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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT AND THE COUNCIL**

Proceeds of organised crime

Ensuring that "crime does not pay"

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1. INTRODUCTION

This Communication focuses on the confiscation and recovery of the proceeds of crime in the European Union¹.

Different legal procedures exist or co-exist in the Member States (MS) of the European Union (EU) in order to confiscate the proceeds of crime. Effective national agencies charged with tracing assets are a precondition for a successful confiscation, as well as for international cooperation.

The European Union can provide added value by

- (1) making the EU legal framework more coherent and further improve it,
- (2) promoting coordination, exchange of information and cooperation among national agencies,
- (3) assisting in the creation of new tools related to the identification and tracing of assets,
- (4) facilitating the enforcement of freezing and confiscation orders,
- (5) facilitating cooperation with third countries through the ratification of conventions and the promotion of asset sharing agreements,
- (6) assisting partners to develop new initiatives through EU funding programmes.

2. WHY DO WE FOCUS ON CRIME PROCEEDS ?

In order to disrupt organised crime activities it is essential to deprive criminals of the proceeds of crime. Organised crime groups are building large-scale international networks and amass substantial profits from various criminal activities. The proceeds of crime are laundered and re-injected into the legal economy.

The effectiveness of national anti-money laundering systems and international cooperation in this area are of paramount importance. However, even where crime proceeds have been successfully laundered, the assets of organised criminals can still be identified through financial intelligence and investigation, seized and recovered.

The confiscation and recovery of criminal assets is a very effective way to fight organised crime, which is essentially profit-driven². Confiscation prevents that criminal wealth may be used to finance other criminal activities, jeopardise the confidence in the financial systems and corrupt legitimate society. Confiscation has a deterrent effect by strengthening the notion

¹ The Communication draws on informal expert meetings held by the Commission, contacts with authorities in the MS, the conclusions of a pan-European conference on Asset Recovery Offices and the draft conclusions of a Commission study on confiscation in the MS (not yet public).

² The conclusions of the Justice and Home Affairs Council of 12-13 June 2007 invited Member States to "increase their efforts in the financial aspects of investigations and prosecutions, for example as regards the seizure of assets".

that “crime does not pay”³. This may help removing negative role models from local communities. In some cases measures confiscating the proceeds of crime allow to target the decision-makers within criminal organisations, which are rarely investigated and prosecuted.

At present the overall number of confiscation cases in the EU is relatively limited and the amounts recovered from organised crime are modest, especially if compared to the estimated revenues of organised criminal groups. An increased use of confiscation procedures is therefore desirable.

3. CURRENT ISSUES WITH THE EU LEGAL FRAMEWORK

Four EU Framework Decisions are being implemented at national level with a view to ensure a common approach to confiscation. Three of them raise implementation issues.

3.1. The existing legal framework and its flawed implementation

*Framework Decision 2001/500/JHA*⁴ harmonised some MS provisions on confiscation and criminal sanctions for money laundering. Overall this text is relatively well transposed in most MS.

*Framework Decision 2003/577/JHA*⁵ applies the principle of mutual recognition to orders freezing property or evidence. There are significant delays in its transposition by the MS. Little information is available on the practical application of the provisions that should ensure that assets or evidence located in one MS can be frozen on the basis of a decision taken by a judicial authority in another MS and transmitted directly to the executing judicial authority by way of a specific certificate. It appears that the certificate to request the execution of freezing orders is rather difficult to complete and does not contain all the necessary fields. Therefore, judicial authorities tend to revert to the standard mutual legal assistance forms. Should this trend continue, this Framework Decision would not have fully achieved its objectives.

*Framework Decision 2005/212/JHA*⁶ aims at ensuring that MS introduce effective rules on confiscation, including rules on proof with regard to the source of the assets concerned. The Commission's implementation report of December 2007⁷ showed that most MS are slow in putting in place measures to allow more widespread confiscation. It appears that the text's provisions are unclear and lead to piecemeal transposition. Moreover, the Framework Decision provides for alternative criteria for extended confiscation. This may have *de facto* restricted the scope for mutual recognition. The relevant national authorities will execute confiscation orders issued by other MS only if these are based on the same ground(s) for confiscation applied by the receiving MS.

³ A 2007 study on illicit drug trade by the UK Home Office showed that confiscation is considered by criminals as a serious deterrent.

⁴ Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182 of 5.7.2001, p. 1.

⁵ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196 of 2.8.2003, p. 45.

⁶ Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-related Proceeds, Instrumentalities and Property, OJ L 68 of 15.3.2005, p. 49.

⁷ Report from the Commission pursuant to Article 6 of the Council Framework Decision of 24 February 2005 on Confiscation of Crime-related Proceeds, Instrumentalities and Property (2005/212/JHA), COM (2007) 805.

*Framework Decision 2006/783/JHA*⁸ applies the principle of mutual recognition to confiscation orders. Better coordination is needed between the previously mentioned criteria for extended confiscation and the provisions on mutual recognition of confiscation orders. Under the latter provisions, one of the reasons for allowing the non-recognition or non-execution of a confiscation order is that it falls outside the scope of the option(s) under Framework Decision 2005/212/JHA adopted by the executing State in its national legislation. Moreover, Framework Decision 2006/783/ JHA seems to apply only to confiscation orders issued within the framework of criminal proceedings. Therefore confiscation orders based on civil confiscation procedures or on the extended use of taxation powers would not necessarily be executed in all MS. This mutual recognition issue is very relevant, as these procedures are increasingly used, especially in common law countries, and are proving to be very effective tools in attacking the proceeds of organised criminal activities. It is too early to assess possible delays in the transposition of this Framework Decision into national legislation.

In addition to the above Framework Decisions, the *Second Protocol*⁹ to the *Convention on the protection of the European Communities' financial interests*¹⁰, which should enter into force by end 2008, provides for measures of confiscation as well as for an operational cooperation with MS in the fight against fraud and money laundering, including confiscation. *The proposal for a Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters*¹¹, which should be formally adopted by end 2008, provides rules on the follow up of freezing orders issued on the basis of Framework Decision 2003/577/JHA. It also includes certain provisions of the 2001 Protocol to the Convention on Mutual Assistance in Criminal Matters¹².

3.2. Recasting the EU legal framework

In conclusion, the existing legal texts are only partially transposed. Some provisions of the Framework Decisions are not very clear with the result that transposition into national legislation is patchy. A lack of coordination between the criteria for extended confiscation on the one hand, and the provisions on the execution of confiscation orders in another MS on the other, may heavily affect mutual recognition. There are relevant issues with the mutual recognition of freezing and confiscation orders based on civil confiscation procedures or on the extended use of taxation powers. It is essential to have in place expedient and effective mechanisms to freeze and confiscate assets abroad. [In light of the above considerations, a recasting of the existing EU legal framework should be considered. Such an exercise would be in line with the EU policies of simplification and better regulation and would improve the clarity and coherence of existing texts.

⁸ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328 of 24.11.2006, p. 59.

⁹ Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests, OJ C 221 of 19.7.1997, p.12.

¹⁰ Convention drawn up on the basis of Article K.3 of the treaty on European Union, on the protection of the European Communities' financial interests, OJ C 316 of 27.11.1995, p.49.

¹¹ Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, COM(2003) 688 final of 14.11.2003.

¹² Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 326 of 21.11.2001.

3.3. A case for further legal provisions

In addition to the recasting of the existing legal framework, the Commission will explore the possibility to extend some legal concepts and introduce new rules in order to increase the possibilities for confiscation. However, as confiscation measures (eg the reversal of the burden of proof) may affect fundamental rights (such as the right to property and the right to adequate means for recourse) a balanced approach is necessary and appropriate safeguards need to be provided for. Based on the practice in MS, the following ideas could be considered for discussion. :

3.3.1. *Confiscation without a criminal conviction (civil confiscation)*

Under most MS jurisdictions confiscation is a sanction linked to a criminal conviction. However, a new legal instrument could introduce instances where confiscation takes place without a prior criminal conviction (thereby transposing FATF Recommendation 3¹³ into EU legislation). For example:

(i) When there is a suspicion that assets are the proceeds of serious crimes, due to their disproportion with the declared income of their owner and to the fact that he/she has habitual contacts with known criminals. In this instance a case may be brought before a civil court (which may order the confiscation of assets) based on an assumption, on the balance of probabilities, that the assets may be derived from proceeds of crime. In these cases the burden of proof is reversed and the alleged criminal should prove the legitimate origin of the assets.

(ii) When the person suspected of certain serious crimes is dead, fugitive for a certain period of time or otherwise not available for prosecution.

(iii) In certain cases, when cash is seized by customs authorities in breach of the EC Regulation on Cash Controls¹⁴. An administrative decision may empower authorities to detain the amounts above EUR 10 000 which were not declared when entering or leaving the EU. However, if these amounts need to be confiscated (for example as the proceeds from tax evasion) a court order is ultimately needed. As tax evasion is not prosecuted in all EU MS with criminal proceedings, this may be a further case of civil confiscation.

3.3.2. *Creating a new criminal offence for owning "unjustified" assets*

Different legal procedures exist or co-exist in the MS (criminal confiscation, civil confiscation, use of tax authorities' powers), which all have the same objective of seizing the proceeds of crime. In certain MS confiscation may not occur in the absence of a prior criminal conviction.

A new criminal offence for owning "unjustified" assets could be introduced in order to attack the proceeds of crime in cases where assets are disproportionate to the declared income of their owner and he/she has habitual contacts with known

¹³ Recommendation 3 of the Financial Action Task Force 40 Recommendations encourages countries to consider confiscation measures "without requiring a criminal conviction or which require an offender to demonstrate the lawful origin of the property alleged to be liable to conviction".

¹⁴ Regulation (EC) no. 1889/2005 of the European Parliament and of the Council on controls of cash entering or leaving the Community, OJ L 309 of 25.11.2005, p. 9.

criminals. The difference with the case under (i) above is that the procedure would take place in a criminal court and the burden of proof would not be fully reversed¹⁵.

3.3.3. *Ensuring mutual recognition of freezing and confiscation orders*

An alternative approach consists in ensuring the mutual recognition of foreign freezing and confiscation orders by MS even when those orders are based on procedures which may not be applicable in the executing State (eg civil confiscation procedures, procedures based on the extended use of taxation powers). However, it should be recognised that such cases of mutual recognition may require supplementary conditions.

3.3.4. *Extending the scope of mandatory confiscation*

Mandatory confiscation could be introduced following conviction for certain serious criminal offences from which organised criminal groups derive substantial profits. The list of offences set out in the Framework Decision on Extended Confiscation could be used as a basis and extended to include other offences.

3.3.5. *Enforcing the obligation to provide information on bank accounts*

A recasting may provide the opportunity to include in the new legal framework the provisions of the already mentioned 2001 Protocol, which has not yet been ratified by a sufficient number of countries and has not yet entered into force. The Protocol foresees that MS authorities should provide details of bank accounts and banking operations of identified persons and may not rely on banking secrecy rules as a ground for refusing to co-operate in this context. The enforcement of these provisions would greatly assist the tracing of assets in other MS. Replacing the Protocol with provisions in the new legal framework on confiscation would allow the Commission to accelerate efforts in order to give them full effect.

4. COOPERATION AMONG NATIONAL AUTHORITIES

The proceeds of crime are increasingly acquired in countries other than those where a criminal organisation normally operates or where a criminal conviction takes place. This makes the identification of the proceeds of crime and their seizure more difficult. Cooperation between national authorities and a swift exchange of information are essential in order to maximise the possibilities to confiscate the proceeds of crime.

4.1. The establishment of national Asset Recovery Offices

Asset Recovery Offices (AROs) facilitate the tracing of criminal assets, participate in confiscation procedures, ensure the proper management of the seized assets and act as a central contact point for confiscation activities at national level.

At present such offices do not exist in all MS of the EU¹⁶ and differ widely in structure, powers and practices. Cooperation between national authorities in this field takes place mostly

¹⁵ This new type of criminal offence has been introduced in France and is proving to be very effective.

¹⁶ Fully fledged AROs exist only in Austria, Belgium, Estonia, France, Germany, Ireland, The Netherlands and the United Kingdom.

through the informal CARIN network (law enforcement and judicial experts on confiscation and asset recovery)¹⁷.

Based on the successful experience of CARIN, Council Decision 2007/845/JHA on cooperation between Asset Recovery Offices of the MS¹⁸ was adopted in December 2007. It aims at ensuring that MS set up or designate, by 18 December 2008, national Asset Recovery Offices which will act as national contact points for confiscation-related activities. They will notably promote, through enhanced cooperation, the fastest possible EU-wide tracing of assets derived from crime. In particular AROs should be able to cooperate effectively with Financial Intelligence Units and judicial authorities. In this respect, training should be increasingly provided to judicial authorities dealing with asset tracing and confiscation.

4.2. Setting up effective Asset Recovery Offices

Within a short time MS should decide the best practical ways of setting up AROs at national level, their powers to trace and freeze assets efficiently, and their possibilities to exchange data.

To support these efforts, a high level pan-European conference on AROs took place in March 2008¹⁹. Its findings will be made sustainable by promoting the exchange of best practice and assisting MS in setting up AROs, notably by organising upon request on-site visits of peer experts in 2009 and 2010. Based on the conclusions and on the work of CARIN, the most relevant recommendations to set up effective AROs are the following:

4.2.1. Structure of AROs

AROs should have a multidisciplinary structure comprising expertise from law enforcement, judicial authorities, tax authorities, social welfare, customs and other relevant services. These representatives should be able to exercise their usual powers and to disclose information within the ARO without being bound by professional secrecy. AROs should be adequately resourced and provide a central point for all incoming requests of assistance from other countries. They should collect all relevant statistics on asset freezing and confiscation. Where AROs do not directly manage seized assets, they should at least collect information on seized assets from the authorities managing them.

4.2.2. Information exchange between AROs

AROs should exchange information rapidly, possibly within the time limits foreseen in Framework Decision 2006/960/JHA²⁰. The legal possibilities for each ARO to

¹⁷ CARIN, supported by the Commission and by Europol, includes experts from 40 countries, including 26 EU Member States. Its objectives are the exchange of best practices and the improvement of inter-agency cooperation in cross-border matters.

¹⁸ Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, OJ L 332 of 18.12.2007, p. 103.

¹⁹ Organised by Europol, the Austrian and Belgian governments and supported by the European Commission under the funding Programme "Prevention of and fight against crime" (http://ec.europa.eu/justice_home/funding/isec/funding_isec_en.htm).

²⁰ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386 of 18.12.2006, p. 89.

spontaneously exchange information should be further analysed. The information that can be obtained from each ARO without resorting to mutual legal assistance procedures should be clarified. The certificates to request the execution of freezing orders and confiscation orders in another MS, as well as the mutual legal assistance forms, should be revised in order to make them easier to use. Detailed guidance should be provided on how to complete them. A standardized secure channel of communication between AROs should be established.

4.2.3. *Powers to be granted to AROs*

AROs should have access to all relevant databases²¹ to identify and trace assets, including financial information (ideally to a central bank account registry at national level), and should have coercive powers to obtain such information. They should have the powers to provisionally freeze assets (e.g. for at least 72 hours) in order to prevent dissipation of the proceeds of crime between the moment when assets are identified and the execution of a freezing or confiscation court order. They should also be able to conduct joint investigations with other authorities.

Different practices exist in the MS with regard to the destination of the assets confiscated and recovered²². It is desirable to promote practices which have proven to be effective at national level.

4.3. Coordination between AROs – The role of Europol and Eurojust

The level of cooperation between AROs will determine the successful execution of freezing and confiscation orders. Once AROs are designated or established in all MS, their activities should be supported and coordinated in order to facilitate the swift exchange of intelligence on the location and ownership of criminals' assets.

Consideration should be given to entrust such coordinating role to Europol, whose Criminal Assets Bureau has already had considerable success in assisting financial investigators. In 2007, it supported 133 investigations to trace criminal proceeds and provided AROs with expert knowledge. National authorities should involve Eurojust to a greater extent in order to facilitate the mutual recognition of freezing and confiscation orders. In 2007, 30 out of over 1000 cases dealt with by Eurojust related to this area.

5. INTERNATIONAL COOPERATION – THIRD COUNTRY ASPECTS

Confiscation of crime proceeds is a global issue as criminals continue to acquire legitimate assets both in the EU and in other world regions. Close international cooperation on confiscation issues should be developed not only within the EU, but also with third countries. The existing EU legal instruments do not sufficiently address these aspects.

However, a number of international Conventions include provisions on the confiscation of criminal proceeds in order to promote international cooperation in the identification, tracing,

²¹ Both open and closed databases, such as Land Registry, Company Records, Vehicle Registration, Convictions and databases from the financial institutions, the police, tax authorities, social welfare agencies, etc.

²² For example, in the United Kingdom assets are shared between the authorities that contributed to their recovery, while in Italy they are often entrusted to NGOs for social use.

freezing and confiscation of criminal assets. The most relevant are the UN Convention against Transnational Organized Crime ("UNTOC"), the UN Convention against Corruption ("UNCAC") and the Council of Europe Conventions on Money Laundering and Confiscation ("Strasbourg Conventions"). A number of important provisions of these conventions are not yet incorporated into Community legislation. The Commission will continue its efforts to ensure that the EU and the MS ratify and implement these Conventions without delay and encourage third countries to do the same.

Initiatives on asset recovery and confiscation are also under way in several international fora such as the G8, the United Nations and the World Bank.

International cooperation in the area of confiscation is not always satisfactory due to varying degrees of willingness to cooperate. It is necessary to promote a more proactive cooperation with third countries, notably by promoting asset sharing agreements, including those related to value confiscation, and dissemination of best practices. FATF Recommendation 38 and its interpretative note encourage countries to stipulate arrangements for co-ordinating seizure and confiscation proceedings, including the sharing of confiscated assets. The 2005 Council of Europe Convention contains similar provisions. The Commission could promote the exchange of best practices among MS in this area.

6. NON-LEGISLATIVE FLANKING MEASURES

6.1. New tools to support confiscation procedures more effectively

In order to facilitate requests relating to the identification and tracing of assets each ARO should have access to centralised registers at national level. Where such registers do not exist, MS should be encouraged to establish them.

Ways to improve the availability of information on outstanding freezing and confiscation orders in the Union including by the creation of a list, should also be explored. It would allow to better monitor overall progress in freezing and confiscation procedures and to derive statistics on the time needed to execute such orders.

6.2. Strengthening financial investigations and financial criminal analysis

They are at the heart of the fight against organised crime and terrorism financing. Promoting a wider use of financial investigation and financial criminal analysis²³ as a law enforcement technique in all EU MS will boost the identification and tracing of the proceeds of crime.

The Commission is working with Europol and a number of MS on a project which consists of establishing a set of common minimum training standards for financial investigators (covering eight areas of knowledge and skill), an EU-wide accreditation system, and of providing training in the MS based on those standards. Some national centres of excellence are producing the relevant training packages. The first deliverables are expected in 2009.

²³ The Commission funded several projects on improving these techniques between 2002 and 2005.

6.3. Keeping regular and comparable statistics on confiscation

More and better quality statistics on frozen or confiscated assets should be available. Very limited data are available, mostly from national databases or through the mutual evaluation reports on anti-money laundering compliance published by the FATF, the International Monetary Fund and the Council of Europe Moneyval Committee.

Under the EU Action Plan 2006-2010 on Crime Statistics, work is under way to develop a new methodology to collect Money Laundering statistics comparable among MS. This methodology foresees the collection of information on frozen, confiscated and recovered assets derived from crime. The resulting statistics may also contribute to evaluate the effectiveness of the countries' confiscation regimes.

7. CONCLUSION – TEN STRATEGIC PRIORITIES

To fight crime effectively means to hit criminals where it hurts them most. The confiscation and recovery of the proceeds of crime targets their resources and is an essential part of the wider EU financial crime strategy.

More should be done to highlight confiscation as one of the most effective ways to fight organised crime. The following action points aim at ensuring that the EU continues to uphold the highest standards in this area:

- (1) A future recasting of the existing EU legal framework would improve its clarity and coherence, as well as further extend existing legal concepts and introduce new provisions.
- (2) MS should complete the transposition of the existing legal framework and implement Council Decision 2007/845/JHA by designating or establishing Asset Recovery Offices that are able to rapidly exchange information, have adequate powers and work on the basis of best practice.
- (3) Practical obstacles to confiscation procedures in the MS should be removed. The Commission and the MS will discuss on the basis of a Commission study assessing the effectiveness of the MS' practices in late 2008 with a view to promote practices which have proven to be effective at national level.
- (4) EU Asset Recovery Offices should meet regularly within an informal Platform in order to ensure effective exchange of information, coordination and cooperation. Europol is encouraged to play a coordinating role among national Asset Recovery Offices.
- (5) A system to assess the effectiveness of EU Asset Recovery Offices (possibly based on peer evaluations) could be developed and implemented.
- (6) Eurojust should be closely involved in facilitating cooperation at judicial level and promoting mutual recognition in confiscation matters, as well as facilitating the interaction between Asset Recovery Offices and judicial authorities.

- (7) A common EU training programme for financial investigators could be developed and implemented as a priority. MS should consider increasing the resources devoted to financial criminal analysis and financial investigations at national level.
- (8) MS could develop better statistics on assets frozen, confiscated and recovered. These data should be comparable between countries. Statistics will help assessing the effectiveness of the confiscation systems in place.
- (9) The Commission and the MS should consider how to make available to Asset Recovery Offices in other MS and in third countries the necessary information to identify and trace assets in their territory, possibly by organising centralised registers.
- (10) Europol, Eurojust and the Member States could cooperate to improve the availability of information, including by the creation of a list, on outstanding freezing and confiscation orders in the European Union.