

NCB forfeiture

& the EU

Overview

- Main focus will be the EU Directive 2014/42/EU and Regulation 2018/1805/EU
- Review of the EU's implementation in the criminal sphere
- EU's current strategy

Commission review of implementation of Directive 2014/42/EU – asset recovery stages

- Identification and tracing (Investigation)
- Freezing and seizing
- Management of frozen and seized assets
- Confiscation
- Disposal

Directive introduced

- Provisions on
 - non conviction based confiscation
 - extended confiscation for specific offences
 - Third party confiscation
 - Freezing and urgent freezing
 - Safeguards
 - Rules for detecting and tracing post conviction
 - Management of frozen and confiscated property
 - Collection of comprehensive data on freezing and confiscation

UK and Denmark did not participate. Transposition was due by 4 Oct 2016

Regulation 2018/1805 on Mutual Recognition of confiscation and freezing orders

- Effective from 19 December 2020
- Aimed to improve cross border recovery and make freezing and confiscation across EU quicker and simpler

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Model 1: Classic non-conviction based confiscation applies where confiscation is not possible on the basis of a final conviction. While proceedings have been instituted against an offender, they cannot be concluded, as the offender cannot be brought before the court or convicted due to his/her death, because the offender has absconded or because the court deems him/her unfit for prosecution due to immunity, age or mental state.

Model 2: Extended confiscation allows for the confiscation of assets, which are not connected to the crime for which the offender is being prosecuted. The order to confiscate is effectively 'extended' beyond the assets related to the prosecution, to other assets owned by the defendant.

Model 3: *In rem* proceedings (action against the assets not the person) are initiated to confiscate assets obtained through unlawful conduct.

Model 4: The unexplained wealth model compares the actual property a person has acquired against income declared by that person in order to identify any disparity between the two. Establishing a direct or indirect link to a predicate offence is not necessary.

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From the analysis it becomes clear that most Member States' non-conviction based confiscation regimes go beyond the minimum harmonisation requirements set out in the confiscation Directive but vary considerably in their scope:

- 25 Member States (all except BG, IE, UK) primarily rely on classic non-conviction based confiscation proceedings (**Model 1**);
- 26 Member States (all except EL and IE) have extended confiscation regimes (**Model 2**);
- 13 Member States (EE, DE, EL, IT, LV, LT LU, NL, PL, RO, SK, SL, ES) also have some form of *in rem*/unexplained wealth procedures (**Models 3 and 4**) in addition to classic ones, or have draft law envisaging such regime;
- 3 Member States (BG, IE, UK) primarily rely on *in rem*/unexplained wealth proceedings (**Models 3 and 4**).

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Looking at Member States having implemented classic non-conviction based confiscation regimes (**Model 1**) differences in scope are visible:

- 8 Member States cover the situation of illness or absconding but also other situations; 4 of them (ES, HU, SE, SI) also cover death, the other 4 (EE, PL, PT, SK) exclude death;
- 7 Member States (BE, CZ, FR, LT, LU, MT, NL) cover only the situation of illness or absconding;
- 7 Member States (AT, CY, EL, FI, HR, IT, LV) cover the situations of death, illness or absconding;
- 2 Member States (DK, EL) cover only the situation of death;
- 1 Member State (DE) covers all cases where a conviction is not possible in criminal proceedings;
- 1 Member State (RO) covers only the case of illness of the suspect or accused person.

17 Member States (14 through Model 1 proceedings and 3 through Model 3 proceedings) cover the case of death of the suspect or accused person.

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- UK and Ireland – model 3 in rem targeting assets not individuals
- They apply civil procedural law rather than criminal procedural law. Regarding matters of evidence, they apply the civil law standard "on the balance of probabilities" (rather than the criminal standard "beyond reasonable doubt");
- They include important safeguards such as notice provisions, the opportunity for a respondent to contest the confiscation order by seeking to vary or annulling it, the opportunity for any persons claiming ownership to be heard, provision for legal aid, provision for compensation etc.;
- The statutory agency charged with the pursuit of the proceeds of crime (e.g. the Criminal Asset Bureau in Ireland) is multidisciplinary and is empowered to share confidential information.

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Bulgaria

As regards the key features of unexplained wealth systems classified under **Model 4**, the Bulgarian system provides for a good case study:

- There is no requirement that the assets should be proceeds or instruments of crime. The lack of evidence that the assets derive from legal sources is sufficient;
- The speed of the procedure compared to criminal proceedings is much higher. The investigation may last for up to one year and can be extended of six months
- Meeting the standards of proof in a separate civil proceeding is far easier than in criminal proceedings.

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Italy

Italy operates a system of preventive confiscation aimed at preventing a re-use of property, which is essentially proven to have been acquired through, or thanks to the income of, a criminal activity:

- The system requires proving the “social danger” of the person that has obtained the property, e.g. if he/she is proven to be habitually involved in the commission of criminal activities or proven to habitually live by means of the proceeds of crime (Art. 1 and of the Italian Antimafia Code).
- Preventive confiscation orders are based on evidence examined according to the same rules that apply to criminal evidence in strict meaning, which prove that the proposed person obtained the property due to his/her being “dangerous to society” at the time of the acquisition.

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Germany

A fundamental reform of the German asset recovery regime (“Vermögensabschöpfung”) in 2017 established a new form of non-conviction based confiscation in German law and includes several key changes:

- It allows for preventive confiscation and traditional *in rem* law confiscation regimes.
- An asset can be confiscated if secured within a criminal proceeding against a person for serious crimes (similar to the list in Art. 83(1) TFEU). It is sufficient if the asset can be linked to a crime and that the accused cannot be convicted or prosecuted for that crime.
- For organised crime offenses, unexplained wealth can also be confiscated independent of a criminal conviction.
- Special provisions are included to address questions such as burden of proof.

The German legislators have anchored this regime in criminal law and criminal procedure, and consider therefore that it is of criminal law character.

Commission review

- Definitions (Art 2)
- Scope (Art 3)
- Confiscation (incl. conviction based , non conviction based) (Art4)
- Extended Conviction (Art 5) for specific offences
- Third party confiscation (Art 6)
- Freezing (Art7)
- Safeguards (Art 8)
- Post conviction detection and tracing (Art 9)

Commission Review

- Management of frozen and confiscated assets (Art 10)
- Statistics (Art 11)
- Assessment of feasibility of adopting uniform rules for NCB
- Recommendation and conclusions

The size of the problem

- According to Europol, more than 5,000 organised crime groups are currently under investigation in Europe with the proceeds of organised crime within the EU currently estimated at about €110 billion per year.
- Europol estimates that only about 2% of criminal proceeds are frozen and 1% confiscated in the EU. It estimates that between 0.7 – 1.28% of annual EU GDP is involved in suspect financial activity.

Obstacles to recovery (EU Action Plan)

Ability to recover criminal proceeds is hindered by:

- narrow scope of the EU confiscation legal framework

- lack of powers in the Asset Recovery Offices to obtain interim freezing orders and have access to public registers of data

- lack of efficient management of the recovered assets and their distribution to victims and for the benefit of society

EU plans for 2022

To provide for a stronger confiscation regime and equip National Asset Recovery Offices with a more effective mandate, the Commission will

- expand the scope of criminal offences covered by confiscation legislation
- introduce more effective rules on non-conviction based confiscation;
- ensure effective management and social reuse of confiscated assets and compensation of victims of crime and
- reinforce the capacity of Asset Recovery Offices to trace and identify illicit assets.

The Commission will:

- Propose the revision of the **Confiscation Directive** and the Council Decision on **Asset Recovery Offices** (2022);
- Assess existing **EU anti-corruption rules** (2022);
- Promote **cooperation** and the exchange of information on the **link between corruption and organised crime**, including through Europol.

Member States are urged to:

- **Systematically conduct financial investigations** in organised crime investigations and, as soon as the financial environment indicates the presence of criminal assets, systematically undertake asset recovery investigations;
- Swiftly transpose the **Directive on facilitating access to financial information** by the deadline of August 2021;
- **Exchange strategic information** with those **sectors at risk** of being infiltrated by organised criminality groups (public-private partnerships);
- Enhance the **specialisation** of law enforcement services, and strengthen the bodies responsible for investigations, prosecutions and judicial proceedings of high-level **corruption** cases.

Member States and Europol are urged to:

- Improve the **intelligence picture** on the threat of **infiltration** in the legal economy, by assessing the risks and methods used by organised crime groups.

NCB – what rules?

- Characterisation criminal, civil, administrative or unique
- Scope or target of the measure
- Burden of proof
- Coercive powers of investigation
- Safeguards
- Statute of limitation
- Sanctions

NCB – what rules?

- NCB is neither civil, criminal or administrative - cross border cooperation?
- It operates in rem – law of property modified by forfeiture rules Art 1 Protocol 1 not Art 6
- The State becomes the trustee or custodian of the assets from the date of the judgment
- The State has a better right to hold the assets than the present holder as a matter of policy on account of how the holder came by the assets – directly or indirectly through crime, corruption or other illicit enrichment?
- Some separation of investigation, prosecution, management and distribution to ensure independence
- Rules must be framed with ability to establish facts in mind
- Enforcing body must not be incentivised and adequately funded but not directly from recoveries

Bulgaria- Counter-Corruption and Unlawfully Acquired Assets Forfeiture Act

- Seizure of property is permitted pursuant to Art. 116 CCUAAFA, which is applied to a wide range of criminal offences (Art. 108(1)).
- Where there is reasonable assumption that property has been acquired unlawfully (Art. 107 CCUAAFA) and the person has been constituted as an accused party of one of the criminal offences AND
- where: (i) the person has not been constituted as an accused party if, among others, an amnesty has been afforded to the person, the statutes of limitation have run, the person has passed away, or there has been a transfer of the criminal proceedings against the person to another jurisdiction and (ii) the person has been constituted as an accused party by the proceeding that has been suspended due to, among others, immunity or the address of the accused party is unknown and the person cannot be found (Art. 108(3)).
- The (civil) proceedings under the CCUAAFA continue regardless of the outcome of the criminal proceedings (Art. 108(4) CCUAAFA). The rules contained in Art. 397(1) Civil Procedure Code Bulgaria apply to the property and the civil fruits derived therefrom (Art. 118(2) CCUAAFA).
- It is unclear whether the seizure of property under the CCUAAFA allows for the seizure of the instrumentalities of crime.

Alternative mechanisms

- Illicit enrichment for corruption and organised crime?
- NCB for drugs and cash?

Differing characteristic of illicit enrichment laws and other confiscation laws targeting proceeds of crime

	Sanctions applied solely on the basis that a person has enjoyed wealth that is not justified by reference to lawful income	Requirement to establish a reasonable suspicion or belief that criminal activity took place, or that the assets were criminally derived	Requirement to establish to a civil standard that an actual criminal activity took place, or that assets were criminally derived	Requirement for a criminal conviction
Illicit enrichment laws	✓	✗	✗	✗
Qualified illicit enrichment laws	✗	✓	✗	✗
Non-conviction based confiscation	✗	→	✓	✗
Extended confiscation	✗	→	→	✓

Third party rights – some issues

- Ensuring notification and adequate participation
- Dealing with priorities and costs of management and preservation
- Legal aid and costs and who should pay for what
- Enforcement
- Effect of IFO's and forfeiture on certain types of property e.g fiduciary deposits, chartered vessels

Key Papers

- [Fight against organised crime: A new 5-year strategy](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0170&from=EN)
(<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0170&from=EN>)
- Common rules for non-conviction based confiscation (Legislative train and associated papers (<https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-common-rules-for-non-conviction-based-confiscation>))
- AGRO IN 2001 <https://curia.europa.eu/juris/documents.jsf?num=C-234/18>
- Asset Recovery – A Comparative study...Bulgaria, Croatia, Moldova & Romania https://www.rai-see.org/php_sets/uploads/2021/02/20180611-AssetRecovery_OSCE_final.pdf

Key Papers

- Non-conviction based forfeiture as an alternative tool to asset recovery [Transparency International Knowledge Hub | Knowledge Hub](#)
- Illicit Enrichment – A Guide to Laws Targeting Unexplained Wealth [Course: Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth \(baselgovernance.org\)](#)
- Can Non conviction based asset forfeiture be compatible with the rule of law [24 briefing paper.pdf \(biicl.org\)](#)
- The Use of Non Conviction based Seizure and Confiscation [1680a0b9d3 \(coe.int\)](#)
- Asset Recovery Handbook Star Initiative [Asset Recovery Handbook: A Guide for Practitioners, Second Edition | Stolen Asset Recovery Initiative \(StAR\) \(worldbank.org\)](#)