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## **CONFERENCE OF THE PARTIES**

### **Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)**

**Added value and feasibility of preparing  
an additional protocol to the  
Council of Europe Convention on Laundering, Search, Seizure and  
Confiscation of the Proceeds from Crime and on the Financing of Terrorism  
(CETS No. 198)**

# **Added value and feasibility of preparing an additional protocol to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)**

## **I. Introduction**

1. Serious and organised crime are a major threat to the rule of law and, more generally, for the safety and security at country as well as global level. Profit-driven, illegal activities generate assets estimated to be around €139 billion every year<sup>1</sup>. Whilst there are no precise statistics, revenues generated by organised crime are substantial, with a 2021 European Commission study estimating the annual revenues from the nine main criminal markets in the EU at between €92 billion and €188 billion in 2019<sup>2</sup>. These profits allow criminals to further fund their illicit activities and infiltrate the legal economy and public institutions.

2. Both experience and scientific research confirm that the fight against organised and financial crime is effective only when criminals are deprived of assets gained through these activities. Asset recovery deters criminal activity by removing its impetus, while protecting the integrity of the financial system and broader economy through reducing the circulation of illicit income. Moreover, it allows for the compensation of the victims of crime, supporting social cohesion and justice. Effective application of asset recovery measures is proven to be a key tool in uncovering and dismantling the broad networks of criminal organisations operating at an international level.

## **II. International legal framework, state of play and relevant initiatives**

3. The existing conventional framework of the Council of Europe (CoE - [CETS 198](#) and [141](#) and also CETS [173](#), [174](#), [185](#), [197](#) and their additional protocols) provides a strong fundament for the recovery of proceeds of crime. In many aspects, the aforementioned standards, mostly through the CETS 198 provisions, exceed the [global standards](#) as set up by the [Financial Action Task Force \(FATF\)](#) and the United Nations ([the United Nations Convention against Corruption](#), “UNCAC”)<sup>3</sup>, thus providing a stronger asset recovery framework to those countries which ratified the CETS 198.

4. Nevertheless, since the adoption of the CETS 198 (2005), the rapidly evolving criminality landscape, as well as a number of challenges identified horizontally within the context of [mutual country assessments](#), call for an urgent need to further foster international cooperation in the area of asset recovery.

5. The findings of the assessment processes carried out by the key AML/CFT monitoring bodies (the FATF, [MONEYVAL](#) and the [COP 198](#)) concluded that very modest results were achieved in the current round of evaluations, estimated to be less than 1% of criminal proceeds being routinely recovered, which does not suffice to state that “crime does not pay”. Generally, it was observed that the poor results achieved so far are partially caused by the lack of a comprehensive binding international legal framework.

6. In response to these challenges, a number of initiatives are being undertaken, namely: (i) the FATF, as a global AML/CFT standard setter, initiated the revision of its standards on

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<sup>1</sup> [Confiscation and asset recovery \(europa.eu\)](#)

<sup>2</sup> [Mapping the risk of serious and organised crime infiltrating legitimate businesses - Publications Office of the EU \(europa.eu\)](#)

<sup>3</sup> Chapter V, Articles 51-59 are devoted to asset recovery, notably: (i) direct recovery of assets through the use of civil proceedings (Article 53), (ii) international cooperation for confiscation (Articles 54 and 55) and return and disposal of assets (Article 57).

asset recovery ([Recommendations 4 and 38](#)) against which States would be assessed globally, (ii) the European Union presented a proposal for a new Directive of the European Parliament and of the Council on Asset Recovery and confiscation<sup>4</sup> and (iii) Interpol has declared police cooperation on asset recovery as one of its priorities<sup>5</sup>.

## **II. Issues identified by experts as requiring reform of Council of Europe instruments in the field of asset recovery**

7. The Council of Europe, with a membership of 46 States, and a number of its conventions being open to non-member states, has historically been at the forefront of asset recovery standards. It therefore constitutes a unique forum to address existing lacunae in the framework of asset recovery and sharing and further enhancing its comprehensiveness.

8. As a first step in addressing the aforementioned issues, several initiatives have taken place involving relevant experts to consider the effectiveness of the existing frameworks and possible reforms of the CoE instruments in the field of asset recovery, and in particular the CETS 198.

9. The Conference of the Parties to CETS 198 has discussed, on an ongoing basis, the need to ensure that the Warsaw Convention, as the only international treaty specifically devoted to money laundering and financing of terrorism, remains relevant and up to date, and enables Parties to respond to evolving challenges in the areas covered by the treaty. Such discussions were initiated already in 2012, and in 2013, the COP concluded that a more general review of the Convention's provisions on international cooperation as a whole was not yet to be undertaken, until a critical mass of states had ratified the convention, and the outcome of the negotiations of the EU 4<sup>th</sup> directive and the Confiscation directive are clear.<sup>6</sup>

10. In 2019, the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) completed a comprehensive *Study on the possible added value and feasibility of preparing a new binding instrument in the CoE on international co-operation as regards the management, recovery and sharing of assets proceeding from crime*,<sup>7</sup> which as such should be considered as a key reference document for the work of a future ad-hoc committee responsible for preparing an additional protocol to the Warsaw Convention.

11. Further to the findings of this study, the C198-COP and the PC-OC held a number of consultative meetings which culminated in the organisation of their Joint session in November 2022. The session gathered representatives from both committees and experts from around the globe (relevant international organisations, specialised institutes, think tanks, etc.) to discuss and consider the development of an additional instrument in the field of asset recovery.

12. In the course of the discussions, experts identified the following areas as being most relevant to be considered for future reform: a) international cooperation in management and sharing of confiscated assets, b) application and execution of non-conviction-based forfeiture decisions rendered in foreign jurisdictions. More precisely:

➤ *Introduction of a legal framework for non-conviction-based confiscation (NCBC):* so far, neither the FATF nor the Council of Europe (in particular under CETS 198) have set binding

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<sup>4</sup> [EUR-Lex - 52022PC0245 - EN - EUR-Lex \(europa.eu\)](#)

<sup>5</sup> [FATF and INTERPOL intensify global asset recovery \(fatf-gafi.org\)](#)

<sup>6</sup> See Meeting report of the 5<sup>th</sup> meeting of the Conference of the Parties, Strasbourg, 12-14 June 2013.

<sup>7</sup> See [PC-OC\(2019\)04REV](#), Study on the possible added value and feasibility of preparing a new binding instrument in the Council of Europe on International Co-operation as regards the management, recovery and sharing of asset proceeding from crime.

rules in respect to confiscation of assets without prior criminal conviction. The latter may have a major advantage under several circumstances such as securing the final confiscation of assets where the statute of limitations for the underlying crimes has run out, as long as the measures undertaken constitute a lawful and proportionate interference with the peaceful enjoyment of one's possessions<sup>8</sup>. Also, criminals are more and more using possibilities to flee the jurisdictions and extradition cannot be always granted due to the strict rules which implies consequently the inability to confiscate assets. Whilst being more and more used by countries, there is not yet a unified approach in rendering international assistance in NCBC cases. At a minimum, the Protocol could seek to foster international cooperation among the States Parties in obtaining evidence for purposes of NCBC procedures, and in recognising and executing foreign NCBC confiscation orders.

➤ *Enhancing the asset sharing arrangements between states:* regrettably, more and more victims face difficulties in obtaining compensation for the damages caused by crimes committed against them. When assets are finally confiscated, they are rarely returned to their countries of origin. According to the World Bank estimates, only 3% of the proceeds are returned to developing countries. This leads to growing economic disparities between nations, and questions about the fairness of international legal norms and principles. The Protocol could aim to ensure that States Parties have an obligation to enter into asset sharing negotiations and agreements, including a fair partitioning of the assets. The Protocol could also seek to further streamline and regulate one of the key requirements of the CETS 198, namely States Parties' obligation to give priority considerations to victims' compensation when acting on a foreign confiscation request.

➤ *Proper management of seized and confiscated assets.* The current legal framework within CETS no. 198 provides for the obligation to manage frozen and seized proceeds of crime, instrumentalities and property of equivalent value. Inadequate management measures have been found to thwart the entire asset recovery process. Execution of foreign confiscation requests takes time and that is why a preservation of value of assets is of a significant importance. Consequently, a consistent asset management measures need to be applied across the States Parties to avoid asset depreciation and unduly high costs of their maintenance. These measures could be embedded in an additional Protocol to CETS 198 to enable smooth and efficient cooperation when sharing seized and confiscated assets.

13. MONEYVAL, whose 5<sup>th</sup> mutual evaluation round is due to end in 2024, has also discussed the state of play in this field, in the context of the review of results achieved and the negotiations of its Strategy for 2024-2027, which was adopted by Ministers responsible for AML/CFT at their high-level meeting, held in Warsaw, on 25 April 2023. Its activity report of 2022 notes "Moreover, successful confiscations of ill-gotten funds as a criminal measure are rather rare in comparison with the estimates of the proceeds of crime. Countries should resort not only to freezing but also to seizure and confiscation of criminal funds. In at least ten countries (39%), enhancing the powers and resources of the countries' asset recovery and management offices will be crucial to improving their effectiveness."

14. At political level, on 25 April 2023, the Ministers from MONEYVAL states and territories adopted a High-level declaration<sup>9</sup> which strongly condemned the continued aggression of the Russian Federation against Ukraine and expressed support for the development of further proportionate legal responses to the aggression. It also called on states to take any possible

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<sup>8</sup> ECtHR *Todorov and Others v. Bulgaria*, no. [50705/11](#), 13 July 2021, *Filkin v. Portugal*, no. [69729/12](#), 3 March 2020, *Gogitidze and Others v. Georgia*, no. [36862/05](#), 12 May 2015. See also *Balsamo v. San Marino*, no. [20319/17](#), 8 October 2019, *G.I.E.M S.R.L. and Others v. Italy*, no. [1828/06](#), 28 June 2018, *Veits v. Estonia*, no. [12951/11](#), 15 January 2015, *Borzhonov v. Russia*, no. [18274/04](#), 22 January 2009.

<sup>9</sup> Declaration of Ministers and High level delegates of the member states and territories of MONEYVAL, Warsaw, 25 April 2023, see [Text of the declaration](#).

further actions as appropriate for the seizure and confiscation of assets of sanctioned individuals and entities and those identified as the proceeds of unlawful conduct. The declaration notes also the poor results observed by the outcomes of mutual evaluations for the confiscation and final deprivation of illegal proceeds.

15. The Ministers of Finance also adopted the strategic priorities of MONEYVAL, which foresee closer synergies between MONEYVAL and the COP 198, and require MONEYVAL to support the Council of Europe in any further development of the CETS no.198.<sup>10</sup>

16. To conclude, in a changing landscape of international organised and economic crime arena, a clear legal framework at international level is more and more in need, notwithstanding the need to ensure that it continues to leave sufficient flexibility to Parties to implement common measures in accordance with national legal traditions and organisational settings.

17. To date, 39 Parties have ratified CETS no. 198, and five Parties - including the European Union- have signed the convention. An additional Protocol to the CETS 198 would allow Parties to benefit from a smooth and streamlined cooperation enabling them to (i) have a direct access and be in a position to execute without delays asset sharing agreements and arrangements among themselves, (ii) provide and receive mutual legal assistance in cases involving NCBC, this being a unique feature of any international framework regulating this complex matter; and (iii) benefit from asset sharing in a way that the property, subject to the States Parties' agreement, preserves or even increases its value from the moment of its seizure. In addition, victims' compensation would be strengthened, thus expanding the civil rights' framework in this area.

18. Bearing in mind that some of these issues are also the subject of discussions of the new EU Directive on asset recovery (which is likely to be finalised by the end of 2023), it is essential for the Council of Europe to integrate timely these elements into a wider pan-European framework. This would improve the possibilities for asset recovery across borders, by having in place clear rules to facilitate cooperation in this area among Parties to the convention and to the future additional protocol.

### **III. Next steps: proposed draft terms of reference of a committee tasked to draft an additional protocol to CETS no. 198**

19. Considering the above, draft terms of reference for a committee responsible for the drafting of an additional protocol to CETS 198 have been prepared. In line with the discussions held within the Conference of the Parties to CETS 198, this work is proposed to start as soon as possible in 2024 and be completed by the end of 2025.

20. The draft text takes into account the discussion of the CDPC Bureau, held in March 2023, and clarifies the CDPC's role in steering and supervising the negotiation and finalisation of such an additional protocol, in accordance with point (x) of the CDPC's terms of reference.

21. As regards Council of Europe treaty-making practice, the drafting of a protocol to a Convention, unless the convention provides for a specific role for the conventional committee, is done within the intergovernmental structure by a drafting committee which is under the authority of a steering committee, and which submits to the steering committee the draft text for approval/adoption, and then transmits it to the Committee of Minister for final adoption.

22. Alternatively, the Committee of Ministers may also give a mandate to an ad hoc committee which operates directly under the authority of the Committee of Ministers (and not

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<sup>10</sup> See Basic Objective 4.1 - [MONEYVAL Strategy on anti-money laundering, combating the financing of terrorism and proliferation financing \(2023-2027\)](#).

under that of a steering committee). This was the case of the CAHDATA which drafted the Protocol amending the Data Protection Convention (CETS No. 223).

23. The proposed terms of reference follow the most recent practice for the drafting of the data protection protocol, by proposing establishing an ad hoc committee. This proposal would have the benefit of embedding the necessary flexibility and autonomy in decision-making, given the short time-frame for completion of the negotiations, and also for deciding promptly on the timetable and consultations to be held during the drafting process, whether within the Council of Europe or with other stakeholders. It is noted that there are no legal impediments for the CDPC, the Conference of the Parties to Convention No. 198 or other CoE bodies playing a particular role in the drafting of this protocol. At a minimum, close consultations at appropriate intervals with the CDPC, MONEYVAL and the Conference of the Parties to CETS 198 would be necessary, to ensure that effective contributions are being made throughout the negotiation process.

24. However, should the CDPC consider that the set-up of the Committee would be best served by establishing it as a subordinate body to the CDPC, this option is included in brackets and can be integrated to reflect that the committee would be working under the authority of the Committee of Ministers and of the CDPC.

25. As requested by the CDPC Bureau, the draft terms of reference include additional information about the possible content of the proposed protocol, and the need to consider any other relevant initiatives in this field in other fora, while keeping for the Parties and signatories to CETS 198 the necessary margin of flexibility, to ensure that they could cover during negotiations the issues that they would deem necessary to strengthen international cooperation.

26. At secretariat level, given the expertise required in this field, but also noting the serious resource issues reflected in the CDPC's Bureau's meeting report of March 2023, the secretariat of this future committee would be provided by the staff of the Division MONEYVAL and Criminal Asset Recovery, while ensuring close co-operation with the CDPC secretariat with respect to overall planning and consultations required for the finalisation of the processes.

27. Finally, the proposed draft terms of reference were developed taking into account the procedures and established practice in place within the Council of Europe, which foresee that it would be up to the CDPC to examine and transmit these terms of reference to the Committee of Ministers for consideration in the context of the ongoing discussions of the preparation of the new Programme and Budget 2024-2027.