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THE EUROPEAN UNION**

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**NOTE**

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Subject: Opinion of the Committee of the Regions  
- Package on protection of the licit economy

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Delegations find in Annex an Opinion of the Committee of the Regions - Package on protection of the licit economy.

**OPINION**  
**of the**  
**Committee of the Regions**

**PACKAGE ON PROTECTION OF THE LICIT ECONOMY**

THE COMMITTEE OF THE REGIONS

- welcomes the European Commission's proposals, which group together coherently the legislative measures and strategies to be implemented in order offer the licit economy useful and rapid protection;
- endorses the Commission's initiatives aimed at preventing unwholesome practices such as conflicts of interest, favouritism and corruption by incriminating forms of behaviour that are still not penalised in some Member States and that obstruct free access to public contracts;
- supports the implementation of a new evaluation mechanism, the EU's future Anti-Corruption Report, to be published every two years, starting in 2013;
- welcomes the draft directive on the freezing and confiscation of criminal proceeds in the EU, as these are indispensable instruments for protecting the global economy, ensuring that "crime does not pay" and that "ill-gotten gains never prosper";
- approves of the reasoning behind the Stockholm Programme whereby it is preferable to make minimum standards under TFEU Article 83 compulsory (including extended confiscation, value confiscation, third party confiscation and confiscation without criminal conviction) rather than seeking to improve the EU's current mechanism, which has no real power;
- calls on Member States to provide for a share of the criminal assets seized to be returned to local and/or regional authorities (once legal claims for recovery have been met) as they are the first victims of criminal organisations that destabilise the social order at local level. They are also best placed to take local-level measures to eradicate the deep-rooted causes of crime. This is one way of showing the work of public authorities in a positive light and creating a virtuous cycle involving elected representatives, civil society and families;
- would encourage local and regional elected representatives to sign a code of ethics entitled "Obliti privatorum, publica curate" (forget private affairs, take care of public ones), which would help to build and preserve a relationship of trust between the public and those governing them;
- encourages elected representatives to submit a declaration of income regarding their properties and their commercial or business interests to an independent public authority.

Rapporteur-General

Christophe Rouillon (FR/PES), Mayor of Coulaines

Reference documents

Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of the proceeds from crime in the European Union

COM(2012) 85 final

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – On the protection of the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers' money

COM(2011) 293 final

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Fighting Corruption in the EU

COM(2011) 308 final

Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law

COM(2012) 363 final

## I. POLICY RECOMMENDATIONS

### THE COMMITTEE OF THE REGIONS

#### *General comments*

1. notes that corruption, organised crime and fraud plague the European Union. According to the NGO Transparency International, these practices result in a loss of EUR 120 billion a year, i.e. 1% of the EU's GDP. The illicit economy pushes countries further into debt, holds back government action against the crisis, reduces investment levels, favours the capital flight and saps public confidence in their representatives and institutions;
2. recalls that the Lisbon Treaty has given the EU enhanced tools to fight cross-border crime by defining Eurojust's role, providing for the introduction of a European Public Prosecutor (Treaty on the Functioning of the European Union (TFEU) Articles 85 and 86) and including clauses on the fight against fraud and any other illegal activity damaging the EU's financial interests (TFEU Articles 310(6) and 325);
3. points out that according to Eurobarometer, 75% of Europeans see corruption as a serious problem for the Member States;
4. notes that the confiscation and freezing of criminal assets have been recognised to be effective tools in the fight against serious forms of organised crime and have been given strategic priority at EU level;
5. considers that to protect the EU's interests there must be better control over the use of subsidies granted for instance in connection with the European social funds, territorial cohesion or the common agricultural policy; fraud is in danger of undermining the legitimacy of these integrated European policies designed to benefit the regions;
6. would underline that at local level, organised crime targets regional and local authority decision-makers in connection with public procurement, public service contracts, building permits and business licences;
7. observes that organised criminal activities such as drugs trafficking and human trafficking are of lasting danger to public order, public health and social cohesion;

8. recalls that, by applying European tax laws in a seemingly legal and sometimes highly innovative way, as in the case of the carbon tax, criminal organisations are robbing and weakening the EU's Member States and also its local and regional authorities;
9. stresses that corruption in sport (betting scams, bribes for the choice of venues for major competitions, secret commissions linked to the transfer of players, etc.) is a source of particular concern, as it undermines the humanist values upheld by millions of amateur athletes and club volunteers;
10. considers that in accordance with the principle of subsidiarity, local and regional authorities are key players in protecting the licit economy, as they launch policies promoting freedom, security and justice.

#### THE COMMITTEE OF THE REGIONS

11. would draw attention to the shortcomings of current EU law when it comes to the fight against fraud, corruption and the confiscation of criminal assets.

##### *On the fight against fraud*

12. notes that in its second report on implementation of the 1995 Convention on the protection of the European Communities' financial interests (COM(2008) 77), the Commission finds that only five Member States have taken "all" the measures needed for "satisfactory" compliance;

##### *On the fight against corruption*

13. regrets that Framework Decision 2003/568/JHA on combating active and passive corruption in the private sector and setting out rules on the liability of legal persons has yet to be transposed;
14. deplores the fact that certain Member States have yet to ratify the international criminal law conventions of the Council of Europe, the United Nations and the OECD;

##### *On the freezing and confiscation of criminal assets*

15. notes inadequacies in the transposition of the five framework decisions drawn up in this area:
- most Member States have adopted only parts of Framework Decision 2005/212/JHA, which allows for value confiscation and extended confiscation;
  - whereas Framework Decision 2003/577/JHA provides for the principle of the mutual recognition of freezing orders, the Commission regrets having very little information on its application;
  - Framework Decision 2006/783/JHA, which provides for the mutual recognition of confiscation orders, failed to make more of the optional rules on extended confiscation established by Framework Decision 2005/212/JHA. In addition, Framework Decision 2006/783/JHA applies only to confiscation orders issued within criminal proceedings and not civil confiscation procedures, whose use is however on the increase;
  - not all Member States have implemented Council Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices, obliging Member States to set them up in order to make cooperation between them possible and to facilitate the tracing of proceeds of crime.

#### THE COMMITTEE OF THE REGIONS

16. welcomes the European Commission's proposals, which group together coherently the legislative measures and strategies to be implemented in order offer the licit economy useful and rapid protection;
17. recalls that the legal bases for legislative measures in this area were provided by the TFEU in its Articles 82, 83, 310(6) and 325;
18. places considerable importance on the protection of EU public funds against fraud and embezzlement, but at the same time notes that, on grounds of subsidiarity and efficacy, additions to Union criminal law only make sense when they address demonstrable shortcomings in Member States' law enforcement practice;
19. welcomes the definition at EU level of basic crimes such as fraud and the embezzlement of public funds;

20. endorses the Commission's initiatives aimed at preventing unwholesome practices such as conflicts of interest, favouritism and corruption by incriminating forms of behaviour that are still not penalised in some Member States and that obstruct free access to public contracts<sup>1</sup>;
21. welcomes the thrust of the OLAF reform aimed at protecting tax payers' money:
  - the *de minimis rule* to be applied will assist OLAF in setting its priorities when it comes to serious fraud investigations;
  - the requirement to follow up administrative investigations means that Member States, previously under no obligation, will now at least have to inform OLAF of the follow-up given to files;
22. is fully satisfied by the political boost given to the fight against corruption within the Union and the overall approach adopted by the Commission on this matter;
23. supports the implementation of a new evaluation mechanism, the EU's future Anti-Corruption Report, to be published every two years, starting in 2013;
24. backs the Commission's proposal to adjust to existing mechanisms such as those of the OECD or the Council of Europe;
25. would nevertheless draw the Commission's attention to the need to learn fast from this global mechanism based on mutual trust between countries and recalls the need to legislate in order to make virtuous practice mandatory, in accordance with TFEU Article 83;
26. is totally satisfied by the Commission's holistic approach, which has also led it to look at accounting and auditing standards for EU companies.

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<sup>1</sup> COM(2007) 328 final and COM(2011) 309 final. The report states that only nine Member States (Belgium, Bulgaria, Cyprus, the Czech Republic, Finland, France, Ireland, Portugal, and the United Kingdom) have correctly transposed all the basic elements constituting the crime of corruption as defined by the 2003 framework decision.

## THE COMMITTEE OF THE REGIONS

27. welcomes the draft directive on the freezing and confiscation of criminal proceeds in the EU, as these are indispensable instruments for protecting the global economy, ensuring that "crime does not pay" and that "ill-gotten gains never prosper";
28. approves of the reasoning behind the Stockholm Programme whereby it is preferable to make minimum standards under TFEU Article 83 compulsory (including extended confiscation, value confiscation, third party confiscation and confiscation without criminal conviction) rather than seeking to improve the EU's current mechanism, which has no real power;
29. supports the draft directive inasmuch as it takes up the legal provisions and concepts already defined in earlier framework decisions on the confiscation of the proceeds and instruments of crime and the confiscation of property of value equivalent to the proceeds of crime;
30. also welcomes the fact that it provides for a very broad understanding of the proceeds of crime (including the recycling of proceeds into property or rights) and enabling property to be seized provisionally pending a decision;
31. *with regard to extended confiscation*, while the CoR welcomes the removal of the options available to Member States under the 2005 framework decision and considers existing provisions on extended confiscation to have thus been improved, it considers Article 4(1) to be too vague and in need of improvement. Under extended confiscation, the law aims to allow confiscation beyond the direct proceeds of the crime, precisely because it can presume that there is a link between the crime and the property or rights it intends to confiscate. The CoR would suggest that the "concrete facts and circumstances" on which the court bases its decision should for instance be illustrated by the imbalance between the value of property and legal income. This most frequent example of "concrete facts and circumstances" also has the advantage of stressing that the onus is then upon the person concerned to show proof that property or rights that are not the direct proceeds of a crime but which are to be confiscated are the fruit of other legal sources of income;
32. welcomes the possibility of *confiscating third party assets*; criminals never have property or rights in their own name and the third party whose role it is to conceal or recycle property is very often a legal person; criminal organisations have long been using highly sophisticated legal techniques to protect property from confiscation. The CoR would therefore strongly recommend extending the principle of the criminal liability of legal persons and introducing the notion of "effective beneficiary";

33. would also suggest including within the present proposal the possibility of considering that the third party is behaving like the real owner and/or sole financial beneficiary. This proof could be provided by evidence: managing a legal entity for personal ends in fact or in law, financing a property, making a property available without payment, etc. This concept, well known in Luxembourg for instance, enables the real beneficiary of a company to be arrested and complements the principle of the liability of legal persons;
34. has some reservations regarding confiscation without conviction as in most Member States confiscation is a penalty linked to a criminal conviction; Furthermore, confiscation without conviction is based on *civil proceedings* and is not covered by the legal base concerned here: the present proposal is based explicitly on TFEU Article 82(2) which refers to criminal matters only. It also undermines legal traditions in countries such as France where property rights are upheld by the constitution;
35. would point out that confiscation without conviction is not covered by TFEU Article 83(1) either, which states that the Parliament and the Council "*establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension*";
36. proposes a criminal law route so as to arrive at an equivalent level of effectiveness in the law on seizures and confiscation based on criminal provisions that have stood the test of time;
37. on this note recalls that civil confiscation is based on the third FATF recommendation, which encourages countries to take confiscatory measures "without requiring a criminal conviction". The same recommendation adds that countries should also adopt measures that "require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation". The aim here appears therefore to secure the main advantage of confiscation without conviction: a reversal in the burden of proof. The creation of a new criminal offence for the possession of "unjustified" assets, or the inability to account for resources, would achieve the same result. (See for instance the new Article 321-6 of the French *Code pénal* which broadly condemns the inability of a person to account for resources relating to their lifestyle or give the origin of property in cases where that person is in habitual contact with offenders sentenced to a minimum of five years' imprisonment.) This achieves the desired reversal of the burden of proof;
38. In accordance with the principle of subsidiarity, this proposal should leave Member States the choice of whether or not to include confiscation without conviction, providing they are able to demonstrate that their legislation is equally efficacious and that they will not obstruct the principle of mutual recognition.

## THE COMMITTEE OF THE REGIONS

39. expresses less serious reservations regarding overly detailed guarantees given at the various stages in the freezing and confiscation of criminal assets, as this could paralyse the new legal basis for the seizure and confiscation of assets in the EU;
40. would nevertheless insist on the need to introduce a European Public Prosecutor and to move immediately to strengthen the police and judicial structures that deal with organised crime within the Member States.

## THE COMMITTEE OF THE REGIONS

41. believes that the introduction of a post of European Public Prosecutor can contribute to more effective reform of OLAF;
42. considers that financial investigations into corruption and the involvement of influential financial and political players or investigations involving cross-border criminal networks would be carried out more effectively and reliably by a European public prosecutor;
43. considers that the development of Eurojust as the basis for a European public prosecutor, with the capacity to initiate criminal investigations, at least when the EU's interests are at serious risk, and the possibility to launch judicial enquiries is an effective way of avoiding situations of the kind mentioned in the Commission Communication on the protection of financial interests, COM(2011) 293 final, the subject of this opinion. The CoR would recall that TFEU Articles 85 and 86 provide for this necessary move in the face of the dual challenge represented by the threat of the financial crisis and serious crime;
44. considers that this move should include the preparation and implementation of a joint European programme for training financial investigators and that the Commission should make this a priority;
45. considers that the effective protection of whistleblowers against reprisals is central both to anti-corruption policies and to the fight against organised crime. However, the relevant legal framework in the EU is uneven. The CoR would also therefore strongly endorse the Commission's initiatives aimed at protecting whistleblowers;

*Bolstering the role of local authorities in combating corruption and organised crime*

46. calls on Member States to provide for a share of the criminal assets seized to be returned to local and/or regional authorities (once legal claims for recovery have been met) as they are the first victims of criminal organisations that destabilise the social order at local level. They are also best placed to take local-level measures to eradicate the deep-rooted causes of crime. This practice already exists in Italy, where a third of 12 000 buildings seized were either given to or resold for the benefit of local authorities to **carry out social work**. **This is** one way of showing the work of public authorities in a positive light and creating a virtuous cycle involving elected representatives, civil society and families;
47. would encourage local and regional elected representatives to sign a code of ethics entitled "Obliti privatorum, publica curate" (forget private affairs, take care of public ones), which would help to build and preserve a relationship of trust between the public and those governing them. This code would set out the rules of impartiality (the imperatives of avoiding any conflict of interest, refusing private invitations from natural or legal persons whose activity has a connection with the authority, handing over to the State gifts worth more than EUR 150, not acting on behalf of family members, etc.) and integrity (not using public funds for personal ends or for electoral campaigns, upholding the rules of public office, etc.);
48. encourages elected representatives to submit a declaration of income regarding their properties and their commercial or business interests to an independent public authority;
49. urges Member States to arrange for the public financing of electoral campaigns, to outlaw donations from legal persons and to establish rules for local elected representatives that guarantee their financial independence and autonomy;
50. calls for an effective fight against money laundering involving the proceeds of corruption and organised crime in tax havens;
51. recommends that Member States equip themselves with the right tools to prevent and detect attacks on probity, such as services to evaluate anti-corruption mechanisms and to monitor public procurement and the subcontracting of public services;
52. calls for the establishment of a European platform for the exchange of good local practice in the fight against corruption and organised crime and in the restitution of seized criminal assets, and of European forums for combating corruption and organised crime;
53. suggests that local authorities should ensure that their grants to top athletes and professional clubs are governed by ethical obligations and strict financial transparency;

54. proposes that the Committee of the Regions appoint an observer within the European Parliament's special committee on corruption and the Council of Europe's Group of States against Corruption (GRECO);
55. will broaden its examination of good practice in governance and administrative management to include the protection of the licit economy in neighbourhood policy partner countries that are members of ARLEM (Euro-Mediterranean Regional and Local Assembly) and CORLEAP (Conference of the Regional and Local Authorities for the Eastern Partnership).

Brussels, 10 October 2012.

The President  
of the Committee of the Regions

Ramón Luis Valcárcel Siso

The Secretary-General  
of the Committee of the Regions

Gerhard Stahl

## II. PROCEDURE

<b>Title</b>	Package on protection of the licit economy
<b>Reference</b>	<p>Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of the proceeds of crime in the European Union – COM(2012) 85 final</p> <p>Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – On the protection of the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers' money – COM(2011) 293 final</p> <p>Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Fighting Corruption in the EU – COM(2011) 308 final</p> <p>Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law – COM(2012) 363 final</p>
<b>Legal basis</b>	TFEU Articles 82(2), 83(1), 85, 86, 310(6) and 325
<b>Procedural basis</b>	Rule 39 a of the Rules of Procedure
<b>Dates of letters from the Commission, Council and Parliament</b>	14 March 2012, 19 April 2012 and 29 March 2012
<b>Date of president's decision</b>	29 March 2012
<b>Commission responsible</b>	Commission for Citizenship, Governance, Institutional and External Affairs (CIVEX)
<b>Rapporteur-General</b>	Christophe Rouillon (PES/FR)
<b>Analysis</b>	19 July 2012
<b>Discussed in commission</b>	22 June 2012 (working document)
<b>Date adopted by commission</b>	-
<b>Result of the vote in commission</b>	-
<b>Date adopted in plenary</b>	10 October 2012
<b>Previous Committee opinion(s)</b>	<p>The Stockholm Programme: challenges and opportunities in view of a new multi-annual programme on the EU area of freedom, security and justice (CdR 201/2009)</p> <p>Delivering an area of freedom, security and justice for Europe's citizens – action plan implementing the Stockholm programme (CdR 170/2010)</p> <p>EU Internal Security Strategy (CdR 407/2010)</p>