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NOTE

from:	Presidency
to:	Council
No. Cion prop.:	7641/12 DROIPEN 29 COPEN 57 CODEC 656
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Subject:	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 - State of play and orientation debate

I. STATE OF PLAY

1. On 13 March 2012 the Commission submitted to the European Parliament and to the Council a proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union¹.
2. The Working Party on Substantive Criminal Law (DROIPEN) has already concluded several extensive rounds of discussions on the proposal. The work in the group is proceeding steadily with a view to reaching a compromise by the end of the year on a text which could form the basis for the negotiations with the European Parliament in the context of the ordinary legislative procedure.

¹ 7641/12 DROIPEN 29 COPEN 57 CODEC 656 + ADD 1 + ADD 2.

3. It should be also recalled that during the Informal JHA Council in Nicosia held in July 2012 a clear political will to continue work on non-conviction based confiscation in the framework of the draft Directive, while introducing a strong catalogue of procedural safeguards, was reiterated.
4. On 12 September 2012 The Council Legal Service issued an opinion in relation to the legal basis on which the Commission proposal is submitted. It was thus reiterated that Article 83 (1), TFEU defines the scope of the directive in relation to the areas of particularly serious crimes listed therein - the so-called Eurocrimes. The work in the Council preparatory bodies is currently proceeding in the light of the Legal Service opinion.
5. The current stage of discussions in the working party presents a certain number of key issues on which further work would be needed in order to define a sustainable Council position bearing sufficient support of delegations. The following could be outlined by way of example:
 - The provision on extended confiscation in Article 4 where defining those offences where conviction could trigger such proceedings, in other words the scope of the provision should be further considered.
 - The provision on non-conviction based confiscation in Article 5, where with a view to providing a level of approximation at EU level, the work will be focusing on defining some specific circumstances in which this regime should be applied as a minimum standard.
 - The provision on freezing in Article 7, where the concept of precautionary freezing will have to be further scrutinised.
6. It is the assessment of the Presidency that the issues presented above are amongst those which are central in the draft Directive for supporting coherent freezing and confiscation systems throughout the EU and that they should continue be treated with close attention in the course of the discussions in the Council preparatory bodies.

II. ORIENTATION DEBATE

7. In general terms, the concept of extended confiscation provides for a possibility to extend confiscation powers to assets that are not direct proceeds of the crime for which a person has been convicted. It often applies when a person is convicted for a more serious offence and he possesses property which is disproportionate to his legal income. It should be recalled that the concept of extended confiscation has been already introduced in EU legislation under the Council Framework decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property.
8. Following extensive discussions at working group level substantial progress was achieved on Article 4 of the Commission proposal, which introduces a more streamlined concept of extended confiscation compared to the regime under FD 2005/212/JHA. In order to make further progress in the examination of this provision the political guidance of the Ministers would be needed, as regards the appropriate criterion for the definition of the scope of application of Article 4.
9. The discussions in DROIPEN held thus far have demonstrated a need to introduce a certain criterion which would limit the scope of the provision in some way. Various approaches were considered throughout the discussions, such as (i) introducing a criterion based on an objective factor, such as an economic benefit filter, or (ii) introducing a penalty threshold, e.g. 4 years of imprisonment, or (iii) extending the application of the provision only to specific types of offences, e.g. organised crime, and terrorism, or (iv) limiting the application of the provision only to serious cases or serious crimes. None of those criteria has gathered sufficient support for reaching a compromise.
10. While the Presidency recognises the need to limit the extended powers of confiscation at national level only to certain categories of offences, which are sufficiently serious in nature and as such would justify broader possibilities to effectively confiscate property, the Presidency believes that first and foremost the final solution on that issue should be driven by the need to ensure even application of the minimum standard instrument in the Member States.

11. As expressed by a number of delegations, it is indeed problematic to apply a criterion for limiting the scope of the provision by applying penalty thresholds (be it 3, 4 or 5 years of imprisonment), since it establishes a direct link to national definitions of offences and sanctions. Those may vary substantially across the EU so that the same type of offences could feature very different levels of sentencing. It would thus not provide a coherent basis for approximation and even application of extended confiscation at EU level, neither would it facilitate mutual recognition.
12. The aforementioned conclusion could also be extended to a possible criterion limiting the scope of the provision on the basis of a serious case or serious crime test. In principle a case is defined as serious at national level mainly on the basis of applicable sentencing levels, as provided by the national legislator. Therefore the use of such a criterion could again result in an uneven implementation of the provision on extended confiscation by making it dependent on the national definitions for serious cases or serious crimes.
13. As already expressed during the DROIPEN discussions, the Presidency believes that any compromise solution in relation to the scope of this provision should be based on objective criteria, which would be interpreted in a coherent manner in all Member States, notwithstanding the criminal policy and sentencing levels at national level. On that basis the scope of the provision could be limited in order to sufficiently satisfy the principle of proportionality, but at the same time this would avoid restricting the scope of the provision unnecessarily or bringing further discrepancies into the body of EU legislation.

14. In this respect, it could be also argued that by defining the scope of this provision in line with the general scope of the directive, the application of the extended confiscation regime would be already effectively limited only to certain areas of crime, as listed under Art. 83 (1), TFEU², which by definition are particularly serious in nature. Coupled together with an economic benefit requirement for the particular offence, which as such could be seen as an objective criterion allowing for even application throughout the EU, the main objectives presented above may be satisfied. The Presidency submitted a draft proposal along these lines at the last DROIPEN meeting held on 10 and 11 October 2012, but the proposal did not receive sufficient support from delegations. Some delegations were of the opinion that the economic benefit requirement is not sufficient to guarantee that extended powers of confiscation would only be used in specific (serious) cases.
15. The Presidency would also like to recall that in practice the extended confiscation provision would be applied by national courts on the basis of the specific circumstances of each case, where normally a number of other objective circumstances, such as a disproportion of the value of the property in question to the lawful income of the convicted person, or the seriousness of the specific case, will have to be considered by the judge in order to decide whether extended confiscation should be used.

² **Art 83 (1) TFEU**

(1) The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the **areas of particularly serious crime with a cross-border dimension** resulting from the nature or impact of such offences or from a special need to combat them on a common basis. EN C 83/80 Official Journal of the European Union 30.3.2010.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

III. CONCLUSIONS

16. In view of the matters presented above, ministers are invited to provide guidance on the following:

- *What criterion for defining the scope of Article 4, among those referred to in paragraph 9 of this note, should be used in order to maintain the effectiveness of the provision on extended powers of confiscation, facilitate its even application in the Member States and satisfy the principle of proportionality and the needs of mutual recognition?*
