

COMBINED EVALUATION ROADMAP / INCEPTION IMPACT ASSESSMENT

This combined evaluation roadmap / Inception Impact Assessment aims to inform citizens and stakeholders about the Commission's work in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Citizens and stakeholders are, in particular, invited to provide views on the Commission's understanding of the current situation, problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options.

TITLE OF THE INITIATIVE	Fighting organised crime – freezing and confiscating the proceeds of crime
LEAD DG – RESPONSIBLE UNIT	DG HOME Organised Crime and Drugs Policy Unit, HOME.D.5
LIKELY TYPE OF INITIATIVE	Proposal for a Directive revising Directive 2014/42/EU on the freezing and confiscation of the proceeds of crime and proposal for a new Directive on Asset Recovery Offices, repealing Council Decision 2007/845/JHA
INDICATIVE PLANNING	Q4 2021
ADDITIONAL INFORMATION	https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/confiscation-and-asset-recovery_en

This combined roadmap/Inception Impact Assessment is provided for information purposes only. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by this document, including its timing, are subject to change.

A. Context, evaluation, problem definition and subsidiarity check

Context

As expressed in the EU Security Union Strategy,¹ the security of European citizens is a priority. Action taken at EU level to support Member States in the fight against organised crime must be continued and further enhanced. Organised-crime generates large profits: with only about 2% of criminal proceeds frozen and 1% confiscated in the EU today,² criminals use illicit earnings to grow their reach and infiltrate the legal economy and public institutions, threatening the security of the Union whilst hindering its economic recovery. At a time of economic recovery following the COVID-19 crisis, it is more important than ever to ensure that crime does not pay.³ In this context, the Commission Work Programme for 2021⁴ announces the revision of Directive 2014/42/EU on the **freezing and confiscation of the instrumentalities and proceeds of crime**⁵ and the proposal for a **Directive on Asset Recovery Offices**. The two initiatives will be presented together in light of their interlinkages. The Commission will therefore evaluate **Directive 2014/42/EU** on the freezing and confiscation of the proceeds of crime and **Council Decision 2007/845/JHA** on Asset Recovery Offices, impact-assessing their potential revision to enhance the EU asset recovery and confiscation framework.

Evaluation

The initiative will start by evaluating the functioning of Directive 2014/42/EU and of Council Decision 2007/845/JHA in EU Member States, including whether they are fit for purpose and fulfil their objectives to equip Asset Recovery Offices and other competent authorities with the means to freeze, manage, confiscate and

¹ 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, <https://ec.europa.eu/info/sites/info/files/communication-eu-security-union-strategy.pdf>

² Europol, "Does crime still pay? Criminal Asset Recovery in the EU – Survey of statistical information 2010-2014," 2016, available at: <https://www.europol.europa.eu/publications-documents/does-crime-still-pay>

³ Report of the Commission to the European Parliament and to the Council, "Asset recovery and confiscation, ensuring that crime does not pay," COM(2020) 217 final, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20200602_com-2020-217-commission-report_en.pdf

⁴ Commission Work Programme 2021, annexes https://ec.europa.eu/info/publications/2021-commission-work-programme-key-documents_en

⁵ Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L127/39, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042>

dispose the proceeds and instrumentalities of crime. It will also aim at identifying possible key problems and obstacles that hamper the effective use of the freezing and confiscation tools.

The Evaluation will assess the following criteria:

- Relevance: whether the tools of Directive 2014/42/EU and of Council Decision 2007/845/JHA correspond to current needs,
- Effectiveness: whether their original objectives have been achieved,
- Efficiency: the functioning of Directive 2014/42/EU of Council Decision 2007/845/JHA from a simplification and burden reduction perspective,
- Coherence: how Directive 2014/42/EU and Council Decision 2007/845/JHA work together with other legislation in the field of cross border co-operation, and
- EU added value of Directive 2014/42/EU and of Council Decision 2007/845/JHA.

Problem the initiative aims to tackle

The central problem the initiative aims to tackle is the low rates of freezing and confiscation of criminal profits. To tackle the threat of organised crime more efficiently, criminal assets should be taken away, to ensure that they are not reinvested in criminal activities or used to infiltrate the licit economy. Although a full evaluation of Directive 2014/42/EU and of Council Decision 2007/845/JHA will be conducted, the Commission report “Asset recovery and confiscation: ensuring that crime does not pay”⁶ and the previously commissioned studies on the implementation of Directive 2014/42/EU (HOME/2017/ISFP/FW/LECO/0084 and on “Asset recovery and confiscation: what works and what doesn’t work” (HOME/2018/ISFP/FW/EVAL/0081) have already shown some potential areas for improvement.

Problem n.1: the framework does not allow for the confiscation of assets related to many criminal activities. The list of criminal activities covered in Article 3 of Directive 2014/42/EU presents a limitation, as it does not include certain important criminal offences, such as crimes against the financial interests of the Union,⁷ arms trafficking or offences typically committed by organised crime groups such as money laundering⁸ and environmental crimes.

Problem n.2: Directive 2014/42/EU provides for limited non-conviction and extended confiscation provisions. Currently the Directive covers non-conviction based confiscation (confiscation not requiring a final criminal conviction for a confiscation order), extended confiscation (confiscation going beyond the strict proceeds and instrumentalities of a crime) and third party confiscation of property in criminal matters (confiscation targeting property not belonging to the convicted person).⁹ On non-conviction based confiscation, Directive 2014/42/EU provides for the limited obligation to enable non-conviction based confiscation only in case of illness and absconding of the suspected or accused person. On extended confiscation, the Directive allows for its application only to a minimum list of crimes, which are listed in Article 5(2) of Directive 2014/42/EU. The issue is that current available confiscation powers might not be enough to effectively take away criminal profits.

Problem n.3: Member States have introduced further non-harmonised rules in addition to the minimum requirements foreseen by this Directive, particularly regarding freezing, non-conviction based confiscation and extended confiscation. The issue is that lack of harmonisation hinders cross-border financial investigations and causes issues of non-recognition of cross-border freezing and confiscation orders, such as in cases regarding additional thresholds of value, standards of evidence, burdens of proof, disproportion between lawful income of

⁶ Report of the Commission to the European Parliament and to the Council, “Asset recovery and confiscation, ensuring that crime does not pay,” COM(2020) 217 final, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20200602_com-2020-217-commission-report_en.pdf

⁷ In addition to Article 10 of Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law, which pertains to freezing and confiscation and explicitly refers to Directive 2014/42/EU.

⁸ In addition to Article 9 of Directive 2018/1673 on combating money laundering by criminal law, which pertains to freezing and confiscation and explicitly refers to Directive 2014/42/EU.

⁹ Europol, “Does crime still pay? Criminal Asset Recovery in the EU – Survey of statistical information 2010-2014,” 2016, available at: <https://www.europol.europa.eu/publications-documents/does-crime-still-pay>

the defendants and the value of the property seized, and time limits within which assets may be considered as derived from criminal activity.¹⁰

Problem n.4: The Confiscation Directive invites Member States to reuse confiscated property for the public interest or social purposes, without creating an obligation. This means that **confiscated assets are not currently regularly used to compensate victims of crime or to return profits to the society through their social reuse.**

Problem n.5: **Asset Recovery Offices have currently limited capacity to identify and trace criminal assets both at national level and in EU cross-border cases.** This issue is driven by Asset Recovery Office's limited and sometimes slow access to information such as direct and immediate access to databases (e.g. company or land registries), insufficient operational powers such as urgent freezing powers, insufficient financial, human and technical resources available, as well as the degree and quality of trainings received. Moreover, Asset Recovery Offices are not always sufficiently involved in the confiscation process and encounter issues regarding financial investigations. Currently, Member States' authorities do not systematically undertake asset recovery investigations (tracing, freezing, confiscating) at an early stage of the investigation and as soon as the financial environment indicates the presence of criminal assets in cross-border investigations. Moreover, standard rules related to the conduct of financial investigations are lacking, particularly for cross-border cases, and asset recovery offices often lack the power to follow up on a financial investigation post-conviction, and have insufficient tracing powers. Furthermore, not all Asset Recovery Offices currently have access to Europol's Secure Information Exchange Network Application (SIENA), and many still encounter operational challenges such as difficulties in identifying the correct international counterparts or lack of feedback and follow up on requests and investigations.

Problem n.6: **Challenges related to statistical data collection.** Even though Article 11 of Directive 2014/42/EU requires Member States to regularly collect and maintain comprehensive statistics on the number of yearly freezing and confiscation orders executed, as well as on the estimated value of the property frozen and recovered, the data collected is of limited comparability. Moreover, Asset Recovery Offices often do not have access to this collected data, nor to the data regarding another Member State. No centralised databases on frozen assets exist in the EU, not allowing Asset Recovery Offices to be notified if assets have already been frozen or confiscated by another Member State.

Problem n.7: Inefficient **management of frozen and confiscated assets.** Once frozen and/or confiscated, assets fast depreciate with different management needs for which law enforcement and judicial authorities are not always equipped to deal with. The difficult management of assets and their depreciation makes it hard for victims to be compensated when compensation provisions exist, and for assets to be repurposed towards social purposes.

Problem n.8: Asset Recovery Offices data **protection framework is not in line with the Data Protection Police Directive** (Directive 2016/680).¹¹

Basis for EU intervention (legal basis and subsidiarity check)

Organised crime threatens the security of the European Union. Criminal groups of increasingly poly-criminal and transnational nature act across borders and exploit loopholes in national legal frameworks. Common rules and joint practice are necessary to ensure effective cooperation across borders to tackle serious and transnational crime.

Provisions concerning judicial cooperation in criminal matters in the Union and on minimum rules on criminal offences would be based on Articles 82 and 83 of the Treaty on the Functioning of the EU (TFEU), which stipulate

¹⁰ As highlighted in the Commission Staff Working Document "Analysis of non-conviction based confiscation measured in the European Union" SWD(2019) 1050, the trend in Member States is of going towards more far-reaching non-conviction based confiscation systems, with a majority of Member States having reported that their non-conviction based confiscation regimes go beyond the requirements set out in the Directive. The Staff Working Document is available at <https://ec.europa.eu/transparency/regdoc/rep/10102/2019/EN/SWD-2019-1050-F1-EN-MAIN-PART-1.PDF>

¹¹ Communication from the Commission to the European Parliament and the Council, "Way forward on aligning the former third pillar acquis with data protection rules," COM(2020)262 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0262>

the approximation of the laws and regulations of the Member States in the area of serious and organised crime. Provisions concerning police cooperation involving all EU Member States for the prevention, detection and investigation of criminal offences would be based on Article 87 TFEU.

B. Objectives and policy options

The initiative aims at modernising the legal framework on freezing and confiscation of the proceeds and instrumentalities of crime and on Asset Recovery Offices. The general objective of the initiative is to reduce incentives behind serious and organised crime, which is profit-motivated, and to disrupt its growth and activities. To ensure that crime does not pay, national authorities need to be equipped with the tools to take away criminal assets to reduce criminals' ability to both enjoy their profits and to reinvest them towards further criminal actions. The initiative will contribute to increasing the low confiscation rates across the European Union, which currently only reach around 2% of freezing and 1% of confiscation of criminal profits.¹² As the ability to freeze and confiscate assets depends directly on the capacity to trace and identify them, the specific objective of the initiative is to strengthen Asset Recovery Offices and to reinforce EU cooperation and informational exchange in order to increase confiscation rates.

The impact assessment will consider the following policy options:

Option 1: 'Baseline scenario (status quo)': freezing and confiscation rules are based on the application of Directive 2014/42/EU. On the confiscation Directive, the baseline scenario entails maintaining the applicability of the Directive to crimes listed in Article 3, allowing extended confiscation only for the criminal offences listed by Article 5(2), and maintaining the current limited provisions on extended and non-conviction based confiscation. Social reuse of the proceeds and instrumentalities of crime is only up for consideration of the Member States and it is not a legal obligation. On Asset Recovery Offices, their capacity to trace and identify criminal assets domestically and internationally would remain limited, on the basis of Council Decision 2007/845/JHA. Their roles and competence would continue to vary widely between Member States, with some Asset Recovery Offices being granted extensive freezing and seizing powers and others acting as hotspots for informational and best practices exchanges only. Asset Recovery Offices data protection framework would remain unaligned with the Data Protection Police Directive (Directive 2016/680).

Option 2: 'Non-legislative interventions': focus on awareness raising of the current powers granted by Directive 2014/42/EU, including law enforcement and judicial specialised training. Possible interventions could include:

- Fostering and promoting the exchange of best practices regarding the social reuse of the proceeds and instrumentalities of crime through increasing the number of Asset Recovery Offices meetings;
- Fostering good practices, awareness raising and tailored training programmes.

Option 3: 'Legislative intervention', could include:

- Broadening the scope of Directive 2014/42/EU to cover additional criminal offences than those included in Article 3 and 5(2) of the Directive;
- Expanding the non-conviction based and extended confiscation provisions of Directive 2014/42/EU;
- Reinforcing the status and powers of the Asset Recovery Offices, so to ensure a higher level of practical cross border cooperation following transnational crime;
- Broadening the obligations towards the systematic launching of financial investigations and post-conviction financial investigations;
- Establishing an obligation to grant Asset Recovery Offices direct access to a minimum set of data and databases (e.g. land registries, vehicle registries, company registries, criminal records, maritime and

¹² Europol, "Does crime still pay? Criminal Asset Recovery in the EU – Survey of statistical information 2010-2014," 2016, available at: <https://www.europol.europa.eu/publications-documents/does-crime-still-pay>

aviation registries) to facilitate the identification and tracing of criminal proceeds and instrumentalities.

- Expand the set of minimum information to be included in cases of cross-border information sharing between Asset Recovery Offices to go beyond the obligations of Article 3 of Council Decision 2007/845/JHA.¹³
- Introducing the obligation for Asset Recovery Offices to exchange information through the Europol Secure Information Exchange Network Application (SIENA) to facilitate the swift and secure identification and tracing of criminal proceeds and instrumentalities;
- Introducing stronger statistical data gathering obligations, including the establishment of central registries of frozen assets at Member States' level and a cross EU registry on cross-border freezing orders;
- Establishing Asset Management Offices in all EU Member States to enforce stricter rules on how to manage frozen and seized assets to avoid their depreciation.
- Introducing stronger obligations towards victim's compensation and towards the social reuse of the proceeds and instrumentalities of crime;
- Aligning the Asset Recovery Offices data protection framework with the Data Protection Police Directive (Directive 2016/680);

Option 4: 'Mixed intervention': a legislative proposal in the lines of option 3 in addition to non-legislative intervention aiming at increasing the capacity and efficiency of asset recovery agencies and law enforcement and judicial actors whilst also empowering them with further legal tools.

C. Preliminary assessment of expected impacts

Likely economic impacts

The intervention will have two main impacts: (i) the increased rates of freezing and confiscation of the proceeds and instrumentalities of crime would ensure that criminal assets would not be reinvested into the legal economy, contributing to the internal EU competitiveness level playing field. (ii) Confiscated criminal assets can be returned to the legal economy and increase States' funding.

Likely social impacts

Confiscation provisions grounded in fundamental rights are expected to have a positive social impact through lowering the rate of crimes and increasing security. Taking away criminal profits and instrumentalities would increase public confidence in public institutions, and send a clear message that crime does not pay. Assets confiscated from criminals would not be reinvested into financing further criminal activities, contributing to the overall positive societal impact of reducing crime and increasing citizens' security. Assets used to compensate victims would increase the perception of a fair judicial system, whilst assets reused for social purposes (such as funding for schools, drugs rehabilitation centres, and similarly socially useful purposes in areas of education, social protection and social inclusions) would have a longer term and more widespread positive societal impact.

Likely environmental impacts

The initiative is expected to have no significant environmental impacts. Additional revenues generated from increased confiscation rates could increase resources available, among others, to environmental protection.

Likely impacts on fundamental rights

The protection of fundamental rights and especially property rights and data protection must be ensured. Confiscation of proceeds and instrumentalities of crime needs to be based on strict safeguards regarding the right to property of the accused, including procedural and defence rights. When grounded in fundamental rights, the increase of confiscation rates of proceeds and instrumentalities of crime would lead to an equally positive impact on the wider right to an effective remedy and delivery of equitable justice.

Likely impacts on simplification and/or administrative burden

¹³ The article currently requires Asset Recovery Offices to share the object of and the reasons for the request, the nature of the proceedings, details on property targeted or sought (bank accounts, real estate, cars, yachts and other high value items) and/or the natural or legal persons presumed to be involved (e.g. names, addresses, dates and places of birth, date of registration, shareholders, headquarters) in the most precise manner possible.

The impact assessment endeavours to establish – where applicable – whether an EU harmonised framework may result in a low level of regulatory costs (administrative burden/compliance costs) for both law enforcement, judicial authorities and public administrations – especially compared to the economic and social impacts the measure could achieve. The analysis will look into the relevant costs and burden reduction potential, quantifying it to the extent possible.

D. Evidence base, data collection and better regulation instruments

Impact assessment

An impact assessment will be carried out to support the preparation of this initiative and to inform the Commission's decision. The work on data collection and on stakeholders' consultation will benefit from a previously commissioned study (HOME/2017/ISFP/FW/LECO/0084) and on a previously commissioned study on 'Asset recovery and confiscation: what works and what doesn't work' (HOME/2018/ISFP/FW/EVAL/0081). The studies will be flanked by further data collection and economic analysis within the framework of an impact assessment study. The impact assessment will be made publicly available.

Evidence base and data collection

Being aware of the restrictions imposed by the COVID-19 pandemic, data collection will be based on a previously commissioned study (HOME/2017/ISFP/FW/LECO/0084) on the transposition of Directive 2014/42/EU and on a previously commissioned study on 'Asset recovery and confiscation: what works and what doesn't work' (HOME/2018/ISFP/FW/EVAL/0081). Planned consultation activities will also provide further data.

Consultation of citizens and stakeholders

The consultation activities will gather backward and forward-looking evidence to feed into the evaluations of Directive 2014/42/EU and Council Decision 2007/845/JHA and into the impact assessment. They will primarily rely on targeted consultations of law enforcement officials to obtain a balanced and comprehensive assessment of potential policy options. These consultations will be carried out to learn from the experience of the targeted stakeholders and to capture their different perspectives and expectations. In particular, the Commission will further address Member States, legal, judicial and law enforcement practitioners, civil society, think tanks, academia, and relevant EU agencies and international bodies. The consultations will build upon the studies previously commissioned by the Commission services and be carried out by means of bilateral and multilateral meetings, interviews, questionnaires, and informed debates. In addition, a public consultation will be published on the Commission's "Have your say" page in Q2 2021.¹⁴ A consultation synopsis report will be published on the Commission's consultation page once all consultation activities will have closed.

Will an Implementation plan be established?

An implementation plan will not be developed.

¹⁴ The "Have your say" page can be accessed at https://ec.europa.eu/info/consultations_en