

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

**TEXT SUBMITTED BY THE PRESIDENCY ON BEHALF OF THE COUNCIL IN VIEW
OF THE FOURTH TRILOGUE ON 2 OCTOBER 2013**

Article 1

Subject matter

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.
2. This Directive is without prejudice to the procedures that Member States may use to confiscate the property in question.

Article 2

Definitions

For the purpose of this Directive, the following definitions shall apply:

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

- (4) 'confiscation' means **a final deprivation of property ordered by a court in relation to a criminal offence;**
- (5) 'freezing' means the temporary prohibition of the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property;
- (6) '**criminal offence**' means **a criminal offence covered by any of the instruments listed in Article 2a.**

Article 2a

Scope

This Directive shall apply to criminal offences covered by: ¹

- 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 ²,
- 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 ³,
- c. Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment ⁴,

¹ Jurist-linguists will be asked to place these instruments in the appropriate order.

² OJ C 195, 25.6.1997, p.2.

³ OJ L 140, 14.6.2000, p.1.

⁴ OJ L 149, 2.6.2001, p.1.

- d. Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism ⁵, as amended by Council Framework Decision 2008/919/JHA of 9 December 2008 ⁶,
- 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 crime⁷,
- f. Council Framework Decision 2003/568/JHA on combating corruption in the private sector ⁸,
- 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 ⁹,
- h. [¹⁰]
- i. Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime ¹¹,
- 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/JHA¹²,

⁵ OJ L 164, 22.6.2002, p.3.

⁶ OJ L 330, 9.12.2008, p.21.

⁷ OJ L 182 of 5.7.2001, p.1.

⁸ OJ L 192, 31.7.2003, p. 54.

⁹ OJ L 335, 11.11.2004, p. 8.

¹⁰ OJ L 69, 16.3.2005, p. 67. [the reference to Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems has been deleted in view of the new point under "1"]

¹¹ OJ L 300, 11.11.2008, p. 42.

¹² OJ L 101, 15.4.2011, p. 1.

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/JHA¹³,

l. **Directive 2013/40/EU of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA**¹⁴,

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

Article 3

Conviction based confiscation

Member States shall take the necessary measures to enable confiscation, either wholly or in part, of instrumentalities and proceeds or property the value of which corresponds to such **instrumentalities or** proceeds, *subject to* a final conviction for a criminal offence.¹⁵

¹³ OJ L 335, 17.12.2001, p. 1.

¹⁴ OJ L 218, 14.8.2013, p. 8.

¹⁵ Accompanying recital (text could be merged into existing recitals, e.g. 9 or 9a):
"Confiscation of property the value of which corresponds to instrumentalities could be used in cases where, in view of the particular circumstances of the case at hand, such a measure is proportionate, having regard notably to the value of the instrumentalities concerned. Member States may also take into account whether and to what extent the convicted person is responsible for making the confiscation of the instrumentalities impossible."

Article 4

Extended powers of confiscation

1. Member States shall adopt the necessary measures to enable confiscation, either wholly or in part, of property belonging to a person convicted of a **serious** criminal offence which is liable to give rise, directly or indirectly, to economic benefit¹⁶, where a court, on the 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.¹⁷
2. **For the purposes of this Directive, the notion of 'serious criminal offence', as referred to in paragraph 1, shall include at least**
 - a) **production of child pornography, as referred to in Article 5(6) of Directive 2011/92/EU;**
 - b) **illegal system interference and of illegal data interference, as referred to in Articles 4 and 5 of Directive 2013/40/EU, where a significant number of information systems have been affected through the use of a tool, referred to in Article 7 of that Directive, designed or adapted primarily for that purpose;**

¹⁶ **Accompanying recital:**

"When determining whether a criminal offence is liable to give rise to economic benefit, Member States may take into account the modus operandi, e.g. if the offence was committed in the context of an organised crime or with the intention to generate regular profits from criminal offences."

¹⁷ **Accompanying recital:**

"(10a) Extended confiscation should be possible where a court is satisfied that the property in question has derived from criminal conduct. This does not mean that it must necessarily be established that the property in question has derived from criminal conduct. It could, for example, be sufficient that the court considers or can reasonably presume that it is substantially more probable that the property in question has been obtained from criminal conduct than from other activities. In this context, 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."

- c) **offences relating to participation in a criminal organisation, as referred to in Article 2 of Council Framework Decision 2008/841/JHA [, at least in cases where, within activities of such criminal organisation, an offence, referred to in Article 1(1) of that Framework Decision, has been committed];**¹⁸
- d) **a criminal offence that is punishable, according to the relevant instrument in Article 2a or, in case that instrument does not contain a threshold, according to the relevant national law, by a custodial sentence of a maximum of at least four years.**
(...)

¹⁸ The Council wonders if all offences relating to participation in a criminal organisation should be included in this point, also relatively minor offences (when there was mere participation, without a criminal offence being committed). It might be good to ensure that this point is applied in a proportionate way; a text suggestion has been put in brackets.

Article 5

Confiscation in specific circumstances

1. Member States shall take the necessary measures to enable confiscation of proceeds and instrumentalities **in cases where criminal proceedings have been initiated** ¹⁹ **regarding a criminal offence** ²⁰ which is liable to give rise, directly or indirectly, to economic benefit, **but where confiscation on the basis of Article 3 is not possible, at least due to illness or flight of the suspect or accused person.** ²¹

2. (...) **The measures referred to in paragraph 1 may be ordered** (...)
 - a) **either through in absentia proceedings; or**
 - b) **without a criminal conviction, following proceedings which, if the suspect or accused person would have been able to stand trial, could have led to a criminal conviction.**

¹⁹ It is suggested to explain in the recitals when criminal proceedings are supposed to have initiated (e.g. when a person has been charged or a criminal investigation has been opened).

²⁰ It is suggested to explain in the recitals that confiscation under Article 5 should only be used in cases where, in view of the particular circumstances of the case, such a measure is proportionate.

²¹ Accompanying recital:

*"Member States should take the necessary measures to enable confiscation in specific circumstances, at least in cases of illness or flight of the suspect or accused person, **when it is impossible for the person to attend the proceedings**. Member States may also provide for measures allowing confiscation in other situations, such as when the person dies after the proceedings have been initiated."*

Article 6

Confiscation from a third party

1. **Member States shall take the necessary measures to enable confiscation of proceeds or other property the value of which corresponds to the proceeds which were transferred to or acquired by third parties, at least if these parties knew or should have known that the purpose of the transfer or acquisition was to avoid confiscation, based on concrete facts and circumstances, including that the transfer was carried out for free or in exchange for an amount significantly lower than the market value.**

2. **This provision shall be construed so as not to prejudice the rights of bona fide third parties.**

Article 7

Freezing

1. Member States shall take the necessary measures to enable **the freezing** of property with a view to possible later confiscation. **Those measures, which shall be ordered by a competent authority, shall include urgent action to be taken when necessary in order to preserve property.**
2. **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 (...).**

Article 8

Safeguards

1. Member States 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 a fair trial** ²² in order to preserve their rights.

²² It is suggested to explain in the recitals (recital 18) that the right to a fair trial shall be available and shall be applied in accordance with the Charter of Fundamental Rights, the European Convention on Human rights and other relevant texts. In the same recital it can also be further clarified how the right to a fair trial works in practice.

2. Member States shall take the necessary measures to ensure that the decision to freeze property is communicated to the *affected* person as soon as possible after its execution. **Such communication shall indicate, at least briefly, the reason or reasons for the decision concerned.** ²³ [...] **When it is necessary to prevent prejudice to a criminal investigation, the competent authorities may postpone communicating the decision to freeze property to the affected person.**
 - 2a. **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 **possible later** confiscation.
 - 2b. Member States shall provide for the effective possibility **for** the person whose property is affected to **contest** the decision to freeze before a court, **in accordance with procedures in national law. Such procedures may provide that when the initial decision to freeze has been taken by a competent authority other than a judicial authority, such decision must firstly be submitted for validation or review to a judicial authority before it can be contested before a court.**
 - 2c. 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.**
3. Member States 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. Member States shall provide for the effective possibility to **contest** the decision to confiscate before a court by the person to whom confiscation is directed.

²³

Accompanying recital:

"The purpose of communicating the decision to freeze property is inter alia to allow the person to contest the decision if he so wishes. Therefore, such communication should indicate, at least briefly, the reason or reasons for the decision concerned, it being understood that such indication could be very succinct."

4. In proceedings referred to in Article 4, the **affected** person shall have an effective possibility to contest **the circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that has derived from criminal conduct.**
5. In the cases referred to in Article 5, the persons whose property is affected by the decision to confiscate shall **have the right of access to a lawyer** throughout the confiscation proceedings relating to the determination of the proceeds and instrumentalities **in order to pursue their rights. The persons concerned shall be informed that they have this right.**²⁴
6. **Third parties shall be entitled to claim title of ownership or other property rights, including in the cases referred to in Article 6.**²⁵
7. **Where as a result of a criminal offence victims have claims against the person who is subject to a confiscation measure provided for under this Directive, Member States shall take the necessary measures to ensure that the confiscation measure does not prevent these victims from seeking compensation for their claims.**

²⁴ Text to be finalised in the light of the final text of Article 5. The following wording would be included in the recitals: *"This Directive should be implemented taking account of the provisions of Directive 2012/13/EU on the right to information in criminal proceedings and Directive 2013/XX/EU on the right of access to a lawyer in criminal proceedings."*

²⁵ Recital 19 would be amended as follows:

*"(19) The measures provided for in this Directive affect substantially the rights of persons, not only of suspected or accused persons but also of 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. **This includes the right to be heard for third parties who claim that they are the owner of the property concerned, or who claim that they have other property rights ("real rights", "ius in re"), such as the right of usufruct.** The decision to freeze property should be communicated to the affected person as soon as possible after its execution. Nevertheless, competent authorities may postpone **communicating such decision to the affected person due to the needs of the investigation.**"*

Article 9

Effective confiscation and execution

Member States shall take the necessary measures to *enable the identification and tracing of property to be frozen and confiscated even after a* final conviction for a criminal offence or following proceedings as foreseen in Article 5 *and to ensure the effective execution of a confiscation order, if such an order has already been issued.*

Article 10

Management of frozen property

1. Member States shall take the necessary measures, *for example by the establishment of centralised offices, a set of specialised offices or equivalent mechanisms*, to ensure the adequate management of property frozen with a view to possible later confiscation.²⁶
2. Member States shall ensure that the measures referred to in paragraph 1 (...) *include the possibility to sell or transfer property where necessary.*

²⁶ Accompanying recital, inspired by AM 56:

"Member States should consider taking measures allowing that confiscated property be used for public interest or social purposes. Such measures could inter alia comprise earmarking property for law enforcement and crime prevention projects, as well as for other projects of public interest and social utility. When managing frozen property and when taking measures concerning the use of confiscated property, Member States should take appropriate action to prevent criminal or illegal infiltration."

Article 11

Statistics

1. 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:
 - a. the number of freezing orders executed,
 - b. the number of confiscation orders executed,
 - c. the *estimated* value of property frozen, *at least of property frozen with a view to possible later confiscation at the time of the freezing*,
 - d. the *estimated* value of property recovered *at the time of confiscation*.

2. **Member States shall also send each year the following statistics to the Commission, if these statistics are available at a central level in the Member State concerned:**
 - a. **the number of requests for freezing orders to be executed in another Member State,**
 - b. **the number of requests for confiscation orders to be executed in another Member State,**
 - c. **the value of the property recovered following execution in another Member State.**

Article 12

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... [*three years from the date of adoption*]. They shall forthwith transmit to the Commission the text of those provisions.
2. 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 reference is to be made.
3. 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.

Article 13

Reporting

The Commission shall, by [three years after the date mentioned in Article 12(1)] 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.

Article 14

Replacement of Joint Action 98/699/JHA and of Framework Decisions 2001/500/JHA and 2005/212/JHA

1. Joint Action 98/699/JHA, 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.

Article 15

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 16

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.
