



STATEMENT ON THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE FREEZING AND CONFISCATION OF PROCEEDS OF CRIME IN THE EUROPEAN UNION

(COM(2012)0085 – C7-0075/2012 – 2012/0036(COD))

The European Criminal Bar Association

The European Criminal Bar Association (ECBA) is an association of independent specialist defence lawyers. The association was founded in 1997 and has become the pre-eminent independent organisation of specialist defence practitioners in all Council of Europe countries. We represent over 35 different European countries including all EU Member States. The ECBA's aim is to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons, not only in theory, but also in the daily practice in criminal proceedings throughout Europe.

Through its conferences, website and newsletter the ECBA provides a suitable forum to access absolutely up-to-date information on legal developments. Through the work of its legal development sub-committee the association actively seeks to shape future legislation with a view to ensuring that the rights of European citizens in criminal proceedings are enhanced in practise. Through the networking opportunities available with membership, members establish one to one contact with other practitioners in other member states both with a view to the exchange of information and to practical cooperation in specific cases. This experience from comparative jurisdictions shapes and informs the submissions which are made by the Association to the law makers, and ensures that those submissions are given due weight.

We were members of the EU Justice Forum and we continue to participate in several EU-projects (e.g. training events for defence lawyers held jointly with ERA, networking/legal aid; letter of rights; pre-trial emergency defence; European Arrest Warrant; translation and interpretation; European Investigation Order) and we have been regularly invited to many EU experts' meetings concerning criminal law issues.

Further information on the ECBA can be found at our website: www.ecba.org.

I. The Commission's Proposal and the Draft Report of LIBE-Committee

The ECBA follow certain EU proposals for legislation in the area of criminal justice to ensure that the rights of all citizens, including the fundamental rights of persons under investigation, suspects, accused and convicted persons are considered and respected.

We have many concerns about the Directive on the freezing and confiscation of proceeds of crime in the European Union (COM(2012)0085 – C7-0075/2012 – 2012/0036(COD)) (the "Commission's Proposal") and the Draft Report of MEP Macovei of 28 August 2012 (the "Draft Report"). In particular we believe there are fundamental flaws in the basis of the Commission's Proposal which are exacerbated by the Draft Report which, at times demonstrate a disregard for the principle of proportionality and the fundamental rights of citizens including breaches in the rule of law. In order to keep this response to a manageable length, we have deliberately selected certain points that are indicative of our concerns, however where we have not made a comment it should not be inferred that we agree with the current drafting of the proposal. In particular we are conscious of the impact on those EU member states legal systems which have already put in place similar measures, resulting in diminished respect for the rule of law and supporting poor investigative practices.

II.i Overview

The draft Directive introduces non-conviction based confiscation and third-party confiscation. It says nothing about mutual recognition. The freezing of assets with a view to possible later confiscation is dealt with in Article 7. Art 4 and 5 deal with confiscation of the proceeds of crime and extended confiscation of other assets where the court finds it "substantially more probable" than not that these assets are derived from other similar crimes.

The principle legal base for the draft Directive is Art 83(1) and Art 82(2) of the Treaty on the Functioning of the European Union (TFEU). Art 83(1) allows directives to be adopted of prescribing minimum rules for "sanctions in the areas of **particularly serious crime with a cross-border dimension**". These areas of crime are listed. Art 82(2) allows directives in specific areas of criminal procedure "to the extent necessary to facilitate mutual recognition of judgments and judicial decisions...in criminal matters having a cross-border dimension". As stated above, there are no provisions in relation to mutual recognition and therefore the suggested additional base under Art 82(2) is erroneous.

In several countries where draconian powers of confiscation have been introduced, the initial principle driver has been the apparent fight against

terrorism and serious organised crime. Since the events of 9/11 there has been an increase in security legislation both on an EU and national level which provide many examples of broad powers being expansively interpreted by policy makers, prosecutors, law enforcement agencies and the courts. This so called practice of "gold plating" whereby domestic measures in purported reliance on a Directive, greatly exceed what is in fact required has in the past seriously compromised fundamental rights, as for example in the anti-money laundering field. It is imperative that serious consideration is given to the principles of proportionality and subsidiarity, necessity, legal basis, respect of the rule of law and Fundamental Rights and Freedoms when proposing new legislation in this area.

There are already several existing Community provisions in this area which are set out in the Explanatory Memorandum of the Commission Proposal (the "Memorandum"). The Memorandum states that these remain "underdeveloped and underutilized" by Member States. This is not a satisfactory basis for introducing additional EU-wide legislation. It is wrong in principle that the authorities in Member States are cajoled in this way with new powers, despite having failed to utilize earlier less invasive measures.

This is particularly the case when the Memorandum also confirms there is little or no empirical data that form the basis of this Commission Proposal.

The Memorandum states the proposal will imply no cost for the EU budget, however in those countries that have introduced legislation of the type proposed, there has been significant expenditure and the need for resourcing and training, with limited evidence that this has produced a net benefit.

The Memorandum states that "all provisions fully respect the principle of proportionality, and fundamental rights". Although we concede that the initial Commission Proposal did try to take these into account, by proposing that non conviction-based confiscation was only for very limited circumstances, that procedures involving the reversal of the burden of proof on the legitimacy of assets needed to be applied fairly and with adequate safeguards for the affected person, that third party rights be respected and protected and that extended powers of confiscation would be excluded in relation to provisions in national law and under the principle of *ne bis in idem*, all of these provisions have been removed in the Draft Report. This demonstrates a blatant disregard to the rights of EU citizens and the rule of law and sends out the dangerous signal that those rights are merely paid lip service and, while referred to, are purely superficial.

The Commission's Proposal does not consider how to proceed if different member states investigate the same cases (a key area where there could be added value in a new instrument). Different persons accused of the

same criminal activities could be confronted with measures to collect the same economic advantage. Any EU proposal should address this.

The Commission's Proposal does not address victims or injured persons' rights and titles. If the European right to confiscate led to the non-enforceability of injured persons' titles, this would contradict the Commission's follow-up program on victims' rights. Therefore it should be guaranteed that victims' rights and titles are not undermined by this proposal for a directive but rather that their primacy be guaranteed as against the individual Member states.

II.ii Specific issues related to the Commission Proposal, as amended by the Draft Report

Several amendments in the Draft Report are not based on empirical data, have no apparent legal foundation and therefore are a matter of speculation and opinion, for example Amendments 1, 2.

Amendment 3,6 and 12 should be reversed in line with the Memorandum which commits to ensuring the fundamental rights and freedoms of European citizens are respected, including the principle of *ne bis in idem*. The Commission Proposal should respect national laws where the relevant crime is statute-barred.

In Art 2 (1) the definition of proceeds as "any economic advantage derived from a criminal offence" is too vague and cannot lead to a uniform assessment. It should be clarified that only "direct" economic advantage derived from a criminal offence is concerned.

In Art 2 (4) the legal character of a regular confiscation should be defined clearly. This should cover the proceeds of criminal activity, but should not include the concept of "penalty".

In Art 4 and 5 it must be specified that the court has to determine that the proceeds derive from a criminal activity even if the substantive offence does not have to be necessarily determined. Confiscation measures have to follow high constitutional standards in all EU member states in terms of the fundamental right of full enjoyment of property. Dependant on the stage of the criminal proceeding there are different degrees of suspicion necessary, at the end of a trial there must be a clear conviction.

Following the explanations on Article 9 the Commission seems to assume that the court takes an abstract decision on confiscation of proceeds (regardless if there are assets to confiscate or not) during the criminal proceedings, while the assessment of the amount will take place afterwards. This is contrary to the principle of proportionality. The amount has to be fixed with the decision on confiscation.

Amendments 9,10 and 11 (concerning Art. 3) propose that confiscation should be possible without any conviction, simply based on a balance of proportionality by a court. This infringes the principles of the presumption of innocence, *ne bis in idem* and the right to peaceful enjoyment of property. In practice this has led to authorities relying on similar draconian powers as an alternative to prosecution. Given the lower burden of proof, and weighty evidential presumptions in favour of confiscation, the reality is that the integrity of criminal due process is undermined to the detriment of all in the pursuit of the few. Investigative authorities naturally abandon proper, rigorous investigation, in favour of a shorthand procedure but with effectively guaranteed success because of the lack of due process. The fact that "less serious criminals" find themselves prosecuted and imprisoned, while those with assets are pursued civilly naturally creates the sensation of differential law enforcement. It is indicative of these draconian powers introduced to tackle terrorism or serious organised crime, that there is legislation creep which results in the same powers being used for less serious allegations of criminal behaviour. Moreover, it can lead to double-confiscation, if the suspect afterwards is pursued in another Member State which then will confiscate whether or not there is a conviction.

Amendment 24 allows preliminary confiscation without any need for reasonable grounds. This again breaches the rule of law and the principle of the presumption of innocence and is the antithesis of what should be expected from the guardians of the rule of law.

If you have any further questions, please do not hesitate to contact us:

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