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From: General Secretariat of the Council
To: Working Party on Cooperation in Criminal Matters (COPEN) - Mutual recognition of freezing and confiscation orders
Subject: Summary of discussions of the COPEN meeting on 13 January 2017 (presentation and general comments)

1. Adoption of the agenda

The agenda was adopted as set out in doc. CM 5311/16.

2. Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders

– Presentation by the Commission

Context

The Commission observed that confiscation of assets generated by criminal activities is a very efficient tool in the fight against crime, as it deprives criminals from the proceeds of their crime. At the same time such confiscation allows for compensating victims and provides additional funds to invest back into law enforcement activities or other crime prevention initiatives. Freezing and confiscation of assets is also an important tool to combat terrorist financing as confiscation of assets disrupts the sources of revenue of terrorist organizations.

The European Agenda on Security of 28 April 2015 ¹ highlighted the need for measures to address terrorist financing in a more effective and comprehensive manner, and it attached strategic importance to the need for improving the mutual recognition of freezing and confiscation orders.

In accordance with the Commission's commitment in the 2016 Action Plan for strengthening the fight against terrorist financing, and in response to calls also from the European Parliament and the Council when Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union ² was adopted, DG JUST prepared the proposal for a Regulation to strengthen the mutual recognition of freezing and confiscation orders.

The main problems of the current legal framework

(1) Insufficient recovery of criminal assets in cross-border cases

According to the Commission, the first general problem is that currently too few criminal assets are frozen and confiscated in the European Union in cross border cases.

The existing EU legislation on mutual recognition of freezing and confiscation orders ³ is not up to date with recent developments in some Member States' legislation and with recent EU legislation establishing minimum rules, notably Directive 2014/42/EU. The current scope of the legislative framework is limited as it does not cover many forms of confiscation that now exist in Member States, including non-conviction based confiscation and extended confiscation.

The Commission also stated that the certificates provided for in the current Framework Decisions are complicated and that the procedures are lengthy. No strictly defined time-limits are foreseen. The nature of the current instruments - Framework Decisions, comparable to Directives - also leave large discretion to Member States as regards their implementation, as a result of which there is no uniform legal Framework.

¹ COM (2015)185 final.

² OJ L 127, 29.4.2014, p. 39.

³ Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, p. 45) and Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59).

(2) Insufficient protection of victims

The second general problem is related to the compensation and restitution of victims. According to the Commission, a possibility to receive a decision on compensation or restitution within the framework of criminal proceedings exists in several Member States, but there is no specific provision at this moment which takes into account such a decision in cross border confiscation cases. The current legal framework is therefore insufficient.

The main elements of the proposal

The Commission explained that the proposed Regulation will enhance the mutual recognition of all types of freezing and confiscation orders issued in the framework of criminal proceedings, including extended confiscation, third-party confiscation and non-conviction based confiscation orders.

The Commission highlighted that the proposed Regulation is a mutual recognition instrument. The new legal instrument does not intend to harmonize rules in the area of confiscation. Such harmonization is foreseen by Directive [2014/42/EU](#).

According to the Commission, this proposal for a Regulation improves the current mutual recognition legal framework in several ways:

- Directly applicable legal instrument:

The proposed Regulation, once adopted, will be directly applicable in the Member States. This will bring clarity and eliminate problems with transposition into national systems.

- Extended scope compared to the current mutual recognition instruments:

In addition to the types of confiscation already covered by the existing Framework Decisions (ordinary confiscation and extended confiscation, the latter with wide discretion to refuse recognition), the proposed Regulation will cover third-party confiscation and criminal non-conviction based confiscation and it will no longer provide for wide discretion to refuse recognition in case of extended confiscation.

- Extended scope compared to Directive 2014/42/EU:

The proposed Regulation will cover mutual recognition of all types of freezing and confiscation orders covered by the Directive. In addition, it will also cover orders for non-conviction based confiscation issued within the framework of criminal proceedings: the cases of death of a person, immunity, prescription, cases where the perpetrator of an offence cannot be identified, or cases where a criminal court can confiscate an asset without conviction when the court has decided that such asset is the proceeds of crime. This requires the court to establish that an advantage was derived from a criminal offence. In order to be included in the scope of the Regulation, these types of confiscation orders must be issued within the framework of criminal proceedings, and therefore all safeguards applicable to such proceedings will have to be fulfilled in the issuing State.

- Clear deadlines for freezing and confiscation orders:

While freezing as a precautionary measure needs to take place urgently and requires short deadlines for recognition and execution, the recognition and execution of confiscation orders can take place within a longer time period. Nevertheless, deadlines for complying with confiscation orders for executing Member States, should be established to ensure efficient cross-border procedures. One single instrument for mutual recognition of both freezing and confiscation orders containing directly applicable rules and deadlines will ensure that the orders are recognised and executed without delay within the Union.

- A standard certificate and a standard form:

A standard certificate for mutual recognition of confiscation orders and a standard form for freezing orders will allow for a speedy and efficient action. They contain all the relevant information on the order, which will help the executing authority to reach precisely the property targeted and will facilitate the recognition and enforcement of the foreign measure by the competent national authorities. The standard form for freezing orders will simplify the mutual recognition procedure of freezing orders to the maximum extent as it will not be accompanied by another domestic freezing order. The procedure for recognition and execution of freezing and confiscation orders are regulated separately in the proposal to simplify direct application by competent national authorities.

- Communication between the competent authorities:

Communication between the competent authorities to allow smooth and swift recognition and execution of freezing and confiscation orders has been emphasised throughout the proposal.

- Victims' rights:

The victim's right to compensation and restitution has been duly taken into account in the Proposal. In cases where the victim has been granted a decision on compensation or restitution and the assets have been confiscated in another State following the mutual recognition procedure, the victim's right to compensation or restitution will have priority over the executing States' interest to receive 50% of the amount obtained by the execution of confiscated assets.

- **General exchange of views**

Member States generally welcomed the proposal of the Commission and indicated that this was a good basis for discussions.

Translations

Several Member States expressed misgivings about the fact that the proposal was currently available in the English language only. They underlined that this was neither in line with Regulation 1 of 1958, nor with the principles of good (and better) law making. The question was raised whether the Commission could not have waited with the presentation of its proposal until the text would have been available in all languages. Member States insisted that all languages are equal, and that they needed the translations in order to be able to properly scrutinise the proposal.

The Commission apologized for the fact that the translations were not all available yet. It explained that translations of several instruments had to be made at the end of last year, which caused the delay. All translations, however, should be available by the end of January 2017.

Type of instrument

Many Member States made a comment about the fact that the proposed instrument is a Regulation, and not a Directive. It was observed that similar instruments in the past had been presented in the form of Directives (or Framework Decisions under the Amsterdam Treaty). Member States indicated that they were surprised about the choice of a Regulation, since this had not been mentioned by the Commission during the preparatory expert meeting.

While some Member States said that they would have preferred a Directive, other Member States said that they supported the choice of a Regulation. Most Member States, however, said that they were still scrutinising whether the choice of a Regulation was appropriate, but that they didn't exclude that they would ultimately be able to accept a Regulation.

In any case, there was a common understanding that if a Regulation would be opted for, the text should be very clear and precise, and that the drafting should take into account the fact that this instrument would be directly applicable in the Member States.

The Commission recalled that the possibility of adopting Regulations for mutual recognition in criminal matters is nowadays possible under Article 82(1) of the Treaty on the Functioning of the European Union (TFEU). This would in no way be a precedent for measures aimed at approximation/harmonisation of substantive criminal law, for which the Treaty does not allow the adoption of Regulations, see Article 82(2) TFEU.

The Commission underlined once again the advantages of a Regulation for a mutual recognition instrument: since Regulations are directly applicable in the Member States and the exact same instrument applies in all Member States - without alterations, because no transposition is needed - the system of mutual recognition of freezing and confiscations order would become much more effective. The Commission also said that it was ready to work with Member States in order to ensure that the drafting was clear and precise.

Structure of the proposal

Various Member States wondered why, in the Commission proposal, the provisions on confiscation preceded the provisions on freezing, while in practice freezing normally precedes confiscation. It was also observed that some textual parts appeared twice in the text (once in relation to freezing, and once in relation to confiscation). The question was raised whether the text could be streamlined on those points.

The Commission said that it was open to discuss changes to the structure of the text.

Scope

Several Member States stated that they were satisfied with the scope of the instrument as it was proposed by the Commission. It was observed, in particular, that non-conviction based confiscation (NCBC) was a very powerful tool, and that it would be appropriate that the Regulation facilitates the use thereof, as proposed by the Commission.

Deadlines

Various Member States asked to have a particular look at the deadlines that are foreseen for the execution of freezing and confiscation orders. It was observed that these deadlines should be realistic; the deadlines as currently proposed would be too tight.

The Commission underlined that strict deadlines are set in order to make the system effective. The Commission indicated, however, that it was open to discuss this point.

Parliamentary scrutiny reserve / General scrutiny reserve

Various Member States entered a parliamentary scrutiny reserve or a general scrutiny reserve on the text. In a later stage, the Member States which (still) have such a reserve will be noted.

– **First examination article-by-article**

Articles 1-3 were discussed. The comments by Member States and the Commission regarding these articles will be inserted in a document that will be established after the next meeting, when the entire proposal will have been discussed.

3. AOB

No issues were raised under this agenda item.
