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*Committee on Civil Liberties, Justice and Home Affairs*

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**2012/0036(COD)**

28.8.2012

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# **DRAFT 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: [...].

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## 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 ...<sup>1</sup>,
  - having regard to the opinion of the Committee of the Regions of ...<sup>2</sup>,
  - 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 and the opinion of the Committee on Legal Affairs (A7-0000/2012),
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.

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<sup>1</sup> OJ C ...

<sup>2</sup> OJ C ...

## 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 **most crime, and particularly** cross-border organised crime, is financial gain. In order to be effective, law enforcement and judicial authorities should be given all means to trace, freeze, manage and confiscate the proceeds of crime.

Or. en

*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 3

*Text proposed by the Commission*

(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.

*Amendment*

(3) Although existing statistics are limited, the amounts recovered from criminal assets 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**.

Or. en

*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 3**

#### **Proposal for a directive Recital 11**

*Text proposed by the Commission*

*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. 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.*

*deleted*

Or. en

*Justification*

*This recital should be deleted for two reasons: (i) it limits the current legal framework for extended confiscation in Council Decision no 2005/212/JH which contradicts the very idea of strengthening the current system and increase its efficiency that is the goal of this proposal; (ii) for consistency with the deletion of Article 4 Paragraph 2 point (b).*

### **Amendment 4**

#### **Proposal for a directive Recital 12**

*Text proposed by the Commission*

*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

(12) The issuance of confiscation orders generally requires a criminal conviction. In some cases, even *in the absence of* a criminal conviction, it should be possible

*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 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.***

to confiscate assets in order to disrupt criminal activities and ensure that profits resulting from criminal activities are not reinvested into the licit economy ***or in criminal activities.***

Or. en

#### *Justification*

*This recital should be amended for reasons of consistency with the deletion of Article 5 points (a) and (b).*

#### **Amendment 5**

##### **Proposal for a directive Article 2 – point 6**

*Text proposed by the Commission*

(6) 'criminal offence' means a criminal offence ***covered by:***

*Amendment*

(6) 'criminal offence' means a criminal offence ***punishable by a custodial sentence of a maximum length of at least***



*12 months.*

*(a) the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty of the European Union on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union,*

*(b) Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro,*

*(c) Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment,*

*(d) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism<sup>51</sup>, as amended by Council Framework Decision 2008/919/JHA of 9 December 2008,*

*(e) Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime,*

*(f) Council Framework Decision 2003/568/JHA on combating corruption in the private sector,*

*(g) Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking,*

*(h) Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems,*

*(i) Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime,*

**(j) Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA,**

**(k) Directive 2011/92/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA.**

Or. en

### *Justification*

*Framework decision 2005/212/JHA limits its scope of application to already harmonised offences only in the case of extended confiscation. Limiting the scope of this proposed Directive to the criminal offences harmonised and listed in Article 2 point 6 means stepping backwards. On the contrary, considering a 'criminal offence' an offence punishable by a custodial sentence for a maximum period of at least 12 months means keeping the same scope as in Directive 2005/212/JHA which requires harmonisation only for extended confiscation.*

### **Amendment 6**

#### **Proposal for a directive Article 3 – title**

*Text proposed by the Commission*

*Amendment*

***Conviction based confiscation***

***Confiscation***

Or. en

### *Justification*

*This amendment aims to make the text of the Directive clearer and ensures consistency with the amendments to Articles 3 and 5.*

### **Amendment 7**

#### **Proposal for a directive Article 3 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. Each Member State shall take the

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.

necessary measures to enable ***judicial authorities*** to confiscate, either wholly or in part, instrumentalities and proceeds following a final conviction for a criminal offence.

Or. en

*Justification*

*This amendment is proposed in order to underline that only judicial authorities should have the power to order the confiscation.*

**Amendment 8**

**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*

2. Each Member State shall take the necessary measures to enable ***judicial authorities, when the confiscation provided for in paragraph 1 is not possible***, to confiscate property the value of which corresponds to the proceeds following a final conviction for a criminal offence.

Or. en

*Justification*

*This amendment aims to better define the situation in which property of the same value as the proceeds of a crime may be confiscated.*

**Amendment 9**

**Proposal for a directive  
Article 3 – paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***2a. Each Member State shall take the necessary measures to enable judicial authorities, in the absence of a criminal conviction, to confiscate instrumentalities***

***and proceeds obtained through conduct which is unlawful under the criminal law where a court finds on the balance of probabilities that any matters alleged to constitute unlawful conduct have occurred.***

Or. en

*Justification*

*This amendment was proposed in order to strengthen the powers of the judicial authorities in the area of confiscation of instrumentalities and proceeds of crime; this is also in accordance with some of the Member States national legislation.*

**Amendment 10**

**Proposal for a directive  
Article 3 – paragraph 2b (new)**

*Text proposed by the Commission*

*Amendment*

***2b. The powers conferred by paragraph 2a shall be exercisable in relation to any property (including cash) whether or not any proceedings have been brought for an offence in connection with the property.***

Or. en

*Justification*

*This amendment aims to clearly specify the kind of property that may be confiscated.*

**Amendment 11**

**Proposal for a directive  
Article 4 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

***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*****

***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 a court finds it **on the balance of probabilities** that the***

*more probable* that the property in question has been derived by the convicted person from similar criminal activities than from other activities.

property in question has been derived by the convicted person from similar criminal activities *rather* than from other activities.

Or. en

#### *Justification*

*This amendment aims at aligning the standard of proof provisions to the ones in the amendment made to Article 3 Paragraph 2.*

### **Amendment 12**

#### **Proposal for a directive Article 4 – paragraph 2 – introduction**

*Text proposed by the Commission*

*Amendment*

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

**deleted**

Or. en

### **Amendment 13**

#### **Proposal for a directive Article 4 – paragraph 2 – point a**

*Text proposed by the Commission*

*Amendment*

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

**deleted**

Or. en

### **Amendment 14**

#### **Proposal for a directive Article 4 – paragraph 2 – point b**

*Text proposed by the Commission*

*Amendment*

***(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.*** ***deleted***

Or. en

*Justification*

*The three amendments above have been proposed in order to allow for stronger extended confiscation powers to the authorities and to better define the cases where extended confiscation powers should be made available.*

## **Amendment 15**

### **Proposal for a directive Article 5 – introduction**

*Text proposed by the Commission*

*Amendment*

***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:*** ***deleted***

Or. en

*Justification*

*The text of Articles 3 and 5 were joined in order to provide for clearer and stronger provisions concerning confiscation.*

## **Amendment 16**

### **Proposal for a directive Article 5 – point a**

*Text proposed by the Commission*

*Amendment*

***(a) the death or permanent illness of the*** ***deleted***

*suspected or accused person prevents any further prosecution; or*

Or. en

*Justification*

*This amendment aims to align the recital to the amendments made to Article 5.*

**Amendment 17**

**Proposal for a directive  
Article 5 – point b**

*Text proposed by the Commission*

*Amendment*

*(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.*                      *deleted*

Or. en

*Justification*

*The two amendments above were proposed in order to align the text of the Directive with the amendments made to Article 3, the situations listed in point a) and b) of Article 5 being covered by the amended text of Article 3 which now has a broader scope*

**Amendment 18**

**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 which were transferred directly or indirectly to third parties, or*

Or. en

## Amendment 19

### Proposal for a directive Article 6 – paragraph 1 – point b

*Text proposed by the Commission*

(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.

*Amendment*

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

Or. en

*Justification*

*The two amendments above were proposed in order to align the text of the Directive with the amendments made to Articles 3 and 5.*

## Amendment 20

### Proposal for a directive Article 6 – paragraph 2 – point a

*Text proposed by the Commission*

(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

*Amendment*

(a) an assessment, based on specific facts, indicates that the confiscation of property under the circumstances of ***Article 3***, is unlikely to succeed, and

Or. en

*Justification*

*The two amendments above were proposed in order to ensure consistency with the provisions of Article 3 which now has a broader scope.*



## Amendment 21

### Proposal for a directive

#### Article 6 – paragraph 2 – point b

*Text proposed by the Commission*

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

*Amendment*

b) the proceeds or property were transferred for free or in exchange for an amount lower than their market value.

Or. en

## Amendment 22

### Proposal for a directive

#### Article 6 – paragraph 2 – point b – letter (i)

*Text proposed by the Commission*

*(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;*

*Amendment*

*deleted*

Or. en

## Amendment 23

### Proposal for a directive

#### Article 6 – paragraph 2 – point b – letter (ii)

*Text proposed by the Commission*

*(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*

*Amendment*

*deleted*

*have suspected that it was transferred to avoid such confiscation, based on concrete facts and circumstances.*

Or. en

*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 24**

**Proposal for a directive  
Article 7 – paragraph 1**

*Text proposed by the Commission*

*1. 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 ordered by** a court.*

*Amendment*

Each Member State shall take the necessary measures to enable it to freeze property **immediately** with a view to possible later confiscation. **The person affected by the** measures **provided for in this Article** shall **have a right of appeal to** a court.

Or. en

*Justification*

*Freezing is the most important tool and a first step in order to recover the instrumentalities and proceeds of crime, therefore the rules governing this measure should be strengthened.*

**Amendment 25**

**Proposal for a directive  
Article 7 – paragraph 2**

*Text proposed by the Commission*

*2. Each Member State shall take the necessary measures to enable its competent authorities to immediately freeze property where there is a high risk*

*Amendment*

*deleted*

*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.*

Or. en

*Justification*

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

**Amendment 26**

**Proposal for a directive  
Article 8 – paragraph 1**

*Text proposed by the Commission*

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*.

*Amendment*

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.

Or. en

*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 27**

**Proposal for a directive  
Article 8 – paragraph 4**

*Text proposed by the Commission*

*4. In proceedings referred to in Article 4, the suspected or accused person shall have an effective possibility to contest the*

*Amendment*

*deleted*

***probability on the basis of which the property concerned is considered to be proceeds.***

Or. en

*Justification*

*This amendment was proposed for more clarity of the text since its provisions are already covered in Article 8 Paragraph 3.*

**Amendment 28**

**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 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.***                      ***deleted***

Or. en

*Justification*

*This amendment was proposed because a lawyer should be provided in accordance with the procedural rules of every Member State to the persons who are entitled to it. Any person who wishes to hire a lawyer is free to do so in any jurisdiction and there is no need for the Directive to introduce a new obligation for the Member States in this respect.*

**Amendment 29**

**Proposal for a directive  
Article 9**

*Text proposed by the Commission*

*Amendment*

Each Member State shall take the

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 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.

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 decision to confiscate.

Or. en

### *Justification*

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

## 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.