement Union restrictive measures. To further counter the risk of violation of such measures, the Commission adopted on 25 May 2022 a proposal for a Council Decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union<sup>9</sup>, together with a Communication towards a Directive on criminal penalties for the violation of Union restrictive measures<sup>10</sup>, to identify the violation of Union law on restrictive measures (violation of Union restrictive measures) as an area of particularly serious crime with a cross-border dimension. The Communication also outlines the possible content of a proposal for a Directive establishing minimum rules for the definition of criminal offences and penalties in this area of crime, which might follow if the Council is to adopt this proposal for a Council Decision after obtaining the consent of the European Parliament, and thereby extend the list of areas of crime where the Union can

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<sup>6</sup> Council Conclusions on enhancing financial investigations to fight serious and organised crime Council document 8927/20, 17 June 2020.

<sup>7</sup> European Parliament resolution of 15 December 2021 on the impact of organised crime on own resources of the EU and on the misuse of EU funds with a particular focus on shared management from an auditing and control perspective, P9\_TA(2021)0501, (2020/2221(INI).

<sup>8</sup> Statement by the European Parliament and the Council on an analysis to be carried out by the Commission, Council doc. 7329/1/14/REV 1 ADD 1.

<sup>9</sup> Add reference number

<sup>10</sup> Add reference number

establish minimum rules concerning the definition of criminal offences and penalties. As a consequence, the proposed Directive, including not only rules on asset tracing and identification as well as asset management, but also rules on freezing and confiscation, should then also apply to the violation of Union restrictive measures, where such conduct constitutes a criminal offence as defined.

Moreover, in order to facilitate the effective implementation of Union restrictive measures across Member States, the proposed Directive sets out provisions to enable the swift tracing and identification of property owned or controlled by persons or entities subject to such measures, including through cooperation with third countries, with a view to detect, prevent and investigate criminal offences related to the violation of Union restrictive measures.

- **Consistency with existing provisions in the policy area**

This proposal is embedded in the global fight against organised crime, corruption and money laundering. It implements the United Nations Convention on Organized Crime (UNTOC) and the Protocols thereto<sup>11</sup> and the United Nations Convention against Corruption (UNCAC)<sup>12</sup>, the Council of Europe Warsaw Convention<sup>13</sup> as well as Recommendation 4 of the Financial Action Task Force (FATF), all of which require the countries party to adopt measures to enable their competent authorities to freeze and confiscate proceeds and instrumentalities of crime.

It is also part of the broader efforts at EU level to combat serious and organised crime. In this context, it complements a set of legislative instruments harmonising the definition of offences and sanctions related to criminal activities, as well as other instruments aimed at preventing or combating related illicit activities such as counterfeiting, trafficking of cultural goods, tax crimes and forgery of administrative documents.

On the other hand, this proposal is consistent with and contributes to the effective implementation of the EU policy on security, which consists of a toolbox of non-legislative and legislative measures aimed at providing law enforcement and judicial authorities with the tools to prevent and combat a wide range of criminal activities, and to ensure a high level of security in the European Union, in particular through cross-border cooperation. This includes, in particular, Regulation (EU) 2018/1805<sup>14</sup>, which facilitates the mutual recognition of freezing and confiscation orders across the EU.

At the same time, the proposal contributes to and is consistent with the legal framework establishing Union restrictive measures, which aims at ensuring their comprehensive

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<sup>11</sup> United Nations Convention against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; Protocol against the Smuggling of Migrants by Land, Sea and Air, General Assembly resolution 55/25 of 15 November 2000; and Protocol against the Illicit Manufacturing and Trafficking in Firearms, General Assembly resolution 55/255 of 31 May 2001.

<sup>12</sup> United Nations Convention against Corruption, General Assembly resolution 58/43 of 1 October 2003

<sup>13</sup> Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198).

<sup>14</sup> 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 of 28.11.2018, p.1.

implementation across the Union and requires Member States to lay down the rules on penalties applicable to infringements of the relevant provisions.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

### **• Legal basis**

The Directive is based on Articles 82(2), 83(1) and (2) and Article 87(2) TFEU.

Measures concerning freezing and confiscation are covered by Article 83(1) TFEU, which allows the establishment of minimum rules concerning the definition of sanctions in the areas of particularly serious crime with a cross-border dimension for the crimes listed in this article. The scope of these measures is extended to offences carried out within the framework of criminal organisations, organised crime being a “eurocrime” within the meaning of Article 83(1) TFEU. This would also include violation of Union restrictive measures as harmonised at EU level. The inclusion of crimes which are either harmonised at EU level or where the related policy area is harmonised at EU level is also justified as the proposed measures on freezing and confiscation are essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures and thereby covered by Article 83(2) TFEU. The measures aimed at improving the management of frozen and confiscated property are necessary to ensure the effective implementation of freezing and confiscation measures, and are ancillary requirements covered by Article 83 TFEU. This also applies to provisions that aim at developing a more comprehensive strategy towards asset recovery, coupled with cooperation mechanisms between authorities at national level and provisions that aim at ensuring that the competent authorities have the necessary resources to carry out their tasks.

Furthermore, measures on asset tracing and identification or cooperation between asset recovery offices and asset management offices with their counterparts in other Member States, also contribute to effective cross-border cooperation in relation to the prevention, detection and investigation of criminal offences. They are as such covered by Article 87(2) TFEU.

As the scope of Article 87 TFEU is not limited in terms of crimes covered, the above measures also apply to the violation of Union restrictive measures, to the extent that such violation constitutes a criminal offence as defined in national law, to the extent that they facilitate the prevention and detection of infringements of Union restrictive measures.

Moreover, the procedural safeguards provided in this Directive as well as the provision to ensure compensation for victims are covered by Article 82(2) TFEU.

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

Individual efforts of Member States to tackle organised crime are not sufficient to tackle the cross-border nature of organised crime groups, with 70% of criminal groups operating in the

EU being active in more than three Member States<sup>15</sup>, and hiding and re-investing property derived from criminal activities across the EU's internal market. Criminal groups employ a complex web of bank accounts and front companies across jurisdictions to disguise the audit trail and hide the source and ownership of funds, with criminals reportedly targeting Member States with weaker asset recovery systems<sup>16</sup>.

A renewed effort across the Union against the financial means of criminal organisations is therefore crucial for the effective recovery of instrumentalities and proceeds of crime. The proposed Directive will facilitate cross-border cooperation and contribute to a more effective fight against organised crime.

- **Proportionality**

In accordance with the principle of proportionality, as set out in Article 5(4) TEU, the proposed Directive is limited to what is necessary and proportionate to implement a common minimum standard across the EU.

The proposal strengthens capabilities and tools to trace and identify, freeze, manage and confiscate illicit assets. While ensuring a sufficiently broad scope, the measures have a particular focus on illicit assets related to criminal activities carried out by organised crime. The proposal clarifies a number of obligations of a more general nature, thereby reducing differences in Member States that can be obstacles in cross-border cooperation and providing further legal clarity.

Furthermore, the impact of the proposed measures on Member States in terms of necessary resources and the need to adapt national frameworks is outweighed by the benefits provided by the improved capabilities of competent authorities to trace and identify, freeze, manage and confiscate illicit assets.

Moreover, the individual measures are limited to what is necessary and proportionate to the objectives of disrupting organised crime activities and depriving criminals of significant illicit gains. This is done, for example, by restricting the systematic launch of asset tracing investigations to offences likely to generate substantial economic benefits. This is also achieved by limiting confiscation possibilities in the absence of a conviction for a specific crime to crimes of serious nature and that are likely to generate substantial benefits. The overall proportionality is ensured by pairing different measures with strong safeguards.

- **Choice of the instrument**

The proposal takes the form of a Directive aimed at ensuring a common minimum standard for freezing and confiscation measures across Member States while at the same time strengthening common capabilities in terms of tracing, identification and management of

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<sup>15</sup> Europol, European Union Serious and Organised Crime Threat Assessment “[A Corrupting Influence: The infiltration and undermining of Europe’s economy and society by organised crimes](#)”, (2021).

<sup>16</sup> Meeting with Eurojust experts in June 2016, quoted from Commission staff working document ‘Impact assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders’, SWD(2016) 468 final.

property and facilitating cross-border cooperation against criminal proceeds. The choice of the legal instrument leaves sufficient flexibility to Member States to implement the common measures in accordance with national legal traditions and organisational settings.

The proposed Directive sets out provisions for asset recovery offices, currently regulated in the asset recovery offices Council Decision, as well as for confiscation aspects, regulated in the Confiscation Directive and in Council Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property. The proposed Directive would replace Council Framework Decision 2005/212/JHA, the asset recovery offices Council Decision, and the Confiscation Directive, establishing common standards for asset tracing and identification, freezing, management, and confiscation in a single instrument. The combination of previously scattered obligations within one single instrument would ensure a more coherent and strategic approach to asset recovery and cooperation of all relevant actors within the asset recovery system.

- **Regulatory Scrutiny Board**

The impact assessment was submitted to the Regulatory Scrutiny Board on 2 February 2022. The Regulatory Scrutiny Board reviewed the draft impact assessment at its meeting of 2 March 2022 and delivered a positive opinion without reservations on 4 March 2022.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Ex-post evaluations/fitness checks of existing legislation**

An evaluation was conducted to assess whether the current EU asset recovery system is still fit for purpose and to identify any shortcomings that could hamper the fight against organised crime. In line with the “evaluate first” principle, the evaluation assessed whether the originally envisaged results were achieved and identified the areas where a further improvement or update of existing legal instruments was needed.

In this context, the two evaluated legal instruments, the asset recovery offices Council Decision and the Confiscation Directive, have contributed to increasing cooperation between asset recovery offices, approximating the concepts of freezing and confiscation across Member States and increased freezing and confiscation rates to some extent. However, the evaluation concluded that challenges in the identification of assets remain and that the overall confiscation of proceeds of crime remains too low to significantly impact organised crime’s profits. Despite the improvement of various aspects of the asset recovery system after the adoption of the asset recovery offices Council Decision and of the Confiscation Directive, the problems identified prior to the adoption of the relevant acts (and in particular the Confiscation Directive) still persist to a large extent, together with a number of shortcomings affecting the Member States’ capacities to trace and identify, freeze, confiscate and manage illicit assets in an effective and efficient manner.

- **Stakeholder consultations**

In developing this proposal, the Commission has consulted a wide variety of stakeholders, including EU institutions and agencies, asset recovery offices, law enforcement authorities in the Member States, non-governmental organisations and civil society, as well as international organisations.

Stakeholders were consulted through a variety of means, including feedback for an inception impact assessment, stakeholder events, workshops, targeted consultations, public consultation, a study to support the impact assessment, semi-structured interviews and policy option workshops.

An inception **impact assessment** was published for feedback from 9 March 2021 to 6 April 2021. In total 13 responses from a variety of stakeholders were received.

Two **stakeholder workshops** were held with asset recovery offices representatives on 25 and 26 May 2021 and the Contact Committee of the Confiscation Directive on 1 and 2 June 2021. The objective of these workshops was to gain opinions in relation to the effectiveness, efficiency, relevance, coherence and EU added value of the Confiscation Directive and the asset recovery offices Council Decision. These workshops were followed by targeted consultations by way of written responses provided by the participants.

A **public consultation** was held from 21 June until 27 September 2021 in order to gather the views of citizens and stakeholders. As many as 50 responses were received. The replies underlined the importance of cross-border cooperation of law enforcement authorities in the fight against the proceeds of crime, and shed light on the obstacles to the effective identification, management and confiscation of proceeds of crime, such as the insufficient powers and access to data of asset recovery offices, as well as the limited scope of the Confiscation Directive. Additionally, the respondents were in favour of updating the legislative measures accordingly to address such problems.

Moreover, the Commission also commissioned a **study to support the preparation of the impact assessment**. The study was carried out by an external consultant between March 2021 and December 2021. The preparation of the study included desk research and almost 40 semi-structured interviews with stakeholders such as the European Union Agency for Law Enforcement Training (CEPOL), the European Union Agency for Law Enforcement Cooperation (Europol), the European Union Agency for Criminal Justice Cooperation (Eurojust), law enforcement authorities, asset recovery offices and Non-Governmental Organisations. Furthermore, it entailed targeted consultations in the form of written questionnaires to asset recovery offices and members of the Contact Committee of the Confiscation Directive in July 2021. Lastly, four additional workshops were held in September 2021 to gather the views of the stakeholders on the policy options and identify the potential impacts of the policy options.

- **Impact assessment**

The impact assessment that supported the development of this initiative explored different policy options to tackle the fact that the EU asset recovery system is not well equipped to



effectively address the complex modus operandi criminal organisations. Besides the baseline scenario, which would entail no change over the current situation, the following options were analysed:

**Option 1**, consisting of **non-legislative measures** to support the exchange of experiences, knowledge and good practices among competent authorities with a view to strengthen asset recovery capabilities and understanding in relation to the various phases of asset recovery. These exchanges would be further enhanced through the development of appropriate EU guidance and, where appropriate, training to competent authorities.

Under **Option 2**, the measures would consist primarily of **targeted amendments** to the asset recovery offices Council Decision and Confiscation Directive in order to specify the scope of existing general requirements and reinforce their effectiveness. These measures would include requirements for Member States to adopt a national strategy on asset recovery and to ensure that the competent authorities have the necessary skills and resources. Furthermore, it would entail measures aimed at improving cross-border cooperation among asset recovery offices, including the access to databases and extended freezing powers.

**Option 3** would contain, in addition to the measures envisaged in option 2, **more detailed requirements** for Member States for all phases of the recovery process. This would include obligations such as the systematic launch of financial investigations as well as specific requirements in asset management like pre-seizure planning, interlocutory sales and the establishment of specialised asset management offices. Moreover, the scope of the Confiscation Directive would be expanded to include a wider range of crimes: the current non-conviction based confiscation provision would be extended and an unexplained wealth confiscation model ensuring the confiscation of assets not linked to a specific crime would be introduced.

Under **Option 4**, the measures would build upon those under Option 3, but the scope of the provisions would be extended to all crimes and entail more extensive requirements when it comes to the launch of investigations. Furthermore, more concrete conditions concerning urgent freezing orders and information exchange between asset recovery offices would be set out.

In light of the various economic, social and environmental impacts associated with each of the options, but also their value in terms of effectiveness, efficiency and proportionality, the impact assessment found that the preferred option was Option 3.

Measures under Option 1 can complement legislative changes, however, given that the problems identified resulted to a significant extent from the legislative framework, these would not have been sufficient to effectively overcome the identified problems. Option 2 would similarly contribute only to a limited extent to improving the current situation, as the few additional requirements compared to the status quo would only strengthen asset tracing and identification capabilities to some degree, would not be sufficient to ensure an efficient management of frozen assets, and would not capture all relevant criminal activities insofar as confiscation measures would remain limited in scope.

As regards Option 3, it was found that the measures concerning asset tracing and identification, and those to ensure the adoption of effective asset management mechanisms and confiscation models would improve the effectiveness of the asset recovery system to a significant extent. Despite the costs, these measures have been considered as efficient given the qualitative leap in the confiscation rate, and proportionate in relation to the administrative burden and interference with Member States' organisational set-ups. In terms of fundamental rights, the impacts of Option 3 and in particular of the new confiscation model were found to be balanced against safeguards and the policy objective sought, given the scale of the problem.

In relation to Option 4, the expected gains in effectiveness were expected to be limited compared to the extra costs and the more significant interference with Member States' freedom to organise national set-ups on asset recovery according to their choices and national preferences.

Following the positive opinion without reservations delivered by the Regulatory Scrutiny Board on 4 March 2022, the impact assessment was revised to strengthen the presentation and comparison of the policy options, including their costs, benefits, and impacts. The impact assessment was further revised to better reflect the views of different stakeholder and how the identified problems differ in the Member States. Finally, the revision outlines a first monitoring and evaluation programme of the envisaged proposal.

- **Regulatory fitness and simplification**

As per the Commission's Regulatory Fitness and Performance Programme (REFIT), all initiatives aimed at changing existing EU legislation should aim to simplify and deliver stated policy objectives more efficiently (i.e. by reducing unnecessary regulatory costs). The analysis of impacts suggests that the measures set out in the proposed Directive are expected to have an impact in terms of burden on Member States which would be outweighed by the benefits.

To the extent that the provisions in the proposed Directive envisage a more strategic approach to asset recovery, provide for more effective tools for confiscating assets and ensure that competent authorities have the necessary resources, skills and powers, the Member States' asset recovery systems as well as cross-border cooperation will become significantly more efficient.

The regulatory burden related to these measures will be more than offset by the benefits in terms of identifying, freezing and confiscating more illicit assets and maintaining or even maximising their value.

- **Fundamental rights**

All measures as provided for in this proposal respect fundamental rights and freedoms as enshrined in the Charter of Fundamental Rights of the European Union, and must be implemented accordingly. Any limitation on the exercise of such fundamental rights and freedoms is subject to the conditions set out in Article 52(1) of the Charter, namely that they be subject to the principle of proportionality with respect to the legitimate aim of genuinely

meeting objectives of general interest recognised by the Union and protecting the rights and freedoms of others. Limitations must be provided for by law and respect the essence of the rights and freedoms set out in the Charter.

The interference of the proposed measures with fundamental rights (including in particular property rights) is justified by the need to effectively deprive criminals and in particular organised crime of their illicit assets, since these are both the main motivation for them to commit crime as well as the means for continuing and expanding their criminal activities. The proposed measures are limited to what is necessary to achieve that objective. The newly introduced confiscation model is justified by the inherent difficulties in linking assets to specific crimes where the owner is engaged in organised crime activities consisting of multiple criminal offences committed over a prolonged period of time. Finally, the respect of fundamental rights will be guaranteed by safeguards including effective remedies available to the person affected for all measures under the proposed Directive, including newly introduced requirements concerning interlocutory sales or the new confiscation model.

This proposal also ensures that the relevant EU data protection rules are applied when implementing the Directive.

#### **4. BUDGETARY IMPLICATIONS**

The proposal has no impact on the European Union budget.

#### **5. OTHER ELEMENTS**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The implementation of the proposed Directive will be reviewed by 3 years after its entry into force, after which the Commission will submit a report to the European Parliament and to the Council. This report will assess the extent to which the Member States have taken the necessary measures to comply with the Directive. A report assessing the impact and added value of the Directive will be submitted by the Commission to the European Parliament and to the Council by five years after the entry into force of the Directive.

- **Detailed explanation of the specific provisions of the proposal**

This proposal for a Directive is structured in eight chapters:

*General provisions on asset recovery and confiscation (Chapter I, Articles 1 to 3).*

Article 1 sets out the subject matter, namely to establish minimum rules on the tracing and identification, freezing, confiscation and management of property in criminal matters and to facilitate the implementation of Union restrictive measures where necessary to prevent, detect or investigate criminal offences related to the violation of such measures.

Article 2 defines the scope by listing the criminal offences to which the rules set out in this Directive should apply. This list includes the crimes listed in Article 83 TFEU and the crimes that are harmonised at EU level. Furthermore, the article on the scope includes a number of crimes that are typically carried out by organised crime groups. In addition, it includes offences related to the violation of Union restrictive measures. For the purposes of tracing and

identification of property, offences punishable by a maximum imprisonment term of at least one year are covered.

Article 3 defines the key terms used in the asset recovery process, retaining the definitions currently included in the Confiscation Directive and adding new definitions for instance in relation to tracing investigations as well as the notion of “targeted financial sanctions” and “Union restrictive measures”. References to the term “asset” are to be understood in a non-technical manner. For the purposes of provisions on the tracing and identification, freezing, confiscation and management of property within the framework of proceedings in criminal matters the terms “proceeds”, “instrumentalities”, and “property” are used and defined.

*Provisions on the tracing and identification of assets (Chapter II, Articles 4 to 10)*

The provisions in Chapter II are based on Article 87(2) TFEU. As such, the provisions aim at the tracing and identification of property in criminal matters as well as at facilitating the implementation of Union restrictive measures where necessary to prevent, detect or investigate criminal offences related to the violation of such measures.

Article 4 requires Member States to ensure asset tracing investigations with a view to facilitate cross-border cooperation, in particular whenever there is a suspicion that a criminal offence may lead to substantial economic profits and in order to prevent, detect or investigate the violation of Union restrictive measures.

Article 5 sets out the obligation for Member States to establish at least one asset recovery office, in line with the current asset recovery offices Council Decision. In addition to the current rules, this provision sets out the specific tasks of the asset recovery offices, including the exchange of information with other asset recovery offices in other Member States also in the context of preventing, detecting and investigating the violation of Union restrictive measures. This article also provides the asset recovery offices with the task of tracing and identification of property of persons and entities subject to Union restrictive measures. In this context, asset recovery offices would also have the power to take immediate action to temporarily freeze the property in question.

Article 6 sets out the information that Member States should make directly accessible to the asset recovery offices in order to ensure a swift reaction to the information requests from other Member States, an aspect not regulated in the asset recovery offices’ Council Decision.

Article 7 provides specific safeguards in relation to access to information. This provision aims at ensuring that national authorities access the information on a need-to-know basis within necessary security and confidentiality rules.

Article 8 establishes a monitoring framework for access to information by the competent national authorities. The objective of this provision is to prevent any misconduct or inadequate access to information.

Article 9 regulates the exchange of information among asset recovery offices, both spontaneously and upon request, providing further details in comparison with the asset recovery offices Council Decision, including by setting out the purposes of such exchanges,

the minimum information to be included in cross-border requests, the channel for exchanging information (SIENA) and grounds for refusal.

Article 10 sets out the time limits to respond to information requests, without modifying the deadlines set in the asset recovery offices Council Decision, which refers to the deadlines of the Council Framework Decision 2006/960/JHA<sup>17</sup>. This provision regulates two scenarios, namely normal requests that should be responded to within seven days and urgent requests that should be dealt with within eight hours.

*Provisions on the freezing and confiscation of assets (Chapter III, Articles 11 to 18).*

The provisions on freezing and confiscation are based on Article 83 TFEU. As such, the provisions in Chapter III shall apply to criminal offences under the scope of Article 2(1), 2(2), 2(3) and 2(4) of this Directive but not to freezing under Union restrictive measures.

Article 11 requires Member States to take the necessary measures to ensure that illicit assets can be frozen quickly and, where necessary, with immediate effect to avoid their dissipation. These measures include – in addition to the measures set out in the Confiscation Directive - the possibility for asset recovery offices to take temporary urgent freezing measures until a formal freezing order can be issued. This article also provides for a specific safeguard establishing that the freezing order shall remain in place only for as long as necessary and that the property should be returned immediately if it is not confiscated.

Article 12 requires Member States to enable the confiscation of instrumentalities and proceeds of crime following a final conviction and to enable the confiscation of property of equivalent value to the proceeds of crime (“standard and value confiscation” as provided for under existing EU rules).

Article 13 requires Member States to enable the confiscation of properties transferred by the accused or suspected person to a third party for the purpose of avoiding confiscation (“third party confiscation” as provided for under the Confiscation Directive). Such confiscation is only justified where the third party knew or ought to have known that the transfer of the property was made for that purpose. The provisions set out circumstances that are relevant in making this assessment.

Article 14 requires Member States to enable the confiscation of property of a convicted person when the national court of a Member State is convinced that that the property derives from a criminal activity (“extended confiscation”). In its assessment, the national court should take into consideration all circumstances of the case, including the fact that the value of the property is disproportionate to the lawful income of the convicted person. Compared to the Confiscation Directive, this possibility should be available for all crimes within the scope of the Directive.

Article 15 requires Member States to provide for the possibility of confiscation where all the evidence for a criminal offence is present, but a conviction is not possible due to a limited

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<sup>17</sup> Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (OJ L 386, 29.12.2006, p. 89).

number of circumstances. These circumstances include, in addition to illness and absconding (already included in the Confiscation Directive), the death of the suspected or accused person, as well as immunity or amnesty, or the fact that the time limits prescribed by national law expired. The scope in terms of offences is limited to those with a maximum imprisonment term of at least 4 years.

Article 16 introduces a new confiscation possibility where assets are frozen based on suspicion of involvement in organised crime activities and where a confiscation under other provisions of the Directive is not possible. It should allow for the confiscation of assets only where the national court is convinced that the assets in question derive from criminal activities. This finding must be based on a comprehensive assessment of all the circumstances of the case, including if the value of the property is disproportionate to the lawful income of the owner. The scope in terms of offences is limited to those with a maximum imprisonment term of at least 4 years.

Article 17 requires Member States to ensure post-conviction asset tracing investigations to ensure the effective enforcement of a confiscation order. Moreover, this article requires Member States to consider the use of confiscated properties for public or social purposes. Both provisions are based on relevant provisions in the Confiscation Directive.

Article 18 aims at ensuring that the right to compensation for victims is not affected by the confiscation measures, similar to the relevant provision in the Confiscation Directive.

#### *Provisions on the management of assets (Chapter IV, Articles 19 to 21)*

The provisions on management are based on Article 83 TFEU. As such, the provisions in Chapter IV shall apply to the criminal offences under the scope of Article 2(1), 2(2), 2(3) and 2(4) of this Directive but not to freezing under Union restrictive measures.

Article 19 requires Member States to ensure that frozen or confiscated assets are managed efficiently until their disposal. Further clarifying the scope of this general requirement (similar to the relevant provision in the Confiscation Directive), the objective of this provision is to preserve the value of the properties and minimise management costs. To achieve this objective, Member States are required to carry out a preliminary assessment of the costs that will be incurred in managing the properties (“pre-seizure planning”).

Article 20 requires Member States to provide for the possibility to transfer or sell frozen assets before the confiscation order is issued (“interlocutory sale”). The provision further specifies the scope of this general obligation (as set out in the Confiscation Directive), requiring interlocutory sales to be undertaken in certain circumstances to avoid the loss of value of property, or that management costs become disproportionate. This requirement is subject to a number of safeguards to protect the legitimate interests of the affected person. These safeguards include, in addition to the general safeguards, the right to be heard before the interlocutory sale decision is taken. These rules 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. In addition, Article 20 includes the possibility to charge the costs for the management of frozen assets to the beneficial owner.

Article 21 requires Member States to establish at least one asset management office, and sets out the tasks for asset management offices in a more precise manner compared to the relevant provisions in the Confiscation Directive.

*Provisions on safeguards (Chapter V, Articles 22 to 24)*

The provisions on safeguards are based on Article 82(2) TFEU. As such, the provisions in Chapter V shall apply to the criminal offences under the scope of Article 2(1), 2(2), 2(3) and 2(4) of this Directive.

Safeguards under this section are broadly based on the current provisions in the Confiscation Directive, while providing further clarifications increasing the effectiveness of the safeguards and updating the safeguards to the new data protection rules.

Article 22 aims to ensure that affected persons are informed of the freezing and confiscation measures adopted including the reasons for their adoption.

Article 23 sets out more specific requirements ensuring that effective legal remedies against measures taken on the basis of the provisions of this Directive are available. This includes also the right of access to a lawyer.

*Provisions on the Asset Recovery Strategic Framework (Chapter VI, Articles 24 to 27)*

Most provisions under this section are new, aiming at ensuring that the overall asset recovery and confiscation process is more effective.

Article 24 requires Member States to adopt a national strategy on asset recovery and to update it every five years. The national strategy should be a tool for Member States to set out measures to enhance the efforts of national authorities involved in the asset recovery process, ensure and facilitate cooperation and coordination and to measure progress. For that purpose, the strategy should set out objectives, needs in terms of resources (including training) as well as cooperation mechanisms between the relevant national authorities.

Article 25 requires Member States to ensure that in particular asset recovery offices and asset management offices have the necessary resources to carry out their tasks.

Article 26 requires Member States to set up a centralised registry containing relevant information on frozen, managed, and confiscated assets. Asset recovery offices, asset management offices, as well as other authorities tasked with the tracing and identification or management of assets should be able to access this registry.

Article 27 requires Member States to collect statistical data on the measures taken on the basis of this Directive and to communicate such data to the Commission on an annual basis. Reliable and complete statistical data is essential for a proper assessment of the effectiveness of measures adopted under this Directive. The article empowers the Commission, where necessary, to adopt delegated acts on the information to be collected and methodology.

*Provisions on the cooperation between asset recovery offices and EU bodies, Agencies and third countries (Chapter VII, Articles 28 and 29)*

Provisions on cooperation are new and reflect the aim to provide for a comprehensive legal framework covering all relevant aspects of asset recovery.

Article 28 aims at ensuring cooperation between asset recovery offices and the European Public Prosecutor's Office, Europol and Eurojust, for the purpose of facilitating the tracing and identification of property that may be subject to confiscation. The article also provides that asset recovery offices will need to cooperate with Europol and Eurojust where necessary to prevent, detect or investigate offences related to the violation of the Union restrictive measures.

Article 29 aims at ensuring cooperation between asset recovery offices as well as asset management offices and their counterparts in third countries. Cooperation between asset recovery offices extends to situations where necessary to prevent, detect or investigate offences related to the violation of Union restrictive measures.

*Final provisions (Chapter VIII, Articles 30 to 37)*

This section deals with a number of legal and technical issues. Firstly, it confers to the Commission the power to adopt delegated acts subject to conditions laid down in the article (Article 30). Secondly, it requires Member States to communicate to the Commission the designated competent authorities as well as relevant contact points pursuant to Article 5 and Article 21 of this Directive (Article 31). Moreover, this chapter includes a provision on the transposition into national law (Article 32) and provides for the obligation for the Commission to report to the European Parliament and the Council on the implementation as well as subsequent evaluation of this Directive (Article 33). It clarifies the relationship to other legal instruments (Article 34) and provides for the replacement of five existing legal acts (Article 35); only Denmark would remain bound by the asset recovery offices Council Decision to ensure that cooperation with Danish asset recovery offices will continue to be governed by the relevant EU acquis. Finally, this section includes rules on the entry into force (Article 36) and the addressees (Article 37).



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 Committee<sup>18</sup>,

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.
- (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.
- (4) The current Union legal framework on tracing and identification, freezing, confiscation and management of proceeds, instrumentalities and property, and on asset

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<sup>18</sup> OJ C , , p. .

recovery offices, consists of Directive 2014/42/EU of the European Parliament and of the Council<sup>19</sup>, Council Decision 2007/845/JHA<sup>20</sup> and Council Framework Decision 2005/212/JHA<sup>21</sup>. 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) 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 orders issued without a final conviction. Proceedings in criminal matters could also encompass criminal investigations by the police and other law enforcement authorities. 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, 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 pre-condition 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

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<sup>19</sup> 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).

<sup>20</sup> 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).

<sup>21</sup> 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).

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 Council<sup>22</sup>. 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

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<sup>22</sup> 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).

competent authorities to launch asset tracing from the moment there is a suspicion of criminal activities that are likely to generate substantial economic benefits.

- (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.
- (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.
- (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 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. 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 Council<sup>23</sup>. 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 Council<sup>24</sup> and to beneficial ownership information pursuant to Directive (EU) 2015/849 of the European Parliament and of the Council<sup>25</sup>.

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<sup>23</sup> 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).

<sup>24</sup> 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

- (18) To ensure the security of the information shared between asset recovery offices, 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 Council<sup>26</sup>, should be mandatory for all communications among asset recovery offices under this Directive. 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.
- (21) Given the limitation on the right to property imposed 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.
- (23) In addition to confiscation measures that allow authorities to deprive criminals of the proceeds or instrumentalities directly stemming from crimes, 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 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, 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.

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prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA (OJ L 186, 11.7.2019, p. 122).

<sup>25</sup> 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).

<sup>26</sup> 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).

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 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.
- (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 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 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.
- (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.
- (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 committed within the framework of a criminal organisation, these criminal offences are liable to give rise to substantial economic benefits and the court is satisfied that the frozen property is derived from criminal 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. While it should not be a precondition for the national court to be satisfied that a criminal offence has been committed, the court must be satisfied that the property in question is derived from criminal offences. When determining whether or not the property in question derived from criminal activities, the national courts should take into account all relevant circumstances of the case, including the fact that the property is substantially disproportionate to the lawful income of the owner. 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.

- (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 include a systematic assessment of how to best preserve and optimise the value of property before the adoption of freezing measures, also known as pre-seizure planning.
- (30) In circumstances where 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 taking such a decision, the owner of the property should have the right to be heard. Member States should consider the possibility to charge the costs of the management of frozen property to the beneficial owner, for instance in alternative to the ordering of an interlocutory sale, and in case of final conviction. These rules, including the possibility for the costs for the management of frozen property to be charged to the 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 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. Without prejudice to the Member States' internal administrative structures, asset management offices should either be the sole authority managing frozen or confiscated property, or should provide support to decentralised actors according to national management set-ups, and support relevant authorities with pre-seizure planning.
- (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, confiscation, and interlocutory sales orders should be communicated to the affected party without delay. The purpose of communicating those 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 order concerned. The affected party should have the effective possibility to challenge the freezing, 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. The same possibility should be provided for the owner affected by an order to sell the property before confiscation.

- (35) When implementing this Directive, and in order to ensure the proportionality of confiscation measures, Member States should provide that confiscation of property is not ordered to the extent it would be disproportionate to the offence in question. Furthermore, Member States should provide for the possibility that, in exceptional circumstances, confiscation 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.
- (36) This Directive should be implemented without prejudice to Directive 2010/64/EU of the European Parliament and of the Council<sup>27</sup>, Directive 2012/13/EU of the European Parliament and of the Council<sup>28</sup>, Directive 2012/29/EU of the European Parliament and of the Council<sup>29</sup>, Directive 2013/48/EU of the European Parliament and of the Council<sup>30</sup>, Directive (EU) 2016/343/EU of the European Parliament and of the Council<sup>31</sup>, Directive 2016/800/EU of the European Parliament and of the Council<sup>32</sup> and Directive (EU) 2016/1919 of the European Parliament and of the Council.<sup>33</sup>
- (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.

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<sup>27</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).

<sup>28</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1).

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

<sup>30</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).

<sup>31</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1).

<sup>32</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1).

<sup>33</sup> Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4.11.2016, p. 1).

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.

- (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. 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-Making<sup>34</sup>. 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.

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<sup>34</sup> OJ L 123, 12.5.2016, p. 1.

- (43) To provide a more comprehensive overview of the action taken to freeze and confiscate, Member States should establish 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 at national level for the purpose of facilitating the management of the specific file. The aim of establishing centralised registries is 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.
- (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.
- (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. 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.

- (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.
- (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/JHA<sup>35</sup>, Council Framework Decision 2001/500/JHA<sup>36</sup>, 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 XX/XX/20XX.

HAVE ADOPTED THIS DIRECTIVE:

## **CHAPTER I**

### **GENERAL PROVISIONS**

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<sup>35</sup> 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).

<sup>36</sup> 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).

## 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.
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/JHA<sup>37</sup>;
  - (b) terrorism, as defined in Directive (EU) 2017/541 of the European Parliament and of the Council<sup>38</sup>;
  - (c) trafficking in human beings, as defined in Directive 2011/36/EU of the European Parliament and of the Council<sup>39</sup>;
  - (d) sexual exploitation of children and child pornography, as defined in Directive 2011/93/EU of the European Parliament and of the Council<sup>40</sup>;
  - (e) illicit trafficking in narcotic drugs and psychotropic substances, as defined in Council Framework Decision 2004/757/JHA<sup>41</sup>;
  - (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

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<sup>37</sup> Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ L 300, 11.11.2008, p. 42).

<sup>38</sup> 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).

<sup>39</sup> 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).

<sup>40</sup> 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).

<sup>41</sup> 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).

Communities or officials of the Member States of the European Union<sup>42</sup> and in the Council Framework Decision 2003/568/JHA<sup>43</sup>;

(g) money laundering, as defined in Directive (EU) 2018/1673 of the European Parliament and of the Council<sup>44</sup>;

(h) forgery of means of payment, as defined in Directive (EU) 2019/713 of the European Parliament and of the Council<sup>45</sup>;

(i) counterfeiting currency, including the euro, as defined in Directive 2014/62/EU of the European Parliament and of the Council<sup>46</sup>;

(j) computer-related crime, as defined in Directive 2013/40/EU of the European Parliament and of the Council<sup>47</sup>;

(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 crime<sup>48</sup>;

(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 Council<sup>49</sup>;

(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 Council<sup>50</sup>, as well as offences related to ship pollution as defined in Directive 2005/35/EC as amended by Directive 2009/123/EC<sup>51</sup>;

(n) facilitation of unauthorised entry and residence, as defined in Council Framework Decision 2002/946/JHA<sup>52</sup>, and Council Directive 2002/90/EC<sup>53</sup>;

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<sup>42</sup> OJ C 195, 25.6.1997, p. 1.

<sup>43</sup> 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).

<sup>44</sup> 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).

<sup>45</sup> 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).

<sup>46</sup> 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).

<sup>47</sup> 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).

<sup>48</sup> OJ L 89, 25.3.2014, p. 7.

<sup>49</sup> 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).

<sup>50</sup> 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).

<sup>51</sup> 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).

<sup>52</sup> 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).

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;
- (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.

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;

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<sup>53</sup> Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 17).

- (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,<sup>54</sup> 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;
- (10) ‘beneficial owner’ means a beneficial owner as defined in Article 3, point (6), of Directive 2015/849/EU<sup>55</sup>;
- (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;
- (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;

## 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.

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<sup>54</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>55</sup> 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).



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, 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 have immediate and direct access to the following information to the extent that 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 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.

#### *Article 7*

##### **Conditions for access to information by asset recovery offices**

1. Access to information pursuant to Article 6 shall be performed 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 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.

## *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.

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, 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 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 for exchanging information pursuant to this Article.

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.

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) 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.

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 Article 12.

2. Freezing measures shall include immediate action to be taken when necessary in order to preserve the property.
3. Member States shall enable asset recovery offices 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.
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 orders pursuant to paragraphs 1, 2, 3 and 4 are issued by a competent authority and 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 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 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 following a final conviction, which may also result from proceedings in absentia.

#### *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 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 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 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.

#### *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, 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 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 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 shall be limited 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 16*

### **Confiscation of unexplained wealth linked to criminal activities**

1. Member States shall take the necessary measures to enable the confiscation of property, where confiscation is not possible pursuant to Articles 12 to 15 and the following conditions are fulfilled:

(a) the property is frozen in the context of an investigation into 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;

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

2. When determining whether the frozen property is derived from criminal 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 of the owner of the property.

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

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.

## *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 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’ 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.
2. Member States shall ensure that, before issuing a freezing order within the meaning of Article 11 paragraph 1, competent authorities responsible for the management of frozen and confiscated property 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.

## *Article 20*

### **Interlocutory sales**

1. Member States shall ensure that property frozen pursuant to Article 11 paragraph 1 can be transferred or sold before the issuing of a confiscation order in one or more of the following circumstances:
  - (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 owner of the property are taken into account when issuing an interlocutory sale order, including whether the property to be sold is easily replaceable. With the exception of cases of absconding, Member States shall ensure that the owner of the property that may be subject to an interlocutory sale is notified and heard before the sale. The 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 returned to persons convicted 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 asset management office for the purpose of the management of frozen and confiscated property.
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;

(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 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 setting out the reasons for the measure.

#### *Article 23*

#### **Legal remedies**

1. Member States shall ensure that the persons affected by the measures provided for under this Directive have the right to defence, to an effective remedy, and to a fair trial in order to uphold their rights.

2. Member States shall provide for the effective possibility for the person whose property is affected to challenge the freezing order pursuant to article 11 before a court, in accordance with procedures provided for in national law. Where the freezing order has been taken by a competent authority other than a judicial authority, national law shall provide that such 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 and the relevant circumstances of the case 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.

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 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.

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, Member States shall put 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 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, including details that enable the identification of the property;

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

(c) the owner of the property, including the beneficial owner, where such information is available;

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

(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.

## **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, 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 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 to facilitate cooperation in cross-border cases.

3. By [... 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 the contact points referred to in paragraphs 1 and 2 respectively.

4. By [...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 + 1 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 [*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 [*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 Council<sup>56</sup>.

#### *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**

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<sup>56</sup> 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).

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.

#### *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*



Brussels, 25.5.2022  
COM(2022) 247 final

2022/0171 (APP)

Proposal for a

**COUNCIL DECISION**

**on adding the violation of Union restrictive measures to the areas of crime laid down in  
Article 83(1) of the Treaty on the Functioning of the European Union**



## **EXPLANATORY MEMORANDUM**

### (1) CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

#### (1) Introduction

Restrictive measures are an essential tool for the promotion of the objective of the Common Foreign and Security Policy ('CFSP'), as set out in Article 21 of the Treaty on European Union ('TEU'). These objectives include safeguarding the Union's values, maintaining international peace and security as well as consolidating and supporting democracy, the rule of law and human rights.

For the sake of preserving these values, the Union may impose restrictive measures against third countries, entities or individuals. These measures include targeted individual measures, i.e., targeted financial sanctions (asset freezes) and restrictions on admissions (travel bans), as well as sectoral measures, i.e. arms embargoes or economic and financial measures (e.g. import and export restrictions, restrictions on the provision of certain services, such as banking services)<sup>1</sup>. Preserving international peace and security, is of particular pertinence in the current context of Russia's invasion of Ukraine. The Union has put in place a series of restrictive measures against Russian and Belarusian individuals and companies, some of which date back to 2014. In this context, in order to enhance Union-level coordination in the enforcement of these restrictive measures, the Commission set up a 'Freeze and Seize' Task Force<sup>2</sup>. Besides ensuring coordination among Member States and Union Agencies such as Europol and Eurojust, it seeks to explore the interplay between restrictive measures and criminal law measures.

Currently, the Union has over forty regimes of restrictive measures in place. Some of these implement restrictive measures by the United Nations; others are adopted autonomously by the Union. In addition to regimes addressing country-specific situations, the Union has also adopted horizontal regimes targeting proliferation and use of chemical weapons, cyberattacks, human rights violations and terrorism<sup>3</sup>. Restrictive measures are binding on Union Member States and on any person or entity under the jurisdiction of the Member States (EU operators)<sup>4</sup>. Inconsistent enforcement of restrictive measures undermines their efficacy and

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<sup>1</sup> The Council adopts restrictive measures. The Council first adopts a CFSP Decision under Article 29 TEU. The measures envisaged in the Council Decision are implemented either at Union or at national level. It has been the practice so far that measures such as arms embargoes or restrictions on admission are implemented directly by the Member States, which are legally bound to act in conformity with CFSP Council Decisions. Other measures interrupting or reducing, in part or completely, economic relations with a third country as well as individual measures freezing funds and economic resources, prohibiting the making available of funds and economic resources, are implemented by means of a Regulation adopted by the Council, acting by qualified majority, on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, under Article 215 TFUE. Anti-circumvention provisions can be found in both types of acts.

<sup>2</sup> Enforcing sanctions against listed Russian and Belarusian oligarchs: Commission's "Freeze and Seize" Task Force steps up work with international partners, Press release European Commission, 17.03.2022, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_1828](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1828); 'Freeze and Seize Task Force': Almost €30 billion of assets of Russian and Belarusian oligarchs and entities frozen by the EU so far, Press release European Commission, 08.04.2022, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_2373](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2373).

<sup>3</sup> For an overview, see the EU sanctions Map, available at <https://www.sanctionsmap.eu/#/main>.

<sup>4</sup> EU restrictive measures apply within the jurisdiction (territory) of the Union: to EU nationals in any location: to companies and organisations incorporated under the law of a Member State- including branches of EU companies in third

the Union's ability to speak with one voice<sup>5</sup>. The implementation and enforcement of Union restrictive measures is primarily the responsibility of Member States. The competent authorities in the Member States have to assess whether there has been a breach of the relevant Council Regulation adopted under Article 215 of the Treaty on the Functioning of the European Union ('TFEU') and to take adequate measures.

In this regard, Union Regulations systematically include a provision requiring Member States to adopt national rules providing for effective, proportionate and dissuasive penalties for infringements of the provisions of those Regulations<sup>6</sup>.

These Regulations generally include:

- the restrictive measures;
- the anti-circumvention clause, which prohibits knowing and intentional participation in activities that seek to circumvent the restrictive measures in point<sup>7</sup>; and
- other obligations, in particular to report on steps taken to implement the restrictive measures (e.g. reporting to authorities the amount of assets that have been frozen).

Article 215 TFEU provides a legal basis for the Council to adopt the 'necessary measures' in the case of an adoption of Union restrictive measures. However, the legal basis for the adoption of restrictive measures does not allow for the approximation of criminal law definitions and the types and levels of criminal penalties<sup>8</sup>.

As will be discussed in more detail in the sections below, in the absence of Union-level harmonisation, national systems differ significantly as far as criminalisation of the violation of Council Regulations on Union restrictive measures ('violation of Union restrictive measures') is concerned. Equally, criminal penalty systems differ substantially.

Against this background, the Commission proposes to add the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union ('TFEU'). Once the Council reaches agreement and the European Parliament grants its consent to add the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the TFEU, the Commission will be in a position to propose a Directive under the ordinary legislative procedure, which could approximate the definition of criminal offences and sanctions.

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countries; on board aircraft or vessels under Member States' jurisdiction; European Commission, Frequently asked questions: Restrictive measures (sanctions), available at [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_22\\_1401](https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_1401).

<sup>5</sup> Communication from the Commission, The European economic and financial system: fostering openness, strength and resilience, COM(2021) 32 final of 19.01.2021, section 5 (strengthening the implementation and enforcement of EU sanctions), p. 16, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0032&from=EN>; In the same Communication the Commission notes that the implementation [of EU restrictive measures] is not as uniform across the EU as it ought to be. This creates distortions in the Single Market as EU companies, including EU subsidiaries of foreign companies, can circumvent prohibitions. This also creates uncertainty among operators. As cited, inconsistent enforcement undermines the efficacy of [restrictive measures] and the EU's ability to speak with one voice. Among other initiatives, the strategy calls for further coordination work between the Commission and Member States to ensure that national penalties for breaching EU restrictive measures are effective, proportionate and dissuasive.

<sup>6</sup> For an example, see Article 8 of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, consolidated text available at [EUR-Lex - 02014R0833-20220413 - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/eli/reg/2014/833/consolidated).

<sup>7</sup> It is noted that that this clause is also applicable if the restrictive measures have not been breached; it is enough to participate in schemes created to that end.

<sup>8</sup> The approximation of criminal definitions and sanctions cannot take place on the non-legislative legal basis of Article 29 TEU, Article 215 TFEU.

In view of the urgent need to hold listed individuals and entities involved in the violation of Union restrictive measures accountable, today the Commission is also adopting a Communication, which has an annex that sets out the main elements that a future Directive on criminal sanctions for the violation of Union rules on restrictive measures could contain.<sup>9</sup>

The sections below examine the problems the current proposal seeks to tackle, together with their underlying causes and the negative consequences caused by the current state of play. This will be followed by a presentation of the objectives of the proposal, and its added value, including the reasons why it complies with the criteria for adding an area of crime to Article 83(1) TFEU.

## (2) Problems the proposal addresses

As the adoption of Union restrictive measures has intensified over the last decades<sup>10</sup>, so too have the schemes to evade them, including by those on a restrictive measures list that are well resourced and able to avail themselves of “facilitators” (lawyers, notaries etc.) and “tools” (complex legal structures to hide beneficial ownership of the assets for instance) to escape their application.

In this regard, a 2021 report by the European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (‘Genocide Network’)<sup>11</sup> is of particular relevance. Based on a comparative assessment of the situation in the Member States, the Genocide Network report points out that in practice, very few individuals or legal persons responsible for the violation of Union restrictive measures are effectively held accountable<sup>12</sup>. However, it also notes that ‘a positive trend can be observed recently in the number of enforcement actions launched and the rise in penalties imposed by certain national authorities’<sup>13</sup>.

Despite the positive trends in some Member States, there seem to be only a few in which there are ongoing judicial proceedings related to the violation of Union restrictive measures<sup>14</sup>. This can serve as an indication that insufficient priority is given to investigating and prosecuting the violation of Union restrictive measures in many Member States. In addition, law enforcement authorities face significant hurdles due to the specific category of offenders, victims and the complex nature of the (combination of) offences concerned.

Violations of Union restrictive measures often have a cross-border nature. For example, a company may buy equipment via a foreign intermediary, knowing that the true vendors are

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<sup>9</sup> Communication from the Commission to the European Parliament and the Council, Towards a Directive on criminal penalties for the violation of Union restrictive measures, COM (2022) 249 of 25.05.2022.

<sup>10</sup> See the EU Sanctions Map, supra note 1.

<sup>11</sup> Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (2002/494/JHA) Eurojust, Genocide Network, see <https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-network?msclid=de6a1668cf6011eca5681e93e0033be2>.

<sup>12</sup> Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, p. 4. An overview of the relevant legislation from Member States and Network Observer States is provided in the annex to the expert report, see [https://www.eurojust.europa.eu/sites/default/files/assets/genocide\\_network\\_report\\_on\\_prosecution\\_of\\_sanctions\\_restrictive\\_measures\\_violations\\_23\\_11\\_2021.pdf](https://www.eurojust.europa.eu/sites/default/files/assets/genocide_network_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf); In view of a presentation in the Council Working Party on Judicial Cooperation in Criminal Matters (COPEN) the report was also published in Council doc. 7274 of 16 March 2022.

<sup>13</sup> Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, p. 13.

<sup>14</sup> For a selection of cases see Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, p. 14.

countries, entities and individuals subject to restrictive measures<sup>15</sup>. In the realm of asset freezes, for instance, an international bank may facilitate the transfer of a “frozen” yacht owned by a listed individual. Such a prohibited transfer could involve a law firm, which aids in the commission of the crime by drafting the papers for the sale of the yacht and, in some cases, a corrupt government official who allows for its change in ownership. Money laundering and/or shell companies might also be accessory means to conceal the origins of the payment for the yacht.

As there are often no direct victims of the violation of restrictive measures, their investigation and prosecution depend on detection by national competent authorities. Furthermore, reports by whistleblowers<sup>16</sup> or complaints by civil society organisations<sup>17</sup> play an important role in reporting violations of restrictive measures.

As regards the interaction of the Member States’ approach towards the criminalisation of violations of Union restrictive measures with confiscation measures, it should be pointed out that in most Member States, confiscation is only possible based on a criminal conviction, or at least established links with criminal activities. Nevertheless, even if in several Member States the violation of restrictive measures has been criminalised, differences among Member States can lead to a fragmented approach in cross-border cases.

### (3) Underlying causes of the problems

Those involved in illicit practices concerning Union restrictive measures may profit from the fact that Member States have very different definitions and penalties for the violation of Union restrictive measures under their administrative and/or criminal law<sup>18</sup>. Some Member States use broad definitions, such as ‘breach of UN and EU sanctions’ or ‘breach of EU regulations’<sup>19</sup>. Other Member States have more detailed provisions in place, for instance providing a list of prohibited conduct<sup>20</sup>.

Based on the replies received to a questionnaire circulated by the Genocide Network, its further consultations<sup>21</sup> and additional research carried out by the Commission in view of this proposal, it can be concluded that in 13 Member States the violation of Union restrictive measures can amount to either an administrative or criminal offence. The criteria according to

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<sup>15</sup> Idem, p. 19-20.

<sup>16</sup> EU Sanctions Whistle-blower Tool, available at: <https://eusanctions.integrityline.com/frontpage>.

<sup>17</sup> An example is the *Lafarge* case based on a criminal complaint by two civil society organisations, together with 11 former Syrian employees of Lafarge discussed in Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, section 4.2., p. 17; case number 19-87.367 - Cour de Cassation (France), 7 September 2021, English translation available at [https://www.eurojust.europa.eu/sites/default/files/assets/21.09.07\\_cour\\_de\\_cassation\\_decision.pdf](https://www.eurojust.europa.eu/sites/default/files/assets/21.09.07_cour_de_cassation_decision.pdf).

<sup>18</sup> Idem, section 5, p. 22.

<sup>19</sup> For instance, Article 459 of the French Customs Code (*Code des douanes*) provides that ‘any person who infringes or attempts to infringe upon economic and financial restriction measures decided (i) at EU level on the basis of Article 215 of the TFEU or (ii) on the basis of international agreements ratified by France faces up to five years of imprisonment. Legal persons may also be prosecuted for such offences.’, see Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, annex; For the original version in French see <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006071570/?msclkiid=ad92a692cece11ec9180daeb34a1af50>; Belgium, Cyprus, the Czech Republic and Lithuania have similar provisions in place, see Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, annex.

<sup>20</sup> For example Article 18(2) and 19(5) of the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*), see [https://www.gesetze-im-internet.de/awg\\_2013/?msclkiid=77c4bc27ced011ecad0f49edf9add31e](https://www.gesetze-im-internet.de/awg_2013/?msclkiid=77c4bc27ced011ecad0f49edf9add31e). Other Member States where national law goes beyond simply providing for the criminalisation of violations of Union restrictive measures are, for instance, Hungary and Slovenia, see Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, section 5, annex.

<sup>21</sup> Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, annex.

which the conduct falls within one or the other regime are different in each Member State, but they are usually related to their gravity (serious nature), or determined in qualitative (intent, serious negligence) or quantitative (damage) terms<sup>22</sup>. In 12 Member States, the violation of Union restrictive measures is a criminal offence only. However, in two Member States, the specific offence of violation of Union restrictive measures can only result in administrative penalties<sup>23</sup>.

**Table: Categorisation of the violation of Union restrictive measures**

<b>Categorisation of the violation of Union restrictive measures</b>	<b>Member States</b>
The violation of restrictive measures is either criminal or administrative offence	BE, BG, CZ, DE, EE, IE, EL, IT, LT, AT, PL, RO, SI
The violation of restrictive measures is a criminal offence	DK, FR, HR, CY, LV, LU, HU, MT, NL, PT, FI, SE
The violation of restrictive measures is an administrative offence	ES, SK

As regards prison sentences, in 14 Member States the maximum length of imprisonment is between 2 and 5 years whereas in eight Member States, maximum sentences between 8 and 12 years are possible<sup>24</sup>. The maximum fine that can be imposed for the violation of Union restrictive measures – either as a criminal or as an administrative offence – varies greatly across Member States, ranging from EUR 1200 to EUR 500,000<sup>25</sup>. Fourteen Member States provide for liability of legal persons for the violation of Union restrictive measures<sup>26</sup>. Twelve Member States provide for administrative penalties, notably fines, which may be imposed on legal persons when their employees (or at least management) violate sanctions<sup>27</sup>. Maximum fines for legal persons range from EUR 133,000 to 37, 5 million<sup>28</sup>.

Finally, the violation of Union restrictive measures is punished by means of criminal law in a number of third countries as well, such as Canada<sup>29</sup> and the United States ('US'). The US Department of Justice has criminal jurisdiction over wilful violation of restrictive measures in accordance with the International Emergency Economic Powers Act ('IEEPA')<sup>30</sup> and the Trading with the Enemy Act.<sup>31</sup> Pursuant to Section 206 of the IEEPA, criminal penalties for wilful violation of restrictive measures include a maximum 20-year term of imprisonment and

<sup>22</sup> Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, section 5.1., p. 22.

<sup>23</sup> Idem.

<sup>24</sup> Idem, section 5.2., p.23.

<sup>25</sup> Idem, section 5.1., p.24.

<sup>26</sup> Idem, based on the report of the Genocide Network and further investigation by the Commission.

<sup>27</sup> Idem, section 5.3., p.24.

<sup>28</sup> Idem, section 5.1., p.24.

<sup>29</sup> Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, p. 13.

<sup>30</sup> 50 U.S.C., paragraphs 1701-06(2011); Congressional Research Service, *The International Emergency Economic Powers Act: Origins, Evolution and Use*, March 2022, available at <https://crsreports.congress.gov/product/pdf/R/R45618/8>.

<sup>31</sup> 50 U.S.C., paragraphs 4301-41 (2009).

a maximum USD 1 million fine<sup>32</sup>. US authorities have imposed heavy criminal fines for the violation of restrictive measures.

#### (4) Negative consequences of the status quo

In the absence of law enforcement, and judicial authorities having the right tools and resources available to prevent, detect, investigate and prosecute the violation of Union restrictive measures, designated individuals and legal persons whose assets are frozen continue to be able to access their assets in practice and support regimes that are targeted by Union restrictive measures.

Moreover, the fact that Member States have very different definitions of, and heterogeneous penalties for, the violation of Union restrictive measures under their administrative and/or criminal law indicates that the same infringement might be punished with different penalties and different enforcement levels. Politically, this weakens the enforcement of Union restrictive measures and undermines the credibility of the Union's objectives.

Finally, the proceeds generated by the exploitation of goods and natural resources traded in violation of Union restrictive measures may also allow the entities or individuals targeted by those restrictive measures to purchase arms and weapons with which they could perpetrate their crimes<sup>33</sup>. The violation of import restrictions could furthermore contribute to the illegal exploitation of goods and natural resources in the country targeted by those restrictive measures<sup>34</sup>, with subsequent environmental and social harm.

#### (5) Objectives of the proposal

Against this background, and in view of the urgent need to end impunity for violations of restrictive measures following Russia's invasion of Ukraine, this proposal aims at initiating the procedure set out in Article 83(1), third subparagraph TFEU. In accordance with this procedure, based on developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in Article 83(1) TFEU. These should be areas of 'particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'<sup>35</sup>. The Council acts unanimously after obtaining the consent of the European Parliament.

Article 83(1) TFEU currently does not allow for establishing minimum rules concerning the definition and penalties for any violation, including circumvention, of Union restrictive measures since the violation of Union restrictive measures as such is not yet covered by the areas of crimes listed in that Article. The areas of crime currently listed are terrorism, trafficking in human beings, sexual exploitation of children, drug trafficking, arms trafficking,

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<sup>32</sup> IEEPA, section 206: § 510.701 Penalties: '(a) Section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705) (IEEPA) is applicable to violations of the provisions of any license, ruling, regulation, order, directive, or instruction issued by or pursuant to the direction or authorization of the Secretary of the Treasury pursuant to this part or otherwise under IEEPA (...) (3) A person who wilfully commits, wilfully attempts to commit, wilfully conspires to commit, or aids or abets in the commission of a violation of any license, order, regulation, or prohibition may, upon conviction, be fined not more than \$1,000,000, or if a natural person, be imprisoned for not more than 20 years, or both.'

<sup>33</sup> Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, p. 14.

<sup>34</sup> *Idem*, p. 5.

<sup>35</sup> Article 83(1) TFEU.



corruption, money laundering, counterfeiting of means of payment, computer crime and organised crime. The violation of Union restrictive measures may however be related to criminal offences covered by some of the listed areas of crime, such as terrorism and money laundering.

The criteria referred to in Article 83(1) TFEU relating to the cross-border dimension of an area of a crime, namely the nature, or impact of criminal offences and the special need to combat on a common basis are inter-linked and should not be assessed in isolation. In the case of the violation of Union restrictive measures, these criteria are met because:

- First, the violation of Union restrictive measures should be qualified as an area of crime in order to ensure the effective implementation of the Union's policy on restrictive measures. The violation of restrictive measures is already categorised as a criminal offence by a majority of Member States. Among those Member States which categorise the violation of restrictive measures as a criminal offence, some have broad definitions in place, such as 'breach of UN and EU sanctions' or 'breach of EU regulations', whereas others have more detailed provisions, for instance providing a list of prohibited conduct. The criteria according to which the conduct falls within the scope of criminal law vary among Member States, but they are usually related to their gravity (serious nature), either determined in qualitative (intent, serious negligence) or quantitative (damage) terms.
- Second, this is a particularly serious area of crime, which presents, in gravity, a similar seriousness to the areas of crime already listed in Article 83(1) TFEU, since it may perpetuate threats to international peace and security, undermine the consolidation and support for democracy, the rule of law and human rights and result in significant economic, social/ societal and environmental damage. Designated individuals and legal persons whose assets are frozen, continue to be able to access their assets in practice and support regimes that are targeted by restrictive measures. Similarly, the money generated by the exploitation of natural resources traded through the violation of Union restrictive measures may also allow the regimes targeted by those restrictive measures to purchase arms and weapons with which they execute their crimes. The violation of Union restrictive measures could furthermore contribute to the illegal exploitation of goods and natural resources in the regime targeted by those restrictive measures.
- Third, violations of Union restrictive measures have a clear and at times even inherent cross-border dimension. Not only are they usually committed by natural persons and legal entities operating on a global scale but in some cases Union restrictive measures, such as import and export restrictions and restrictions on banking services even forbid cross-border operations. Hence, by definition, their violation is conduct on a cross-border scale requiring a common cross-border response at Union level.
- Fourth, the fact that Member States have very different definitions and penalties for the violation of Union restrictive measures under their administrative and/or criminal law suggests that the same infringement might be punished with different penalties and different enforcement levels. This undermines Union objectives to safeguard international peace and security and uphold Union common values. Therefore, there is a special need for common action at Union level to address the violation of Union restrictive measures by means of criminal law.

- Fifth, the different definitions of, and heterogeneous sanctions for, the violation of Union restrictive measures under Member States' administrative and/or criminal law represent an obstacle to the consistent application of the Union policy on restrictive measures. They may even lead to forum shopping by offenders and ultimately their impunity because they could choose to conduct their activities in the Member States that provide for less severe responses to the violation of Union restrictive measures. Harmonisation would also increase the deterrent effect of sanctions for the violation of Union restrictive measures.

Beyond complying with the criteria referred to in Article 83(1) TFEU, common action at Union level would not only contribute towards a level playing field among Member States, but also contribute towards a global level playing field and law enforcement and judicial cooperation in countering the violation of restrictive measures.

As will be further discussed below, the proposal to add the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) TFEU complements the Commission proposal<sup>36</sup> that aims to revise the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union and the Council Decision on Asset Recovery Offices<sup>37</sup>. The proposed new Directive on asset recovery and confiscation would apply to the violation of Union restrictive measures insofar as this offence would be harmonised under Union law.

Once the Council, after obtaining the consent of the European Parliament, agrees to add the violation of Union restrictive measures as an area of crime under Article 83(1) TFEU, the Commission will be able to propose a Directive on the violation of Union restrictive measures under the ordinary legislative procedure. As mentioned, today the Commission is also adopting a Communication, which has an annex that sets out the main elements that a future Directive on criminal sanctions for the violation of Union rules on restrictive measures could contain<sup>38</sup>.

- **Consistency with existing policy provisions in the policy area**

Article 2 of the Treaty on European Union ('TEU') lays down the Union's common values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights. The effective enforcement of restrictive measures, including through criminal law measures aimed at addressing the violation of restrictive measures, supports the upholding of such common values within and outside the Union.

Furthermore, the Union constitutes an area of freedom, security and justice with respect for fundamental rights and different legal systems and traditions of the Member States. It aims to ensure a high level of security through measures including preventing and combatting crime, racism and xenophobia. Under Article 83(1) TFEU, the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and penalties in

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<sup>36</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation, COM (2002) 245 of 25.05.2002.

<sup>37</sup> Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014, p. 39–50; 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. 103–105.

<sup>38</sup> Communication from the Commission to the European Parliament and the Council, Towards a Directive on criminal penalties for the violation of Union restrictive measures, COM (2022) 249 of 25.05.2022.



the areas of particularly serious crime with a cross-border dimension, resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

As previously mentioned, enabling the approximation of criminal definitions and penalties for the violation of Union restrictive measures will complement the Commission proposal for a Directive on asset recovery and confiscation, implementing the Security Union Strategy<sup>39</sup> and the EU strategy to tackle organised crime<sup>40</sup>.

This proposal aims at strengthening the capabilities of national authorities to trace and identify, freeze and manage property which is the proceeds or instrumentalities of crime. Furthermore, it provides for a reinforced legal framework on confiscation including specific cases where a conviction for a specific crime is not possible.

In addition, the new proposal contributes to the effective implementation of restrictive measures by requiring Member States to enable the tracing and identification of property linked to violations of Union restrictive measures as defined under national law and by making the revised rules on asset recovery and confiscation applicable to the criminal offence of the violation of Union restrictive measures.

Following the adoption of a Directive approximating the definitions and sanctions related to the violation of Union restrictive measures, potential elements of which are discussed further in the aforementioned Communication also adopted today, the rules on tracing and identification, freezing, management, and confiscation measures would become applicable to property related to the violation of Union restrictive measures. In the end, proceeds of the violation of Union restrictive measures, for example in instances where individuals and companies would make available funds to those subject to targeted financial sanctions (i.e. asset freezes), could become the object of confiscation measures. At the same time, instrumentalities used to pursue the violation of restrictive measures could become the object of confiscation as well.

- **Consistency with other Union policies**

*Council Regulations on Union restrictive measures*

The establishment of minimum rules concerning the criminal law definition of and penalties for the violation of restrictive measures based on Article 83(1) TFEU would strengthen the enforcement of restrictive measures in the Member States, thereby complementing measures taken in accordance with Article 29 TEU and Article 215 TFEU. The Commission and the High Representative for Foreign Affairs and Security Policy have proposed to strengthen the provision on penalties in Regulations 833/2014 and 269/2014 in the framework of the sixth package of restrictive measures in response to the Russian aggression against Ukraine. The amended provisions would oblige Member States to lay down the rules on penalties, including as appropriate criminal penalties, applicable to infringements of these regulations and to take all measures necessary to ensure that they are implemented. The penalties must be effective, proportionate and dissuasive. Member States must also provide for appropriate measures of

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<sup>39</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Security Union Strategy, COM (2020) 605 final of 24.07.2020.

<sup>40</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU strategy to tackle organised crime, COM (2021) 70 final of 14.04.2021.

confiscation of the proceeds of such infringements. However, as previously mentioned, Article 29 TEU and Article 215 TFEU are not a legal basis for the approximation of criminal definitions and the types and levels of criminal penalties.

### *2021 Commission Communication on the European economic and financial system*

Furthermore, in its 2021 Communication entitled ‘The European economic and financial system: fostering openness, strength and resilience’<sup>41</sup>, the Commission notes that the implementation [of Union restrictive measures] is not as uniform across the Union as it ought to be. This creates distortions in the Single Market, as Union companies, including EU subsidiaries of foreign companies, can find means to circumvent the restrictive measures. This also creates uncertainty among operators. As cited, inconsistent enforcement undermines the efficacy of [Union restrictive measures] and the Union’s ability to speak with one voice. Among other initiatives, the strategy calls for further coordination work between the Commission and Member States to ensure that national penalties for breaching EU restrictive measures are effective, proportionate and dissuasive.

## (2) LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

### • **Legal basis**

Under Article 83(1) TFEU, the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Those areas of crime, which are listed in this article, are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. As it currently stands, this list does not allow for establishing minimum rules concerning the definition of and sanctions for the violation of restrictive measures.

The present proposal aims at initiating the procedure set out in Article 83(1), third subparagraph TFEU. In accordance with this procedure, based on developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in Article 83(1) TFEU, in this case the violation of Union restrictive measures. The Council acts unanimously after obtaining the consent of the European Parliament. The justification for how the criteria specified under Article 83(1) TFEU are met in this case have been discussed in section 1.5 above.

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

The objective of this Decision, namely adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) TFEU, has to be achieved at Union level. It therefore complies with the principle of subsidiarity as set out in Article 5 TEU. In this

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<sup>41</sup> COM(2021) 32 final of 19.01.2021

particular case, the need for action at Union level was further demonstrated when discussing why the criteria specified under Article 83(1) TFEU are met (section 1.5 above).

- **Proportionality**

In accordance with the principle of proportionality, any measure proposed by the Commission should not exceed what is necessary to achieve its purpose. The decision to add the violation of Union restrictive measures to the list of EU crimes in Article 83(1) TFEU would be proportionate in view of the fact that the criteria specified under Article 83(1) TFEU are met. Moreover, this decision would be without prejudice to the actions that could be undertaken in a second step. In particular, it does not determine or pre-empt the scope and content of the secondary legislation that could be subsequently proposed.

- **Choice of the instrument**

The present proposal aims at initiating the procedure set out in Article 83(1), third subparagraph. In accordance with this procedure, based on developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in Article 83(1) TFEU, in this case the violation of restrictive measures. It shall act unanimously after obtaining the consent of the European Parliament.

### (3) RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Collection and use of expertise**

Following Russia's invasion of Ukraine, the Commission set up the 'Freeze and Seize' Task Force at the beginning of March 2022. Its aim is to ensure coordination among Member States in the enforcement of the Union restrictive measures concerning Russian and Belarussian listed individuals and companies, and to explore the interplay between Union restrictive measures and criminal law measures. These exchanges of views included meetings with national competent authorities for the implementation of sanctions, Eurojust and the Genocide Network<sup>42</sup>, the Secretariat of which is hosted by Eurojust.

A specific subgroup of the 'Freeze and Seize' Task Force is dedicated to the enhancement of the implementation of Union restrictive measures. In particular, it tackles questions raised by national authorities and explore possible ways to identify assets proactively. Representatives and national competent authorities of the Member States participate in this subgroup. During the exchanges of views taking place in the context of this subgroup, the difficulties in holding individuals and legal persons involved in the violation of Union restrictive measures accountable emerged on several occasions. Participants in such exchange also argued in favour of a common criminal law approach to the violation of Union restrictive measures.

Evidence of the need for such a common approach is specifically provided for in a report prepared by the Genocide Network<sup>43</sup> and published in December 2021. This report highlights

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<sup>42</sup> Eurojust, Genocide Network, see <https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-network?msclkid=de6a1668cf6011eca5681e93e0033be2>.

<sup>43</sup> Genocide Network, *Expert Report on Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021.

the need for the penalisation of the violation of Union restrictive measures to ensure that individuals or legal persons responsible for such violations are effectively held accountable.<sup>44</sup> It furthermore concludes that ‘prosecuting sanctions violations can offer a safety net to avoid impunity’, especially regarding the link with core international crimes<sup>45</sup>.

Furthermore, discussions within the subgroup of the Task Force on investigations and confiscation demonstrated the importance of a proactive approach and coordination among authorities competent for the implementation of Union restrictive measures. Financial Intelligence Units, law enforcement authorities and customs authorities, along with international partners, civil society and investigative journalists, should cooperate and exchange information in order to obtain the leads that will enable law enforcement to start an investigation.

The Commission also consulted its Expert Group on EU Criminal Policy on 13 May 2022<sup>46</sup>, which welcomed the idea of harmonising definitions and sanctions at Union level.

- **Impact assessment**

Given the exceptional urgency, no impact assessment could be conducted, and the relevant obligation was lifted. The proposal to add the violation of restrictive measures to the areas of crime laid down in Article 83(1) TFEU does not have, in itself, any impact on national governments, regional or local authorities, economic operators or citizens.

- **Fundamental rights**

This proposal does not determine or pre-empt the scope and content of the secondary legislation to be subsequently proposed by the Commission once the Council decides, after obtaining the consent of the European Parliament, to add the violation of Union restrictive measures to the list of EU crimes under Article 83(1) TFEU. The approximation of criminal definitions and sanctions will have to take into account the differences between the criminal justice systems of the Member States, including as regards penalties. Moreover, the subsequent Directive would need to comply with the fundamental rights and observing the principles laid down in the Charter of Fundamental Rights of the European Union (‘the Charter’)<sup>47</sup>.

#### (4) BUDGETARY IMPLICATIONS

This proposal to add the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) TFEU does not create, in itself, any financial or administrative burden for the EU, national governments, regional or local authorities, economic operators or citizens.

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<sup>44</sup> Idem, p. 4.

<sup>45</sup> Idem, p. 26.

<sup>46</sup> European Commission, Expert Group on EU Criminal Policy, <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?do=groupDetail.groupDetail&groupID=2760&msclkid=56005123cfaf11ec8de3edb643537b59>.

<sup>47</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

(5) OTHER ELEMENTS

- **Detailed explanation of the specific provisions of the proposal**

**Article 1**

In accordance with Article 1, the violation of Union restrictive measures will be added as an area of crime within the meaning of Article 83(1) TFEU.

**Article 2**

Article 2 concerns the entry into force of the Council Decision. In view of the urgent need for action this shall be on the first day following that of its publication in the Official Journal of the European Union.

Proposal for a

## **COUNCIL DECISION**

### **on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union**

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament<sup>48</sup>,

Whereas:

- (1) The purpose of this Decision is to add the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union ('TFEU').
- (2) Article 29 of the Treaty on European Union ('TEU') provides that the Council can adopt decisions defining the approach of the Union to a particular matter of a geographic or thematic nature, including restrictive measures.
- (3) Article 215 TFEU enables the Council to adopt restrictive measures against natural or legal persons and groups, or non-State entities, or to adopt measures providing for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, on the basis of a decision pursuant to Article 29 TEU. Member States should have effective, proportionate and dissuasive penalties in place for violations of Council Regulations on Union restrictive measures.
- (4) For the purposes of this decision, Union restrictive measures are measures falling within the scope of Article 29 TEU and Article 215 TFEU, such as for example measures of freezing of funds and economic resources, prohibitions to make funds and economic resources available and prohibitions of entry into the territory of a Member State of the European Union, as well as sectoral economic measures and arms embargoes.
- (5) Member States should have effective, proportionate and dissuasive penalties in place for the violation of all Union restrictive measures, including obligations, such as reporting, established therein. Those penalties should also address the circumvention of Union restrictive measures.
- (6) The Commission ensured coordination among Member States and EU agencies in the enforcement of the restrictive measures adopted in the context of Russia's aggression against Ukraine and explored the interplay between restrictive measures and criminal law measures.

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<sup>48</sup>OJ C , , p .

- (7) Article 83(1) TFEU currently does not allow for establishing minimum rules concerning the definition and penalties for the violation of Union restrictive measures, since their violation as such is not yet covered by the areas of crimes listed in that Article. The areas of crime currently listed are terrorism, trafficking in human beings, sexual exploitation of children, drug trafficking, arms trafficking, corruption, money laundering, counterfeiting of means of payment, computer crime and organised crime. The violation of Union restrictive measures may however be related to criminal offences covered by some of the listed areas of crime, such as terrorism and money laundering.
- (8) The criteria referred to in Article 83(1) TFEU relating to the cross-border dimension of an area of a crime, namely the nature, or impact of criminal offences and the special need to combat on a common basis are inter-linked and should not be assessed in isolation.
- (9) The violation of restrictive measures should be qualified as an area of crime in order to ensure the effective implementation of the Union's policy on restrictive measures. The violation of restrictive measures is already categorised as a criminal offence by a majority of Member States. Some Member States which categorise violation of restrictive measures as a criminal offence, have broad definitions in place, such as 'breach of UN and EU sanctions' or 'breach of EU regulations', whereas others have more detailed provisions, for instance providing a list of prohibited conduct. The criteria according to which the conduct falls within the scope of criminal law vary among Member States, but they are usually related to their gravity (serious nature), either determined in qualitative (intent, serious negligence) or quantitative (damage) terms.
- (10) The violation of Union restrictive measures is a particularly serious area of crime, which presents in gravity, a similar seriousness to the areas of crime already listed in Article 83(1) TFEU, since it may perpetuate threats to international peace and security, undermine the consolidation and support for democracy, the rule of law and human rights and result in significant economic, social/ societal and environmental damage. Because of such violations, individuals and entities whose assets are frozen or whose activities are restricted continue to be able to access their assets and support regimes that are targeted by restrictive measures or continue to access State funds that were allegedly misappropriated. Similarly, the money generated by the exploitation of goods and natural resources traded in violation of Union restrictive measures may also allow the regimes targeted by those restrictive measures to purchase arms and weapons, with which they execute their crimes. The violation of Union restrictive measures relating to trade could furthermore contribute to the illegal exploitation of natural resources in the jurisdiction targeted by those restrictive measures;
- (11) In its Resolution 1196 (1998) of 16 September 1998, the United Nations Security Council highlighted the importance of strengthening the effectiveness of arms embargoes as a means to diminish the availability of arms with which to pursue armed conflicts. It also encouraged States to consider, as a means of implementing their obligations to carry out decisions of the Security Council on arms embargoes, the adoption of legislation or other legal measures making the violation of arms embargoes established by the Security Council a criminal offence.
- (12) The fact that Member States have very different definitions and penalties for the violation of Union restrictive measures under their administrative and/or criminal law suggests that the same infringement might be punished with different penalties and

different enforcement levels. This undermines the Union objectives to safeguard international peace and security and uphold Union common values. Therefore, there is a special need for common action at Union level to address the violation of Union restrictive measures by means of criminal law.

- (13) Violations of Union restrictive measures have a clear and at times even inherent cross-border dimension. Not only are they usually committed by natural persons and legal entities operating on a global scale but in some cases Union restrictive measures, such as restrictions on banking services even forbid cross-border operations. Hence, by definition, their violation is conduct on a cross-border scale requiring a common cross-border response at Union level.
- (14) The different definitions of, and heterogeneous sanctions for, the violation of Union restrictive measures under Member States' administrative and/or criminal law represent an obstacle to the consistent application of the Union policy on restrictive measures. They may even lead to forum shopping by offenders and their impunity because they could choose to conduct their activities in the Member States that provide for less severe responses to the violation of Union restrictive measures. Harmonisation would also increase the deterrent effect of sanctions for the violation of Union restrictive measures.
- (15) The violation of Union restrictive measures should therefore constitute an "area of crime" as it meets the criteria set out in Article 83(1) TFEU.
- (16) Common action at Union level would not only contribute towards a level playing field among Member States, and enhance law enforcement and judicial cooperation in addressing the violation of Union restrictive measures; it would also contribute towards a global level playing field in terms of law enforcement and judicial cooperation with third countries on the violation of Union restrictive measures.
- (17) The objective of this Decision, namely adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) TFEU has to be achieved at Union level. It therefore complies with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality as set out in that Article, this Decision does not go beyond what is necessary in order to achieve this objective.
- (18) Therefore, extending the list of the areas of crime in Article 83(1) TFEU to cover the violation of Union restrictive measures is necessary, as a first step, to enable, as a second step, the adoption of substantive secondary legislation, *inter alia* establishing minimum rules on the definitions and penalties for the violation of Union restrictive measures.
- (19) This Decision should not affect the actions that may be undertaken in a second step. In particular, it should not determine or pre-empt the scope and content of the secondary legislation to be subsequently proposed.
- (20) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.
- (21) [non-participation:] 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 TEU and to the TFEU, and without prejudice to Article 4 of that protocol, Ireland is not taking part in the adoption of this Decision and is not bound by it or subject to its application.



OR [participation:] 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 TEU and to the TFEU, Ireland has notified [, by letter of...], its wish to take part in the adoption and application of this Decision.

- (22) This Decision should enter into force as a matter of urgency on the day following that of its publication in the *Official Journal of the European Union* in order to urgently enable the adoption of secondary legislation establishing minimum rules on the definitions and penalties for the violation of Union restrictive measures,

HAS ADOPTED THIS DECISION:

*Article 1*

The violation of Union restrictive measures shall be an area of crime within the meaning of Article 83(1) TFEU.

*Article 2*

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

Done at Brussels,

*For the Council  
The President*



Brussels, 25.5.2022  
COM(2022) 249 final

ANNEX

**ANNEX**

*to the Communication from the Commission to the European Parliament and the Council*

**Towards a Directive on criminal penalties for the violation of Union restrictive measures**

## 1.1. Introduction

Adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union ('TFEU') would enable the Commission to propose a Directive under the ordinary legislative procedure, which could approximate the definition of criminal offences and penalties.

Such a Commission proposal would need to comply with the principles of subsidiarity and proportionality governing all EU action<sup>1</sup>. It would also need to be in line with Better Regulation requirements<sup>2</sup>. Furthermore, the proposal would need to consider the specificities of criminal law<sup>3</sup>. In particular, the approximation of criminal law definitions and penalties would have to take into account the differences between the criminal justice systems of the Member States, including as regards penalties.

Moreover, the subsequent Directive would need to respect fundamental rights and observe the principles laid down in the Charter of Fundamental Rights of the European Union ('the Charter')<sup>4</sup>. Notably, compliance of the provisions of the Directive with the rights to liberty and security, the protection of personal data, the right to property, the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence, the principles of legality, including the principle of non-retroactivity of criminal penalties and proportionality of criminal offences and penalties, as well as the principle of *ne bis in idem*, would need to be ensured.

The future Directive would cover a range of criminal law issues which are customary in Union Directives based on Article 83 TFEU. The following is an illustrative list of possible provisions to be included in the future legislative proposal.

## 1.2. Scope

The first provision would set out the purpose and scope of the Directive, and in particular clarify that it applies to the violation of Union restrictive measures. These restrictive measures are adopted pursuant to Article 29 of the Treaty on European Union (TEU) and Article 215 TFEU and include targeted individual measures, i.e., asset freezes, prohibitions to make available funds and economic resources and restrictions on admissions (travel bans), as well as sectoral restrictive measures, i.e. arms embargoes or economic and financial measures (e.g. import and export restrictions, restrictions on the provision of certain services, such as banking services).

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<sup>1</sup> Articles 5(1) and 5(4) of the Treaty on European Union; Protocol No. 2 on the application of the principles of subsidiarity and proportionality.

<sup>2</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1–14.

<sup>3</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM (2011) 573 final, 20.09.2011; Council conclusions on guidelines for future criminal law in EU legislation, Council doc. 14162/09 of 9.10.2009; European Parliament resolution of 22 May 2012 on an EU approach to criminal law, OJ C 264E, 13.9.2013, p. 7–11.

<sup>4</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

### **1.3. Definitions**

This Article of the Directive would contain all relevant definitions, including, when appropriate by means of cross-referencing the provisions of the Council Regulations and Decisions on restrictive measures. These definitions would include, among others ‘restrictive measures’, ‘designated entity’ and ‘designated person’. A relevant example of a criminal law measure in which the use of similar cross-references in the provision on definitions are included, is Directive 2014/57/EU on criminal sanctions for market abuse (Market Abuse Directive)<sup>5</sup>.

### **1.4. Criminal offences, including incitement, aiding, abetting and attempt**

The Articles on the offences to be approximated by the Directive would include precise definitions of various criminal offences related to violations of Union restrictive measures, such as:

- making funds or economic resources available directly or indirectly, to, or for the benefit of, a designated person/entity;
- failing to freeze funds or economic resources belonging to or owned, held or controlled by a designated person/entity;
- engaging in prohibited financial activities, such as providing prohibited loans or credit;
- engaging in prohibited trade, commercial or other activities, such as importing or exporting goods and technology covered by trade bans, or providing prohibited services;
- breaching applicable conditions under authorisations granted by competent authorities;
- failure to comply with any obligation to provide information to the authorities, such as the obligation to declare any assets belonging to, owned, held or controlled by a designated person/entity;
- engaging in actions or activities that seek to directly or indirectly circumvent the restrictive measures, with knowledge and intent, including by being involved in schemes designed to conceal the assets or involvement of designated persons/entities, by assisting the targets of restrictive measures to evade their impact, or by providing misleading information to authorities;
- non-reporting a violation of restrictive measures, or activities that seek to circumvent them, in violation of a specific obligation to report.

The offences to be approximated, unless otherwise provided, would require intent, or at least gross negligence based on knowledge that the conduct concerns persons, entities, activities or property subject to restrictive measures, or ignoring restrictive measures or related legal prohibitions (wilful blindness).

The Directive would also include related offences, such as money laundering. For the latter, a provision would oblige Member States to take the necessary measures to ensure that the money

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<sup>5</sup> 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. 179–189, Article 2.

laundering offence, as described in Article 3 of Directive (EU) 2018/1673<sup>6</sup>, applies to property derived from the criminal offences covered by the Directive.

The Directive would furthermore contain a provision obliging Member States to take the necessary measures to ensure that inciting, aiding and abetting the commission of the criminal offences referred to in the Directive, as well as the attempt to commit such offences, are punishable as criminal offences<sup>7</sup>.

### **1.5. Penalties for natural and legal persons**

Council Regulations adopted under Article 215 TFEU systematically include a provision requiring Member States to adopt national rules providing for effective, proportionate and dissuasive penalties to be applied in the event of infringements of the provisions of the relevant Regulation<sup>8</sup>. As this obligation leaves significant gaps between the levels and types of penalties, the future Directive should contain an Article on penalties for natural persons. These penalties would be applicable to all offences mentioned in section 1.4. above, and equally require Member States to apply effective, proportionate and dissuasive penalties as well as to set out a certain minimum of the maximum criminal penalties, including fines for natural persons. Such penalties should be proportionate in relation to the considerable seriousness of the offences<sup>9</sup>.

In addition, the Directive would include a provision on the liability of legal persons. This provision would be applicable to all offences mentioned in section 1.4 above. In accordance with this provision, Member States would need to provide for penalties and the liability of legal persons:

- (i) for any of the criminal offences referred to in section 1.4. committed for their benefit by persons having a leading position within the legal person; or
- (ii) for the lack of supervision or control by persons in a leading position which has made possible the commission, by a person under their authority, of any of the above-mentioned criminal offences for the benefit of that legal person<sup>10</sup>.

The Directive would also approximate penalties applicable to legal persons. In particular, the Member States would be required to take the necessary measures to ensure that a legal person held liable pursuant to the relevant provisions discussed in section 1.4. is subject to effective, proportionate and dissuasive penalties, including:

- criminal or non-criminal fines;
- temporary exclusion from access to public funding, including tender procedures, grants and concessions;
- temporary or permanent disqualification from the practice of business activities;

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<sup>6</sup> 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 -30.

<sup>7</sup> Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law ('PIF Directive'), OJ L 198, 28.7.2017, p. 29–41, Article 5; Market abuse directive, Article 6.

<sup>8</sup> For an example, see Article 8 of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, consolidated text available at [EUR-Lex - 02014R0833-20220413 - EN - EUR-Lex \(europa.eu\)](#).

<sup>9</sup> See also PIF Directive, Article 7; Market abuse directive, Article 7.

<sup>10</sup> See also PIF Directive, Article 6; Market abuse directive, Article 8.

- withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence;
- placing under judicial supervision;
- judicial winding-up; and
- temporary or permanent closure of establishments used for committing the offence<sup>11</sup>.

In addition, the Directive could provide that Member States should take the necessary measures to ensure that legal persons that benefit from the commission by others of offences in violation of Union restrictive measures are punishable by fines, the maximum limit of which should be not less than a certain percentage of the total worldwide turnover of the legal person in the business year preceding the fining decision.

The liability of legal persons would not exclude the possibility of criminal proceedings against natural persons who are the perpetrators of the criminal offences provided for in section 1.4.

### **1.6. Aggravating and mitigating circumstances**

The Directive would also contain an Article setting out the aggravating circumstances to be taken into account when penalties are applied for an offence referred to in section 1.4. above. Those aggravating circumstances could include:

- grave consequences of the breach in view of the purposes of the restrictive measures;
- high value of the funds, economic resources, goods or technology in question;
- the offence was committed by a public official when performing his/her duties;
- the offence was committed in the context of private professional activity, including by breaching one's professional duties;
- commission of the offence within the context of a criminal organisation in the sense of Framework Decision 2008/841/JHA<sup>12</sup>;
- the offence involved the use of false or forged documents;
- the offender committed similar previous infringements of Union law on restrictive measures;
- the offender actively obstructed investigation activities, or intimidated or interfered with witnesses; and
- the offence generated or was expected to generate substantial financial benefits (with the notion of substantial financial benefits to be further defined in a recital).

The Directive would equally contain an Article setting out mitigating circumstances to be considered when penalties are applied to an offence referred to in section 1.4. above. In particular, in accordance with this Article, the Member States would be obliged to ensure that, in relation to the above-mentioned offences, certain facts would be regarded as a mitigating circumstance. This would for example apply to the fact that an offender provided the

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<sup>11</sup> See also PIF Directive, Article 10; Market abuse directive, Article 9.

<sup>12</sup> Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime OJ L 300, 11.11.2008, p. 42–45.

administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to identify or bring to justice the other offenders or find evidence.

### **1.7. Jurisdiction rules**

The Directive would also include a provision on jurisdiction rules. Inter alia, following the example of Article 11 of Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law ('PIF Directive'), a Member State would need to establish jurisdiction over the offences referred to in section 1.4., where the criminal offence would be committed in whole or in part within its territory or where the offender is one of its nationals. Furthermore, Member States would be obliged to inform the Commission if they decide to extend their jurisdiction over offences committed:

- (i) by habitual residents in their territory;
- (ii) for the benefit of a legal person established in their territory; or
- (iii) by one of their officials acting in his or her official duty.

In cases where the offender is one of their nationals, Member States would not be allowed to make the exercise of jurisdiction subject to the condition that a prosecution can only be initiated following:

- (i) a report made by the victim in the place where the criminal offence was committed; or
- (ii) a denunciation from the State of the place where the criminal offence was committed.

Council Regulations adopted under Article 215 TFEU systematically include the following jurisdiction clause:

“This Regulation shall apply:

- (a) within the territory of the Union, including its airspace;
- (b) on board any aircraft or any vessel under the jurisdiction of a Member State;
- (c) to any person inside or outside the territory of the Union who is a national of a Member State;
- (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State;
- (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.”

This would also be reflected in the Directive. In particular, following paragraph (e) above, Member States would be required to extend their criminal jurisdiction to non-EU persons outside EU territory insofar as their business has an EU nexus (which may, by extension, also concern their assets).

### **1.8. Limitation periods**

The Directive would include a provision applicable to all offences mentioned in section 1.4 above, which would require the establishment of a minimum limitation period, as well as a provision on the limitation period for the enforcement of penalties following a final conviction.

A relevant example may be found in Article 12 of the PIF Directive. In accordance with this Article, Member States have to:

- (i) prescribe limitation periods for a sufficient period of time after commission of the criminal offences referred to in the Directive in order for those criminal offences to be tackled effectively, with minimum limitation periods applying to offences punishable by a maximum penalty of at least four years of imprisonment;
- (ii) take the necessary measures to enable penalties to be enforced.

### **1.9. Cooperation between Member States, Union institutions, bodies, offices and agencies as well as with third states**

To enhance the investigation of cases with a cross-border element, the Directive would include a provision which would require mutual cooperation between Member States' competent authorities, Union institutions, bodies, offices and agencies, including Eurojust and Europol<sup>13</sup>. This provision of the Directive would also facilitate the sharing of information on practical issues (in particular, patterns of circumvention, e.g. structures to hide the true ownership/control of assets) with authorities in other Member States and with the Commission.

### **1.10. Whistle-blowers**

To enhance the effectiveness of the Union restrictive measures, the Commission recently launched the EU Sanctions Whistle-blower Tool<sup>14</sup>. Due to the importance of the whistle-blowers' contribution to the proper application of the Union restrictive measures, the Commission proposal would provide for an obligation for Member States to take the necessary measures to ensure that the protection granted under Directive (EU) 2019/1937<sup>15</sup> is applicable to persons reporting criminal offences referred to in the Directive. Furthermore, Member States would be obliged to take all necessary measures to ensure that persons reporting offences referred to in the Directive and providing evidence or otherwise cooperating with the investigation, prosecution or adjudication of such offences, were given the necessary support and assistance in the context of criminal proceedings<sup>16</sup>.

## **2. WAY FORWARD**

Once the Council reaches an agreement and the European Parliament grants its consent to add the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) TFEU, the Commission would be in the position to immediately propose a Directive under the

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<sup>13</sup> See also PIF Directive, Article 15.

<sup>14</sup> European Commission, Overview of sanctions and related tools, available at [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/overview-sanctions-and-related-tools\\_en#whistleblower](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/overview-sanctions-and-related-tools_en#whistleblower).

<sup>15</sup> Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, 26.11.2019, p. 17–56.

<sup>16</sup> See also 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, COM(2021)851 final, 15.12.2021, Article 13.



ordinary legislative procedure, which could approximate the definition of criminal offences and penalties.

Such a Commission proposal would need to comply with the principles of subsidiarity and proportionality governing all EU action.<sup>17</sup> It would also need to be in line with Better Regulation requirements<sup>18</sup>.

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<sup>17</sup> Articles 5(1) and 5(4) TEU; Protocol No. 2 on the application of the principles of subsidiarity and proportionality.

<sup>18</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1–14.