

RECOVER (GA101091375)

The subject matter of the Regulation (EU) 2018/1805. National confiscation models

Reform proposals: Germany. The application of the new Directive (EU)**2024/1260 on asset recovery and confiscation in
the German legal order**

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I. Preliminary remarks

As a preliminary remark, it should be mentioned that, according to the answer given by Parliamentary State Secretary Benjamin Strasser on 21 May 2024 to a question by Member of the Bundestag Thomas Heilmann (CDU/CSU) on the transposition of the provisions of EU Directive 2024/1260 (new Directive 2024) on asset recovery and confiscation into German law, the Federal Ministry of Justice is currently examining which legislative and other transposition requirements result from the aforementioned Directive. The draft transposition law is to be presented in time to meet the thirty-month transposition deadline of 23 November 2026 pursuant to Article 33(1) of the Directive²⁶⁰.

II. Major amendments needed**1. Scope of application – criminal offences covered by asset recovery and
confiscation measures (Art. 2)**

The scope of application of the asset recovery and confiscation measures of the new

²⁶⁰ BT-Drucks. 20/11501, S. 26.

Directive 2024 according to Art. 2 covers the following crimes: organised crime (offences committed within the framework of a criminal organisation), terrorism, human trafficking, sexual abuse and sexual exploitation of children and child pornography, drug trafficking, corruption in private sector, money laundering, fraud and counterfeiting of non-cash means of payment and counterfeiting of euro and other currencies, cybercrime, illicit manufacturing of and trafficking in firearms, fraud to the Union's financial interests, environmental crime and ship-source pollutions, market abuse and crimes concerning information accompanying transfers of funds and certain crypto-assets, unauthorised entry, transit and residence and last but not least criminal offences for the violation of Union restrictive measures (Art. 2 (1)). It should be emphasised that the new Directive 2024, compared to the previous Directive 2024/42/EU, adds new offences to the list of crimes to be taken into account during the transposition process into national law, such as illicit manufacturing of and trafficking in firearms, fraud against the financial interests of the EU, environmental crimes, facilitation of unauthorised entry and residence, and violation of EU restrictive measures against Russian oligarchs, which has recently been classified as a crime under harmonisation. In the process of transposition of the new Directive 2024 into the national legal order, a cross-check should be made not only with the list of crimes explicitly mentioned in Art. 2 (1) of Directive 2024, but also to other EU legal acts that regulate criminal offences and that may provide themselves for the application of the new Directive 2024 to these offences (Art. 2 (2)). And when it comes to the first stage of asset recovery, i.e. the tracing and identification of illegal assets, these measures should apply to all criminal offences that are punishable under national law by deprivation of liberty or a detention order of at least one year.

The German legal system already allows for asset recovery in all of these categories of offences, as an 'unlawful act' under Section 73 et seq. is the sufficiently broad

requirement. The only form of confiscation that is limited to a list of offences and is subject to adaptation is that of Section 76a para. 4 of the German Criminal Code, the so-called *selbständige erweiterte Einziehung* (a form of non-conviction-based confiscation).

2. Asset Recovery Offices (AROs) (Art. 5 et seq.)

The responsibilities of AROs have been significantly expanded by the new Directive 2024 and should be updated in national legislation²⁶¹. The relevant legal bases governing the German AROs are to be amended: 1) for the judicial ARO in Section 2 para. 2 No. 3c) BfJG (*Gesetz über die Errichtung des Bundesamts für Justiz (BfJG)* – Act on the Establishment of the Federal Office of Justice (BfJG)) and 2) for the police ARO in Section 3 para. 2a BKAG (*Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten (Bundeskriminalamtgesetz - BKAG)* – Act on the Federal Criminal Police Office and Cooperation between the Federal Government and the Federal States in Criminal Police Matters (Federal Criminal Police Office Act - BKAG)). The main innovation is that AROs should now have the power to order temporary urgent asset freezing measures for a maximum of seven days (Art. 11 (3) of the new Directive 2024). In addition, it should be reviewed whether AROs have immediate and direct access under national law to the wide range of information necessary for tracing and identifying assets, as set out in Art. 6 of the new Directive 2024. The relevant data protection compliance according to Art. 8 of the new Directive 2024 in conjunction with the Directive 2016/680/EU on the protection of natural persons with regard to the processing of personal data for criminal purposes. This will ensure that AROs don't abuse such broad investigative powers and comply with the relevant data protection provisions. Last but not least, adaptations should be made according to the new time limits foreseen in Art. 10 of the new Directive 2024 on the exchange of information between competent authorities, but the German police ARO mentioned the need for adequate and

²⁶¹ A. Sakellarakis, *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?*, in “*New Journal of European Criminal Law*”, 13(4), 2022, 478-501 (490).

increased human resources in this sense.

3. Confiscation Models (Art. 12-16)

Direct, third party, extended and non-conviction-based confiscation according to Articles 12-15 of the new Directive 2024 do not seem to pose major problems of transposition into national law.

The German extended confiscation already covers all criminal offences under Section 73a of the German Criminal Code. The only point which could need a slight change would be to extend the scope of application of the German extended confiscation as under Art. 14 of the new Directive 2024 in order to cover all property derived from criminal offences, so that in addition to the proceeds of crime, this should also cover surrogates and benefits²⁶².

The non-conviction-based confiscation of Art. 15 of the new Directive 2024 corresponds to the so-called *selbständige Einziehung* under Section 76a (1-3) of the German Criminal Code and also covers the cases of confiscation due to illness, absconding, death and the statute of limitations. A slight change could be made in the German criminal law ruling the case of non-conviction based confiscation after the death of the person as Article 15 of the new Directive 2024 seems according to the German government not to be fully congruent with German law, insofar as the latter treats the case of confiscation after death as one of third-party confiscation from the heir²⁶³. Moreover, what is now covered by the general principle of proportionality, but could be explicitly mentioned in the new national legislation, is the limit set by Art. 15

²⁶² Richtlinie (EU) 2024/1260 des Europäischen Parlaments und des Rates vom 24. April 2024 über die Abschöpfung und die Einziehung von Vermögenswerten – Möglicher Anpassungsbedarf im deutschen Straf- und Strafprozessrecht, WD 7 - 3000 - 036/24, 30.05.2024, p. 9.

²⁶³ *Idem*, p. 11.

(2) of the new Directive 2024 that confiscation

without a prior conviction under this provision should be limited to “offences liable to give rise, directly or indirectly, to substantial economic benefit, and where the national court is satisfied that the instrumentalities, proceeds or property to be confiscated are derived from, or directly or indirectly linked to, the criminal offence in question”.

Art. 16 on the so-called ‘confiscation of unexplained wealth linked to criminal conduct’ is also based on the German model of the so-called *erweiterte selbständige Einziehung*, so that no major changes should be made in this respect. Art. 437 of the German Code of Criminal Procedure can be adapted so that to cover the provision of Art. 16 (2) of the new Directive 2024, ruling that in order to determine the property which should be confiscated account shall be taken of all the circumstances of the case, including the available evidence and specific facts, which may include the substantial disproportion between the value of the property and the lawful income of the affected person but also two other elements which are till now not explicitly mentioned with this wording under Art. 437 of the German Code of Criminal Procedure, namely that there is no plausible licit source of the property and that that the affected person is connected to people linked to a criminal organisation. Moreover till now Art. 76a para. 4 of the German criminal code was allowing this form of confiscation for a specific list of crimes. This should be checked and amended accordingly to the new provision of Art. 16 of the new Directive 2024 mentioning that this new under harmonisation confiscation form should be provided for a) property derived from criminal conduct committed within the framework of a criminal organisation, b) that conduct is liable to give rise, directly or indirectly, to substantial economic benefit and c) the criminal offence is punishable by deprivation of liberty of a *maximum* of at least four years.

When it comes to the third party confiscation ruled under Art. 13 of the new Directive

2024 two points should be taken into account during the transposition process²⁶⁴: First, Art. 13 of the new Directive 2024 rules that third party confiscation includes situations where «the transfer or acquisition was carried out free of charge or in exchange for an amount which is clearly disproportionate to the market value of the property». This criterion of disproportionality should be possible to be subsumed under Section 73b (1) (2) (b) of the German criminal code ruling on third party confiscation that “the object so obtained [...] was transferred to that person and said person recognised, or ought to have recognised, that the object obtained was derived from an unlawful act”. Second, Art. 13 rules a case of third party confiscation that is mainly inspired by the Italian legislation and would have to be transposed to the German criminal law ruling that confiscated can be also property when «the property was transferred to closely related parties while remaining under the effective control of the suspected or accused person».

4. Interlocutory sales and Asset Management Offices (AMOs) (Art. 21-22)

The most important provision on interlocutory sales under Art. 21 of the new Directive 2024 seems to be in line with Section 111p of the German Code of Criminal Procedure. A clearer formulation covering all three cases under Art. 21 (1) of the new Directive 2024 may be taken into account. Now it is provided that an object which has been seized pursuant to Section 111c GCCP or detained pursuant to Section 111f GCCP may be sold if there is a risk of its spoilage or a considerable loss of value or if its storage, care or preservation would involve considerable costs or difficulties (emergency sale). A specification of the costs and difficulties could be the wording of

²⁶⁴ *Idem*, p. 8-9.

the new Directive 2024:

b) the storage or maintenance costs of the property are disproportionate to its market value and c) the management of the property requires special conditions and expertise which is not readily available. An interesting point to be taken into account is whether real estate

could be the subject of interlocutory sales. While it is often assumed in the literature that it also applies to property, this has repeatedly been denied by the courts. Since Article 21 of the new Directive 2024 also covers real property, there could be a need for transposition in this respect - although it cannot be ruled out that the adoption of the Directive and the obligation to interpret national law in accordance with the Directive could lead to a modified interpretation of Section 111p of the Code of Criminal Procedure by the courts in this respect²⁶⁵

The role of the AMOs should also be strengthened, their responsibilities in relation to the AROs clarified and the possibility of creating a single independent national authority instead of their dispersed existence within the various prosecutors' offices explored.

5. National strategy on asset recovery (Art. 25)

At the policy level, an important change in the implementation of Art. 25 of the new Directive 2024, namely the obligation of Member States to establish a national strategy for asset recovery by May 24, 2027 and to provide for its regular updating for a maximum of five years.

6. Statistics (Art. 28)

²⁶⁵ *Idem*, p. 15.

One of the first conclusions of the RECOVER program was the need to review the way confiscation statistics are collected in Germany and to add more specific data to the content of the statistics in order to get a proper picture of the effectiveness of the asset recovery measure. Handwritten notes by prosecutors should be replaced by computer programs, the content of the statistics should definitely include the figures of cross-border confiscations based on Regulation 2018, and the requirements for their content should be updated in order to comply with the new Art. 28 of Directive 2024. Member States shall regularly collect and maintain comprehensive statistics from the competent authorities in order to review the effectiveness of their confiscation systems. The statistics collected shall be sent to the Commission by 31 December of the following year and shall include a list of the specific elements referred to in Art. 28 of the new Directive 2024.