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The harmonisation of criminal asset recovery in the European Union: an assessment of the proposal for a new directive on asset recovery and confiscation

By Paolo Vespa

ABSTRACT

The present paper is an extract of my Master's thesis (a.a. 2022/23) titled: "The harmonisation of Criminal Asset Recovery in the European Union. An Assessment of the Proposal for a New Directive on Asset Recovery and Confiscation". Such Proposal, issued in May 2022 by the European Commission, was the opportunity to examine the state of art of the EU Member States' criminal asset recovery regimes, *i.e.* those sets of investigative and legal processes that have – as their core objective – the deprivation of ill-gotten property from the hands of criminals. At a time when crime is driven by financial gain more than ever and the States' individual efforts against it are undermined by the increasing cross-border dimension of crime, enhancing the asset recovery legal frameworks throughout the European Union is of paramount importance, and the mentioned Proposal contained some relevant insights, which later led, in April 2024, to the adoption of Directive (EU) 2024/1260.

1. INTRODUCTION

The European Union integration process has – throughout the years – achieved remarkable progress. Starting as a consortium of States that shared objectives of economic nature, it later led to a project of political union among diversity, whose significance was gradually also shown in the criminal law field. By progressively overcoming the historically rooted reasons that strictly linked criminal matters (and, in particular, the *ius puniendi*) with the States' sovereignty, the EU supranational legislator has been recognised growing competence to legislate in this delicate field together with the Member States. This process of Europeanisation moved along two instances that can conflict: the need to ensure security in the Union by putting in place legal regimes of criminal law and the respect for fundamental rights (among which, those related to the limitation of personal freedom) and guarantees that are specific to criminal substantive and procedural law as provided in the national legal systems. The turning point for

starting to do so was the (still ongoing) internationalisation of crime, which undermine(d) the effectiveness of the European States' individual efforts.

The fight against crime through harmonising legislation at a supranational level led the European Commission[1], in May 2022, to issue a Proposal[2] aiming at enhancing the criminal asset recovery regimes of the Member States. Asset recovery can be defined as that set of investigative and legal processes that have – as their core objective – the deprivation of ill-gotten property from the hands of criminals.[3] Since money is the lifeblood of all domestic and international organised crime groups,[4] depriving criminals of their ill-gotten assets is an essential element to disrupting their activities[5] and increasing the costs of engaging in illegal activities, strengthening the notion that '*crime does not pay*'[6].

Effectively, the EU legislator already grasped such relevance and intervened to bring together the Member States' regimes on asset recovery. Though, the available data show that the Member States' efforts so far are not sufficient overall, and that crime *does* still pay within the Union borders: it is, in fact, estimated that of around €110 billion that are generated annually by illicit markets in the Union, only 1.1% – on average – are recovered by the Member States.[7] Since it has been recognised that, among the reasons behind these unsatisfactory data, there is a still-existing significant disharmony and fragmentation of the Member States' regimes on asset recovery, the European Commission issued the Proposal, showing, once again, the high political priority of recovering criminal assets in the Union.

The present work, which relates to the Master's thesis mentioned in the abstract, brings back some of its main points of analysis, which, starting from the assessment of the Proposal's provisions that were more likely to entail greater implications for the Member States in their implementation, aimed to provide a basis for an evaluation of the implications and future perspectives of criminal asset recovery in the Union.

[1] Hereinafter, also: 'Commission'.
[2] Proposal for a directive of the European Parliament and of the Council on asset recovery and confiscation [2022] COM/2022/245 final. Hereinafter: 'Proposal'.
[3] FATF 'Asset Recovery' https://www.fatf-gafi.org/en/topics/asset-recovery.html, accessed 15 June 2023.
[4] Michael Zeldin, 'Money Laundering: Legal Issues' in Robert Effros, *Current Legal Issues Affecting Central Banks*, *Volume II* (International Monetary Fund 1994) 209-229, p. 209.
[5] Commission Communication on the EU Strategy to tackle Organised Crime 2021-2025 COM(2021), p. 170.
[6] Eurojust, 'Eurojust Annual Report 2021' (2022) DOI: 10.2812/632122, p. 24.
[7] Europol, 'Does crime still pay? Criminal asset recovery in the EU' (2016) https://www.europol.europa.eu/cms/sites/default/files/documents/criminal_asset_recovery_in_the_eu_web_version.pdf, p. 4.

2. THE EUROPEAN UNION'S LEGAL INTEGRATION IN CRIMINAL MATTERS. A BRIEF OVERVIEW OF THE HISTORICAL BACKGROUND

The present section will trace the momentous steps in the European legal integration in criminal matters. In particular, it will be explained how the need to address the increasingly transnational dimension of crime, together with the idea of advancing a European *political* project, made their way to overcome the idea that granting a supranational body competency to legislate in criminal matters was not conceivable.

Following a gradual '*spill-over effect*'[8] of EU law and policy on purely economic dimensions to broader issues, including criminal law, as well as the flourishing of the EU integration process, the first explicit Union's competence in the field of criminal law was attributed with the 1992 Treaty of Maastricht. This Treaty, while creating the 'European Union', provided for the establishment of the so-called three pillars. Each of them represented an area of cooperation within the Union, and, interestingly, the third one, concerned cooperation in the fields of justice and home affairs, which also covered judicial cooperation in *criminal* matters together with the combating of terrorism and other serious crimes. Considering the sensitivity of the matter, under this 'pillar' an *'intergovernmental framework of action'*[9] was established. Its areas required unanimity in decision-making and the use of classic international law instruments, namely international agreements and (binding) resolutions, the only difference being that the latter were formally called 'joint positions' or 'joint actions'.[10] It is, then, with the 1997 Treaty of Amsterdam[11] that the third pillar areas were '*communitarised*'[12]. At that time, therefore, it was clear the Union had become '*the pre-eminent forum*'[13] for making a start with EU criminal law. Moreover, it is under this Treaty that the expression still in use today to refer to the EU policy area which includes judicial cooperation in criminal matters was *formally* used for the first time: the 'Area of Freedom, Security and Justice' (AFSJ). The Treaty also introduced two important measures conceived as legally binding: 'Decisions' and 'Framework Decisions', the latter also providing legal approximation and therefore being the third pillar equivalent of the Directives emanated in the first pillar.

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[8] Valsamis Mitsilegas, *EU Criminal Law* (2nd edn, Hart Publishing 2022), p. 2.
[9] Ibid, p. 1.
[10] Pieter Jan Kuijper, 'The evolution of the Third Pillar from Maastricht to the European Constitution: institutional aspects' (2004) Common Market Law Review Vol. 41 Issue 2 609, p. 610.
[11] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, [1997].
[12] Valsamis Mitsilegas, *EU Criminal Law* (2nd edn, Hart Publishing 2022), p. 8.
[13] Koen Lenaerts, Piet Van Nuffel and Tim Corthaut, 'The Area of Freedom, Security, and Justice' in Koen Lenaerts, Piet Van Nuffel and Tim Corthaut (eds), *EU Constitutional Law* (Oxford University Press 2021) 243–274, p. 244.

Another major development, especially when considering criminal law's intrinsic impact on human rights, occurred a few years later than the Amsterdam Treaty, when in 2000 the Charter of Fundamental Rights of the European Union[14] was solemnly declared at Nice. Several of its provisions relate to criminal law matters. Emblematic examples are Article 17 (right to property, especially relevant for asset recovery issues), or those in Title VI, labelled 'Justice'. However, the Charter was elevated to the status of primary law only in 2009 along with the Lisbon Treaty. Since then, it has been an indisputably crucial source for interpreting EU criminal law, as its binding value covers not only EU institutions, bodies, offices, and agencies, but also Member States when they are implementing Union law.[15] Therefore, thanks to the expansion of EU criminal law and the valorisation that the CJEU has always been doing of its principles and rules,[16] the Charter has been relied on in different scenarios and will increasingly do so.

A more recent radical change of the scene in EU criminal law was given, in 2007, by the Treaty of Lisbon. In fact, the pillar structure was abolished and the law-making process acquired as a default rule the 'ordinary legislative procedure', characterised by a qualified majority voting in the Council and an equal participation of the European Parliament as a co-legislator.[17] In addition to that, the AFSJ was 'constitutionalised' and inserted into the Treaty on the Functioning of the European Union[18] as the new Title V.

3. THE RECOVERY OF CRIMINAL ASSETS. PRELIMINARY REMARKS

Criminal asset recovery[19] is a significantly complex subject. Before delving into the future perspectives arising from a EU legislator intervention in the field, it is appropriate to examine the concepts and principles related to it, as well as its stages.

AR may be defined as that set of investigative and legal processes that have – as their core objective – the deprivation of ill-gotten property from the hands of criminals.[20] There is no unique view of these stages' classification, as this cannot

[14] Charter of Fundamental Rights of the European Union, OJ C 326.

[15] Ibid Article 51(1). In particular, to understand how the CJEU interprets 'when implementing EU law', see Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 21.

[16] In particular, for the CJEU's commitment to widen and strengthen the scope of the Charter, see Valeria Scalia, 'Protection of Fundamental Rights and Criminal Law. The Dialogue between the Eu Court of Justice and the National Courts' (2015) EuCrim Issue 3/2015 100.

[17] Peter Csonka and Oliver Landwehr, '10 Years after Lisbon – How "Lisbonised" Is the Substantive Criminal Law in the EU?' (2019) EuCrim Issue 4/2019 261, p. 261.

[18] Hereinafter: 'TFEU'.

[19] Hereinafter: also 'AR'.

[20] FATF 'Asset Recovery' https://www.fatf-gafi.org/en/topics/asset-recovery.html accessed 15 June 2023. It is relevant to underline that "criminal asset recovery" does not cover as such violations of administrative nature. Indeed, it does cover situations where a criminal sanction is

but be based on the basis of reconstruction arising from (still different) national systems. However, being the Proposal which was analysed in the Master's thesis presented by the Commission, it will be the latter's classification that was used. Such classification, of course, reconstructs the AR processes throughout the Union's Member States, and includes five phases: tracing and identification, freezing, management, confiscation, and disposal of criminal assets.[21] Interestingly, the Proposal contained rules for all of them.

The first stage of AR is the *tracing* and *identification* of tainted assets. It consists of two sub-phases, strictly interconnected. The *tracing* part, indeed, refers to following the trail of illegally acquired proceeds as well as the examination of this revenue. The *identification* part, instead, relates to the localisation of the asset, may it be in a physical place within the country, such as an apartment, or dematerialised in the financial or virtual environment, such as an amount of money in bank accounts or crypto-assets.

For 'freezing of assets', the second stage of AR, is usually intended the temporary retaining of property with a view to their possible subsequent final decision of confiscation. This could be achieved through different methods. For instance, some options include prohibiting the transfer of the item, or burdening it and then marking eventual displacements with absolute invalidities. The usefulness of freezing assets within the AR process is evident. First of all, this stage avoids what is probably the most problematic occurrence for recovering assets: their dissipation.

Once the allegedly criminal assets have been frozen, the status of these assets is pending to the proceedings that could lead to confiscation. What happens at this time is what constitutes the third AR stage. The final objective of this stage is to ensure that the frozen assets are well-administered and preserved, so that they do not lose value. This is, of course, relevant from the perspective of the State, but also of the person whose property is at stake. In fact, by mismanaging property and making it lose value or depreciate, the State loses an opportunity to reinject some property into the legal economy. The same objective can also practically concern (the management of) confiscated assets *before* they reach their final recipient, that is, before the 'disposal' stage of AR.

Confiscation is the important fourth stage of AR, and can be defined as an act of authority *'that establishes state dominion over private property, with the correlative extinction of rights or claims held by other parties'*[22]. It usually takes the

provided and, in such sense, both the 2014 Directive and the Proposal in analysis only address the recovery of assets within criminal domain.

[21] 'Confiscation and Asset Recovery' https://home-affairs.ec.europa.eu/policies/internal-security/organised-crime-and-human-trafficking/confiscation-and-asset-recovery_en accessed 15 June 2023.

[22] Serena Quattrocolo, Sandra Oliveira Silva and Ernestina Sacchetto, *Assets confiscation and prevention of crime in Europe: an overview upon the EU and domestic legislations* (Wolters Kluwer 2022), p. 3.

form of an order or of a measure taken by a court, having a definitive character and concretely resulting in the actual deprivation of the ill-gotten assets from criminals' hands. Hence, confiscation must always be issued by a *judicial* authority, to which reliable and admissible evidence must be presented.[23] The rationale is clear: a final deprivation of assets from the citizens' hands must be covered by a strong level of safeguards as it is '*in constant tension*'[24] with the right to property and the right to the peaceful enjoyment of the possession.

The last AR phase is the disposal of the assets, once they are confiscated. These revert to the State (or States, if applicable) and/or are given to the victim(s). Depending on the nature of this property, such benefit could consist of different options (from the direct restitution of the items/sums of money to the granting of compensation rights, etc.). Anyway, either if the confiscated assets need to be reverted to one or more States, an '*innovative*'[25] disposal form might also follow: the assets could be *reused* for *public* or *social* purposes. These expressions refer to the property's return to the affected communities and to the encouragement of their use in accordance with communal and public needs.[26] The assets that can be socially reused might be of different natures, from real estate to moveable assets, like a boat, or money, and this very much depends on the national legal frameworks.

The Proposal in discussion, as already mentioned, builds upon the existing EU legal framework in the AR field[27] by intervening on all the phases just recalled.

4. THE PROPOSAL FOR A DIRECTIVE: FEATURES, NOVELTIES AND FUTURE PERSPECTIVES

Declared objective of the Proposal is to strengthen the still-very-different national legal frameworks on AR by providing a new, more detailed set of rules that

[23] 'Financial Investigations | How to Find Evidence of Assets in Criminal Activities' (*Stolen Asset Recovery Initiative – The World Bank, UNODC*) https://star.worldbank.org/focus-area/financial-investigations accessed 18 June 2023.

[24] Serena Quattrocolo, Sandra Oliveira Silva and Ernestina Sacchetto, *Assets confiscation and prevention of crime in Europe: an overview upon the EU and domestic legislations* (Wolters Kluwer 2022), p. 3.

[25] Barbara Vettori and Boban Misoski, 'Social reuse of confiscated assets in the EU: current experiences and potential for its adoption by other EU and non-EU countries' (2019) Liber Amicorum. Studia in honorem academici Vlado Kambovski septuagesimo anno, p. 700.

[26] Ibid.

[27] Council Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property; 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 [2007] OJ L 332/103; 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 [2014] OJ L 127/39; 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 [2018] OJ L 303/1; hereinafter: 'Regulation 2018/1805'.

addresses the issue, so that Member States can '*count on similarly effective asset tracing and confiscation capabilities*'[28], otherwise, the Commission recalled, criminals might target those States where the assets are less likely to be identified[29], ultimately resulting in a multi-speed Union as well as in an internal market's distortion.[30]

The rules contained in the Proposal adopted different approaches, from providing minimum common rules concerning the AR stages to regulating organisational and institutional aspects.

4.1. The scope of application of the Proposal

In comparison with the mentioned EU legal framework on AR already into force, the Proposal – with Article 2 – sets to expand the scope of application of EU-wide applicable rules on AR to more offences when compared to the 2014 Directive on the topic[31]. Its first paragraph includes *in addition*: illicit trafficking in weapons, munitions and explosives; fraud, including criminal offences affecting the Union's financial interests; environmental crimes; and facilitation of unauthorised entry and residence.[32]

Interestingly, *migrant smuggling* is not included in Article 2(1)'s list. It could be argued that this choice raises some concerns. First of all, statistics show the high profitability of this crime nowadays.[33] Secondly, this exclusion collides even more when considering that the offence of 'facilitation of unauthorised entry and residence' is, instead, included. Doubts arise to the extent that the crime components of this last offence resemble those of migrant smuggling, as both crimes concretise in circumventing immigration controls or requirements. However, migrant smuggling differentiates itself in its *motive* of producing financial gain, while the facilitation of unauthorised entry and residence can also be done for other reasons, including humanitarian motives. Hence, it is difficult to understand why the Proposal should cover the *minus* (facilitation of unauthorised entry and residence) and leave out the *maior*, namely, migrant smuggling, which is a more profit-driven activity.

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[28] Impact Assessment Report Accompanying the Proposal, p. 154.
[29] Ibid, p. 134.
[30] Ibid, p. 30.
[31] 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 [2014] OJ L 127/39, hereinafter "2014 Directive'.
[32] Proposal Article 2(1) (k, l, m, n).
[33] General Secretariat of the Council of the European Union, 'Empact 2022 Results' (2023) available at https://www.consilium.europa.eu/media/65450/2023_225_empact-factsheets-2022_web-final.pdf p. 5.

Article 2(1) also does not cover *illicit tobacco trade*, the absence of which was also criticised by the European Economic and Social Committee.[34] Effectively, the significant involvement of organised crime in such activity, its cross-border element and its elevated estimated revenues (ranging from €8 to €10 billion in the Union) would suggest that illicit tobacco trade is included in the Proposal's scope of application.[35]

Another exclusion that can be noted in the Proposal's rules concern *market abuse* crimes.[36] The preparatory works do not explain the reasons why the Commission did not propose to harmonise the AR rules for these offences. However, it is certainly true that the market abuse field, especially when a criminal sanction (in addition or alternatively to the administrative sanction) is provided, is complex and delicate, and not only for its highly-technical nature. The EU's Member States feature a set of regulatory authorities of the market[37] that often have sanctioning powers, including administrative measures of property deprivation. Hence, there is an ongoing debate[38] on the prohibition of *bis in idem* in the field of market abuse, which might have discouraged the Commission to include these offences in the list of Article 2. Another possible reason for this is that market abuse crimes do not generally present a clear connection with organised crime, to which the Proposal mainly refers. Interestingly, the Council adopted in June 2023 a General Approach on a Draft Directive on AR and confiscation, and specifically proposed on the matter to include the offences covered by the so-called market abuse EU Directive.[39]

The Council even went further in proposing other amendments concerning the Proposal's scope of application, the content of which can be shared. Contrary to Article 2(1) of the Proposal, which lists a set of crime *titles* (for instance, 'terrorism') and then refers to other EU or international instruments to define these as to how they should be intended by the Member States, the Council proposed a different approach, similar to that of the 2014 Directive. The Council's version does not refer to crimes as such but to all criminal offences which are 'covered by'

[34] Opinion of the European Economic and Social Committee on 'Proposal for a directive of the European Parliament and of the Council on asset recovery and confiscation' (COM(2022) 245 — final) EESC 2022/03642, 16 December 2022, p. 8.

[35] Europol, 'Mapping the risk of serious and organised crime infiltrating legitimate businesses' (2021) available at https://op.europa.eu/en/publication-detail/-/publication/ab3534a2-87a0-11eb-ac4c-01aa75ed71a1/language-en p. 55.

[36] For instance, insider trading, insider dealing, market manipulation.

[37] For instance, in Italy there is 'Commissione Nazionale per le Società e la Borsa', in France 'Autorité des marchés financiers', in Germany 'Bundesanstalt für Finanzdienstleistungsaufsicht'.

[38] As regards Italy, see Désirée Fondaroli, 'La poliedrica natura della confisca' (2019) Archivio Penale 2019(2), p. 1.

[39] Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation. General approach. 22 May 2023 Interinstitutional File: 2022/0167(COD), available at https://data.consilium.europa.eu/doc/document/ST-9314-2023-INIT/en/pdf Article 2(1)(o) – hereinafter, also: 'Council position'.

some given EU/international instruments. For instance, it mentions 'the *offences* covered by the Directive (EU) 2017/541', and not just 'terrorism, as defined in' such Directive.

To proceed with the analysis of the Proposal's scope of application, what has been considered a '*complete novelty*'[40] is Article 2(2), in the part it requires the application of the rules on AR to an exhaustive list of additional ten offences when committed within the framework of a criminal *organisation*.

4.2. The tracing and identification stage of asset recovery

The first stage of AR, as anticipated, is the *tracing* and *identification* of tainted assets. It consists of two sub-phases, strictly interconnected. The *tracing* part, indeed, refers to following the trail of illegally acquired proceeds as well as the examination of this revenue. The *identification* part, instead, relates to the localisation of the asset, may it be in a physical place within the country, such as an apartment, or dematerialised in the financial or virtual environment, such as an amount of money in bank accounts or crypto-assets.

The key actors in this phase are law enforcement authorities and Asset Recovery Offices. The paper will deepen on the provisions regarding the latter authorities in Section 5. Hence, to avoid repetitions, this section will only deal with the Proposal's aspects concerning the work of law enforcement authorities.

An important novelty introduced by the Proposal on this aspect can be found in Article 4(2), which sets a rule for the *systematic* launch of asset tracing investigations to offences likely to generate substantial economic benefits. The rationale behind it is that many Member States do not undertake pro-active parallel financial and asset tracing investigations in a routine and expedited manner.[41] In particular, only eleven of them *automatically* launch parallel financial investigations for all forms of crime, while other eight Member States limit this automatism to certain crimes, and the remaining eight leave it up to the judicial authorities to discretionally decide on this aspect.[42] Moreover, even when these investigations are launched, the Commission highlighted how these are often not prioritised, as national authorities often concentrate on the collection of evidence on the criminal act rather than on their assets.[43] However, in light of the proportionality principle of the EU intervention, the Commission limited the automaticity of the asset tracing investigations' launching to offences that are

[40] Anna Sakellaraki, 'EU Asset Recovery and Confiscation Regime – Quo Vadis? A First Assessment of the Commission's Proposal to Further Harmonise the EU Asset Recovery and Confiscation Laws. A Step in the Right Direction?' (2022) New Journal of European Criminal Law 1, p. 6.
[41] Impact Assessment Report Accompanying the Proposal, p. 10.
[42] Ibid, p. 10-11.
[43] Ibid.

'likely to give rise to substantial economic benefit'.[44] The decision appears to be *correct*, as it subjects the pursuing of the demanding asset tracing investigations when "it is worth the effort", namely when they aim at recovering a significant amount of assets.

4.3. The freezing stage of asset recovery

For 'freezing of assets', the second stage of AR, is usually intended the temporary retaining of property with a view to their possible subsequent final decision of confiscation.

When considering that, at the time of the Proposal, Member States could only freeze 2% of illicit assets in the Union,[45] the proposed new rules on this AR stage appear rather mild. It could be argued, however, that there was an attempt to revitalise the right to information of the persons affected by freezing orders, also by excluding the possibility of purely formalistic motivations for these orders. To bring an already-existing example, Italy requires that seizure measures aimed at confiscation must also include an explanation of the *periculum in mora* (danger in delay), to be intended as the reasons that make it necessary to anticipate the ablation effect of confiscation before the judgement is defined.[46]

Speaking about the Member States' leeway, Article 11 does not set a European definition of the concept of *competent authority* to freeze. This approach was already taken by the EU legislator with the 2014 Directive, which marked the disappearance of the competent authority criterion from the European definition of the concept of freezing, previously present in the EU legislation.[47] Currently, Member States also entrust prosecution service, or even the police under the prosecutor's control, with freezing powers, even if this tends to be combined with the prior (authorisation) or subsequent (validation) intervention of a judge.[48] More precisely, two main trends can be spotted in the Union: some States (such as Belgium, France, Romania) entrust the prosecutor as the main authority in charge of ordering freezing, while in others (such as Germany, Netherlands, Italy), courts are vested with such a prerogative, and the prosecutors and/or police officers may

[44] Ibid, p. 59-60.
[45] Ibid, p. 13.
[46] See Article 321(2) Italian Criminal Procedure Code in combination with Italian *Corte di Cassazione,* Sez. Un., no. 36959/21.
[47] For instance, see Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence OJ L 196/545, which refers to *judicial* authorities.
[48] See, for an overview, European Commission, Directorate-General for Justice, *Comparative law study of the implementation of mutual recognition of orders to freeze and confiscate criminal assets in the European Union: final findings report* (Publications Office 2015), https://data.europa.eu/doi/10.2838/727210, p. 179-182.

proceed only in case of an emergency.[49] Regardless of these differences, the same Proposal *also* preserves the connection with the judiciary, in the view of protecting rights (see Article 23(2)).

Speaking of safeguards, not only specific but also *general* guarantees apply to freezing measures. These safeguards are not a foregone conclusion. The underlying idea that freezing orders involve a measure of *provisional* nature, often collocated in the pre-trial phase, can divert the attention from the fact that it still involves a limitation of the property right and that it might have some collateral consequences which might hinder the individual's position in the subsequent trial. Among other examples, freezing orders, by removing the availability of property, might hamper the possibility of effective legal representation. Though, the provisional character of freezing orders even brought some supreme or constitutional courts to deduce from this the inapplicability of the guarantees of Articles 6 (right to a fair trial) and 7 (no punishment without law) of the European Convention on Human Rights.[50]

In any case, the Commission did *not* propose to set any *deadlines* or time limits for the freezing measure. This is not surprising: many systems are featured by the absence of a time frame for it, and this is commonly explained by the provisional nature of the measure and the purpose pursued, namely to guarantee the effective execution of confiscation measures.[51] However, this mechanism, which appears correct in theory, may collide with the very lengthy procedures preceding and succeeding the trial. Such collision even brought the ECtHR, in *Jouan v Belgium*, to consider that a three-year period - during which the applicant's bank account had been blocked - exceeded a 'reasonable time' and to hold unanimously that a violation of Article 6(1) ECHR had occurred.[52] However, Eurojust also notices – and this is important to interpret Article 11 of the Proposal - that it was not the three-year period as such to lead to the right's violation, but the circumstances of the case.

4.4. The confiscation stage of asset recovery

Confiscation, as already mentioned, is the core of AR, as it results in the definitive deprivation of tainted assets from criminals' hands. The Proposal sets to both amend the rules for the models of confiscation already provided by Directive 2014/42/EU and introduce a newly constructed type of confiscation.

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[49] Olivier Cahn and Juliette Tricot, 'Procedural aspects of freezing in Europe. A comparative analysis' in Alessandro Bernardi (ed.), *Improving confiscation procedures in the European Union* (Jovene Editore 2019) 499-512, p. 508.
[50] Ibid, p. 504.
[51] Ibid, p. 505.
[52] *Jouan v Belgium* [2008] ECtHR 5950/05.

4.4.1. Standard confiscation (Article 12)

In standard confiscation (also called criminal confiscation or conviction-based confiscation), assets can be taken away from the owner once he/she has been convicted of a crime. This is the oldest and most common approach to asset confiscation, and it has always been the least controversial, as it comes after a *clear* determination of guilt "surrounding" the property.

The Proposal's common rules on standard confiscation can be found in Article 12, but, compared to the 2014 Directive, they did not undergo any changes. Already at the time of the Proposal, indeed, all Member States had already enabled, subject to a final conviction, the confiscation of instrumentalities and proceeds of crime.[53]

4.4.2. Confiscation from a third party (Article 13)

Differently from the measures affecting personal *liberty*, the objects of confiscation are patrimonial assets or material things, which are intrinsically *distinct* from the owner.[54] As such, they can also be moved, transferred, acquired, etc. The *general principle* would be that confiscation measures would be inapplicable on assets owned by third parties innocent of the crime. However, this had to find *derogation* because of an empirical finding: criminals often transfer the ownership of ill-gotten assets to mitigate the confiscation's risk. Again, the Proposal sets rules on this confiscation type in Article 13 in line with the rules from 2014.

The measure imposes confiscation when the proceeds of a crime were transferred – directly or indirectly – by a suspected or accused person to third parties, or were acquired by third parties from a suspected or accused person. The reference to both *direct* and *indirect* transfers could theoretically cover different modalities: a purchase, a gift, a transfer through corporate restructuring or merger, a transfer via trusts, etc. The wording also suggests that the proceeds must be transferred by an already suspected or convicted person. This, however, might be problematic if the property is owned by relatives or other close persons and transferred *before* the criminals knew that the person is in this situation (suspected or convicted).[55] To solve possible issues, Eurojust had suggested, during the negotiations for the 2014 Directive, to include a legal *presumption* whereby any asset held by heirs or close friends *has been transferred* if the owner cannot explain

[53] European Commission, 'Report from the Commission to the European Parliament and the Council 'Asset recovery and confiscation: ensuring that crime does not pay' (2020) COM(2020) 217 final, p. 7.

[54] Emanuele Nicosia, *La confisca, le confische. Funzioni politico-criminali, natura giuridica e problemi ricostruttivo applicativi* (Giappichelli 2012), p. 101.

[55] Isidoro Blanco Cordero, 'Modern Forms of Confiscation and Protection of Third Parties' in Katalin Ligeti and Michele Simonato, *Chasing Criminal Money: Challenges and Perspectives On Asset Recovery in the EU* (Oxford Hart Publishing 2017) 139-154, p. 146.

the licit origin of those assets.[56] However, this amendment was neither accepted by the EU legislator at that time nor by the EU Commission for the Proposal in discussion.

That said, a fundamental aspect that deserves to be highlighted can be found in Article 13(2), in the part that it allows the confiscation of assets from third persons only when they '*knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation*'. Hence, the third party of which the assets can be targeted needs to be in *mala fide*, or – alternatively - there must be a situation of negligence that should have brought the third party to know about the criminal's purpose to avoid confiscation (this is referred in Spanish as '*ignorancia deliberada*'[57]). These alternative requirements effectively "repair" the friction of the confiscation type in discussion with the above-mentioned general principle of non-applicability of confiscation measures on assets owned by third parties innocent of the crime. Indeed, a link with the crime originating the investigation and the conviction is set. Moreover, the presence of these mental elements needs to be proved on the basis of 'concrete facts and circumstances', hence not simply by means of presumptions. A special indicator to prove that the third party knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation is also provided by Article 13(2) and is that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value. In the doctrine, then, it has been argued on this mental element, that *knowledge* of the intention to avoid confiscation by the transfer *implies* awareness of the illegal origin of the property transferred.[58] Therefore, the same doctrine also includes – in the mentioned expression - the so-called *dolus eventualis,* e.g., when the third party foresees the possibility that his/her acquisition could evade confiscation.[59] On the contrary, the fact that the person only knows (or ought to have known) that the property in question has an illicit origin does not suffice to fulfil the purpose to avoid confiscation required by the provision.[60]

Interestingly, Recital 24 of the Proposal states that the rules on third-party confiscation should extend to both natural and legal persons. This is an aspect that needs to be emphasised. Due to unbridgeable differences among the Member States, the Union *never* imposes *criminal* liability for legal persons, therefore the

[56] Eurojust's opinion on the proposal of the EU Commission for a directive on the freezing and confiscation of proceeds of crime in the EU (2012), p. 7.
[57] Francisco Garrido Carrillo, 'Cuestiones pendientes sobre el decomiso ocho años después. La Propuesta de Directiva del Parlamento Europeo y del Consejo sobre recuperación y decomiso de activos' (2022) Revista de Estudios Europeos n.º Extraordinario monográfico 1 (2023): 311-348, p. 335.
[58] Isidoro Blanco Cordero, 'Modern Forms of Confiscation and Protection of Third Parties' in Katalin Ligeti and Michele Simonato, *Chasing Criminal Money: Challenges and Perspectives On Asset Recovery in the EU* (Oxford Hart Publishing 2017) 139-154, p. 148.
[59] Ibid.
[60] Ibid, p. 149.

application of the Directive to them rests (and will still rest) with the respective Member State. However, this is a (partial, being only a Recital) exception.[61] Member States should ensure that the notion of 'third party' under Article 13 of the Proposal extends to legal persons, too. It is indeed frequent that goods or things potentially subject to confiscation, that are in the material availability and enjoyment of the criminal who determined the occurrence of the conditions for confiscation, actually are – at a formal level – owned by a legal person, because they were indeed transferred to them with the purpose of avoiding confiscation.[62] However, these situations are not unproblematic, as the legal person's mental element must anyway be proved to allow the confiscation of the assets transferred to third parties. In particular, it is complicated to assess the negligence standard established by Article 13 ('ought to have known').[63] Though, as negligence implies the violation of a 'duty of care', in the context of legal persons, this can be proved in some situations. For instance, a company may be called to follow some precautionary measures when acquiring assets. Blanco Cordero makes the example of a company that is dedicated to buying and selling works of art and is required to ask for the traceability of the piece of art.[64] Another possible situation where the negligence standard might be assessed is when companies have in place a compliance programme to follow while doing business.[65]

Whether the third party is a legal or a natural person, it is anyway fundamental that proper safeguards are in place in the national systems. On this point, the Proposal builds upon the 2014 Directive as well as upon the recent CJEU and ECtHR case law.

4.4.3. Extended confiscation (Article 14)

Extended confiscation follows a prior criminal conviction of the person for one or more specific crimes, and it goes beyond the direct proceeds of the crime for which a person was convicted, because of a rebuttable presumption of illegality of the defendant's property. Hence, it is still a conviction-based confiscation, but the difference is that it relies on the fact and circumstances that suggest that the assets of the criminal are of illicit nature.

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[61] Vanessa Franssen, 'The EU's Fight Against Corporate Financial Crime: State of Affairs and Future Potential' (2018) German Law Journal Vol. 19(5) 1221, p. 1244.

[62] Emanuele Nicosia, *La confisca, le confische. Funzioni politico-criminali, natura giuridica e problemi ricostruttivo applicativi* (Giappichelli 2012), p. 122.

[63] Isidoro Blanco Cordero, 'Modern Forms of Confiscation and Protection of Third Parties' in Katalin Ligeti and Michele Simonato, *Chasing Criminal Money: Challenges and Perspectives On Asset Recovery in the EU* (Oxford Hart Publishing 2017) 139-154, p. 151.

[64] Ibid.

[65] An example is the organisational and management models provided in Italy by the Italian Legislative Decree No. 231/2001.

This confiscation type is referred to by the Commission as a tool '*adapted to organised crime groups usually operating over long time periods*'[66]. It is 'adapted' because, as everyone could expect, it is unlikely that organised crime groups maintain organised records or bookkeeping that expose the sums amassed over the years, and it is even more difficult that law enforcement authorities might provide evidence for each and every individual criminal act that permitted criminals to amass those assets.[67] In addition to that, as recalled in Recital 25 of the Proposal, criminal organisations engage in a wide range of criminal activities. These usually include drug trafficking, migrant smuggling, corruption of public officials, etc. Though, it is often difficult to find enough evidence for *each* of these activities. Besides, even for those criminal networks that are only dedicated to, *for instance*, drug trafficking *only*, the same Commission recalls that a court might be able to convict a group for one specific cargo, but not for those over the preceding years from which it also profited.[68] In all these situations, in order to concretely stop criminals' ill-gotten revenues and consequently disrupt their illicit activities, extended confiscation might be a powerful tool.

At the time of the Proposal, despite extended confiscation having been already object of the 2014 Directive, this is largely unreleased, bringing to less than 30% of total confiscated assets throughout the Union.[69] The Commission, therefore, proposed to intervene on two levels: the first one consists of an expansion of the extended confiscation's scope of application, while the second concerns the common minimum possibilities that this form is applied.[70] First, as regards the *scope of application*'s extension, this is extended to the entirety of the list of crimes to which the Proposal should apply (a choice which was not left uncriticised)[71]. Second, the Proposal also increases the *possibility* to apply extended confiscation. The text, in fact, unlike the 2014 Directive, does not mention the opportunity – for the Member States – to determine a certain period during which the property could be deemed to have originated from criminal conduct. Of course, though, Member States would be free to keep existing time limits or to create new ones.

Incidentally, it is also necessary to point out that specifying that a national court has to be at least satisfied that the property to confiscate under Article 14 is derived from criminal conduct is essential in defining the borders of such

[66] Impact Assessment Report Accompanying the Proposal, p. 22.
[67] Ibid.
[68] Ibid, p. 20.
[69] Ibid, p. 22.
[70] Inception Impact Assessment - Revision 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 [2021] Document Ares(2021)1720625.
[71] See, for instance, Jose Menezes Sanhudo, 'Crime does not pay! But at what cost? Critical remarks on extended and non-conviction-based asset confiscation in Portugal and the EU' in Serena Quattrocolo, Sandra Oliveira Silva and Ernestina Sacchetto (eds), *Assets confiscation and prevention of crime in Europe: an overview upon the EU and domestic legislations* (Wolters Kluwer 2022) 193-230, p. 221.

confiscation types. The consequence otherwise could be that all the property owned by a convicted person might be liable to give rise to economic benefit, just for the fact that these assets could *theoretically* be *reinvested* for illicit activities. What Article 14, instead, points out is that proving – at least in a satisfying way – that the specific property at stake is derived from criminal conduct is an ineluctable necessity for national authorities. Moreover, such aspect needs to be proved on the basis of *all* the circumstances of the case, including *specific* facts and available evidence.

At the same time, one should not think that legal presumptions *cannot* be included in the 'circumstances of the case' to be considered. To point in this direction, there is, first of all, the example provided by the same text of the Proposal in Article 14(2), which mentions the disproportionateness of the value of the property to the lawful income of the convicted person as a factor that could indicate that the property in question has an illicit origin. Secondly, both the CJEU and the ECtHR have intervened on the matter, and delivered a favourable opinion of these presumptions in criminal law under certain conditions.[72]

4.4.4. Non-conviction based confiscation (Article 15)

Non-conviction based confiscation, as the name might suggest, allows for the deprivation of ill-gotten assets irrespective of any prior conviction.[73] Hence, at least how it is traditionally intended, non-conviction based confiscation goes even further than the extended confiscation and third-party confiscation described above. While the last two *loosen* the link between the assets to target and the crime, with non-conviction based confiscation that link is, more radically, *broken*.[74]

Success in criminal asset recovery also depends on the possibility of confiscating property regardless of the outcome of a criminal proceeding, which is often time-consuming and uncertain.[75] Moreover, non-conviction based confiscation creates the opportunity to target assets where the evidentiary frame suffices for assuming the illicit origin of the goods to be confiscated but not for proving the accused guilty.[76] This situation is especially, but not only, frequent in

[72] See, for instance, Case C-203/21 *Criminal proceedings against Delta Stroy 2003* [2022] ECLI:EU:C:2022:865, para 55; *Salabiaku v. France* [1988] ECtHR 10519/83, para 28; *Phillips v. the UK* [2001] ECtHR 41087/98, para 40; *Janosevic v. Sweden* [2003] ECtHR 34619/97, para 101; *G.I.E.M. S.r.l. and Others v. Italy* [2018] ECtHR 1828/06, 34163/07 and 19029/11, paras 242-243.

[73] Michaël Fernandez-Bertier, 'The confiscation and recovery of criminal property: a European Union state of the art' (2016) ERA Forum, p. 10.

[74] Ciro Grandi, 'Non-conviction-based confiscation in the EU legal framework' in Alessandro Bernardi (ed.), *Improving confiscation procedures in the European Union* (Jovene Editore 2019) 31-56, p. 33.

[75] Ibid, p. 32.

[76] Federico Alagna, 'Non-conviction Based Confiscation: Why the EU Directive is a Missed Opportunity' (2014) Eur J Crim Policy Res (2015) 21:447–460, p. 456. See also European

relation to certain types of crime. Emblematic examples concern corruption offences. Indeed, these are typically private acts between individuals which are seldom witnessed or recorded, and are actually very dangerous to the individuals' security as they are often linked with other crimes, such as customs offences or environmental crimes.[77] Hence, non-conviction based confiscation can be a powerful tool to target the assets arising from corruption, especially of those higher up in the corruptive act, and therefore removed from the criminal act itself.[78]

Though, non-conviction based confiscation is also a mechanism recognised as highly controversial, not only by the EU Member States. Indeed, this confiscation type might contribute to avoiding the recognition of due process safeguards because of the absolute lack of connection with individual criminal responsibility as such.

In comparison to the 2014 Directive - Article 15 contains rules which open *more possibilities*, and sets *less strict requirements* for allowing the type of confiscation in the label.

Before analysing the possibilities that – as a minimum rule – Member States should include in their non-conviction based systems, it can be preliminarily noted that Article 15 covers situations that in the Member States' national laws are either causes of extinction of the offence, such as death or amnesty, or other situations that anyway might impede the continuation of criminal proceedings, such as absconding of the suspected or accused person. More into detail, Article 15 also introduces *new* possibilities for non-conviction based confiscation. Letter *c)* includes the *death* of the suspected or accused person, as provided for under national law. It is not uncommon that a person might die when standing trial. During his/her criminal "career", however, the person might have accumulated a considerable amount of assets deriving from illicit activities. The best scenario is, of course, that those assets would not continue to be enjoyed by close relatives, but, instead, be reverted to the State and reinjected into legal economy. At the time of the Proposal, only ten Member States provided non-conviction based confiscation in the case of death of the suspect or accused person.[79]

Letter *d),* instead, regards the *immunity from prosecution* of the suspected or accused person, as provided for under national law. 'Immunity' in criminal law refers to a legal protection granted to a person that shields them from criminal prosecution for a particular offence (or a set of offences) by virtue of the position

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Commission, Staff Working Document, 'Analysis of non-conviction based confiscation measures in the European Union' (2019) SWD(2019) 1050 final, p. 2.

[77] Jonathan Spicer and Juhani Grossmann, 'Targeting Profit: Non-Conviction Based Forfeiture in Environmental Crime' (2022) Basel Institute on Governance, available at https://files.worldwildlife.org/wwfcmsprod/files/Publication/file/65px91isgl_R5_IO.pdf?_ga=2.13992437.390410622.1687341411-1799037479.1687341410 p. 3.

[78] Ibid.

[79] Impact Assessment Report Accompanying the Proposal, p. 128.

he/she covers.[80] At the time of the Proposal, only two Member States include this condition in their non-conviction based confiscation regimes.[81]

Letter *e)* relates to the *amnesty* 'granted to the suspected or accused person, as provided for under national law'. 'Amnesty' refers to a sovereign act of oblivion or forgetfulness (from Greek *amnēsia*) for past acts, granted by a government to persons who have been guilty of crimes.[82] Also in this case, the impact of this provision would be particularly significant, as currently only five Member States provide non-conviction based confiscation in cases ended with amnesty.[83] While providing non-conviction based confiscation in cases of immunity from prosecution and amnesty could mitigate their frequent perception by society as means fuelling impunity, it also raises some doubts. Indeed, the two situations refer to cases where prosecution is either not possible (immunity) or not researched by the State anymore (amnesty). Hence, while it is true that the economic dimension of crime should be partially separated by the offence itself, requiring confiscation can also be seen as a sort of obstinacy of the State.

Lastly, letter *f)* requires non-conviction based confiscation in case the *time limits* prescribed by national law *have expired*, but only insofar as such limits 'are not sufficiently long to allow for the effective investigation and prosecution of the relevant criminal offences'. In criminal law, time limits refer to the length of time that prosecutors have to exercise legal action, and bring the case to criminal proceedings.

As for the *less strict requirements,* Article 15 partially "blurs" the necessity of the link between property and individual criminal responsibility when compared to the 2014 Directive.[84] Indeed, while the latter requires confiscation when the stopped proceedings 'could have led to a criminal conviction if the suspected or accused person had been able to stand trial', thereby entailing – as said - 'a full proof of a crime committed'[85] by the person, Article 15(1)(2) of the Proposal provides a slightly lower standard. It requires, as a precondition for the confiscation, that 'criminal proceedings have been initiated but the proceedings could not be continued' and that 'the national court is satisfied that all the elements of the offence are present'. It could accordingly be argued that the confiscation

[80] 'Immunity from Prosecution' (*LII / Legal Information Institute*) https://www.law.cornell.edu/wex/immunity_from_prosecution accessed 14 July 2023.
[81] Impact Assessment Report Accompanying the Proposal, p. 128.
[82] 'Amnesty | Definition & Facts | Britannica' https://www.britannica.com/topic/amnesty accessed 14 July 2023.
[83] Impact Assessment Report Accompanying the Proposal, p. 128.
[84] Anna Sakellaraki, 'EU Asset Recovery and Confiscation Regime – Quo Vadis? A First Assessment of the Commission's Proposal to Further Harmonise the EU Asset Recovery and Confiscation Laws. A Step in the Right Direction?' (2022) New Journal of European Criminal Law 1, p. 18.
[85] Ciro Grandi, 'Non-conviction-based confiscation in the EU legal framework' in Alessandro Bernardi (ed), *Improving confiscation procedures in the European Union* (Jovene Editore 2019) 31-56, p. 50.

model under Article 15 still requires the initiation of criminal proceedings as one of the requirements. However, to national courts it does *not* require full proof of a crime committed, but an adequate assessment of the presence of the elements of the offence. Overall, despite the less strict requirement provided by Article 15, this model *also* does *not* meet the characteristics of non-conviction based confiscation traditionally intended.[86]

4.4.5. Confiscation of unexplained wealth linked to criminal activities (Article 16)

Defined by Filippo Spiezia, former Eurojust's vice-President, as a '*true novelty*'[87] of the Proposal, Article 16 reveals the attempt of the European Commission to introduce common rules about a completely new confiscation type in the EU legal framework on AR. Such model specifically addresses offences committed in the context of a criminal *organisation,* and is linked with the concept of '*unexplained wealth'*, referred to – in the preparatory works – as 'property without evidence of legitimate origin, when there is a significant disproportion between the value of assets and the stated income of the person'.[88]

The proposed introduction is actually based on an idea that already exists in some national jurisdictions. According to available data, fifteen Member States have *some forms* of *in rem/*unexplained wealth procedures.[89] However, under the hat of 'unexplained wealth orders', several different tools are used and, in some cases, only assets of a certain value may be targeted by them.[90] Generally speaking, these are highly controversial for a set of reasons, going from the risk of lack of proportionality to the risk of affecting the right to the presumption of innocence, because the individual in the case might be called to find different proofs that his/her assets were lawfully acquired. In addition to that, these models' underlying mechanisms might once again resemble the ancient forms of confiscation, where the criminal is deprived of the entire patrimony.

However, the Commission structured Article 16 of the Proposal in such a way as to both restrict the commonly considered unexplained wealth concepts and to provide due safeguards. Above all, the confiscation under Article 16(1) has a

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[86] Jose Menezes Sanhudo, 'Crime does not pay! But at what cost? Critical remarks on extended and non-conviction-based asset confiscation in Portugal and the EU' in Serena Quattrocolo, Sandra Oliveira Silva and Ernestina Sacchetto, *Assets confiscation and prevention of crime in Europe: an overview upon the EU and domestic legislations* (Wolters Kluwer 2022) 193-230, p. 221-222.

[87] Filippo Spiezia, 'La lotta alla criminalità organizzata fuori dai confini nazionali' (2022) Sistema Penale, p. 24.

[88] Impact Assessment Report Accompanying the Proposal, p. 38.

[89] European Commission, Staff Working Document, 'Analysis of non-conviction based confiscation measures in the European Union' (2019) SWD(2019) 1050 final, p. 6.

[90] Transparency International, 'Non-conviction-based confiscation as an alternative tool to asset recovery' (2022) available at https://knowledgehub.transparency.org/assets/uploads/helpdesk/Non-Conviction-Based-Forfeiture_2022.pdf, p. 7.

subsidiary basis, in the sense that it is possible only insofar as the other confiscation types provided by the Proposal are not applicable. It is clear the Commission's attempt to offer an alternative to the competent national authorities to overcome the obstacles hindering AR that regard the more "traditional" confiscation types. Pursuant to the same provision, other conditions must also be met. First, the property to be confiscated must already be frozen in the context of an investigation into criminal offence(s) committed in the framework of a criminal organisation. Second, such criminal offence(s) must be 'liable to give rise, directly or indirectly to *substantial* economic benefit'. Third, a national court must be satisfied that the frozen property is derived from criminal offences committed in the framework of a criminal organisation.

On closer examination, Article 16 contains elements both of extended confiscation under Article 14 and of non-conviction based confiscation under Article 15. From the requirements described above, effectively, it can be deduced that, contrary to the situation under Article 15 (which interestingly is labelled as non-conviction based confiscation), Article 16 *does entail* an example of non-conviction based confiscation as traditionally intended (*action in rem*), also *extended* to all property derived from criminal offences committed in the framework of a criminal organisation.[91]

4.5. The management stage of asset recovery

While proceedings that could lead to confiscation are pending, the frozen assets also need to be well-administered and preserved, so that they do not lose value. The same objective, then, concerns the management of confiscated assets *before* they reach their final recipient, that is, before the 'disposal' stage of AR.

An important introduction related to the management phase of AR in the Proposal can be found in Article 19(2), which provides rules on the so-called *pre-seizure planning* and obliges the national authorities competent to freeze assets to assess the costs which may be incurred in the management of property. The guiding objective of such assessment is the preservation and the optimization of the value of such property until its disposal.

Since not only the *preservation*, but also the *optimization* of the property's value is set to be a criterion for the pre-seizure planning, the Proposal tries to suggest that asset management should follow a more *active* approach, possibly including profit-driven measures (as it is the case in France and Italy), to the detriment of those Member States which – so far- have preferred a more prudent approach, such

[91] Anna Sakellaraki, 'EU Asset Recovery and Confiscation Regime – Quo Vadis? A First Assessment of the Commission's Proposal to Further Harmonise the EU Asset Recovery and Confiscation Laws. A Step in the Right Direction?' (2022) New Journal of European Criminal Law 1, p. 18.

as Germany.[92] For instance, in Italy, when the assets concern sums of money, these can be managed dynamically by low-risk financial instruments.[93]

At the same time, Article 19(2) also raises doubts. The provision requires that the pre-seizure planning is carried out by the authorities *before* issuing a freezing order. As previously mentioned, one of the *freezing's* purposes is to avoid the dissipation of the assets, retaining them with a view to their possible subsequent final decision of confiscation, or anyway implementing protective measures on them. In most cases, speediness is of paramount importance to achieve this objective, otherwise criminals might take advantage of delays to transfer funds (abroad), convert them, or anyway make it more difficult for law enforcement authorities to trace them. Requiring Member States to ensure that the assessment of the costs shall always be done *before* the issuance of the freezing order might be detrimental to the very objective of freezing assets, especially in those situations where *complex* assets, such as businesses, are to be frozen. Exemptions should, therefore, be considered.

One of the possible outcomes of the pre-seizure planning pursuant to Article 19 might be the State's management of frozen assets results economically inconvenient, or anyway not efficiently driven. In these situations, States can also consider selling this property to private parties interested in it. Article 20 of the Proposal, labelled 'interlocutory sales', sets rules to bring together the Member States' rule on the point. These rules explicitly apply to the transfer and sale of property *before* confiscation. In particular, Article 20(1) sets three minimum circumstances among which Member States can choose for providing interlocutory sales in their systems. The first one is when the property is '*perishable or rapidly depreciating*'. The second one regards the disproportionateness of the storage or maintenance costs to the value of the property. The third one, instead, applies when '*the property is too difficult to administer, or its management requires special conditions and non-readily available expertise*'. Some Member States already provide these possibilities, and some also went beyond the minimum conditions provided by Article 20(1).[94] One leading State in this sense is the Netherlands, whose strategy of selling off assets pre-confiscation contributed to significantly diminishing the cost of management of movable seized assets.[95]

Article 21(1) of the Proposal also marks a turning point in the Union's institutional infrastructure related to AR, as it *obliges* for the first time Member States to have in place at least and organise in a certain way an Asset Management Office for the purpose of the management of frozen and confiscated property. The

[92] Thibaut Slingeneyer, 'Management of frozen assets' in Alessandro Bernardi (ed.), *Improving confiscation procedures in the European Union* (Jovene Editore 2019) 547-564, p. 550.
[93] Ibid.
[94] Ibid, p. 551.
[95] United Nations, 'Study prepared by the Secretariat on effective management and disposal of seized and confiscated assets' (2017) available at https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2017-August-24-25/V1705952e.pdf, p. 21.

Proposal's provision does not require that the Asset Management Offices should have a particular legal nature or whether they should be incardinated within a particular structure, such as the Ministry of Justice or the national prosecution service. Among the Member States that have already established an Asset Management Office, some have incardinated the Offices in the same structure as the Asset Recovery Offices, and this is something which was also encouraged by the European Parliament's LIBE Committee.[96] On this aspect, the French Asset Recovery Office suggested – as a good practice for France – to decentralise these Offices into regional branches closer to criminal courts, in order to support regions with higher rates of criminal offences.[97] The suggestion appears correct, especially for the bigger Member States, because Asset Management Offices often have *direct* contact with the assets and with the local competent authorities to facilitate their management. However, it is also true that a centralised approach minimises communication problems and can produce more accurate statistics.[98]

4.6. The disposal stage of asset recovery

Disrupting criminal activities through the deprivation of their revenues and means is the main underlying AR's objective. Hence, it is self-evident that AR performs a *punitive* function. However, AR also intrinsically has a *reparative/restitutive* function, because the high criminal revenues, which produce notable damages to society, revert to the State and to the legal economy (and can also be given to compensate victims). The possibility of valorising this reparative function to the most lies in the final stage of AR, namely the disposal of the assets, once they are confiscated.

Despite the Commission's purpose of providing a comprehensive set of rules on AR in the Union, the potential of the confiscated assets' disposal stage continues to be, as in the 2014 Directive, unexploited.

On one side, Article 17(2) requires that Member States 'consider' taking measures to ensure the confiscated assets' social reuse. The Commission did not propose any change of pace in comparison to the 2014 Directive, after which only a few Member States currently have active paths of social reuse. In this sense, the

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[96] In particular, these Member States are Ireland, Malta, the Netherlands, Spain, and Romania. See *Study on freezing, confiscation and asset recovery – what works, what does not work Country chapters* (Publications Office of the European Union, 2021), p. 182, 456, 483, 579.

[97] *Study on freezing, confiscation and asset recovery – what works, what does not work Country chapters* (Publications Office of the European Union, 2021), p. 253. The mentioned suggestion has been followed up in 2022, when the French Asset Management Office opened two regional offices in Lille and Rennes. See Agrasc 'Rapport d'activité 2022' (2023) available at https://media.licdn.com/dms/document/media/D4E1FAQFyCKVPQt5Ewg/feedshare-document-pdf-analyzed/0/1688138570266?e=1691625600&v=beta&t=kPCpMpfc0f9PlB-zhqyVHTX9Ja-et6ViKmwNTZfiJiY p. 4.

[98] Thibaut Slingeneyer, 'Management of frozen assets' in Alessandro Bernardi (ed.), *Improving confiscation procedures in the European Union* (Jovene Editore 2019) 547-564, p. 548.

Italian direct reuse experience deserves to be mentioned. Assets suitable for social reuse in this Member State are *immovable* assets.[99] These are managed by the *Agenzia Nazionale per l'amministrazione e la destinazione dei Beni Sequestrati e Confiscati alla criminalità organizzata'* until their final disposal. If an asset is not sold or is not destinated to the patrimony of the State, it can be given to the local authorities where it is located.[100] In turn, these can use the asset for institutional purposes (through, for instance, the reconversion of buildings for schools and firehouses)[101], or (and this is what happens in the majority of the cases) concede it – at no charge – to organisations established by law which commit themselves to carry out projects for social purposes.[102] Of course, the organisation might have to bear – helped by national funds - the costs to restructure the asset and make it safe, if it is (part of) a building, or treat it to make it, for instance, cultivable, if it is a field. In any case, the same organisation also needs to pay taxes on that asset. Hence, it is important that it becomes economically independent in the management of the asset, and finds a balance between social purposes and cost-effectiveness. In addition to the hypothesis described above, the mentioned Agency can also *directly* grant the assets to organisations established by law when the nature of the asset makes its disposal for social purposes evident.[103] Currently, nine hundred voluntary and cooperative organisations manage these confiscated properties and offer services from the community, in support of new models of social and economic development.[104]

On another side, Article 18 aims at ensuring that when, as a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure provided by the Proposal, his/her right to compensation is not affected. In this case, the provision does not set *positive* requirements for the Member States' disposal of assets. Though, it sets *negative* requirements, in the sense that they are refrained from putting in place measures which could prevent victims from obtaining the mentioned compensation. However, Member States have already

[99] Barbara Vettori and Boban Misoski, 'Social reuse of confiscated assets in the EU: current experiences and potential for its adoption by other EU and non-EU countries' (2019) Liber Amicorum. Studia in honorem academici Vlado Kambovski septuagesimo anno, p. 702-703.

[100] Caterina De Benedictis, 'I beni confiscati alla criminalità organizzata: da capitale sociale mafioso a capitale sociale puro' (2021) Rivista giuridica del Mezzogiorno Fascicolo 1, marzo 2021 175, p. 179.

[101] 'Utilizzo sociale dei beni confiscati: una peculiarità dell'ordinamento italiano' (*ANBSC*) https://benisequestraticonfiscati.it/utilizzo-sociale-dei-beni-confiscati-una-peculiarita-dellordinamento-italiano/ accessed 20 July 2023.

[102] Caterina De Benedictis, 'I beni confiscati alla criminalità organizzata: da capitale sociale mafioso a capitale sociale puro' (2021) Rivista giuridica del Mezzogiorno Fascicolo 1, marzo 2021 175, p. 179-180.

[103] Ibid, p. 180.

[104] Libera, 'The Social Re-use of Confiscated Assets in Europe, a First Mapping' (2021) available at https://www.confiscatibene.it/sites/default/files/blog-upload/The%20social%20re-use%20of%20confiscated%20assets%20in%20Europe_a%20first%20mapping.pdf p. 7.

established compensation schemes.[105] A good example comes from Italy, where - if business assets, including entire companies, are confiscated - they can be liquidated or sold to compensate the victims of mafia crimes.[106]

5. FOCUS: THE ROLE OF THE EU ASSET RECOVERY OFFICES AND THE PROPOSAL

The present section goes more in detail with one of the aspects that were impacted the most by the Proposal, *i.e.* the role of the EU Asset Recovery Offices.[107] These are the national competent agencies that facilitate the first AR stage, the assets' tracing and identification,[108] and represent the emblematic concretisation of the necessary EU-wide cooperation in the field of AR and of the Union intervention in both national and cross-border AR cases.

Being provided by EU law already in 2007[109], all Member States have designated their AROs, with nineteen of them establishing only one and the others two.[110] States were also left free to decide whether their ARO(s) should form part of an administrative, law enforcement, or judicial authority. In those States where only one ARO is designated, the majority of them chose to establish it within a law enforcement structure, while the other three with a mixed nature and the remaining two as administrative authorities.[111] Differently, in all Member States with *two* AROs, one is always established as a judicial authority and the other always as law enforcement. [112]

Overall, there is no doubt that the AROs' establishment has already increased the effectiveness in the cross-border identification of criminal assets, just as there is no doubt the EU legislator's efforts to ensure these Offices are active for this task produced considerable results.[113] However, the AROs' potential is not fully exploited under the current framework, and the differences in the national settings described above are an example: the role of AROs is uneven in the Union's

[105] Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims [2004] OJ L 261/15 Recital 8.
[106] Caterina De Benedictis, 'I beni confiscati alla criminalità organizzata: da capitale sociale mafioso a capitale sociale puro' (2021) Rivista giuridica del Mezzogiorno Fascicolo 1, marzo 2021 175, p. 191.
[107] Hereinafter: also 'AROs' or 'Offices'.
[108] 'Asset Recovery' (Eurojust) https://www.eurojust.europa.eu/judicial-cooperation/instruments/asset-recovery accessed 15 July 2023. See also George Pavlidis, 'Asset recovery in the European Union: implementing a "no safe haven" strategy for illicit proceeds' (2022) 25 Journal of Money Laundering 109, p. 112.
[109] 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 [2007] OJ L 332/103 – hereinafter, also 'ARO Council Decision'.
[110] Impact Assessment Report Accompanying the Proposal, p. 120.
[111] Ibid.
[112] Ibid, p. 120-121.
[113] Ibid, p. 11, 131.

territory, with some of them clearly being more efficient than others as well as with some being under-staffed (e.g. Slovenia's ARO with only one employee) when compared to others (e.g. Ireland's ARO with 91 employees, despite this State being only double the population of Slovenia).[114] In addition to that, the Commission held that the unsatisfying EU AR data[115] are also caused by the still suboptimal AROs' capacity to identify and trace assets[116] across borders. *Inter alia*, the following issues were identified: the differences regarding AROs' powers to *directly* access relevant information[117]; the lack of autonomous tracing powers[118] and speediness in cross-border cooperation[119]; and the need to strengthen the swift and secure communication of crime-related information[120].

Starting the present analysis with Article 5 of the Proposal, its letter *a)* sets out that AROs shall be able to *trace* and *identify* instrumentalities, proceeds, or property whenever necessary to support other competent *national* authorities responsible for asset tracing investigations. Setting this as a minimum rule for the Union's AROs will require those Member States that still do not grant AROs *autonomous* tracing powers (27% out of the total) to revise their legislation, so that these Offices will not have to rely on the responsiveness of other competent authorities to trace criminal assets.[121] At the same time, letter *b)* clarifies extends the rule contained in letter *b)* in relation to assets that may become or is the object of a freezing or confiscation order issued by *another* Member State, and therefore addresses the EU *cross-border* cooperation on AR. Clearly, this provision is strictly linked with Regulation 2018/1805, which imposes the mutual recognition of freezing and confiscation orders between Member States.[122]

The fulfilment of the described AROs' tasks would also certainly not be possible without using *information* to make connections, follow leads, detect criminal activities, etc. Article 6 of the Proposal aims to harmonise - at the EU level - the

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[114] Ibid, p. 13, 80, 133, 148.

[115] 'Confiscation and Asset Recovery' https://home-affairs.ec.europa.eu/policies/internal-security/organised-crime-and-human-trafficking/confiscation-and-asset-recovery_en accessed 10 July 2023.

[116] Impact Assessment Report Accompanying the Proposal, p. 11.

[117] Ibid.

[118] Ibid.

[119] Ibid, p. 12.

[120] European Commission, 'Report from the Commission to the European Parliament and the Council 'Asset recovery and confiscation: ensuring that crime does not pay' (2020) COM(2020) 217 final, p. 16.

[121] Impact Assessment Report Accompanying the Proposal, p. 11.

[122] Mutual recognition is an example of EU negative integration, which refers to obliging Member States to recognise decisions/certificates/orders coming from another Member State and issued according to the law of that State as if they had been issued in their own systems, unless one of the listed grounds for non-execution is resorted to. See Anne Weyembergh and Inés Armada, 'The Mutual Recognition Principle and EU Criminal Law' in Maria Fletcher, Ester Herlin-Karnell, Claudio Matera (eds), *The European Union as an Area of Freedom, Security and Justice,* (Routledge Research in EU Law, 2016).

AROs' power to access information, ensuring that they have *direct* and *immediate* access to certain information, though without entering into any privacy violation by abusively accessing/exchanging sensitive information. In particular, as for the 'immediateness' requirement – e.g. by simply inserting some given credentials in the database's platform - the extra time the single ARO would spend to reach the information would be saved, allegedly ultimately resulting in a reduction of late answers and in the facilitation of cross-border cooperation. Article 6(2) furtherly specifies, on the ways to access information, that '*where the information referred to in paragraph 1 is not stored in databases or registers*', Member States shall ensure that AROs '*can swiftly obtain that information by other means*'. Overall, this second paragraph seems to serve the function of a safeguard clause, to avoid situations in which the Member States could bypass the obligation under paragraph 1, by not putting the AROs in a situation to directly and immediately access certain information because this is not stored in databases or registers. Realistically, the information referred to in paragraph 1, however, will almost always be maintained in national databases or registers. Still, depending on the specific AROs' nature (judicial, administrative or law enforcement) *and* the "sensitivity" of the information, one could imagine that the 'other means' can consist of a request to a court, or to the law enforcement authority, also through a form to fill. Besides, these methods already happen at present, in relation to other types of information.[123] One interesting example comes from the Netherlands, whose legislation currently does not stipulate to which registries and national databases the two AROs have access.[124] However, as the Dutch AROs are part of - respectively - the police and public prosecution office, they can easily – when needed in an investigation in which they are involved – have access to the national databases.[125] Going back to the EU level, and thinking of the possible national implementations, AROs might also think of other measures specifically to ensure that access by other means is 'swift', as Article 6(2) requires. In particular, they can, for instance, sign data access agreements or establish preferred communication channels (such as a dedicated email account) with law enforcement authorities holding information. The Council's position mentions, on this point, '*a request to the institution holding the information*'.[126]

The Proposal also identifies different types of information which might be necessary, for the AROs, to identify and trace criminal assets and, therefore, which Member States would need to grant access to. On this, two remarks are certainly worth attention. First, by making references to the status quo, it will be shown how

[123] See for instance, for the request of court orders, *Study on freezing, confiscation and asset recovery – what works, what does not work Country chapters* (Publications Office of the European Union, 2021), p. 183. For requests through a form, see, instead, p. 232.
[124] Ibid, p. 483.
[125] Ibid.
[126] Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation. General Approach [2023] Recital 17.

Article 6 certainly covers *more* information than AROs, as things stand at present, have access to. Second, Article 6 tries to address an issue brought to the Commission's attention already in 2011, namely the differences in the national legislation on what information can be accessed by AROs and does so by specifying which registers and databases they must have access to.[127] At the same time, however, these are *national* databases and registers. Consequently, the information concretely contained in them might significantly vary from State to State, since each Member State has its own criteria for the inclusion of data in the dataset.[128] Hence, despite the Commission's attempt to create a more level playing field in AROs' access to information, some AROs will anyway have access to more information than others.

In addition to the *access* to information, the Proposal also strongly intervenes on the *exchange* of such information, also at a cross-border level. Effectively, data show that 7 out of 10 organised crime criminals are active in *more* than three States, and that 65% of criminal groups are composed of members of multiple nationalities.[129] To ensure that the AROs grasp (and tackle) this international dimension of crime, Article 9 sets rules for the information exchange among all Member States' Offices.

In particular, Article 9 entails, as in the ARO Council Decision, two possible ways of exchanging information: either *upon request* from another MS's ARO or *spontaneously*. Currently, the available reports[130] show that the information exchange upon request is by large the most relevant in terms of both quantity and quality. However, one aspect that really stands out from Article 9, when compared to the ARO Council Decision, is the lack of any reference to the Framework Decision 2006/960/JHA (the "Swedish Initiative").[131] Hence, the AROs will not be called anymore to fill out the templates provided by it. Actually, the Proposal does not refer to *any* form. On this note, the Dutch ARO had advised the Commission, just before the Proposal, to create specific standard forms in the context of AR cross-border cooperation.[132] The request, however, remained unheard, even

[127] Report from the Commission to the European Parliament and to the Council based on Article 8 of the ARO Council Decision, p. 9.

[128] Europol, 'Does crime still pay? Criminal asset recovery in the EU' (2016) https://www.europol.europa.eu/cms/sites/default/files/documents/criminal_asset_recovery_in_the_eu_web_version.pdf, p. 12.

[129] 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), p. 19.

[130] *Study on freezing, confiscation and asset recovery – what works, what does not work Country chapters* (Publications Office of the European Union, 2021).

[131] ARO Council Decision Article 3.

[132] 'European Commission - Have Your Say' Feedback from: Judicial ARO - Netherlands (*European Commission - Have your say*) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12725-Fighting-organised-crime-freezing-and-confiscating-the-proceeds-of-crime/F2218429_en accessed 20 July 2023.

though the SIENA platform (which will be mandatory to use for the exchanges of *all* AROs) is technically constructed to work with forms.[133]

Going further, even if the provision in discussion makes a list of the elements to be described while requesting for information, it does not specify the *language* in which the *request* needs to be submitted, nor it sets a rule on the language in which the *references* extracted from public registers must appear (when these need to accompany the formal texts). As regard the latter, in particular, the use of the national languages (different from English) for these references has been found not convenient by, for instance, the Spanish ARO's former deputy director.[134] More generally, the practice throughout the years showed that cross-border information exchanges are of better quality when the same language (English) is used.[135] Differently, in fact, written requests may have to pass through an 'in-house' translation service or even an external trusted company, depending on the language skills available, and this increases the level of unnecessary *bureaucracy*.[136]

Another interesting innovation of the proposed framework is that, under Article 9(6), AROs are – as a general rule – *obliged* to provide the information to the AROs that request it. The rationale behind this change of path relates to one of the above-mentioned problems identified by the AROs on the status quo, namely the provision of incomplete responses in cross-border cooperation[137].[138] Still, there are situations that are *exempted* from this obligation. A refusal is indeed possible if there are *'factual reasons'* to assume that providing the information would either '*harm the fundamental national security interests*" of the requested MS, or '*jeopardise an ongoing investigation, or a criminal intelligence operation*' or, instead, '*pose an imminent threat to the life or physical integrity of a person*'.[139]

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[133] Europol, 'SIENA, Secure Information Exchange Network Application' (2012) Publications Office, available for download at https://op.europa.eu/en/publication-detail/-/publication/bf5426ff-929f-4f0b-ba2a-1d2793dc3030, p. 2.

[134] Information obtained by directly contacting Luis Vallés Causada, deputy director of ORGA (one of the two Spanish AROs). This information merely represents a personal view and does not, therefore, represent the ORGA's position on the matter.

[135] International Centre for Migration Policy Development, 'Study on the status of information exchange amongst law enforcement authorities in the context of existing EU instruments' (2010) available at https://home-affairs.ec.europa.eu/system/files/2020-09/icmpd_study_lea_infoex.pdf p. 105.

[136] Ibid, p. 78.

[137] *Study on freezing, confiscation and asset recovery – what works, what does not work Country chapters* (Publications Office of the European Union, 2021), p. 103, 160, 311.

[138] Impact Assessment Report Accompanying the Proposal, p. 12.

[139] The text of the Council's position also contains an additional refusal ground, when the provision of information would 'clearly be disproportionate or irrelevant with regard to the purposes for which it has been requested'. See Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation. General Approach [2023] Article 9(6).

The Commission, however, did not define these refusal grounds; by doing so, it implicitly allowed the Member States and the AROs to interpret them broadly, with the consequence that these exemptions *could* be invoked too easily.

At the same time, two elements need to be taken into consideration. First, one cannot help but notice that the Commission wanted to increase the level of obligation concerning the information exchange upon request. Indeed, the ARO Council Decision does not have any reference to the obligation of the AROs to follow up on the request for information. Second, it can be derived from the Proposal that the Member States should be called to ensure that their AROs do not simply invoke the refusal grounds in an abstract and meaningless way. There are mainly two sub-reasons for this consideration. Primarily, Article 9(7) requires Member States to ensure that '*reasons are given for refusals'*, and that such refusals only affect the part of the requested information covered by the mentioned refusal grounds. On top of that, it cannot be forgotten that, according to the well-settled general theory of the EU sources of law, *'the provisions of secondary law cannot be deprived of any practical effect or rendered redundant*'.[140] Instead, their *effet utile* should be maximised.[141] If this is true, invoking, for instance, 'national security' insignificantly, with formalistic and standardised reasons put forward, would deprive the EU law provision in discussion, namely Article 9(6), of the effect of increasing the level of obligation (and therefore, of responsiveness and effectiveness) concerning the information exchange. The doubts arising from the lack of definitions given by the Commission are, anyway, significant and still leave room for broad interpretations, and therefore for a large invocation of the exemptions.

With regard to the use made after an information an exchanged between AROs, it is worth mentioning that the *status quo* sees the majority of AROs usually providing information to other AROs *without* granting its use for evidence purposes.[142] Indeed, this is not an obligation - under the legal framework arising from the ARO Council Decision.[143]

Quite interestingly, instead, Article 9(4) clarifies that Member States *shall* ensure that the information exchanged among AROs can be presented as evidence before a national court, in accordance with procedures in national law. Hence, the degree of discretion left to Member States is much more restricted, and the wording suggests that the sending ARO has a duty to transfer the information to another ARO in such way that the Member State of the receiving ARO can use it for evidentiary purposes.

Either if the cooperation is spontaneous or upon request, then, Article 9(1) sets some rules on the information that can be exchanged, creating a twofold approach.

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[140] Stefano Montaldo, 'Directive 2014/42/EU and Social Reuse of Confiscated Assets in the EU: Advancing a Culture of Legality' (2015) New Journal of European Criminal Law 195-212, p. 205.
[141] Ibid.
[142] Impact Assessment Report Accompanying the Proposal, p. 12.
[143] Ibid.

'*Any information*' can be exchanged, provided that it is necessary for the performance of AROs' tasks of Article 5. For what concerns personal data, however, the exchangeable information are only those listed in Section B, point 2 of Annex II to the Europol Regulation 2016/794[144]. Even more, the stricter requirement of a '*case-by-case basis*' applies. The relevance of this provision can be explained in light of two perspectives. Firstly, it needs to be recalled that the freezing and confiscation orders in the EU Member States are *judicial* orders, which need to be based on evidence. Furthermore, an ARO which grants the exchanged information for evidence purposes contributes to speeding the AR proceedings, due to the fact that, otherwise, the requesting authorities need to re-send a request via judicial channels in order to obtain a freezing order.[145] This mechanism clearly increases the assets' dissipation risks.[146] Hence, especially in a context where the final confiscation is often prevented by an '*unreasonably heavy burden of proof placed on the competent national authorities*'[147], dissipating potentially useful evidence is to be avoided. Secondly, the Commission's change of pace is also the result of another consideration: linking criminals to the offence (and therefore, prosecuting them) starting from their profits is something especially useful in those – not uncommon – situations in which high-level organised group criminals benefit from profits generated by crimes they themselves do not commit, but that are carried out by others under their command.[148] In these circumstances, AR-related evidence in the availability of the AROs might, therefore, be decisive not only for the actual recovery of criminal assets but also for bringing certain criminals to trial.

For what concerns, instead, the *means* to exchange information, Article 9(5), contrary to the ARO Council Decision (silent on the topic), requires AROs to use Europol's Secure Information Exchange Network Application (SIENA), and accordingly makes it mandatory for Member States to ensure that AROs have direct access to it. SIENA, launched in 2009[149] by Europol to respond to the communication needs of EU law enforcement[150], is currently one of the most

[144] 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 [2016] OJ L 135/53. Hereainfter, also: Europol Regulation.
[145] Ibid.
[146] Ibid.
[147] Parliamentary Assembly of the Council of Europe, 'Fighting organised crime by facilitating the confiscation of illegal assets' Resolution 2218 (2018), para 3.
[148] Impact Assessment Report Accompanying the Proposal, p. 22.
[149] George Pavlidis, 'Asset recovery in the European Union: implementing a "no safe haven" strategy for illicit proceeds' (2022) 25 Journal of Money Laundering 109, p. 115.

[150] 'Secure Information Exchange Network Application (SIENA)' (*Europol*) https://www.europol.europa.eu/operations-services-and-innovation/services-support/information-exchange/secure-information-exchange-network-application-siena accessed 24 July 2023.

widely used channels among Member States for data sharing.[151] According to the Commission, SIENA allows AROs to quickly communicate with each other, but also to benefit from Europol's analysis and operational support and cross-checking of data with other intelligence and investigations.[152] On this point, it is worth recalling that 2,400 national authorities and 14 international organisations and agencies were part of the SIENA network already in 2021.[153] Furthermore, almost all AROs that already use SIENA find it indeed a good way to communicate.[154] For instance, it ensures the strict confidentiality of the information exchanged.[155] Moreover, it has been highlighted by the same AROs how partial responses can be sent/received.[156] In fact, the SIENA platform itself gives the possibility to send urgent information to another MS's ARO with the remark 'partial answer' and another part of the request, which takes longer time and/or is of less importance, can be sent later.[157] Another example that can be recalled is the 'Large File Exchange' mechanism, which enables the secure exchange of files when these involve large amounts of data.[158] From these considerations originated Article 9(5), which, however, would not disrupt the AROs' network. In a certain way, indeed, the provision incorporates and implements an ongoing phenomenon. During the last few years, indeed, SIENA has become the default information exchange channel for the *majority* of the AROs.[159] Therefore, Article 9(5) will particularly impact only the *eight* Member States whose AROs, according to the available data, are still *not* (directly) connected to the system[160] and use instead

[151] Gábor Kemény and Michal Vít, 'Information exchange of law enforcement agencies within the EU in context of COVID 19 outbreak' (2022) Social Sciences & Humanities Open 7 (2023), p. 3.
[152] Impact Assessment Report Accompanying the Proposal, p. 12.
[153] 'Secure Information Exchange Network Application (SIENA)' (*Europol*) https://www.europol.europa.eu/operations-services-and-innovation/services-support/information-exchange/secure-information-exchange-network-application-siena accessed 24 July 2023.
[154] See in particular *Study on freezing, confiscation and asset recovery – what works, what does not work Country chapters* (Publications Office of the European Union, 2021), p. 76, 140, 233, 311, 335, 384, 408, 424, 432, 655. For a different opinion, p. 507.
[155] Presidency of the Council of the European Union, 'Manual on Law Enforcement Information Exchange' (2018) 6243/2/18 REV 2, available at https://www.statewatch.org/media/documents/news/2018/aug/eu-councl-law-enforcment-%20information-exchange-6727--add-2-18.pdf p. 3.
[156] *Study on freezing, confiscation and asset recovery – what works, what does not work Country chapters* (Publications Office of the European Union, 2021), p. 684.
[157] Ibid, p. 684.
[158] 'Intelligence - Europol Review 2015' https://www.europol.europa.eu/annual_review/2015/intelligence.html accessed 24 July 2023.
[159] 'Secure Information Exchange Network Application (SIENA)' (*Europol*) https://www.europol.europa.eu/operations-services-and-innovation/services-support/information-exchange/secure-information-exchange-network-application-siena accessed 24 July 2023.
[160] Impact Assessment Report Accompanying the Proposal, p. 12.

other tools for communication, such as a dedicated e-mail account.[161] These Member States will need, in fact, to overcome the reasons which have so far prevented connecting the AROs to SIENA. According to the available data, such reasons concern technical obstacles, considerations of legal nature, or organisational decisions.[162] An example of this last case is the Greek ARO, that currently prefers to go through the Europol National Unit to access SIENA.[163]

Article 25, then, addresses the necessity for the AROs to have adequate *financial* and *technological* resources. Speaking of *technological* resources, Spain's example should be recalled for its innovative perspective. In March 2023, the Spanish ARO started using a system of artificial intelligence and machine learning as a support to handle the large amounts of data and to determine the real ownership of the property to recover.[164] On the artificial intelligence's potential in assisting law enforcement authorities in detecting illicit money flows, a EU-funded project (TRACE)[165] is also exploring the possibilities. This assistance may involve – *inter alia* - the analysis and visualisation of financial data (virtually in any given language), and the identification of suspicious financial activity patterns.[166]

6. CONCLUSIONS

The gradual (and still ongoing) political project of bringing unity among the Member States' diversity as well as the overcoming of the historically rooted assumption according to which criminal law was solely an expression of the State's sovereignty is increasingly reshaping the national criminal legal systems throughout the Union. The path from the first EU acts on criminal asset recovery to the 2022 Proposal for a Directive on the topic is a vivid example of the potential of bringing the national legal framework closer together. My Master's thesis, of which this paper is an extract, analysed the contents of such Proposal and its implications on the criminal asset recovery regimes in the Union. The underlying

[161] 'European Commission - Have Your Say' Feedback from: ARO Italy (*European Commission - Have your say*) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12725-Fighting-organised-crime-freezing-and-confiscating-the-proceeds-of-crime/F2015555_en accessed 20 July 2023.

[162] Impact Assessment Report Accompanying the Proposal, p. 12.

[163] *Study on freezing, confiscation and asset recovery – what works, what does not work Country chapters* (Publications Office of the European Union, 2021), p. 205.

[164] 'La oficina de recuperación y gestión de activos en un horizonte transnacional de investigación física y tecnológica' (2023) Diariolaley available at https://diariolaley.laleynext.es/dll/2023/02/17/la-oficina-de-recuperacion-y-gestion-de-activos-en-un-horizonte-transnacional-de-investigacion-fisica-y-tecnologica p. 6.

[165] 'Developing AI solutions to disrupt illicit money flows' (*TRACE*) https://trace-illicit-money-flows.eu/ accessed 20 July 2023.

[166] Dimitrios Kafteranis, Athina Sachoulidou and Umut Turksen 'Artificial Intelligence in Law Enforcement Settings' EuCrim, available at https://eucrim.eu/articles/artificial-intelligence-in-law-enforcement-settings/.

objective was to understand whether the proposed rules can meet the objective of ensuring that the Member States can count on similarly effective AR capabilities and enhance their regimes.

Overall, although far from remaining beyond any criticism, the Proposal sets the basis for a renewed EU legal framework on AR which could effectively enhance the complex and multi-faceted field of AR, and do so in alignment with the respect for due safeguards as interpreted by the CJEU and the ECtHR. In particular, it has been shown that the Proposal altogether reflects the lines of reasoning that these two Courts followed when dealing in the past years with AR-related cases, and in particular with regard to the respect for human rights as enshrined in the Charter and the ECHR.

Also, the analysis highlighted that, for many aspects, the Member States' rules will be more impactful to tackle the economic dimension of crime, other than overall more similar among themselves (especially, for instance, for aspects of asset tracing and confiscation). Such increased similarity can also be expected to benefit the application of Regulation 2018/1805 concerning the mutual recognition of freezing and confiscation orders. While the most critical ones in the doctrine had argued that Member States are obliged – under this Regulation – to recognise not different frameworks, but rather, *'the truly unknown'*[167] (to underline that the existing national differences in the AR field might hamper the Regulation's application, just as they did in the past)[168], the implementation of the Proposal's rule should, instead, create a barrier to this phenomenon, as the Member States' AR regimes will get closer.

To conclude with the words of T. Raja Kumar, the President of the FATF organisation:

'[A] *key element is to ensure that the legislative framework gives law enforcement and prosecutors a wide range of powers, tools and mechanisms to quickly freeze, seize and confiscate assets. […] We can only derive high benefit from enhanced or new asset recovery legislation and measures if the right structures and systems are put in place that will facilitate its effective use.*'[169]

[167] Frank Meyer, 'Recognizing the Unknown – the New Confiscation Regulation' (2020) EuCLR 140 and Sandra Oliveira e Silva, 'Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders: A headlong rush into Europe-wide harmonisation?' (2022) NJECL 198, p. 202.

[168] See, in particular, Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders [2016] SWD(2016) 468 final, p. 12-13.

[169] 'First Learning and Development Forum - Opening Remarks by FATF President' https://www.fatf-gafi.org/en/the-fatf/fatf-presidency/first-learning-development-forum-speech.html accessed 25 July 2023.

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