

Freezing and confiscation of instrumentalities and proceeds of crime in the EU

2012/0036(COD) - 12/03/2012 - Legislative proposal

PURPOSE: establish a legal framework on the freezing and confiscation of proceeds of crime in the European Union.

PROPOSED ACT: Directive of the European Parliament and of the Council.

BACKGROUND: at global level, according to United Nations estimates, the total amount of criminal proceeds in 2009 was approximately USD 2.1 trillion, or 3.6% of global GDP. There are no reliable estimates of the size of criminal profits in the European Union, but in Italy the proceeds of organised crime laundered in 2011 have been estimated by the Bank of Italy at EUR 150 billion.

The profits derived from these activities are laundered and reinvested into licit activities. Organised crime groups increasingly hide and reinvest assets in Member States other than the one where the crime is committed which weakens our ability to fight cross-border serious and organised crime in the EU as a whole.

All Member States should therefore have in place an efficient system to freeze, manage and confiscate criminal assets because, although regulated by EU and national laws, the confiscation of criminal assets remains underdeveloped and underutilised.

As an effective tool in the fight against organised and serious crime, confiscation of criminal assets has been given strategic priority at EU level. The 2009 [Stockholm Programme](#) calls the Member States and the Commission to make the confiscation of criminal assets more efficient and to strengthen the cooperation between Asset Recovery Offices.

In a series of conclusion, the Council has also called on the Commission to consider strengthening the **legal framework in order to achieve more effective regimes for third party confiscation and extended confiscation.**

For its part, the European Parliament adopted an [own-initiative report on organised crime](#) which invites the Commission to present new legislative proposals in the field.

It is in this context that the Commission put forward “An [Internal Security Strategy in Action](#)” in which it undertook to propose legislation to strengthen the EU legal framework on confiscation, in particular to allow more third-party confiscation and extended confiscation, and to facilitate **mutual recognition of non-conviction-based confiscation orders** between Member States. Over time, all confiscation and freezing orders issued by a Member State should be effectively enforced against assets located in another Member State.

It should be noted that the majority of definitions and certain basic provisions in this proposal for a directive may be found in existing European texts, and in particular:

- [Framework Decision 2001/500/JHA](#), which obliges Member States to enable confiscation, to allow value confiscation where the direct proceeds of crime cannot be seized and to ensure that requests from other Member States are treated with the same priority as domestic proceedings;
- [Framework Decision 2005/212/JHA](#), which harmonises confiscation laws;

- [Framework Decision 2003/577/JHA](#), which provides for mutual recognition of freezing orders;
- [Framework Decision 2006/783/JHA](#), which provides for the mutual recognition of confiscation orders; and
- [Council Decision 2007/845/JHA](#) on cooperation between national Asset Recovery Offices.

IMPACT ASSESSMENT: the Commission conducted an impact assessment of several policy alternatives that represent differing degrees of EU-level intervention.

- **Option 0:** a non-legislative option,
- **Option 1:** a minimal legislative option (correcting deficiencies in the existing EU legal framework which inhibit it from functioning as intended) and
- **Option 2:** a maximal legislative option (going beyond the aims of the existing EU legal framework). Within the latter, two maximal legislative sub-options are analysed, one with and one without EU level action relating to mutual recognition of freezing and confiscation orders between Member States.

The preferred policy option is the maximal legislative option. This option would considerably enhance the harmonisation of national rules on confiscation and enforcement, *inter alia* by amending existing provisions on extended confiscation, and introducing new provisions on non-conviction based confiscation and third party confiscation and introducing more effective rules on the mutual recognition of freezing and confiscation orders.

LEGAL BASIS: Articles 82(2) and Article 83 of the Treaty on the Functioning of the European Union (TFEU).

CONTENT: this proposal for a Directive lays down minimum on the freezing of property with a view to possible later confiscation and on the confiscation of property in criminal matters. **The Directive only makes provision for minimum rules** (national legislative measures may be more ambitious). The adoption of those minimum rules will further **harmonise the Member States' freezing and confiscation regimes**, and thus facilitate mutual trust and effective cross-border cooperation.

Confiscation: based on the existing provision of the Framework Decision 2005/212/JHA, the proposal provides for the Member States to enable the confiscation of instrumentalities and proceeds of crime following a final conviction and to enable the confiscation of property of equivalent value to the proceeds of crime.

Extended powers of confiscation: according to the proposal “extended confiscation signifies the **ability to confiscate assets which go beyond the direct proceeds of a crime**. A criminal conviction may be followed by the (extended) confiscation not only of assets associated with the specific crime, but of additional assets which the court determines are the proceeds of other similar crimes. Extended confiscation powers are already provided for in the EU legislation. Framework Decision 2005/212/JHA obliges Member States to allow the confiscation of assets belonging directly or indirectly to persons convicted of certain serious crimes (related to organised crime and terrorism activities). However, this Framework Decision establishes alternative minimum set of rules for extended confiscation, leaving Member States free to apply one, two or all three options. This proposal introduces extended confiscation for the crimes listed in Article 83(1) TFEU as set out in existing Union legislation. It also streamlines the existing regime of alternative options for extended confiscation, by providing for **a single minimum standard**. Extended confiscation can take place where a court finds, based on specific facts, that a person convicted of an offence covered by this Directive is in possession of assets which are substantially more probable to be derived from other criminal activities of similar nature or gravity than from any other activities.

Extended confiscation is excluded where the similar criminal activities could not be the subject of criminal proceedings due to prescription under national criminal law. The proposal also excludes from confiscation the proceeds of alleged criminal activities for which the affected person has been finally acquitted in a previous trial or other situations where the **ne bis in idem** principle applies.

Non-conviction based confiscation: this provision introduces provisions on non-conviction based confiscation in limited circumstances, with a view to addressing cases where criminal prosecution cannot be exercised. It accordingly concerns confiscation in relation to a criminal offence, but it allows Member States to choose whether confiscation should be imposed by criminal and/or civil/administrative courts.

Non-conviction based procedures allow to freeze and confiscate an asset without a prior conviction of its owner in a criminal court.

In order to meet the requirement of proportionality, the proposal would not introduce non-conviction based confiscation in all cases, but makes it possible only in circumstances where a criminal conviction cannot be obtained because the suspect has died, is permanently ill or when his flight or illness prevents effective prosecution within a reasonable time and poses the risk that it could be barred by statutory limitations.

Third party confiscation: criminals often transfer their assets to knowing third parties as soon as they come under investigation, in order to avoid confiscation. Third party confiscation involves the confiscation of assets that have been transferred by an investigated or convicted person to third parties. The Member States' national provisions on third party confiscation are diverging. This hampers the mutual recognition of freezing and confiscation orders on assets transferred to a third party. In order to meet the requirements of proportionality and protect the position of a third party acquiring property in good faith, the proposal does not introduce minimum harmonisation provisions on third party confiscation in all cases. This provision requires **third party confiscation to be available for the proceeds of crime or other property of the defendant received for a price lower than market value** and that a reasonable person in the position of the third party would suspect to be derived from crime or to be transferred in order to circumvent the application of confiscation measures. It clarifies that the reasonable-person-test must be based on concrete facts and circumstances to prevent arbitrary decisions. Moreover, third party confiscation should be possible only following an assessment, based on specific facts, that the confiscation of property of the convicted, suspected or accused person is unlikely to succeed, or in situations where unique objects must be restored to their rightful owner.

Freezing: this provision requires Member States to enable the freezing of property or instrumentalities in danger of being dissipated, hidden or transferred out of the jurisdiction in view of possible later confiscation. It clarifies that such measures should be ordered by a court. The introduction of the possibility to use freezing powers **in urgent cases** in order to prevent asset dissipation in situations where waiting for an order issued by a court would jeopardize the possibilities of freezing is a longstanding priority concern of prosecutors and law enforcement agencies. The second paragraph of this Article requires Member States to have in place measures to ensure that assets in danger of being dissipated, hidden or transferred out of their jurisdiction can be **frozen immediately** by the competent authorities, prior to seeking a court order or pending its request.

Safeguards: according to the jurisprudence of the European Court of Human Rights and the Charter of Fundamental Rights of the European Union, fundamental rights such as the right to property are not absolute. They can legitimately be subject to restrictions provided these restrictions are provided for by law and are necessary and genuinely meet objectives of general interest or the need to protect the rights and freedoms of others, as in the prevention of organised crime. Inasmuch as freezing or confiscation orders interfere with the right to property or other fundamental rights, they must be capable of challenge by affected parties under the conditions set by this Article.

The existing EU legislation (e.g. Framework Decision 2005/212/JHA) provides that Member States should ensure that adequate legal remedies for the affected persons exist in national legislation. With a view to fully complying with the Charter of Fundamental Rights, this Article introduces minimum safeguards at EU level.

These aim at guaranteeing:

- **the respect of the presumption of innocence,**
- **the right to a fair trial (including the ne bis in idem principle),**
- the existence of **effective judicial remedies** before a court and
- the right to be informed on how to exercise such remedies.

Determination of the extent of the confiscation and effective execution: persons suspected to belong to criminal organisations have proven to be successful in hiding their assets, often with the benefit of advice from skilled professionals. In case a confiscation order was issued, no property or insufficient property was discovered and the confiscation order could not be executed, this Article requires Member States to allow financial investigations on the person's assets to be pursued to the extent necessary to fully execute such order. This provision addresses the problem of the foreclosure of confiscation activities at the end of the criminal procedure and allows unexecuted or partially executed confiscation orders to apply against previously hidden assets which have "resurfaced" in the meantime.

Management of frozen property: this provision intends to facilitate the management of property frozen in view of possible later confiscation. It requires Member States to introduce measures aimed at ensuring an adequate management of such property, notably by granting powers to realise frozen property, at least where it is liable to decline in value or become uneconomical to maintain.

Effectiveness and reporting obligations: this provision introduces reporting obligations for Member States, which would help generate statistics to be used for evaluation purposes.

BUDGETARY IMPLICATIONS: this proposal will imply no cost for the EU budget. It does not concern the budgetary allocation of the product of confiscation.