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INFORMATION NOTE

from:	General Secretariat of the Council
to:	Permanent Representatives Committee/Council
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 - Outcome of the European Parliament's first reading (Strasbourg, 24 to 27 February 2014)

I. INTRODUCTION

In accordance with the provisions of Article 294 of the TFEU and the joint declaration on practical arrangements for the codecision procedure ¹, a number of informal contacts have taken place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this dossier at first reading, thereby avoiding the need for second reading and conciliation.

In this context, the rapporteur, Mrs Monica Luisa MACOVEI (EPP-RO), presented one compromise (amendment 60) to the proposal for a Directive, on behalf of the Committee on Civil Liberties, Justice and Home Affairs. This amendment had been agreed during the informal contacts referred to above.

¹ OJ C 145, 30.6.2007, p.5

II. VOTE

When it voted on 25 February 2014, the plenary adopted the compromise amendment (amendment 60) to the proposal for a Directive. The Commission's proposal as thus amended and the legislative resolution constitute the Parliament's first-reading position¹, it reflects what had been previously agreed between the institutions. The Council should therefore be in a position to approve the Parliament's position.

The act would then be adopted in the wording which corresponds to the Parliament's position.

¹ The text of the amendment adopted and the European Parliament's legislative resolution are set out in the Annex. The amendment is presented in the form of a consolidated text, where changes to the Commission's proposal are highlighted in *bold and italics*. The symbol "■" indicates deleted text.

Freezing and confiscation of proceeds of crime *I**

European Parliament legislative resolution of 25 February 2014 on the 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 (COM(2012)0085 – C7-0075/2012 – 2012/0036(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2012)0085),
 - having regard to Article 294(2) and Articles 82(2) and 83(1) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0075/2012),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the opinion of the European Economic and Social Committee of 11 July 2012¹,
 - having regard to the opinion of the Committee of the Regions of 10 October 2012²,
 - having regard to the opinion of the European Union Agency for Fundamental Rights of 4 December 2012,
 - having regard to the undertaking given by the Council representative by letter of 3 December 2013 to approve Parliament's position, in accordance with Article 294(4) of the Treaty on the Functioning of the European Union,
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A7-0178/2013),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

¹ OJ C 299, 4.10.2012, p. 128.

² OJ C 391, 18.12.2012, p. 134.

Position of the European Parliament adopted at first reading on 25 February 2014 with a view to the adoption of Directive 2014/.../EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and 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 Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure¹,

Whereas:

¹ OJ C 299, 4.10.2012, p. 128.

² OJ C 391, 18.12.2012, p. 134.

¹ Position of the European Parliament of 25 February 2014.

- (1) The main motive for cross-border organised crime, *including mafia-type criminal organisation, is financial gain. As a consequence, competent authorities should be given the means to trace, freeze, manage and confiscate the proceeds of crime. However, the effective prevention of and fight against organised crime should be achieved by neutralising the proceeds of crime and should be extended, in certain cases, to any property deriving from activities of a criminal nature.*
- (2) Organised criminal groups operate without borders and increasingly acquire assets in Member States other than those in which they are based and in third countries. There is an increasing need for effective international █ cooperation on asset recovery and mutual legal assistance.

- (3) *Among the most effective means of combating organised crime is providing for severe legal consequences for committing such crime, as well as effective detection and the freezing and confiscation of the instrumentalities and proceeds of crime.*
- (4) Although existing statistics are limited, the amounts recovered from *proceeds* of crime in the Union seem *insufficient* compared to the estimated proceeds. Studies have shown that, although regulated by Union and national law, confiscation procedures remain underused.
- (5) *The adoption of minimum rules will approximate the Member States' freezing and confiscation regimes, thus facilitating mutual trust and effective cross-border cooperation.*
- (6) The Stockholm Programme¹ 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.

- (7) The current Union legal framework on freezing, seizure and confiscation of assets consists of Joint Action 98/699/JHA¹, Council Framework Decision 2001/500/JHA², Council Framework Decision 2003/577/JHA³, Council Framework Decision 2005/212/JHA⁴ and Council Framework Decision 2006/783/JHA⁵.
- (8) The Commission implementation reports on Framework Decisions 2003/577/JHA, 2005/212/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 by differences between Member States' law.
- (9) 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 for the Member States bound by this Directive.

¹ Joint Action 98/699/JHA of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of from crime (OJ L 333, 9.12.1998, p. 1).

² 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 (OJ L 182, 5.7.2001, p. 1).

³ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, p. 45).

⁴ Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property (OJ L 68, 15.3.2005, p. 49).

⁵ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59).

- (10) *Member States are free to bring confiscation proceedings which are linked to a criminal case before any competent court.*
- (11) There is a need to *clarify* the existing concept of proceeds of crime to include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds. *Thus proceeds can include any property including that which has been transformed or converted, fully or in part, into other property, and that which has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds. It can also include the income or other benefits derived from proceeds of crime, or from property into or with which such proceeds have been transformed, converted or intermingled.*
- (12) *This Directive provides for a broad definition of property that can be subject to freezing and confiscation. That definition includes legal documents or instruments evidencing title or interest in such property. Such documents or instruments could include, for example, financial instruments, or documents that may give rise to creditor claims and are normally found in the 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.*

- (13) ***Freezing and confiscation under this Directive are autonomous concepts, which should not prevent Member States from implementing this Directive using instruments which, in accordance with national law, would be considered as sanctions or other types of measures.***
- (14) In the confiscation of instrumentalities and proceeds of crime following a final decision of a court and of property of equivalent value to those instrumentalities and proceeds, the broad concept of criminal offences covered by this Directive should apply. Framework Decision 2001/500/JHA requires Member States to enable the confiscation of instrumentalities and proceeds of crime following a final conviction and to enable the confiscation of property the value of which corresponds to such instrumentalities and proceeds. Such obligations should be maintained for the criminal offences not covered by this Directive, ***and the concept of proceeds as defined in this Directive should be interpreted in the similar way as regards 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 direct confiscation, as appropriate in accordance with national law.***

- (15) *Subject to a final conviction for a criminal offence, it should be possible to confiscate instrumentalities and proceeds of crime, or property the value of which corresponds to such instrumentalities or proceeds. Such final conviction can also result from proceedings in absentia. When confiscation on the basis of a final conviction is not possible, it should nevertheless under certain circumstances still be possible to confiscate instrumentalities and proceeds, at least in the cases of illness or absconding of the suspected or accused person. However, in such cases of illness and absconding, the existence of proceedings in absentia in Member States would be sufficient to comply with this obligation. When the suspected or accused person has absconded, Member States should take all reasonable steps and may require that the person concerned be summoned to or made aware of the confiscation proceedings.*
- (16) *For the purposes of this Directive, illness should be understood to mean the inability of the suspected or accused person to attend the criminal proceedings for an extended period, as a result of which the proceedings cannot continue under normal conditions. Suspected or accused persons may be requested to prove illness, for example by a medical certificate, which the court should be able to disregard if it finds it unsatisfactory. The right of that person to be represented in the proceedings by a lawyer should not be affected.*

- (17) *When implementing this Directive in respect of confiscation of property the value of which corresponds to instrumentalities, the relevant provisions could be applicable where, in view of the particular circumstances of the case at hand, such a measure is proportionate, having regard in particular to the value of the instrumentalities concerned. Member States may also take into account whether and to what extent the convicted person is responsible for making the confiscation of the instrumentalities impossible.*
- (18) *When implementing this Directive, Member States may provide that, in exceptional circumstances, confiscation should not be ordered, insofar as it would, in accordance with national law, represent undue hardship for the affected person, on the basis of the circumstances of the respective individual case which should be decisive. Member States should make a very restricted use of this possibility, and should only be allowed to provide that confiscation is not to be ordered in cases where it would put the person concerned in a situation in which it would be very difficult for him to survive.*

- (19) 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 be followed by the confiscation not only of property associated with a specific crime, but also of additional property which the court determines constitutes the proceeds of other crimes. This approach is referred to as extended confiscation. Framework Decision 2005/212/JHA provides for three different sets of minimum requirements that Member States can choose from in order to apply extended confiscation. As a result, in the process of transposition of that Framework Decision, Member States have chosen different options which resulted in divergent concepts of extended confiscation in national jurisdictions. That divergence hampers cross-border cooperation in relation to confiscation cases. It is therefore necessary to further harmonise the provisions on extended confiscation by setting a single minimum standard. ■
- (20) *When determining whether a criminal offence is liable to give rise to economic benefit, Member States may take into account the modus operandi, for example if a condition of the offence is that it was committed in the context of organised crime or with the intention of generating regular profits from criminal offences. However, this should not, in general, prejudice the possibility to resort to extended confiscation.*

- (21) *Extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities. In this context, the court has to consider the specific circumstances of the case, including the 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 during which the property could be deemed to have originated from criminal conduct.*
- (22) *This Directive lays down minimum rules. It does not prevent Member States from providing more extensive powers in their national law, including, for example, in relation to their rules on evidence.*

(23) *This Directive applies to criminal offences which fall within the scope of the instruments listed herein. Within the scope of those instruments, Member States should apply extended confiscation at least to certain criminal offences as defined in this Directive.*

(24) 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. It is therefore becoming increasingly necessary to allow for the confiscation of property transferred to *or acquired by* third parties.

Acquisition by a third party refers to situations where, for example, property has been acquired, directly or indirectly, for example through an intermediary, by the third party from a suspected or accused person, including when the criminal offence has been committed on their behalf or for their benefit, and when an accused person does not have property that can be confiscated. Such confiscation should be possible at least in cases where third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer was carried out free of charge or in exchange for an amount significantly lower than the market value. The rules on third party confiscation should extend to both natural and legal persons. In any event the rights of bona fide third parties should not be prejudiced.

- (25) *Member States are free to define third party confiscation as subsidiary or alternative to direct confiscation, as appropriate in accordance with national law.*
- (26) *Confiscation leads to the final deprivation of property. However, preservation of property can be a prerequisite to confiscation and can be of importance for the enforcement of a confiscation order. Property is preserved by means of freezing.* 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 *take immediate action in order to secure such property.*
- (27) *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 confiscation order. Without prejudice to different national legal systems and to Framework Decision 2003/577/JHA, this Directive should approximate some aspects of the national systems of freezing for the purposes of confiscation.*
- (28) *Freezing measures are without prejudice to the possibility for a specific property to be considered evidence throughout the proceedings, provided that it would ultimately be made available for effective execution of the confiscation order.*

- (29) *In the context of criminal proceedings, property may also be frozen with a view to its possible subsequent restitution or in order to safeguard compensation for the damage caused by a criminal offence.*
- (30) *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 confiscation orders to benefit from their property once they have served their sentences. It is therefore 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 identified and the confiscation order remains unexecuted.
- (31) 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 to possible subsequent confiscation. This may require a **■** review by the court in order to ensure that the purpose of preventing the dissipation of property remains valid.

- (32) Property frozen with a view to possible subsequent confiscation should be managed adequately in order not to lose its economic value. Member States should take the necessary measures, including **the possibility of selling** or transferring **the property** to minimise such losses. Member States should take relevant measures, **for example** the establishment of national centralised Asset Management Offices, **a set of specialised offices** or equivalent mechanisms **, in order to effectively** manage the assets frozen before confiscation and preserve their value, pending judicial determination.
- (33) *This Directive substantially affects 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 this Directive. This includes the right to be heard for third parties who claim that they are the owner of the property concerned, or who claim that they have other property rights ("real rights", "ius in re"), such as the right of usufruct. The freezing order should be communicated to the affected person as soon as possible after its execution. Nevertheless, the competent authorities may postpone communicating such orders to the affected person due to the needs of the investigation.*

- (34) *The purpose of communicating the freezing order is, inter alia, to allow the affected person to challenge the order. Therefore, such communication should indicate, at least briefly, the reason or reasons for the order concerned, it being understood that such indication can be very succinct.*
- (35) *Member States should consider taking measures allowing confiscated property to be used for public interest or social purposes. Such measures could, inter alia, comprise earmarking property for law enforcement and crime prevention projects, as well as for other projects of public interest and social utility. That obligation to consider taking measures entails a procedural obligation for Member States, such as conducting a legal analysis or discussing the advantages and disadvantages of introducing measures. When managing frozen property and when taking measures concerning the use of confiscated property, Member States should take appropriate action to prevent criminal or illegal infiltration.*
- (36) 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 freezing and confiscation of property, asset tracing, judicial and asset disposal activities.

- (37) *Member States should endeavour to collect data for certain statistics at a central level, with a view to sending them to the Commission. This means that the Member States should make reasonable efforts to collect the data concerned. It does not mean, however, that the Member States are under an obligation to achieve the result of collecting the data where there is a disproportionate administrative burden or when there are high costs for the Member State concerned.*
- (38) This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union ("the Charter") *and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"), as interpreted in the case-law of the European Court of Human Rights. This Directive should be implemented in accordance with those rights and principles. This Directive should be without prejudice to national law 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 and the ECHR.*
- (39) *Specific safeguards should be put in place, so as to ensure that as a general rule reasons are given for confiscation orders, unless when, in simplified criminal proceedings in minor cases, the affected person has waived his or her right to be given reasons.*

- (40) ***This Directive should be implemented taking account of the provisions of Directive 2010/64/EU of the European Parliament and of the Council¹, Directive 2012/13/EU of the European Parliament and of the Council² and Directive 2013/48/EU of the European Parliament and of the Council³ which concern procedural rights in criminal proceedings.***
- (41) Since the objective of this Directive, namely facilitating confiscation of property in criminal matters, cannot be sufficiently achieved by the Member States but can rather 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 (TEU). 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.

¹ ***Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).***

² ***Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1).***

³ ***Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).***

- (42) In accordance with Articles 3 and 4a(1) of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the Treaty on the Functioning of the European Union (TFEU), ■ Ireland has notified its wish to take part in the adoption and application of this Directive. ***In accordance with that Protocol, Ireland is to be bound by this Directive only in respect of the offences covered by the instruments by which it is bound.***
- (43) ***In accordance with Articles 1, 2 and 4a(1) of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, 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 its participation in accordance with Article 4 of that Protocol, the United Kingdom is to be bound by this Directive only in respect of the offences covered by the instruments by which it is bound.***

- (44) In accordance with Articles 1 and 2 of Protocol (No 22) on the position of Denmark annexed to the TEU and to the TFEU, 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:



Article 1
Subject matter

1. This Directive establishes minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters.
2. ***This Directive is without prejudice to the procedures that Member States may use to confiscate the property in question.***

Article 2
Definitions

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

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

- (2) 'property' means property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title or interest in such property;
- (3) 'instrumentalities' means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;
- (4) 'confiscation' means a *final deprivation of property* ordered by a court in relation to a criminal offence ;
- (5) 'freezing' means the temporary prohibition of the transfer, destruction, conversion, disposal or movement of property or temporarily assuming custody or control of property;
- (6) 'criminal offence' means an offence *covered by any of the instruments listed in Article 3*.

Article 3

Scope

This Directive shall apply to criminal offences covered by:

- (a) Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union¹ ("Convention on the fight against corruption involving officials");
- (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 euro²;
- (c) Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment³;
- (d) 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 crime⁴;
- (e) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism⁵;

¹ OJ C 195, 25.6.1997, p. 2.

² OJ L 140, 14.6.2000, p. 1.

³ OJ L 149, 2.6.2001, p. 1.

⁴ OJ L 182, 5.7.2001, p. 1.

⁵ OJ L 164, 22.6.2002, p. 3.

- (f) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector¹;
- (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 trafficking²;
- (h) Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime³;
- (i) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA⁴;
- (j) Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA⁵ ;

¹ OJ L 192, 31.7.2003, p. 54.

² OJ L 335, 11.11.2004, p. 8.

³ OJ L 300, 11.11.2008, p. 42.

⁴ OJ L 101, 15.4.2011, p. 1.

⁵ OJ L 335, 17.12.2011, p. 1.

- (k) **Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA¹,**

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

Article 4

Confiscation

1. Member *States* shall take the necessary measures to enable ***the confiscation***, either in whole or in part, ***of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.***
2. ***Where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.***

¹ ***OJ L 218, 14.8.2013, p. 8.***

Article 5
Extended confiscation

1. **Member States shall adopt the necessary measures to enable the *confiscation*, either in whole or in part, of property belonging to a person convicted of a 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 the 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 is derived from criminal conduct.***

2. ***For the purpose of paragraph 1 of this Article, the notion of "criminal offence" shall include at least the following:***
 - (a) ***active and passive corruption in the private sector, as provided for in Article 2 of Framework Decision 2003/568/JHA, as well as active and passive corruption involving officials of institutions of the Union or of the Member States, as provided for in Articles 2 and 3 respectively of the Convention on the fight against corruption involving officials;***

- (b) offences relating to participation in a criminal organisation, as provided for in Article 2 of Framework Decision 2008/841/JHA, at least in cases where the offence has led to economic benefit;*
- (c) causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes if the child is over the age of sexual consent, as provided for in Article 4(2) of Directive 2011/93/EU; distribution, dissemination or transmission of child pornography, as provided for in Article 5(4) of that Directive; offering, supplying or making available child pornography, as provided for in Article 5(5) of that Directive; production of child pornography, as provided for in Article 5(6) of that Directive;*
- (d) illegal system interference and illegal data interference, as provided for in Articles 4 and 5 respectively of Directive 2013/40/EU, where a significant number of information systems have been affected through the use of a tool, as provided for in Article 7 of that Directive, designed or adapted primarily for that purpose; the intentional production, sale, procurement for use, import, distribution or otherwise making available of tools used for committing offences, at least for cases which are not minor, as provided for in Article 7 of that Directive;*

- (e) *a criminal offence that is punishable, in accordance with the relevant instrument in Article 3 or, in the event that the instrument in question does not contain a penalty threshold, in accordance with the relevant national law, by a custodial sentence of a maximum of at least four years.*



Article 6
Confiscation from a third party

1. ■ Member *States* shall take the necessary measures to enable *the confiscation of* proceeds, *or other property the value of which corresponds to proceeds*, which, *directly or indirectly*, were transferred ■ by a suspected or accused *person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.*
2. *Paragraph 1 shall not prejudice the rights of bona fide third parties.*

Article 7

Freezing

1. Member **States** shall take the necessary measures to enable *the freezing of* property with a view to possible subsequent confiscation. *Those* measures, *which* shall be ordered by a *competent authority, shall include urgent action to be taken when necessary in order to preserve property.*
2. *Property in the possession of a third party, as referred to under Article 6, can be subject to freezing measures for the purposes of possible subsequent confiscation.*

Article 8

Safeguards

1. Member **States** shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights.

2. **Member States** shall take the necessary measures to ensure that *the* freezing order is communicated to the affected *person* as soon as possible after its execution. *Such communication shall indicate, at least briefly, the reason or reasons for the order concerned. When it is necessary to avoid jeopardising a criminal investigation, the competent authorities may postpone communicating the freezing order to the affected person.*
3. *The freezing order shall remain in force only for as long as it is necessary to preserve the property with a view to possible subsequent confiscation.*
4. *Member States shall provide for the effective possibility for the person whose property is affected to challenge the freezing order before a court, in accordance with procedures provided for in national law. Such procedures may provide that when the initial freezing order has been taken by a competent authority other than a judicial authority, such order shall first be submitted for validation or review to a judicial authority before it can be challenged before a court.*

5. 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.***
6. **█** Member ***States*** shall take the necessary measures to ensure that reasons are given for any confiscation order and that the order is communicated to the person affected. **█** Member States shall provide for the effective possibility for a person in respect of whom confiscation is ordered to challenge the order before a court.
7. ***Without prejudice to Directive 2012/13/EU and Directive 2013/48/EU, persons whose property is affected by a confiscation order shall have the right of access to a lawyer throughout the confiscation proceedings relating to the determination of the proceeds and instrumentalities in order to uphold their rights. The persons concerned shall be informed of that right.***
8. In proceedings referred to in Article 5, the ***affected*** person shall have an effective possibility to challenge the ***circumstances of the case, including specific facts and available evidence*** on the basis of which the property concerned is considered to be ***property that is derived from criminal conduct.***

9. *Third parties shall be entitled to claim title of ownership or other property rights, including in the cases referred to in Article 6.*
10. *Where, as a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure provided for under this Directive, Member States shall take the necessary measures to ensure that the confiscation measure does not prevent those victims from seeking compensation for their claims.*

Article 9

Effective confiscation and **█** execution

█ Member *States* shall take the necessary measures to *enable the detection and tracing of* property to be *frozen and* confiscated *even after* a final conviction for a criminal offence or following proceedings *in application of Article 4(2) and to ensure the effective execution of a confiscation order, if such an order has already been issued.*

Article 10
Management of frozen *and confiscated* property

1. Member *States* shall take the necessary measures, *for example by* establishing centralised offices, *a set of specialised offices* or equivalent mechanisms, to ensure the adequate management of property frozen with a view *to* possible subsequent confiscation.
2. Member *States* shall ensure that the measures referred to in paragraph 1 include the *possibility to sell* or transfer property *where necessary*.
3. *Member States shall consider taking measures allowing confiscated property to be used for public interest or social purposes.*

Article 11
Statistics

1. Member States shall regularly collect and maintain comprehensive statistics from the relevant authorities . The statistics collected shall be sent to the Commission each year and shall include :

- (a) the number of freezing orders executed;
- (b) the number of confiscation orders executed;
- (c) the *estimated* value of property frozen, *at least of property frozen with a view to possible subsequent confiscation at the time of freezing*;
- (d) the *estimated* value of property recovered *at the time of confiscation*.

2. ***Member States shall also send each year the following statistics to the Commission, if they are available at a central level in the Member State concerned:***

- (a) the number of requests for freezing orders to be executed in another Member State;
- (b) the number of requests for confiscation orders to be executed in another Member State;
- (c) the *value or estimated* value of the property recovered following execution in another Member State.

3. ***Member States shall endeavour to collect data referred to in paragraph 2 at a central level.***

Article 12 Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...⁺. They shall forthwith transmit to the Commission the text of those provisions.
2. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.
3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 13 Reporting

The Commission shall, by ...⁺⁺ 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.

⁺ OJ: please add the date that is 30 months from the date of adoption of this Directive.

⁺⁺ OJ: please add the date that is 30 months and three years from the date of adoption of this Directive.

In that report, the Commission shall also assess whether there is any need to revise the list of offences in Article 5(2).

Article 14

Replacement of Joint Action 98/699/JHA and of certain provisions 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 the first four indents of Article 1 and Article 3 of Framework Decision 2005/212/JHA, are replaced by this Directive for the Member States bound by this Directive, without prejudice to the obligations of those Member States relating to the time limits for transposition of those Framework Decisions into national law.
2. For the Member States bound by this Directive, references to Joint Action 98/699/JHA and to the provisions of Framework Decisions 2001/500/JHA and 2005/212/JHA 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 Member States in accordance with the Treaties.

Done at

For the European Parliament
President

For the Council
President