

REASONED OPINION WITH REMARKS 4/2012 OF THE JOINT COMMITTEE FOR EU AFFAIRS, DATED MAY 8, 2012, ON THE COMPLIANCE WITH THE PRINCIPLE OF SUBSIDIARITY BY THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE FREEZING AND CONFISCATION OF THE PROCEEDS OF CRIME IN THE EUROPEAN UNION [COM (2012) 85 FINAL] [2012/0036 (COD)] {SWD (2012) 31 FINAL} {SWD (2012) 32 FINAL}.

BACKGROUND

A. The Protocol on the application of the principles of subsidiarity and proportionality attached to the Lisbon Treaty of 2007, in force since December 1st, 2009, establishes a procedure allowing national parliaments to verify European legislative initiatives' compliance with the subsidiarity principle. The said Protocol has been developed in Spain by Act 24/2009, of December 22, amending Act 8/1994, of May 19. In particular, new articles 3 j), 5 and 6 of Act 8/1994 are the legal basis for this report.

B. The Proposal for a Directive of the European Parliament and of the Council on the Freezing and Confiscation of the Proceeds of Crime in the European Union has been adopted by the European Commission and conveyed to the national parliaments, which have a period of eight weeks to verify the subsidiarity check of the initiative, being the deadline May 8, 2012.

C. The Bureau and the Spokespersons of the Joint Committee for EU Affairs agreed on March 27, 2012, to examine the said European legislative initiative, appointing to that end as Rapporteur MP Mr. José López Garrido, and requesting the Government the report envisaged in section 3 j) of act 8/1994.

D. So far written reports have been received from the Government and from the Regional Parliaments of Catalonia, Aragón, and the Basque Country in which they considered the European legislative initiative examined to be in compliance with the subsidiarity principle.

E. The Joint Committee for EU Affairs, in its meeting held on May 8, 2012, adopted the following

OPINION

1.- Article 5.1 of the Treaty on the European Union indicates that “*the use of Union competences is governed by the principles of subsidiarity and proportionality*”. According to Article 5.3 of the same Treaty, “*under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall only act in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*”. The Protocol on the application of the principles of subsidiarity and proportionality attached to the Lisbon Treaty of 2007, sets out the aim, procedure and results of the subsidiarity monitoring which is to be carried out by EU Member States (articles 5(3) and 12(b) of the TEU).

2.- The examined proposal is based on the provisions enshrined in Title V of the Treaty on the Functioning of the European Union (TFEU), under the heading Area of Freedom, Security and Justice. Thus, according to section 67 (3) of the TFEU, the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, and through measures for coordination and cooperation between police and judicial authorities, as well as through the mutual recognition of judgements in criminal matters.

These measures are based on Article 82 (1) (2), and Article 83 (1) of the TFEU.

The current EU legal framework on the freezing and confiscation of proceeds of crime consists of four Council Framework Decisions (FD) and one Council Decision:

- Framework Decision 2001/500/JHA, which obliges Member States to enable confiscation, to allow value confiscation where the direct proceeds of crime cannot be seized and to ensure that requests from other Member States are treated with the same priority as domestic proceedings.
- Framework Decision 2005/212/JHA, which harmonises confiscation laws. Ordinary confiscation, including value confiscation, must be available for all crimes punishable by 1 year imprisonment. Extended confiscation must be available for certain serious offences, when "committed within the framework of a criminal organisation";
- Framework Decision 2003/577/JHA, which provides for mutual recognition of freezing orders;

- Framework Decision 2006/783/JHA, which provides for the mutual recognition of confiscation orders; and
- Council Decision 2007/845/JHA on the exchange of information and cooperation between Asset Recovery Offices obliges Member States to set up or designate national Asset Recovery Offices as national central contact points which facilitate, through enhanced cooperation, the fastest possible EU-wide tracing of assets derived from crime.

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

3.- This proposal deals with the problem of the insufficient recovery of the proceeds of crime in the European Union. Given that organised crime is essentially profit-driven, in order to disrupt organised crime activities it is essential to deprive criminals of the proceeds of crime. 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.

To date, estimates of money lost to organised crime in the Member States, as well as data on success in asset recovery, remain limited.

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.

Confiscating criminal assets is increasingly recognised as an important 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.

4.- The proposal deals with a field which is shared competence between the European Union and the Member States, hence the need to apply the subsidiarity principle.

According to the principle of subsidiarity, the Union shall only act on an exceptional basis in areas which do not fall under its exclusive competence, thus establishing that it shall only act in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Bearing in mind the disparity of national confiscation systems in national Member States and how this hinders the enforcement of freezing orders in other Member States, the European Union is better positioned to lay down the rules for the harmonization of national legislations as regards the freezing and confiscation of the proceeds of crime.

5.- From a budgetary perspective, which is so important for the proportionality of the measure, the impact assessment accompanying the proposal justifies that the increase in confiscations of assets of proceeds of crime will fully compensate Member States for the costs eventually incurred as a result of the implementation of this Directive.

Notwithstanding the latter, and bearing in mind that the Proposal for a Directive provides in its Article 10 for the establishment of “national centralised offices” able to adopt measures with a view to ensuring the adequate management of property frozen, it would be advisable that the European Union provide the necessary resources for the establishment of such offices, at least in their initial stage and hoping that they will be economically self sufficient in the future.

In the same line of budgetary impact and proportionality of the proposed measure, the Proposal for a Directive lays down in Article 11 the obligation for Member States to collect and maintain “comprehensive statistics” of a long list of data to assess the effectiveness of their confiscation systems. It would be advisable to limit such detailed information solely and exclusively to the crimes which fall within the scope of the Directive and not include all “criminal offences” as established by the text of the Proposal, in order to balance the need for the Commission to obtain as much data as possible and the need not to overburden national authorities with too much administrative work.

CONCLUSION

For the aforementioned reasons, the Joint Committee for EU Affairs considers that the Proposal for a Directive of the European Parliament and of the Council on the Freezing and Confiscation of the Proceeds of Crime in the European Union complies with the principles of subsidiarity and proportionality laid down in the Treaty on the European Union in force, according to which the Union shall only

act in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level.

However, the Joint Committee for EU Affairs considers that in order to substantially enhance the proportionality of the Proposal for a Directive, it would be advisable to take into account the necessary economic resources for the setting up of the “national centralised offices”, at least in the initial stage of the establishment of such offices, as well to set a reasonable limit to the need to compile and convey statistic data related to this Directive.

This Opinion shall be conveyed to the European Parliament, the Council and the European Commission, within the framework of political dialogue between national Parliaments and EU institutions.