

INCEPTION IMPACT ASSESSMENT			
TITLE OF THE INITIATIVE	Strengthening the mutual recognition of criminal assets' freezing and confiscation orders		
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A. Context, Subsidiarity Check and Objectives

Context

One of the main motives for criminal activity is financial gain. Making sure that crime does not pay by seizing back as much of these profits as possible is therefore a very effective mechanism to combat crime. This is what confiscation does: it is a measure, ordered by a court following procedures in relation to a criminal offence, resulting in the final deprivation of property.¹ In order to ensure that the asset to be confiscated is not moved or destroyed before the confiscation is ordered, it can be preceded by a freezing measure that temporarily prohibits the transfer, destruction, conversion, disposal or movement of property.² Freezing and confiscation of assets are also important tools to combat terrorism financing.

Criminals increasingly operate without borders and acquire assets in Member States other than those in which they are based and in third countries. There is an **increasing need for effective cooperation on asset recovery between Member States** and on international level.

Moreover, the link between organised crime and terrorist financing is now well established³. The extent to which organised crime is prevented from profiting from criminal conduct has a well-established link to the ability of terrorists to secure the financing necessary for their deadly activities.

In recent years, many Member States have instituted new and diverse forms of confiscation orders in order to deprive criminals of their illegally obtained assets more efficiently. Here is an overview of the main types of confiscation existing in Member States:

- ordinary confiscation is a confiscation measure directed against an asset which is the direct proceed of a crime;
- extended confiscation is a confiscation measure that goes beyond the direct proceeds of a crime, where the property seized is derived from criminal conduct;
- third-party confiscation is a confiscation measure made to deprive someone other than the offender – the third party - of criminal property, where that third party is in possession of property transferred to him by the offender;
- value-based confiscation is a confiscation measure by which a court, once it determines the benefit obtained by an individual from criminal conduct, imposes an order for the payment of money, which is realizable against any property of the individual;
- non-conviction based confiscation ('NCB') is a confiscation measure taken in the absence of a conviction and directed against an asset from illicit origin. It covers cases where a criminal conviction is not possible because the suspect has become ill or fled the jurisdiction, has died or where the statute of limitations has passed. It also covers the cases of action against the asset itself, regardless of the person in possession of the property.

¹ Cf. Art. 2 (c) of Framework Decision 2006/783/JHA and Art. 2(4) of 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.

² Freezing orders can also be used to securing evidence to be admitted in criminal proceedings; in that case, they fall within the remit of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

³ The Crime–Terror Continuum: Tracing the Interplay between Transnational Organised Crime and Terrorism, by Tamara Makarenko, Global Crime Vol. 6, No. 1, February 2004, p. 129.

In addition several Member States provide for the right of the victim for restitution or compensation of damages from the confiscated property.

When adopting Directive 2014/42/EU, which establishes common minimum rules and thereby harmonises the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, the European Parliament and the Council called on the Commission "to present a legislative proposal on mutual recognition of freezing and confiscation orders at the earliest possible opportunity" (...) "considering the need of putting in place a comprehensive system for freezing and confiscation of proceeds and instrumentalities of crime in the EU".⁴⁵

The European Agenda on Security **confirmed that mutual recognition of freezing and confiscation orders should be improved.**⁶ This was furthermore confirmed in the Action plan on Financing Terrorism⁷, underlining that beyond being a sanction, confiscation of criminal assets is also a preventative tool. To this end, the Commission wishes to ensure that all types of freezing and confiscation orders in the area of serious crime available within Member States are enforced to the maximum extent possible throughout the EU, though the application of the principle of mutual recognition, as provided for by Article 82 TFEU. Any initiative on mutual recognition instruments will take due consideration of the fundamental rights of persons subject to freezing and confiscation orders.

The current initiative is a response to all these calls.

The most recently adopted initiative in the field of confiscation is Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. The deadline for transposition is 4 October 2016, so evaluation of the effectiveness of this measure is not yet possible. It is described below. The main purpose of the Directive, the scope of which is limited to the 10 Eurocrimes⁸, is to establish minimum rules on freezing and confiscation and to harmonise the different national regimes within the EU, notably with regard to extended confiscation, confiscation from a third party and a limited form of non-conviction based confiscation. The Directive does not directly concern cross-border cooperation. Therefore, in order for cross-border freezing and confiscation to work more effectively, the Directive needs to be complemented by a comprehensive mutual recognition instrument, in order to facilitate the recovery of assets across EU borders,

The Commission is also committed to concluding, by the end of 2016, an assessment of a regime for the freezing of assets of terrorists under Article 75 TFEU⁹. However, this initiative concerns administrative freezing and is not linked to the judicial freezing of assets of illicit origin. Therefore, it addresses a different issue and has no overlap with the initiative being examined here.

Issue

The current legal framework for the recovery of criminal assets is not well fit to respond effectively to the challenges of criminals hiding their assets in other Member States: the current EU instruments for the cross-border recovery of criminal assets are inefficient, badly transposed and poorly applied. Only very few freezing and confiscation orders are executed in other Member States, compared to other types of mutual recognition instruments.

Several reasons for the limited use of the two framework decisions have been identified.¹⁰ A major issue is that the current mutual recognition instruments do not cover all the types of freezing and confiscation orders that can be adopted at national level (notably with regard to NCB or extended confiscation). In implementing the framework decisions, some Member States have even explicitly limited the scope of mutual recognition. In addition, the grounds for refusal are quite broad, thereby discouraging requests.¹¹ Member States have also reported that the mutual recognition certificates do not contain all necessary fields and are unnecessarily

⁴ Council doc. 7329/1/14 REV 1 ADD 1.

⁵ In its final report of 11 June 2013, the Special Committee on Organised Crime of the European Parliament also called for European legislation providing for the full application of the existing mutual recognition instruments and the immediate enforceability of confiscation orders, cf. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0245+0+DOC+XML+V0//EN>

⁶ COM(2015) 185 final

⁷ COM(2016) 50 final.

⁸ Euro crimes are particularly serious crimes with cross-border elements referred to in Article 83(1) TFEU. They include issues such as 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, cybercrime and organised crime.

⁹ COM (2016) 50 final.

¹⁰ Cf. in particular the 2013 Comparative Law Study of the Implementation of mutual recognition of orders to freeze and confiscate criminal assets in the European Union, by DBB Law, published November 2013 (referred to as the "2013 DBB Comparative Law Study").

¹¹ Cf. 2013DBB Comparative Law Study, p 76 and 84.

complicated. As a result, judicial authorities tend to use the forms relating to mutual legal assistance rather than the specific mutual recognition forms.¹² Moreover, some Member States consider mutual legal assistance as faster, more practicable and more efficient.

The size of the problem

There is currently a scarcity of reliable statistical data in the Union of the value of criminal assets currently being identified, being confiscated, and of the value of EU cross-border freezing and confiscation orders. However, it cannot be disputed that the value of criminal assets recovered in the EU can be considered insufficient, especially if compared to the estimated revenues of organised crime groups. The French body in charge of recovering and managing recovered criminal proceeds, AGRASC¹³, estimates that €1,200 billion of criminal money circulates throughout the world economy each year.¹⁴ A 2015 study by Organised Crime Portfolio¹⁵ stated that the main illicit markets in the 28 EU Member States produce approximately €110 billion each year, which is about 1% of EU GDP¹⁶. In 2012-13, an official estimate in the UK put the value of the proceeds of frauds alone at £52bn *per annum* while, in Italy, The Bank of Italy estimated the value of the criminal economy at 10.9 per cent of GDP in 2012.

Some data suggest that only 0.2 per cent of these criminal assets are recovered.¹⁷ Even allowing for a proportion of this figure which is not capable of being recovered because not every crime is reported and investigated, the proportion and value of the unrecovered sums of money is still woefully low and means that crime continues to pay. The total value of confiscations enforced in 2014 across the whole of Europe is estimated by an Italian study to amount to €4 billion¹⁸. The total value of confiscated assets is often much lower than the total value of the assets seized or frozen. Europol reports that 2.2% of the criminal proceeds generated in Europe are seized and 1.1% of the criminal proceeds generated in Europe are eventually confiscated¹⁹. In Italy, the total value of seized or frozen assets in 2015 is 5.3 billion euro, of which only 1.1 billion euro has been confiscated. In the UK, between 2010 to 2013-14, over 2.5 billion worth of assets have been frozen, of which 746 million of criminal assets have been confiscated. Of this amount, 93 million pound has been returned to victims²⁰.

Looking at cross-border contexts, the above-mentioned recovery rate is even lower, when criminal assets are located in several Member States as it is more and more the case in the EU. Feedback from stakeholders suggests that only very few freezing and confiscation orders are executed in other Member States, compared to some other mutual recognition instruments. At The Hague Conference on Asset Recovery hosted by Eurojust on 11 December 2014 some Member States indicated that they receive very few incoming requests to freeze and confiscate property, and compared to other Mutual Recognition Instruments, such as the European Arrest Warrant (EAW), freezing orders and confiscation orders remain underused. For example, statistics on mutual recognition instruments collected by the Polish Ministry of Justice show that in 2014 there were only 2 confiscation cases (of which 1 settled) and no freezing cases. For some Member States, classic tools and instruments of international co-operation, i.e. requests for mutual legal assistance, remain the most acceptable route for asset recovery cases. Also experts from Eurojust stated at several occasions²¹ that confiscation procedures remain underused.

During the Syracuse Presidency conference in September 2014, some data about confiscation and freezing orders were reported. For example, in 2011, there were 130,000 orders for freezing and confiscation; in the same period only 1500 orders were sent and received between Member States, which corresponds to about 1,1% of all freezing and confiscation orders issued. Although there is no firm statistical evidence, it does not seem credible that the appropriate proportion of orders with a cross-border dimension is as low as 1,1%. There is therefore a strong indication that cross-border asset recovery is underused and that the EU legal framework

¹² Cf. Communication from the Commission to the European Parliament and the Council - Proceeds of organised crime: ensuring that "crime does not pay", COM(2008) 766 final, p. 4; confirmed by 2013 Comparative Law Study of the Implementation of mutual recognition of orders to freeze and confiscate criminal assets in the European Union, prepared by DBB, p. 72.

¹⁴ AGRASC publication to be found at this web address: http://www.justice.gouv.fr/art_pix/1_plaquette_agrasc_fr2.pdf

¹⁵ "From illegal markets to legitimate business: the portfolio of organised crime in Europe", <http://www.ocportfolio.eu/File%20originali/OCP%20Full%20Report.pdf>

¹⁶ Given the lack of figures on illicit markets, the overall quantification of €110 billion may be underestimated.

¹⁷ United Nations Office on Drugs and Crime, "Estimating illicit financial flows resulting from drug trafficking and other transnational organised crime", Research Report, October 2011, http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf

¹⁸ Confiscated Goods – The Dark Billions: A whole investigation on criminal investments seized by EU Countries, Dataninja.it, 16 December 2015.

¹⁹ Europol, Report on seizures in EU, to be published / ERA seminar.

²⁰ National Fraud Authority

²¹ Hague Conference 2014; most recently, at the ERA Seminar on Freezing, Confiscation and Recovery of Assets, May 2016.

does not work properly.

That most of these figures have come from only few Member States is a reflection of the poverty of the available figures. A 2013 study²² finds a number of reasons for the lack of statistics including the fact that Member States sometimes execute freezing or confiscation orders locally and do not require central reporting and collation of the figures, keep no records of the different types of orders they are being asked to enforce so that such figures that exists are too general to allow nuanced analysis. The lack of available data has also been flagged in the above-mentioned 2015 Study by Crime Portfolio.²³ Directive 2014/42/EU will improve to a certain extent the collection of data by imposing an obligation on Member States to collect statistics on national and to provide available statistics on cross-border cases. It needs to be seen whether and how the current initiative could further enhance the collection of data and statistics on criminal assets.

Stakeholder Mapping

The stakeholders most directly affected are the judges and prosecutors who make and apply for freezing and confiscation orders in issuing states and law enforcement authorities (police or court staff) who are involved in the execution of such orders. As critical are their counterparts in executing Member States who must enforce orders, and who bear the cost of doing so.

Further stakeholders are:

- Ministries of Justice and Interior;
- Defence lawyers and Bar Associations (CCBE, ECBA);
- Criminal law experts;
- National Asset Recovery Agencies, CARIN and ARO networks;
- EU institutions and bodies (Eurojust, EJM criminal, Europol);
- Victims' Associations;
- Anti-fraud services;
- Civil society.

What are the main problems at EU level and how it is likely to develop in the future in case no policy action is taken (option 1)?

The current EU legal framework consists of four main instruments. Two of them are harmonisation instruments while two others are mutual recognition instruments. Both types of instruments are necessary in order to have a functioning regime of recovery of criminal asset, and they complement each other.

1) Differences in Member States' confiscation regimes will remain

Council Framework Decision 2005/212/JHA requires Member States to put in place measures to enable the domestic confiscation of criminal instrumentalities and proceeds for all criminal offences punishable by detention of at least a year. However, the level of harmonisation introduced by this instrument is very low, keeping diverse national legal confiscation regimes. It did not establish a uniform regime but left Member States a choice between different options which led to often diverging transposition into national law. **Directive 2014/42/EU** takes harmonisation further insofar as it covers more types of confiscation, but not all. Additionally, the range of criminal offences captured by Directive 2014/42/EU is narrow: the scope of the instrument is limited to the 10 Eurocrimes, and does not cover other criminal offences which generate proceeds. Thus, the Directive, though more recent, is more restrictive in scope than Framework Decision 2005/212/JHA, which covers all crimes and therefore remains applicable.

These harmonisation measures have each made improvements, but they have been patchy and too limited in scope. As a result, there are important differences between Member States' confiscation regimes, both in terms of forms of confiscation, and in terms of the objectives of confiscation measures, which create difficulties in the mutual recognition of such decisions. It is essential that Member States, despite their differences, have the ability to enforce the widest range of freezing or confiscation order capable of being made in other Member States. Only a mutual recognition instrument of the kind being proposed can achieve this.

²² See 2013 DBB Comparative Law Study, page 460.

²³ See chapter 11.1 on the availability of data in Europe

2) Deficiencies of mutual recognition instruments and in their application

Framework Decision 2003/577/JHA allows for the mutual recognition and enforcement of cross-border **freezing orders**, while **Framework Decision 2006/783/JHA** allows for the mutual recognition and enforcement of cross-border **confiscation orders**. While they apply to all crimes, none of these instruments requires the mutual recognition of extended or NCB confiscation orders or freezing orders preparing them, nor do they provide for the compensation of victims.

The Commission implementation reports for both instruments²⁴ indicate the lack of implementation among some Member States (non-transposition) and that national implementing legislation is in certain cases inadequate (numerous omissions and misinterpretations). Some deficiencies are inherent to this kind of legal instruments, which leave a large margin of discretion to the Member States. Framework Decision 2006/783/JHA does not set a limit on the type of confiscation orders which can be recognised and executed. However, in implementing this instrument, Member States have themselves limited the scope of orders which they will enforce in numerous ways, e.g. for NCB confiscation²⁵. This means that Member States, **all** purporting to put into effect the same instrument have interpreted the scope of the same measure in very different ways, meaning that the circulation of confiscation orders between Member States continues to face obstacles. The new instrument would address these deficiencies by including within its scope all freezing and confiscation orders which meet certain minimum standards, particularly including fundamental rights standards. The new instrument would not allow the Member States discretion for limiting the scope in their domestic systems.

Subsidiarity check

Legal Basis

The legal basis to support action in the field of mutual recognition of criminal assets' freezing and confiscation orders is Article 82(1) TFEU, which specifies *inter alia* that judicial co-operation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions. Measures may be adopted in accordance with the ordinary legislative procedure to (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions and (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

Subsidiarity

Since this initiative deals with judicial cooperation among Member States by way of mutual recognition, the EU is best placed to achieve the objectives. Mutual recognition is in line with the principle of subsidiarity since it aims at cooperation without requiring full prior harmonisation of national rules, and cannot be achieved by Member States acting alone.

The assets of organised criminal groups are increasingly invested outside their home countries (often in several countries). This cross-border dimension of organised crime activities and their investments justifies action at EU level to target the assets of organised criminal groups.

While cross-border criminal investigation and asset tracing may occur in several countries, prosecution and the judicial activities leading to confiscation normally take place in only one Member State. The resulting freezing and confiscation orders may then need to be enforced in another Member State. Therefore, while criminal activities and investments are increasingly cross-border, confiscation procedures remain essentially national. However, the cross-border dimension in their execution is evident.

Moreover, the penetration of organised crime into the economy of one Member State affects the functioning of the whole EU Internal Market. Even when managing licit businesses, organised crime groups often support these activities with the recourse to intimidation and corruption, thus altering competition and the smooth functioning of the Internal Market. The resulting loss of revenues affects both national and EU financial interests, even when it takes place in only one Member State.

Main policy objectives

The general objective of the initiative is to seize assets deriving from criminal activities in order to prevent and deter crime, including terrorism and organised crime, and compensating victims of crime.

The specific objectives of the initiative are:

- to improve the circulation of criminal assets' freezing and confiscation orders in cross-border cases, thus making it more difficult for criminals to successfully hide their assets abroad;
- to reduce delays for mutual recognition of both freezing and confiscation orders and allow for fast cross-border

²⁴ COM(2008) 885 final and COM(2010) 428 final.

²⁵ Cf. 2013 DBB Comparative Law Study, page 83 with further examples.

execution of freezing orders in urgent cases;

- to provide procedural safeguards for the protection of fundamental rights of persons concerned, including the victims.

An increase in the types of orders which can be enforced across borders combined with an improvement to the practical functioning of the process of obtaining mutual recognition of orders, in particular by simplifying the process and harnessing electronic developments, will lead to a larger volume of criminally-derived property being taken out of the hands of criminals. Crucially, there is a need to respond to the ever more creative ways in which criminals are trying to retain the proceeds of their criminal conduct, notably by transferring assets to Member States where they have no criminal activities and therefore, cannot be prosecuted.

B. Option Mapping

Baseline scenario – no EU policy change

Option 1: The baseline scenario means that the gaps in existing mutual recognition instruments and deficiencies in their application will remain.

Without further action to strengthen mutual recognition of freezing and confiscation orders, it is very unlikely that at EU-level a larger number of freezing and confiscation orders will be recognised on a cross border basis. This would mean that opportunities to seize criminal assets and reduce serious crime would continue to be missed.

It is expected that the implementation of Directive 2014/42/EU across Member States will result in larger amounts of criminal assets being seized domestically than at present. It may also have a positive impact on cross-border cooperation for those forms of confiscation in respect of which the Directive sets common minimum standards (for example in respect of Eurocrimes: extended powers of confiscation and a limited number of NCB confiscations), but this cooperation would to a larger extent be based on mutual legal assistance and not benefit from the advantages of mutual recognition.

Without further action, Member States will continue to rely on more traditional instruments of intergovernmental cooperation: mutual legal assistance requests, including cooperation under international conventions. These may be very flexible, but they bring the disadvantages of intergovernmental cooperation: it is slow and depends entirely on the goodwill of the requested party. The work of international organisations, for example the Council of Europe ('CoE') with regard to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism ('Warsaw Convention')²⁶, might slightly improve cross-border cooperation. This Convention obliges signatories to put in place domestic measures to criminalise certain conduct, and to adopt measures to enable the seizure of criminal assets. It also requires parties to provide judicial cooperation "to the widest extent possible". However, because the Convention sets *minimum* standards, because not all Member States are signatories to this instrument, and because there is a wide discretion to refuse requests, the coverage offered by the Warsaw Convention is limited. However, in its latest Action Plan on Transnational Organised Crime,²⁷ the Council of Europe proposes actions to improve implementation of this Convention, e.g. by launching training programmes covering some of the most recent forms of confiscation. Such actions would contribute to improvements in practice, but the above-mentioned limitations of the Convention would nevertheless persist.

The main advantage of this scenario is to properly implement and consolidate the existing tools and best practices in applying those tools.

The disadvantages are that Member States would increasingly be left behind by criminals: in the area of asset recovery, it is vital for States to have the ability to respond very quickly; criminals are able to move assets across borders extremely quickly, sometimes with a few clicks on a computer. By contrast, traditional methods of obtaining Mutual Legal Assistance ('MLA') are much slower – on average, the duration for execution of a MLA request in the EU is one year -, often bureaucratic and also bring an element of uncertainty because of the wide discretion States enjoy to execute a request or not to.

Options of improving implementation and enforcement of existing legislation or doing less/simplifying existing legislation

Option 2: additional non-legislative supporting actions at EU level

Option 2 would consist in improving the implementation and enforcement of existing mutual recognition instruments without legislating.

On 1 December 2014 the Commission obtained the competence to start legal action before the European Court of Justice in cases where these "Third Pillar instruments" were wrongly implemented. Following compliance assessments, the Commission may launch infringement procedures for those Member States who have not yet implemented Framework Decision 2003/577 (freezing – 1 Member State) and Framework Decision 2006/783

²⁷ Council of Europe Action Plan on Combating transnational organised (2016-2020)CDPC (2015) 17 Fin, page 24, cf. [http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/CDPC%20documents/CDPC%20\(2015\)%2017%20Fin.pdf](http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/CDPC%20documents/CDPC%20(2015)%2017%20Fin.pdf).

(confiscation – 4 Member States). By taking infringement action the Commission could address some implementation deficiencies. However, this competence cannot address the problems in implementation which arise from the instruments themselves. Many key provisions in these instruments allow much leeway for Member States, for example, by providing optional choices for transposition. Also the grounds for refusal are relatively broad which encourages refusals and discourages requests. This has added to the incoherence and inconsistency of their implementation. The certificates, which are mentioned as one of the reasons why the framework decisions are underused, are part of the instruments and cannot be amended without legislative action.

The Commission could also support training measures for law enforcement and judicial authorities to promote and improve their application as well as workshops to exchange best practices or peer review meetings with Ministries of Justice. Those activities should involve key players such as Eurojust, the European Judicial Training Network and the European Judicial Network. However, this would not solve the issue of the limited scope of these instruments which do not include the most modern forms of confiscation such as non-conviction based, extended confiscation or confiscation for the benefit of victims. In addition, the above-mentioned issues linked to the nature of the current instruments, leaving a margin of discretion to Member States, would not be addressed under this option.

Alternative policy approaches

Option 3: new mutual recognition instrument with a certain number of improved provisions (Codification and simplification of existing mutual recognition instruments)

Option 3 would attempt to codify the existing two instruments into one and at the same time modernise and simplify the existing provisions, while aligning its scope with that of Directive 2014/42/EU in terms of types of confiscation measures covered. The new instrument would, however, not be limited to the 10 Eurocrimes. Improvements could in particular be achieved by reviewing the certificates to be used, introducing mandatory deadlines for procedures, including quick urgency procedures, or introducing harmonised grounds for refusal based on fundamental rights. This option would improve the functioning of the existing instruments, however, some confiscation measures would not be covered and the need for implementation by Member States would lead to divergences between the different national systems.

Option 4: new mutual recognition instrument with extended scope and improved provisions

Option 4 would consist in the adoption of a new mutual recognition instrument that would address all deficiencies and gaps identified for the existing instruments. It would notably include within its ambit all freezing orders and all confiscation measures which meet certain stringent minimum standards, particularly including strong fundamental rights standards. It would also allow victims to benefit from asset recovery in cross-border cases, where this is possible under national law. A new mutual recognition measure would also allow for requests which are capable of being executed very quickly. Finally, it would consolidate and streamline provisions and certificates, making it far easier for practitioners to work with.

Option 4(a)

Under this option, there is the possibility to limit the types of confiscation orders which can be recognised to those which are linked to criminal justice proceedings.

Option 4(b)

Another sub-option is to extend the obligation to recognise confiscation orders beyond those covered by option 4(a) to those made in civil proceedings where they are linked to criminal activities, but on condition that certain fundamental rights safeguards are respected.

This last option would ensure the widest scope and cover all existing confiscation orders. It would therefore be the most effective option in meeting the objectives. However, compared to option 4(a), it might be politically less feasible and might raise issues with regard to the legal basis, which relates to judicial cooperation in criminal matters. It needs to be carefully examined if and to which extent confiscation orders issued in the context of civil proceedings may be included in a new instrument.

Regulation vs. Directive

Article 82(1) TFEU gives the legislator a choice: it does not limit the possible measures to directives, but also allows for the adoption of regulations. Whereas a directive would give Member States some margin for transposition, a regulation would be directly applicable and would provide greater legal certainty.

Alternative policy instruments

Due to their fundamental rights impact, the procedures to freeze and confiscate criminal assets require strong procedural safeguards which can only be provided through legal guarantees provided by a legally binding instrument. Self-regulation is not an option.

<p>Traditional bases for obtaining Mutual Legal Assistance, including CoE Conventions such as the Warsaw Convention may be used but, as set out above, are often slow and provide for a wide discretion to refuse thus leading to more legal uncertainty for requesting states.</p> <p>Both alternatives do not harness the efficiency sought in the Area of Freedom, Security and Justice.</p>
<p>Alternative/differentiated scope</p>
<p>Not relevant.</p>
<p>Options that take account of new technological developments</p>
<p>Judicial cooperation requires that judges or prosecutors fill out a certificate which is the legal basis for the mutual recognition request. A legislative initiative will include a modern and user-friendly certificate which could be made available through the e-Justice Portal and in respect of which automatic translation would be used as far as possible. An additional option is that the transmission of the orders be done through the e-Justice Portal or the EJN portal. This would also allow the collection of statistical data at a minimal cost for Member States. Having such material in future will allow for a much more accurate evaluation of the success of the measure.</p>
<p>Preliminary proportionality check</p>
<p>If compared to harmonisation measures, an EU initiative on mutual recognition is a less intrusive measure. Its aim is not to harmonise national laws and require Member States to offer in their domestic jurisdictions the same kinds of confiscation regimes. Instead, its aim is to complement the existing harmonisation instruments by ensuring that most types of confiscation orders made in one Member State can be recognised and executed in any other Member State, even if that kind of order is not available domestically in the executing Member State. Where the initiative would trigger additional costs for Member States, these costs would be more than offset by the additional income generated by increased confiscation activities.</p>
<p style="text-align: center;">C. Data Collection and Better Regulation Instruments</p>
<p>Data collection</p>
<p>Particular mention is made of the urgency of this measure and the commitment made at a high level to adopting the current proposal in the 4th quarter of 2016. It is, therefore, particularly important that no time (or resource) be lost in duplicating effort already expended.</p> <p>The proposal will build on :</p> <ul style="list-style-type: none"> - the implementation reports on the existing instruments such as Framework Decision 2003/577/JHA and Framework Decision 2006/783/JHA as already explored in the 2013 study; - the 2012 Impact Assessment accompanying the Commission proposal for Directive 2014/42/EU which already concluded on the need for a legal instrument to improve mutual recognition in this area; - several recent expert meetings and conferences dedicated to the issue of mutual recognition of freezing and confiscation orders and in particular to NCBC. <p>In view of the existing data, it is not proposed to conduct a separate <i>ex post</i> evaluation of the existing mutual recognition instruments. The 2013 study evaluated the performance of the existing EU measures (effectiveness, efficiency). The 2012 Impact Assessment accompanying the proposal for Directive 2014/42/EU also included an evaluation of the same measures, and reached an identical conclusion, namely that there was a fundamental problem with the scope of the existing measures and that a new mutual recognition instrument was justified. The 2012 Impact Assessment was approved by the Impact Assessment Board.</p> <p>In so far as statistical information is concerned, a distinction should be drawn between data concerning the sums seized in Member States pursuant to cross-border requests, and forecasts of the financial impact of the initiative if adopted. With regard to the former, as explained above, accurate data does not exist, as Member States don't collect this information and thus it is necessary to extrapolate general figures from the limited information available. The data used in the 2012 Impact Assessment will be adapted and/or complemented. With regard to the latter, asset recovery is one of the few areas in the area of judicial cooperation in which Member States can generate income. In Framework Decision 2006/783/JHA, Article 16 provides rules on asset sharing: where the value of the confiscated property is Euros 10,000 or less, the full amount is retained by the executing Member State. Where the value is above Euros 10,000, the property is split equally between the requesting and executing Member State. It is recognised, of course, that criminals do not hide their criminal assets evenly across Member States. It is highly likely that larger commercial and financial economies will be the repositories of a larger proportion of such criminal property. It is likely, therefore, that these Member States will receive a significant percentage of asset recovery requests, thus incurring greater administrative and judicial costs. However, if the current asset sharing rules are maintained, they would also be able to retain a correspondingly larger share of the seized property.</p>
<p>Consultation approach</p>

Stakeholders

The stakeholders are law enforcement authorities, prosecutors, judges and other criminal justice practitioners involved in the making and execution of freezing and confiscation orders; ministries of Justice and Interior, defence lawyers and Bar Associations (CCBE, ECBA), National Asset Recovery Agencies and CARIN and ARO networks, EU institutions and bodies (Eurojust, EJC criminal, Europol), criminal law experts, Victims' Associations, Anti-fraud services, civil society.

Consultation Strategy

Confiscation is a specialised and technical topic which is dealt with by a rather limited number of experts working in this area, namely prosecutors, judges, lawyers, officials working in national Ministries of Justice or Interior or Asset Recovery Agencies.

It is therefore considered that a targeted consultation of experts and specialists would be a more effective way of engaging those with the relevant knowledge, as opposed to a public consultation.

Past consultation

Under the Italian Presidency in September 2014, the Commission jointly organised a "Conference on mutual recognition of judicial decisions and confiscation" in Syracuse and engaged with Member States. The first session assessed the current status of Mutual Recognition of Judicial Decisions in Criminal Matters. Over 100 practitioners from 28 Member States attended. DG Home and DG JUST, over a series of sessions, set out the existing framework and sought feedback from those present. This feedback has informed the development of the initiative.

In December 2014, also under the Italian Presidency, a meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions took place in The Hague at Eurojust. Senior lawyers from 14 Member States provided their assessments of how the existing instruments (EU and Council of Europe) were functioning, the likely impact on Directive 2014/42 on confiscation and whether further legislative or non-legislative measures were necessary. Valuable input was gathered which continues to inform the development of the initiative.

In the lead up to the 2012 Impact Assessment, extensive consultation was engaged in. Among the parties consulted were defence representatives. While they expressed concerns about the increased use of extended and NCBC confiscation, their concerns centred on fundamental rights. These will be taken on board as appropriate, one of the aims of the new initiative being to strengthen the protection of fundamental rights.

In addition, three meetings of individual experts took place in Brussels on 7 January 2015, 30 March 2015 and 14 March 2016, to discuss specific issues related to asset recovery among EU Member States.

A NL Presidency Conference entitled "Strengthening the mutual recognition of freezing and confiscation orders" took place on 20 June 2016. It was attended by about 100 practitioners and experts from all Member States.

A meeting with a group of Eurojust members who have expertise in asset recovery took place in June 2016. During a meeting of the ARO Platform in June 2016, Asset Recovery Offices representatives were consulted on their experience with mutual recognition, in particular with respect to the management of assets frozen assets.

Future Consultation

Planned future consultations include:

- Consultation of organisations representing victims of crime, notably Victim Support Europe.

Will an Implementation plan be established?

Yes No This will depend on whether the proposed instrument will be a Directive or a Regulation.

D. Information on the Impact Assessment Process

An Inter-Service Group has been set up. It is led by DG Justice and Consumers and composed of Secretariat General, Legal Service, DG Migration and Home Affairs, DG Economic and Financial Affairs, DG Internal Market, Industry, Entrepreneurship and SMEs, DG Taxation and Customs Union, the European Anti-Fraud Office and the European External Action Service. A first meeting of the ISG group took place in May 2016.

E. Preliminary Assessment of Expected Impacts

Likely economic impacts

The initiative will have a direct positive impact on national budgets through revenue. It will improve the smooth functioning of the Internal Market by protecting the licit economy from organised crime and thereby contribute to boosting growth and jobs in Europe.

Likely social impacts

If organised criminals are deprived of assets which would otherwise go towards funding or facilitating criminal

<p>activity, the benefits to public safety are clear. Additionally, it is intended that the initiative will include provision for the mutual recognition of confiscation orders made for the benefit of victims. This would have an immediate impact on the restitution of property or provision of compensation to individual victims of crime. The initiative will also have a positive impact on the financial and psychological situation of victims of crime on a broader level because – in some Member States at least – victims' organisations will receive parts of the recovered criminal assets.</p>
<p>Likely environmental impacts</p>
<p>Not relevant.</p>
<p>Likely impacts on simplification and/or administrative burden</p>
<p>If the initiative is fruitful, Member States will be able to bypass the traditional Mutual Legal Assistance route, which can be slow and cumbersome, and which comes with considerable legal uncertainty. The initiative is likely to reduce the administrative burdens for judges and prosecutors through the simplification of the certificates they have to fill in for the mutual recognition request. The initiative will take advantage of the modern tools available in the context of the e-Justice Portal and limit as far as possible the need for non-automatic translation. This will save both money and time. Being able to generate a request for the mutual recognition of an order and having it recognised and executed within a very short time also means that assets can be dissipated less easily.</p>
<p>Likely impacts on SMEs.</p>
<p>Businesses and SME's will not be directly affected by this proposal. However, seizing of criminal assets makes it more difficult for criminal business to operate, thus in the long term it should help legitimate business by decreasing competition by illegal actors. As an example, statistics indicate that the total fraud loss in the UK in 2011 is 73 billion pound, of which the private sector lost 45.5 billion pound. Fraud is a significant element of the organised crime groups (OCG) threat either as the primary activity of an OCG, or as an enabler/ funding stream for other serious crimes.</p>
<p>Likely impacts on competitiveness and innovation</p>
<p>See above impact on legitimate economy.</p>
<p>Likely impacts on public administrations</p>
<p>As previously stated, confiscation is one of the few areas of judicial cooperation with the potential to generate money for both issuing and executing states, because it is possible for confiscated assets to be shared equally between them. This is an incentive to both for greater effectiveness.</p>
<p>Likely impacts on third countries, international trade or investment</p>
<p>If the initiative is successful and cooperation improved among Member States, this could be an incentive for criminal organisations to hide their illicit assets in third countries.</p>