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**A5-0383/2002**

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## **REPORT**

1. on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on confiscation of crime-related proceeds, instrumentalities and property  
(10697/2002 – C5-0375/2002 – 2002/0818(CNS))

2. on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders  
(10701/2002 – C5-0377/2002 – 2002/0816(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Giuseppe Di Lello Finuoli

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases  
covered by Articles 105, 107, 161 and 300 of the EC Treaty and  
Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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## PROCEDURAL PAGE

1. By letter of 1 August 2002 the Council consulted Parliament, pursuant to Article 39(1) of the EU Treaty, on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on confiscation of crime-related proceeds, instrumentalities and property (10697/2002 – 2002/0818(CNS)).

At the sitting of 2 September 2002 the President of Parliament announced that he had referred this proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible (C5-0375/2002).

2. By letter of 1 August 2002 the Council consulted Parliament, pursuant to Article 39(1) of the EU Treaty, on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders (10701/2002 – 2002/0816(CNS)).

At the sitting of 2 September 2002 the President of Parliament announced that he had referred this proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible (C5-0377/2002).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Giuseppe Di Lello Finuoli rapporteur at its meeting of 11 September 2002.

The committee considered the initiative of the Kingdom of Denmark and the draft report at its meetings of 11 September 2002, 8 October 2002 and 5 November 2002.

At the meeting of 5 November 2002 the committee adopted:

1. the draft legislative resolution on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on confiscation of crime-related proceeds, instrumentalities and property (2002/0818(CNS)) by 26 votes to 1, with 0 abstentions.

At the meeting of 5 November 2002 the committee adopted:

2. the draft legislative resolution on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders (2002/0816(CNS)) by 23 votes to 2, with 2 abstentions.

The following were present for the vote: Jorge Salvador Hernández Mollar, (chairman), Lousewies van der Laan (vice-chairman), Giacomo Santini (vice-chairman), Giuseppe Di Lello Finuoli (rapporteur), Roberta Angelilli, Mary Elizabeth Banotti, Giuseppe Brienza, Kathalijne Maria Buitenweg (for Patsy Sørensen), Carlos Coelho, Gérard M.J. Deprez, Francesco Fiori (for Marcello Dell'Utri, pursuant to Rule 153(2)), Pierre Jonckheer, Sylvia-Yvonne Kaufmann (for Ilka Schröder), Timothy Kirkhope, Eva Klamt, Luís Marinho (for Gerhard Schmid), Marcelino Oreja Arburúa, Elena Ornella Paciotti, José Ribeiro e Castro, Martine Roure, Francesco Rutelli, Ole Sørensen (for Baroness Sarah Ludford), Joke Swiebel, Anna Terrón i Cusí, Maurizio Turco, Graham R. Watson (for Bill Newton Dunn) e Olga Zrihen Zaari (for Walter Veltroni).

The report was tabled on 7 November 2002.

## DRAFT LEGISLATIVE RESOLUTION

### 1. European Parliament legislative resolution on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on confiscation of crime-related proceeds, instrumentalities and property (10697/2002 – C5-0375/2002 – 2002/0818(CNS))

#### (Consultation procedure)

*The European Parliament,*

- having regard to the initiative of the Kingdom of Denmark and the modified initiative (10697/2002<sup>1</sup>),
  - having regard to Articles 30, 31 and 34(2)(c) of the Treaty on European Union,
  - having been consulted by the Council pursuant to Article 39(1) of the Treaty on European Union (C5-0375/2002),
  - having regard to Rules 106 and 67 of its Rules of Procedure,
  - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0383/2002),
1. Approves the initiative of the Kingdom of Denmark as amended;
  2. Calls on the Council to alter the text of the initiative accordingly;
  3. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;
  4. Asks to be consulted again should the Council intend to make substantial modifications to the initiative of the Kingdom of Denmark;
  5. Instructs its President to forward its position to the Council and Commission and the Government of the Kingdom of Denmark.

Modified initiative (10697/2002)

Amendments by Parliament

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#### Amendment 1 Article 1, fourth indent

– "confiscation" means a penalty or measure, ordered by a **court** following proceedings in relation to a criminal offence or criminal offences, resulting in

– "confiscation" means a penalty or measure, ordered by a **judge** following proceedings in relation to a criminal offence or criminal

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<sup>1</sup> OJ C 184, 2.8.2002, p. 3.

the final deprivation of property.

offences, resulting in the final deprivation of property.

*Justification*

*'Court' is a generic term which can refer both to investigating magistrates and to judges per se. It should therefore be modified so that specific reference is made to the 'judge' as being the sole judicial entity legally empowered to issue final confiscation orders.*

Amendment 2

Article 2

(10697/2002 – C5-0375/2002 –2002/0818(CNS))

Member States shall adopt the necessary measures to enable them to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.

Member States shall adopt the necessary measures to enable them to confiscate, either wholly or in part, ***in proportion to the criminal offence established,*** instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.

*Justification*

*The notion of proportionality should be introduced so that confiscation does not result in a loss of property disproportionate to the offence committed.*

Amendment 3

Article 3

(10697/2002 – C5-0375/2002 –2002/0818(CNS))

1. Member States shall adopt the necessary measures to enable them to confiscate, either wholly or in part, property belonging to a person convicted of ***a criminal act, including property not resulting from the criminal act of which the person in question is convicted,*** if:

1. Member States shall adopt the necessary measures to enable them to confiscate, either wholly or in part, property belonging to a person convicted of ***an act of – or connected with – organised crime, and to which he has title or access, even through intermediary natural or legal persons, or the equivalent value of that property if it cannot be traced,*** if:

(a) the act *is of such a nature that it can generate* substantial proceeds, and

(b) the act is punishable by at least a maximum sentence of up to six years in prison.

(a) the act *has generated* substantial proceeds, and

(b) the act is punishable by at least a maximum sentence of up to six years in prison.

#### *Justification*

*Confiscation is only ordered once the criminal act has been established and the extent of the proceeds obtained by the person convicted is known. It is therefore appropriate to refer to the proceeds already ascertained and not to the possibility of the criminal act generating 'substantial proceeds' since the same act could in fact have generated proceeds of a minimal amount.*

*It should be specified, not least for reasons of consistency with the recitals, that the criminal act in question must be an act of organised crime.*

#### Amendment 4 Article 3, paragraph 2

2. Member States shall also adopt the necessary measures to enable them to confiscate, either wholly or in part, property acquired by the spouse or cohabitee of the person concerned under the conditions set out in paragraph 1. Member States may disregard cases where the property was acquired more than three years prior to the commission of the offence which forms the basis for confiscation pursuant to paragraph 1, or cases where the marriage or cohabitation did not exist at the time of acquisition.

2. Member States shall also adopt the necessary measures to enable them to confiscate, either wholly or in part, property acquired by the spouse or cohabitee of the person concerned under the conditions set out in paragraph 1 ***where it is proven that the property belongs to that person and that the spouse or cohabitee has fictitious access or title to it.*** Member States may disregard cases where the property was acquired more than three years prior to the commission of the offence which forms the basis for confiscation pursuant to paragraph 1, or cases where the marriage or cohabitation did not exist at the time of acquisition.

#### *Justification*

*In the interests of protecting the rights of third parties, it should have to be proven that the property has been fictitiously registered.*

Amendment 5  
Article 3, paragraph 3

3. Member States shall also adopt the necessary measures to enable them, in accordance with the conditions set out in paragraph 1, to confiscate, either wholly or in part, property transferred to a legal person in respect of which the person concerned – ***acting either alone or in conjunction with his closest relations*** – has a controlling influence. ***The same shall apply if the person concerned receives a significant part of the legal person's income.*** Member States may disregard cases where the property was transferred to the legal person more than three years prior to the commission of the offence which forms the basis for confiscation pursuant to paragraph 1.

3. Member States shall also adopt the necessary measures to enable them, in accordance with the conditions set out in paragraph 1, to confiscate, either wholly or in part, property transferred to a legal person in respect of which the person concerned has a controlling influence – ***even de facto via an intermediary.*** Member States may disregard cases where the property was transferred to the legal person more than three years prior to the commission of the offence which forms the basis for confiscation pursuant to paragraph 1.

*Justification*

*This modification renders the provision more intelligible and less equivocal in respect of the rights of third parties. Once the fictitious use of an intermediary has been demonstrated, the intermediary third party or parties cannot claim infringement of their own rights precisely because the property does not belong to them.*

Amendment 6  
Article 3, paragraph 4 a (new)  
(10697/2002 – C5-0375/2002 –2002/0818(CNS))

***4a. The Member States shall adopt all the necessary measures to ensure that the onus of proof in respect of the unlawful origin of the property lies with the prosecution and not with the defence.***



### *Justification*

*The aim of this amendment is to emphasise that the unlawful origin of the property must always be proved by the entities prosecuting a case. Otherwise, the unlawful origins of the property could only be argued on the basis of mere suppositions or suspicions. In practice, this would result in the onus of proof being inverted and it becoming the duty of the defence to show that the property was of lawful origin. Rules which have mere suspicion as their basis are incompatible with every modern system of criminal law, which draw on the principles of an offence having had to be committed, safeguards and the assumption of innocence.*

## DRAFT LEGISLATIVE RESOLUTION

### 2. European Parliament legislative resolution on the initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders (10701/2002 – C5-0377/2002 – 2002/0816(CNS))

#### (Consultation procedure)

*The European Parliament,*

- having regard to the initiative of the Kingdom of Denmark and the modified initiative (10701/2002<sup>1</sup>),
  - having regard to Articles 30, 31 and 34(2)(c) of the Treaty on European Union,
  - having been consulted by the Council pursuant to Article 39(1) of the Treaty on European Union (C5-0377/2002),
  - having regard to Rules 106 and 67 of its Rules of Procedure,
  - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0383/2002),
1. Approves the initiative of the Kingdom of Denmark as amended;
  2. Calls on the Council to alter the text of the initiative accordingly;
  3. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;
  4. Asks to be consulted again should the Council intend to make substantial modifications to the initiative of the Kingdom of Denmark;
  5. Instructs its President to forward its position to the Council and Commission and the Government of the Kingdom of Denmark.

Modified initiative (10701/2002)

Amendments by Parliament

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Amendment 7  
Article 2, letter (c)  
(10701/2002 – C5-0377/2002 –2002/0816(CNS))

(c) 'confiscation' shall mean a sanction or measure ordered by a *court* following

(c) 'confiscation' shall mean a sanction or measure ordered by a *judge* following

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<sup>1</sup> OJ C 184, 2.8.2002, p. 3.

proceedings in relation to a criminal offence or offences, resulting in the definitive expropriation of property;

proceedings in relation to a criminal offence or offences, resulting in the definitive expropriation of property;

*Justification*

*'Court' is a generic term which can refer both to investigating magistrates and to judges per se. It should therefore be modified so that specific reference is made to the 'judge' as being the sole judicial entity legally empowered to issue final confiscation orders.*

Amendment 8  
Article 2, letter (f)

(f) "order" shall mean a final sanction or measure imposed by a competent **judicial authority** in respect of an offence whereby confiscation is ordered.

(f) "order" shall mean a final sanction or measure imposed by a competent **judge** in respect of an offence whereby confiscation is ordered.

*Justification*

*'Judicial authority' is a generic term which can refer both to investigating magistrates and to judges per se. It should therefore be modified so that specific reference is made to the 'judge' as being the sole judicial entity legally empowered to issue final confiscation orders. On the other hand, this modification should not be made in those parts of the text that refer to the transmission or execution of the confiscation order by the competent judicial authority, since under the law of certain Member States this can be performed by an investigating magistrate.*

Amendment 9  
Article 3, paragraph 1

1. The issuing judicial authority shall be **the court** of the issuing State which has issued the confiscation order.

1. The issuing judicial authority shall be **a judge** of the issuing State which has issued the confiscation order.

### *Justification*

*'Court' is a generic term which can refer both to investigating magistrates and to judges per se. It should therefore be modified so that specific reference is made to the 'judge' as being the sole judicial entity legally empowered to issue final confiscation orders.*

### Amendment 10

#### Article 11, paragraph 4

(10701/2002 – C5-0377/2002 –2002/0816(CNS))

4. A confiscation order shall be executed even if the natural person who is the subject of the confiscation order subsequently dies or the legal person which is the subject of the confiscation order is subsequently dissolved.

The ***executing*** State may not impose a custodial sentence or any other measure limiting a person's freedom as an alternative legal remedy as a result of a request pursuant to Article 4, ***unless the issuing State has given its consent to this in the request.***

4. A confiscation order shall be executed even if the natural person who is the subject of the confiscation order subsequently dies or the legal person which is the subject of the confiscation order is subsequently dissolved.

The ***issuing State and the*** executing State may not impose a custodial sentence or any other measure limiting a person's freedom as an alternative legal remedy as a result of a request pursuant to Article 4.

### *Justification*

*It is impossible for either the executing State or the issuing State to substitute confiscation of property with a custodial sentence because this would be contrary to the constitutional rules of certain Member States.*

## EXPLANATORY STATEMENT

### Introduction

A clear consensus is emerging at international level that the confiscation of crime-related proceeds is one of the most effective ways of combating organised crime, particularly when such proceeds are destined for laundering.

Combating money laundering requires close cooperation at international level, especially in view of the fact that transnational crime networks are growing ever stronger and more organised.

Cooperation between states in the area of confiscation became a focal point of international cooperation in criminal matters in the 1980s. The origins of the campaign against money laundering lie in the combating of drug trafficking, and in the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, which was concluded in Vienna on 19 December 1988.

The Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime of 8 November 1990 subsequently became the European-level point of reference in this area.

In addition, the United Nations has drawn up the Convention against transnational organised crime of 15 November 2002, which establishes a raft of measures in the area of confiscation of the proceeds of crime.

### Basis of the Council initiative

The Action Plan to combat organised crime, which was adopted by the Council on 28 April 1997<sup>1</sup>, endorsed by the Amsterdam European Council of June 1997 and drawn on by the Vienna European Council of December 1998, provided the basis for the initial decisions taken by the European Union in the area of confiscation. In political guideline 11 of the action plan, the European Council stressed the importance of each Member State 'having well-developed and wide ranging legislation in the field of confiscation of the proceeds from crime and the laundering of such proceeds' and of 'introducing special procedures for tracing, seizure and confiscation of proceeds from crime'. Recommendation 26 of the action plan invited the Member States to take specific measures with regard to confiscation, and in particular to enhance search and seizure of the illicit proceeds of organised crime and to generalise the criminalisation of laundering of the proceeds of crime. The action plan also referred to the Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime of 1990, which has been ratified by all the Member States and the candidate countries, except Turkey.

The aim of Joint Action 98/699/JHA<sup>2</sup> of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and proceeds from crime, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, was to implement the aforementioned recommendations. However, as was pointed out in the European Parliament's report<sup>3</sup>, the joint action went no further than to call for

<sup>1</sup> OJ C 251, 15.8.1997, pp. 1-16.

<sup>2</sup> OJ L 333, 9.12.1998, pp. 1-3.

<sup>3</sup> Orlando Report, A4-0222/98, 4 June 1998

cooperation between Member States, in the form of complying with requests for legal assistance, and did not bring forward any practical proposals to improve the legal provisions of the Member States with regard to confiscation, nor any proposals to introduce special procedures for confiscation. It therefore failed to fulfil any of the requirements of the action plan.

The Tampere European Council of 15/16 October 1999 called for the approximation of criminal law and procedures on money laundering (particularly in the field of the confiscation of property) and called on the Council to focus efforts on a limited number of sectors of particular relevance, such as financial crime, with a view to agreement on common definitions, charges and sanctions. It also called on the Council to ensure that tangible steps were taken to trace, freeze, seize and confiscate the proceeds of crime.

Following Tampere, the Council adopted the European Union strategy for the beginning of the new millennium for the prevention and control of organised crime, which recommended that all the points set out above be made priorities to be adopted by the Council within clearly defined time limits (criminalisation of laundering of the proceeds of crime by 31 December 2000, execution of confiscation orders by 31 December 2002).

On 26 June 2001 the Council adopted Framework Decision 2001/500/JHA<sup>4</sup> on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, on an initiative of the French Republic, which abrogated certain articles of the joint action of 1998. The framework decision took further steps forward by introducing the principle of the mutual recognition of national provisions on the seizure and confiscation of the instrumentalities and proceeds of crime. It nevertheless proved insufficient because, as was pointed out in the Marinho Report (A5 0313/2000), it only laid down penalties in the case of serious offences, leaving an unjustifiably wide margin of criminal impunity. Furthermore, the fact that the joint action of 1998 was not abrogated meant that the area was regulated by two instruments of differing legal weight. Lastly, many of the provisions set out were not implemented, making for an inadequate provision of legal assistance between Member States.

### **Draft framework decision on the confiscation of crime-related proceeds, instrumentalities and property**

The draft framework decision presented by the Danish Presidency is part of the broader policy of approximation of criminal law at European level. This provides, on the basis of the Treaty of Amsterdam, for the establishing of minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime (Article 31 of the Treaty on European Union). The decision therefore aims to ensure that all the Member States have in place effective rules providing for confiscation when an offence is punished by deprivation of liberty for a period of more than one year. The Member States are also called on to adopt measures granting extensive powers to confiscate the property of a person convicted of a criminal act – not only the proceeds of the crime itself but also other property in the possession of the person convicted – when that act is liable to generate substantial proceeds and is punishable by a maximum sentence of at least six years in prison and the person

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<sup>4</sup> OJ L 182, 5.7.2001, pp. 1-2.

convicted cannot prove that the property is of lawful origin.

Your rapporteur agrees with the approach adopted by the Danish Presidency as regards the two mechanisms referred to above, but in the case of extensive powers of confiscation suggests that the proposal be restricted to organised crime offences, which would tally with the recitals.

On the other hand, your rapporteur considers the provisions of the Danish proposal concerning the inversion of the onus of proof with regard to the lawful acquisition of a convicted person's property to be excessive. As indicated in the justification for the amendments, it would be more appropriate to tone down these provisions, with the prosecution having to prove that the property possessed is disproportionate to declared income or the activity pursued, and the person convicted having the onus to prove the lawful origin of the property.

The same principle should apply to the confiscation of goods transferred to a partner or cohabitee or to a legal person – i.e. it should have to be proven that the property of the partner or cohabitee belongs to the person convicted and that the partner or cohabitee or the representatives of the legal person have only fictitious title or access to it.

However, it is unacceptable that the above-mentioned third parties should – without having committed any crime – be required to prove the lawful origin of the property when there is no proof that such property belongs to the person convicted or that the third parties have fictitious title or access to it.

### **Framework decision on the execution of confiscation orders**

Framework Decision 2001/500/JHA referred to the freezing and seizure of property, and not solely to the confiscation thereof.

The Danish Presidency's proposal, on the other hand, only covers the execution of confiscation orders, since a separate framework decision has been presented for the execution of orders freezing property or evidence, on which political agreement has been reached but which is still to be adopted by the Council.

The framework decision brought forward by the Danish Presidency is a logical continuation of the previous decision, since confiscation follows seizure in the event of actual conviction by a court. The two decisions should be viewed as parallel decisions.

Following the same pattern as for the seizure order, the authority in the issuing state sends the confiscation order to the authority in the executing state, accompanied by a standardised certificate. The executing state immediately executes this order.

Furthermore, drawing on the provisions of the European arrest warrant, the confiscation order is executed without verification of double criminality in the case of the thirty-two serious offences listed in the annex to the European Arrest Warrant and set out in Article 5 of the Danish Presidency's proposal.

Your rapporteur agrees with the approach adopted in the decision and has simply tabled certain amendments which ensure that this decision is parallel with the decision on the execution of seizure orders, in line with the Convention of 1990.

The decision will enable considerable progress to be made in improving mutual assistance with regard to the proceeds from organised crime. Other steps also have to be taken. Mutual assistance is often obstructed by the absence of clarity with regard to the division of property confiscated between the states taking part in the operation.

The 1997 action plan called for the possibility of the division of confiscated property following international cooperation to be examined. A draft decision to this end was presented

by the Austrian Republic on 8 November 1999, setting out guidelines on the division of confiscated property. The Council took no action on this initiative at the time, and the European Parliament hopes it can be brought back into play.