



EUROPEAN COMMISSION
Impact Assessment Board

Brussels,
D(2011)

Opinion

Title

Impact assessment on a Directive on the confiscation and recovery of criminal assets; DG HOME

(draft version of 10 May 2011)

(A) Context

The importance of identifying and seizing criminal assets more effectively is mentioned in the 2009 European Council Stockholm Programme, the 2010 Justice and Home Affairs Council Conclusions and the Commission Communication "An Internal Security Strategy in action" (COM(2010)673). Confiscation and asset recovery is considered as a very effective way to fight profit-motivated organised crime. Although only some Member States collect statistics, at present the number of freezing and confiscation procedures and the amounts recovered from organised crime seem insufficient when compared to the estimated revenues of organised criminal groups or to the number of criminal convictions for serious crimes. Additionally, while criminal assets are thought to be increasingly invested in Member States beyond the state of origin, the pursuit of foreign assets tends to be more difficult due to tracing problems and greater legal complexity. While there are already international and EU laws in this area, reports suggest that Member States' implementation and enforcement differs for Council Framework Decisions 2005/212/JHA, 2003/577/JHA, 2006/783/JHA and 2007/845/JHA.

(B) Overall assessment

The report provides relevant analysis to inform a decision in this area although, as it acknowledges, there are serious and intractable deficiencies in the evidence base. It should be improved in a number of regards. Firstly, the problem requiring EU intervention should be explained more precisely including by clarifying the obstacles to mutual recognition of national asset recovery orders and their relation to incomplete transposition and inadequate implementation of the current EU legal framework. Secondly, the justification for the preferred option should be strengthened, in order to clarify why it can be considered proportionate despite fundamental rights concerns. Thirdly, stakeholder views should be presented early in the report then addressed throughout the analysis and the limited consultation process should be transparently acknowledged. Fourthly, the costs likely to arise from implementation should be assessed as fully as possible. Finally, the objectives of the initiative should be clarified to enable a meaningful evaluation in future.

(C) Main recommendations for improvements

(1) Explain the problem requiring EU intervention in more precise terms and strengthen the baseline scenario. The importance of the underlying problem of organised crime should be better explained, by summarising the basis and reliability of the reported revenue estimates. The importance of mutual recognition of national asset recovery orders and the obstacles that currently impede this should be better explained (perhaps with the aid of a diagram of the procedures involved). The extent to which these obstacles hinder law enforcement should also be discussed. The report should clarify the reasons for the sub-optimal harmonisation of asset recovery procedures and explain whether these are chiefly caused by a lack of effort or support for transposing and implementing the existing EU legal framework, or whether they arise from inconsistencies, gaps or other problems with the framework. On this basis, the baseline scenario should be strengthened, in particular by providing a better explanation of the gaps that would remain in the event of improved implementation of the existing framework and expected changes in the underlying problem of organised crime due to increasing cross-border activity. The relevance of international conventions that underpin the EU framework should be clarified (e.g. do these establish a clear consensus and willingness to take specific actions among signatories, are there general protocols on international asset recovery requests?).

(2) Show the preferred option to be justified and proportionate given fundamental rights concerns. The report should more fully explain how the preferred option respects the subsidiarity principle by clearly demonstrating the need for and value added of EU action. This should include a better explanation of why it is proportionate to require all Member States to have extended, non conviction-based and third party confiscation powers and to recognise the use of such powers by other states, given that some stakeholders feel such powers place inappropriate restrictions on fundamental rights (actions 5-7). To clarify this, a clearer explanation of the component policy actions that are used to create the options should be provided. This should indicate what safeguards to protect fundamental rights are specifically incorporated and whether each specific action applies to all or only some crimes. The report should also briefly summarise the general safeguards that have to be applied by Member States when using such powers given EU-wide commitments, e.g. to the European Charter of Fundamental Rights.

(3) Present stakeholder views transparently and justify the consultation process. The limited consultation process should be transparently acknowledged and reasons for this should be given. The main concerns of stakeholders and in particular defence lawyers, as representatives of those likely to face costs and disruption, should be mentioned upfront then addressed throughout the report. Similarly, the views of civil society and victims' groups who represent likely beneficiaries should be incorporated, preferably drawing on a new enquiry that will allow them to react to the key elements of the impact assessment.

(4) Improve the assessment of costs likely to arise from implementation. The report should provide an improved assessment of possible implementation costs, ideally based on quantitative data from States which are already taking similar actions. Where Member States' activity levels and hence overall costs cannot be predicted, the report should use varied examples to indicate a cost range for actions such as reporting of statistics and establishing a redistribution mechanism.

(5) Clarify the objectives of EU intervention. The specific objectives of this EU intervention should be expressed in a more "SMART" way to provide the basis for a future evaluation of its success (e.g. specific, measurable, achievable, realistic, time-dependent). Through this, the report should clarify whether the initiative's main aim is to harmonise practices in order to promote and facilitate mutual recognition or whether it is mainly intended to prompt new asset recovery activity at national level in order to more effectively deter profit-motivated crime across the Community.

Some more technical comments have been transmitted to the author DG and are expected to be incorporated in the final version of the impact assessment.

(D) Procedure and presentation

A hyperlink to the second external study should be provided, as it should be made public before or at the same time as the publication of the proposal (footnote, p5).

(E) IAB scrutiny process

Reference number	2010/HOME/351
External expertise used	No
Date of IAB meeting	8 June 2011