



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 22 July 2009 (03.08)
(OR. de,en)**

11971/09

DROIPEN 61

COVER NOTE

from :	Mr Nikolaus Obrovski, JHA Counsellor, Permanent Representation of Austria to the European Union
to :	Mr Ivan Bizjak, Director-General, DGH Justice and Home Affairs, General Secretariat of the Council
Subject :	Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property - Notification letter

Delegations will find attached a notification letter from Austria.

From:

Permanent Representation of Austria to the European Union
30, avenue de Cortenbergh
B-1040 Brussels
Tel.: +32 2 2345-100 (switchboard)
Fax: +32 2 2356-100
e-mail: bruessel-ov@bmeia.gv.at

Contact person: Mr Nikolaus OBROVSKI
Direct tel.: +32 2 2345-269
Direct fax: +32 2 2356-308
e-mail: nikolaus.obrovski@bmeia.gov.at

To:

Director-General Jonathan Faull
European Commission
Justice, Freedom and Security DG
Rue de Luxembourg, 46
B-1049 Brussels

Brussels, 26 June 2009

GZ 3.3.20/18/09

Subject: Council Framework Decision 2005/212/JHA of 24 February 2005
on Confiscation of Crime-Related Proceeds, Instrumentalities and Property;
notification

Sir,

The Permanent Representation of Austria hereby submits an overview of the implementing provisions and relevant legislation transposing into Austrian national law the obligations imposed under Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.

(Complimentary close)
For the Permanent Representation:
(Signed)
Mr Nikolaus Obrovski
(Attaché/Judicial Affairs)

A copy of this letter has been sent to Director-General Ivan Bizjak and is also being e-mailed to Sebastiano Tiné (Head of Department).

Overview of implementing provisions

Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property

Pursuant to Article 6(2) of the Council Framework Decision of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ L 68, 15.3.2005, p. 49), Member States must 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 that Framework Decision.

In accordance with that requirement, the Republic of Austria hereby gives notice that the obligations imposed on it under that legal act have been complied with in full by the following provisions of Austrian law:

Re Article 2 - Confiscation:

In terms of its content, this Article corresponds to Article 1(a) of the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (in conjunction with Article 2 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime).

The relevant provision is implemented in Austrian law by Articles 20, 20b and 26 of the Penal Code and by Articles 110 to 115 of the Code of Criminal Procedure, as published in Official Journal of the Republic of Austria I 2004/19 (Articles 143 and 144a of the old version of the Code of Criminal Procedure), and by Articles 443 to 446 of the Code of Criminal Procedure and Articles 64 to 67 of the Extradition and Judicial Assistance Act (ARHG). Since, under Austrian law, confiscation is not restricted to particular levels of crime, the requirement laid down by Article 2 may be considered to be satisfied.

Re Article 3 - Extended powers of confiscation:

The obligation under Article 3 is implemented in Austrian criminal law by Articles 20 and 20b of the Penal Code, in particular since Article 20 of the Penal Code does not refer to the commission of certain offences, but rather enables proceeds to be recovered wherever a pecuniary advantage has been obtained for or as a result of a criminal offence. It is therefore not necessary for a conviction to have been obtained for such an offence.

Furthermore, Article 20(3) of the Penal Code tightens up the provisions concerning the recovery of proceeds in respect of offenders who received pecuniary advantages while they were members of a criminal organisation or terrorist association in cases where it is suspected that such advantages are derived from criminal offences and where the offender cannot provide evidence of their legitimate origin.

In the event of a conviction, proceeds may therefore be recovered in any case; this satisfies the obligations under Article 3(2)(a) and (b) of the Framework Decision, whereby confiscation must be enabled at least "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 ...".

The obligation under Article 3(2) for a national court to be "fully convinced" that the property in question has been derived from criminal activities is in any case required under Austrian law for the recovery of proceeds, and is reflected in particular in Article 20(2) of the Penal Code.

The requirement under Article 3(2)(c) is satisfied by Article 20(3) of the Penal Code.

As regards the non-mandatory provision contained in Article 3(3), it may be stated that, under Article 20(4) of the Penal Code, proceeds may be recovered not only from the perpetrator of a criminal offence, but also from any other person to whom the offender may have transferred the pecuniary advantage resulting from such an offence and who has thereby been directly and unjustly enriched. This also applies in cases where that third party is a legal person.

Re Article 4 - Legal remedies:

Articles 443 to 445a of the Code of Criminal Procedure provide for legal remedies for all interested parties as regards financial penalties imposed by a court. Decisions on financial penalties may be contested by appeal both in favour of and against the convicted party or person held liable, except where a simplified decision-making procedure is used pursuant to Article 445a of the Code of Criminal Procedure.

The text of the relevant provisions is attached hereto.

Federal Law of 23 January 1974 on acts punishable by a court (Penal Code)

Article 20 of the Penal Code - Recovery of proceeds

(1) Any person who

1. has committed an act punishable by a court and has thereby obtained a pecuniary advantage, or
2. has received a pecuniary advantage for the commission of an act punishable by a court

shall be fined an amount equivalent to the level of unjust enrichment thereby obtained. In so far as the extent of such enrichment cannot be determined, or can be determined only with a disproportionate degree of effort, the court shall set the amount to be recovered as it sees fit.

(2) If

1. the offender has committed offences on a repeated or recurring basis (Article 17) and has received a pecuniary advantage as a result of or in return for such offences, and if
 2. at the time the offences were committed, he received further pecuniary advantages which are suspected to be derived from other offences of the same type and whose legitimate origin cannot be proved,
such pecuniary advantages shall also be taken into account when setting the amount which is to be recovered.
- (3) Offenders who, while members of a criminal organisation (Article 278a) or a terrorist association (Article 278b), received pecuniary advantages which are suspected to be derived from criminal offences and whose legitimate origin cannot be proved shall be fined an amount which the court judges to be equivalent to the amount of enrichment thereby obtained.
- (4) Any person who has been directly and unjustly enriched by an act punishable by a court committed by another individual or as a result of a pecuniary advantage accorded to them for the commission of such an act shall be fined an amount equivalent to such enrichment. Any legal person or partnership thus enriched shall likewise be liable to pay such a fine.
- (5) In the event of the death of a directly enriched person or the cessation of a directly enriched legal person or partnership, such enrichment shall be recovered from their legal successor in so far as that person was alive or in existence at the time of the transfer.
- (6) Where more than one person has been enriched, they shall be fined on the basis of their share in such enrichment. Where that share cannot be determined, the court shall set it at the level which it deems to be appropriate.

Article 20b of the Penal Code - Forfeiture

- (1) Assets over which a criminal organisation (Article 278a) or a terrorist association (Article 278b) has right of disposal or which are made available or accumulated as a means of terrorist financing (Article 278d) shall be forfeited.
- (2) Assets derived from an act punishable by a court shall be forfeited if the act from which they stem is also punishable by a court under the law of the State where it was committed but is not subject to Austrian criminal law pursuant to Articles 62 to 65.

Article 26 of the Penal Code - Confiscation

- (1) Property used or intended to be used by an offender to commit an act punishable by a court or which is created by such an act shall be confiscated if the specific nature of such property makes this necessary in order to prevent the commission of such acts.
- (2) Property shall not be confiscated in cases where the person having a rightful claim to it eliminates its specific nature, in particular by removing or rendering unusable devices or characteristics which facilitate the commission of acts punishable by a court. Property to which a person not involved in the punishable act has a legal entitlement may be confiscated only if the person concerned cannot guarantee that it is not being used for the commission of such acts.
- (3) Provided that the conditions for confiscation are satisfied, property may also be confiscated in cases where no individual may be prosecuted for or convicted of the act punishable by a court.

1975 Code of Criminal Procedure (Official Journal of the Republic of Austria 1975/631, as published in Official Journal of the Republic of Austria I 2007/109)

Article 110 of the Code of Criminal Procedure - Impoundment

- (1) Impoundment shall be permitted if it appears necessary
 1. for reasons of proof
 2. to safeguard private-law claims (Article 367), or
 3. to safeguard the recovery of proceeds (Article 20 of the Penal Code), forfeiture (Article 20b of the Penal Code), confiscation (Article 26 of the Penal Code) or any other legally prescribed financial order.
- (2) Impoundment shall be ordered by the public prosecutor's office and implemented by the Criminal Police.
- (3) The Criminal Police shall be entitled to impound property on its own initiative (Article 109(1)(a))
 1. if
 - (a) no-one has right of disposal over such property,
 - (b) the property in question was taken from the victim as a result of the offence,
 - (c) the property in question was found at the scene of the crime and was used or may have been used to commit the criminal offence, or
 - (d) the property in question is of low value or can easily be replaced temporarily,
 2. if the possession of such property is generally prohibited (Article 445a(1)),
 3. if the property in question was used by a person apprehended for the reasons laid down in Article 170(1)(1) or was found when that person was searched pursuant to Article 120(1), or
 4. in the cases referred to in Article 4 of Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (OJ L 196, 2.8.2003, pp. 7-14).
- (4) The impoundment of property for reasons of proof (paragraph 1(1)) is not permitted and shall in all cases be revoked at the request of the person concerned if such proof can be supplied by means of image, sound or other recordings or by photocopies of written records or computer-processed data, and where there is no reason to presume that the impounded

property itself or the original copies of the impounded data will have to be examined in the main proceedings.

Article 111. (1) Any person who has right of disposal over property or assets which are to be impounded shall be obliged (Article 93(2)) to surrender them or otherwise enable them to be impounded at the request of the Criminal Police. If necessary, this obligation may also be enforced by conducting searches of persons or places of residence; Articles 119 to 122 shall thereby be applied accordingly.

(2) In cases where information stored on data carriers is to be impounded, the persons concerned must provide access to such information and hand over or produce an electronic data carrier in a conventional data format if so requested. They must also allow a back-up copy to be made of the information stored on the data carriers.

(3) Persons who have not themselves been charged with an offence shall, at their request, be refunded the standard and appropriate costs which they have necessarily incurred as a result of the removal of documents or other evidentiary property from other parties or the provision of photocopies.

(4) In all cases, a statement of impoundment shall be handed over or issued to the person concerned either immediately or within a maximum of 24 hours, and such persons shall be informed of their right of appeal (Article 106). In the case of an impoundment to safeguard a decision on private-law claims (Article 110(1)(2)), the victim shall also be notified wherever possible.

Article 112. Where the person concerned by or present during the impoundment opposes the impoundment of written records or data carriers on the grounds of a legally recognised duty of confidentiality, such records and data carriers shall be accorded suitable protection against unauthorised disclosure or alteration and shall be submitted to the court; they may not be inspected beforehand. The court shall examine the records and data carriers and shall decide whether and to what extent they must continue to be safeguarded or returned to the person concerned. Any complaint which is lodged against such a decision shall have a suspensory effect.

Article 113. (1) Impoundment shall end

1. if revoked by the Criminal Police (paragraph 2),
2. if such revocation is ordered by the public prosecutor's office (paragraph 3),
3. if the court orders seizure.

(2) The Criminal Police shall notify the public prosecutor's office immediately, or within a maximum of 14 days (Article 100(2)(2)), in cases where it does not revoke in advance an impoundment pursuant to Article 110(3) in the absence of the relevant requirements, or where such requirements cease to apply. However, such a notification may be joined to the subsequent notification on condition that this will not damage the essential interests of the proceedings or persons and provided that the property impounded is either of low value, or not subject to anyone's right of disposal, or covered by a general prohibition on possession (Article 445a(1)). In the case of Article 110(3)(5), the Criminal Police shall proceed in accordance with the provisions of Articles 3, 4 and 6 of the 2004 Law on Product Piracy (Official Journal of the Republic of Austria I No 56/2004).

(3) The public prosecutor's office shall apply immediately to the court for seizure or, if the requirements for such seizure do not apply or no longer apply, shall order that the impoundment be revoked.

Article 114. (1) Until a decision on seizure is taken (Article 115(2)), the Criminal Police, followed by the public prosecutor's office, shall be responsible for the safekeeping of impounded property. (2) Where the grounds for the continued safekeeping of impounded property cease to apply, such property shall immediately be handed over to the person in whose right of disposal it was impounded, unless that person clearly has no rightful claim to it. In such a case, the property shall be handed over to the person having a rightful claim to it or, if such a person is not clearly identifiable and cannot be identified without a disproportionate degree of effort, shall be deposited in the court's safekeeping pursuant to Article 1425 of the General Civil Code. The persons concerned shall be notified of any such action.

Article 115 of the Code of Criminal Procedure - Seizure

- (1) Seizure shall be permitted if it is anticipated that the impounded property
1. will be required as evidence in the subsequent proceedings,
 2. is subject to private-law claims (Article 367), or
 3. will be used to secure a court order on the recovery of proceeds (Article 20 of the Penal Code), forfeiture (Article 20b of the Penal Code), confiscation (Article 26 of the Penal Code) or any other legally prescribed financial order whose enforcement would otherwise be jeopardised or severely impeded.
- (2) The court shall decide on seizure without delay at the request of the public prosecutor's office.
- (3) Article 110(4) shall apply *mutatis mutandis*. If necessary, seizure shall be restricted to the records and photocopies referred to therein.
- (4) Unless otherwise specified in that Law, the provisions of the Enforcement Order on Interim Measures shall apply *mutatis mutandis* to seizures by means of a garnishee order or a prohibition on sale or mortgage (Article 109(2)(b)).
- (5) Decisions allowing seizures to secure a court order on the recovery of proceeds (Article 20 of the Penal Code) or forfeiture (Article 20b of the Penal Code) shall specify a sum equivalent to the amount of the anticipated recovery or forfeiture.
- (6) Where the conditions for seizure do not apply or no longer apply, or on payment of the sum determined in accordance with paragraph (5), the public prosecutor's office shall revoke such seizure once the charge has been brought before the court.

III. Procedure concerning the recovery of proceeds, forfeiture and confiscation

- Article 443. (1) Unless otherwise specified in this section, the judgment shall contain provisions concerning the recovery of proceeds, forfeiture, confiscation and other financial orders (liability for fines, forfeiture confiscation and value confiscation).
- (2) If the outcome of the criminal proceedings, either in itself or following the completion of investigations which do not significantly delay the decision on the question of liability or punishment, does not allow a reliable judgment to be formed as to the financial orders referred to in paragraph (1) above, the pronouncement of such orders may be reserved on the basis of a separate decision (Articles 445 and 445a), except where such orders are no longer permissible due to the nature of the assets or property concerned.
- (3) Other than in the case referred to in Article 445a, a decision on financial orders shall have the same status as a decision regarding punishment, and may be contested by appeal both in favour of and against the convicted party or person held liable (Articles 64 and 444).

Article 444. (1) The main proceedings and the pronouncement of judgment may take place in the absence of the person held liable (Article 64) provided that the latter was duly summoned to the main proceedings (Article 221(2)).

(2) Where persons held liable assert their rights only after the decision on forfeiture or confiscation has entered into force, they shall have thirty years in which to assert their claims to the property or to the purchase price thereof (Article 408) against the Federal Government by civil means.

Article 444a. Unless otherwise specified, the provisions on forfeiture shall apply in spirit to liability for fines, forfeiture confiscation, value confiscation and recovery of proceeds.

Article 445. (1) Where there are sufficient grounds for assuming that the conditions for the recovery of proceeds (Article 20 of the Penal Code), forfeiture (Article 20b of the Penal Code) or confiscation (Article 26 of the Penal Code) are satisfied but it is not possible to issue a ruling in that regard in criminal proceedings or in proceedings directed at internment in one of the institutions referred to in Articles 21 to 23 of the Penal Code, the public prosecutor shall make an independent application for the imposition of such a financial order.

(2) Decisions on applications for the recovery of proceeds or forfeiture shall be taken independently, following a public hearing, by the court which was or which is considered to be competent for the hearing and pronouncement of sentence for the offence on which such an order is to be based; where no such court exists, such decisions shall be taken by the regional court within whose jurisdiction the asset or property is located. The decision of the regional court shall be taken by a single judge. In cases where a jury has ruled on the offence on which the order is to be based or reserved a decision (Article 443(2)), the presiding judge shall act as the single judge.

(3) Decisions on applications for confiscation shall generally be taken independently, following a public hearing, by the district court within whose jurisdiction the offence was committed (Article 445a); where that court cannot be identified or is located outside Austria, such decisions shall be taken by the district court within whose jurisdiction the property is located. The provisions concerning the main proceedings before the district courts and Article 444 shall apply *mutatis mutandis*.

(4) Such decisions may be contested by appeal both in favour of and against the person concerned in accordance with Articles 463 to 468 (Article 489); the last sentence of Article 444(1) shall apply *mutatis mutandis*.

Article 445a. (1) The district court may rule independently, after hearing the public prosecutor and the parties held liable (Article 444), on applications for confiscation in cases where the value of the property liable to be confiscated does not exceed EUR 1 000 or where its possession is generally prohibited. Such a hearing may be dispensed with in cases where the person held liable resides outside Austria, or if considerable administrative efforts would be required in order to identify his place of residence.

Article 446. Where the requirements for the independent procedure are not satisfied until the main proceedings, the decision may be issued in the form of a judgment acquitting the accused or refusing the application for internment in an institution.

Federal Law of 4 December 1979 on Extradition and Judicial Assistance in Criminal Matters (Extradition and Judicial Assistance Law)

Enforcement of foreign decisions in criminal matters - Requirements

Article 64. (1) The enforcement or continued enforcement of a foreign court's decision imposing a fine or custodial sentence, a preventive measure or a financial order shall be permitted at the other State's request if:

1. the foreign court's decision was issued in accordance with a procedure complying with the principles enshrined in Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms (Official Journal of the Republic of Austria No 210/1958),
2. the decision was issued in response to an act punishable by a court under Austrian law,
3. the decision was not issued in response to one of the criminal offences referred to in Articles 14 and 15,
4. the period of limitation has not yet lapsed under Austrian law,
5. the person to whom the foreign court's decision is addressed has not been prosecuted, definitively convicted or acquitted or otherwise discharged in respect of the act in question in Austria.

(2) The enforcement of a foreign court's decision imposing a custodial sentence or preventive measure is permissible only if the convicted person is an Austrian national, is permanently or otherwise resident in Austria and has consented to enforcement in Austria.

(3) The enforcement of preventive measures is permissible only if Austrian law provides for a similar measure.

(4) The enforcement of a foreign court's decision imposing financial orders is permissible only if the requirements for a financial penalty, recovery of proceeds, forfeiture or confiscation are satisfied under Austrian law and no corresponding order has hitherto been issued in Austria.

(5) Furthermore, the enforcement of a foreign court's decision imposing a financial penalty or the recovery of proceeds is permissible only if the payment thereof is expected to be effected in Austria and the person concerned has been heard, in so far as he may be contacted.

(6) In addition, the enforcement of a foreign court's decision definitively imposing forfeiture or confiscation is permissible only if the property or assets to which the decision relates are located in Austria and the person concerned has been heard, in so far as he may be contacted.

(7) Financial penalties, sums which have been recovered, assets which have been forfeited and property which has been confiscated shall be assigned to the Federal Government.

Austrian enforcement decision

Article 65. (1) In cases where the enforcement of a foreign court's decision in criminal matters is transferred, the penalty, preventive measure or financial order which is to be enforced in Austria shall be determined under Austrian law with due regard for the measure thus pronounced. Forfeiture ordered by a foreign court's decision may also be enforced as forfeiture in Austria provided that a recovery of proceeds has been effected under Austrian law.

- (2) The person to whom the decision relates must not be treated any less favourably as a result of the transfer of enforcement than he would be if the decision were enforced in the other State.
- (3) Articles 38 and 66 of the Penal Code shall apply *mutatis mutandis*.

Article 66. Requests for the enforcement of foreign decisions in criminal matters shall be forwarded by the Federal Ministry of Justice to the competent regional court (Article 67(1)). Where, at the time the request is received, circumstances already exist which prohibit the transfer of enforcement for one of the reasons referred to in Articles 2 and 3(1), or where the request cannot be dealt with in accordance with the law, the Federal Minister for Justice shall immediately refuse the request. At any stage in the proceedings, the Federal Minister for Justice may ask the requesting State for additional documentation, acting either on his own initiative or at the request of the Court of First Instance.

Article 67. (1) The regional court within whose area of jurisdiction the person concerned is permanently or otherwise resident shall be competent to rule on requests for the enforcement and adaptation of the sentence, preventive measure or recovery of proceeds. If no specific regional court can be identified as competent pursuant to these provisions, the Vienna Regional Criminal Court shall be considered to be competent. The regional court (Article 31(5) of the Code of Criminal Procedure) within whose area of jurisdiction the assets or property are located shall be competent to rule on requests for the enforcement of decisions on forfeiture or confiscation.

(2) The Federal Minister for Justice shall notify the requesting State of his decision concerning the request for the transfer of enforcement in accordance with the procedure laid down for that purpose, and shall inform it of such enforcement.

(3) Once the enforcement of a sentence or preventive measure has been transferred, criminal proceedings may no longer be instigated for the offence on which the judgment was based.

(4) Enforcement, conditional release and pardon shall be governed by the provisions of Austrian law.

(5) Enforcement shall in any case end if the enforceability of the punishment or preventive measure lapses under the law of the requesting State.
