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NOTE

from :	Presidency
to :	Working Party on Substantive Criminal Law
No. Prop. :	7641/12 DROIPEN 29 COPEN 57 CODEC 656
Subject :	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 - Overview of replies to the questionnaire on non-conviction based confiscation

1. OVERVIEW

Delegations can find attached a general overview of the replies to the questionnaire on non-conviction based confiscation¹.

1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?

Most Member States have a system in place that allows for the confiscation of the proceeds of crime without a criminal conviction. In some cases the relevant provisions are extended also to instrumentalities. Naturally, the scope of applicability varies.

¹ 12219/2/12 REV 2 DROIPEN 100 COPEN 162 CODEC 1843 + ADD 1.

In some cases confiscation is considered only as a penalty whilst in others it can (also) be used as a security measure to safeguard public safety and order and to prevent the circulation of dangerous illicit goods.

2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).

Whether the confiscation procedures are part of the final conviction, or whether they are pursued separately/in parallel, most Member States require a link with a criminal case/criminal proceedings. Only few Member States have a fully civil-based confiscation system in place.

A majority of Member States that provided an answer to whether the measure is directed at the person or at the assets apply confiscation measures on assets. A few Member States can apply these measures on both without a separation or there is a link between the two or one can become the other during the proceedings. In certain Member States the approach depends on the object of confiscation (assets, instrumentalities or objects used for crime).

3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?

In those Member States that require a link to criminal proceedings, the confiscation procedure takes place most often before a criminal court. There are however some Member States where the link is required but where confiscation procedures should take place before civil courts.

4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).

In most Member States non-conviction based confiscation could take place only where obtaining a conviction or continuing the prosecution is not possible any longer. However, there is a great variety of circumstances which would "trigger" such non-conviction based proceedings which are inherently linked to the specific criminal case, e.g. expiration of the statute of limitation, age of the defendant (minors), amnesty, immunity, permanent illness, mental disorder, flight from prosecution, suspension or waiver of the proceedings, plea bargaining, where a consent of a victim has not been granted for the proceedings provided that such is required, etc. In some cases the death of the accused, for example, means that the case will be closed and no confiscation procedures can be applied whilst in some Member States this only changes the type of procedure, or, more specifically, means that non-conviction based procedures may start to be applied.

Other Member States require a more remote link to criminal proceedings. In these cases confiscation proceedings could be effectively conducted upon indictment (on a comprehensive list for specific offences) or even without an indictment in case of amnesty, statute of limitations, death or transfer of criminal proceedings in another state, or when there are sufficient indications that the person is involved in illegal activities. In order to start non-conviction based proceedings some Member States require a certain threshold with which the property of the person exceeds his lawful income and a certain period of time in which the property has come into the person's possession.

A limited number of Member States apply civil forfeiture procedures and therefore do not require any link to criminal proceedings or to a person's possessions.

5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?

Those Member States that express possible legal obstacles cite most often the constitutional principles such as the presumption of innocence and right to property. Also references to the rulings of ECHR were made. Additionally, if confiscation and a criminal conviction were effected in different proceedings, this could be seen to constitute a violation of the ne bis in idem principle.

6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:

- whose system requires a link to criminal proceedings
- whose system applies civil forfeiture procedures.

In most cases Member states indicate that they could recognise non-conviction based confiscation orders, as long as the issuing state applies a system requiring a link to criminal proceedings and provided that the order is in line with the domestic system of the receiving Member State. Many replied to this question on a theoretical basis since there had not been any/many cases in practice. Some Member States that require a link to a criminal case/criminal proceedings in their domestic system did not categorically preclude the recognition of orders based on civil proceedings. In these cases the order however has to meet the standards and legal requirements of the recognising State.

2. ARTICLE 5: WAY FORWARD

Based on the replies to the questionnaire, it seems that most Member States provide for a possibility to use non-conviction based confiscation ordered by a criminal court when criminal conviction can not be obtained or prosecution can not be carried further. On the other hand, there is a great deal of variety as regards the basic approach, scope and criteria for its use. The latter could constitute a serious challenge in order to find a common ground for a minimum standard provision laying down specific circumstances where non-conviction based confiscation would apply. At the same time, such a minimum standard provision should allow those Member States which require only a remote link to criminal proceedings for independent non-conviction based procedures, or which apply civil forfeiture procedures, to adopt a "broader" approach to non-conviction based confiscation.

In this regard, the Presidency is of the opinion that the state of discussion on Article 5 presents two possible approaches to this provision, which could be considered alternatively by delegations, with a view to providing guidance on the basis to continue the discussions:

1. To continue work on the basis of the Commission proposal for Article 5, providing as a minimum rule non-conviction based confiscation in the limited circumstances described therein,
or

2. To seek to accommodate the variety of approaches to non-conviction based confiscation presented in the replies of delegations, whereas the following aspects could be considered in such a provision:

- General provision on taking measures to allow confiscation of proceeds of crime without a criminal conviction, as a minimum rule in cases where conviction can not be obtained or prosecution can not be carried further.
- Specific circumstances, e.g. in case of death, flight or absence and/or in other appropriate cases, could be provided either in the operative text or only in recitals
- Effective safeguards defined under Article 8
- Specific provision that this is without prejudice to the possibilities of Member States to adopt a broader approach to non-conviction based confiscation, where independent confiscation proceedings could be carried out with a more distant link or notwithstanding a link with criminal proceedings.

Either approach involves re-visiting the relevant EU mutual recognition tool Framework Decision 2006/783/JHA.

Delegations are requested to indicate their position on this proposal.
