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MUTUAL RECOGNITION OF CONFISCATION ORDERS AND NATIONAL DIFFERENCES

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Introduction

By applying the principle of mutual recognition to confiscation orders, Framework Decision 2006/783/JHA¹ aims at facilitating as well as enhancing cross-border confiscation. Evaluation yet shows that – especially in comparison to other mutual recognition tools, such as the European Arrest Warrant² – only very few confiscation requests are based on this act.³ EU reports indicate that this lack of application is partly due to the considerable differences between the Member States' confiscation systems: as a matter of fact, they have not only been responsible for the rather limited scope of the Framework Decision but also for the Member States' apparently great reluctance to apply this instrument.⁴

This essay will try to shed light on the question why mutual recognition regarding confiscation faces so many difficulties or – to be more precise – why the Member States' different confiscation laws constitute a barrier to transnational confiscation that cannot be easily removed by EU law. In a first step, the main differences between the Member States' confiscation regimes will be briefly depicted (I.). Second, the shortcomings of the Framework Decision will be explained (II.). And finally, it will be demonstrated why Regulation (EU) 2018/1805⁵ – that will replace the Framework Decision as from December 2020 (Art. 39 (1) of the Regulation) – is not likely to bring a significant improvement (III.).

¹ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59).

² Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

³ Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders SWD(2016)468, p. 16, 27 ff. As a matter of fact, there are hardly any statistics available. See also *Eurojust*, Report on Eurojust's Casework in Asset Recovery, 2019.

⁴ Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders SWD(2016)468.

⁵ Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders (OJ L 303, 28.11.2018, p. 1). The Regulation will also replace Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, p. 45).

I. The Main Differences between the Member States' Confiscation Systems

Confiscation systems are “notorious” for differing substantially, both in substantive and procedural elements. Most crucial of all: In some Member States, for instance France⁶ and Belgium⁷, the confiscation of criminal proceeds is defined as a criminal punishment whereas in others, such as Germany⁸, it is considered as a precautionary or preventive measure.⁹

Furthermore, whereas in some Member States confiscation is generally only possible if the owner of the proceeds has been convicted of a criminal offense (so-called criminal or ordinary confiscation), a growing number of Member States also allow for non-conviction based confiscation¹⁰.

Even between those Member States that provide for such an option, the relevant schemes vary significantly: In some legal systems, non-conviction based confiscation takes place within the context of criminal proceedings and is limited to circumstances in which the offender has died or has absconded. In others, it might also cover cases in which a conviction cannot be obtained due to evidential issues. Several Member States, such as the United Kingdom¹¹, Ireland¹² or Italy¹³, even pursue non-conviction based confiscation as separate proceedings that can occur independently to any related criminal proceedings (often called civil confiscation)¹⁴.

The different confiscation mechanisms also entail different standards of proof: In criminal confiscation proceedings, the illicit origin of the proceeds generally has to be established “beyond reasonable doubt”, which means, the court has to be intimately convinced that the proceeds have been derived from the associated crime. In non-conviction based confiscation procedures, competent authority may often decide “on the balance of probabilities” whether the proceeds stem from criminal activities.

Great variety also exists with regard to so-called extended confiscation (regimes enabling the confiscation of assets that go beyond the direct proceeds of a crime). Some jurisdictions require the court to be at least satisfied that the assets in question result

⁶ So-called *peine complémentaire*, see E. CAMOUS, “Art. 131-21 et 131-21-1”, in: JurisClasseur Pénal Code, para. 14 ff.

⁷ So-called *peine accessoire*, see F. LUGENTZ, D. VANDERMEERSCH, *Saisie et confiscation en matière pénale*, Bruxelles: Bruylant, 2015, para. 5 ff.

⁸ So-called (criminal) measure *sui generis* (*Maßnahme eigener Art*, Section 11 Nr. 8 of the German Criminal Code) that bears resemblance to the civil law concept of unjustified enrichment (*ungerechtfertigte Bereicherung*). For more information see A. ESER - F. SCHUSTER, “Vorbemerkungen § 73”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 12 ff.

⁹ See for an overview of the Member States’ confiscation laws Comparative Law Study of the Implementation of Mutual Recognition of Orders to Freeze and Confiscate Criminal Assets in the European Union, p. 30 ff.

¹⁰ See for an overview of the non-confiscation schemes that exist in the EU Comparative Law Study of the Implementation of Mutual Recognition of Orders to Freeze and Confiscate Criminal Assets in the European Union, p. 240 ff. See also *European Commission*, Analysis of non-conviction based confiscation measures in the European Union SWD(2019) 1050 final.

¹¹ So-called Civil recovery, see Chapter V of the Proceeds of Crime Act (POCA) from 2002.

¹² Proceeds of Crime Acts 1996 - 2016.

¹³ So-called *misura di prevenzione*. For more information see M. PANZAVOLTA, R. FLOR, “A Necessary Evil? The Italian ‘Non-Criminal System’ of Asset Forfeiture”, in: J. P. RUI, U. SIEBER, *Non-conviction-based confiscation in Europe – Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction*, Freiburg i. Br.: Nomos, 2015, p. 111 ff.

¹⁴ Similar schemes exist in Bulgaria, Slovenia and Slovakia, see *Eurojust*, Report on non-conviction-based confiscation (General Case 751/NMSK - 2012), 2013.

from similar or even any other criminal conduct whereas in others, the burden of proof is even reversed, for example by means of statutory presumptions.

II. The Drawbacks of the Framework Decision 2006/783/JHA

The concept of mutual recognition is supposed to make international cooperation both simpler and more efficient: in particular, contrary to traditional mutual legal assistance instruments¹⁵, giving wide discretion in that respect, Member States are in general obliged to grant requests by another Member State. In principal, this is also the case with Framework Decision 2006/783/JHA: According to Art. 7 (1), Member States “shall without further formality recognise a confiscation order ... and shall forthwith take all the necessary measures for its execution, unless the competent authorities decide to invoke one of the grounds for non-recognition or non-execution provided for in Article 8”. However, Framework Decision 2006/783/JHA faces several technical as well operational issues that might seriously undermine its effectiveness: First, it suffers from a rather limited scope that does not include any civil confiscation scheme. Second, the grounds for refusal laid down in Article 8 of the Framework Decision allow Member States to only recognise confiscation orders that comply with their own internal law. Finally, the transposition has been very slow and – to make things even worse – often inconsistent.

1. Limited Scope

According to Article 2 lit. c of the Framework Decision, the term “confiscation order” denotes “a final penalty or measure imposed by a court following proceedings in relation to a criminal offence, resulting in the definitive deprivation of property”. Art. 2 lit. d complements this definition by stating that the term “property” also refers to assets that are liable to extended confiscation forms¹⁶. Non-conviction based confiscation, however, is not mentioned at all by the Framework Decision. Admittedly, merely speaking of “proceedings *in relation to* a criminal offense”, the definition laid down in Art. 2 lit. c does not stipulate that a conviction must have been recorded. Furthermore, its wording is almost identical to the definitions used by the European Council Conventions on confiscation¹⁷ which, according to the Explanatory Reports, apply to

¹⁵ See, for example, – in the context of confiscation – Article 5 (4) (c) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: “The decisions and actions shall be taken by the requested Party, in accordance with and subject to provisions of its domestic law”.

¹⁶ The Framework Decision distinguishes between two types of extended confiscation orders, ie orders resulting ‘from the application in the issuing State of any of the extended powers of confiscation specified in Article 3(1) and (2) of Framework Decision 2005/212/JHA’ – Art 2 (d) (iii) and orders that have been issued ‘under any other provisions relating to extended powers of confiscation’ – Art 2 (d) (iv). See below for more details.

¹⁷ Art. 1 lit. d of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990 and of the Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005 define

“criminal activities or acts connected therewith, such as acts related to civil *in rem* actions”¹⁸.

Nevertheless, the fact that the Framework Decision only refers to the concept of extended confiscation strongly indicates that the scope does not include any other special confiscation scheme. Moreover, according to Article 1 (1), the confiscation order has to be imposed by a court “competent in criminal matters” which, in any case, leaves out civil confiscation.

2. Extensive Grounds for Refusal

Apart from a limited scope, the Framework Decision leaves extensive grounds for refusal: In general, the enforcement of a confiscation order can only be refused on the grounds – exhaustively – listed in Article 8 of the Framework Decision (Art. 7 (1): “shall... recognise ..., unless the competent authorities decide to invoke one of the grounds ... provided for in Article 8”). Most of the grounds for refusal enumerated in Article 8 are common in the field of mutual legal assistance in criminal matters, such as the *ne bis in idem* principle (Art. 8 (2) (a)) or the double criminality requirement (Art. 8 (2) (b)). Yet, there is also Article 8 (2) (g) stipulating that an extended confiscation order does not have to be executed if it is not based on one of the three options foreseen by Article 3 (2) of Framework Decision 2005/212/JHA¹⁹ (so-called “confiscation under any other provisions relating to extended powers of confiscation” (Article 2 (d) (iv)) as opposed to “confiscation resulting from the application in the issuing State of any of the extended powers of confiscation specified in Article 3 (1) and (2) of Framework Decision 2005/212/JHA” (Article 2 (d) (iii)).

Article 3 of Framework Decision 2005/212/JHA (described by the European Commission as the “real added value of the Framework Decision”²⁰) required Member States to allow for extended confiscation. However, because no consensus had been reached in the Council²¹, it did not establish a single minimum standard but provided for a set of three options that ranged from a fairly high down to a rather low standard of proof: Member States could choose (“or alternatively”) between schemes that covered at least either property obtained during a period prior to the conviction (Art. 3 (2) (a) of

“confiscation” as “penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property”.

¹⁸ Explanatory Report to the Convention on Laundering, Search Seizure and Confiscation of the Proceeds from Crime, p. 7.

¹⁹ Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property. Article 3 has now been replaced by Article 5 of the 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 (OJ L 127, 29.04.2014, p. 39), see Art. 14 (1) of the Directive.

²⁰ Report from the Commission pursuant to Article 6 of the Council Framework Decision of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property (COM(2007) 805 final), p. 4.

²¹ M. KILCHLING, „§ 16 Geldwäsche“ in U. SIEBER, H. SATZGER, B. HEINTSCHEL-HEINEGG, Europäisches Strafrecht, München: C.H. Beck, 2014, para. 19.

Framework Decision 2005/212/JHA), property derived from similar criminal activities (Art. 3 (2) (b) of Framework Decision 2005/212/JHA) or property disproportionate to the lawful income of the convicted person (Art. 3 (2) (c) of Framework Decision 2005/212/JHA)²².

Article 7 (5) of the Framework Decision even permits Member States to automatically refuse the execution of these types of confiscation orders (“[e]ach Member State may state in a declaration ... that its competent authorities will not recognise and execute confiscation orders under circumstances where confiscation of the property was ordered under the extended powers of confiscation referred to in Article 2 (d) (iv)”). As a matter of fact, almost all Member States have submitted such a notification²³.

In addition, even if the confiscation order complies with one of the three options of Framework Decision 2005/212/JHA, the executing Member State has to enforce it only “to the extent provided for in similar domestic cases under national law”, Article 8 (3) of the Framework Decision. In other words, if the option applied by the issuing Member State differs from the one implemented by the executing Member State, the latter is free to deny the execution of the request.

3. Slow and Inconsistent Transposition

The effectiveness of the Framework Decision is further hampered by its slow transposition into national law: Almost all Member States exceeded the transposition deadline – often by years²⁴. Even now (as for March 2019), the implementation is still pending in Ireland and Luxembourg.

Furthermore, the implementation report issued by the European Commission in 2012 revealed that several Member States had included additional grounds for refusal in their national legislations.²⁵ For example, Austria would not recognise confiscation orders that violated the the fundamental rights and legal principles enshrined in Article 6 of the TEU, i.e. the European *ordre public* while the Czech Republic and Latvia would not enforce confiscation orders that contravened fundamental principles of their constitutions, i.e. the national *ordre public*²⁶.

²² Article 3 (2) of Framework Decision 2005/212/JHA read as follows: “Each Member State shall take the necessary measures to enable confiscation under this Article at least:

- (a) 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 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,
- (b) where a national court based on specific facts is fully convinced that the property in question has been derived from similar criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,
- (c) where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person.”

²³ Council document 13344/16.

²⁴ See Status of Implementation, available under https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=34 (last accessed on 31rd March 2019).

²⁵ Report from the Commission to the European Parliament and the Council based on Article 22 of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (COM(2010) 428 final).

²⁶ Implementation report (Fn. 25), p. 10.

III. Regulation (EU) 2018/1805 as Remedy?

To overcome these deficiencies, the EU has adopted a new mutual recognition instrument – Regulation (EU) 2018/1805 – that is supposed to amend the framework as follows:

1. The New Approach

First, according to Article 1 (1), the Regulation will apply to all kinds of confiscation orders as long as they are issued “within the framework of proceedings in criminal matters” (as opposed to “framework of proceedings in civil or administrative matters”, Article (1) (4)). In particular, the scope will not be restricted to the types provided for by Directive 2014/42/EU on the confiscation of proceeds²⁷, but will also cover “criminal” non-conviction based confiscation orders (referred to as “confiscation without a final conviction”, see recital 13 and Article 2 (3) of the Regulation).

Second, Member States shall no longer be able to deny the execution of a confiscation order simply due to its type²⁸. The original proposal had also omitted an *ordre public* ground for refusal. However, protests by Germany²⁹ and the European Parliament³⁰ resulted in the introduction of Article 19 (1) (h): now, Member States “may decide not to recognise and to execute a confiscation order ... where in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the confiscation order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence”³¹.

Last but not least, to avoid the transposition problems that the Framework Decision has faced, the EU legislator has opted for the instrument of the regulation (Article 288 TFEU). Hence, the rules will be directly applicable³².

2. Critical Appraisal

Nevertheless, it has to be doubted whether the Regulation will be an improvement. First, it is not at all obvious what types of confiscation orders exactly are covered by its scope. What kind of criteria have to be fulfilled to qualify a confiscation order as “issued within the framework of proceedings in criminal matters”, meant to be an “autonomous concept” (recital 13)? What elements distinguish “criminal matters”

²⁷ Those are: extended confiscation (Article 5 of the Directive), a very basic version of non-conviction based confiscation (Article 4 (2) of the Directive) and third party confiscation (Article 6 of the Directive).

²⁸ Cf. Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders (COM(2016) 819 final), p. 13.

²⁹ Germany had even threatened to reject the proposal, see Council document 15104 ADD 1/17, p. 2: “Although Germany, like the other Member States, sees the need to improve cross-border cooperation in the area of asset recovery, in light of the above Germany is not in a position to agree to the general approach contained in the current text of the Regulation”.

³⁰ Council document 5482/18.

³¹ Article 19 (1) (h) of the Regulation has been drafted in the style of the recent CJEU case law in *Arranyosi & Căldăraru*, eucrim 2018, 202.

³² Proposal for a Regulation (Fn. 33), p. 7.

from “civil matters”? Does the characterisation depend on the nature of the proceedings, the issuing authority or on the purpose of the relevant scheme? As a matter of fact, this issue already came up in the Council when deciding on its general approach. The proposal by the EU Commission was meant to apply to orders “issued within the framework of criminal proceedings”. After Italy had pointed out that such a wording would probably rule out its *misura di prevenzione* being not of criminal but of a “hybrid nature”, the Council (as well as the European Parliament) finally agreed upon the current term “within the framework of proceedings in criminal matters” to ensure a broader understanding and to align with the terminology of Articles 82 ff. TFEU³³.

Furthermore, as mentioned above, the Regulation will not only apply to the confiscation types prescribed by Directive 2014/42/EU, but to every sort of confiscation order – provided it has been issued “within the framework of proceedings in criminal matters”. Consequently, Member States might be obliged to recognise and to execute confiscation orders that are not consistent with their internal laws, probably even contravene constitutional principles. A study carried out in preparation of the Directive 2014/42/EU reported that especially non-conviction based confiscation is subject to concerns about complying with fundamental rights and/or principles.³⁴ There are reasons to believe that obstacles to the enforcement of such an order may be found in most Member States’ legislations.

Article 19 (1) (h) of the Regulation has slightly eased the situation. However, apart from the fact that this clause is misconfigured (why is the refusal of a confiscation order that violates fundamental rights only optional?), it so far has only the very “patchy” case law of the ECtHR to rely on.³⁵

IV. Conclusion

In general, the concept of mutual recognition offers many advantages. However, mutual recognition also depends to a great deal on mutual trust and thereby on shared concepts. With regard to confiscation however, the Member States’ national regimes still differ widely and – most important of all – profoundly. The harmonisation measures adopted by the European Union, such as the Directive 2014/42/EU, might have led or will lead to a certain degree of approximation. Nevertheless, it has to be kept in mind that they only lay down minimum standards, allowing Member States, even encouraging them, to go beyond the obligations.³⁶ In particular, they cannot change the legal nature of a Member State’s confiscation regime.

Although a new instrument on the mutual recognition of confiscation orders is to be welcomed, the Regulation does not offer an adequate response to the problems mentioned above, but raises a number of legal issues instead. Taking into account the current state of play, it is a far too ambitious project. Instead of adopting a harmonisation measure “in disguise”, Member States should be given time to “warm

³³ Council document 12685/17.

³⁴ Comparative Law Study of the Implementation of Mutual Recognition of Orders to Freeze and Confiscate Criminal Assets in the European Union, p. 266 f.

³⁵ For example, the ECtHR has not decided yet on a confiscation system that considers confiscation to be a penalty.

³⁶ See, for example, Recital 22 of Directive 2014/42/EU.

up” to the new confiscation concepts and – in particular – to better get to know the different systems.