

MUTUAL RECOGNITION ASPECTS. A COMPARATIVE ANALYSIS

TABLE OF CONTENTS Introduction – 3.1 Freezing orders – 3.1.1 Implementation – 3.1.2 Scope of application – 3.1.2.1 Framework Decision – 3.1.2.2 Regulation (EU) 2018/1805 – 3.1.3 Procedure – 3.1.3.1 Competent authority – 3.1.3.2 Time limits – 3.1.3.3 Language regime – 3.1.3.4 Regulation – 3.1.4 Grounds for non-recognition and non-execution – 3.1.4.1 Framework Decision – 3.1.4.2 Regulation – 3.1.5 Grounds for postponement – 3.1.6 Legal remedies – 3.2 Confiscation Orders – 3.2.1 Implementation – 3.2.2 Scope of Application – 3.2.2.1 Framework Decision – 3.2.2.2 Regulation – 3.2.3 Procedure – 3.2.4 Grounds for non-recognition and non-execution – 3.2.4.1 Framework Decision – 3.2.4.2 Regulation – 3.2.5 Grounds for postponement – 3.2.6 Legal remedies – 3.3 Conclusion.

Introduction

The current EU legal framework on the mutual recognition of freezing orders and confiscation orders consists of Framework Decision 2003/577/JHA¹ and Framework Decision 2006/783/JHA². As from December 2020, however, the two Framework Decisions will be replaced by Regulation ((EU) 2018/1805)³ which is why the analysis will make reference to all three instruments.

3.1 FREEZING ORDERS (FRAMEWORK DECISION 2003/577/JHA/ REGULATION (EU) 2018/1805)

3.1.1 Implementation

Except for **Germany** and **Italy**, that had been behind schedule for three and ten years, the Member States more or less met the transposition deadline (August 2005, Art. 14 (1))⁴. In comparison with the implementation of Framework Decision 2006/783/JHA on the mutual recognition of confiscation orders that turned out to be exceedingly slow (see below 3.2.1), this might be a bit of a surprise. However, it has to be kept in mind that the Framework Decision also covered the freezing of evidence⁵.

¹ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property (OJ L 196, 2.8.2003, p. 45).

² 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).

³ 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).

⁴ As for the other Member States, see https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=24 (last reviewed on 7 May 2019). The implementation seems to be pending in Luxembourg.

⁵ The corresponding part has been replaced by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, p. 1).

3.1.2 Scope of application

3.1.2.1 Framework Decision

The Framework Decision applies to every freezing order that has been issued by a judicial authority in the framework of criminal proceedings for the purpose of subsequent confiscation (Art. 1 Sentence 1 and Art. 3 (1) (b)). As the Framework Decision does not define the term “confiscation”, its scope is not strictly limited to the freezing of proceeds or property liable to ordinary conviction-based confiscation, but may also be interpreted to cover freezing orders related to other types of (criminal) confiscation.

Among the Member States, however, there seems to be some confusion as to the exact scope of application: while in **France**⁶ and **Romania**⁷, it is at least doubtful whether the legislation extends to freezing orders concerning property that is not directly linked to the offense in question, **Italy**⁸ has expressly limited the scope to freezing orders made for the purpose of criminal (conviction-based) confiscation.

The Framework Decision applies to all categories of criminal offenses, though – except for the offenses listed in Art. 3 (2) – the execution of a request may be subject to the requirement of dual criminality (Art. 7 (1) (d), also see below).

3.1.2.2 Regulation (EU) 2018/1805

The Regulation will cover freezing orders “issued within the framework of proceedings in criminal matters” (Art. 1 (1) – as opposed to “proceedings in civil or administrative matters”, Art. 1 (4)). Even though the exact meaning remains far from clear (for more details see below 3.2.2.1), the Regulation will apply to freezing orders that have been issued with a view to non-conviction based confiscation (or as described by the Regulation: “confiscation without a final conviction”, see recital 13 and Article 2 (2) of the Regulation).

3.1.3 Procedure

3.1.3.1 Competent authority

According to Art. 4 (1), the request (comprising the standard certificate and the original freezing order) shall be sent directly to the “competent judicial authority for execution” (principle of direct contact), i.e. transmission via a central authority is not required.⁹

In **Belgium**¹⁰, **France**¹¹ and **Italy**¹², the power to rule on the execution in general lies with the criminal court, though the request has to be sent through the prosecution

⁶ National Report France 3.1.1.

⁷ National Report Romania, C.I.

⁸ National Report Italy, 3.1.

⁹ If the judicial authority addressed has no jurisdiction, it has to transmit the request ex officio to the competent one (Art. 4 para 4). The issuing state has to make the necessary inquiries, e.g. via the EJM contact point (Art. 4 para 3).

¹⁰ National Report Belgium,

¹¹ National Report France, 3.1.2.

¹² National Report 3.1.1.

service.¹³ In **Germany**¹⁴ and the **Netherlands**¹⁵, the public prosecutor is competent to both receive and to grant the request while in **Romania**¹⁶, depending on the judicial phase (investigation or trial), the prosecution service and/or the court will decide on the execution.

The competence of the judicial authority *ratione loci* is usually established by the location of the assets in question or the majority thereof. Some Member States have also adopted rules on “conflicts of jurisdiction”: for example, if, in **Romania**¹⁷, the request falls within the jurisdiction of several authorities, the prosecution service and/or the court in Bucharest will be competent (see above), while in **Italy**¹⁸, the competence of the judicial authority that first received the request will prevail.

As can be seen from the information submitted by the Member States to the European Commission as to their “competent judicial authorities”, the principle of direct contact as enshrined in Art. 4 (1) is widely recognized. **Romania**, however, makes an exception because, contrary to its domestic legislation, it has notified that requests for freezing shall be transmitted to the Ministry of Justice.¹⁹

3.1.3.2 Time limits

The Framework Decision does not lay down specific time limits, though the executing State shall decide on (granting) the request “as soon as possible and, whenever practicable, within 24 hours” (Art. 5 (3)) while the execution is to be carried out “immediately ... in the same way as for a freezing order made by an authority of the executing State” (Art. 5 (1)).

Except for **Belgium** (decision at the latest within 5 days)²⁰ and **Romania** (decision within 24 hours)²¹, the Member States have not set any time frames, either. Nevertheless, they all stipulate that requests for freezing shall be executed swiftly (e.g. **France**: “immediately”; the **Netherlands**: “promptly”). In either case, the implementing legislation does not provide for sanctions for the failure to execute the freezing order within due time.

3.1.3.3 Language regime

According to Art. 9 (2), the certificate (unlike the freezing order) shall be translated into the official language or one of the official languages of the executing State. Otherwise, the executing authority may refuse the request (Art. 8 (1) lit. a, see below). Member States may, however, declare that they will also accept certificates translated into other languages (Art. 9 (3))²².

¹³ As for the other Member States, see Council Document 14349/16.

¹⁴ National Report Germany, 3.1.2. The freezing must, however, be authorized by the Court.

¹⁵ National Report 3.1.2.

¹⁶ National Report Romania, C.I: during the investigative phase, prosecution service alongside the court and during trial, only the court.

¹⁷ National Report Romania, C.I.

¹⁸ National Report Italy, 3.1.1.

¹⁹ Cf. Council Document 14349/16.

²⁰ National Report Belgium,

²¹ National Report Romania, C.I.

²² For an overview see Council Document 14349/16.

Except for **Belgium** (French, Dutch, English and German) and the **Netherlands** (Dutch and English), the Member States have been reluctant to recognise other language regimes: **France, Italy** and **Romania** have notified that the certificate must be translated into the official languages while **Germany** will accept other language versions on the basis of reciprocity only.²³

3.1.3.4 Regulation (EU) 2018/1805

The Regulation maintains the procedure provided for by the Framework Decision, albeit with a few changes: First, Member States do no longer have to transmit the original freezing order but only the certificate to the “executing authority” (Art. 4 (1) of the Regulation)²⁴ and second, it provides for specific time limits: Member States shall decide on the request within 48 hours while the measures necessary to execute the order must be taken no later than 48 hours afterwards (Art. 9 (3) of the Regulation). However, a failure to comply with these time frames will not be sanctioned.²⁵

3.1.4 Grounds for non-recognition and non-execution

3.1.4.1 Framework Decision

The Member States may deny the execution of a request only on one of the grounds listed exhaustively in Art. 7 („The competent judicial authorities of the executing State may refuse to recognise or execute the freezing order only if“, Art. 7 (1)). Even though all of them are optional (“may refuse”), the Member States partly transposed them as mandatory grounds. As will be seen, this is especially the case with **Belgium, France, Germany** and **Romania**:

- The certificate is incomplete or incorrect (Art. 7 para 1 lit. a): This ground for refusal has been implemented as optional by all Member States. As a matter of fact, it might also be considered a ground for postponement because in all Member States, the competent authority may impose a deadline for completion, correction or submission (see Art. 7 (2)).

- There is immunity under the law of the executing State which makes it impossible to execute the freezing order (Art. 7 para 1 lit. b)²⁶: In **Belgium, France, Germany** and **Romania**, the refusal is mandatory while in **Italy** and the **Netherlands**, it is optional.

²³ Council Document 14349/16.

²⁴ Member States may, however, declare that the issuing authority shall transmit the original freezing order together with the freezing certificate, Art. 4 (2) of the Regulation.

²⁵ See also Art. 9 (6) of the Regulation: “The expiry of the time limits set out in paragraph 3 shall not relieve the executing authority of its obligation to take a decision on the recognition and execution of the freezing order, and to execute that order, without delay”.

²⁶ This ground of refusal presumably dates from the time when the Framework Decision also covered the freezing of evidence because at least in the context of confiscation of proceeds, such a scenario is difficult to imagine.

- *Ne bis in idem* principle (Art. 7 para 1 lit. c)²⁷: **Belgium, France, Germany** and **Romania** implemented this ground for refusal as mandatory, **Italy** and the **Netherlands** as optional.
- Lack of dual criminality (Art. 7 (1) (d)): the executing State may refuse a request if the requirement of dual criminality is not met (also see above 3.1.3.1). Except for **Italy** and **the Netherlands**, this ground for refusal has been implemented as mandatory by the Member States. For the offenses listed in Art. 3 (2), however, the dual criminality check has been abolished. Art. 3 (2) seems to have been transposed in compliance with the Framework Decision. **Belgium** yet considers abortion and euthanasia not to be covered by “murder or grievous bodily harm”, i.e. still verifies the dual criminality in these cases.²⁸

Some Member States even included additional grounds for refusal: **Belgium**²⁹ and **Germany**³⁰ will not recognize freezing orders that violate the fundamental rights and legal principles enshrined in Article 6 of the TEU, i.e. the European *ordre public*, while in **France**³¹, the freezing must be in line with its public order or the fundamental interests of the nation, i.e. the national *ordre public*. The latter will also deny the execution of freezing orders that were taken for discriminatory reasons or that might have a discriminatory effect on the party concerned³².

3.1.4.2 Regulation (EU) 2018/1805

The Regulation will introduce two additional grounds of refusal: Apart from the grounds mentioned above, Member States may deny a request due to the territoriality principle (Art. 8 (1) (d) of the Regulation) or “where in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the freezing 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” (Art. 8 (1) (f) of the Regulation). The latter provision corresponds to the European *ordre public* clause (see below 3.2.4.2) that has been established by some Member States’ in their domestic legislation (see above 3.1.5.1.).

²⁷ Contrary to the Framework Decision on the European Arrest Warrant, the EU legislator refrained from specifying the conditions under which the principle applies, thus the characterization is up to the Member States. In **Belgium, Germany** and **France**, the relevant provisions have been drafted in the style of Art. 54 CISA/ Art. 50 CFR.

²⁸ Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, COM(2008) 885 final, p. 3; Belgium Report, 3.1.3.

²⁹ National Report Belgium, 3.1.3.

³⁰ National Report Germany, 3.1.3.

³¹ National Report France, 3.1.3

³² National Report France, 3.1.3.

3.1.5 Grounds for postponement

Art. 8 provides for a list of (optional) grounds for postponement that are mainly based on a conflict of interests:

- Ongoing criminal investigation (Art. 8 (1) (a)) and property subject to a freezing order in criminal proceedings (Art. 8 (1) (b)): These two grounds have been transposed almost verbatim by all Member States.
- Property subject to a freezing order in non-criminal proceedings (Art. 8 (1) (c)): This ground can be found in the legislations of France, the Netherlands and Romania.

Except for **France**³³ which will also defer proceedings if the property concerned is a document or medium protected for national defence purposes, the Member States did not lay down additional grounds for postponement.

3.1.6 Legal remedies

The executing State must ensure that all interested parties, i.e. all parties affected by the freezing order, have effective legal remedies against the decision on the recognition and execution of a freezing order (Art. 11 (1)). The substantive reasons, however, e.g. whether the freezing order is based on reasonable suspicion, can only be reviewed by a court in the issuing State (Art. 11 (2)).

In general, the legal remedies provided for by the Member States correspond to the remedies against a domestic freezing order.

3.2 CONFISCATION ORDERS (FRAMEWORK DECISION 2006/783/JHA/ REGULATION (EU) 2018/1805)

3.2.1 Implementation

In contrast to Framework Decision 2003/577/JHA, Framework Decision 2006/783/JHA has been implemented considerably slow: Almost all Member States exceeded the transposition deadline (November 2008, Art. 22 (1)), **Italy** for even seven years.³⁴

3.2.2 Scope of Application

3.2.2.1 Framework Decision

According to Art. 2 (c), the term “confiscation order” denotes “a final penalty or measure imposed by a court following proceedings *in relation* to a criminal offence”. This broad definition notwithstanding, its context suggests that the scope of the Framework Decision is limited to conviction-based confiscation orders in the framework of criminal proceedings: First, references to special types of confiscation are limited to the concept of extended confiscation (Art. 2 (d)) and second, the confiscation order must have been imposed by a court competent in criminal matters (Art. 1 (1)), thereby excluding “civil” non-conviction based confiscation.

None of transposition laws seems to specify the scope of application nor is there any case law on this matter.

³³ National Report France, 3.1.4.

³⁴ As for the other Member States see <https://www.ejn-crimjust.europa.eu/ejn/lib/documentproperties.aspx?Id=211> (last reviewed on 7 May 2019).

3.2.2.2 Regulation (EU) 2018/1805

The Regulation will apply to all kinds of confiscation orders, provided they have been 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, it will also include “criminal” non-conviction based confiscation orders (referred to as “confiscation without a final conviction”, see recital 13 and Article 2 (2) of the Regulation). The exact scope, however, remains obscure even though it can be derived from the legislative procedure that Italy’s *misura di prevenzione* will be covered³⁵.

3.2.3 Procedure

The procedural framework adopted by Framework Decision 2006/783/JHA is very similar to the rules on mutual recognition of freezing orders (principle of direct contact (Art. 4 (1)), language regime of the executing State (Art. 19 (1)), no time limits), even though Member States may also notify a central authority as “competent authority” (see Art. 3 (2)).

3.2.4 Grounds for non-recognition and non-execution

3.2.4.1 Framework Decision

Similar to the mutual recognition of freezing orders, the enforcement of confiscation orders may only be refused for the grounds exhaustively listed in Art. 8 (1) of the Framework Decision (“The competent authorities in the executing State shall without further formality recognise a confiscation order ... unless the competent authorities decide to invoke one of the grounds for non-recognition or non-execution provided for in Article 8, Art. 7 (1)”). Though designed as optional (“may refuse”, Art. 8 (1)), these grounds have often been transposed as mandatory by the Member States. As a matter of fact, **Italy** happens to be the only Member State that implemented all refusal grounds as optional.

- The certificate is incomplete or incorrect (Art. 8 (1)): This ground for refusal has been implemented by **Germany, Italy** and **Romania** as optional, by **France** as mandatory.
- Principle of *ne bis in idem* (Art. 8 (2) (a)): Refusal is mandatory in **Belgium, France, Germany** and **the Netherlands** while in **Italy** and **Romania**, it is optional.
- Lack of dual criminality (Art. 8 (2) (b)): The request must be refused in **Belgium, Germany, the Netherlands** and **Romania**. However, the offenses listed in Art. 6 (3) are not subject to the verification of dual criminality.
- Immunity or privilege (Art. 8 (2) (c)): This ground is mandatory in **Belgium, Germany, France** and **the Netherlands**, while optional in **Italy** and **Romania**.
- The rights of any interested party (Art. 8 (d)): This ground has been implemented as optional in **Belgium**, in **Germany** and **France** (limited to third parties) as mandatory.³⁶
- Trials in absentia (Art. 8 (2) (e)): Except for **Italy** and **Romania**, the refusal is mandatory in the Member States.

³⁵ Cf. Council document 5482/18.

³⁶ National Report France 3.3.3.

- Territoriality principle (Art. 8 (2) (f): this ground of refusal has been transposed partially as optional and partially as mandatory by **Germany**³⁷ and the **Netherlands**³⁸ while **Belgium, France, Italy** and **Romania** provided for an optional ground for refusal.
- Extended confiscation not provided for by the law of the executing State (Art. 8 (2) (g): in **Germany** and **France**, the recognition must be denied whereas in **Belgium, Italy, the Netherlands** and **Romania**, refusal is optional.
- The execution is time-barred (Art. 8 (2) (h)): Refusal is mandatory in **the Netherlands**, partially optional and partially mandatory in **France**³⁹ and optional in **Belgium**.

Belgium, Germany and **France** also apply the grounds for refusal mentioned in the context of the mutual recognition of freezing orders (see above 3.1.5.1).

3.2.4.2 Regulation (EU) 2018/1805

The Regulation adopts most of the grounds for refusal laid down in Art. 8 of the Framework Decision, although the Member States will no longer be able to deny the enforcement of a confiscation order simply due to its type⁴⁰. Art. 19 (1) (h), however, provides for a European *ordre public* clause: Accordingly, Member States “may decide not 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”⁴¹.

3.2.6 Legal remedies

Except for the, Art. 9 corresponds to Art. 11 of Framework Decision 2003/577/JHA. Likewise, the legal remedies provided for by the Member States are similar to the remedies against domestic confiscation orders (see above 3.1.7).

3.3 Conclusion

As seen above, the Member States’ legislations considerably differ from the Framework Decisions with regard to the scope and the grounds for refusal. However, as almost no Member State could provide for relevant case-law and/or practical experience on the national regimes, the lack of application often criticized might not be due to the limited scope or the extensive grounds for refusal, but seem to result from other factors and impediments to an effective implementation in court practice such as factual difficulties in identifying and recovering proceeds of crime. This is also why the Regulation is unlikely to improve the situation because it focuses on legal, but not on practic

³⁷ National Report Germany 3.3.3.

³⁸ National Report The Netherlands, 3.3.3.

³⁹ National Report France 3.3.3.

⁴⁰ This aspect has been of special concern to the EU legislator, see 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.

⁴¹ Article 19 (1) (h) of the Regulation has been drafted in the style of the recent CJEU case law in *Arranyosi & Căldărău*, eucrim 2018, 202.