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Targeting unexplained wealth: Implications of the EU's 2024 Directive on asset recovery

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Introduction

In 2024, the European Union (EU) passed *Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on Asset Recovery and Confiscation* ("the Directive").¹

This Directive places a number of legislative obligations on EU Member States to better "facilitate and ensure effective asset recovery and confiscation efforts across the Union".² Member States have until 23 November 2026 to implement them.³

One of the more notable (and perhaps controversial) obligations is contained in Article 16, which requires states to introduce legislative measures to enable the confiscation of "unexplained wealth". This policy paper examines this Article and the powers and restrictions that Member States will need to include in such "unexplained wealth" measures to ensure compliance with the Directive.

In brief, it shows that the wording of the Directive gives Member States considerable flexibility in deciding the scope of their own unexplained wealth measures. As a bare minimum, states will be required to introduce measures that can be used to target unexplained wealth linked to organised crime. The Directive, however, does not limit Member States from adopting measures that go much further, and States could still opt to introduce broader

measures that target unexplained wealth relating to all criminal activity, including corruption.

Why was a new Directive on asset recovery introduced?

The Directive seeks to build on the existing EU legal framework targeting the proceeds of crime, namely:

- *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*;⁴
- *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*;⁵ and
- *Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property*.⁶

Following an evaluation of the above instruments, the European Commission concluded that they had "not fully achieved the policy objective of fighting organised crime through recovering its profits".⁷

1 See: <http://data.europa.eu/eli/dir/2024/1260/oj>.

2 *Directive (EU) 2024/1260* at [7].

3 *Ibid.*, Article 33; Note, Ireland and Denmark are not bound by the Directive, see *ibid.*, at [63]-[64].

4 See: <http://data.europa.eu/eli/dir/2014/42/oj>.

5 See: <http://data.europa.eu/eli/dec/2007/845/oj>.

6 See: https://eur-lex.europa.eu/eli/dec_framw/2005/212/oj.

7 *Directive (EU) 2024/1260*, at [6].

Consequently, given the increasingly “significant threat” posed by organised crime to the integrity of the economy and to the rule of law, the new Directive seeks to “update” the existing framework and better equip the EU to tackle this issue.⁸ To achieve this, the Directive seeks to “strengthen the instruments to confiscate instrumentalities and proceeds of crime and property derived from the criminal activities of criminal organisations”⁹

In line with this overarching objective, the Directive instructs Member States to implement a number of confiscation-related legislative instruments under Articles 12–16. These include measures that were already highlighted, to some degree, under *Directive 2014/42/EU*, including:

- **traditional “confiscation”** measures that can be used to target property relating to a criminal offence for which someone has been convicted (Article 12), even where this property has been transferred to third parties (Article 13);
- **“extended confiscation”** measures that can be used to target any economic benefits derived by a convicted person from wider criminal conduct (Article 14); and
- **“non-conviction-based confiscation”** measures that can be used to target property that is derived from a criminal offence in limited circumstances where a criminal proceeding has commenced but cannot be completed (Article 15).¹⁰

Beyond these instruments, however, the Directive also includes a new obligation on Member States under Article 16: to implement measures that can be used to target “unexplained wealth linked to criminal conduct”.

Article 16: Unexplained wealth

Under Article 16, Member States are directed to:

...take the necessary measures to enable, where, in accordance with national law, the confiscation measures of Articles 12 to 15 may not be applied, the confiscation of property identified in the context of an investigation in relation to a criminal offence, provided that a national court is satisfied that the identified property is derived from criminal conduct committed within the framework of a criminal organisation and that conduct is liable to give rise, directly or indirectly, to substantial economic benefit.¹¹

While the Article does not give a specific definition for “unexplained wealth”, it provides the following guidance to determine whether property could be confiscable in this context:

When determining whether the property referred to in paragraph 1 should be confiscated, account shall be taken of all the circumstances of the case, including the available evidence and specific facts, which may include:

- a. that the value of the property is substantially disproportionate to the lawful income of the affected person;**
- b. that there is no plausible licit source of the property;**
- c. that the affected person is connected to people linked to a criminal organisation.**

Notably, the Directive explicitly outlines that “it should not be a precondition for the confiscation of unexplained wealth that individual offences be proven”. Instead, a court must simply be “satisfied” that the property in question is “derived” from criminal conduct.¹² The standard of proof that must be reached to induce this satisfaction from the court is not explicitly outlined in the Directive, which only

⁸ *Ibid.*, at [1] – [6].

⁹ *Ibid.*, at [7].

¹⁰ Note that the new Directive broadens the situations where non-conviction based measures should be applied to include cases where a relevant person has died or when certain limitation periods have expired. See *ibid.*, Article 15.

¹¹ *Directive (EU) 2024/1260*, Article 16.1.

¹² *Ibid.*, at [34], Article 16.1.

states that it should be based on “sufficient facts and circumstances”¹³

The Article also does not specify which party to an unexplained wealth-related proceeding carries the burden of proof. Proposed amendments to the Article put forth by European Parliament Committees during the legislative process recommended that it specifically indicate that the burden of proof in such proceedings “shall lie on the prosecution”, but this requirement was ultimately not included in the final text of the Directive.¹⁴

Analysis: A broad asset recovery tool within a narrow scope

Article 16 requires Member States to introduce a confiscation measure that targets a new category of assets, namely “unexplained wealth”, without the need to first prove an individual offence (such as with traditional or extended confiscation) or to demonstrate that a pre-existing criminal proceeding cannot be completed (such as with non-conviction based forfeiture).¹⁵ This represents a significant step by the EU to expand the amount of assets that may be subjected to confiscation.

It is important to highlight, however, that Article 16 only obligates Member States to implement a measure to target

unexplained wealth under arguably narrow circumstances – particularly when considered in the context of unexplained wealth laws that already exist internationally.

Specifically, Article 16 only obligates Member States to design a measure that:

- Acts as a supplementary instrument to traditional confiscation measures, extended confiscation measures and non-conviction based confiscation measures that can be utilised when, “in accordance with national law”, these latter measures “may not be applied”; and
- can be used to only confiscate property that has been “identified in the context of an investigation into a criminal offence” where the relevant offence is “punishable by deprivation of liberty of a maximum of at least four years”¹⁶

Furthermore, Article 16 only obligates Member States to implement a measure that can be used in the context of organised crime or, more specifically, where a court is satisfied that the relevant property derives from criminal conduct that was:

- “committed within the framework of a criminal organisation”;¹⁷ and
- is liable to give rise to a “substantial economic benefit”

Proposed amendments by the Committee on Civil Liberties, Justice and Home Affairs recommended that Article 16 also specifically obligate Member States to introduce unexplained wealth measures that could be used to target assets derived from additional criminal activity, such as

13 *Ibid.*, at [34]. At this stage it is unclear how states will approach this issue. More traditional unexplained wealth laws generally do not require any link between an asset and criminality to be established at all, or alternatively, that the state merely establish a “reasonable suspicion” that such a link exists. If states, however, implement measures that require higher standards of proof to be met (e.g. on the balance of probabilities) then it will arguably be more logical to categorise these laws as non-conviction based forfeiture laws (which also generally use the same standard of proof) rather than traditional unexplained wealth-focused laws, despite the fact that these laws will be introduced to target the “unexplained wealth” outlined by Article 16 (see: Dornbierer, A., 2021. *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*. Basel: Basel Institute on Governance, Part 1).

14 European Parliament Committee on Legal Affairs, *Opinion of the Committee on Legal Affairs for the Committee on Civil Liberties, Justice and Home Affairs on the Proposal for a directive of the European Parliament and of the Council on asset recovery and confiscation (COM(2022)0245 – C9-0186/2022 – 2022/0167(COD))*, dated 24.03.2023, p.24, accessed 29 October 2024 at: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/AD/2023/05-22/1275386EN.pdf; European Parliament Committee on Civil Liberties, Justice and Home Affairs, *Amendments 76-366: Draft Report, Asset Recovery and Confiscation, Proposal for a Directive (COM(2022)0245 – C9-0186/2022 – 2022/0167(COD))*, dated 10.03.2023, p.108, accessed 29 October 2024 at: https://www.europarl.europa.eu/doceo/document/LIBE-AM-745293_EN.pdf.

15 *Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on Asset Recovery and Confiscation* at [34] and Articles 15-16.

16 *Ibid.*, Article 16.1, 16.4; Note, however, that the Directive also states that “[i]t should be possible for Member States to decide to allow for confiscation of unexplained wealth where criminal proceedings are discontinued or for such confiscation to be ordered separately from criminal proceedings into the offence”, see *ibid.*, at [34].

17 Article 3 specifies that the definition of a “criminal organisation” in the context of the Directive is the same definition as that outlined in Council Framework Decision 2008/841/JHA, Article 1(1), namely: “... a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit.” A “structured association” is subsequently defined as “an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.”

corruption.¹⁸ These recommendations, however, were ultimately not included in the final text of the directive. Consequently, Article 16 does not obligate Member States to introduce the broader types of unexplained wealth laws that exist internationally which can be used to target unexplained property in much wider contexts.

Nonetheless, it is also important to emphasise that while the Directive sets a minimum standard for the type of unexplained wealth mechanism Member States are required to introduce, it specifically does not limit Member States from adopting broader measures applicable to “other crimes or circumstances”. Consequently while the Member States may opt to introduce a more narrow mechanisms to meet the minimum standards put forth by Article 16, they may also choose to introduce an unexplained wealth mechanism that can be applied in a much wider set of circumstances.

Safeguards and limitations

Importantly, the Directive outlines a number of mandatory conditions to ensure that any measures implemented in line with Article 16 do not infringe on established legal rights and are not applied to trivial cases.

For example, measures introduced in compliance with Article 16 (or any other Article in the Directive) must be implemented in accordance with the rights and principles outlined in the *Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms*.¹⁹ Additionally, a person affected by a confiscation order under Article 16 should also be given “an effective possibility to exercise the right to challenge” the process.²⁰ Finally, Article 16 also explicitly notes that any introduced measures should “not prejudice the rights of bona fide third parties”.²¹

As noted above, limitations are also included in the Directive to ensure that any Article 16-related measures introduced by Member States can only be used in cases above “a certain threshold of seriousness”.²² For example, the property must have first been identified in an investigation of a relevant criminal offence that carries a maximum punishment of at least four years’ imprisonment. Furthermore, the criminal conduct from which the unexplained wealth has been derived must be conduct that is liable to give rise to a “substantial” economic benefit.

The Directive also gives Member States the option to incorporate additional limitations when implementing Article 16 measures, including:

- a condition that the confiscation should not occur if it would cause “undue hardship” to the affected person;²³
- a condition that confiscation of unexplained wealth can only occur if the relevant property had been previously “frozen” in the context of an investigation of an organised crime-related offence;²⁴ and
- a limitation outlining the “period of time during which the property could be deemed to have originated from such criminal conduct”.²⁵

Finally, the Directive also specifies that when applying measures relating to Article 16, “the national competent authorities can choose not to order or execute confiscation of unexplained wealth where, in the case in question, the application of the rules set out in this Directive would be manifestly unreasonable or disproportionate”.²⁶

18 European Parliament Committee on Civil Liberties, Justice and Home Affairs, Amendments 76-366: *Draft Report, Asset Recovery and Confiscation, Proposal for a Directive (COM(2022)0245 – C9-0186/2022 – 2022/0167(COD))*, dated 10.03.2023, pp.107-108, accessed 29 October 2024 at: https://www.europarl.europa.eu/doceo/document/LIBE-AM-745293_EN.pdf. Specifically, this document recommended that the measures be applicable to “criminal offences committed in the framework of or in connection with a criminal organisation, or EU or non-EU public structures promoted or financed, at least partially, by public authorities and involved in fraudulent or corrupt activities”.

19 *Directive (EU) 2024/1260* at [45].

20 *Ibid.*, Article 24.4.

21 *Ibid.*, Article 16.3 and at [33].

22 *Ibid.*, at [32].

23 *Ibid.*, at [49]. Note this condition also applies to other confiscation measures under Article 12-15 of the Directive.

24 *Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on Asset Recovery and Confiscation*, Article 16.5.

25 *Ibid.*, at [33].

26 *Ibid.*

An opportunity to bolster the asset recovery toolbox

The obligations imposed by Article 16 empower law enforcement agencies and judicial authorities to target a broader range of assets for confiscation. The Article also serves to harmonise the approaches taken by EU Member States to tackling unexplained wealth in the context of organised crime and will undoubtedly facilitate cross-border cooperation on cases of this kind.

As a bare minimum, Member States will be required to introduce measures that enable the confiscation of unexplained wealth identified specifically within the context of investigation into a criminal offence, where a court can be satisfied that the property has been derived from criminal conduct committed within the framework of a criminal organisation.

Member States, however, are specifically not limited from introducing measures that go beyond this baseline.

Many laws exist outside the EU which enable states to target “unexplained wealth” in more expansive circumstances, beyond an organised crime context. The Directive specifically does not limit Member States from designing unexplained wealth measures along these lines, providing of course that they respect the legal rights and principles established within the EU.

Consequently, those Member States seeking to reinforce their asset recovery capabilities so that they can better target all proceeds of crime – and especially those derived from corruption – can use the obligations imposed by the Directive as a basis for introducing unexplained wealth mechanisms with similarly expansive scopes. Providing that the law enforcement agencies and judicial authorities tasked with using these laws are then also backed by adequate resourcing, this will better enable these States to recover a broader range of criminal proceeds.

Further resources

For further information regarding the development and passing of the Directive itself, see the *Legislative Train Schedule* and the wide range of sources referenced within it: europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-life/file-revision-of-the-directive-on-the-freezing-and-confiscation-of-proceeds-of-crime.

For further information regarding the different forms of unexplained wealth laws that exist internationally, see: *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth* baselgovernance.org/publications/illicit-enrichment-guide-laws-targeting-unexplained-wealth.

Keywords

- asset recovery
- illicit enrichment
- unexplained wealth
- European Union
- legislation
- European Court of Human Rights

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