

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

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This Commission staff working document presents the results of the analysis carried out by the European Commission of provisions on non-conviction based confiscation in the legislation of the Member States.

It should be stated that the Commission is currently verifying the complete transposition of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union into national legislation by Member States. The period for transposing the Directive expired in October 2016 but the Directive is still being transposed in some Member States.

Hence, this staff working document merely describes the legal regimes governing non-conviction based confiscation to map the different approaches taken in this policy area and identify trends. It is not aimed at making any statements as to the completeness or conformity of the transposition at national level and does in no way prejudge possible infringement procedures related to the confiscation Directive.

Non-conviction based confiscation typologies

For the purpose of this analysis, the factual information collected is organised according to models which are inspired by the non-conviction based confiscation Typologies Guide developed by the EU-funded Camden Asset Recovery Inter-Agency Network (CARIN) in 2015, which foresees four Models:

- **Model 1:** Classic non-conviction based confiscation applies where confiscation is not possible on the basis of a final conviction. While proceedings have been instituted against an offender, they cannot be concluded, as the offender cannot be brought before the court or convicted due to his/her death, because the offender has absconded or because the court deems him/her unfit for prosecution due to immunity, age or mental state.
- **Model 2:** Extended confiscation allows for the confiscation of assets, which are not connected to the crime for which the offender is being prosecuted. The order to confiscate is effectively 'extended' beyond the assets related to the prosecution, to other assets owned by the defendant.
- **Model 3:** *In rem* proceedings (action against the assets not the person) are initiated to confiscate assets obtained through unlawful conduct.
- **Model 4:** The unexplained wealth model compares the actual property a person has acquired against income declared by that person in order to identify any disparity between the two. Establishing a direct or indirect link to a predicate offence is not necessary.

From the analysis it becomes clear that most Member States' non-conviction based confiscation regimes go beyond the minimum harmonisation requirements set out in the confiscation Directive but vary considerably in their scope:

- 25 Member States (all except BG, IE, UK) primarily rely on classic non-conviction based confiscation proceedings (Model 1);
- 26 Member States (all except EL and IE) have extended confiscation regimes (Model 2);

- 13 Member States (EE, DE, EL, IT, LV, LT LU, NL, PL, RO, SK, SL, ES) also have some form of *in rem*/unexplained wealth procedures (Models 3 and 4) in addition to classic ones, or have draft law envisaging such regime;
- 3 Member States (BG, IE, UK) primarily rely on *in rem*/unexplained wealth proceedings (Models 3 and 4).

Looking at Member States having implemented classic non-conviction based confiscation regimes (Model 1) differences in scope are visible:

- 8 Member States cover the situation of illness or absconding but also other situations; 4 of them (ES, HU, SE, SI) also cover death, the other 4 (EE, PL, PT, SK) exclude death;
- 7 Member States (BE, CZ, FR, LT, LU, MT, NL) cover only the situation of illness or absconding;
- 7 Member States (AT, CY, EL, FI, HR, IT, LV) cover the situations of death, illness or absconding;
- 2 Member States (DK, EL) cover only the situation of death;
- 1 Member State (DE) covers all cases where a conviction is not possible in criminal proceedings;
- 1 Member State (RO) covers only the case of illness of the suspect or accused person.

Possible challenges

A key challenge to the introduction of non-conviction based confiscation legislation is the compliance with fundamental rights. The absence of a criminal conviction raises issues relating to the right to fair trial, effective judicial remedy, the presumption of innocence as well as the right to property.

Conclusions

Member States' legal frameworks on non-conviction based confiscation have undergone considerable changes over the last years.

It is true that while confiscation has received more attention recently, the actual rate is still very low. The lack of current data is an aspect that should also be addressed. Further reflection and consultation on this matter are necessary.

This work constitutes an intermediary step and will inform the Commissions' reply to the call of the European Parliament and the Council in their joint declaration in the context of the Report on the transposition of the confiscation Directive, which will be presented by the Commission at the end of 2019.