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NOTE

from:	General Secretariat of the Council of the European Union
to:	delegations
Subject:	Tackling the proceeds of crime through non-conviction based regimes - Response by Finland to Mr Alan Shatter, Minister of Justice, Equality and Defense Department of Justice and Equality of the Republic of Ireland

Delegations find attached in Annex letter of Mrs Anna-Maja HENRIKSSON, Finnish Minister for Justice, in response of the letter of Mr Alan SHATTER, Minister of Justice, Equality and Defense Department of Justice and Equality of the Republic of Ireland, concerning the tackling the proceeds of crime through non-conviction based regimes.

Helsinki, 18 June 2012

Dear Colleague,

I would like to thank you for your letters dated 23 April and 31 May 2012 and for the information you provided me with in the background note concerning the non-conviction based regime for confiscation and proceeds of crime in Ireland.

To begin with, I find it positive that the EU JHA Council has launched preparations for new EU legislation in this field and that the negotiations on the basis of the Commission's proposal continue in an active interaction between the Member States. In light of your proposals, I would also like to take the opportunity to explain to you how the Finnish legislation deals with confiscation and proceeds of crime. Our legislation concerning forfeiture corresponds mainly to the obligations set in the Directive proposed by the Commission. However, both the non-conviction based confiscation proposed in Article 5 and the third party confiscation proposed in Article 6 of the Directive seem to be somewhat problematic from our perspective.

According to the provisions of the Criminal Code of Finland, it is possible to impose a sanction of forfeiture regardless of whether the defendant is sentenced to a criminal sanction or not. However, a prerequisite for this is that the criminal act, which the forfeiture is based on, has been proved to have been committed and that the other conditions for ordering forfeiture are fulfilled. Additionally, it is required that the person to whom a request for forfeiture is directed has been summoned to court. Hence, the obligation to enable the penalty of forfeiture as provided in Article 5 of the Directive on confiscation, proposed by the Commission, is problematic in case the person flees prosecution. Based on the wording of the Article, it is also difficult to judge whether it is possible in the national legislation to presume evidence on the fact that the offence has been committed.

The starting point of the Finnish legislation is that the person benefiting from the offence is imposed a sanction of forfeiture. The Criminal Code enables, however, confiscation of property from a person contributory to money laundering or concealment of illegally obtained goods or from a person on behalf of whom the offence has been committed.

As regards to other provisions of the draft Directive, we would like to pay more attention to the rights of the victim, which in our view are unfortunately not protected sufficiently at EU level. In this regard we have concerns especially about the narrow scope of Article 7, which concerns freezing. According to Finnish law, compensation for damages and restitution are in most cases dealt with in the context of criminal proceedings. When applying the EU instruments on mutual recognition, problematic situations have occurred e.g. where property, following our request, has been frozen in another Member State for the purpose of its later confiscation. Still later on, when convicting the person for a criminal offence, the Court, instead of ordering the property to be confiscated to the State, has ordered the property to be returned to its lawful owner or to be compensated for damages to an injured party. Thus, it would facilitate the application of the mutual recognition instruments, if Article 7 included a possibility to freeze property also for the purpose of restitution or compensation for damages caused by a criminal offence, where so provided for in the national law of a Member State, or at least a possibility to return property which has been frozen for the purpose of confiscation to its lawful owner instead of an obligation to confiscate it.

To this end, we have in our written comments to the Working Party suggested an addition to Article 7. Our purpose is not to impose any obligations on the Member States to amend their national law on freezing, but only to facilitate the application of the mutual recognition instruments and to enable cooperation in order to freeze property and later on to return it to its lawful owner, instead of having an obligation to confiscate property to the State. Even though the draft Directive as such is not an instrument on mutual recognition, it does, however, serve as a basis for material conditions concerning the application of the instruments on mutual recognition, which most likely will also be “Lissabonized” in future.

Importantly, I would like to express my appreciation for your efforts to ensure effective cooperation in confiscating assets in the EU. I look forward to our close cooperation in this matter as well as in other topics on the agenda of the EU Justice and Home Affairs Council.

(Complimentary close)

(signed) Anna-Maja HENRIKSSON