

**Statement of civil society organizations  
regarding the Federal Government's draft bill  
for a reform of the criminal code in respect of confiscation of criminal assets  
(of 5 September 2016, Bundestagsdrucksache 18 / 9525)**

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### **Introduction**

The signing civil society organizations work both on a voluntary and full-time basis in a variety of fields, comprising culture, social work, the advancement of democratization and the prevention of right-wing extremism, as well as raising awareness for issues related to mafia-type criminal organizations and / or victims' rights, in particular the rights of trafficked persons. Using their joint expertise for this statement, they aim to provide advice to the parliamentary deliberations on a complex societal issue.

The signing organizations welcome the Federal Government's efforts to fundamentally reorganize the system of confiscation of criminal assets in Germany, thereby implementing Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union in the European Union (hereinafter 'Directive 2014/42 / EU'). From their point of view, the Federal Government's bill for a law on the reform of the criminal code in respect of confiscation of criminal assets of 5 September 2016 (Bundestagsdrucksache 18 / 9525) contains a number of positive changes.

Examples include the provision for simplified arrangements for victim compensation, which should generally strengthen the protection of victims' rights. Also the possibility of separating decisions in the criminal case as such from decisions on possible property confiscation is a welcome change. However, the provision to limit the duration to only six months during which such a second decision has to be reached (see Article 2, § 423 confiscation after separation) does not seem to be well-founded. Considering the internationality of many organised-crime cases with corresponding lengthy international investigations, a period of 12 months to reach a decision would seem to be more practical. The proposed easing of the burden of proof appears to be balanced and according to international standards (see Article 2, amendment of the Code of criminal procedure, § 437 Special rules for autonomous confiscation).

This statement cannot and does not provide a comprehensive assessment of the entire draft bill. Instead, our aim is to focus on a specific issue and to make concrete recommendations for the further legislative process.

One of the objectives of the bill is the implementation of EU Directive 2014/42 / EU. However, when preparing the implementation, article 10 (3) of Directive 2014/42 / EU seems to not have had any influence on the Federal Government's draft bill. The article states that "Member States shall consider taking measures allowing confiscated property to be used for public interest or social purposes." Similar measures for the reuse of confiscated assets are already foreseen in Germany for assets confiscated according to the statute concerning associations (Vereinsgesetz), § 13 (4): "The assets remaining after satisfying possible creditors' demands are to be used for charitable purposes by the beneficiary of the confiscation." In light of this provision it is all the more questionable why this existing demand of the legislator is obviously not to be applied in the present draft bill.

Through this statement the signing organizations aim to insert such measures into the draft bill on the reform of the system of confiscation of criminal assets, in particular with regard to confiscated buildings and real estate.

### **The particular role of buildings and real estate**

For mafia-type organisations, other groups in the area of organised crime (eg environmental crime: landfill sites, economic crime, human trafficking), and also for Nazi-type criminal organisations, buildings and real estate are of particular interest in many respects. As is clear from a specialist study commissioned by the German Federal Criminal Agency (BKA)<sup>1</sup> the real estate sector in Germany is particularly vulnerable to money laundering activities, it can be said that the real estate sector has an important hinge function for the infiltration of the legal economy by criminal organizations. In addition, buildings often have an important logistical function for the activities of criminal organizations (whether they are used to accommodate people, to provide space to carry out criminal activities, or to store goods; in the area of right-wing extremism they are used additionally for training courses and events such as concerts). This is also proven by the fact that in the past years, property has been confiscated at various occasions when state or federal authorities have dissolved associations according to the provisions of the statute regarding associations (Vereinsgesetz).<sup>2</sup>

In addition to events in real estate, there are many interferences between criminal organizations, such as the so-called 'rocker clubs', and neo-Nazi criminal organizations. Many concerts of the right-wing scene are performed, e.g. Jointly with so-called 'rocker clubs'. According to the joint statement drawn up by the BKA and the Federal Office for the Protection of the Constitution, links between the right-wing extremist scene and rock groupings included a considerable number of a total of 522 neo-Nazis known as outlaw motorcycle gangs.

It must also be said that it is around buildings and real estate that many of the strong ties can be observed that exist between criminal organizations, such as the so-called 'outlaw motorcycle clubs', and neo-Nazi groups. Many concerts of the extreme rightwing-scene are staged jointly with so-called 'rocker clubs'. According to the joint paper of the BKA and the Federal Office for Constitutional Protection (German inland secret service) on the links between the right-wing extremist scene and rocker groups, the considerable number of a total of 522 known neo-Nazis are members of so-called 'Outlaw Motorcycle Gangs'.<sup>3</sup>

The presence of criminal organizations and their aim to exercise territorial control through intimidation or violence is often experienced in a social space around individual properties. It is often at the example of specific buildings that the general public, or specific groups defined as minorities, experience in their

<sup>1</sup> <http://bit.ly/2dogFb2> – read on 10 October 2016

<sup>2</sup> cf for instance.: [www.bundesanzeiger.de](http://www.bundesanzeiger.de) dissolution of „Schwarze Schar MC Wismar“ by the state of Mecklenburg-Vorpommern (published on 8 January 2014) or dissolution of „Freie Netz Süd“ by the free state of Bavaria (published on 23 July 2014).

<sup>3</sup> Quoted according to Förster, Andreas: „Lagebild zu Rockerclubs in Deutschland: Rocker und Rechtsextreme – gemeinsam aber nicht eins“, Berliner Zeitung of 1 March 2015.

respective social space what the BKA has recently termed a "climate of fear"<sup>4</sup>. Equally, the Federal Government spoke of "disturbing developments" in its report on the situation of German unity 2016 "which have the potential to disturb the peace and public order in East Germany."<sup>5</sup>

Based on these considerations the signing organizations recommend to provide for the separate treatment of confiscated buildings and real estate in the bill on the reform of confiscation of criminal assets. The aim should be to create a possibility allowing confiscated property to be used for public interest or social purposes, and assigning such properties in transparent public procedures (similar to what is stipulated in the German statute concerning associations and analogous to comparable systems in other EU Member States<sup>6</sup>).

### **Considerations on the necessity and appropriateness of a special treatment of buildings and real estate**

The European Court of Human Rights and a number of national Supreme Courts have repeatedly ruled that that confiscation of property in cases of serious offenses such as terrorism or serious organised crime are compatible with the fundamental human right to the protection of private property.<sup>7</sup> To the signing organizations a special treatment of confiscated buildings and real estate appears necessary and appropriate as there is a demonstrable strong social interest in the effective confiscation in such cases. It must be underlined, however, that the signing organizations are not providing recommendations on state intervention rights as such, let alone aiming to strengthen them *per se*. The sanctity of legitimately acquired private living space must in any case be preserved. The signing organizations are concerned with drawing attention to the specific issue of the social reuse of formerly criminal property on the basis of states' rights to define the contents and limits of the guarantees to the right of private property.

In implementing the proposed special treatment of buildings and real estate, the signing organizations therefore recommend an approach based on civil law principles, such as those which are laid out in the statutes on associations (Vereinsgesetz). A publicly and transparently implemented procedure for the allocation of confiscated property to not-for-profit civil society organizations will strengthen the rule of law through the foreseeability of future practice. Moreover, the publicly stated aim of sending the clear message 'crime should not pay' will be easier to achieve. It will be possible to increase the norm consciousness of the general public if previously criminally used buildings and real estate are transferred to not-for-profit civil society organizations.

### **Commentary on some passages in the draft bill**

#### **§ 75 StGB-E Effect of Confiscation**

By introducing the possibility of civil society re-use of confiscated buildings and real estate the norm consciousness of the general public and its confidence in the criminal justice system can be effectively strengthened, helping to achieve general preventive aims. Furthermore, in accordance with the draft bill's central aim of strengthening victims' rights for compensation the local social space could thereby be 'compensated' for previous criminality-related impairments.

<sup>4</sup> Quoted according to <http://www.tagesschau.de/inland/bka-asylunterkuenfte-101.html>, read on 10 October 2016

<sup>5</sup> Die Beauftragte der Bundesregierung für die neuen Bundesländer: „Jahresbericht der Bundesregierung zum Stand der Deutschen Einheit 2016“, page 10.

<sup>6</sup> cf. [http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462437/IPOL-LIBE\\_NT\(2012\)462437\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462437/IPOL-LIBE_NT(2012)462437_EN.pdf)

<sup>7</sup> cf for instance : ECtHR, 12 August 2015, Gogitidze and others v. Georgia, no. 36862/05; ECtHR, 15 January 2015, Veits v. Estonia, no. 12951/11; ECtHR, 27 June 2002, Butler v. The United Kingdom, no. 41661/98; ECtHR, 4 September 2001, Riela and others v. Italy, no. 52439/99; ECtHR, 22 February 1994, Raimondo v. Italy, no. 12954/87.

Recommendation:

A new paragraph (4) could be inserted here to create a special treatment of buildings and real estate for the above reasons:

"(4) In the case of the confiscation of buildings and real estate, the beneficiary shall decide on its future use based on the results of a public participatory planning procedure. Priority is to be given to non-for-profit organizations. Details shall be governed by state laws."

### **§ 76 a StGB-E Autonomous confiscation**

The introduction of the possibility of autonomous confiscation is welcomed. The possibilities of obscuring factual rights to property are particularly significant in the case of mafia-type and Nazi-type criminal organizations with their diverse business fields. This is founded both in the nature of the organizations mentioned above (eg using impeccable front men to stand in for persons hierarchically higher than them), as well as in the internationalization and new means of criminal activity provided by the internet. Since the possibilities of the use of autonomous confiscation are to be restricted by a catalog of serious crimes related to terrorism and organized crime, the signing organizations regard the introduction of the possibility of autonomous confiscation as both acceptable and useful.

Recommendation:

In the case of the introduction of a specific treatment of buildings and real estate, § 76 a (4) should be amended accordingly:

"(...) If the confiscation of an object is ordered, ownership of the object or ownership rights shall pass to the State once the decision enters into force; Section 75 (3) **and (4)** shall apply accordingly."

### **§ 76 a (4) (1) (c) StGB-E**

The planned § 76 (4) StGB-E lists a catalogue of serious offenses in the field of terrorism and organized crime. This is to be welcomed. Forms of organized crime can often be a qualifying aspect for the area of human trafficking (§§232 ff StGB). Moreover, in situations of human trafficking, links to buildings and real estate can often be discerned which serves to underline that from our point of view the introduction of a special treatment of confiscated buildings and real estate is recommendable. However, in our opinion, already the basis forms of human trafficking as defined in § 232 StGB and § 233 StGB constitute serious criminal offenses.

Recommendation:

The signing organizations therefore recommend that the catalogue of criminal offenses within the meaning of sentence 1 of § 76 a StGB-E should include § 232 StGB and § 233 StGB in full, § 76 a (4) (1) (c) .

## **Summary**

The signing organizations recommend:

- > Extension of the deadline to bring a decision in separate confiscation procedures to 12 months (see Article 2 of the draft bill, amendment of the Code of Criminal Procedure StPO, § 423 Confiscation after separation).
- > Insertion of a new paragraph (4) in § 75 concerning the special treatment of confiscated buildings and real estate and its social and not-for-profit reuse, analogous to the provisions of the statutes on associations (Vereinsgesetz).
- > A minor extension to the list of catalogue crimes in connection with which autonomous confiscation can be applied in order to include the full range of criminal offenses related to human trafficking.

## **The first signing organizations:**

Echolot – Projekte für demokratische Kultur, gegen Mafien e.V.  
(Echolot - projects for democratic culture, against mafias)  
Contact: [b.plassmann@echolot-verein.de](mailto:b.plassmann@echolot-verein.de)

Amadeu Antonio Foundation  
Contact: [tobias.scholz@amadeu-antonio-stiftung.de](mailto:tobias.scholz@amadeu-antonio-stiftung.de)

Bundesverband Mobile Beratung e.V.  
(Federation of mobile support centres for victims of right-wing extremism)  
[www.bundesverband-mobile-beratung.de](http://www.bundesverband-mobile-beratung.de)

KOK - Bundesweiter Koordinierungskreis gegen Menschenhandel e.V.  
(KOK – federal coordination circle against human trafficking)  
[www.kok-gegen-menschenhandel.de](http://www.kok-gegen-menschenhandel.de)

Bundesverband Freie Darstellende Künste e.V.  
(Federal association of free performing arts)  
[www.freie-theater.de](http://www.freie-theater.de)

Mafia? Nein Danke! e.V.  
[www.mafianeindanke.de](http://www.mafianeindanke.de)

.lkj) Landesvereinigung kulturelle Kinder- und Jugendbildung Sachsen-Anhalt e.V.  
(Regional association for cultural youth work Saxony-Anhalt)  
[www.lkj-sachsen-anhalt.de](http://www.lkj-sachsen-anhalt.de)

Lola für Demokratie in Mecklenburg-Vorpommern e.V.  
[www.lola-fuer-lulu.de](http://www.lola-fuer-lulu.de)