

Procedure file

| Basic information | |
|---|---------------------|
| <p>COD - Ordinary legislative procedure (ex-codecision procedure) 2012/0036(COD) Directive</p> | Procedure completed |
| <p>Freezing and confiscation of instrumentalities and proceeds of crime in the EU</p> <p>Amending Joint Action 98/699/JHA 1998/0909(CNS) Amending Framework Decision 2001/500/JHA 2000/0814(CNS) Amending Framework Decision 2005/212/JHA 2002/0818(CNS)</p> <p>Subject 7.30.30 Action to combat crime 7.30.30.06 Action to combat economic fraud and corruption 7.30.30.08 Capital outflow, money laundering 7.40.04 Judicial cooperation in criminal matters</p> <p>Legislative priorities Joint Declaration 2022</p> | |

| Key players | | | |
|---|---|---|------------|
| European Parliament | Committee responsible | Rapporteur | Appointed |
| | LIBE Civil Liberties, Justice and Home Affairs | | 25/04/2012 |
| | | PPE MACOVEI Monica | |
| | | Shadow rapporteur S&D BORSELLINO Rita Verts/ALE TAVARES Rui | |
| Council of the European Union | Council configuration | Meeting | Date |
| | Transport, Telecommunications and Energy | 3303 | 14/03/2014 |
| | Justice and Home Affairs (JHA) | 3195 | 25/10/2012 |
| | Justice and Home Affairs (JHA) | 3162 | 26/04/2012 |
| European Commission | Commission DG Migration and Home Affairs | Commissioner MALMSTRÖM Cecilia | |
| European Economic and Social Committee European Committee of the Regions | | | |

| Key events | | | |
|------------|---|------------------------------|---------|
| 12/03/2012 | Legislative proposal published | COM(2012)0085 | Summary |
| 15/03/2012 | Committee referral announced in Parliament, 1st reading | | |
| 26/04/2012 | Debate in Council | 3162 | Summary |
| 25/10/2012 | Debate in Council | 3195 | |
| 07/05/2013 | Vote in committee, 1st reading | | |
| 20/05/2013 | Committee report tabled for plenary, 1st | A7-0178/2013 | Summary |

| | | | |
|------------|---|---|---------|
| | reading | | |
| 24/02/2014 | Debate in Parliament |  | |
| 25/02/2014 | Results of vote in Parliament |  | |
| 25/02/2014 | Decision by Parliament, 1st reading | T7-0120/2014 | Summary |
| 14/03/2014 | Act adopted by Council after Parliament's 1st reading | | |
| 03/04/2014 | Final act signed | | |
| 03/04/2014 | End of procedure in Parliament | | |
| 29/04/2014 | Final act published in Official Journal | | |

Technical information

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| Procedure reference | 2012/0036(COD) |
| Procedure type | COD - Ordinary legislative procedure (ex-codecision procedure) |
| Procedure subtype | Legislation |
| Legislative instrument | Directive |
| | Amending Joint Action 98/699/JHA 1998/0909(CNS) Amending Framework Decision 2001/500/JHA 2000/0814(CNS) Amending Framework Decision 2005/212/JHA 2002/0818(CNS) |
| Legal basis | Treaty on the Functioning of the EU TFEU 083-p1-a1; Treaty on the Functioning of the EU TFEU 082-p2 |
| Mandatory consultation of other institutions | European Economic and Social Committee European Committee of the Regions |
| Stage reached in procedure | Procedure completed |
| Committee dossier | LIBE/7/09120 |

Documentation gateway

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|---|--------------------------------|------------|------|---------|
| Legislative proposal | COM(2012)0085 | 12/03/2012 | EC | Summary |
| Document attached to the procedure | SWD(2012)0031 | 12/03/2012 | EC | |
| Document attached to the procedure | SWD(2012)0032 | 12/03/2012 | EC | |
| Economic and Social Committee: opinion, report | CES1584/2012 | 11/07/2012 | ESC | |
| Committee draft report | PE494.663 | 28/08/2012 | EP | |
| Committee of the Regions: opinion | CDR1269/2012 | 10/10/2012 | CofR | |
| Amendments tabled in committee | PE498.052 | 08/01/2013 | EP | |
| Committee report tabled for plenary, 1st reading/single reading | A7-0178/2013 | 20/05/2013 | EP | Summary |
| Text adopted by Parliament, 1st reading/single reading | T7-0120/2014 | 25/02/2014 | EP | Summary |
| Draft final act | 00121/2013/LEX | 03/04/2014 | CSL | |
| Commission response to text adopted in plenary | SP(2014)446 | 20/05/2014 | EC | |

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|--------------------|--|-------------------------------|------------|----|---------|
| Follow-up document | | SWD(2019)1050 | 12/04/2019 | EC | Summary |
| Follow-up document | | COM(2020)0217 | 02/06/2020 | EC | |

Additional information

| | |
|----------------------|-------------------------|
| National parliaments | IPEX |
| European Commission | EUR-Lex |

Final act

[Directive 2014/42](#)
[OJ L 127 29.04.2014, p. 0039](#) Summary

[Corrigendum to final act 32014L0042R\(01\)](#)
[OJ L 138 13.05.2014, p. 0114](#) Summary

Freezing and confiscation of instrumentalities and proceeds of crime in the EU

PURPOSE: establish a legal framework on the freezing and confiscation of proceeds of crime in the European Union.

PROPOSED ACT: Directive of the European Parliament and of the Council.

BACKGROUND: at global level, according to United Nations estimates, the total amount of criminal proceeds in 2009 was approximately USD 2.1 trillion, or 3.6% of global GDP. There are no reliable estimates of the size of criminal profits in the European Union, but in Italy the proceeds of organised crime laundered in 2011 have been estimated by the Bank of Italy at EUR 150 billion.

The profits derived from these activities are laundered and reinvested into licit activities. Organised crime groups increasingly hide and reinvest assets in Member States other than the one where the crime is committed which weakens our ability to fight cross-border serious and organised crime in the EU as a whole.

All Member States should therefore have in place an efficient system to freeze, manage and confiscate criminal assets because, although regulated by EU and national laws, the confiscation of criminal assets remains underdeveloped and underutilised.

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

In a series of conclusions, the Council has also called on the Commission to consider strengthening the legal framework in order to achieve more effective regimes for third party confiscation and extended confiscation.

For its part, the European Parliament adopted an [own-initiative report on organised crime](#) which invites the Commission to present new legislative proposals in the field.

It is in this context that the Commission put forward An [Internal Security Strategy in Action](#) in which it undertook to propose legislation to strengthen the EU legal framework on confiscation, in particular to allow more third-party confiscation and extended confiscation, and to facilitate mutual recognition of non-conviction-based confiscation orders between Member States. Over time, all confiscation and freezing orders issued by a Member State should be effectively enforced against assets located in another Member State.

It should be noted that the majority of definitions and certain basic provisions in this proposal for a directive may be found in existing European texts, and in particular:

- [Framework Decision 2001/500/JHA](#), which obliges Member States to enable confiscation, to allow value confiscation where the direct proceeds of crime cannot be seized and to ensure that requests from other Member States are treated with the same priority as domestic proceedings;
- [Framework Decision 2005/212/JHA](#), which harmonises confiscation laws;
- [Framework Decision 2003/577/JHA](#), which provides for mutual recognition of freezing orders;
- [Framework Decision 2006/783/JHA](#), which provides for the mutual recognition of confiscation orders; and
- [Council Decision 2007/845/JHA](#) on cooperation between national Asset Recovery Offices.

IMPACT ASSESSMENT: the Commission conducted an impact assessment of several policy alternatives that represent differing degrees of EU-level intervention.

- Option 0: a non-legislative option,
- Option 1: a minimal legislative option (correcting deficiencies in the existing EU legal framework which inhibit it from functioning as intended) and
- Option 2: a maximal legislative option (going beyond the aims of the existing EU legal framework). Within the latter, two maximal legislative sub-options are analysed, one with and one without EU level action relating to mutual recognition of freezing and confiscation orders between Member States.

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

confiscation orders.

LEGAL BASIS: Articles 82(2) and Article 83 of the Treaty on the Functioning of the European Union (TFEU).

CONTENT: this proposal for a Directive lays down minimum on the freezing of property with a view to possible later confiscation and on the confiscation of property in criminal matters. The Directive only makes provision for minimum rules (national legislative measures may be more ambitious). The adoption of those minimum rules will further harmonise the Member States' freezing and confiscation regimes, and thus facilitate mutual trust and effective cross-border cooperation.

Confiscation: based on the existing provision of the Framework Decision 2005/212/JHA, the proposal provides for the Member States to enable the confiscation of instrumentalities and proceeds of crime following a final conviction and to enable the confiscation of property of equivalent value to the proceeds of crime.

Extended powers of confiscation: according to the proposal extended confiscation signifies the ability to confiscate assets which go beyond the direct proceeds of a crime. A criminal conviction may be followed by the (extended) confiscation not only of assets associated with the specific crime, but of additional assets which the court determines are the proceeds of other similar crimes. Extended confiscation powers are already provided for in the EU legislation. Framework Decision 2005/212/JHA obliges Member States to allow the confiscation of assets belonging directly or indirectly to persons convicted of certain serious crimes (related to organised crime and terrorism activities). However, this Framework Decision establishes alternative minimum set of rules for extended confiscation, leaving Member States free to apply one, two or all three options. This proposal introduces extended confiscation for the crimes listed in Article 83(1) TFEU as set out in existing Union legislation. It also streamlines the existing regime of alternative options for extended confiscation, by providing for a single minimum standard. Extended confiscation can take place where a court finds, based on specific facts, that a person convicted of an offence covered by this Directive is in possession of assets which are substantially more probable to be derived from other criminal activities of similar nature or gravity than from any other activities.

Extended confiscation is excluded where the similar criminal activities could not be the subject of criminal proceedings due to prescription under national criminal law. The proposal also excludes from confiscation the proceeds of alleged criminal activities for which the affected person has been finally acquitted in a previous trial or other situations where the ne bis in idem principle applies.

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

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

Third party confiscation: criminals often transfer their assets to knowing third parties as soon as they come under investigation, in order to avoid confiscation. Third party confiscation involves the confiscation of assets that have been transferred by an investigated or convicted person to third parties. The Member States' national provisions on third party confiscation are diverging. This hampers the mutual recognition of freezing and confiscation orders on assets transferred to a third party. In order to meet the requirements of proportionality and protect the position of a third party acquiring property in good faith, the proposal does not introduce minimum harmonisation provisions on third party confiscation in all cases. This provision requires third party confiscation to be available for the proceeds of crime or other property of the defendant received for a price lower than market value and that a reasonable person in the position of the third party would suspect to be derived from crime or to be transferred in order to circumvent the application of confiscation measures. It clarifies that the reasonable-person-test must be based on concrete facts and circumstances to prevent arbitrary decisions. Moreover, third party confiscation should be possible only following an assessment, based on specific facts, that the confiscation of property of the convicted, suspected or accused person is unlikely to succeed, or in situations where unique objects must be restored to their rightful owner.

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

Safeguards: according to the jurisprudence of the European Court of Human Rights and the Charter of Fundamental Rights of the European Union, fundamental rights such as the right to property are not absolute. They can legitimately be subject to restrictions provided these restrictions are provided for by law and are necessary and genuinely meet objectives of general interest or the need to protect the rights and freedoms of others, as in the prevention of organised crime. Inasmuch as freezing or confiscation orders interfere with the right to property or other fundamental rights, they must be capable of challenge by affected parties under the conditions set by this Article.

The existing EU legislation (e.g. Framework Decision 2005/212/JHA) provides that Member States should ensure that adequate legal remedies for the affected persons exist in national legislation. With a view to fully complying with the Charter of Fundamental Rights, this Article introduces minimum safeguards at EU level.

These aim at guaranteeing:

- the respect of the presumption of innocence,
- the right to a fair trial (including the ne bis in idem principle),
- the existence of effective judicial remedies before a court and
- the right to be informed on how to exercise such remedies.

Determination of the extent of the confiscation and effective execution: persons suspected to belong to criminal organisations have proven to be successful in hiding their assets, often with the benefit of advice from skilled professionals. In case a confiscation order was issued, no property or insufficient property was discovered and the confiscation order could not be executed, this Article requires Member States to allow

financial investigations on the person's assets to be pursued to the extent necessary to fully execute such order. This provision addresses the problem of the foreclosure of confiscation activities at the end of the criminal procedure and allows unexecuted or partially executed confiscation orders to apply against previously hidden assets which have "resurfaced" in the meantime.

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

Effectiveness and reporting obligations: this provision introduces reporting obligations for Member States, which would help generate statistics to be used for evaluation purposes.

BUDGETARY IMPLICATIONS: this proposal will imply no cost for the EU budget. It does not concern the budgetary allocation of the product of confiscation.

Freezing and confiscation of instrumentalities and proceeds of crime in the EU

The Council welcomed the proposal of the Commission for a directive on the freezing and confiscation of proceeds of crime in the EU, presented in March 2012.

The Danish presidency wants to push forward negotiations and will start in May detailed discussions in the preparatory bodies. Some Member States emphasised the need to go further on the provisions on non-conviction based confiscation while others stressed the need to make the instrument compatible with national instruments.

Freezing and confiscation of instrumentalities and proceeds of crime in the EU

The Committee on Civil Liberties, Justice and Home Affairs adopted the report by Monica Luisa MACOVEI (EPP, RO) 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.

The committee recommends that the position of the European Parliament adopted in first reading following the ordinary legislative procedure should amend the Commission proposal as follows:

Purpose: as well as establishing minimum rules on the freezing of property with a view to possible later confiscation, on the confiscation of property in relation to criminal matters, the Directive also recommends general principles for the management and disposal of confiscated property.

Definitions: Members amended certain definitions, and in particular:

- proceeds now means any economic advantage derived directly or indirectly from a criminal offence;
- property also refers to property held jointly with a spouse;
- confiscation means a measure ordered by a judgment of the competent national court or following judicial proceedings, in relation to a criminal offence, resulting in the final deprivation of property based upon a judgment.

Reinforcing the provisions of non-conviction based confiscation: the committee wishes to extend provisions regarding non-conviction-based confiscation. The text now states that, in addition to the provisions in the Commission proposal, judicial authorities may also confiscate, as a criminal sanction, proceeds and instrumentalities without a criminal conviction where a court is convinced on the basis of specific circumstances and all the available evidence that those assets derive from activities of a criminal nature, while fully respecting the provisions of Article 6 of the ECHR and the European Charter of Fundamental Rights. Such confiscation is to be considered of criminal nature according, amongst others, to the following criteria: (i) the legal classification of the offence under national law, (ii) the nature of the offence and (iii) the degree of severity of the penalty that the person concerned risks incurring and shall also be in line with national constitutional law.

Extended confiscation: the report notes that extended confiscations are particularly effective in combating organised crime, and that some Member States already allow confiscation for instance where a criminal conviction is not pursued or cannot be achieved, if a court is satisfied, after making full use of the available evidence, including the disproportionality of assets compared to the declared income, that the property derives from activities of a criminal nature. Accordingly, the text now states that judicial authorities may confiscate property belonging to a person convicted of a criminal offence where, based on specific facts such as that the value of the property is disproportionate in relation to the lawful income of the convicted person, a court finds it substantially more probable that the property in question has been derived from activities of a criminal nature than from other activities.

Third party confiscation: the amendments state that confiscation of property shall be possible if the proceeds or property were transferred for free or in exchange for an amount significantly lower than their market value.

In addition, a new clause states that each Member State shall take legislative measures in order to introduce provisions aimed at prosecuting those persons who fictitiously attribute ownership and availability of property to third parties, with the aim of avoiding seizure or confiscation measures.

Freezing: Members consider that competent authorities must be able to immediately freeze or seize property with a view to possible its later confiscation. The person affected by this measure shall have a right of appeal to a court. The committee deleted the Commission's wording that such property must be in danger of being dissipated, hidden or transferred out of the jurisdiction.

The rules on third-party confiscation extend to both natural and legal persons.

Safeguards: the amended text specifies that the persons whose instrumentalities and proceeds of crime are confiscated under the directive, irrespective of their ownership at the time of confiscation, have the right to an effective remedy, including the right to a fair trial.

In addition, the amended text states:

- affected persons must have the right to an effective remedy prior to a final decision on confiscation being taken, including the opportunity to make legal representations, in order to preserve their rights;
- where as a result of a criminal offence injured parties have claims against the accused, confiscation must not jeopardise the enforcement of such claims.

Management of frozen and confiscated property: the committees amendments specify that:

- Member States must provide for the possibility of confiscated property being used for social purposes. Statistics collected by Member States shall show the type of use to which the confiscated property has been put, and the contribution it has made to the social and economic development of the area and local communities concerned;
- a new recital states that it would be useful to consider the formation of a Union fund that would collect a part of the confiscated assets from Member States. Such a fund should be open to pilot projects by the citizens of the Union, associations, coalitions of NGOs and any other civil society organisation, to encourage the effective social reuse of the confiscated assets and to expand the democratic functions of the Union;
- Member States must take measures, based on existing best practice while applying national law, to provide for the disposal and the destination of the confiscated property. It could as a priority earmark such property for law enforcement and crime prevention projects as well as for other projects of public interest and social utility. Member States are also called upon to take all the necessary measures to prevent any criminal or illegal infiltration in this phase.

Lastly, they may introduce a revolving fund for financing measures aimed at safeguarding property between the time when it is frozen and the time when it is confiscated, in order to ensure its integrity against any acts of vandalism or acts that may render it less immediately available.

Freezing and confiscation of instrumentalities and proceeds of crime in the EU

The European Parliament adopted by 631 votes to 19, with 25 abstentions, a legislative resolution 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.

Parliament adopted its position at first reading under the ordinary legislative procedure. The amendments adopted in plenary were the result of an agreement negotiated between the European Parliament and the Council. They amended the Commission proposal as follows:

Purpose: the proposed Directive seeks to establish minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters. It should be without prejudice to the procedures that Member States may use to confiscate the property in question.

Scope: as well as the criminal offences provided in the proposal, the future Directive should also apply to attacks against information systems as defined in [Directive 2013/40/EU](#) of the European Parliament and of the Council.

Confiscation: Member States should 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.

Where confiscation is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States should 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.

Extended confiscation: Member States should 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.

In this context, the future Directive defined the notion of criminal offence shall include at least the following: (i) active and passive corruption in the private sector or involving officials of institutions of the Union or of the Member States; (ii) offences relating to participation in a criminal organisation ; (iii) causing or recruiting a child to participate in pornographic performances; (iv) illegal system interference and illegal data interference; (v) a criminal offence that is punishable by a custodial sentence of a maximum of at least four years.

Third party confiscation: Member States should 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. This provision should not prejudice the rights of bona fide third parties.

Freezing: Member States should take the necessary measures to enable the freezing of property with a view to possible subsequent confiscation. Those measures, which should be ordered by a competent authority, should include urgent action to be taken when necessary in order to preserve property.

Safeguards: Member States should 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. Amongst the safeguards, the following should be noted: (i) the right to information as regards the freezing order; (ii) the right to restitution of property frozen by not subject to subsequent confiscation; (iii) the reason for any confiscation; (iv) the right of access to a lawyer during the confiscation proceedings; (v) the right to challenge 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.

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.

In proceedings, 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.

Moreover, 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 should take the necessary measures to ensure that the confiscation measure does not prevent those victims from seeking compensation for their claims.

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.

More extensive national provisions on evidence: 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.

Confiscated property to be used for social purposes: 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. Reports: the Commission should 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. In that report, the Commission should also assess whether there is any need to revise the list of offences in the Directive.

Freezing and confiscation of instrumentalities and proceeds of crime in the EU

Corrigendum to Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

Article 12:

for: ?1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 4 October 2015. They shall forthwith transmit to the Commission the text of those provisions.';

read: ?1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 4 October 2016. They shall forthwith transmit to the Commission the text of those provisions.';

Article 13:

for: ?The Commission shall, by 4 October 2018 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.

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

read: ?The Commission shall, by 4 October 2019 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.

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

Freezing and confiscation of instrumentalities and proceeds of crime in the EU

PURPOSE: to establish a legal framework on the freezing and confiscation of proceeds of crime in the European Union.

LEGISLATIVE ACT: Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

CONTENT: 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. This Directive is without prejudice to the procedures that Member States may use to confiscate the property in question.

Scope: the Directive shall apply to criminal offences within the scope of the instruments it lists. Under the scope of these instruments, Member States should apply an extended confiscation to at least a certain number of criminal offences.

Confiscation: 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.

Where confiscation on the basis of abovementioned 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.

Extended confiscation: 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.

The notion of criminal offence shall include at least the following: (i) active and passive corruption in the private sector as well as active and passive corruption involving officials of institutions of the Union or of the Member States; (ii) offences relating to participation in a criminal organisation; (iii) causing or recruiting a child to participate in pornographic performances; (iv) illegal system interference and illegal data interference; (v) a criminal offence that is punishable by a custodial sentence of a maximum of at least four years.

Confiscation from a third party: 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. This measure shall not prejudice the rights of bona fide third parties.

Freezing: Member States should take the necessary measures to enable the freezing of property with a view to possible subsequent confiscation. Those measures, which should be ordered by a competent authority, should include urgent action to be taken when necessary in order to preserve property.

Safeguards: Member States should 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.

Amongst the safeguards, the following should be noted:

- the right to information as regards the freezing order;
- the right to challenge the circumstances of the case;
- the right to restitution of property frozen by not subject to subsequent confiscation;
- the reason for any confiscation;
- the right of access to a lawyer during the confiscation proceedings;
- the right to challenge 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.

Moreover, 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 should take the necessary measures to ensure that the confiscation measure does not prevent those victims from seeking compensation for their claims.

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.

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.

Management of frozen and confiscated property: 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.

Member States shall consider taking measures allowing confiscated property to be used for public interest or social purposes.

Statistics: Member States shall regularly collect and maintain comprehensive statistics from the relevant authorities on the number of freezing orders executed and other statistics of the same type (including the number of requests for freezing orders to be executed in another Member State). The Member States shall also send each year the following statistics to the Commission.

Undue hardship: 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.

Reporting: the Commission shall, by 4 October 2018 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. In that report, the Commission shall also assess whether there is any need to revise the list of offences.

It should be noted this Directive replaces [Joint Action 98/699/JHA](#) and certain provisions of Framework Decisions [2001/500/JHA](#) and [2005/212/JHA](#).

ENTRY INTO FORCE: 19.05.2014.

TRANSPOSITION: 04.10.2015.

Freezing and confiscation of instrumentalities and proceeds of crime in the EU

This Commission staff working document presents the results of the analysis carried out by the European Commission of provisions on non-conviction based confiscation in the legislation of the Member States.

It should be stated that the Commission is currently verifying the complete transposition of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union into national legislation by Member States. The period for transposing the Directive expired in October 2016 but the Directive is still being transposed in some Member States.

Hence, this staff working document merely describes the legal regimes governing non-conviction based confiscation to map the different

approaches taken in this policy area and identify trends. It is not aimed at making any statements as to the completeness or conformity of the transposition at national level and does in no way prejudice possible infringement procedures related to the confiscation Directive.

Non-conviction based confiscation typologies

For the purpose of this analysis, the factual information collected is organised according to models which are inspired by the non-conviction based confiscation Typologies Guide developed by the EU-funded Camden Asset Recovery Inter-Agency Network (CARIN) in 2015, which foresees four Models:

- Model 1: Classic non-conviction based confiscation applies where confiscation is not possible on the basis of a final conviction. While proceedings have been instituted against an offender, they cannot be concluded, as the offender cannot be brought before the court or convicted due to his/her death, because the offender has absconded or because the court deems him/her unfit for prosecution due to immunity, age or mental state.
- Model 2: Extended confiscation allows for the confiscation of assets, which are not connected to the crime for which the offender is being prosecuted. The order to confiscate is effectively extended beyond the assets related to the prosecution, to other assets owned by the defendant.
- Model 3: In rem proceedings (action against the assets not the person) are initiated to confiscate assets obtained through unlawful conduct.
- Model 4: The unexplained wealth model compares the actual property a person has acquired against income declared by that person in order to identify any disparity between the two. Establishing a direct or indirect link to a predicate offence is not necessary.

From the analysis it becomes clear that most Member States non-conviction based confiscation regimes go beyond the minimum harmonisation requirements set out in the confiscation Directive but vary considerably in their scope:

- 25 Member States (all except BG, IE, UK) primarily rely on classic non-conviction based confiscation proceedings (Model 1);
- 26 Member States (all except EL and IE) have extended confiscation regimes (Model 2);
- 13 Member States (EE, DE, EL, IT, LV, LT, LU, NL, PL, RO, SK, SL, ES) also have some form of in rem/unexplained wealth procedures (Models 3 and 4) in addition to classic ones, or have draft law envisaging such regime;
- 3 Member States (BG, IE, UK) primarily rely on in rem/unexplained wealth proceedings (Models 3 and 4).

Looking at Member States having implemented classic non-conviction based confiscation regimes (Model 1) differences in scope are visible:

- 8 Member States cover the situation of illness or absconding but also other situations; 4 of them (ES, HU, SE, SI) also cover death, the other 4 (EE, PL, PT, SK) exclude death;
- 7 Member States (BE, CZ, FR, LT, LU, MT, NL) cover only the situation of illness or absconding;
- 7 Member States (AT, CY, EL, FI, HR, IT, LV) cover the situations of death, illness or absconding;
- 2 Member States (DK, EL) cover only the situation of death;
- 1 Member State (DE) covers all cases where a conviction is not possible in criminal proceedings;
- 1 Member State (RO) covers only the case of illness of the suspect or accused person.

Possible challenges

A key challenge to the introduction of non-conviction based confiscation legislation is the compliance with fundamental rights. The absence of a criminal conviction raises issues relating to the right to fair trial, effective judicial remedy, the presumption of innocence as well as the right to property.

Conclusions

Member States legal frameworks on non-conviction based confiscation have undergone considerable changes over the last years.

It is true that while confiscation has received more attention recently, the actual rate is still very low. The lack of current data is an aspect that should also be addressed. Further reflection and consultation on this matter are necessary.

This work constitutes an intermediary step and will inform the Commissions reply to the call of the European Parliament and the Council in their joint declaration in the context of the Report on the transposition of the confiscation Directive, which will be presented by the Commission at the end of 2019.