EUROPEAN COMMISSION

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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

{SWD(2012) 31 final}
{SWD(2012) 32 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. General context

This proposal for a Directive aims to make it easier for Member States' authorities to confiscate and recover the profits that criminals make from cross-border serious and organised crime. It seeks to attack the financial incentive which drives crime, to protect the licit economy against criminal infiltration and corruption, and to return criminal profits to public authorities providing services for citizens. It responds to the current economic context, where a financial crisis and a slowdown in economic growth creates new opportunities for criminals, increased vulnerabilities in our economy and financial system, and new challenges for public authorities to finance growing needs for social services and assistance.

Organised crime groups are illegal enterprises designed to generate profit. They engage in a multitude of cross-border criminal activities - such as drug trafficking, trafficking in human beings, illicit arms trafficking, and corruption - generating very large earnings.

At global level, according to United Nations estimates, the total amount of criminal proceeds in 2009 was approximately USD 2.1 trillion, or 3.6% of global GDP[1]. There are no reliable estimates of the size of criminal profits in the European Union[2], but in Italy the proceeds of organised crime laundered in 2011 have been estimated by the Bank of Italy at € 150 billion. In the United Kingdom in 2006 organised criminal revenue was estimated at £15 billion.

The profits derived from these activities are laundered and reinvested into licit activities. Organised crime groups increasingly hide and reinvest assets in Member States other than the one where the crime is committed[3]. This weakens our ability to fight cross-border serious and organised crime in the EU as a whole, and affects the functioning of the Internal Market by distorting competition with legitimate businesses and undermining trust in the financial system[4]. Finally, serious and organised crime deprives national governments and the EU budget of tax revenues.

All Member States should therefore have in place an efficient system to freeze, manage and confiscate criminal assets, backed by the necessary institutional setup, financial and human resources. However, although regulated by EU and national laws, confiscation of criminal assets remains underdeveloped and underutilised. The overall amount recovered from crime

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1 United Nations Office on Drugs and Crime, "Estimating illicit financial flows resulting from drug trafficking and other transnational organised crime", October 2011.

2 More estimates exist on the value of criminal markets. The global drug trade generated USD 321 billion in 2005 according to the United Nations. Trafficking in human beings is globally worth USD 42.5 billion per year according to the Council of Europe. The global market in counterfeit goods was estimated at up to USD 250 billion per year by the OECD. Corruption in the EU has been estimated to cost as much as 1 % of EU GDP per year.

3 See Justice and Home Affairs Council Conclusions on confiscation and asset recovery of June 2010, Council document 7769/3/10. For similar statements, see the Executive Summary of the EU Organised Crime Threat Assessment 2011 and the Eurojust Annual Report 2010.

4 See also Council Conclusions on Economic Crisis Prevention and Support for Economic Activity, 23.4.2010 (Council document 7881/10), point 7d.

in the EU remains modest compared to the estimated revenues of organised criminal groups[5]. For example, in 2009 confiscated assets amounted to € 185 million in France, £ 154 million in the United Kingdom, € 50 million in the Netherlands and € 281 million in Germany.

As an effective tool in the fight against organised and serious crime, confiscation of criminal assets has been given strategic priority at EU level. The 2009 Stockholm Programme[6] calls the Member States and the Commission to make the confiscation of criminal assets more efficient and to strengthen the cooperation between Asset Recovery Offices.

The Justice and Home Affairs Council Conclusions on confiscation and asset recovery adopted in June 2010[7] call for a more coordinated approach between Member States to achieve a more effective and widespread confiscation of criminal assets. They call, in particular, on the Commission to consider strengthening the legal framework in order to achieve more effective regimes for third party confiscation and extended confiscation. They stress the importance of all phases of the confiscation and asset recovery process and recommend measures to preserve the value of assets during that process.

The Commission Communication "An Internal Security Strategy in Action"[8] states that the Commission will propose legislation to strengthen the EU legal framework on confiscation, in particular to allow more third-party confiscation[9] and extended confiscation, and to facilitate mutual recognition of non-conviction-based[10] confiscation orders between Member States.

The European Parliament adopted in October 2011 an own initiative report on organised crime which calls the Commission to propose new legislation on confiscation as soon as possible, in particular rules on the effective use of extended and non-conviction based confiscation, rules allowing for the confiscation of assets transferred to third parties and rules concerning the mitigation of the burden of proof after the conviction of an offender for a serious offence concerning the origin of assets held by the offender[11].

In its Communication on the proceeds of crime adopted in 2008[12] the Commission identified ten strategic priorities for future work and highlighted shortcomings in the EU legal framework (lack of implementation, lack of clarity of some provisions, lack of coherence between existing provisions).

In this context, the Commission proposes a Directive laying down minimum rules for Member States with respect to freezing and confiscation of criminal assets through direct confiscation, value confiscation, extended confiscation, non-conviction based confiscation (in

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5 For example, in the United Kingdom an official estimate in 2006 put organised criminal revenue at £15 billion, while in the same year £125 million were recovered by the State, see Home Office (2006) cited in the 2010 Europol Organised Crime Threat Assessment.

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

7 Council document 7769/3/10.

8 COM(2010) 673 final of 22.11.2010.

9 Third party confiscation involves the confiscation of assets that have been transferred by an investigated or convicted person to a third party.

10 Non-conviction based procedures allow the freezing and confiscation of property irrespective of a prior conviction of its owner in a criminal court.

11 European Parliament Report on organised crime in the European Union, adopted on 25 October 2011, Document A7-0333/2011 [*provisional reference*].

12 "Proceeds of organised crime - Ensuring that 'crime does not pay'", COM (2008) 766 final of 20.11.2008.

limited circumstances), and third-party confiscation. The adoption of those minimum rules will further harmonise the Member States' freezing and confiscation regimes, and thus facilitate mutual trust and effective cross-border cooperation.

The Commission will moreover continue to explore and research possible ways to strengthen the mutual recognition of freezing and confiscation orders, while taking full account of fundamental rights. Over time, all confiscation and freezing orders issued by a Member State should be effectively enforced against assets located in another Member State. To this end, the Commission will continue to encourage Member States to implement the existing EU mutual recognition legal instruments.

This proposal will imply no cost for the EU budget. It does not concern the budgetary allocation of the product of confiscation.

1.2. Existing Community provisions in this area

The current EU legal framework on the freezing and confiscation of proceeds of crime consists of four Council Framework Decisions (FD) and one Council Decision:

- Framework Decision 2001/500/JHA[13], which obliges Member States to enable confiscation, to allow value confiscation[14] where the direct proceeds of crime cannot be seized and to ensure that requests from other Member States are treated with the same priority as domestic proceedings;

- Framework Decision 2005/212/JHA[15], which harmonises confiscation laws. Ordinary confiscation, including value confiscation, must be available for all crimes punishable by 1 year imprisonment. Extended confiscation[16] must be available for certain serious offences, when "committed within the framework of a criminal organisation";

- Framework Decision 2003/577/JHA[17], which provides for mutual recognition of freezing orders;

- Framework Decision 2006/783/JHA[18], which provides for the mutual recognition of confiscation orders; and

- Council Decision 2007/845/JHA[19] on the exchange of information and cooperation between Asset Recovery Offices obliges Member States to set up or designate national Asset Recovery Offices as national central contact points which facilitate, through enhanced cooperation, the fastest possible EU-wide tracing of assets derived from crime.

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13 OJ L 182 of 05.07.2001.

14 Value confiscation involves the confiscation of an amount of money equivalent to the value of the proceeds of a crime.

15 OJ L 68/49 of 15.3.2005.

16 Extended confiscation involves the confiscation of assets which go beyond the direct proceeds of a crime so that there is no need to establish a connection between suspected criminal assets and a specific criminal conduct.

17 OJ L 196/45 of 2.8.2003.

18 OJ L 328/59 of 24.11.2006.

19 OJ L 332/103 of 18.12.2007.

These instruments were developed essentially to fight serious and organised crime. However, apart from the provisions on extended confiscation, the current EU legal framework on substantive criminal law applies to the confiscation of the proceeds from any criminal offence punishable by deprivation of liberty for more than a year.

1.3. Consistency with other policies

The Commission Work Programme 2011 includes the current proposal as a strategic initiative, as part of a broader political initiative aimed at protecting the licit economy from criminal infiltration. That initiative includes measures to address corruption in the EU[20] and an EU anti-fraud strategy[21] adopted in June 2011. By protecting the licit economy, this proposal will contribute to growth and jobs in Europe and help facilitate sustainable growth in line with the Europe 2020 strategy [22].

The anti-corruption package adopted by the Commission in June 2011 established a reinforced policy approach against corruption in a wide range of internal and external EU policies and set up a new reporting mechanism for evaluating Member States' efforts against corruption on a regular basis, starting with 2013. The Communication on Fighting Corruption in the EU called upon the Member States to take all necessary steps to ensure the effective detection, prosecution, and a stable track-record of dissuasive penalties and recovery of criminally acquired assets in corruption cases. It also stressed the need for a revised EU legal framework on confiscation and asset recovery to ensure that courts in Member States are able to effectively confiscate criminal and criminally tainted assets and to fully recover the corresponding values, including in cases involving corruption.

In the same context of protection of licit economy, the Commission launched in 2011 several initiatives aiming to provide better safeguards for taxpayers' money at EU level against fraud and corruption. These include a Commission proposal for amending the legal framework of OLAF[23], the Communication on the protection of EU financial interests by criminal law and administrative investigations[24], and the Communication on a Commission Anti-Fraud Strategy (CAFS). The implementation of CAFS is carried out in close coordination with the work on the EU Anti-Corruption Report. The latter will focus on the enforcement of anti-corruption policies in the Member States, while CAFS focuses on measures for preventing and combating fraud and corruption, in particular against EU funds.

This proposal is consistent with the EU anti-money laundering legislation, notably the EU Third Anti-Money Laundering Directive[25] and the related initiatives that the Commission, the other EU institutions and the Member States are undertaking in this area.

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20 COM(2011) 307, 308 and 309 and C(2011) 3673 final of 6.6.2011.

21 COM(2011) 376 final of 24.6.2011.

22 COM(2010)2020 final of 3.3.2010. See also Council Conclusions on Economic Crisis Prevention and Support for Economic Activity, 23.4.2010 (Council document 7881/10), point 7d.

23 (COM(2011) 135 final) of 17.3.2011.

24 (COM(2011) 293 final) of 26.5.2011.

25 Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309/15 of 25.11.2005.

2. RESULTS OF THE CONSULTATIONS WITH THE INTERESTED PARTIES AND THE IMPACT ASSESSMENT

2.1. Consultations with the interested parties

The proposal has been prepared in accordance with the Commission's better regulation principles. Minimum standards for consultation of interested parties have been met in the preparation of this proposal and the impact assessment.

Wide consultations and discussions with experts were carried out in the Camden Asset Recovery Inter-Agency Network Plenary meeting[26] (September 2010) and in eight meetings of the EU informal Asset Recovery Offices' Platform between 2009 and 2011.

No open Internet consultation was carried out, as confiscation is a specialised topic where limited expertise is available. Contacts were established with civil society, notably with organisations promoting legality, the fight against organised crime and the protection of the victims of crime[27].

Issues relating to confiscation of criminal assets are also widely discussed between experts. International practitioners' meetings and strategic seminars on confiscation and asset recovery[28] are increasingly taking place. Practitioners consider most of the provisions included in the proposal to reflect best practices as set out in the recommendations issued by the Camden Asset Recovery Inter-Agency Network between 2005 and 2010. The provisions are also in line with the recommendations on confiscation from the OECD Financial Action Task Force (FATF)[29].

The Member States expressed their position on these issues in 2010 in the JHA Council Conclusions mentioned above. Although there was broad agreement on most issues, a few Member States expressed reservations regarding non-conviction based confiscation. Conversely, on other issues (e.g. third party confiscation, asset management) Member States agreed that a stronger EU response is necessary.

Defence lawyers expressed concerns about an increase in extended confiscation, non-conviction based confiscation and third party confiscation powers due to fundamental rights concerns (possible limitation of the right to property and right to a fair trial). As explained below, those concerns are carefully addressed in the proposal.

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[26] This network (CARIN), supported by the Commission and by Europol, is an international network of asset recovery practitioners which includes experts (one law enforcement and one judicial contact point) from over 50 countries and jurisdictions, including 26 EU Member States. Its objectives are the exchange of best practices and the improvement of inter-agency cooperation in cross-border asset recovery matters.

[27] For example the Commission services held several bilateral meetings with representatives of the FLARE (Freedom, Legality and Rights in Europe) Network and their associated networks.

[28] For example the Centres of Excellence for Asset Recovery Training (CEART) Seminar and the Eurojust Strategic Seminar held in 2010.

[29] Notably Recommendation 4 of the FATF Recommendations as revised in February 2012.

2.2. Impact assessment

In line with its better regulation policy, the Commission conducted an impact assessment of policy alternatives based on an external study which was completed in March 2011[30].

The external study is based on a broad consultation of practitioners and experts, including interviews with some national contact points of the Camden Asset Recovery Inter-Agency Network. As shown by their position in negotiating the Council Conclusions mentioned above, Member States generally agree on the need for stronger EU rules on asset recovery.

The impact assessment also draws on the conclusions and recommendations of another study, finalised in 2009[31]. It analyses Member States' practices in confiscation, focusing in particular on what has proven effective at national level with a view to promoting and exchanging best practices. The study identified several obstacles to effective confiscation, such as conflicting legal traditions, resulting in the lack of a common approach to confiscation measures, difficulties in securing and maintaining assets, lack of resources and training, limited cross-agency contacts and a lack of coherent and comparable statistics.

Finally, the impact assessment is based on the implementation reports issued by the Commission on the existing EU legal acts. The reports on Framework Decisions 2005/212/JHA[32], 2003/577/JHA[33] and 2006/783/JHA[34] show that Member States have been slow in transposing them and that the relevant provision have been often implemented in an incomplete or incorrect way. Only the degree of implementation of Council Decision 2007/845/JHA in the Member States can be considered as moderately satisfactory[35].

The impact assessment analysed several policy options representing different degrees of EU-level intervention: a non-legislative option, a minimal legislative option (correcting deficiencies in the existing EU legal framework which inhibit it from functioning as intended) and a maximal legislative option (going beyond the aims of the existing EU legal framework). Within the latter, two maximal legislative sub-options are analysed, one with and one without EU level action relating to mutual recognition of freezing and confiscation orders between Member States.

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30 Framework Service Contract No JLS/2010/EVAL/FW/001/A1, *Study for an Impact Assessment on a proposal for a new legal framework on the confiscation and recovery of criminal assets.*

31 "*Assessing the effectiveness of EU Member States' practices in the identification, tracing, freezing and confiscation of criminal assets*", available at http://ec.europa.eu/home-affairs/policies/crime/crime_confiscation_en.htm

32 Report from the Commission pursuant to Article 6 of the Council Framework Decision of 24 February 2005 on Confiscation of Crime-related Proceeds, Instrumentalities and Property (2005/212/JHA), COM(2007) 805 final of 17.12.2007.

33 Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, COM(2008) 885 final of 22.12.2008.

34 Report from the Commission pursuant to Article 22 of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, COM(2010) 428 final of 23.8.2010.

35 Report from the Commission based on Article 8 of the Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, COM(2011) 176 final of 12.4.2011.

The preferred policy option is the maximal legislative option. This option would considerably enhance the harmonisation of national rules on confiscation and enforcement, *inter alia* by amending existing provisions on extended confiscation, and introducing new provisions on non-conviction based confiscation and third party confiscation and introducing more effective rules on the mutual recognition of freezing and confiscation orders.

Among other fundamental rights, the impact assessment analysed the impacts on the protection of personal data, which were not considered as substantial.

The full impact assessment report is available at: http://ec.europa.eu/home-affairs/policies/crime/crime_confiscation_en.htm

2.3. Legal basis

This proposal is based on Articles 82(2) and 83(1) of the TFEU.

The conferral of powers related to confiscation and asset recovery has changed following the entry into force of the Lisbon Treaty. As the main legal basis for this proposal is Article 83(1) TFEU, its scope is limited to the offences in the areas listed in that Article, namely terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Illicit arms trafficking is covered where that crime is committed in the context of organised crime.

One of the listed areas of crime is "organised crime". The proposal will therefore cover other criminal activities not specifically listed in Article 83(1) where those activities are committed by participating in a criminal organisation as defined in Framework Decision 2008/841/JHA on the fight against organised crime[36].

The limitation of the scope of this proposal to the areas of crime listed in Article 83(1), including crimes committed by participating in a criminal organisation, implies that existing provisions of EU rules on confiscation should remain in place in order to maintain a degree of harmonisation with respect to criminal activities which fall outside the scope of this Directive. The proposal accordingly maintains in force Articles 2, 4 and 5 of Framework Decision 2005/212/JHA.

2.4. Subsidiarity, proportionality and respect for fundamental rights.

Under Article 5(3) TEU, the Union shall only act if the proposed action cannot be sufficiently achieved by the Member States. Article 67 TFEU foresees that the Union shall provide citizens with a high level of security by preventing and combating crime. Confiscating criminal assets is increasingly recognised as an important tool to combat organised crime, which is very often transnational in nature and thus needs to be tackled on a common basis. The EU is therefore better placed than individual Member States to regulate freezing and confiscation of criminal assets.

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[36] Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300/42 of 11.11.2008.

The assets of organised criminal groups are increasingly hidden and invested outside their home country (often in several countries)[37]. This double cross-border dimension (of organised crime activities and their investments) further justifies EU action to target the assets of organised criminal groups.

All provisions fully respect the principle of proportionality, and fundamental rights, including the right to property, the presumption of innocence and the right of defence, the right to a fair trial, the right to a fair and public hearing within a reasonable time, the right to an effective judicial remedy before a court and the right to be informed on how to exercise it, the right to respect for private and family life, the right to protection of personal data, 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.

In particular, the introduction of harmonised non-conviction based confiscation provisions is foreseen only for very limited circumstances, i.e. where the defendant cannot be prosecuted due to death, illness or flight. Extended confiscation is allowed only to the extent that a court finds, based on specific facts, that a person convicted of an offence is in possession of assets which are substantially more probable to be derived from other similar criminal activities than from other activities. The convicted person is given an effective possibility of rebutting such specific facts. Moreover, the extended powers of confiscation cannot be applied to the alleged proceeds of criminal activities for which the affected person has been acquitted in a previous trial, or in other cases where the *ne bis in idem* principle applies. Third party confiscation is allowed only under specific conditions, i.e. where the acquiring third party paid an amount lower than market value and should have suspected that the assets are proceeds of crime, and after an assesment showing that confiscation of assets directly from the person who transferred them is unlikely to succeed. Finally, specific safeguards and judicial remedies are included in the proposal in order to ensure an equal level of protection and respect for fundamental rights. These include the right to be informed about the proceedings, the right to be represented by a lawyer, the obligation to communicate any decision affecting property as soon as possible and to have an effective possibility to appeal against such decision. These specific remedies are foreseen not only for accused or suspected person but also for other persons in the context of third party confiscation.

Although it has avoided ruling on the principled question of the compatibility of non-conviction based and extended confiscation regimes with the European Convention on Human Rights, the European Court on Human Rights (ECtHR) has rendered several decisions, upholding their application in particular cases. National non-conviction based procedures involving reversals of the burden of proof on the issue of the legitimacy of assets (which are more far-reaching than the provisions in this Directive) have been upheld by the ECtHR in specific cases, so long as they were applied fairly in the particular case and with adequate safeguards in place for the affected person. For example an application of the Italian legislation was held to be a proportionate restriction on fundamental rights in as much as it constitutes a "necessary weapon" in the fight against the Mafia[38]. In another case an application of the United Kingdom civil confiscation regime was found not to violate the ECHR[39].

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37 See references in footnote 2.

38 Judgment Raimondo vs Italy of 22 February 1994.

39 Judgment Walsh v. Director of the Asset Recovery Agency (United Kingdom) (2005).

2.5. Choice of instruments

In order to amend the EU provisions on harmonisation, a Directive replacing Joint Action 98/699/JHA and, in part, Framework Decisions 2001/500/JHA and 2005/212/JHA is the only viable instrument.

2.6. Specific provisions

- *Objective (Article 1)*

This provision clarifies that the Directive provides only minimum rules (national legislation can be more far-reaching) and that it concerns confiscation of proceeds and instrumentalities in criminal matters.

- *Definitions (Article 2)*

Most definitions are taken from previous EU Framework Decisions or from international conventions. The definition of “proceeds” has been extended as compared to the definition set out in Framework Decision 2005/212/JHA in order to include the possibility of confiscating all valuable benefits resulting from the proceeds of crime, including indirect proceeds.

The definition of "criminal offence" cross-refers to precise definitions in the areas of crime listed in Article 83(1) TFEU as set out in existing EU legislation.

- *Confiscation (Article 3)*

This provision incorporates (part of) Article 2 of Framework Decision 2005/212/JHA and (part of) Article 3 of Framework Decision 2001/500/JHA. It requires 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.

- *Extended powers of confiscation (Article 4)*

Extended confiscation signifies the ability to confiscate assets which go beyond the direct proceeds of a crime. A criminal conviction may be followed by the (extended) confiscation not only of assets associated with the specific crime, but of additional assets which the court determines are the proceeds of other similar crimes.

Extended confiscation powers are already provided for in the EU legislation. Framework Decision 2005/212/JHA obliges Member States to allow the confiscation of assets belonging directly or indirectly to persons convicted of certain serious crimes (related to organised crime and terrorism activities). However, this Framework Decision establishes alternative minimum set of rules for extended confiscation, leaving Member States free to apply one, two or all three options. The Commission implementation report showed that these provisions are unclear and led to piecemeal transposition. Moreover, the alternative options for extended confiscation have restricted the scope for mutual recognition of confiscation orders. The authorities in one Member State will execute confiscation orders issued by another Member State only if these are based on the same alternative options applied in that Member State. As a result, the mutual recognition of orders based on extended confiscation is problematic.

This proposal introduces extended confiscation for the crimes listed in Article 83(1) TFEU as set out in existing Union legislation. It also streamlines the existing regime of alternative

options for extended confiscation, by providing for a single minimum standard. Extended confiscation can take place where a court finds, based on specific facts, that a person convicted of an offence covered by this Directive is in possession of assets which are substantially more probable to be derived from other criminal activities of similar nature or gravity than from any other activities. Extended confiscation is excluded where the similar criminal activities could not be the subject of criminal proceedings due to prescription under national criminal law. The proposal also excludes from confiscation the proceeds of alleged criminal activities for which the affected person has been finally acquitted in a previous trial (thereby upholding the presumption of innocence protected under Article 48 of the Charter of Fundamental Rights) or other situations where where the *ne bis in idem* principle applies.

- *Non-conviction based confiscation (Article 5)*

This provision introduces provisions on non-conviction based confiscation in limited circumstances, with a view to addressing cases where criminal prosecution cannot be exercised. It accordingly concerns confiscation in relation to a criminal offence, but it allows Member States to choose whether confiscation should be imposed by criminal and/or civil/administrative courts. Non-conviction based procedures allow to freeze and confiscate an asset without a prior conviction of its owner in a criminal court.

In order to meet the requirement of proportionality, the proposal would not introduce non-conviction based confiscation in all cases, but makes it possible only in circumstances where a criminal conviction cannot be obtained because the suspect has died, is permanently ill or when his flight or illness prevents effective prosecution within a reasonable time and poses the risk that it could be barred by statutory limitations.

This provision mirrors the provisions of the United Nations Convention against Corruption. In order to facilitate international cooperation in confiscation, the Convention encourages the States parties to consider taking the necessary measures to allow confiscation of the proceeds of corruption without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases (Art. 54, paragraph 1, letter c). It also draws on the work of the OECD Financial Action Task Force (FATF), which encourages its member countries to consider adopting measures allowing the proceeds of crime or instrumentalities to be confiscated without requiring a criminal conviction, or requiring an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation (Recommendation no. 3). This provision further draws on the views expressed by the G8 Lyon-Roma Group in a report emphasizing that, while in principle conviction based confiscation should be pursued, there are instances where criminal prosecution is not possible due to the defendant being dead or having fled, to a lack of sufficient evidence necessary to start a criminal prosecution, or to other technical reasons[40]. The introduction of provisions on confiscation without a criminal conviction has been supported also by practitioners gathered in the Camden Asset Recovery Inter-Agency Network and the Asset Recovery Offices' Platform.

- *Third party confiscation (Article 6)*

[40] Final report of the Italian project on "Confiscation: Legal issues and international cooperation" developed within the Criminal Legal Affairs SubGroup (CLASG) of the G8 Roma-Lyon Group.

Criminals often transfer their assets to knowing third parties as soon as they come under investigation, in order to avoid confiscation. Third party confiscation involves the confiscation of assets that have been transferred by an investigated or convicted person to third parties. The Member States' national provisions on third party confiscation are diverging. This hampers the mutual recognition of freezing and confiscation orders on assets transferred to a third party.

In order to meet the requirements of proportionality and protect the position of a third party acquiring property in good faith, the proposal does not introduce minimum harmonisation provisions on third party confiscation in all cases. This provision requires third party confiscation to be available for the proceeds of crime or other property of the defendant received for a price lower than market value and that a reasonable person in the position of the third party would suspect to be derived from crime or to be transferred in order to circumvent the application of confiscation measures. It clarifies that the reasonable-person-test must be based on concrete facts and circumstances to prevent arbitrary decisions. Moreover, third party confiscation should be possible only following an assessment, based on specific facts, that the confiscation of property of the convicted, suspected or accused person is unlikely to succeed, or in situations where unique objects must be restored to their rightful owner.

- *Freezing (Article 7)*

The first paragraph of this provision requires Member States to enable the freezing of property or instrumentalities in danger of being dissipated, hidden or transferred out of the jurisdiction in view of possible later confiscation. It clarifies that such measures should be ordered by a court.

The introduction of the possibility to use freezing powers in urgent cases in order to prevent asset dissipation in situations where waiting for an order issued by a court would jeopardize the possibilities of freezing is a longstanding priority concern of prosecutors and law enforcement agencies. The second paragraph of this Article requires Member States to have in place measures to ensure that assets in danger of being dissipated, hidden or transferred out of their jurisdiction can be frozen immediately by the competent authorities, prior to seeking a court order or pending its request.

- *Safeguards (Article 8)*

According to the jurisprudence of the European Court of Human Rights and the Charter of Fundamental Rights of the European Union, fundamental rights such as the right to property are not absolute. They can legitimately be subject to restrictions provided these restrictions are provided for by law and - subject to the principle of proportionality - are necessary and genuinely meet objectives of general interest or the need to protect the rights and freedoms of others, as in the prevention of organised crime.

Article 47 of the EU Charter of Fundamental Rights guarantees the right to an effective remedy and the right to a fair trial. Inasmuch as freezing or confiscation orders interfere with the right to property or other fundamental rights, they must be capable of challenge by affected parties under the conditions set by this Article.

The existing EU legislation (e.g. Article 4 of Framework Decision 2005/212/JHA) provides that Member States should ensure that adequate legal remedies for the affected persons exist in national legislation.

With a view to fully comply with the Charter of Fundamental Rights, this Article introduces minimum safeguards at EU level. These aim at guaranteeing the respect of the presumption of innocence, the right to a fair trial (including the *ne bis in idem* principle), the existence of effective judicial remedies before a court and the right to be informed on how to exercise such remedies.

- *Determination of the extent of the confiscation and effective execution (Article 9)*

Persons suspected to belong to criminal organisations have proven to be successful in hiding their assets, often with the benefit of advice from skilled professionals. The investigations on assets in view of possible later confiscation are generally lengthy and need to be carried out within the timeframe of the corresponding criminal procedures.

In case a confiscation order was issued, no property or insufficient property was discovered and the confiscation order could not be executed, this Article requires Member States to allow financial investigations on the person's assets to be pursued to the extent necessary to fully execute such order. This provision addresses the problem of the foreclosure of confiscation activities at the end of the criminal procedure and allows unexecuted or partially executed confiscation orders to apply against previously hidden assets which have "resurfaced" in the meantime, also at a date when criminal proceedings are finalised.

- *Management of frozen property (Article 10)*

This provision intends to facilitate the management of property frozen in view of possible later confiscation. It requires Member States to introduce measures aimed at ensuring an adequate management of such property, notably by granting powers to realise frozen property, at least where it is liable to decline in value or become uneconomical to maintain.

- *Effectiveness and reporting obligations (Article 11)*

This provision introduces reporting obligations for Member States, which would help generate statistics to be used for evaluation purposes.

2012/0036 (COD)

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2) and Article 83(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee[41],

Having regard to the opinion of the Committee of the Regions[42],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(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.

(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.

(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.

(4) The Stockholm Programme[43] 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.

(5) The current Union legal framework on freezing, seizure and confiscation of assets consists of 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[44]; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence[45]; Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property[46]; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders[47].

(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 and confiscation orders are not fully effective. Confiscation is hindered as a result of differences between Member States' legislation.

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41 OJ C , , p. .

42 OJ C , , p. .

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

44 OJ L 182, 5.7.2001, p. 1.

45 OJ L 196, 2.8.2003, p. 45.

46 OJ L 68, 15.3.2005, p. 49.

47 OJ L 328, 24.11.2006, p. 59.

(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.

(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.

(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 Directive.

(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 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 person is convicted, than from other activities.

(11) In accordance with the principle of *ne bis in idem* it is appropriate to exclude from extended confiscation the proceeds of alleged criminal activities for which the affected person has been finally acquitted in a previous trial or in other cases where the *ne bis in idem* principle applies. Extended confiscation should also be excluded where the similar criminal activities could not be the subject of criminal proceedings due to prescription under national criminal law.

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

(13) The practice by a suspected or accused person of transferring property to a knowing third party with a view to avoiding confiscation is common and increasingly widespread. The current Union legal framework does not contain binding rules on the confiscation of property transferred to third parties. Therefore it is becoming increasingly necessary to allow for confiscation of property transferred to third parties, which should normally take place when an accused person does not have property that can be confiscated. It is appropriate to provide for third party confiscation, under certain conditions, following an assessment, based on specific facts, that the confiscation of property of the convicted, suspected or accused person is unlikely to succeed, or in situations where unique objects must be restored to their rightful owner. Furthermore, to protect the interests of *bona fide* third parties, such confiscation should only be possible if the third party knew or should have known that property was the proceeds of crime or was transferred in order to avoid confiscation and was given for free or transferred in exchange for an amount lower than its market value.

(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.

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

(16) Property frozen with a view to later confiscation should be managed adequately in order not to lose its economic value. Member States should take the necessary measures including sale or transfer of the property to minimise such losses. Member States should take relevant measures, such as the establishment of national centralised Asset Management Offices or equivalent mechanisms (for example where such

functions are decentralised), in order to properly manage the assets frozen before confiscation and preserve their value, pending judicial determination.

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

(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 with these rights and principles.

(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.

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

(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.]

(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.

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

OBJECTIVE AND SCOPE

Article 1

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.

Article 2

Definitions

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

(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;

(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 penalty or a measure, ordered by a court following proceedings in relation to a criminal offence resulting in the final deprivation 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;

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

(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[48],

(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[49],

(c) Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment[50],

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48 OJ C 195, 25.6.1997, p.2.
49 OJ L 140, 14.6.2000, p.1.
50 OJ L 149, 2.6.2001, p.1.

(d) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism[51], as amended by Council Framework Decision 2008/919/JHA of 9 December 2008[52],

(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[53],

(f) Council Framework Decision 2003/568/JHA on combating corruption in the private sector[54],

(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[55],

(h) Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems[56],

(i) Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime[57],

(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[58],

(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[59].

TITLE II

FREEZING AND CONFISCATION

Article 3

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.

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51 OJ L 164, 22.6.2002, p.3.
52 OJ L 330, 9.12.2008, p.21.
53 OJ L 182 of 5.7.2001, p.1.
54 OJ L 192, 31.7.2003, p.54.
55 OJ L 335, 11.11.2004, p.8.
56 OJ L 69, 16.3.2005, p.67.
57 OJ L 300, 11.11.2008, p.42.
58 OJ L 101, 15.4.2011, p.1.
59 OJ L 335, 17.12.2001, p. 1.

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.

Article 4

Extended powers of confiscation

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.

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

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

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

Article 5

Non-conviction based confiscation

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

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

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

Article 6

Confiscation from a third party

1. Each Member State shall take the necessary measures to enable it to confiscate:

(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

(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.

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

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

(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;

(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.

Article 7

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.

2. Each Member State shall take the necessary measures to enable its competent authorities to immediately freeze 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.

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.

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.

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.

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.

5. In the cases referred to in Article 5, the person whose property is affected by the decision to confiscate shall be represented by a lawyer throughout the proceedings in order to pursue the rights of the defence of the person relating to the establishment of the criminal offence and to the determination of the proceeds and instrumentalities.

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.

Article 9

Determination of the extent of the confiscation and effective execution

Each Member State shall take the necessary measures to make it possible to determine the precise extent of the property to be confiscated following a final conviction for a criminal offence or following proceedings as foreseen in Article 5, that has resulted in a decision to confiscate, and to allow further measures to be taken to the extent necessary to effectively execute that decision to confiscate.

Article 10

Management of frozen property

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

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.

TITLE III

FINAL PROVISIONS

Article 11

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:

(a) the number of freezing orders executed,

(b) the number of confiscation orders executed,

(c) the value of property frozen,

(d) the value of property recovered,

(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.

Article 12

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by … *[two years from the date of adoption]*. 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 States shall determine how such 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.

Article 13

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.

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.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*