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NOTE

From:	Presidency
To:	Delegations
Subject:	Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation – Presidency proposal on Article 16

Delegations will find attached a Presidency proposal for a compromise text on Article 16, which will be discussed with EP next week. In addition to the request for input indicated in the text in Annex, delegations are kindly invited to also, under the same deadline, present their comments in writing on the Articles that were for time reasons not possible to discuss at the meeting of JHA Counsellors on 28 November, i.e. Articles 20 - 36 in the draft Directive (see WK 15667/2023).

Article 16 – confiscation of unexplained wealth

As explained at the JHA Counsellors' meeting on 28 November, proposed wording for Art. 16 is included here, together with a rationale, followed by a proposal for related recitals. Delegations are invited to indicate whether this draft would **not** be acceptable to them by 5 December – noon.

Article 16

*Confiscation of unexplained wealth linked to criminal **activities***

1. *Member States shall, **where Articles 12 to 15 are not applied**, take the necessary measures to enable the confiscation of property identified in the context of an investigation in relation to a criminal offence, where the national court is satisfied that the identified property is derived from criminal **activities** committed within the framework of a criminal organisation, ~~at least~~ where these activities are liable to give rise, directly or indirectly, to substantial economic benefit.*
2. *When determining whether the property referred to in paragraph 1 should be confiscated, account shall be taken of all the circumstances of the case, including the available evidence and specific facts, which, where relevant, may include, but are not limited to:*
 - a) that the value of the property is substantially disproportionate to the lawful income of the affected person,*
 - b) that there is no plausible licit source of the property,*
 - c) the affected person is linked to the activities of a criminal organisation.*
3. ***Paragraph 1 shall not prejudice the rights of bona fide third parties***
4. *For the purposes of this Article, the notion of ‘criminal offence’ shall include offences referred to in Article 2 paragraphs 1 to 4 when punishable by deprivation of liberty of a maximum of at least four years.*
5. *Member States may provide, ~~alternatively or cumulatively~~, that the confiscation of unexplained wealth in accordance with this Article shall only be pursued where the property to be confiscated has been previously frozen in the context of the investigation where it was identified.*

RATIONALE

Art. 16 lies on three main building blocks:

- a) Assets previously identified / frozen
- b) Possible subsidiarity in respect of other forms of confiscation
- c) The link to criminal offences / conduct / activities.

The Parliament insists for Art. 16 to have adequate and reinforced safeguards, and to reflect on the principle of subsidiarity. However, from a positive perspective, the EP does not want to distort national systems that are already in place.

The Presidency's proposal considers the abovementioned building blocks as follows:

- a) Identified / frozen

Given the flexibility of the EP on this point, the word "*identified*" is maintained in para. 1, while para. 5, as drafted in the GA, allows for an alternative "*frozen*" for countries that need this limitation.

- b) Subsidiarity

A limited formula of subsidiarity is introduced: confiscation of unexplained wealth may only apply if Articles 12 to 15 are not applied. The reasons why those Articles would not be applied are not outlined, since those modalities are left to national law. This gives Member States enough flexibility to introduce the confiscation of unexplained wealth as an alternative system, if they so wish.

- c) Link to criminal offences / conduct / activities.

In order to strengthen the link to the criminal sphere and respect the criminal legal basis, one possibility was - as in the original COM proposal - to state in the operative part that the court has to be satisfied that the assets result from "*criminal offences*". This option was rejected in the GA, that opted for the word "*criminal conduct*", meaning that there is no need to specify these offences nor achieve a conviction. However, the term "*criminal activities*" would also capture this underlying idea, while also probably being acceptable to the EP.

In this latter respect, recital language would need to be strengthened in order to maintain a necessary link to the criminal sphere (for which sanctions can be harmonised under Article 83 of the Treaty). If a feasible compromise is to be achieved, it appears necessary in this sense to reinforce the link to criminal offences and proceedings, in order to ensure that relevant safeguards exist and the link between confiscation and underlying offences is maintained, while holding on to the idea that individual offences do not need to be specified or proven. This can be done by specifying that the identification is based on strong indications that the property in question has a criminal origin and that criminal activities can consist in any [serious] criminal offence.

Without prejudice to everything indicated above, it is worth pointing out, finally, that we must avoid that the resulting provision can no longer being regarded as a sanction or measure having criminal nature within the meaning of Article 83, as this would create problems in two areas:

- on the one hand, it would raise doubts about their inclusion in the scope of application of the Mutual Recognition Regulation 2018;
- on the other hand, it would be risky in terms of the CJEU's assessment of such a provision.

Therefore, to minimise such risks, it is advisable to refrain from using any terminology that is typically used by courts, in particular the ECHR, to classify offences, sanctions and procedures as civil in nature.

A recital would precise that the rights of bona fide third parties should be protected *in accordance with national law* (similarly to the recital related to Art. 13).

Finally, the expression “*at least*” is deleted, but an explanation is introduced at the end of Recital 28, indicating that the Directive does not prevent MS from adopting confiscation measures under this Directive that extend the scope of this type of confiscation, provided that it is ensured that such confiscation measures are subject to procedures that satisfy essential characteristics of a criminal procedure and in particular its safeguards.

RECITALS

(28) Due to the intrinsically opaque nature of organised crime, it is not always possible to link property derived from criminal activities to a specific criminal offence and confiscate such property. In situations, when the confiscation measures of Article 12 to 15 are not applied for legal or factual reasons, **it should still be possible to confiscate property that has been identified or, where the national legal system requires freezing, frozen in the context of an investigation in relation to a criminal offence based on indications that the property could be derived from criminal activities.** Such property should be confiscated where the court is satisfied that the property is derived from criminal **activities committed within the framework of a criminal organisation and where these activities are liable to give rise, directly or indirectly, to substantial economic benefit.** When determining whether criminal activities are liable to give rise to substantial economic benefit, Member States may take into account all relevant circumstances including the modus operandi, for example if a condition of the offence is that it was committed in the context of organised crime or with the intention of generating regular profits from criminal offences. **Member States should enable confiscation of such unexplained wealth when the investigation in which the property was identified concerns an offence falling within**

the scope of this Directive that is punishable by deprivation of liberty of a maximum of at least four years. These conditions ensure that confiscation of property not linked to a specific offence refers to criminal activities that meet a certain threshold of seriousness. [The Directive does not prevent Member States from adopting confiscation measures under this Directive that extend the scope of unexplained confiscation measures to a broader set of crimes or circumstances provided that it is ensured that such confiscation measures are subject to procedures that satisfy essential characteristics of a criminal procedure and in particular its safeguards.] The rights of bona fide third parties should be protected in accordance with national law.

[(28bis) This directive is without prejudice to the types of measures that Member States may use to confiscate unexplained wealth, provided that it is ensured that such confiscation measures are subject to procedures that satisfy essential characteristics of a criminal procedure, in particular its safeguards. Viewing that the subject matter of the Directive is limited to proceedings in criminal matters, the Directive, does not apply to confiscation measures in proceedings in civil matters, that Member States might have implemented.]

(28-a) While it should not be a precondition for the national court to be satisfied that a **specific** criminal offence has been committed **or that the property stems from specific offences**, there **must be sufficient facts and circumstances** for the court to be satisfied that the property in question is derived from criminal activities. **The relevant activities could consist of any type of [serious] offence committed within the framework of a criminal organisation. [Individual offences do not have to be proven, but the court must be satisfied that the property in question is derived from such criminal conduct.]** When determining whether the property should be **confiscated**, the national courts should take into account all relevant circumstances of the case, including the **available evidence and specific facts, such as that the value of the property is substantially disproportionate to the lawful income of the person. Another circumstance that could be considered is the absence of a plausible licit source of the property, as the provenance of lawfully acquired property can normally be accounted for.** The person's

connection to activities of a criminal organisation could also be of relevance. Also, other circumstances such as prior entries in the criminal register as well as the situation in which the property was found or indications of participation in criminal activities might be taken into account. The assessment should be made on a case-by-case basis depending on the circumstances of the case. The mechanism of confiscation of unexplained wealth is not intended to be used when in the individual case the application of the rules set out in the Directive would be manifestly unreasonable or disproportionate. Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from such criminal conduct. Member States should ensure that the appropriate procedural rights of the affected person are respected.

(28-b) Confiscation of unexplained wealth should be possible when proceedings are discontinued. It should be noted that when the offence is prosecuted, the confiscation order should not necessarily have to be tried in conjunction with the offence, Member States could also allow for the issue of confiscation to be separated from the criminal charges and be tried separately provided that the court deciding on the confiscation proceedings is competent in criminal matters and the proceedings satisfy essential characteristics of a criminal procedure, in particular its safeguards.

[For the reasons explained above, concerning the mentions of language pointing to civil law we would prefer to have the whole recital 28-b deleted]

~~(28b) When determining whether a criminal offence or criminal conduct is liable to give rise to economic benefit, Member States may take into account all relevant circumstances including the modus operandi, for example if a condition of the offence is that it was committed in the context of organised crime or with the intention of generating regular profits from criminal offences.~~

[NB: 28b is integrated above in 28]