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Delegations find in Annex Opinion of the European Economic and Social Committee on the 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.

European Economic and Social Committee

SOC/459

Proceeds of crime

Brussels, 11 July 2012

OPINION

of the

European Economic and Social Committee

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) 85 final – 2012/0036 (COD)

Rapporteur: **Mr de Lamaze**

On 15 March 2012 and 4 April 2012, respectively, the European Parliament and the Council decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, 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) 85 final - 2012/0036 (COD).

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 28 June 2012.

At its 482nd plenary session, held on 11 and 12 July 2012 (meeting of 11 July), the European Economic and Social Committee adopted the following opinion by 142 votes with 5 abstentions.

1. Conclusions and recommendations

- 1.1 The EESC supports this Commission initiative, which aims to strengthen the current European legislative framework on freezing and confiscation of the proceeds of crime. The Committee, which shares the concerns of the Parliament and the Council, wishes to emphasise that organised crime is increasing and becoming more complex, particularly in light of its cross-border nature and its substantial resources. In the absence of European harmonisation, criminal organisations take advantage of the least stringent sets of laws, and there is an urgent need to boost efforts at European level. At stake is the security of the people of the EU, a goal which fully justifies EU intervention under Articles 5(3) and 67 of the Treaty on the Functioning of the European Union.
- 1.2 However, the EESC wishes to make clear that this must be designed and implemented with full respect for national tradition and practices in this area and must take account of particular sensitivities, especially as to the specific crimes that are to be tackled.

1.3 The EESC wishes to highlight the need for a global, operational and integrated approach in this field. It regrets that the proposal does not incorporate the *acquis communautaire* in relation to judicial cooperation and cooperation between investigative authorities. As a first step, identifying and tracing the proceeds of crime requires strengthening the powers of the Asset Recovery Offices and Eurojust. The EESC also calls for promotion of:

- better cooperation between the authorities responsible for tracking, preventing and punishing large-scale trafficking, including cooperation as to the resources used,
- a common culture among all relevant professionals,
- a cross-cutting approach across all Commission DGs,
- tax and procedural harmonisation, to which the Europe 2020 strategy could contribute.

1.3.1 Apart from the necessary coordination and the systematic exchange of information between national Asset Recovery Offices, the EESC believes that it is necessary in the long term to consider centralisation at European level in this area, whether through a new, dedicated organisation or directly through Eurojust. In view of what is at stake, the fight against organised crime cannot rely on cooperation alone.

1.4 If measures to freeze and confiscate the proceeds of crime are to be effective, a holistic approach is needed that governs every dimension of the instrument and, when it comes to the confiscated goods being reused, takes care to give priority to socially beneficial purposes.

On that subject, the Committee highlights the need to avert the risk that a direct sale of the goods could enable criminal organisations to regain possession of them.

1.5 Finally, the EESC notes that the effectiveness of the fight against organised crime cannot justify any violation whatsoever of the fundamental rights set out in the Charter of Fundamental Rights, particularly the rights of the defence.

2. **Content of the Commission proposal**

- 2.1 This proposal, whose aim is to protect the licit economy from criminal infiltration, sets minimum rules for the Member States in relation to the freezing and confiscation of assets derived from crime, that is to say the proceeds (including indirect proceeds) of crime as well as its instrumentalities. Since the main legal basis of the proposal is Article 83(1) of the Treaty on the Functioning of the European Union, its scope is limited to "Euro-crimes", which includes crimes committed by participation in a criminal organisation but only to the extent that they have already been harmonised at European level.
- 2.2 The proposal, which replaces Joint Action 98/699/JHA and, in part, Framework Decisions 2001/500/JHA¹ and 2005/212/JHA²:
- carries over the existing provisions on confiscation of instrumentalities and proceeds of crime following final conviction and on confiscation of property of equivalent value to the proceeds of crime (Article 3), and
 - amends the provisions on extended confiscation (Article 4) by providing for a single set of minimum rules in place of the current system of optional rules. Extended confiscation is not available in cases of prescription or where the non bis in idem principle applies.
- 2.3 This proposal also introduces new provisions, which allow for:
- non-conviction based confiscation (Article 5), 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,
 - confiscation of assets transferred to a third party who should have been aware of their criminal origin (Article 6),
 - preventative interim freezing of assets which are in danger of vanishing in the absence of intervention, provided that if such a measure is taken by the competent authorities, it must be confirmed by a court (Article 7),

¹ On money laundering and the identification, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.

² On confiscation of crime-related proceeds, instrumentalities and property.

- investigations in relation to a person's assets to allow previously unexecuted confiscation orders to be carried out, even after criminal proceedings have been completed (Article 9),
- adequate management of frozen property to prevent it declining in value before being confiscated (Article 10).

2.4 These restrictions on fundamental rights³ are balanced by safeguards which aim to guarantee the presumption of innocence, the right to a fair trial, the existence of effective judicial remedies and the right to be informed of how to exercise such remedies (Article 8).

3. **General comments**

3.1 In the context of the major human, social, economic and financial costs of organised crime, not to mention the way that it constrains the rights and freedoms of individuals and players in the internal market, harming their confidence, the EESC emphasises that confiscation measures have a key role to play in the fight against organised crime by undermining its main purpose, namely financial gain.

3.2 The EESC therefore supports the aims of this initiative to strengthen the European legislative framework in this field. Both the European Parliament and the Council have long insisted on the need for such tightening in the wake of the Stockholm Programme. In this respect, the Committee welcomes the European Parliament's recent creation of a special committee on organised crime, corruption and money laundering, which reaffirms the determination to put the fight against these scourges at the top of the EU's list of political priorities.

3.3 The EESC calls for full awareness of the critical situation caused by the crisis and the worrying increase in illegal activities in the EU. It would like to see greater harmonisation between the Member States in dealing with criminal networks and their assets.

³ Or on these principles.

3.4 In the context of the crisis, the EESC calls for attention to be paid to the economic and social possibilities offered by seizing what are often very large illegally-acquired sums in order to return them to circulation within the legal economy. It also highlights the fact that the fight against organised crime should support the virtuous circle created by such an approach through a better-functioning internal market, by reducing the competition distortions from which legal businesses suffer.

3.5 The need for a global, operational and integrated approach

3.5.1 Since the effectiveness of the fight against organised crime necessarily requires a global approach, the EESC regrets the fact that the harmonisation of freezing and confiscation measures is not part of a global instrument including the *acquis communautaire* in relation to judicial cooperation and cooperation between investigative authorities that was adopted under the old third pillar, since these are inseparable, complementary elements of one policy.

3.5.2 The EESC stresses that, if measures to freeze and confiscate the proceeds of crime are to be effective, a holistic approach is needed so as to provide a framework that takes account of all of the dimensions of the related issues, with a particular focus on the need to counter the risk that a direct sale of the goods could enable criminal organisations to regain possession of those goods.

3.5.3 In order to achieve consistency, greater legal certainty and more satisfactory transposition and application of European rules, the EESC also calls for the directive to refer to Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders and Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds of crime.

3.5.4 In fact, freezing and confiscation measures can only be effectively executed if they are supported by an equally effective system of tracing and identification of the proceeds of crime, including laundered proceeds.

3.5.5 With regard to the reuse of confiscated goods, the Committee would stress the importance of creating mechanisms for cooperation among Member States so as to facilitate the sharing of best practices amongst competent national authorities.

3.5.6 In this respect, the EESC reasserts:

- the need to give Asset Recovery Offices easier access to financial information (particular data on bank accounts)⁴,
- the advantages for the Member States of making full use of the potential of Eurojust, whose added value in relation to cross-border investigation and prosecution needs no further demonstration, and which can help facilitate interaction between Asset Recovery Offices and judicial authorities,
- the urgent need to strengthen Eurojust's powers of initiative, particularly the power to open investigations,
- the advantages of cooperation between all authorities responsible for tracking, preventing and punishing large-scale trafficking, using all their resources (electronic files, mutual exchange of information and resources in terms of staff, expertise and equipment),
- the urgent need to create a common culture in this field in Europe, through exchanges of customs, police, tax and justice personnel,
- the need to produce the necessary synergy between the Commission's Directorates-General in order to contribute to this,
- the need for tax and procedural harmonisation, so as to deny organised crime any refuge in Europe, and
- the need to link the fight against organised crime to the Europe 2020 strategy.

3.5.7 Furthermore, the success and effectiveness of certain steps that have been taken at national level to deal with confiscated assets on a centralised basis⁵ suggest that this experience should be transferred to the European level. The EESC would therefore suggest that, beyond the necessary coordination and the systematic exchange of information between national Asset Recovery Offices, genuine consideration should be given to the possibility of European centralisation in this field, whether through a new, dedicated organisation or directly through Eurojust. Even though at present such centralisation may clash with national sensitivities related to the sharing of certain databases, it should still be treated as an objective, albeit perhaps a long-term one, since cooperation alone cannot achieve the goal of effectively combating organised crime.

⁴ See the report from the Commission based on Article 8 of 2007/845/JHA, 12 April 2011.

⁵ Particularly AGRASC in France and BOOM in the Netherlands.

3.5.8 Finally, bearing in mind that the European confiscation strategy can only be fully effective if it forms part of a worldwide approach, the EESC regrets the fact that the proposal does not deal with that essential element.

4. **Specific comments**

4.1 **Article 1 of the draft directive:** replace "in criminal matters" with "as a result of criminal offences".

4.2 **Article 2(1) of the draft directive:** targets of freezing and confiscation measures

4.2.1 The EESC welcomes the extension of these measures to indirect gains; this represents significant progress compared with Decision 2005/212/JHA.

4.3 **Article 3(2) of the draft directive:** confiscation of equivalent value

4.3.1 The EESC recommends extending this to property used to commit the offence (referred to as "instrumentalities"). It sees no reason to limit this measure to the proceeds of crime. The EESC highlights the fact that the definition of "instrumentalities" includes vehicles used to transport the proceeds of crime within the EU.

4.4 **Article 4 of the draft directive:** extended powers of confiscation

4.4.1 The EESC welcomes the simplification represented by the introduction of the single standard in this respect, since the system of options under Decision 2005/212/JHA led to excessive diversity in national approaches, to the detriment of the effective application of the principle of mutual recognition in this field.

4.4.2 However, the EESC is very disappointed that the criterion of the value of the property being disproportionate to lawful income no longer appears prominently⁶, but is present only implicitly as one of the "specific facts" on the basis of which the court can reach its decision (Article 4(1)). This factor does in fact have decisive importance in those national laws that are the most advanced in terms of the fight against organised crime. The EESC notes the Commission's decision to leave reference to this criterion to the discretion of national courts and calls on the EP and the Council to reintroduce this criterion by adding to the proposal for a directive, after the words "to a person convicted of a criminal offence", the words "to an extent proportional to his lawful income". At the same time, the Committee urges national authorities to treat this criterion as a point of the greatest importance.

4.5 **Article 5 of the draft directive:** non-conviction based confiscation

4.5.1 Although it may appear difficult as a matter of principle to reconcile confiscation with the fact that the person concerned is not called to account for the actions on which the measure is based, the EESC recognises that this is a useful measure in practical terms and supports it on the grounds of effectiveness. It would also help with mutual recognition with common law countries, which already use civil confiscation procedures.

4.5.2 However, the EESC is concerned that introducing the concept of "permanent illness of the suspected or accused person" may open the door to all manner of abuses. As EU law gives every accused person the right to legal representation, the EESC calls for illness not to be grounds for non-conviction based confiscation and therefore asks that it be deleted from the proposal for a directive (Article 5).

4.6 **Article 7 of the draft directive:** freezing

4.6.1 The EESC notes that judicial procedure, and so the rights of the defence, cannot be excluded simply because that is necessary in order to make enforcement effective.

4.6.2 The EESC believes that all freezing measures should be confirmed by a court within a reasonable time, but that the competent administrative authorities should have the power to take any immediate protective measures.

⁶ This is one of the alternative and/or cumulative options provided for by Decision 2005/212/JHA (Article 3(2)(c)).

4.7 **Article 8 of the draft directive:** safeguards for the rights of the defence

- 4.7.1 The proposal provides for procedural safeguards and judicial remedies for the defendant, in line with the approach developed by the European Court of Human Rights to assess the proportionality of certain measures that restrict the fundamental right to property – particularly extended confiscation, non-conviction based confiscation and third party confiscation – on a case-by-case basis. While it may seem unnecessary to remind impartial courts of the law, it is useful to make clear that all court confiscation orders must give reasons and be communicated to all those affected by them.
- 4.7.2 For the sake of consistency with the requirements under the European anti-money laundering rules, the EESC emphasises that, in connection with the anticipated future instrument in this respect, the person whose assets are seized should have the right to legal aid.
- 4.7.3 In the EESC's view, the accused should not have fewer rights than a person whose involvement is as a third party who receives the goods in question. To avoid any ambiguity in that respect, the EESC proposes that Article 8(1) should be redrafted as follows: "Each Member State shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and the right to legal aid. Any judicial confiscation order must give reasons and be notified to the person concerned."

4.8 **Article 9 of the draft directive:** effective execution

- 4.8.1 The EESC considers that the goal of ensuring effective execution of confiscation orders, while legitimate in itself, cannot justify the adoption of "further measures" which would be added on top of the judges' decision. This is a necessary safeguard in the light of the principles of a fair trial and of determination of the sentence. The only measures that are, of course, acceptable are "further investigative measures within the context of continuing effective execution of a sentence imposed by a court".
- 4.8.2 The EESC notes that confiscation proper can be added to a sentence involving payment of criminal, tax or customs fines, to counter the risk of loss to the state resulting from fraud as to the composition of the unlawfully obtained goods. It therefore recommends that the directive provide for strengthened cooperation between Member States, so that all Member States can be sure that such penalties will be enforced. Such a provision is an essential condition for proceedings to be effective.

4.9 The matter of application and restitution of confiscated funds

- 4.9.1 Far from being a subsidiary point, the matter of application of funds has a direct impact on the overall effectiveness of the confiscation strategy. Since direct sale of property often allows criminal organisations to regain possession of such property in roundabout ways, the EESC highlights the advantages of applying such assets first to social purposes, as is the case in Italy. As the European Parliament has noted⁷, this would have the double benefit of preventing organised crime and promoting economic and social development.
- 4.9.2 The EESC sees the consideration now being given by DG Justice to this question of social application of the proceeds of crime as important. There are various possible approaches, which must involve the central authorities of the Member States and which should be explored and adapted in light of the victims, the public interest and the nature of the frozen assets.
- 4.9.3 Reasons linked with the need to comply with the principles of subsidiarity and proportionality should not prevent the EU from proposing even a general legal framework in this field. The EESC urges the Member States to exchange best practices in this area.
- 4.9.4 That implies the prior existence of clear rules related to restitution. It is quite often the case that the Member State in which the property is seized is not the state in which restitution is to be made. For reasons of fairness and to establish a level playing field between Member States, the EESC calls for the EU to provide clarification on this point, particularly in relation to the 2006 framework decision, which provides for 50:50 sharing between Member States.

Brussels, 11 July 2012.

The President of the
European Economic and Social Committee

Staffan Nilsson

⁷ Report on organised crime in the EU, October 2011.