



**COUNCIL OF  
THE EUROPEAN UNION**

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**NOTE**

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| from:           | Presidency  |
| to:             | Council   |
| No. Cion prop.: | 7641/12 DROIPEN 29 COPEN 57 CODEC 656   |
| No. prev. doc.: | 16566/12 DROIPEN 167 COPEN 255 CODEC 2758   |
| 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 [ <b>first reading</b> ]<br>- General approach |

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**I. BACKGROUND INFORMATION**

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 Union<sup>1</sup>.
2. The Working Party on Substantive Criminal Law (DROIPEN) held an intensive set of meetings on the draft Directive. The Working Party held monthly meetings since May. At its meeting of 3 April 2012, CATS was asked to provide strategic guidance and give orientation to the subsequent expert debate regarding some of the new elements of the draft Directive, as set out in doc. 8169/12.

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

3. On 23 July 2012 the Ministers of Justice held a discussion in relation to non-conviction based confiscation and safeguards during the Informal JHA Council in Nicosia. On 26 October 2012 during the JHA Council in Luxembourg the Ministers took note of the state of play of negotiations on the draft Directive and held an orientation debate on the appropriate criterion to define the scope of Article 4 on extended powers of confiscation.
4. IE notified the Council that it wishes to take part in the adoption and application of the Directive, as required under Article 3(1) of Protocol (No 21) on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice to the Treaties.
5. UK and DK do not participate in the adoption of this instrument.
6. One delegation has a Parliamentary scrutiny reservation.

Changes compared to the Commission proposal are highlighted in *bold and italic*.

## II. COMPROMISE PACKAGE

7. The text found in the Annex represents a compromise proposal, as resulting from the extensive deliberations held in the Council preparatory bodies. Throughout the discussions, the initial Commission proposal was adjusted a number of times, in order to accommodate, as far as possible, the positions expressed by delegations. In this respect, the Presidency would like to invite ministers to consider the compromise text submitted to their attention as a package, where the various elements should be treated as integral elements of the overall compromise.
8. There are several aspects of the current text, which may be outlined by way of example, in order to demonstrate the present balance of compromises:
  - Scope of the Directive (Article 2) - in conformity with the legal basis of the proposal, the scope of the Directive is extended only to the offences, which have been subject to approximation at EU level in the areas of crimes listed under Art. 83(1), TFEU - the "Eurocrimes".

- Extended powers of confiscation (Article 4) - In line with the political guidance provided by the Ministers during the JHA Council in October 2012, the application of the provision was limited by way of compromise to serious criminal offences, which are liable to give rise, directly or indirectly, to economic benefit. This is a further limitation from the general scope of the Directive, namely the offences falling under the scope of Art. 83(1) TFEU. In addition, the standard of proof has been adjusted in accordance with the positions of delegations, thus removing a direct reference to the balance of probabilities, seen as incompatible with some national legal systems.
- Non-conviction based confiscation in specific circumstances (Article 5) - The application of the provision has been limited only to two specific circumstances - permanent illness and flight of the suspected or accused person, in so far as proceedings under art. 3 or 4 of the Directive would not possible. The scope of the provision has been put in line with the scope of Art. 4. Flexibility as regards the procedures to be used at national level to achieve confiscation objectives in those circumstances has been introduced - be it through in absentia or non-conviction based proceedings.
- Freezing (Article 7) - The possibility that freezing is ordered by other competent authorities than judicial authorities, as it is the case in a number of national systems, has been explicitly recognised. In such cases, Member States shall ensure that such measures may be effectively reviewed by a court or another judicial authority. On the other hand, the reference to freezing measures allowing for urgent action, where necessary, which was the core of the original COM proposal for that provision, has been retained in the text.
- Safeguards (Article 8) - Subject to some modifications, the provision on safeguards has been kept largely in line with the Commission proposal.
- Statistics (Article 11) - taking into consideration the consistently expressed concerns by Member States, the requirement for statistics has been significantly limited, thus keeping in the current text only letters "a" - "d".

- Transposition period (Article 12) - By way of a compromise and with a view to reflecting the legal complexity of the subject matter of this Directive, the transposition period has been extended from two years to three years.
- Additionally, a number of relevant recitals have been amended in relation to concerns or misgivings by the Member States and additional ones have been inserted to address proportionality and procedural interests of the Member States.
- As a part of the compromise package, it was agreed that the following declaration of the Council and the European Parliament should be included in the minutes of the Council in order to address the outstanding concerns relating to the mutual recognition of freezing and confiscation orders and that this declaration should form part of the negotiations with the European Parliament:

*"An effective system of freezing and confiscation in the EU is inherently linked to well functioning mutual recognition of freezing and confiscation orders. Considering the need of putting in place a comprehensive system for freezing and confiscation of proceeds and instrumentalities of crime in the EU, the European Parliament and the Council call on the Commission to present a legislative proposal on mutual recognition of freezing and confiscation orders at the earliest possible opportunity, in relation to which the concept of freezing should be further examined.*

*The Commission is also called on to address the possible difficulties in the implementation of the instruments on mutual recognition of freezing and confiscation orders, which may arise from the replacement of certain provisions of Framework decision 2005/212/JHA by the corresponding provisions of the Directive on the freezing and confiscation of proceeds of crime in the European Union".*

***In view of the above, the Council is invited***

***a/ to consider the overall compromise package proposal and***

***b/ to endorse the text, so that it forms the basis for the future discussions with the European Parliament, according to Art. 294 TFEU.***

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)(b) 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<sup>2</sup>,

Having regard to the opinion of the Committee of the Regions<sup>3</sup>,

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 (...) cooperation on asset recovery and mutual legal assistance.

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<sup>2</sup> OJ C , , p. .

<sup>3</sup> OJ C , , p. .

- (3) Although existing statistics are limited, the amounts recovered from criminal assets in the Union seem insufficient compared to the estimated proceeds of crime. Studies have shown that, although regulated by EU legislation and national laws, confiscation procedures remain underutilised.
- (4) The Stockholm Programme<sup>4</sup> 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<sup>56</sup>; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence<sup>7</sup>; Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property<sup>8</sup>; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders<sup>9</sup>.
- (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.
- (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.

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<sup>4</sup> "An open and secure Europe serving and protecting the citizens", Council document 17024/09, adopted by the European Council on 10/11 December 2009.

<sup>5</sup> OJ L 182, 5.7.2001, p. 1.

<sup>6</sup> OJ L 182, 5.7.2001, p. 1.

<sup>7</sup> OJ L 196, 2.8.2003, p. 45.

<sup>8</sup> OJ L 68, 15.3.2005, p. 49.

<sup>9</sup> OJ L 328, 24.11.2006, p. 59.

- (7a) *Member States are free to take confiscation procedures which are linked to a criminal case in front of any court whether criminal, civil or administrative.*
- (8) There is a need *to clarify* 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 (...). *Thus proceeds may include any property including when it has been transformed or converted, fully or in part, into other property, or when it has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds. It may also include the income or other benefits derived from proceeds of crime, or from property into which such proceeds have been transformed, converted or intermingled.*
- (8a) *This Directive provides for a broad definition of property that could be subject to freezing and confiscation. It includes legal documents or instruments evidencing title or interest in such property. Such documents or instruments could constitute, for example, financial instruments, or documents that may give rise to creditor claims and are normally found in possession of the person affected by the relevant procedures. This Directive is without prejudice to the existing national procedures for keeping legal documents or instruments evidencing title or interest in property, as they are applied by the competent national authorities or public bodies in accordance with national law.*
- (8b) *Confiscation and freezing under this Directive are autonomous concepts, which should not prevent Member States to implement the provisions of this Directive with instruments which in accordance with national legislation would be considered as sanctions or other types of measures.*
- (9) Confiscation of instrumentalities and proceeds following a final decision of a court and of property of equivalent value to those proceeds should (...) refer to *the* broadened concept for the criminal offences covered by this Directive. Framework Decision 2001/500/JHA required Member States to enable the confiscation of instrumentalities and proceeds of crime following a final conviction and to enable the confiscation of property of equivalent value to the proceeds of crime. Such obligations should be maintained for the criminal offences not covered by this Directive. *Member States are free to define the confiscation of property of equivalent value as subsidiary or alternative to the direct confiscation, as appropriate in accordance with national legislation.*

- (9a) *When implementing this Directive, Member States may provide that confiscation should not be ordered, insofar as according to national legislation this would represent an undue hardship for the affected person, whereby the circumstances of the respective individual case should be decisive<sup>10</sup>.***
- (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.(...)
- (10a) *The court has to consider the specific circumstances of the case, including facts and available evidence based on which a decision on extended confiscation could be issued. The fact that the property of the person is disproportionate to his lawful income could be among those facts giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a requirement for a certain period of time in which the property could be deemed to have originated from criminal conduct.***
- (10aa) *This Directive sets up minimum rules. It does not prevent Member States from providing more extensive powers in national law, including in relation to its rules on evidence, for example, by providing a reversed burden of proof.***

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<sup>10</sup> One delegation would like the deletion of this recital.

***(10b) This Directive applies to criminal offences which fall under the scope of the instruments listed under Article 2a. Within the scope of those instruments, Member States should apply extended powers of confiscation to serious criminal offences in line with national legislation.***

***(...)***

**(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 have put in place non-conviction based confiscation systems where no link to criminal proceedings is required, such as the civil forfeiture proceedings, or where a more distant link to a criminal case is sufficient in order to start independent confiscation proceedings. Those systems do not fall under the scope of this Directive.***

***(12b) Due to permanent illness or flight it might be impossible to confiscate proceeds and instrumentalities based on a conviction or by way of extended powers of confiscation. Such situations might arise due to legal obstacles, for example when the statutory limitation period has expired. In such situations Member States should still be able to confiscate, as applicable under national legislation, through in absentia proceedings or non conviction based proceedings. When the person has fled Member States should take all reasonable steps and may require that the person is summoned to or made aware of the confiscation proceedings.***

**(13)** The practice by a suspected or accused person of transferring property to a knowing third party with a view to avoiding confiscation is common and increasingly widespread. The current Union legal framework does not contain binding rules on the confiscation of property transferred to third parties. Therefore it is becoming increasingly necessary to allow for confiscation of property transferred to third parties, which should normally take place when an accused person does not have property that can be confiscated. ***(...)***

- (13a) *When implementing the provision on third party confiscation, Member States should take into consideration situations where proceeds or property were transferred to or acquired by a third party for free or in exchange for an amount significantly lower than their market value. The rules on third party confiscation are extending to both natural and legal persons. Acquisition by a third party refers to situations where, for example, property has been directly acquired by the third party, including when the criminal offence has been committed on their behalf or to their benefit.*
- (13b) *Member States are free to define third party confiscation as subsidiary or alternative to direct confiscation, as appropriate in accordance with national legislation.*
- (14) (...) *Confiscation leads to the final deprivation of property. Preservation of property is often prerequisite to confiscation and of importance to the enforcement of a confiscation order. Property is often preserved by means of freezing. Freezing measures are often ordered by a court or another judicial authority. In order to prevent the dissipation of property before a freezing order can be issued the competent authorities in the Member States should be empowered to immediately take action in order to secure property.*
- (14.1) *Since property is often preserved for the purposes of confiscation, freezing and confiscation are closely linked. In some legal systems freezing for the purposes of confiscation is regarded as a separate procedural measure of a provisional nature, which may be followed by a decision to confiscate. Without prejudice to the various national legal systems and the Framework decision on freezing (2003/577/JHA) the Directive should approximate some aspects of the national systems of freezing for the purposes of confiscation.*
- (14a) *Freezing measures are without prejudice to the possibility for a specific property to be considered evidence throughout the proceedings, as long as it would be made available for effective execution of the confiscation order at the end.*
- (14b) *Property may be frozen in the context of criminal proceedings also with a view to possible later restitution or in order to safeguard compensation for damages caused by a criminal offence<sup>11</sup>.*

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<sup>11</sup> One delegation maintains reservation on the inclusion of recital 14a and 14b.

- (14c) *Where property has been frozen or confiscated, Member States are later on free to dispose of the property in line with national law. Confiscation should not lead to justified claims, for example such on the part of the victim, which were brought against the affected person to be hindered or prevented in total.*
- (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 *later* 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 *the possibility to* sell or transfer (...) the property to minimise such losses. Member States should take relevant measures, such as *for example* the establishment of national centralised Asset Management Offices or equivalent mechanisms (for example where such functions are decentralised), in order to (...) *effectively* 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. ***This Directive should be without prejudice to national laws in relation to legal aid and does not create any obligations for Member States' legal aid systems, which should apply in accordance with the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.***
- (18a) ***Specific safeguards should be put in place, so as to ensure that as a general rule reasons are given for decisions to confiscate, unless when in simplified criminal proceedings as regards cases which are not serious, the affected person has waived his right of reasons to be given.***
- (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. ***The decision to freeze property should be communicated to the affected person as soon as possible after its execution. Nevertheless, competent authorities may postpone providing the information to the person concerned due to the needs of the investigation.***
- (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, Ireland has notified its wish to take part in the adoption and application of this Directive. ***In accordance with that Protocol, Ireland should be bound by this Directive only in respect of the offences covered by the instruments in the adoption and implementation of which it participates.***
- (21a) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, the United Kingdom is not taking part in the adoption of this Directive and is not bound by it or subject to its application. ***Subject to the notification under Article 4 of that Protocol, the United Kingdom should be bound by this Directive only in respect of the offences covered by the instruments in the adoption and implementation of which it participates.***
- (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**

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.

*1a. 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 (...).
- (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;

## *Article 2a*

### ***Scope***

'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<sup>12</sup>,
- 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<sup>13</sup>,
- c. Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment<sup>14</sup>,
- d. Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism<sup>15</sup>, as amended by Council Framework Decision 2008/919/JHA of 9 December 2008<sup>16</sup>,
- 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<sup>17</sup>,
- f. Council Framework Decision 2003/568/JHA on combating corruption in the private sector<sup>18</sup>,

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<sup>12</sup> OJ C 195, 25.6.1997, p.2.

<sup>13</sup> OJ L 140, 14.6.2000, p.1.

<sup>14</sup> OJ L 149, 2.6.2001, p.1.

<sup>15</sup> OJ L 164, 22.6.2002, p.3.

<sup>16</sup> OJ L 330, 9.12.2008, p.21.

<sup>17</sup> OJ L 182 of 5.7.2001, p.1.

<sup>18</sup> OJ L 192, 31.7.2003, p.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<sup>19</sup>,
- h. Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems<sup>20</sup>,
- i. Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime<sup>21</sup>,
- 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<sup>22</sup>,
- 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<sup>23</sup>,

***as well as any other future legal instruments if these instruments provide specifically that this Directive applies to criminal offences harmonised therein.***

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<sup>19</sup> OJ L 335, 11.11.2004, p.8.

<sup>20</sup> OJ L 69, 16.3.2005, p.67.

<sup>21</sup> OJ L 300, 11.11.2008, p.42.

<sup>22</sup> OJ L 101, 15.4.2011, p.1.

<sup>23</sup> OJ L 335, 17.12.2001, p. 1.

*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 or property the value of which corresponds to such proceeds, ***subject to*** a final conviction for a criminal offence.
2. (...)

*Article 4*

**Extended powers of confiscation**

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 ***serious*** criminal offence ***which is liable to give rise, directly or indirectly, to economic benefit***, 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***.

(...)

*Article 5*

**Non-conviction based confiscation *in specific circumstances***

1. ***Member States shall take the necessary measures to enable confiscation of proceeds and instrumentalities, at least in case of a serious criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and where the confiscation as provided for under Articles 3 or 4 would not be possible due to permanent illness or flight of the suspected or accused person.***

2. *Member States may implement the measures referred to in paragraph 1 either through in absentia proceedings or through non conviction based proceedings<sup>24</sup>.*

#### *Article 6*

#### **Confiscation from a third party**

1. Each Member State shall take the necessary measures to enable it to confiscate (...) *proceeds or other property the value of which corresponds to the proceeds which were transferred to or acquired by third parties (...).*
- 1a. *This provision shall be construed so as not to prejudice the rights of bona fide third parties*
2. (...)

#### *Article 7*

#### **Freezing<sup>25</sup>**

1. Each Member State shall take the necessary measures to enable it to freeze property (...) with a view to possible later confiscation. *Those measures shall include urgent action to be taken when necessary in order to preserve property. Such measures shall be ordered by a competent national authority<sup>26</sup>.*
2. *If the competent national authority ordering the freezing is not a court or another judicial authority, each Member State shall take the necessary measures to ensure that the measure may be effectively reviewed by a court or another judicial authority.*

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<sup>24</sup> One delegation has a reservation on the inclusion of Art. 5 (2).

<sup>25</sup> Two delegations doubt the applicability of the legal basis to this article.

<sup>26</sup> One delegation maintains that a freezing order should be issued by a court or judicial authority.

3. ***Property in the possession of a third party, as referred to under Article 6 (...), can be subject to freezing measures for the purposes of eventual confiscation in line with this Article.***

#### *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 (...), in order to preserve their rights.
2. Each Member State shall take the necessary measures to ensure (...) that the decision to freeze property (...) is communicated to the ***affected*** person as soon as possible<sup>27</sup> after its execution. ***The decision to freeze property shall*** remain in force only for as long as it is necessary to preserve the property<sup>28</sup> with a view to ***possible later*** confiscation. Each Member State shall provide for the effective possibility ***for*** the person whose property is affected to ***contest*** the decision to freeze before a court ***or another judicial authority (...)***. 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. 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 ***contest*** the decision to confiscate before a court by the person to whom confiscation is directed.
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 ***proceeds*** (...).

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<sup>28</sup> One delegation would like the deletion of the reference to preservation of property.

5. In the cases referred to in Article 5, the person whose property is affected by the decision to confiscate shall (...) ***have the right to access to a lawyer*** throughout the confiscation proceedings relating to the (...) determination of the proceeds and instrumentalities ***in order to pursue his/her rights***.
6. ***A third party shall have recourse to an effective remedy in order to claim title of ownership. (...)***

*Article 9<sup>29</sup>*

***Effective confiscation and execution***

Each MS shall take the necessary measures to ***enable it to identify and trace 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<sup>30</sup>**

1. Each Member State shall take the necessary measures (...) 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 ***allow to effectively manage*** the economic value of such property, ***including the possibility to*** sell or transfer property which is liable to decline in value ***where necessary***.

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<sup>29</sup> One delegation has a scrutiny reservation.

<sup>30</sup> One delegation has a reservation of substance on this article.

### TITLE III

#### FINAL PROVISIONS

##### Article 11

##### Statistics

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 *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*.

(...)

##### 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.

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*

*The President*

*For the Council*

*The President*

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