

COUNCIL FRAMEWORK DECISION 2005/212/JHA

of 24 February 2005

on Confiscation of Crime-Related Proceeds, Instrumentalities and Property

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 29, 31(1)(c) and 34(2)(b) thereof,

Having regard to the initiative of the Kingdom of Denmark⁽¹⁾,

Having regard to the opinion of the European Parliament,

Whereas:

- (1) The main motive for cross-border organised crime is financial gain. In order to be effective, therefore, any attempt to prevent and combat such crime must focus on tracing, freezing, seizing and confiscating the proceeds from crime. However, this is made difficult, *inter alia*, as a result of differences between Member States' legislation in this area.
- (2) In the conclusions of the Vienna European Council of December 1998, the European Council called for a strengthening of EU efforts to combat international organised crime in accordance with an action plan on how best to implement the provisions of the Treaty of Amsterdam in an area of freedom, security and justice⁽²⁾.
- (3) Pursuant to paragraph 50(b) of the Vienna Action Plan, within five years of the entry into force of the Treaty of Amsterdam, national provisions governing seizures and confiscation of the proceeds from crime must be improved and approximated where necessary, taking account of the rights of third parties in bona fide.
- (4) Paragraph 51 of the conclusions of the Tampere European Council of 15 and 16 October 1999 stresses that money laundering is at the very heart of organised crime, and should be rooted out wherever it occurs and that the European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds from crime. The European Council also calls, in paragraph 55, for the approximation of criminal law and procedures on money laundering (e.g. tracing, freezing and confiscating funds).
- (5) Pursuant to Recommendation 19 in the 2000 action plan entitled 'The prevention and control of organised crime: a European Union strategy for the beginning of the new millennium', which was approved by the Council on 27 March 2000⁽³⁾, an examination should be made of the possible need for an instrument which, taking into account best practice in the Member States and with due respect for fundamental legal principles, introduces the possibility of mitigating, under criminal, civil or fiscal law, as appropriate, the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime.
- (6) Pursuant to Article 12, on confiscation and seizure, of the UN Convention of 12 December 2000 against Transnational Organised Crime, States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of judicial proceedings.
- (7) All Member States have ratified the Council of Europe Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Some Member States have submitted declarations with regard to Article 2 of the Convention concerning confiscation so as to be obliged to confiscate proceeds only from a number of specified offences.
- (8) The Council Framework Decision 2001/500/JHA⁽⁴⁾ lays down provisions on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime. Under that Framework Decision, Member States are also obliged not to make or uphold reservations in respect of the provisions of the Council of Europe Convention concerning confiscation, insofar as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year.
- (9) The existing instruments in this area have not to a sufficient extent achieved effective cross-border co-operation with regard to confiscation as there are still a number of Member States which are unable to confiscate the proceeds from all offences punishable by deprivation of liberty for more than one year.

⁽¹⁾ OJ C 184, 2.8.2002, p. 3.

⁽²⁾ OJ C 19, 23.1.1999, p. 1.

⁽³⁾ OJ C 124, 3.5.2000, p. 1.

⁽⁴⁾ OJ L 182, 5.7.2001, p. 1.

- (10) The aim of this Framework Decision is to ensure that all Member States have effective rules governing the confiscation of proceeds from crime, *inter alia*, in relation to the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime. This Decision is linked to a Danish draft Framework Decision on the mutual recognition within the European Union of decisions concerning the confiscation of proceeds from crime and asset-sharing, which is being submitted at the same time.
- (11) This Framework Decision does not prevent a Member State from applying its fundamental principles relating to due process, in particular the presumption of innocence, property rights, freedom of association, freedom of the press and freedom of expression in other media,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

For the purposes of this Framework Decision:

- ‘proceeds’ means any economic advantage from criminal offences. It may consist of any form of property as defined in the following indent,
- ‘property’ includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property,
- ‘instrumentalities’ means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences,
- ‘confiscation’ means a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property,
- ‘legal person’ means any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations.

Article 2

Confiscation

1. Each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.
2. In relation to tax offences, Member States may use procedures other than criminal procedures to deprive the perpetrator of the proceeds of the offence.

Article 3

Extended powers of confiscation

1. Each Member State shall as a minimum adopt the necessary measures to enable it, under the circumstances referred to in paragraph 2, to confiscate, either wholly or in part, property belonging to a person convicted of an offence
 - (a) committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union ⁽¹⁾, when the offence is covered by:
 - Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro ⁽²⁾,
 - 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 ⁽³⁾,
 - Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings ⁽⁴⁾,
 - Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence ⁽⁵⁾,
 - Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography ⁽⁶⁾,

⁽¹⁾ OJ L 351, 29.12.1998, p. 1.

⁽²⁾ OJ L 140, 14.6.2000, p. 1.

⁽³⁾ OJ L 182, 5.7.2001, p. 1.

⁽⁴⁾ OJ L 203, 1.8.2002, p. 1.

⁽⁵⁾ OJ L 328, 5.12.2002, p. 1.

⁽⁶⁾ OJ L 13, 20.1.2004, p. 44.

— Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking⁽¹⁾,

(b) which is covered by the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism⁽²⁾,

provided that the offence according to the Framework Decisions referred to above

— regarding offences other than money laundering are punishable with criminal penalties of a maximum of at least between 5 and 10 years of imprisonment,

— regarding money laundering, are punishable with criminal penalties of a maximum of at least 4 years of imprisonment,

and the offence is of such a nature that it can generate financial gain.

2. Each Member State shall take the necessary measures to enable confiscation under this Article at least:

(a) where a national court based on specific facts is fully convinced that the property in question has been derived from criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,

(b) where a national court based on specific facts is fully convinced that the property in question has been derived from similar criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,

(c) where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person.

3. Each Member State may also consider adopting the necessary measures to enable it to confiscate, in accordance with the conditions set out in paragraphs 1 and 2, either wholly or in part, property acquired by the closest relations of the person concerned and property transferred to a legal person in respect of which the person concerned — acting

either alone or in conjunction with his closest relations — has a controlling influence. The same shall apply if the person concerned receives a significant part of the legal person's income.

4. Member States may use procedures other than criminal procedures to deprive the perpetrator of the property in question.

Article 4

Legal remedies

Each Member State shall take the necessary measures to ensure that interested parties affected by measures under Articles 2 and 3 have effective legal remedies in order to preserve their rights.

Article 5

Safeguards

This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental principles, including in particular the presumption of innocence, as enshrined in Article 6 of the Treaty on European Union.

Article 6

Implementation

1. Member States shall adopt the necessary measures to comply with this Framework Decision by 15 March 2007.

2. Member States shall transmit to the General Secretariat of the Council and to the Commission, by 15 March 2007, the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. In accordance with a report established on the basis of this information and a written report from the Commission, the Council shall assess, by 15 June 2007, the extent to which Member States have taken the necessary measures in order to comply with this Framework Decision.

Article 7

Entry into force

This Framework Decision shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Done at Brussels, 24 February 2005.

For the Council

The President

N. SCHMIT

⁽¹⁾ OJ L 335, 11.11.2004, p. 8.

⁽²⁾ OJ L 164, 22.6.2002, p. 3.