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COMMISSION STAFF WORKING PAPER

EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the

**Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE
COUNCIL**

on the freezing and confiscation of proceeds of crime in the European Union

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Disclaimer: This executive summary commits only the European Commission's services involved in its preparation and does not prejudge the final form of any decision to be taken by the Commission

1. PROBLEM DEFINITION

In order to disrupt organised crime activities it is essential to deprive criminals of the proceeds of crime. Organised crime is essentially profit-driven. Seizing back as much of these profits as possible hampers criminal activities, deters criminality by showing that "crime does not pay" and provides funds to be re-invested into law enforcement or crime prevention initiatives.

The problem addressed by this impact assessment is the **insufficient recovery of criminal assets in the EU**. To date, estimates of money lost to organised crime in the Member States, as well as data on success in asset recovery, remain limited. Some recent reports and unofficial sources estimated the annual proceeds from organised crime in some Member States as very high¹. The figures provide a striking contrast with the amounts recovered annually in the Union². Although only some Member States maintain statistics on the amounts recovered annually from crime, at present the number of freezing and confiscation procedures in the EU and the amounts recovered from organised crime seem insufficient if compared to the estimated revenues of organised criminal groups or to the number of criminal convictions decided by courts for serious crimes.

Organised crime activities are often transnational in nature and the assets of criminal groups are increasingly invested in other Member States. Pursuing assets located abroad is invariably more problematic, due to the increased difficulties in tracing them and to legal obstacles in obtaining evidence and executing freezing or confiscation orders.

Although asset confiscation has a basis in international law, EU law and Member State laws, these laws remain underdeveloped and underutilised. It is unlikely that any Member State confiscates a significant proportion of criminal assets and that the laws are achieving their stated aim.

¹ In Italy the proceeds of organised crime laundered in 2011 were estimated at €150 billion (Bank of Italy, 2011). In the UK an official estimate in 2006 put organised criminal revenue at £15bn *per annum*

² For example in 2009 €189m were recovered in the UK and €60m in the Netherlands.

2. ANALYSIS OF SUBSIDIARITY

The EU has already passed measures relating to the confiscation and recovery of criminal assets. Following the entry into force of the Treaty of Lisbon, the legal basis to support action in this field can be found in Article 82, paragraphs (1) and (2), and Article 83 (1) TFEU. The most appropriate legal basis and the extent of the EU's power to harmonise will depend on whether a specific provision relates to harmonisation or mutual recognition.

Under Article 5(3) TEU, the Union shall only act if the proposed action cannot be sufficiently achieved by the Member States. Article 67 TFEU foresees that the Union shall provide citizens with a high level of security by preventing and combating crime. Confiscating criminal assets is increasingly recognised as an essential tool to combat organised crime, which is very often transnational in nature and thus needs to be tackled on a common basis. This is all the more true in the EU, where the abolition of internal frontiers makes it easier to commit cross-border crimes.

As acknowledged by the Stockholm Programme 2010-2014, the Union must reduce the number of opportunities available to organised crime as a result of a globalised economy, not least during a crisis that is exacerbating the vulnerability of the financial system. The EU is therefore better placed than individual Member States in sharpening more efficiently one of the most effective tools to fight organised crime groups.

The cross-border dimension of organised crime assets (increasingly invested outside their home country and often in several countries) further justifies pan-European action.

3. OBJECTIVES

The overall long-term objective is the substantial reduction of organised crime revenues and accumulated wealth within the EU. The **general objectives** are to combat organised crime, to achieve justice for victims and to raise public confidence in the criminal justice system. In line with the underlying components of the problem, four **specific policy objectives** can be defined: i) to increase the harmonisation of rules allowing to confiscate criminal assets, with due respect of fundamental rights ii) to provide minimum harmonised rules allowing Member States to freeze/seize and manage criminal assets pending confiscation, with due respect of fundamental rights, iii) to make it easier for Member States to freeze/seize and confiscate assets across borders, and iv) to raise utilisation of freezing and confiscation tools by Member State agents.

4. POLICY OPTIONS

In order to remedy the shortcomings resulting from the problem definition, 21 EU-level policy actions were identified (some of which are complementary).

Given the high number of envisaged policy actions, the 21 EU-level actions were first screened individually against potential barriers to implementation, such as i) the existence of an adequate conferral of power to the EU, ii) proportionality; and iii) compatibility with fundamental constitutional or criminal law principles of the Member States. The impact on fundamental rights was also analysed in detail, based on the relevant jurisprudence of the European Court of Human Rights. Four policy actions were discarded after the screening against the implementation barriers.

The **remaining policy actions** were **grouped into policy options** representing different degrees of EU-level intervention: a non-legislative option, a minimal legislative option (correcting deficiencies in the existing EU legal framework which inhibit it from functioning as intended) and a maximal legislative option (going beyond the aims of the existing EU legal framework). Within the latter, two maximal legislative sub-options are analysed, one with and one without EU level action relating to mutual recognition.

4.1. Policy option 1 – Status quo

This policy option would involve no new action at EU level, but constitutes the continuation of existing activities. No new action at EU level does not mean no change at EU level. Under the Treaty of Lisbon the existing EU legal framework will, on 1 December 2014, become enforceable against Member States through infringement proceedings.

4.2. Policy option 2 – Non-legislative option

Under the non-legislative policy option, workshops would be used with a view to **promoting implementation of existing confiscation obligations** (policy action 1) and **promoting implementation of existing mutual recognition obligations** (policy action 12). **Utilisation workshops** for government decision-makers in some Member States on the profitability of asset confiscation work (policy action 15) could increase utilisation of these tools and provide a forum for the sharing of knowledge and practitioner experience.

4.3. Policy option 3 – Minimal legislative option

This option consists of transposition and utilisation workshops plus additional policy actions addressing identified deficiencies in the existing legal framework on mutual recognition. In relation to the enforcement of confiscation orders, this option envisages that the legal framework could be simplified by consolidating FD 2006/783/JHA and 2005/214/JHA and extending their scope to include all compensation orders made in the context of criminal proceedings (**policy action 14**). This option would also include the introduction of **consolidated mutual recognition forms (policy action 19)**. This option would also entail **enforcing the primacy of mutual recognition over mutual legal assistance conventions as regards requests between Member States (policy action 20)**. .

4.4. Policy option 4.1 – Maximal legislative option without mutual recognition

This option would consist of all policy actions which do not involve legislative action in relation to mutual recognition.

In order to enhance confiscation powers, this option would foresee the possibility of **confiscating all valuable benefits, including indirect proceeds (policy action 2)** by introducing a wide definition of "criminal proceeds".

As a way to address the foreclosure of confiscation activities when the criminal procedure is concluded, this option foresees **separating confiscation proceedings from criminal proceedings (policy action 4)** so that financial investigations can be carried out and unexecuted orders can be enforced also at a later date when criminal proceedings are finalised.

This option would also **strengthen extended confiscation (policy action 5)** by extending the scope of the offences to which it applies and providing for it at least where a court finds it

substantially more probable that the assets of a person convicted of an offence covered by Article 83(1) TFEU are derived from similar criminal activities.

With a view to addressing barriers to prosecution, this option would include the introduction of **non-conviction based confiscation in limited circumstances (policy action 6)**. This would make confiscation possible in circumstances where a conviction cannot be obtained because the suspect has died, fled prosecution or sentencing or is unable to stand trial due to mental illness.

Criminals often transfer their assets to knowing third parties as soon as they are under investigation in order to avoid confiscation. This option would also include **third party confiscation (policy action 7)** for assets received for less than market value and which a reasonable person in the position of the third party would suspect to be derived from crime. In relation to the freezing/seizure of criminal assets, this option foresees the introduction of harmonised minimum standards (**policy action 8**). It would also foresee **mechanisms to safeguard freezing (policy action 9)**, so that Member States would be required to have in place appropriate mechanisms to ensure that assets in danger of being hidden or transferred out of their jurisdiction can be frozen/seized immediately by non-judicial authorities even prior to seeking a court order.

With regard to asset preservation, this option would grant **powers to realise frozen assets** at least where they are liable to decline in value or uneconomical to maintain (**policy action 10**).

In the area of utilisation of powers, this option would introduce **reporting obligations (policy action 16)** for Member States, which would help generate statistics which could be used for evaluation purposes.

4.5. Policy option 4.2 – Maximal legislative option including mutual recognition

This option consists of **all the envisaged policy actions** (but policy action 19 and 20 partly overlap). Compared to option 4.1, it also includes the **Mutual recognition of all types of orders (policy action 13)**. This option would also entail the mutual recognition of **compensation orders (policy action 14)** by consolidating FD 2006/783/JHA and 2005/214/JHA and extending their scope to include all compensation orders made in the context of criminal proceedings. This option would also provide for **consolidated mutual recognition forms (policy action 19)** and for measures **enforcing the primacy of mutual recognition (policy action 20)**.

5. ASSESSMENT OF IMPACTS

5.1. Analysis of Option 1 - Status Quo

On the *'do nothing' option*, slow progress can be predicted towards achieving each of the specific objectives. Its **economic impact** is expected to be low, resulting from natural progression in assets recovered. The spread between criminally owned assets and assets recovered by governments is likely to increase. Its **social impact** is likely to be negligible, following a slight increase in criminal assets being recovered in favour of crime victims. This option would have **no impact on criminal behaviour**. Without additional action at EU level, criminals are likely to continue investing their assets in other Member States, thereby increasing the need for a cross-border dimension of confiscation activities. **Overall**, significant gaps would remain, mutual recognition instruments would remain underutilised

and the amount of criminal assets confiscated throughout the EU would remain small compared to estimates of organised criminal turnover. Whilst the situation without EU intervention would not be static, the pace of change would be too slow. This option would therefore not achieve the objective of increasing the recovery of criminal assets in the Union. Member States support for this option is unlikely. The European Parliament would be totally dissatisfied with this solution.

5.2. Analysis of Option 2 – Non-legislative option

This option would have a **low economic impact**. Transposition workshops could entail a slight positive impact on transposition for the Member States which have not yet fully transposed the relevant texts. The costs of utilisation workshop would be negligible and their usefulness would depend on the scale on which they are organised. Given the severe underutilisation of confiscation procedures, utilisation workshops could potentially have a more significant impact upon utilisation and avoid that decisions may continue to be made based on the assumption that asset confiscation work is unprofitable. The **social impact** would be **negligible** and the **impact on criminal behaviour** are quite limited. Overall the added value of the *non-legislative option* is likely to be **low** and its most promising aspect is the utilisation workshops. This option would hardly achieve the objective of increasing the recovery of criminal assets in the Union and would draw heavy criticism from the European Parliament.

5.3. Analysis of Option 3 – Minimal legislative option

In addition to the **economic impacts** of transposition workshops and utilisation workshops, improving mutual recognition instruments would clearly increase the number of cross-border enforcement procedures and, to some extent, the value of the assets recovered. However, it is hard to assess the economic added value of even a significant increase in the utilisation of mutual recognition instruments. An increased utilisation in mutual recognition instruments would shift administrative costs from central authorities to local judicial authorities and the administrative cost of handling requests from other Member States should in principle decrease. The time savings resulting from a wider use of mutual recognition (as opposed to mutual legal assistance) would allow faster cross-border execution and increase the chances of successful recovery by limiting the risks for asset dissipation. The envisaged consolidation of mutual recognition forms may require some initial training for the practitioners, the costs of which would be likely offset by the benefits. A moderate increase in the number and value of assets recovered should logically correspond to a moderate increase in **social impact** in the form of compensation to victims. Better enforcement of cross-border procedures would likely result in increased confidence in the national criminal justice systems and in the EU Area of Justice, Freedom and Security. In relation to **fundamental rights** a low impact on the right to property is expected. A **slight impact on criminal behaviour** can be expected. A better enforcement of cross-border procedures may have some displacement effects, resulting in a net capital flight of criminal money out of the EU, with a slight negative impact on the illicit economy and on the economies of third countries. **Overall** the added value of the *minimal legislative option* is likely to be **moderate**. This option would barely achieve the objective of increasing the recovery of criminal assets in the Union and would likely not be considered as an adequate response to the problem by the European Parliament.

5.4. Analysis of Option 4.1 - Maximal legislative option without mutual recognition

In addition to the transposition workshops and utilisation workshops, most policy actions, considered in isolation, would have **at least a moderate economic impact**. Because of the

number of policy actions and the severe lack of data on both the amounts frozen, confiscated and recovered and the costs of carrying out confiscation-related activities, it is not possible to provide a quantification of the cost of this option. Moreover, in many cases implementation costs may differ depending on the characteristics of the Member States.

In order to address the lack of data, the main economic analysis presented is an **EU27 profitability estimate** based on a model which uses proxy indicators to extrapolate from a detailed analysis of income and cost in the UK (the only Member State for which income and costs for all elements of the asset confiscation system can be estimated and which has a confiscation system that is a reasonable approximation of the maximal legislative sub-option) Although only indicative, the results of this exercise are encouraging: **21 of 27 Member States** are indicated by the model to be **profitable** (many of them highly profitable) for this option. The fact that asset confiscation work appears to be potentially profitable in most Member States pleads in favour of EU-level intervention. It can be assumed that recovering more assets in favour of the State will have a significant **social impact** as it will, at least in some Member States, go hand in hand with recovering more assets in favour of victims of crime. Confiscating criminal assets will cause public confidence in criminal justice to rise.

Actions having a significant positive impact upon confiscation tools (eg Actions 5 on extended confiscation, 6 on non-conviction based confiscation or 7 on third party confiscation) are also those having the biggest **impact on fundamental rights**. A limitation of the right to property and right to a fair trial of the defendant must be justified, respect proportionality and be accompanied by adequate safeguards. The European Court on Human Rights (ECtHR) has rendered many decisions, consistently upholding their application of non-conviction based confiscation regimes in particular cases. However, it has avoided ruling on the principled question of their compatibility with the European Convention on Human Rights. Reversals of the burden of proof concerning the legitimacy of assets have so far survived the scrutiny of the ECtHR, so long as they were applied fairly in the particular case, with adequate safeguards in place to allow the affected person to challenge these rebuttable presumptions. While the ECtHR has consistently upheld extended confiscation regimes in specific cases, their compatibility with the Convention is assessed on a case by case basis. Again, the degree of procedural safeguards afforded to the defendant plays a determinant role in assessing the proportionality of the measure. A strong argument in favour of justifying third party confiscation is the case where assets are claimed both by the third party and by a victim. If the perpetrator of a crime has insufficient assets to meet a claim (as is often the case), measures in favour of the third party would weaken the position of the victim. Temporary measures such as freezing orders may, due to their provisional character, justify further limitations of certain rights and principles of due process, provided that sufficient safeguards or remedies are available and those limitations respect the essence of those rights and principles. If applied with proportionality and complemented with adequate safeguards, laid down in the EU legislative proposals, the measures in this policy option would respect fundamental rights.

The **impact on criminal behaviour** of this option would be significant, as non-conviction based confiscation (even in limited circumstances) and third party confiscation would oblige criminals to change their practices and make it more difficult for them to hide their assets. This option could cause moderate capital flight of criminal money to non-EU countries and have a significant negative impact on the illicit economy and on the economies of third countries. **Overall** the added value of this option is likely to be **significant**. The immediate impacts of implementing this option include stronger systems for confiscation, freezing and managing assets. However, this option would also bring an important impact on utilisation.

While utilisation workshops would inform Member State decision-makers about the potential profitability of asset confiscation work and thus empower them to promote change, more powerful legislative tools would encourage utilisation by concretely raising the chances of successful intervention. Moreover, harmonisation of confiscation laws can also *de facto* promote mutual recognition by ensuring that incoming orders are compatible with the judicial system of the executing Member State. This option would achieve the objective of increasing the recovery of criminal assets in the Union. Most likely it would be moderately welcomed by the European Parliament.

5.5. Analysis of Option 4.2 - Maximal legislative option including mutual recognition

In terms of **economic impact**, adding EU-level action on mutual recognition would improve the results of the EU27 profitability analysis still further. However, given the scarcity of data on the number and amounts of orders to be enforced in other Member States, a detailed profitability estimate by country for this policy option is not possible. The additional costs for Member States liable to receive many foreign non-conviction based orders for execution would be fully offset by the existing provision (in FD 2006/783/JHA) that the Member State enforcing a confiscation order is entitled to retain 50% of the recovered value. The **social impact** would be **significant**. In addition to the impacts of the maximal option without mutual recognition, the enhancements on mutual recognition can be expected to result in increased confidence in the EU Area of Justice, Freedom and Security. The **impact on criminal behaviour** would also be **significant**. The measures in the maximal legislative option coupled with a significantly improved enforcement of cross-border procedures would likely oblige criminals to change their practices and could have displacement effects, resulting in a net capital flight of criminal money out of the EU. This would result in an even more significant impact on the illicit economy and on the economies of third countries. **Overall**, the added value of this option is likely to be **very significant**. The combined effects of economic profitability, significant social impacts and greater utilisation are further enhanced by actions on mutual recognition which are more far-reaching than those in the minimal legislative option. This option would be fully consistent with the objective of increasing the recovery of criminal assets in the Union. It would likely be welcomed by the European Parliament.

6. COMPARISON OF OPTIONS

The **preferred policy option** is the **maximal option featuring action on mutual recognition**, while the maximal legislative option without mutual recognition and the minimal legislative option are ranked equal second. The preferred option respects the principles of subsidiarity and proportionality because it does not go beyond what is needed to achieve the objectives described whilst respecting fundamental rights. It would considerably enhance the harmonisation of rules and enforcement of orders in the Member States, *inter alia* by amending existing provisions on extended confiscation and introducing new provisions on non-conviction based confiscation, third party confiscation introducing the mutual recognition of all types of orders (including non-conviction based orders). Its policy actions are calibrated in order to be proportionate and not unduly affect fundamental rights.. In order to meet the concerns expressed by defense lawyers, minimum safeguards at EU level are foreseen with a view to fully comply with the EU Charter on Fundamental Rights. Monitoring and Evaluation

The implementation of the preferred option should be subject to future monitoring and evaluation. . As a result of the lack of statistical data on asset confiscation and the poor quality of available data, it is currently not possible to carry out a proper evidence-based assessment

of the impact of new policies/legislation at EU level or at Member State level in most countries. In addition, information on the extent to which mutual recognition facilitates cross-border enforcement is not readily available.

For this reason, the preferred option includes the introduction of reporting obligations on the Member States in relation to asset confiscation work. Data will be collected by judicial authorities (courts, prosecution offices) asset management offices and other authorities in charge of asset disposal, at least on an annual basis. The data so collected will feed into monitoring and evaluation activities and will allow the Commission to assess to what extent the proposed legislation achieves its objectives. Particular attention should be paid to those Member States where data collection is relatively under-developed.

In order to monitor the effective implementation of the proposed legislation the Commission will prepare an implementation plan and produce regular implementation reports based on consultations of the Member States and stakeholders. The first report is in principle foreseen three years after the entry into force of the legislation. The mapping exercise of the asset confiscation legislation in the Member States which was carried out in preparation for the present impact assessment could be used as a baseline for monitoring developments in law and utilisation in the Member States.

Evaluations will also be carried out on a regular basis, the first report being foreseen five years after the entry into force of the legislation. The evaluation reports could include a cost-benefit modelling exercise to assess the current and estimate the future profitability of asset confiscation work.

Transposition workshops and other expert meetings will also take place to discuss implementation problems. The exchange of best practices in all the phases of the confiscation process will continue to take place within the EU Asset Recovery Offices Platform.