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European Union Committee

32nd Report of Session 2010–12

The United Kingdom opt-in to the draft directive on proceeds of crime

Report

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The Members of the Sub-Committee on Home Affairs which prepared this report are listed in the Appendix.

Information about the Committee

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Sub-Committee Staff

The current staff of the Sub-Committee are Michael Collon (Clerk), Sarah Watts (Policy Analyst) and Amanda McGrath (Committee Assistant).

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CONTENTS

	<i>Paragraph</i>	<i>Page</i>
Introduction	1	5
Current EU legislation	2	5
The draft Directive	7	6
Limited scope of the draft Directive	7	6
Summary of the draft Directive's provisions	10	7
Legal questions	14	8
Should the Government opt in?	16	8
Debate on this report	22	9
Appendix: Sub-Committee F (Home Affairs)		11

The United Kingdom opt-in to the draft directive on proceeds of crime

Introduction

1. “The main motive for cross-border organised crime is financial gain. In order to be effective, law enforcement and judicial authorities should be given the means to trace, freeze, manage and confiscate the proceeds of crime.” This is the first recital of a proposal for a Directive submitted by the Commission to the Council on 12 March 2012,¹ and published by the Council on 14 March 2012.² The Directive will apply to the United Kingdom only if by 15 June 2012 the Government notify the President of the Council that they wish to take part in the adoption and application of the Directive—in other words, they opt in to it.³ In this report, prepared by the Home Affairs Sub-Committee,⁴ we consider whether the Government should do so.

Current EU legislation

2. The current EU legislation on the freezing and confiscation of the proceeds of crime pre-dates the Treaty of Lisbon. The first relevant instrument even pre-dates the power, introduced by the Treaty of Amsterdam, for the EU to legislate on police and judicial cooperation in criminal matters: this instrument is a Joint Action adopted by the Council in 1998 on the initiative of the United Kingdom.⁵ In essence this is an informal agreement between the Member States not to enter reservations to the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime;⁶ to cooperate in the identification, freezing and confiscation of assets; to take steps to prevent assets being dissipated; and to exchange best practice.
3. The Treaty of Amsterdam introduced the power of the Council to legislate in this area by adopting Framework Decisions (in effect analogous to Directives) and Decisions. Since the entry into force of that Treaty, four Framework Decisions and one Decision have been adopted:
 - Framework Decision 2001/500/JHA, which obliges Member States to enable confiscation;⁷

¹ Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, COM(2012)85 final

² Document 7641/12

³ Protocol (No 21) to the Treaties on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, Article 3.

⁴ The members of the Sub-Committee are listed in the Appendix.

⁵ Joint Action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (98/699/JHA) (OJ L333 of 9 December 1998, page 1)

⁶ This was the first Council of Europe Convention on money laundering. The United Kingdom signed it on the day it was opened for signature, and ratified it before its entry into force. It is now superseded by the Warsaw Convention which, as we have noted with regret on a number of occasions, the United Kingdom has yet to sign or ratify.

⁷ OJ L182 of 5 July 2001, page 1

- Framework Decision 2005/212/JHA, which harmonises confiscation laws;⁸
 - Framework Decision 2003/577/JHA, which provides for mutual recognition of freezing orders;⁹
 - Framework Decision 2006/783/JHA, which provides for the mutual recognition of confiscation orders;¹⁰ and
 - Council Decision 2007/845/JHA on the exchange of information and cooperation between Asset Recovery Offices.¹¹
4. This legislation falls into two groups. The first group consists of the two Framework Decisions of 2001 and 2005 dealing with confiscation. The 2001 Framework Decision requires Member States to allow the confiscation of the proceeds of crime, or of an amount of money equivalent to the proceeds where the proceeds themselves cannot be seized (value confiscation), and to ensure that requests from other Member States are given the same priority as domestic proceedings. The 2005 Framework Decision harmonises confiscation laws, requiring ordinary confiscation and value confiscation to be available for all offences punishable by at least one year’s imprisonment, and requiring extended confiscation—the confiscation of assets going beyond the direct proceeds of crime—to be available for certain serious offences “when committed within the framework of a criminal organisation”.
5. The second group consists of the Framework Decisions of 2003 and 2006 which provide for orders made by the courts of a Member State for securing evidence or for freezing or confiscating assets in another Member State to be automatically recognised and executed in that other Member State. The Decision on cooperation between Asset Recovery Offices assists this process.
6. The Commission, in its explanatory memorandum,¹² states that reports on the three Framework Decisions of 2003, 2005 and 2006 “show that Member States have been slow in transposing them and that the relevant provisions have been often implemented in an incomplete or incorrect way”. This is most unsatisfactory. We hope that the Commission will ensure that any new legislation on this important topic is promptly and fully implemented; if necessary, the Commission should make full use of its powers under the Treaties.¹³

The draft Directive

Limited scope of the draft Directive

7. The two current groups of legislation form a coherent whole, and we would have hoped and expected that new legislation would incorporate action on both fronts. This indeed seems to be what the Commission was proposing in its Communication “The EU Internal Security in Action: five steps towards a

⁸ OJ L68 of 15 March 2005, page 49

⁹ OJ L196 of 2 August 2003, page 45

¹⁰ OJ L382 of 24 November 2006, page 59

¹¹ OJ L332 of 18 December 2007, page 103

¹² Paragraph 2.2

¹³ Article 258 TFEU

more secure Europe”.¹⁴ Objective 1, Action 3 reads: “To this end the Commission will propose legislation in 2011 to strengthen the EU legal framework on confiscation, in particular to allow more third-party confiscation and extended confiscation and to facilitate mutual recognition of non-conviction-based confiscation orders between Member States”.

8. The draft Directive introduces non-conviction based confiscation (civil recovery) and third-party confiscation. It says nothing about mutual recognition, despite accepting in the Impact Assessment that the 2003 and 2006 Framework Decisions support extended confiscation “only in a limited way”, and that neither Framework Decision requires mutual recognition of civil recovery orders. It concludes that “these limitations handicap the ability of Member States to combat organised crime”.¹⁵
9. We have had occasion to question in our recent report *The EU Drugs Strategy*¹⁶ whether the division of responsibilities in the Commission between DG Home and DG Justice hampered the effective formulation of policies in that field. We regret the failure of the draft Directive to deal adequately with mutual recognition of extended confiscation orders, and to deal at all with mutual recognition of civil recovery orders.

Summary of the draft Directive’s provisions

10. The Directive establishes only minimum rules on the freezing and confiscation of the proceeds of crime. Member States are free to include in their national law provisions which go further. The Government say in their explanatory memorandum that they already comply with a number of provisions of the draft, and in some cases already exceed them.
11. The freezing of assets with a view to possible later confiscation is dealt with in Article 7 of the Directive. Under current United Kingdom legislation property which may be dissipated, hidden, or transferred out of the jurisdiction in an effort to frustrate confiscation can only be frozen by court order, whatever the urgency. The Government are concerned that the Directive would allow the freezing of property before a court order has been obtained.
12. Articles 3 and 4 deal respectively with confiscation of the proceeds of crime, and extended confiscation of other assets where the court “finds it substantially more probable” than not that these assets are derived from other similar crimes. The Government are seeking clarification of these words.
13. Non-conviction based confiscation (civil recovery) is introduced by Article 5 and would be new to EU law. It would be used for cases where there cannot be a criminal conviction, for example because of the death or flight of the suspected person. United Kingdom law already allows this form of confiscation.¹⁷ Confiscation of assets transferred to a third party would be introduced into EU law by Article 6; again, this is already allowed in the United Kingdom.

¹⁴ COM(2010)673 final, document 16797/10. This Communication was the subject of our report *The EU Internal Security Strategy* (17th report, Session 2010–12, HL Paper 149).

¹⁵ Commission Staff Working Paper, document 7641/12 ADD1, paragraph 4.2.3, headed “Inadequate powers for enforcing confiscation orders between Member States (mutual recognition)”.

¹⁶ 26th Report, Session 2010–12, HL Paper 270, Chapter 7

¹⁷ Proceeds of Crime Act 2002, Part 5.

Legal questions

14. The principal legal base for the draft Directive is Article 83(1) of the Treaty on the Functioning of the European Union (TFEU), which allows directives to be adopted prescribing minimum rules for “sanctions in the areas of particularly serious crime with a cross-border dimension ...”. These areas of crime are listed. But Article 82(2) is also given as a legal base. This allows directives to be adopted setting out minimum rules in specific areas of criminal procedure “to the extent necessary to facilitate mutual recognition of judgments and judicial decisions ... in criminal matters having a cross-border dimension”. Given that the Directive does not deal with rules of procedure of the kind mentioned in Article 82(2), we do not understand why this Article is given as an additional legal base.
15. Article 14 of the Directive would repeal the 1998 Joint Action in its entirety, but would only repeal and replace specific provisions of the Framework Decisions of 2001 and 2005. In paragraph 2.3 of its explanatory memorandum the Commission states that some provisions of the 2005 Framework Decision must remain in force because they apply to some criminal activities which are outside the scope of Article 83(1) TFEU. We do not understand this. Since the entry into force of the Treaty of Lisbon on 1 December 2009 there has been no Treaty base for Framework Decisions, and those which pre-date this remain in force only because Protocol 36 to the Treaties, dealing with Transitional Provisions, provides in Article 9 that the effects of legal acts adopted under the former Title VI TEU—the third pillar—before that date are preserved “until those acts are repealed, annulled or amended in implementation of the Treaties”. Partial repeal is not expressly mentioned. There is however no doubt that the Framework Decisions of 2001 and 2005 are to be amended, and it seems to us that there will remain no legal base for any of their provisions which are not re-enacted in the Directive, even if the result is to narrow the scope of the criminal activities to which they apply. We would therefore have expected that the 2001 and 2005 Framework Decisions would be repealed in their entirety, and their remaining provisions re-enacted in the Directive within the limits of the present EU competence.¹⁸ We hope consideration will be given to this in the course of negotiations.

Should the Government opt in?

16. Under the former Title VI TEU, Framework Decisions required unanimity to be adopted, so the question of an opt-in did not arise. Directives adopted under Article 83 TFEU, which is in Title V of Part Three, are subject to Protocol 21 to the Treaties and, as we have said, will apply to the United Kingdom only if the Government opt in.
17. **We have no doubt that the Government should opt in to this proposal.** It is not unusual for a proposal for legislation to raise legal questions and questions of substance at an early stage, like those mentioned above. These can usually be resolved in the course of negotiations, and the Government will be able to play a fuller part in those negotiations if they have opted in.

¹⁸ This would be consistent with Declaration 50 adopted on the signature of the Treaty of Lisbon, which invites the institutions to seek to adopt within the 5-year transitional period legal acts amending or replacing those adopted under the former Title VI TEU.

18. Only a very small proportion of the proceeds of serious organised crime is currently recovered,¹⁹ and confiscation would be a more effective weapon if there was better cooperation at international level. If the Government failed to opt in to a measure setting out minimum provisions to be adopted by Member States, this would be against the national interest of the United Kingdom, which is that all Member States should introduce tougher measures on the confiscation of criminal assets. It would in our view send entirely the wrong message to our partners about the Government's attitude to international cooperation.
19. One of the matters listed in paragraph 26 of the explanatory memorandum as an issue the Government will consider in deciding whether or not to opt in is "burden on the legislative programme". Member States will have two years from the date of adoption of the draft Directive in which to transpose it into national law; and, as the Government have said, United Kingdom law already complies with most of the substantive provisions of the Directive. We regard this consideration as lacking in merit.
20. There is a further issue. As we have said, the Joint Action and certain provisions of the two Framework Decisions are to be repealed and replaced, but only "in relation to Member States participating in the adoption of this Directive"; if the United Kingdom does not opt in, it will continue to be bound by the existing measures. The Government accept this.²⁰ This would be an unfortunate situation and an unnecessary complication.
21. The Government also state:²¹ "The measures being repealed are ones that fall within the scope of the UK's decision whether to accept full European Court of Justice jurisdiction over those EU police and criminal justice measures adopted before 1 December 2009 which have not been amended or repealed." This is a reference to Protocol 36 to the Treaties. The effect of Article 10(2) of Protocol 36 is that the Court of Justice will acquire jurisdiction to interpret the remaining provisions of the Framework Decisions for most Member States, but not for the United Kingdom if it does not opt in to the Directive. The Framework Decisions would then remain in the list of measures about which the Government will have to decide, no later than 31 May 2014, whether it wishes all or none of them to continue to apply to the United Kingdom.²² We plan to undertake a separate inquiry into this well in advance of that date.

Debate on this report

22. **We make this report to the House for debate.**
23. On 9 June 2008 Baroness Ashton of Upholland, then Leader of the House, undertook that the Government would make time for reports such as this dealing with the question whether the Government should opt in to individual JHA²³ measures to be debated in the House.²⁴ On 20 January

¹⁹ Commission Staff Working Paper, document 7641/12 ADD1, paragraph 4.1. See also our report *Money laundering and the financing of terrorism* (19th Report, Session 2008–09, HL Paper 132) Chapter 3, and the evidence cited there.

²⁰ Explanatory memorandum, paragraph 34, Article 14

²¹ *Ibid.*

²² Article 10(4) of Protocol 36

²³ Justice and Home Affairs, the commonly used expression for the matters now covered by Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU).

2011 Mr David Lidington MP, the Minister of State for Europe, made a written ministerial statement on behalf of the Government in which he said: “The Government will continue to honour the arrangements that are currently in place following the undertakings of the then Government Minister, Baroness Ashton, for enhanced Parliamentary scrutiny of JHA opt-in decisions”.²⁵

24. Additionally, Mr Lidington gave a commitment that, where there was strong parliamentary interest, the Government would set aside time for a debate in both Houses on its proposed approach to opting-in to a particular draft measure. Pursuant to this, on 15 March 2012 Mr James Brokenshire MP, Parliamentary Under-Secretary of State for Crime and Security, made a further written ministerial statement, repeated in the House of Lords,²⁶ offering debates in Government time on a number of proposals, including “Draft Directives creating minimum rules for the confiscation of criminal assets and arrangements for the mutual recognition of confiscation orders”. This proposal, as we have said, does not deal with the mutual recognition of confiscation orders, but does create minimum rules for the confiscation of criminal assets.
25. We welcome the fact that the Government have undertaken to make time for a debate on this report, and hope that this can take place as early as possible next Session, and in any case well before the expiry of the time limit for the Government to decide whether or not to opt in.
26. We retain the proposal for a Directive under scrutiny.

²⁴ The undertakings are set out in full in Appendix 1 of our report *Enhanced scrutiny of EU legislation with a United Kingdom opt-in*, 2nd Report, Session 2008–09, HL Paper 25.

²⁵ HC Official report, 20 January 2011, cols. WS 51–52

²⁶ HL Official report, 15 March 2012, cols. WS 32–33

APPENDIX: SUB-COMMITTEE F (HOME AFFAIRS)

The members of the Sub-Committee which prepared this report were:

Lord Avebury
Lord Blencathra
Lord Dear
Baroness Eccles of Moulton
Lord Hannay of Chiswick (Chairman)
Lord Hodgson of Astley Abbotts
Lord Judd
Lord Mackenzie of Framwellgate
Lord Mawson
Lord Richard
Lord Tomlinson
Lord Tope

No interests relevant to the subject of the report were declared.

The following members of the European Union Committee attended the meeting at which the report was approved:

Lord Bowness
Lord Carter of Coles
Lord Dykes
Lord Foulkes of Cumnock
Lord Hannay of Chiswick
Lord Harrison
Baroness Howarth of Breckland
Baroness O’Cathain
Lord Plumb
Lord Roper (Chairman)
The Earl of Sandwich
Baroness Young of Hornsey

During consideration of the report, Lord Bowness declared an interest as:

Solicitor and notary public

Declarations of Interests:

A full list of Members’ interests can be found in the Register of Lords Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>