



EUROPEAN PARLIAMENT

2009 - 2014

Plenary sitting

A7-0178/2013

20.5.2013

*****|**
REPORT

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
(COM(2012)0085 – C7-0075/2012 – 2012/0036(COD))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Monica Luisa Macovei

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

CONTENTS

	Page
DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION.....	5
EXPLANATORY STATEMENT.....	34
PROCEDURE.....	35

DRAFT EUROPEAN PARLIAMENT 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 (COM(2012)0085 – C7-0075/2012 – 2012/0036(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2012)0085),
 - having regard to Article 294(2) and Articles 82(2) and 83(1) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0075/2012),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the opinion of the European Economic and Social Committee of 11 July 2012¹,
 - having regard to the opinion of the European Union Agency for Fundamental Rights of 4 December 2012,
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A7-0178/2013),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

¹ OJ C 299, 4.10.2012, p. 129

Amendment 1

Proposal for a directive

Recital 1

Text proposed by the Commission

(1) The main motive for cross-border organised crime is financial gain. In order to be effective, law enforcement and judicial authorities should be given the means to trace, freeze, manage and confiscate the proceeds of crime.

Amendment

(1) The main motive for cross-border organised crime, ***including mafia-type criminal organization***, is financial gain. ***As a consequence, competent*** authorities should be given the means to trace, freeze, manage and confiscate the proceeds of crime. ***However, the effective prevention of and fight against organized crime should not be limited to neutralizing the proceeds of crime but rather be extended, in other cases, to any property deriving from activities of a criminal nature. Mutual recognition of freezing and confiscation orders of proceeds of crime is not effective enough. An effective fight against economic crime, organised crime and terrorism would require the mutual recognition of measures taken in a different field from that of criminal law or otherwise adopted in the absence of a criminal conviction in the circumstances defined in Article 5 and having as their object, more broadly, any possible asset or income attributable to a criminal organization or to a person suspected or accused of belonging to a criminal organisation.***

Justification

Financial gain is the goal of most crime, not only of cross-border organised crime.

Considering the low efficiency of the current system, all means should be given to trace, freeze, manage and confiscate proceeds of crime.

Amendment 2

Proposal for a directive

Recital 2

Text proposed by the Commission

(2) Organised criminal groups operate without borders and increasingly acquire assets in other Member States and in third countries. There is an increasing need for effective international law enforcement cooperation on asset recovery and mutual legal assistance.

Amendment

(2) Organised criminal groups operate without borders and increasingly acquire assets in other Member States and in third countries. There is an increasing need for effective international law enforcement cooperation on asset recovery and mutual legal assistance. ***The adoption of minimum rules will harmonise the Member States' freezing and confiscation regimes, thus facilitating mutual trust and effective cross-border cooperation.***

Amendment 3
Proposal for a directive

Recital 2 a (new)

Text proposed by the Commission

Amendment

(2a) The most effective means of combating organised crime are severe legal consequences, effective detection, and the seizure and confiscation of the instrumentalities and proceeds of crime. Extended confiscations are particularly effective.

Amendment 4

Proposal for a directive
Recital 3

Text proposed by the Commission

Amendment

(3) Although existing statistics are limited, the amounts recovered from criminal assets in the Union seem ***insufficient*** compared to the estimated proceeds of crime. Studies have shown that, although regulated by EU legislation and national laws, confiscation procedures remain underutilised.

(3) Although existing statistics are limited, the amounts recovered from criminal ***proceeds*** in the Union seem ***extremely low*** compared to the estimated proceeds of crime. Studies have shown that, although regulated by EU legislation and national laws, confiscation procedures remain underutilised ***and laws at national level are uneven and therefore require***

harmonisation, not least in order to ensure full and complete performance of the confiscation itself.

Justification

The point it is not that asset recovery are insufficient but rather that they are low compared the estimated monetary income of crime. The diversity of the national regulations must be pointed out as a reason for this Directive proposal. Diverse legislation affects efficiency and cooperation in particular in trans-border organized and other crime.

**Amendment 5
Proposal for a directive**

Recital 7 b (new)

Text proposed by the Commission

Amendment

(7b) Member States are free to adopt confiscation procedures which are linked to a criminal case before any court, whether criminal, civil or administrative.

Justification

This makes clear that Member States can implement the Directive through whatever type of court proceedings suits their national system.

**Amendment 6
Proposal for a directive**

Recital 9

Text proposed by the Commission

Amendment

(9) Confiscation of instrumentalities and proceeds following a final decision of a court and of property of equivalent value to those proceeds should therefore refer to this broadened concept for the criminal offences covered by this Directive. Framework Decision 2001/500/JHA required Member States to enable the confiscation of instrumentalities and proceeds of crime following a final conviction and to enable the confiscation

(9) Confiscation of instrumentalities and proceeds following a final decision of a court, ***both based on a criminal conviction and in the absence of such conviction***, and of property of equivalent value to those proceeds should therefore refer to this broadened concept for the criminal offences covered by this Directive. Framework Decision 2001/500/JHA required Member States to enable the confiscation of instrumentalities and

of property of equivalent value to the proceeds of crime. Such obligations should be maintained for the criminal offences not covered by this Directive.

proceeds of crime following a final conviction and to enable the confiscation of property of equivalent value to the proceeds of crime. Such obligations should be maintained for the criminal offences not covered by this Directive, ***and the concept of proceeds as defined in this Directive should be extended to criminal offences not covered by this Directive.***

Amendment 7 Proposal for a directive

Recital 11

Text proposed by the Commission

(11) In accordance with the principle of ne bis in idem it is appropriate to exclude from extended confiscation the proceeds of alleged criminal activities for which the affected person has been finally acquitted in a previous trial or in other cases where the ne bis in idem principle applies.

Extended confiscation should also be excluded where the similar criminal activities could not be the subject of criminal proceedings due to prescription under national criminal law.

Amendment

(11) In accordance with the principle of ne bis in idem it is appropriate to exclude from extended confiscation the proceeds of alleged criminal activities for which the affected person has been finally acquitted in a previous trial or in other cases where the ne bis in idem principle applies.

Amendment 8 Proposal for a directive

Recital 12

Text proposed by the Commission

(12) The issuance of confiscation orders generally requires a criminal conviction. In some cases, even where a criminal conviction cannot be achieved, it should still be possible to confiscate assets in order to disrupt criminal activities and ensure that profits resulting from criminal activities are not reinvested into the licit economy. Some Member States allow

Amendment

(12) The issuance of confiscation orders generally requires a criminal conviction. In some cases, even where a criminal conviction cannot be achieved, it should still be possible to confiscate assets in order to disrupt criminal activities such as ***organised crime or terrorism*** and ensure that profits resulting from criminal activities are not reinvested into the licit

confiscation where there is insufficient evidence for a criminal prosecution, if a court considers on the balance of probabilities that the property is of illicit origin, and also in situations where a suspect or accused person becomes a fugitive to avoid prosecution, is unable to stand trial for other reasons *or* died before the end of criminal proceedings. This is referred to as non-conviction based confiscation. Provision should be made to enable non-conviction based confiscation ***in at least the latter, limited, circumstances*** in all Member States. ***This is in line with Article 54.1.c) of the United Nations Convention against Corruption, which provides that each State Party is to consider taking the necessary measures to allow confiscation of illicitly acquired property without a criminal conviction, including in cases in which the offender cannot be prosecuted by reason of death, flight or absence.***

economy. Some Member States allow confiscation where there is insufficient evidence for a criminal prosecution if a court considers on the balance of probabilities that the property is of illicit origin, and also in situations where a suspect or accused person becomes a fugitive to avoid prosecution ***or conviction***, is unable to stand trial for other reasons, died before the end of criminal proceedings. In ***other*** cases ***some Member States allow confiscation for instance where a criminal conviction is not pursued or cannot be achieved, if a court is satisfied, after making full use of the available evidence, including the disproportionality of assets compared to the declared income, that the property derives from activities of a criminal nature.*** This is referred to as non-conviction based confiscation. Provision should be made to enable non-conviction based confiscation in all Member States.

Amendment 9

Proposal for a directive

Recital 12 a (new)

Text proposed by the Commission

Amendment

(12a) This Directive only covers such forms of non-conviction based confiscation which are considered to be of a criminal nature. In order to establish the criminal nature of any such confiscation measure, amongst others, the following criteria should be taken into consideration: (i) the legal classification of the offence under national law, (ii) the nature of the offence and (iii) the degree of severity of the penalty that the person concerned risks incurring.

Amendment 10
Proposal for a directive

Recital 12 b (new)

Text proposed by the Commission

Amendment

(12b) In individual cases it should be possible to dispense partially with a freezing order. Thus this would be possible in cases where the measure would place a disproportionate burden on the person affected or lead to the loss of his or her livelihood.

Justification

The Commission proposal does not currently contain any provisions for cases of undue hardship. Where the conditions for confiscation exist, confiscation would necessarily be ordered. In order to prevent disproportionate consequences it is essential to introduce a 'hardship clause'.

Amendment 11
Proposal for a directive

Recital 12 c (new)

Text proposed by the Commission

Amendment

(12c) Confiscation should not hinder or prevent justified claims by victims of criminal offences committed by the person affected by the confiscation.

Amendment 12
Proposal for a directive

Recital 13

Text proposed by the Commission

Amendment

(13) The practice by a suspected or accused person of transferring property to a knowing third party with a view to avoiding confiscation is common and increasingly widespread. The current

(13) The practice by a suspected or accused person of transferring property to a knowing third party with a view to avoiding confiscation is common and increasingly widespread. The current

Union legal framework does not contain binding rules on the confiscation of property transferred to third parties. Therefore it is becoming increasingly necessary to allow for confiscation of property transferred to third parties, ***which should normally take place when an accused person does not have property that can be confiscated. It is appropriate to provide for third party confiscation, under certain conditions, 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. Furthermore,*** to protect the interests of bona fide third parties, such confiscation should only be possible if the third party knew or should have known that property was the proceeds of crime or was transferred in order to avoid confiscation ***and*** was given for free or transferred in exchange for an amount lower than its market value.

Amendment 13 Proposal for a directive

Recital 13 a (new)

Text proposed by the Commission

Union legal framework does not contain binding rules on the confiscation of property transferred to third parties. Therefore it is becoming increasingly necessary to allow for confiscation of property transferred to ***or acquired by*** third parties. To protect the interests of bona fide third parties, such confiscation should only be possible if the third party knew or should have known that property was the ***instrumentalities or the*** proceeds of crime or was transferred in order to avoid confiscation ***or if it*** was given for free or transferred in exchange for an amount ***significantly*** lower than its market value. ***Third-party confiscation should also be possible where the suspect or accused person was acting for another natural or legal person from the outset.***

Amendment

(13a) In order to fight more effectively against criminal organisations and serious crime, in line with already existing experience, Member States should introduce in their criminal system an offence to punish and prosecute behaviour aimed at fictitiously attributing ownership and availability of property to third parties, with the aim of avoiding seizure or confiscation measures. Assistance in committing such an offence should also be suitably punished.

Amendment 14
Proposal for a directive

Recital 13 b (new)

Text proposed by the Commission

Amendment

(13b) The rules on third-party confiscation extend to both natural and legal persons.

Amendment 15
Proposal for a directive

Recital 15

Text proposed by the Commission

Amendment

(15) Suspected or accused persons often hide property throughout the entire duration of criminal proceedings. As a result confiscation orders cannot be executed, leaving those subject to confiscations orders to benefit from their property once they have served their sentence. It is accordingly necessary to enable the determination of the precise extent of the property to be confiscated even after a final conviction for a criminal offence, in order to permit the full execution of confiscation orders when no property or insufficient property was initially discovered and the confiscation order remains unexecuted. Given the limitation of the right to property by freezing orders, such provisional measures should not be maintained longer than necessary to preserve the availability of the property with a view of possible future confiscation. This may require **a regular** review by the court in order to ensure that their purpose of preventing the dissipation of property remains valid.

(15) Suspected or accused persons often hide property throughout the entire duration of criminal proceedings. As a result confiscation orders cannot be executed, leaving those subject to confiscations orders to benefit from their property once they have served their sentence. It is accordingly necessary to enable the determination of the precise extent of the property to be confiscated even after a final conviction for a criminal offence, in order to permit the full execution of confiscation orders when no property or insufficient property was initially discovered and the confiscation order remains unexecuted. Given the limitation of the right to property by freezing orders, such provisional measures should not be maintained longer than necessary to preserve the availability of the property with a view of possible future confiscation. This may require, **where necessary, a** review by the court in order to ensure that their purpose of preventing the dissipation of property remains valid.

Amendment 16
Proposal for a directive

Recital 16

Text proposed by the Commission

(16) Property frozen with a view to later confiscation should be managed adequately in order not to lose its economic value. Member States should take the necessary measures including *sale or* transfer of the property to minimise such losses. Member States should take relevant measures, such as the establishment of national centralised Asset Management Offices or equivalent mechanisms (for example where such functions are decentralised), in order to properly manage the assets frozen before confiscation and preserve their value, pending judicial determination.

Amendment

(16) Property frozen with a view to later confiscation should be managed adequately in order not to lose its economic value, ***to encourage its social reuse and to avoid the risk of further criminal infiltration. To that end, it would be useful to consider the formation of a Union fund that would collect a part of the confiscated assets from Member States. Such a fund should be open to pilot projects by the citizens of the Union, associations, coalitions of NGOs and any other civil society organisation, to encourage the effective social reuse of the confiscated assets and to expand the democratic functions of the Union.*** Member States should take the necessary measures, including sale or transfer of the property, to minimise such losses ***and to favour social aims.*** Member States should take ***all*** relevant measures, ***legislative or otherwise,*** such as the establishment of national centralised Asset Management Offices or equivalent mechanisms (for example where such functions are decentralised), in order to properly manage the assets frozen before confiscation and preserve their value, pending judicial determination.

Amendment 17
Proposal for a directive

Recital 16 a (new)

Text proposed by the Commission

Amendment

(16a) In order that civil society may concretely perceive the effectiveness of the action of the Member States against organised crime, including mafia type

crime, and that the proceeds are actually taken away from the criminals, it is necessary to adopt common measures to avoid that the criminal organisations recover possession of property illicitly obtained. Best practice in several Member States has shown that the following are effective tools: management and administration by Asset Management Offices (AMO) or similar mechanisms, as well as the use of the confiscated property for projects aimed to contrast and prevent crime, and for other institutional or public purposes or social use.

Amendment 18
Proposal for a directive

Recital 16 b (new)

Text proposed by the Commission

Amendment

(16b) The practice of using confiscated assets for social purposes fosters and sustains the dissemination of a culture of legality, assistance to crime victims and action against organised crime, hence creating ‘virtuous’ mechanisms, which may also be implemented through non-governmental organisations, that benefit society and the socio-economic development of an area, using objective criteria.

Justification

Some Member States have already experimented with using confiscated criminal assets for public purposes, which has met with great success in social terms and in terms of combating criminal activities.

Amendment 19
Proposal for a directive

Recital 17

Text proposed by the Commission

(17) Reliable data sources on the freezing and confiscation of the proceeds of crime are scarce. In order to allow for the evaluation of this Directive, it is necessary to collect a comparable minimum set of appropriate statistical data on asset tracing, judicial and asset disposal activities.

Amendment

(17) Reliable data sources on the freezing and confiscation of the proceeds of crime are scarce. In order to allow for the evaluation of this Directive, it is necessary to collect a ***proper*** comparable minimum set of appropriate statistical data on asset tracing, judicial and asset ***management and*** disposal activities, ***whilst respecting the principle of proportionality.***

Amendment 20
Proposal for a directive

Recital 17 a (new)

Text proposed by the Commission

Amendment

(17a) Records should be kept of the value of the property destined to be reused for the victims of crimes that were directly or indirectly affected.

Amendment 21
Proposal for a directive

Recital 18

Text proposed by the Commission

Amendment

(18) This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, and notably the right to property, the right to respect for private and family life, the right to protection of personal data, the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence, the right not to be tried or punished twice in criminal proceedings for the same criminal offence and the principles of legality and proportionality of criminal offences. This

(18) This Directive respects the fundamental rights and observes the principles recognised by the ***European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the case-law of the European Court of Human Rights,*** the Charter of Fundamental Rights of the European Union, and notably the right to property, the right to respect for private and family life, the right to protection of personal data, the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence, the

Directive has to be implemented in accordance with these rights and principles.

right not to be tried or punished twice in criminal proceedings for the same criminal offence and the principles of legality and proportionality of criminal offences. This Directive has to be implemented in accordance with these rights and principles.

Amendment 22
Proposal for a directive

Recital 18 a (new)

Text proposed by the Commission

Amendment

(18a) Some Member States have already successfully adopted non-conviction-based systems of confiscation. As a matter of facts, the European Court of Human Rights has never considered the fact that individuals may be subjected to such a measure of deprivation of their property. to be a violation of fundamental rights, sanctioned in the Charter of Fundamental Rights of the European Union and in the ECHR,

Amendment 23
Proposal for a directive

Recital 20

Text proposed by the Commission

Amendment

(20) Since the objective of this Directive, namely facilitating confiscation of property ***in criminal matters***, cannot be sufficiently achieved by the Member States and can be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that

(20) Since the objective of this Directive, namely facilitating confiscation of property, cannot be sufficiently achieved by the Member States and can be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that

objective.

objective.

Amendment 24
Proposal for a directive

Article 1 – paragraph 1

Text proposed by the Commission

This Directive establishes minimum rules on the freezing of property with a view to possible later confiscation **and** on the confiscation of property in criminal matters.

Amendment

This Directive establishes minimum rules on the freezing of property with a view to possible later confiscation, on the confiscation of property in **relation to** criminal matters **and recommends general principles for the management and disposal of confiscated property.**

Amendment 25
Proposal for a directive

Article 2 – point 1

Text proposed by the Commission

(1) ‘proceeds’ means any economic advantage derived from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds by a suspected or accused person and any valuable benefits;

Amendment

(1) ‘proceeds’ means any economic advantage derived **directly or indirectly** from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds by a suspected or accused person and any valuable benefits;

Amendment 26
Proposal for a directive

Article 2 – point 2

Text proposed by the Commission

(2) ‘property’ means property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title or interest in such property;

Amendment

(2) ‘property’ means property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title or interest in such property, **as well as**

property held jointly with a spouse;

Amendment 27
Proposal for a directive

Article 2 – point 4

Text proposed by the Commission

(4) ‘confiscation’ means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence resulting in the final deprivation of property;

Amendment

(4) ‘confiscation’ means a penalty or a measure ordered by **a judgment of the competent national court or** following **judicial** proceedings, in relation to a criminal offence, resulting in the final deprivation of property **based upon a judgment.**

Justification

According to the EPLS the measure has to be in relation to a criminal offence. Notwithstanding its denomination in national law as civil confiscation, Article 83(1) TFEU does not exclude this type of confiscation, as long as it can be qualified as "criminal sanction" according to the criteria developed in the Engel judgement of the ECtHR (be of a criminal nature, the severity of the penalty). The "criminal nature" of such a confiscation is a condition for any harmonisation under Article 83(1) TFEU. (para.37 of CLS)

Amendment 28
Proposal for a directive

Article 2 – point 6 – point k a (new)

Text proposed by the Commission

Amendment

(ka) as well as any other legal instruments if those instruments provide specifically that this Directive applies to the criminal offences harmonised therein.

Amendment 29
Proposal for a directive

Article 3 – paragraph 1

Text proposed by the Commission

1. Each Member State shall take the necessary measures to enable *it* to confiscate, either wholly or in part, instrumentalities and proceeds *following* a final conviction for a criminal offence.

Amendment

1. Each Member State shall take the necessary measures to enable *only judicial authorities* to confiscate, either wholly or in part, instrumentalities and proceeds *or property the value of which corresponds to such instrumentalities and proceeds, subject to* a final conviction for a criminal offence.

Amendment 30
Proposal for a directive

Article 3 – paragraph 2

Text proposed by the Commission

2. Each Member State shall take the necessary measures to enable it to confiscate property the value of which corresponds to the proceeds following a final conviction for a criminal offence.

Amendment

deleted

Amendment 31

Proposal for a directive
Article 4 – paragraph 1

Text proposed by the Commission

1. Each Member State shall adopt the necessary measures to enable *it* to confiscate, either wholly or in part, property belonging to a person convicted of a criminal offence where, based on specific facts, a court finds it substantially more probable that the property in question has been derived *by the convicted person from similar criminal activities* than from other activities.

Amendment

1. Each Member State shall adopt the necessary measures to enable judicial authorities to confiscate, either wholly or in part, property belonging to a person convicted of a criminal offence where, based on specific facts *such as that the value of the property is disproportionate in relation to the lawful income of the convicted person*, a court finds it substantially more probable that the property in question has been derived *from activities of a criminal nature* than from other activities.

Amendment 32

Proposal for a directive Article 4 – paragraph 2

Text proposed by the Commission

2. Confiscation shall be excluded where the similar criminal activities referred to in paragraph 1

(a) could not be the subject of criminal proceedings due to prescription under national criminal law; or

(b) have already been subject to criminal proceedings which resulted in the final acquittal of the person or in other cases where the ne bis in idem principle applies.

Amendment

2. Confiscation shall be excluded where the criminal activities referred to in paragraph 1 ***have already been subject to criminal proceedings which resulted in the final acquittal of the person concerned or in other cases where the ne bis in idem principle applies.***

Amendment 33

Proposal for a directive Article 5

Text proposed by the Commission

Amendment

1. Each Member State shall take the necessary measures to enable judicial authorities to confiscate, as a criminal sanction, proceeds and instrumentalities without a criminal conviction where a court is convinced on the basis of specific circumstances and all the available evidence that those assets derive from activities of a criminal nature, while fully respecting the provisions of Article 6 of the ECHR and the European Charter of Fundamental Rights. Such confiscation is to be considered of criminal nature according, amongst others, to the following criteria: (i) the legal

classification of the offence under national law, (ii) the nature of the offence and (iii) the degree of severity of the penalty that the person concerned risks incurring and shall also be in line with national constitutional law.

Each Member State shall take the necessary measures to enable it to confiscate proceeds and instrumentalities without a criminal conviction, following proceedings which could, if the suspected or accused person had been able to stand trial, have led to a criminal conviction, where:

(a) the death or permanent illness of the suspected or accused person prevents any further prosecution; or

(b) the illness or flight from prosecution or sentencing of the suspected or accused person prevents effective prosecution within a reasonable time, **and poses the serious risk that it could be barred by statutory limitations.**

2. Each Member State shall **also** take the necessary measures to enable judicial authorities to confiscate proceeds and instrumentalities without a criminal conviction, following proceedings which could, if the suspected or accused person had been able to stand trial, have led to a criminal conviction, where:

(a) the death, **illness** or permanent illness of the suspected or accused person, **where the illness or permanent illness results in the person being unfit to stand trial**, prevents any further prosecution; or

(b) the illness or flight from prosecution or sentencing of the suspected or accused person prevents effective prosecution within a reasonable time **and poses the serious risk that it could be barred by statutory limitations.**

3. If a Member State already has non-criminal procedures covering the circumstances in paragraphs 1 and 2, they are not required also to implement those procedures in their criminal system.

Justification

Notwithstanding its denomination in national law as civil confiscation, Article 83(1) TFEU does not exclude this type of confiscation, as long as it can be qualified as "criminal sanction" according to the criteria developed by the ECtHR in Engel judgement (be of a criminal nature, the severity of the penalty). The "criminal nature" of such a confiscation is a condition for any harmonisation under Article 83(1) TFEU. (para.37 of the CLS)

Amendment 34 Proposal for a directive

Article 6 – paragraph 1 – point a

Text proposed by the Commission

Amendment

(a) proceeds which were transferred ***to third parties by a convicted person or on his behalf, or by suspected or accused persons under the circumstances of Article 5***, or

(a) proceeds ***or instrumentalities*** which were transferred ***directly or indirectly to or acquired by third parties***, or

Amendment 35
Proposal for a directive

Article 6 – paragraph 1 – point b

Text proposed by the Commission

Amendment

(b) other property ***of the convicted person***, which was transferred to third parties in order to avoid confiscation of property the value of which corresponds to the proceeds.

(b) other property which was transferred to ***or acquired by*** third parties in order to avoid confiscation of property the value of which corresponds to the proceeds.

Amendment 36
Proposal for a directive

Article 6 – paragraph 2 – introductory part

Text proposed by the Commission

Amendment

2. The confiscation of proceeds or property referred to in paragraph 1 shall be possible where ***the property is subject to restitution or where***

2. The confiscation of proceeds or property referred to in paragraph 1 shall be possible where:

Justification

The existence of a (civil-law) claim to restitution does not create an entitlement to confiscate proceeds or property from a third party. The state's right to confiscate illicitly acquired property must be strictly separated from the injured party's civil-law claim to restitution; in principle the two are mutually exclusive. At any rate we should avoid confusing the two claims.

Amendment 37
Proposal for a directive

Article 6 – paragraph 2 – point a

Text proposed by the Commission

Amendment

(a) an assessment, based on specific facts relating to the convicted, suspected or accused person, indicates that the confiscation of property of the convicted person, or of the suspected or accused person under the circumstances of Article 5, is unlikely to succeed, and **deleted**

Amendment 38
Proposal for a directive
Article 6 – paragraph 2 – point b – introductory part

Text proposed by the Commission

Amendment

(b) the proceeds or property were transferred for free or in exchange for an amount lower than their market value **when the third party:** (b) the proceeds or property were transferred for free or in exchange for an amount **significantly** lower than their market value;

Amendment 39
Proposal for a directive
Article 6 – paragraph 2 – point b – point i

Text proposed by the Commission

Amendment

(i) in the case of proceeds, knew about their illicit origin, or, in the absence of such knowledge, a reasonable person in its position would have suspected that their origin was illicit, based on concrete facts and circumstances; **deleted**

Amendment 40

Proposal for a directive

Article 6 – paragraph 2 – point b – point ii

Text proposed by the Commission

Amendment

(i) in the case of other property, knew that it was transferred in order to avoid confiscation of property the value of which corresponds to the proceeds or, in the absence of such knowledge, a reasonable person in its position would have suspected that it was transferred to avoid such confiscation, based on concrete facts and circumstances. *deleted*

Justification

The three amendments above were proposed because their provisions are implied by the introductory text of Paragraph 2. It is clear that if a person receives a property for free or for an amount lower than its market value that person is in a position to have reasonable suspicions concerning the origin of the property.

Amendment 41

Proposal for a directive

Article 6 – paragraph 2 – point b a (new)

Text proposed by the Commission

Amendment

(ba) in the case of proceeds, the third party knew of their illicit origin or, in the absence of such knowledge, a reasonable person in his or her position would have suspected that their origin was illicit, based on concrete facts and circumstances;

Amendment 42

Proposal for a directive

Article 6 – paragraph 2 – point b b (new)

Text proposed by the Commission

Amendment

(bb) in the case of other property, the third party knew that it was transferred in order to avoid confiscation of property the value of which corresponds to the proceeds or, in the absence of such knowledge, a reasonable person in his or her position would have suspected that it was transferred to avoid such confiscation, based on concrete facts and circumstances.

**Amendment 43
Proposal for a directive**

Article 6 a (new)

Text proposed by the Commission

Amendment

Article 6a

Fictitious assignment of property to third parties

Each Member State shall take legislative measures in order to introduce provisions aimed at prosecuting those persons who fictitiously attribute ownership and availability of property to third parties, with the aim of avoiding seizure or confiscation measures.

**Amendment 44
Proposal for a directive**

Article 7 – paragraph 1

Text proposed by the Commission

Amendment

I. Each Member State shall take the necessary measures to enable **it to** freeze property **in danger of being dissipated, hidden or transferred out of the jurisdiction with a view to possible later confiscation. Such measures shall be**

Each Member State shall take the necessary measures to enable **its competent authorities to immediately** freeze or seize property **with a view to possible its later confiscation. The person affected by the measures provided for in this Article shall**

ordered by a court.

have a right of appeal to a court.

Amendment 45

Proposal for a directive Article 7 – paragraph 2

Text proposed by the Commission

Amendment

2. Each Member State shall take the necessary measures to enable its competent authorities to immediately freeze property where there is a high risk of dissipation, hiding or transfer of that property before a court's decision. Such measures shall be confirmed by a court as soon as possible.

deleted

Justification

This amendment was proposed in order to ensure consistency with the amendment to Article 7 Paragraph 1.

Amendment 46

Proposal for a directive Article 8 – paragraph 1

Text proposed by the Commission

Amendment

1. Each Member State shall 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 that suspects*** have the right to a fair trial, ***in order to preserve their rights.***

1. Each Member State shall take the necessary measures to ensure that the persons ***whose instrumentalities and proceeds of crime are confiscated*** under this Directive, ***irrespective of their ownership at the time of confiscation,*** have the right to an effective remedy, ***including*** the right to a fair trial.

Justification

This amendment clarifies that the persons who have the right to a remedy and a fair trial in order to determine the legality of confiscation are those who used instrumentalities and/or obtained proceeds of crime irrespective of the ownership of those goods at the moment of confiscation.

Amendment 47
Proposal for a directive

Article 8 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Each Member State shall take the necessary measures to ensure that affected persons have the right to an effective remedy prior to a final decision on confiscation being taken, including the opportunity to make legal representations, in order to preserve their rights.

Amendment 48
Proposal for a directive

Article 8 – paragraph 4

Text proposed by the Commission

Amendment

4. In proceedings referred to in Article 4, the ***suspected or accused*** person shall have an effective possibility to contest the probability on the basis of which the property concerned is considered to be proceeds.

4. In proceedings referred to in Article 4, the ***convicted*** person shall have an effective possibility to contest the probability on the basis of which the property concerned is considered to be proceeds.

Justification

Article 4 only covers convicted persons so it is not correct to refer to a 'suspected or accused person'.

Amendment 49
Proposal for a directive

Article 8 – paragraph 5

Text proposed by the Commission

Amendment

5. In the cases referred to in Article 5, the person whose property is affected by the decision to confiscate shall be represented by a lawyer ***throughout the proceedings*** in

5. In the cases referred to in Article 5, the person whose property is affected by the decision to confiscate shall ***have the right to be informed that throughout the***

order to pursue *the* rights of *the* defence of *the person* relating to the establishment of the criminal offence and to the determination of the proceeds and instrumentalities.

proceedings he or she has the right to be represented by a lawyer of his or her choice or to be provided with an ex officio lawyer in accordance with the particular rules applicable in the Member State concerned in order to pursue *his/her* rights of defence relating to the establishment of the criminal offence and to the determination of the proceeds and instrumentalities.

Amendment 50
Proposal for a directive

Article 8 – paragraph 6 – subparagraph 2 (new)

Text proposed by the Commission

Amendment

Each Member State shall take the necessary measures to ensure that, where as a result of a criminal offence injured parties have claims against the accused, confiscation does not jeopardise the enforcement of such claims.

Justification

There should be uniform rules on dealing with claims by injured parties. It would go against the aims of the Commission's other legislation on victims' rights if European law on confiscation meant that injured parties' claims could not be enforced. It needs to be ensured that the confiscation provided by the proposal for a directive cannot thwart the claims of injured parties.

Amendment 51
Proposal for a directive
Article 9

Text proposed by the Commission

Amendment

Each Member State shall take the necessary measures to make it possible to determine the precise extent of the property to be confiscated *following a final conviction for a criminal offence or following proceedings as foreseen in*

Each Member State shall take the necessary measures to make it possible to determine the precise extent of the property to be confiscated and to allow further measures to be taken to the extent necessary to effectively execute that

Article 5, that has resulted in a decision to confiscate, and to allow further measures to be taken to the extent necessary to effectively execute that decision to confiscate. decision to confiscate.

Justification

This Article must be amended for reasons of consistency with the amendments to Articles 3 and 5

**Amendment 52
Proposal for a directive**

Article 10 – title

Text proposed by the Commission

Amendment

Management of frozen property

Management of frozen **and confiscated** property

Justification

The management of property should be better defined, including when that property has been confiscated, in terms of its use for social purposes.

**Amendment 53
Proposal for a directive**

Article 10 – paragraph 1

Text proposed by the Commission

Amendment

1. Each Member State shall take the necessary measures, such as the establishment of national centralised offices or equivalent mechanisms, to ensure the adequate management of property frozen with a view of possible later confiscation.

1. Each Member State shall take the necessary measures, such as the establishment of national centralised offices or equivalent mechanisms, to ensure the adequate management of property frozen with a view to possible later confiscation, **and shall provide for the possibility of confiscated property being used for social purposes.**

Justification

The management of property should be better defined, including when that property has been

confiscated, in terms of its use for social purposes.

Amendment 54
Proposal for a directive

Article 10 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. In this regard, close cross-border cooperation and efficient exchange of information between Members States' police, judicial and financial authorities is essential.

Amendment 55
Proposal for a directive

Article 10 – paragraph 2

Text proposed by the Commission

Amendment

2. Each Member State shall ensure that the measures referred to in paragraph 1 optimise the economic value of such property, and shall include the sale or transfer of property which is liable to decline in value.

2. Each Member State shall ensure that the measures referred to in paragraph 1 ***relating to frozen property*** optimise the economic value of such property, and shall include, ***only if necessary***, the sale or transfer of property which is liable to decline in value. ***Each Member State shall take all the necessary measures to prevent any criminal infiltration in this phase.***

Amendment 56
Proposal for a directive

Article 10 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Each Member State is called upon to take the necessary measures, based on existing best practice while applying national law, to provide for the disposal and the destination of the confiscated property. It could as a priority earmark

such property for law enforcement and crime prevention projects as well as for other projects of public interest and social utility. Member States are also called upon to take all the necessary measures to prevent any criminal or illegal infiltration in this phase.

Amendment 57
Proposal for a directive

Article 10 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Each Member State may introduce a revolving fund for financing measures aimed at safeguarding property between the time when it is frozen and the time when it is confiscated, in order to ensure its integrity against any acts of vandalism or acts that may render it less immediately available.

Amendment 58
Proposal for a directive

Article 11 – introductory part

Text proposed by the Commission

Amendment

Member States shall regularly collect and maintain comprehensive statistics from the relevant authorities in order to review the effectiveness of their confiscation systems. The statistics collected shall be sent to the Commission each year and shall include for all criminal offences:

Member States shall regularly collect and maintain comprehensive statistics from the relevant authorities in order to review the effectiveness of their confiscation systems. The statistics collected shall be sent to the Commission each year and shall include for all criminal offences *falling within the scope of this Directive*:

Amendment 59
Proposal for a directive

Article 11 – point k a (new)

Text proposed by the Commission

Amendment

***(ka) the type of use to which the
confiscated property has been put, and the
contribution it has made to the social and
economic development of the area and
local communities concerned.***

EXPLANATORY STATEMENT

The European Parliament has called on the Commission to propose new legislation on confiscation for a long time. By its own initiative report adopted in October 2011, the Parliament stressed in particular the need for rules on the effective use of extended and non-conviction based confiscation, rules allowing for the confiscation of assets transferred to third parties. In addition, the Parliament encouraged the introduction of instruments in national legal systems which, under criminal, civil or fiscal law, as appropriate, mitigate the burden of proof concerning the origin of assets held by a person accused of an offence related to organised crime.

The proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union was adopted by the European Commission on 12 March 2012. This Directive lays down the minimum rules for Member States with respect to freezing and confiscation of criminal assets through direct confiscation, value confiscation, extended confiscation, non-conviction based confiscation and third party confiscation.

The Rapporteur generally supports the Commission proposal. The adoption of those minimum rules will harmonise the Member States' freezing and confiscation regimes facilitating mutual trust and effective cross-border cooperation. It will also constitute a step towards strengthening the mutual recognition of freezing and confiscation orders which is an important aspect of the fight against cross-border serious and organized crime in the EU.

With this report the Rapporteur intends to reinforce the provisions of non-conviction based confiscation and extended confiscation so as to make them more efficient in order to actually serve the purpose of preventing the use of proceeds of crime for committing future crimes or their reinvestment into licit activities.

Concerning the non-conviction based confiscation the Rapporteur notes that this system which was first used in the USA now appears to be more and more globally spread. Jurisdictions which have introduced non-conviction based confiscation legislation include: Italy, Ireland, United Kingdom, Albania, Bulgaria, Slovakia, Australia, South Africa, the Canadian provinces of Alberta and Ontario. At European level the existent systems of non-conviction based confiscation have been debated both in front of national Courts as well as the European Court of Human Rights and were considered compatible with national constitutional requirements and those of the European Court, provided that they are adopted by a judicial authority, with full respect of the rights of the defence and of bona fide third parties, and that they can be challenged before a court. These basic safeguards have also been included in the present Directive.

The provisions on extended confiscation were strengthened so that they provide for a single minimum standard which does not fall below the threshold set by Framework Decision 2005/212/JHA.

PROCEDURE

Title	Freezing and confiscation of proceeds of crime in the European Union			
References	COM(2012)0085 – C7-0075/2012 – 2012/0036(COD)			
Date submitted to Parliament	12.3.2012			
Committee responsible Date announced in plenary	LIBE 15.3.2012			
Rapporteur(s) Date appointed	Monica Luisa Macovei 25.4.2012			
Discussed in committee	19.9.2012	10.1.2013	20.2.2013	6.5.2013
	7.5.2013			
Date adopted	7.5.2013			
Result of final vote	+: 48	–: 7	0: 2	
Members present for the final vote	Jan Philipp Albrecht, Roberta Angelilli, Edit Bauer, Rita Borsellino, Emine Bozkurt, Arkadiusz Tomasz Bratkowski, Salvatore Caronna, Philip Claeys, Carlos Coelho, Agustín Díaz de Mera García Consuegra, Ioan Enciu, Frank Engel, Hélène Flautre, Kinga Gál, Kinga Göncz, Nathalie Griesbeck, Sylvie Guillaume, Ágnes Hankiss, Anna Hedh, Salvatore Iacolino, Livia Járóka, Teresa Jiménez-Becerril Barrio, Timothy Kirkhope, Juan Fernando López Aguilar, Baroness Sarah Ludford, Monica Luisa Macovei, Svetoslav Hristov Malinov, Véronique Mathieu Houillon, Nuno Melo, Louis Michel, Claude Moraes, Georgios Papanikolaou, Carmen Romero López, Judith Sargentini, Csaba Sógor, Renate Sommer, Wim van de Camp, Renate Weber, Josef Weidenholzer, Tatjana Ždanoka, Auke Zijlstra			
Substitute(s) present for the final vote	Cornelis de Jong, Monika Hohlmeier, Petru Constantin Luhan, Antonio Masip Hidalgo, Siiri Oviir, Raül Romeva i Rueda, Salvador Sedó i Alabart, Joanna Senyszyn			
Substitute(s) under Rule 187(2) present for the final vote	Metin Kazak, Evgeni Kirilov, Marit Paulsen, Cristian Dan Preda, Patrizia Toia, Jacek Włosowicz, Marina Yannakoudakis, Andrea Zanoni			
Date tabled	20.5.2013			