

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

2012/0036(COD) - 25/02/2014 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 631 votes to 19, with 25 abstentions, a legislative resolution on the proposal for a directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union.

Parliament adopted its position at first reading under the ordinary legislative procedure. The amendments adopted in plenary were the result of an agreement negotiated between the European Parliament and the Council. They amended the Commission proposal as follows:

Purpose: the proposed Directive seeks to establish minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters. It should be **without prejudice to the procedures that Member States may use to confiscate the property in question.**

Scope: as well as the criminal offences provided in the proposal, the future Directive should also apply to attacks against information systems as defined in [Directive 2013/40/EU](#) of the European Parliament and of the Council.

Confiscation: Member States should take the necessary measures to enable the confiscation, **either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds**, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.

Where confiscation is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States should take the necessary measures to **enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit**, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.

Extended confiscation: Member States should adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a **criminal offence** which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that **the value of the property is disproportionate to the lawful income of the convicted person**, is satisfied that the property in question is derived from criminal conduct.

In this context, the future Directive defined the notion of ‘criminal offence’ shall include at least the following: (i) active and passive corruption in the private sector or involving officials of institutions of the Union or of the Member States; (ii) offences relating to participation in a criminal organisation ; (iii) causing or recruiting a child to participate in pornographic performances; (iv) illegal system interference and illegal data interference; (v) a criminal offence that is punishable by a custodial sentence of a maximum of at least four years.

Third party confiscation: Member States should take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly,

were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those **third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation**, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out **free of charge or in exchange for an amount significantly lower than the market value**. This provision should not prejudice the rights of **bona fide** third parties.

Freezing: Member States should take the necessary measures to enable the freezing of property with a view to possible subsequent confiscation. Those measures, which should be ordered by a competent authority, should include **urgent action** to be taken when necessary in order to preserve property.

Safeguards: Member States should take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights. Amongst the safeguards, the following should be noted: (i) the right to **information as regards the freezing order**; (ii) the right to restitution of property frozen by not subject to subsequent confiscation; (iii) the reason for any confiscation; (iv) the right of access to a lawyer during the confiscation proceedings; (v) the right to challenge the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.

Persons whose property is affected by a confiscation order shall have the right of access to a lawyer throughout the confiscation proceedings relating to the determination of the proceeds and instrumentalities in order to uphold their rights.

In proceedings, the affected person shall have an effective possibility to challenge the circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct.

Moreover, where, as a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure provided for under this Directive, Member States should take the necessary measures to ensure that the confiscation measure does not prevent those victims from seeking **compensation** for their claims.

When implementing this Directive, Member States may provide that, in exceptional circumstances, confiscation should not be ordered, insofar as it would, in accordance with national law, **represent undue hardship for the affected person**, on the basis of the circumstances of the respective individual case which should be decisive. Member States should make a very restricted use of this possibility, and should only be allowed to provide that confiscation is not to be ordered in cases where it would put the person concerned in a situation in which it would be very difficult for him to survive.

More extensive national provisions on evidence: this Directive lays down minimum rules. It does not prevent Member States from providing more extensive powers in their national law, including, for example, in relation to their rules on evidence.

Confiscated property to be used for social purposes: Member States should consider taking measures allowing confiscated property to be used for public interest or social purposes. Such measures could, inter alia, comprise earmarking property for law enforcement and crime prevention projects, as well as for other projects of public interest and social utility. **Reports:** the Commission should submit a report to the European Parliament and the Council, assessing the impact of existing national law on confiscation and asset recovery, accompanied, if necessary, by adequate proposals. In that report, the Commission should also assess whether there is any need to revise the list of offences in the Directive.