

Comparative table

submitted by the Presidency on behalf of the Council

in view of the second trilogue on Wednesday 10 July 2013

**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 (2012/0036(COD))**

Abbreviations used:

AM = (draft) amendment of the LIBE Committee of the European Parliament (see doc 1450/13)

GA = text of Council general approach as agreed on 7 December 2012 (doc 17287/12)

TM = technical meeting

COM = Commission

EP = European Parliament

CNS = Council

MS = Member States

NCBC = non conviction based confiscation

RECITALS

Commission	Council	European Parliament	Compromise solution proposed by the Council	Comments by the Council
<p>(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.</p>	<p>(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.</p>	<p>(1) [AM 1] The main motive for cross-border organised crime, <i>including mafia-type criminal organization</i>, is financial gain. <i>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</i></p>		

		<i>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.</i>		
(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.	(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 (...) cooperation on asset recovery and mutual legal assistance.	(2) [AM 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. <i>The adoption of minimum rules will harmonise the Member States' freezing and confiscation regimes, thus facilitating mutual trust and effective cross-border cooperation.</i>		
		(2a) [AM 3] <i>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.</i>		

<p>(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.</p>	<p>(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.</p>	<p>(3) [AM 4] Although existing statistics are limited, the amounts recovered from criminal <i>proceeds</i> in the Union seem <i>extremely low</i> compared to the estimated proceeds of crime. Studies have shown that, although regulated by EU legislation and national laws, confiscation procedures remain underutilised <i>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.</i></p>		
<p>(4) The Stockholm Programme¹ and the Justice and Home Affairs Council Conclusions on confiscation and asset recovery adopted in June 2010 emphasise the importance of a more effective identification, confiscation and re-use of criminal assets.</p>	<p>(4) The Stockholm Programme and the Justice and Home Affairs Council Conclusions on confiscation and asset recovery adopted in June 2010 emphasise the importance of a more effective identification, confiscation and re-use of criminal assets.</p>			<p>Consensus.</p>
<p>(5) The current Union legal framework on freezing, seizure and confiscation of assets consists of Council Framework Decision 2001/500/JHA of 26 June</p>	<p>(5) The current Union legal framework on freezing, seizure and confiscation of assets consists of Council Framework Decision 2001/500/JHA of 26 June</p>			<p>Consensus.</p>

¹ "An open and secure Europe serving and protecting the citizens", Council document 17024/09, adopted by the European Council on 10/11 December 2009.

<p>2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime²; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence³; Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property⁴; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders⁵.</p>	<p>2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.</p>			
<p>(6) The Commission implementation reports on Framework Decisions 2005/212/JHA, 2003/577/JHA and 2006/783/JHA show that existing regimes for extended confiscation and for the mutual recognition of freezing</p>	<p>(6) The Commission implementation reports on Framework Decisions 2005/212/JHA, 2003/577/JHA and 2006/783/JHA show that existing regimes for extended confiscation and for the mutual recognition of freezing</p>			<p>Consensus.</p>

² OJ L 182, 5.7.2001, p. 1.

³ OJ L 196, 2.8.2003, p. 45.

⁴ OJ L 68, 15.3.2005, p. 49.

⁵ OJ L 328, 24.11.2006, p. 59.

and confiscation orders are not fully effective. Confiscation is hindered as a result of differences between Member States' legislation.	and confiscation orders are not fully effective. Confiscation is hindered as a result of differences between Member States' legislation.			
(7) This Directive aims to amend and expand the provisions of Framework Decisions 2001/500/JHA and 2005/212/JHA. Those Framework Decisions should be partially replaced in relation to Member States participating in the adoption of this Directive.	(7) This Directive aims to amend and expand the provisions of Framework Decisions 2001/500/JHA and 2005/212/JHA. Those Framework Decisions should be partially replaced in relation to Member States participating in the adoption of this Directive.			Consensus.
	<i>(7a) Member States are free to take confiscation procedures which are linked to a criminal case in front of any court whether criminal, civil or administrative.</i>	<i>(7b) [AM 5] Member States are free to adopt confiscation procedures which are linked to a criminal case before any court, whether criminal, civil or administrative.</i>		Consensus.
(8) There is a need to broaden the existing concept of proceeds to include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds, the value of any liabilities avoided and any valuable benefits.	(8) There is a need <i>to clarify</i> the existing concept of proceeds to include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds (...). <i>Thus proceeds may include any property including when it has been transformed or converted, fully or in part, into other property, or when it</i>			

	<p><i>has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds. It may also include the income or other benefits derived from proceeds of crime, or from property into which such proceeds have been transformed, converted or intermingled.</i></p>			
	<p><i>(8a) This Directive provides for a broad definition of property that could be subject to freezing and confiscation. It includes legal documents or instruments evidencing title or interest in such property. Such documents or instruments could constitute, for example, financial instruments, or documents that may give rise to creditor claims and are normally found in possession of the person affected by the relevant procedures. This Directive is without prejudice to the existing national procedures for keeping legal documents or instruments evidencing title or interest in property, as they are applied by the competent national</i></p>			

	<i>authorities or public bodies in accordance with national law.</i>			
	<i>(8b) Confiscation and freezing under this Directive are autonomous concepts, which should not prevent Member States to implement the provisions of this Directive with instruments which in accordance with national legislation would be considered as sanctions or other types of measures.</i>			
(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 of property of equivalent value to the proceeds of crime. Such obligations should be maintained for the criminal offences not covered by this	(9) Confiscation of instrumentalities and proceeds following a final decision of a court and of property of equivalent value to those proceeds should (...) refer to the 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 of property of equivalent value to the proceeds of crime. Such obligations should be maintained for the criminal offences not covered by this Directive. Member States are	(9) [AM 6] 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 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		

Directive.	<i>free to define the confiscation of property of equivalent value as subsidiary or alternative to the direct confiscation, as appropriate in accordance with national legislation.</i>	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.		
	(9a) When implementing this Directive, Member States may provide that confiscation should not be ordered, insofar as according to national legislation this would represent an undue hardship for the affected person, whereby the circumstances of the respective individual case should be decisive.	(12b) [AM 10] 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.		
(10) Criminal groups engage in a wide range of criminal activities. In order to effectively tackle organised criminal activities there may be situations where it is appropriate that a criminal conviction is followed by the confiscation not only of property associated with a specific crime, but also of additional property which the court determines are the proceeds of other crimes. This approach is referred to as extended confiscation. Framework Decision	(10) Criminal groups engage in a wide range of criminal activities. In order to effectively tackle organised criminal activities there may be situations where it is appropriate that a criminal conviction is followed by the confiscation not only of property associated with a specific crime, but also of additional property which the court determines are the proceeds of other crimes. This approach is referred to as extended confiscation. Framework Decision			

<p>2005/212/JHA provided for three different sets of minimum requirements that Member States could choose in order to apply extended confiscation. As a result, in the process of transposition, Member States have chosen different options which resulted in divergent concepts of extended confiscation in national jurisdictions. That divergence hampers cross-border cooperation relevant for confiscation cases. It is therefore necessary to further harmonise the provisions on extended confiscation by setting a single minimum standard. Extended confiscation should apply when a national court, based on specific facts such as those related to the nature of the criminal offence, the legal income of a convicted person, the difference between the financial situation and the standard of living of that person or other facts, finds it substantially more probable that the property in question has been derived from other criminal offences, of similar nature or gravity as the criminal offence for which the</p>	<p>2005/212/JHA provided for three different sets of minimum requirements that Member States could choose in order to apply extended confiscation. As a result, in the process of transposition, Member States have chosen different options which resulted in divergent concepts of extended confiscation in national jurisdictions. That divergence hampers cross-border cooperation relevant for confiscation cases. It is therefore necessary to further harmonise the provisions on extended confiscation by setting a single minimum standard.(...)</p>			
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<p>person is convicted, than from other activities.</p>				
	<p><i>(10a) The court has to consider the specific circumstances of the case, including facts and available evidence based on which a decision on extended confiscation could be issued. The fact that the property of the person is disproportionate to his lawful income could be among those facts giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a requirement for a certain period of time in which the property could be deemed to have originated from criminal conduct.</i></p>			
	<p><i>(10aa) This Directive sets up minimum rules. It does not prevent Member States from providing more extensive powers in national law, including in relation to its rules on evidence, for example, by providing a reversed burden of proof.</i></p>			
	<p><i>(10b) This Directive applies to criminal offences which fall under the scope of the</i></p>			

	<i>instruments listed under Article 2a. Within the scope of those instruments, Member States should apply extended powers of confiscation to serious criminal offences in line with national legislation.</i>			
(11) In accordance with the principle of <i>ne bis in idem</i> 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 <i>ne bis in idem</i> 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.		(11) [AM 7] In accordance with the principle of <i>ne bis in idem</i> 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 <i>ne bis in idem</i> principle applies. [...]		
(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	(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	(12) [AM 8] 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		

<p>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.</p>	<p>into the licit economy. (...). <i>Some Member States have put in place non-conviction based confiscation systems where no link to criminal proceedings is required, such as the civil forfeiture proceedings, or where a more distant link to a criminal case is sufficient in order to start independent confiscation proceedings. Those systems do not fall under the scope of this Directive.</i></p>	<p>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 <i>or conviction</i>, is unable to stand trial for other reasons, died before the end of criminal proceedings. In <i>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.</i> This is referred to as non-conviction based confiscation. Provision should be made to enable non-conviction based confiscation in all Member States.</p>		
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		<p><i>(12a) [AM 9] 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.</i></p>		
	<p><i>(12b) Due to permanent illness or flight it might be impossible to confiscate proceeds and instrumentalities based on a conviction or by way of extended powers of confiscation. Such situations might arise due to legal obstacles, for example when the statutory limitation period has expired. In such situations Member States should still be able to confiscate, as applicable under national legislation, through in absentia proceedings or non</i></p>	<p>[recital 12b has been put next to recital 9a GA]</p>		<p>Recital to be aligned with the final text of the operative part (Art. 5).</p>

	<i>conviction based proceedings. When the person has fled Member States should take all reasonable steps and may require that the person is summoned to or made aware of the confiscation proceedings.</i>			
		[recital 12c has been put next to recital 14c GA]		
(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	(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. (13a) <i>When implementing the provision on third party confiscation, Member States should take into consideration situations</i>	(13) [AM 12] 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 <i>or acquired by</i> 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 <i>instrumentalities or the</i> proceeds of crime or was transferred in order to avoid		

<p>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.</p>	<p><i>where proceeds or property were transferred to or acquired by a third party for free or in exchange for an amount significantly lower than their market value. The rules on third party confiscation are extending to both natural and legal persons. Acquisition by a third party refers to situations where, for example, property has been directly acquired by the third party, including when the criminal offence has been committed on their behalf or to their benefit</i> when an accused person does not have property that can be confiscated. (...)</p>	<p>confiscation <i>or if it</i> was given for free or transferred in exchange for an amount <i>significantly</i> lower than its market value. <i>Third-party confiscation should also be possible where the suspect or accused person was acting for another natural or legal person from the outset.</i></p> <p><i>(13b) [AM 14] The rules on third-party confiscation extend to both natural and legal persons.</i></p>		
		<p><i>(13a) [AM 13] 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.</i></p>		

		<i>Assistance in committing such an offence should also be suitably punished.</i>		
	<i>(13b) Member States are free to define third party confiscation as subsidiary or alternative to direct confiscation, as appropriate in accordance with national legislation.</i>			
(14) Provisional measures should be provided for in order to ensure that property remains available with a view to possible later confiscation. Such freezing measures should be ordered by a court. In order to prevent the dissipation of property before a freezing order can be issued by a court, the competent authorities in the Member States should be empowered to immediately prohibit the transfer, conversion, disposition or movement of property in danger of being hidden or transferred out of the jurisdiction, on a request for a freezing order with a view of possible later confiscation, pending the determination by a court.	(14) (...) Confiscation leads to the final deprivation of property. Preservation of property is often prerequisite to confiscation and of importance to the enforcement of a confiscation order. Property is often preserved by means of freezing. Freezing measures are often ordered by a court or another judicial authority. In order to prevent the dissipation of property before a freezing order can be issued the competent authorities in the Member States should be empowered to immediately take action in order to secure property.			

	<p><i>(14.1) Since property is often preserved for the purposes of confiscation, freezing and confiscation are closely linked. In some legal systems freezing for the purposes of confiscation is regarded as a separate procedural measure of a provisional nature, which may be followed by a decision to confiscate. Without prejudice to the various national legal systems and the Framework decision on freezing (2003/577/JHA) the Directive should approximate some aspects of the national systems of freezing for the purposes of confiscation.</i></p>			
	<p><i>(14a) Freezing measures are without prejudice to the possibility for a specific property to be considered evidence throughout the proceedings, as long as it would be made available for effective execution of the confiscation order at the end.</i></p>			
	<p><i>(14b) Property may be frozen in the context of criminal proceedings also with a view to possible later restitution or in order to safeguard compensation for damages</i></p>			

	<i>caused by a criminal offence.</i>			
	<i>(14c) Where property has been frozen or confiscated, Member States are later on free to dispose of the property in line with national law. Confiscation should not lead to justified claims, for example such on the part of the victim, which were brought against the affected person to be hindered or prevented in total.</i>	<i>(12c) [AM 11] Confiscation should not hinder or prevent justified claims by victims of criminal offences committed by the person affected by the confiscation.</i>		
(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	(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	(15) [AM 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		

<p>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.</p>	<p>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 <i>later</i> 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.</p>	<p>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, <i>where necessary, a</i> review by the court in order to ensure that their purpose of preventing the dissipation of property remains valid.</p>		
<p>(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</p>	<p>(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 <i>the possibility to</i> sell or transfer (...) the property to minimise such losses. Member States should take relevant measures, such as <i>for example</i> the establishment of national centralised Asset Management Offices or equivalent mechanisms (for example where such functions are decentralised), in order to (...) <i>effectively</i> manage the assets frozen before confiscation and</p>	<p>(16) [AM 16] Property frozen with a view to later confiscation should be managed adequately in order not to lose its economic value, <i>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</i></p>		

judicial determination.	preserve their value, pending judicial determination.	<p><i>the effective social reuse of the confiscated assets and to expand the democratic functions of the Union.</i></p> <p>Member States should take the necessary measures, including sale or transfer of the property, to minimise such losses <i>and to favour social aims</i>. Member States should take <i>all</i> relevant measures, <i>legislative or otherwise</i>, 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.</p>		
		<p><i>(16a) [AM 17] 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</i></p>		

		<i>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.</i>		
		<i>(16b) [AM 18] 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.</i>		
(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	(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	(17) [AM 19] 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.	collect a comparable minimum set of appropriate statistical data on asset tracing, judicial and asset disposal activities.	collect a <i>proper</i> comparable minimum set of appropriate statistical data on asset tracing, judicial and asset <i>management and</i> disposal activities, <i>whilst respecting the principle of proportionality</i> .		
		<i>(17a) [AM 20] 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.</i>		
(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 Directive has to be implemented in accordance	(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 Directive has to be implemented in accordance	(18) [AM 21] This Directive respects the fundamental rights and observes the principles recognised by the <i>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</i> , 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		

<p>with these rights and principles.</p>	<p>with these rights and principles. <i>This Directive should be without prejudice to national laws in relation to legal aid and does not create any obligations for Member States' legal aid systems, which should apply in accordance with the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.</i></p>	<p>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.</p>		
	<p><i>(18a) Specific safeguards should be put in place, so as to ensure that as a general rule reasons are given for decisions to confiscate, unless when in simplified criminal proceedings as regards cases which are not serious, the affected person has waived his right of reasons to be given.</i></p>	<p><i>(18a) [AM 22] Some Member States have already successfully adopted non-conviction-based systems of confiscation. As a matter of fact, 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.</i></p>		
<p>(19) The measures provided for in this Directive affect substantially the rights of persons, not only of suspected or accused persons but also of</p>	<p>(19) The measures provided for in this Directive affect substantially the rights of persons, not only of suspected or accused persons but also of</p>			

<p>third parties who are not being prosecuted. It is therefore necessary to provide for specific safeguards and judicial remedies in order to guarantee the preservation of their fundamental rights in the implementation of the provisions of this Directive.</p>	<p>third parties who are not being prosecuted. It is therefore necessary to provide for specific safeguards and judicial remedies in order to guarantee the preservation of their fundamental rights in the implementation of the provisions of this Directive. <i>The decision to freeze property should be communicated to the affected person as soon as possible after its execution. Nevertheless, competent authorities may postpone providing the information to the person concerned due to the needs of the investigation.</i></p>			
<p>(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</p>	<p>(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</p>	<p>(20) [AM 23] 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</p>		

necessary in order to achieve that objective.	necessary in order to achieve that objective.	does not go beyond what is necessary in order to achieve that objective.		
<p>(21) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, [the United Kingdom and Ireland has notified its wish to take part in the adoption and application of this Directive] or [and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland is not taking part in the adoption of this Directive and is not bound by it or subject to its application.]</p>	<p>(21) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Ireland has notified its wish to take part in the adoption and application of this Directive. <i>In accordance with that Protocol, Ireland should be bound by this Directive only in respect of the offences covered by the instruments in the adoption and implementation of which it participates.</i></p>			
	<p>(21a) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4</p>			

	<p>of that Protocol, the United Kingdom is not taking part in the adoption of this Directive and is not bound by it or subject to its application.</p> <p><i>Subject to the notification under Article 4 of that Protocol, the United Kingdom should be bound by this Directive only in respect of the offences covered by the instruments in the adoption and implementation of which it participates.</i></p>			
<p>(1) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.</p>	<p>(22) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.</p>			
<p>HAVE ADOPTED THIS DIRECTIVE:</p>				

ARTICLES

Commission	Council	European Parliament	Compromise solution proposed by the Council	Comments by the Council
OBJECTIVE AND SCOPE				
<u>Article 1</u>				
Subject matter				
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.	1. 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.	[AM 24] This Directive establishes minimum rules on the freezing of property with a view to possible later confiscation, on the confiscation of property in <i>relation to</i> criminal matters <i>and recommends general principles for the management and disposal of confiscated property.</i>		It seems appropriate to await firstly the outcome of the discussions on Article 10 and then align this provision as appropriate.
	<i>1a. This Directive is without prejudice to the procedures that Member States may use to confiscate the property in question.</i>			CNS suggests maintaining this text of the GA.
<u>Article 2</u>				
Definitions				
For the purpose of this Directive, the following definitions shall apply:	For the purpose of this Directive, the following definitions shall apply:			Consensus.

<p>(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;</p>	<p>(1) ‘proceeds’ means any economic advantage derived, <i>directly or indirectly</i> from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds (...).</p>	<p>(1) [AM 25] ‘proceeds’ means any economic advantage derived <i>directly or indirectly</i> 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;</p>	<p>Possible compromise solution: ‘proceeds’ means any economic advantage derived <i>directly or indirectly</i> from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds [...] <u>and any valuable benefits</u>;</p>	<p>CNS can accept the compromise text at left on condition that the EP accepts the rest of the text of this Article as in the GA.</p>
<p>(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;</p>	<p>(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;</p>	<p>(2) [AM 26] ‘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, <i>as well as property held jointly with a spouse</i>;</p>		<p>The Directive should not go into matrimonial regimes; it should define what property means, not who holds it or owns it. CNS therefore invites EP to accept the text of the COM proposal (which is also reproduced in the GA).</p>
<p>(3) ‘instrumentalities’ means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;</p>	<p>(3) ‘instrumentalities’ means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;</p>			<p>Consensus.</p>
<p>(4) ‘confiscation’ means a penalty or a measure, ordered by a court following proceedings in</p>	<p>(4) ‘confiscation’ means (...) <i>a final deprivation of property ordered by a court in relation to a criminal offence.</i></p>	<p>(4) [AM 27] ‘confiscation’ means a penalty or a measure ordered by <i>a judgment of the competent national court or</i></p>		<p>CNS strongly invites EP to accept the GA text, which is more neutral as regards the legal nature of confiscation,</p>

relation to a criminal offence resulting in the final deprivation of property;		following <i>judicial</i> proceedings, in relation to a criminal offence, resulting in the final deprivation of property <i>based upon a judgment</i> .		and which clearly indicates that only a court can order confiscation.
(5) 'freezing' means the temporary prohibition of the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property;	(5) 'freezing' means the temporary prohibition of the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property;			Consensus.
(6) 'criminal offence' means a criminal offence covered by:			Possible compromise solution: <i>'criminal offence' means a criminal offence covered by any of the instruments listed in Article 2a.</i>	CNS proposes this new structure, under which the Eurocrimes instruments will be listed in Art. 2a, while a definition of 'criminal offence' will be inserted in Art. 2.
(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 ⁶ ,				

⁶ OJ C 195, 25.6.1997, p.2.

<p>(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 euro⁷,</p>				
<p>(c) Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment⁸,</p>				
<p>(d) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism⁹, as amended by Council Framework Decision 2008/919/JHA of 9 December 2008¹⁰,</p>				
<p>(e) Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the</p>				

⁷ OJ L 140, 14.6.2000, p.1.

⁸ OJ L 149, 2.6.2001, p.1.

⁹ OJ L 164, 22.6.2002, p.3.

¹⁰ OJ L 330, 9.12.2008, p.21.

identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime ¹¹ ,				
(f) Council Framework Decision 2003/568/JHA on combating corruption in the private sector ¹² ,				
(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 ¹³ ,				
(h) Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems ¹⁴ ,				
(i) Council Framework Decision 2008/841/JHA of 24 October 2008 on				

¹¹ OJ L 182 of 5.7.2001, p.1.

¹² OJ L 192, 31.7.2003, p.54.

¹³ OJ L 335, 11.11.2004, p.8.

¹⁴ OJ L 69, 16.3.2005, p.67.

the fight against organised crime ¹⁵ ,				
(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 ¹⁶ ,				
(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 ¹⁷ .				
		<i>(ka) [AM 28] as well as any other legal instruments if those instruments provide specifically that this Directive applies to the criminal offences harmonised therein.</i>		CNS can accept this AM if "any" is deleted. The text should however be kept in Article 2a, see below.

¹⁵ OJ L 300, 11.11.2008, p.42.

¹⁶ OJ L 101, 15.4.2011, p.1.

¹⁷ OJ L 335, 17.12.2001, p. 1.

	<u>Article 2a</u>			
	<i>Scope</i>			
	(a) 'Criminal offence' means a criminal offence covered by:		Possible compromise solution: <i>This Directive shall apply to criminal offences covered by:</i>	See above. This new chapeau fits better in the context of an article on scope.
	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 ⁹ ,			
	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 ¹⁰ ,			
	c. Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment ¹¹ ,			
	d. Council Framework Decision 2002/475/JHA of 13 June 2002 on combating			

	terrorism ¹² , as amended by Council Framework Decision 2008/919/JHA of 9 December 2008 ¹³ ,			
	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 ¹⁴ ,			
	f. Council Framework Decision 2003/568/JHA on combating corruption in the private sector ¹⁵ ,			
	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 ¹⁶ ,			
	h. Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems ¹⁷ ,			
	i. Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight			

	against organised crime ¹⁸ ,			
	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 ¹⁹ ,			
	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 ²⁰ ,			
	<i>as well as any other future legal instruments if these instruments provide specifically that this Directive applies to criminal offences harmonised therein.</i>		Possible compromise solution: <i>as well as [...] other legal instruments if those instruments provide specifically that this Directive applies to the criminal offences harmonised therein.</i>	See above. CNS can basically accept AM 28.
<i>TITLE II</i>				
FREEZING AND CONFISCATION				
<u>Article 3</u>				
Conviction based				

confiscation				
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.	1. Each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds or property the value of which corresponds to such proceeds, subject to a final conviction for a criminal offence.	1. [AM 29] 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.	Possible compromise solution: 1. Each Member State shall take the necessary measures to enable it 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.	The reference to judicial authorities does not seem necessary in the light of the definition of ‘confiscation’ in Article 2(4). CNS can however accept the inclusion of "instrumentalities" on condition that EP shows flexibility on Article 4. It might be useful to clarify in the recitals which instrumentalities can notably be subject to confiscation (e.g. vehicles).
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.	2. (...)	<i>Deleted</i> [AM 30]		Consensus.
<u>Article 4</u>				
Extended powers of confiscation				

<p>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.</p>	<p>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 <i>serious</i> criminal offence <i>which is liable to give rise, directly or indirectly, to economic benefit</i>, where a court <i>on the</i> basis of the circumstances of the case, including specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question has derived from criminal conduct.</p>	<p>1. [AM 31] 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 <i>such as that the value of the property is disproportionate in relation to the lawful income of the convicted person</i>, a court finds it substantially more probable that the property in question has been derived <i>from activities of a criminal nature</i> than from other activities.</p>	<p>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 <i>serious</i> criminal offence <i>which is liable to give rise, directly or indirectly, to economic benefit</i>, where a court <i>on the</i> basis of the circumstances of the case, including specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, <i>is satisfied that the property in question has derived from criminal conduct</i>.</p>	<p>CNS insists on maintaining the requirement of "seriousness", given the intrusive character of extended confiscation and since not all criminal offences covered by the Eurocrimes instruments are serious offences. CNS could however endeavour to discuss a more concrete definition of "serious offences".</p> <p>CNS also insists on maintaining the criterion "<i>which is liable to give rise, directly or indirectly, to economic benefit</i>," in order there to be a sufficient link between the criminal offence and the property that is subject to confiscation.</p> <p>CNS considers it also preferable to keep the expression "criminal conduct", (instead of "criminal activities") in line with language used in other instruments, see e.g. Directive 2011/99/EU (EPO), art. 1.</p> <p>As regards the burden of proof, CNS strongly prefers keeping "is satisfied". This text is the result of extensive negotiations in the Council and constitute a fine and delicate balance. It seems very</p>
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				difficult to find alternative wording that is equally suitable.
2. Confiscation shall be excluded where the similar criminal activities referred to in paragraph 1	2. (...)	2. [AM 32] Confiscation shall be excluded where the criminal activities referred to in paragraph 1 <i>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.</i>		CNS observes that a confiscation order is a sanction that is imposed after the assessment of guilt of a crime. Even if separate proceedings were used to calculate the proceeds, these proceedings are still to be considered as a sequel to the prosecution in criminal proceedings. It is therefore unclear how a “ne bis in idem” situation can arise in these circumstances. CNS would appreciate receiving clarification from EP on this issue, and also on the question how this amendment is to be interpreted in the light of a broad scope of the instrument, as advocated by EP on other points.
(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 <i>ne bis in idem</i> principle applies.				
Article 5				
Non-conviction based confiscation	Non-conviction based confiscation in specific circumstances			
	<p>1. <i>Member States shall take the necessary measures to enable confiscation of proceeds and instrumentalities, at least in case of a serious criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and where the confiscation as provided for under Articles 3 or 4 would not be possible due to permanent illness or flight of the suspected or accused person.</i></p>	<p>1. [AM 33] <i>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</i></p>	<p>Possible compromise solution:</p> <p>1. <i>Member States shall take the necessary measures to enable confiscation of proceeds and instrumentalities, <u>at least in case of a serious criminal offence, where the confiscation as provided for under Articles 3 or 4 is not possible because the suspected or accused person has fallen ill or has fled.</u></i></p>	<p>CNS cannot accept NCBC in case of death, since the legal base (Art. 83(1)) requires that there should be a "criminal sanction" (when a person is dead, confiscation cannot anymore be considered to be a criminal sanction).</p> <p>CNS can however accept deleting the reference to "economic benefit", on condition that the reference to Articles 3 and 4 is kept.</p> <p>CNS insists on keeping a reference to "serious criminal offence", but could discuss making it more concrete (see under Art. 4).</p> <p>As regards the Engel criteria, CNS suggests accepting them in an appropriate form in the recitals, e.g. by redrafting recital 12a.</p>

		<i>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.</i>		
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:	2. Member States may implement the measures referred to in paragraph 1 either through in absentia proceedings or through non conviction based proceedings.	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:		CNS considers it important to keep the text of the GA.
(a) the death or permanent illness of the suspected or accused person prevents any further prosecution; or		(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.		(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.		

		<p>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.</p>		<p>CNS cannot accept the wording proposed by EP on legal grounds. Confiscation under this Directive, which is based on Article 83(1), has to be implemented by all Member States as a criminal sanction. Confiscation in rem (civil procedure) cannot be qualified as a criminal sanction and therefore cannot constitute a proper transposition of the Directive; it could however be maintained by MS as an additional mechanism in their national law.</p> <p>CNS further refers to the wording of Art. 1(1a) GA.</p>
Article 6				
Confiscation from a third party				
<p>1. Each Member State shall take the necessary measures to enable it to confiscate:</p>	<p>1. Each Member State shall take the necessary measures to enable it to confiscate (...) <i>proceeds or other property the value of which corresponds to the proceeds which were transferred to or acquired by third parties (...).</i></p>		<p>Possible compromise solution:</p> <p>1. Each Member State shall take the necessary measures to enable it to confiscate <i>proceeds or other property the value of which corresponds to such proceeds, which were transferred to or acquired by third parties.</i></p>	<p>While CNS can accept a reference to "instrumentalities" in Art. 3, it cannot accept such reference in this article on third party confiscation, since this would be too intrusive. Unlike proceeds, instrumentalities are property, which has been used for committing an offence, but</p>

				which, in general, was obtained legally and can be used also for legal purposes. Therefore, their confiscation does not aim at depriving the perpetrator of an unjustified enrichment, which is the objective of confiscation.
(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) [AM 34] proceeds <i>or instrumentalities</i> which were transferred <i>directly or indirectly to or acquired by third parties</i> , or		
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) [AM 35] other property which was transferred to <i>or acquired by</i> third parties in order to avoid confiscation of property the value of which corresponds to the proceeds.		
	<i>1a. This provision shall be construed so as not to prejudice the rights of bona fide third parties.</i>			CNS suggests keeping the text of the GA; see also the comments below.
2. The confiscation of proceeds or property referred to in paragraph 1 shall be possible where the property is subject to	2. (...)	2. [AM 36] The confiscation of proceeds or property referred to in paragraph 1 shall be possible where: [...]		

restitution or where				
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		[AM 37] <i>deleted</i>		Consensus.
(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) [AM 38] the proceeds or property were transferred for free or in exchange for an amount <i>significantly</i> lower than their market value;		<p>CNS cannot accept AM 38, 41, 42, since they are too detailed and risk to hamper the current well-functioning national legal systems. It is suggested however to address this issue in the recitals.</p> <p>Proposed recital:</p> <p><i>(13aa) The rules on third party confiscation should be construed so as not to prejudice the rights of bona fide third parties. The competent authorities of the Member States could presume that third parties are not bona fide in situations such as the following: in the case of proceeds, when the third party knew of their illicit origin or, in the absence of such knowledge, a reasonable person in his or her position</i></p>

				<i>would have suspected that their origin was illicit, based on concrete facts and circumstances; in the case of other property, when 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.</i>
		<i>(ba) [AM 41] 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;</i>		
		<i>(bb) [AM 42] in the case of other property, the third party knew that it was transferred in order to avoid confiscation of property the value of</i>		

		<i>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.</i>		
(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;		[AM 39] <i>deleted</i>		
(ii) 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.		[AM 40] <i>deleted</i>		

		[AM 43] <i>Article 6a</i>		
		<i>Fictitious assignment of property to third parties</i>		
		<i>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.</i>		
<u>Article 7</u>				
Freezing				
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.	1. Each Member State shall take the necessary measures to enable it to freeze property (...) with a view to possible later confiscation. <i>Those measures shall include urgent action to be taken when necessary in order to preserve property. Such measures shall be ordered by a competent national authority.</i>	[AM 44] Each Member State shall take the necessary measures to enable <i>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 have a right of appeal to</i> a court.		
2. Each Member State shall take the necessary measures to enable its competent authorities to immediately freeze	2. <i>If the competent national authority ordering the freezing is not a court or another judicial authority, each Member State shall take</i>	[AM 45] <i>deleted</i>		

property when 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.	<i>the necessary measures to ensure that the measure may be effectively reviewed by a court or another judicial authority.</i>			
	<i>3. Property in the possession of a third party, as referred to under Article 6, can be subject to freezing measures for the purposes of eventual confiscation in line with this Article.</i>			
Article 8				
Safeguards				
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 affected by the measures provided for under this Directive have the right to an effective remedy (...), in order to preserve their rights.	1. [AM 46] Each Member State shall take the necessary measures to ensure that the persons <i>whose instrumentalities and proceeds of crime are confiscated</i> under this Directive, <i>irrespective of their ownership at the time of confiscation</i> , have the right to an effective remedy, <i>including</i> the right to a fair trial.		
		<i>1a. [AM 47] Each Member State shall take the necessary measures to ensure that</i>		

		<i>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.</i>		
2. Each Member State shall take the necessary measures to ensure that reasons are given for any decision to freeze property, that the decision is communicated to the person affected as soon as possible after its execution and that it remains in force only for as long as it is necessary to preserve the property with a view to future confiscation. Each Member State shall provide for the effective possibility to appeal against the decision to freeze by the persons whose property is affected before a court at any time before a decision on confiscation is taken. Frozen property which is not subsequently confiscated shall be returned immediately to its legitimate owner.	2. Each Member State shall take the necessary measures to ensure (...) that the decision to freeze property (...) is communicated to the <i>affected</i> person as soon as possible after its execution. The decision to freeze property shall remain in force only for as long as it is necessary to preserve the property with a view to <i>possible later</i> confiscation. Each Member State shall provide for the effective possibility <i>for</i> the person whose property is affected to <i>contest</i> the decision to freeze before a court <i>or another judicial authority</i> (...). Frozen property which is not subsequently confiscated shall be returned immediately (...). The conditions or procedural rules under which such property is returned shall be determined by national law.			

<p>3. Each Member State shall take the necessary measures to ensure that reasons are given for any decision to confiscate and that the decision is communicated to the person affected. Each Member State shall provide for the effective possibility to appeal against the decision to confiscate before a court by the persons whose property is affected.</p>	<p>3. Each Member State shall take the necessary measures to ensure that reasons are given for any decision to confiscate and that the decision is communicated to the person affected. Each Member State shall provide for the effective possibility to <i>contest</i> the decision to confiscate before a court by the person to whom confiscation is directed.</p>			
<p>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.</p>	<p>4. In proceedings referred to in Article 4, the <i>affected</i> person shall have an effective possibility to contest <i>the circumstances of the case, including specific facts and available evidence (...) on the basis of which the property concerned is considered to be proceeds (...)</i>.</p>	<p>4. [AM 48] In proceedings referred to in Article 4, the <i>convicted</i> person shall have an effective possibility to contest the probability on the basis of which the property concerned is considered to be proceeds.</p>		
<p>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</p>	<p>5. In the cases referred to in Article 5, the person whose property is affected by the decision to confiscate shall (...) <i>have the right of access to a lawyer</i> throughout the confiscation proceedings relating to the (...) determination of the proceeds</p>	<p>5. [AM 49] In the cases referred to in Article 5, the person whose property is affected by the decision to confiscate shall <i>have the right to be informed that throughout the proceedings he or she has the right to be represented by a lawyer of his</i></p>		

<p>defence of the person relating to the establishment of the criminal offence and to the determination of the proceeds and instrumentalities.</p>	<p>and instrumentalities <i>in order to pursue his/her rights</i>.</p>	<p><i>or her choice or to be provided with an ex officio lawyer in accordance with the particular rules applicable in the Member State concerned</i> in order to pursue <i>his/her</i> rights of defence relating to the establishment of the criminal offence and to the determination of the proceeds and instrumentalities.</p>		
<p>6. Where the person whose property is affected is a third party, the person or the person's lawyer shall be informed of the proceedings that can lead to a decision to confiscate that property and shall be allowed to participate in those proceedings to the extent necessary to effectively preserve the person's rights. That person shall have at least the right to be heard, the right to ask questions and the right to provide evidence before a final decision on confiscation is taken.</p>	<p><i>6. A third party shall have recourse to an effective remedy in order to claim title of ownership. (...)</i></p>			
		<p>[AM 50] Each Member State shall take the necessary measures to ensure that, where as a result of a</p>		

		<i>criminal offence injured parties have claims against the accused, confiscation does not jeopardise the enforcement of such claims.</i>		
<u>Article 9</u>				
Determination of the extent of the confiscation and effective execution	<i>Effective confiscation and execution</i>			
Each Member State shall take the necessary measures to make it possible to determine the precise extent of the property to be confiscated <i>following a final conviction for a criminal offence or following proceedings as foreseen in Article 5, that has resulted in a decision to confiscate</i> , and to allow further measures to be taken to the extent necessary to effectively execute that decision to confiscate.	Each MS shall take the necessary measures to <i>enable it to identify and trace property to be frozen and confiscated even after a final conviction</i> for a criminal offence or following proceedings as foreseen in Article 5 <i>and to ensure the effective execution of a confiscation order, if such an order has already been issued.</i>	[AM 51] 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 decision to confiscate.		
<u>Article 10</u>				
Management of frozen property		[AM 52] Management of frozen <i>and confiscated</i> property		
1. Each Member State shall take the necessary	1. Each Member State shall take the necessary measures	1. [AM 53] Each Member State shall take the necessary		

<p>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.</p>	<p>(...) to ensure the adequate management of property frozen with a view of possible later confiscation.</p>	<p>measures, <i>such as the establishment of national centralised offices or equivalent mechanisms</i>, to ensure the adequate management of property frozen with a view to possible later confiscation, <i>and shall provide for the possibility of confiscated property being used for social purposes.</i></p>		
		<p><i>1a. [AM 54] In this regard, close cross-border cooperation and efficient exchange of information between Members States' police, judicial and financial authorities is essential.</i></p>		
<p>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.</p>	<p>2. Each Member State shall ensure that the measures referred to in paragraph 1 <i>allow to effectively manage</i> the economic value of such property, <i>including the possibility to</i> sell or transfer property which is liable to decline in value <i>where necessary.</i></p>	<p>2. [AM 55] Each Member State shall ensure that the measures referred to in paragraph 1 <i>relating to frozen property</i> optimise the economic value of such property, and shall include, <i>only if necessary</i>, the sale or transfer of property which is liable to decline in value. <i>Each Member State shall take all the necessary measures to prevent any criminal infiltration in this phase.</i></p>		
		<p><i>2a. [AM 56] Each Member State is called upon to take</i></p>		

		<p><i>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.</i></p>		
		<p><i>2b. [AM 57] 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.</i></p>		
TITLE III				
FINAL PROVISIONS				
<u>Article 11</u>				

Statistics				
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 (...).The statistics collected shall be sent to the Commission each year and shall include (...):	[AM 58] 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 <i>falling within the scope of this Directive</i> :		
a. the number of freezing orders executed,	a. the number of freezing orders executed,			
b. the number of confiscation orders executed,	b. the number of confiscation orders executed,			
c. the value of property frozen,	c. the <i>estimated</i> value of property frozen <i>with a view to possible later confiscation at the time of the freezing</i> ,			
d. the value of property recovered,	d. the <i>estimated</i> value of property recovered <i>at the time of confiscation</i> ,			
e. the number of requests for freezing orders to be executed in another	(...)			

Member State,				
f. the number of requests for confiscation orders to be executed in another Member State,				
g. the value of the property recovered following execution in another Member State,				
h. the value of the property destined to be reused for law enforcement, prevention or social purposes,				
i. the number of cases where confiscation is ordered in correlation with the number of convictions for the criminal offences covered by this Directive,				
j. the number of requests for freezing and confiscation orders refused by the courts,				
k. the number of requests for freezing and confiscation orders not upheld following legal				

challenges.				
		<i>(ka) [AM 59] 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.</i>		
<u>Article 12</u>				
Transposition				
1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... <i>[two years from the date of adoption]</i> . They shall forthwith transmit to the Commission the text of those provisions.	1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... <i>[three years from the date of adoption]</i> . They shall forthwith transmit to the Commission the text of those provisions.			
When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member	When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such			Consensus.

States shall determine how such reference is to be made.	reference is to be made.			
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.	2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.			Consensus.
<u>Article 13</u>				
Reporting				
The Commission shall, by [three years after transposition deadline] submit a report to the European Parliament and the Council, assessing the impact of existing national law on confiscation and asset recovery, accompanied, if necessary, by adequate proposals.	The Commission shall, by [three years after transposition deadline] submit a report to the European Parliament and the Council, assessing the impact of existing national law on confiscation and asset recovery, accompanied, if necessary, by adequate proposals.			Consensus.
<u>Article 14</u>				
Replacement of Joint Action 98/699/JHA and of Framework Decisions 2001/500/JHA and 2005/212/JHA				
1. Joint Action 98/699/JHA,	1. Joint Action 98/699/JHA,			Consensus.

point (a) of Article 1 and Articles 3 and 4 of Framework Decision 2001/500/JHA, and Articles 1 and 3 of Framework Decision 2005/212/JHA, are hereby replaced in relation to Member States participating in the adoption of this Directive, without prejudice to the obligations of the Member States relating to the time limit for transposition of the Framework Decisions into national law.	point (a) of Article 1 and Articles 3 and 4 of Framework Decision 2001/500/JHA, and Articles 1 and 3 of Framework Decision 2005/212/JHA, are hereby replaced in relation to Member States participating in the adoption of this Directive, without prejudice to the obligations of the Member States relating to the time limit for transposition of the Framework Decisions into national law.			
2. In relation to Member States participating in the adoption of this Directive, references to the Joint Action and to the provisions of the Framework Decisions referred to in paragraph 1 shall be construed as references to this Directive.	2. In relation to Member States participating in the adoption of this Directive, references to the Joint Action and to the provisions of the Framework Decisions referred to in paragraph 1 shall be construed as references to this Directive.			Consensus.
Article 15				
Entry into force				
This Directive shall enter into force on the twentieth day	This Directive shall enter into force on the twentieth day			Consensus.

following that of its publication in the <i>Official Journal of the European Union</i> .	following that of its publication in the <i>Official Journal of the European Union</i> .			
Article 16				
Addressees				
This Directive is addressed to the Member States in accordance with the Treaties.	This Directive is addressed to the Member States in accordance with the Treaties.			Consensus.
