

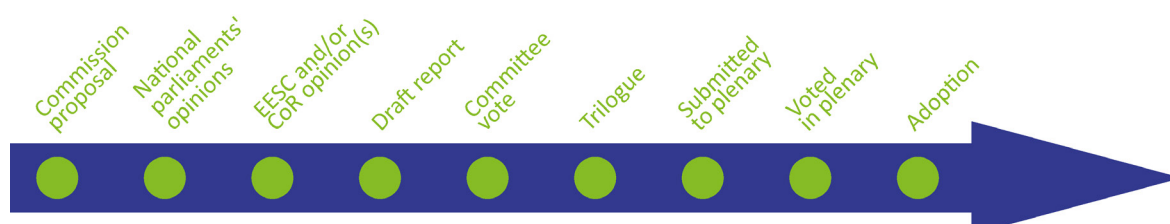
Mutual recognition of freezing and confiscation orders

OVERVIEW

In order to respond more effectively to the challenge of criminals and terrorists hiding assets in other Member States, in 2016 the European Commission proposed a regulation on the mutual recognition of freezing and confiscation orders in criminal matters. The directly applicable instrument removes the need for national transposition, broadens the scope of the current rules to cover new types of confiscation and includes provisions on victims' rights to restitution and compensation.

In June 2018, provisional agreement was reached in interinstitutional negotiations and the European Parliament voted the agreed text on 4 October 2018. The Council followed suit on 6 November 2018. The final act was signed on 14 November and published in the Official Journal of the EU on 28 November 2018. The regulation will apply 24 months after its entry into force, namely from 19 December 2020.

Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders		
<i>Committee responsible:</i>	Civil Liberties, Justice and Home Affairs (LIBE)	COM(2016) 819 21.12.2016
<i>Rapporteur:</i>	Nathalie Griesbeck (ALDE, France)	
<i>Shadow rapporteurs:</i>	Salvatore Domenico Pogliese (EPP, Italy) Emilian Pavel (S&D, Romania) Monica Macovei (ECR, Romania) Barbara Spinelli (GUE/NGL, Italy) Eva Joly (Greens/EFA, France) Ignazio Corrao (EFDD, Italy) Lorenzo Fontana (ENF, Italy)	2016/0412 (COD) Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Procedure completed.</i>	Regulation (EU) 2018/1805 OJ L 303, 28.11.2018, pp. 1-38	



Glossary¹

Freezing: a measure to prevent the dissipation, transformation, movement or destruction of criminal assets to avoid confiscation during the investigation process.

Ordinary confiscation: a confiscation measure directed against an asset that is the direct proceed or the instrumentality of a crime, following a criminal conviction for that crime.

Value-based confiscation: a confiscation measure by which a court imposes an order corresponding to the value of proceeds or instrumentalities of a crime, enforceable against any property of the individual.

Extended confiscation: a confiscation measure following a criminal conviction that goes beyond the direct proceeds of the crime for which a person was convicted, where the property seized is derived from criminal conduct. A direct link between the property and the offence is not necessary if the court concludes that part of the person's property was obtained through other unlawful conduct.

Third-party confiscation: a confiscation measure depriving someone other than the offender (a third party) of criminal property, where that third party possesses property received from the offender.

Non-conviction based confiscation (NCBC): a confiscation measure taken in the absence of a conviction and directed against an asset of illicit origin. It covers cases where a criminal conviction is not possible because the suspect has become ill or fled the jurisdiction, has died, lacks legal capacity, or has immunity from prosecution, etc., but also cases where action is taken against the asset itself (*in rem* proceedings, generally civil proceedings) regardless of the person in possession of the property.

Introduction

Confiscation of the proceeds of crime is a key measure for fighting organised crime. While precise statistics are lacking (globally and at EU level), [illicit markets](#) in Europe are believed to generate around €110 billion annually. A 2016 [Europol report](#) estimated that 98.9 % of criminal profits are not confiscated and remain at the criminals' disposal; moreover, 2.2 % of proceeds of crime were provisionally seized or frozen in the EU over the 2010-2014 period, but only 1.1 % of criminal profits was definitively confiscated. The estimated annual value of provisionally frozen assets in the EU is around €2.4 billion, of which about €1.2 billion are eventually confiscated each year.

In December 2016, the European Commission presented a [proposal](#) for a regulation on the mutual recognition of freezing and confiscation orders for the proceeds of crime. The regulation, based on [Article 82\(1\)](#) of the Treaty on the Functioning of the European Union (TFEU), is aimed at simplifying the existing legal framework and improving the cross-border enforcement of freezing and confiscation orders, in order to respond more effectively to the [challenge](#) of criminals and terrorists hiding their assets in other Member States. According to the Commission, the directly applicable regulation proposes to offer one single instrument for the recognition of both freezing and confiscation orders in the EU related to criminal matters. Accordingly, an order issued by one Member State's competent authorities would be recognised and executed in another Member State as if it were a domestic order. The proposal also widens the scope of the current rules to cover new types of confiscation order such as third-party confiscation and non-conviction based confiscation (NCBC), and reduces the possibility of refusal for extended confiscation orders. Another aim of the proposal is to improve the speed and efficiency of execution of freezing and confiscation orders by introducing tighter deadlines and standard certificates meant to simplify the recognition and enforcement procedure. Finally, the proposal gives precedence to victims' rights to compensation and restitution over the interests of the Member States (both issuing and executing states).

Existing situation

The first EU measures in this area built on Council of Europe commitments² and were designed to improve judicial cooperation between EU Member States with regard to the freezing and confiscation of criminal assets located in one or several Member States, when the criminal proceedings took place or a conviction was issued in another Member State. Since 1998, when [Joint Action 98/699/JHA](#) on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime was adopted at EU level, another six legal instruments dealing with freezing and confiscating criminal assets have been agreed. Both the joint action and the subsequent [Council Framework Decision 2001/500/JHA](#) required that confiscation requests from other Member States be given equal priority to domestic requests, and provided for value-based confiscation. The EU then applied the **principle of mutual recognition**³ to freezing and confiscation orders, through the adoption of Council Framework Decision [2003/577/JHA](#) of 22 July 2003 (on orders freezing property or evidence) and Council Framework Decision [2006/783/JHA](#) of 6 October 2006 (on confiscation orders). In order to facilitate implementation in the context of diverse national procedures and laws, other EU measures focused on **harmonising the various Member States' national legislation**: Council Framework Decision [2005/212/JHA](#) of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property and, more recently, [Directive 2014/42/EU](#) of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the EU. Finally, [Council Decision 2007/845/JHA](#) of 6 December 2007 required Member States to establish national asset recovery offices, to improve cooperation on identifying and locating criminal assets or property associated with criminal activities.

Main features of the existing EU instruments

The harmonisation measures

- Council Framework Decision [2005/212/JHA](#) on confiscation of crime-related proceeds, instrumentalities and property

The Council framework decision was a first attempt to harmonise national legislations regarding the confiscation of criminal assets. It obliges Member States to adopt the necessary measures enabling them to confiscate criminal assets (or their value) from offences punishable by deprivation of liberty for more than one year, as well as to include in their legislation the [possibility](#) of extended confiscation for seven offences defined by EU law when committed within the framework of a criminal organisation (provided certain conditions are met concerning the penalties applicable).⁴ The decision also introduces minimum rules on legal remedies and the obligation to respect fundamental rights.

- Directive [2014/42/EU](#) on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

The directive, adopted in 2014, is a harmonisation instrument covering both freezing and confiscation of criminal assets. Its aim is to simplify [the rules](#) and fill significant gaps hindering freezing and confiscation in cross-border cases. The directive also takes into account legislative developments in Member States in the area, institutes clearer rules (minimum standards) on extended confiscation⁵ and third-party confiscation,⁶ and introduces [a limited form](#) of non-conviction based confiscation in relation to criminal proceedings (in cases where the suspect is permanently ill or has fled).⁷ The directive repealed in full Joint Action 98/69/JHA and in part the 2001 and 2005 framework decisions. On account of the legal basis ([Article 83 TFEU](#)) the scope of the directive is limited to the 'eurocrimes' defined in that article. However confiscation maintains its [broader scope](#) as the 2014 directive did not replace the provision in the 2005 framework decision that enabled confiscation for all offences punishable with imprisonment for at least one year. The directive also establishes safeguards for those targeted by freezing and confiscation measures and

for victims of criminal offences. Other provisions concern the management of frozen and confiscated assets and the collection and transmission of statistical data. The transposition deadline expired on 4 October 2016. Directive 2014/42/EU does not apply to Denmark or the UK, which are nevertheless bound by the 2005 framework decision.

The mutual recognition instruments

- Council Framework Decision [2003/577/JHA](#) on the execution in the European Union of orders freezing property or evidence

This decision applies the mutual recognition principle to orders issued by national judicial authorities for the [purpose](#) of freezing criminal assets in view of their subsequent confiscation, but also – until May 2017 – of freezing evidence with a view to its transfer to the requesting state in the context of mutual legal assistance.⁸ The framework decision offers an alternative means of cooperation to the [traditional procedures](#) of mutual legal assistance between Member States, based on mutual recognition. It is the second mutual recognition instrument relating to criminal proceedings adopted in the EU, after the European arrest warrant, and includes the obligation for Member States to recognise the orders for the freezing of criminal assets with a view to subsequent confiscation issued by another Member State, with only a limited list of grounds for refusal.⁹

Council Framework Decision 2003/577/JHA applies in theory to all freezing orders regardless of the offence subject to criminal proceedings (with some restrictions in practice). For reasons of efficiency, the framework decision abolishes the double criminality requirement for the [32 serious offences](#) listed in the European Arrest Warrant Framework Decision, provided they are punishable in the issuing Member State by a custodial sentence of a maximum of at least three years. For other criminal offences, the executing state may condition the recognition and enforcement of the freezing order on the existence in its national law of a criminal offence that could give rise to freezing proceedings. Finally, the framework decision includes provisions on the respect of fundamental rights, as well as on the legal remedies available.

- Council Framework Decision [2006/783/JHA](#) on the application of the principle of mutual recognition to confiscation orders

While it does not replace the bilateral or multilateral agreements on [mutual legal assistance](#) between Member States, the framework decision establishes mutual recognition as regards confiscation orders issued following a criminal conviction.¹⁰ It reduces the grounds for refusing to recognise and execute confiscation orders and eliminates, among Member States, any system of conversion of the confiscation order into a national one. The grounds for refusal are the same as for freezing orders, to which several have been added.¹¹ The framework decision removes the double incrimination requirement for the standard 32 serious offences provided they are punishable in the issuing state by a custodial sentence of a maximum of at least three years. For other criminal offences falling outside their scope, the executing state may condition the recognition and execution of a confiscation order on the fact that the acts giving rise to the confiscation order constitute an offence that permits confiscation under the law of the executing state. In addition, the framework decision provides for 'extended confiscation' (covering 'any or all the assets' of a person found guilty even if the link between the property and the offence is not formally proven, as long as the court is *fully satisfied* that the property has criminal origins). However, an extended confiscation order may not be recognised by the executing state if it falls only under the scope of the issuing Member State's law. The framework decision also includes provisions on how to divide confiscated proceeds between the issuing and executing Member States.¹² Finally, the fundamental rights and legal remedies provisions are the same as for the Council framework decision on freezing orders.

Identified shortcomings of the current framework

Despite efforts at EU level to enhance cooperation between Member States in identifying, freezing and confiscating criminal assets, the Commission has identified two [main problems](#) in cross-border

cases: insufficient recovery of criminal assets and unsatisfactory protection of victims' rights to restitution and compensation.

The first problem can be linked to how Member States used and implemented the mutual recognition instruments. The two framework decisions applying the mutual recognition principle to freezing and confiscation orders, respectively, have not been extensively [used](#). This can be explained, on the one hand, by the rather complicated procedures and certificates involved and, on the other, by their lack of coverage of [many types](#) of freezing and confiscation orders that can be adopted at national level.

Cooperation has also been impeded by the fact that these framework decisions have been poorly or not yet [implemented](#) in national law. For example, eight years after its transposition deadline, in November 2016, there were still five Member States that had not notified [implementation](#) of the framework decision on confiscation orders in their national legislation. As of July 2018, the process was still [ongoing](#) in two Member States. Moreover, regarding the same framework decision, the Commission assessed there were major differences between Member States in [transposition](#). For example, the [definitions](#) of certain key terms (including 'confiscation order') were not transposed in the same manner in national laws, leading to a degree of uncertainty as to the scope of the framework decision: some Member States enacted partial definitions of some terms, while others did not include in their transposing laws all the definitions contained in the framework decision. Some Member States also added various supplementary grounds for refusing recognition or execution of a confiscation order to those foreseen by the framework decision; and many notified that they would not recognise and execute orders under extended powers of confiscation. These substantial differences in Member States' legislation became a significant impediment in the practical application of the principle of mutual recognition and led to many decisions opposing confiscation orders issued by another EU Member State.

In addition, following the adoption and [transposition](#) of Directive 2014/42/EU, the two mutual recognition instruments have been considered to a great extent obsolete, as they do not cover some of the newer (and more effective) freezing and confiscation measures established by that directive, but also those established at national level.

The second main [problem](#) identified by the Commission relates to the insufficient protection of victims' rights to compensation and restitution in cross-border cases. Neither of the two framework decisions on the mutual recognition of freezing and confiscation orders contain provisions on victims' rights, while the existing EU directives on victims' rights (restitution/compensation from the offender) and on compensation (from the state) rely for their implementation in practice on national rules that can differ from one Member State to another. Cross-border cases have raised particular difficulties, as the authorities of the victim's Member State do not have the legal tools to ensure that the assets confiscated in another Member State will be returned to the victim.

Parliament's starting position

Following the adoption of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU, the European Parliament and the Council issued a [joint statement](#) whereby the two institutions called on the Commission to 'present a legislative proposal on mutual recognition of freezing and confiscation orders at the earliest possible opportunity, in relation to which the concept of freezing should be further examined'. The Commission was also asked to address the possible difficulties in the implementation of the instruments on mutual recognition of freezing and confiscation orders arising from the replacement by new Directive 2014/42/EU of certain provisions of Framework Decision [2005/212/JHA](#) on confiscation of crime-related proceeds, instrumentalities and property.

In its [resolution](#) of 25 October 2016 on the fight against corruption and follow-up of the CRIM resolution, the European Parliament called for swift transposition of Directive 2014/42/EU and called again on the Commission 'to submit as soon as possible a legislative proposal to ensure mutual

recognition of seizure and confiscation orders linked to national asset-protection measures'. Parliament also called on the Commission and the Member States to: strengthen EU measures regarding the tracing, freezing and confiscation of proceeds of crime, also by providing for confiscation in the absence of a final conviction; promote the management of frozen and confiscated property and its re-use for social purposes and as compensation for families of victims and businesses; and develop cooperation among EU Member States authorities, including between the national asset recovery offices (AROs) which should be given adequate resources.

Preparation of the proposal

The Commission's [proposal](#) is designed to tackle the problem of the limited recovery rate of criminal assets at EU level, in particular when it comes to executing freezing and confiscation orders in other Member States. Although reliable statistics are lacking, there are indications that [cross-border cooperation](#) in this area is increasing (for example between AROs tracking assets in other Member States); however, this cooperation seems not yet to be adequately reflected by an increase of cross-border asset recovery cases. The Commission proposal assumes that increasing the recovery rate would have a deterrent effect on crime by denying criminals their profits and the possibility to reinvest them in other criminal activities, and would limit these criminal assets' disruptive effect on the functioning of the single market.

In addition, the Commission's proposal should also be considered against the background of the links between organised crime and terrorism and the need for effective measures against terrorist financing. One of the priorities of the [European Agenda on Security](#) (April 2015) has been to disrupt the financing of organised crime networks, as a step towards addressing terrorist financing. In the February 2016 [action plan to strengthen the fight against terrorist financing](#), the Commission committed to put forward a [package of measures](#) designed 'to disrupt and cut off the financial sources of criminals and terrorists' and strengthen the EU's capacity to fight organised crime and terrorism. The package, also a priority initiative in the [Commission's 2017 work programme](#), was presented on 21 December 2016 and consisted of three proposals: a regulation on the mutual recognition of freezing and confiscation orders in criminal matters, a directive setting minimum rules on definitions and criminal sanctions as regards money laundering offences and a regulation on cash controls.

In preparation for the proposal for a regulation on the mutual recognition of freezing and confiscation orders, the Commission relied on a series of reports and studies, as well as on expert meetings and conferences on the issue. No public consultation was carried out. The [Commission](#) issued two reports in [2008](#) and [2010](#) on the implementation of Framework Decision 2003/577/JHA and Framework Decision 2006/783/JHA respectively. They concluded that the mutual recognition regimes instituted by the two Council framework decisions, in particular the rules on extended confiscation, were not fully effective. The reasons are considered to be the persisting differences between Member States' laws in this area, as well as the weak implementation of EU legislation at national level and gaps in the framework decisions themselves. Moreover, the 2012 [impact assessment](#) accompanying the Commission proposal for Directive 2014/42/EU already established that there was a need for a new legal instrument to improve mutual recognition in this area. Finally, a 2013 [comparative law study](#) on the implementation of mutual recognition of freezing and confiscation orders in the EU concluded that a single coherent instrument for mutual recognition could be envisaged. In this sense, it suggested the adoption of a regulation that would provide: a unique re-enacted framework for Framework Decisions 2003/577/JHA and 2006/783/JHA; a solid basis to support Directive 2014/42/EU for purposes of mutual recognition; and a basis for the Court of Justice of the EU to operate its control over mutual recognition related acts.

Based on the assessments and consultations mentioned above, the Commission's [Impact Assessment](#) accompanying the proposed regulation analysed four main policy options, including preserving the status quo, non-regulatory action and regulatory (minimum, medium or maximum) alternatives. Of these, the preferred choice was the medium regulatory scenario, consisting of a new

legal instrument with an extended scope covering all types of freezing and confiscation orders (conviction and non-conviction based) issued in the context of criminal proceedings. In comparison, the minimum regulatory option would have required only the recognition of those orders covered by Directive 2014/42/EU, while the maximum regulatory option would have extended the scope to cover, in addition to criminal proceedings, also civil and administrative proceedings where the property is shown to constitute proceeds of criminal conduct.

EPRS published an [initial appraisal](#) of this impact assessment in June 2017 that found a number of weaknesses, which 'could be attributed to political urgency and the need for EU action in the area of the freezing and confiscation of criminal assets'. They include for example the choice of legal instrument (regulation), which the impact assessment does not analyse or explain in enough depth.

The changes the proposal would bring

Based on Article 82(1) TFEU, the proposed regulation applies the mutual recognition principle to all types of freezing and confiscation orders issued in the context of criminal proceedings, to include, as well extended confiscation, non-conviction based confiscation and third party confiscation. It aims to improve cross-border cooperation in the recovery of assets and proceeds of crime through mutual recognition without having any harmonisation dimension. Accordingly, an order issued by one Member State's competent authorities would be recognised and executed in another Member State as if it were a domestic order. Notably, this is the first time a regulation has been proposed to implement mutual recognition arrangements in the criminal law field; this was previously achieved by means of framework decisions or directives.

The regulation is meant to replace the two framework decisions from 2003 (freezing) and 2006 (confiscation). However, they will remain in force for those Member States not taking part in the adoption of the regulation and bound by them, namely Denmark and Ireland. The United Kingdom announced the intention to [opt into](#) the adoption of the regulation, although it is unlikely the regulation would apply in the UK in the light of its planned withdrawal from the EU in March 2019. The government justified the opt-in as a signal of the UK's commitment in that area.

According to the Commission, the proposed instrument would improve the current EU framework on the mutual recognition of freezing and confiscation orders in several ways:

- as a regulation, it is directly applicable, thereby avoiding any national transposition problems, and offering thus legal certainty;
- it is wider in scope than the two framework decisions it will replace. It will cover all forms of confiscation harmonised by Directive 2014/42/EU (traditional confiscation, extended confiscation, third-party and a limited form of non-conviction based confiscation); moreover, it goes even further than the 2014 directive to cover all criminal offences (and is not limited to the eurocrimes covered by the directive), as well as other types of NCBC, as long as these are issued in the framework of criminal proceedings;
- it introduces tight and clear deadlines for the recognition and execution of freezing and confiscation orders. The proposal envisages shorter deadlines in the case of freezing orders: the executing authority must take the decision on the recognition and execution of the freezing order or on consulting with the issuing authority no later than 24 hours after receipt of the order; after taking the decision, the executing authority has another 24 hours to carry out the freezing. Furthermore, the executing authority will have to take full account of specific requirements made by the issuing authority, such as the need for the property to be frozen immediately or on a specified date. As regards confiscation orders, the decision on recognition and execution must be taken no later than 30 days after the receipt of the confiscation order; a maximum of another 30 days is planned for the executing authority to carry out the order. A maximum 30-day extension is provided should it not be possible for the executing authority to meet the abovementioned deadlines;

- the proposed standard certificate for confiscation orders and standard form for freezing orders will ensure the speed and efficiency of the procedures;
- the need for improving communication between the relevant Member States' authorities is constantly underlined throughout the proposal;
- it takes into account the victims' rights: when property is confiscated, the victim's right to compensation and restitution will take precedence over both issuing and executing Member States' interests. In particular, the proposal provides that, if a judicial authority of the issuing state has issued a decision to compensate or provide restitution to the victim, the relevant sum of money obtained from the execution of the confiscation order would be awarded to the issuing state for the purposes of compensation or restitution to the victim. This derogates from the rule that money obtained from the execution of a confiscation order is to be split 50 - 50 between the executing and the issuing state, if that sum exceeds €10 000.

As regards fundamental rights, the Commission underlines that the proposal includes important safeguards: respect for the principle of proportionality; inclusion of grounds for refusal based on the *ne bis in idem* principle and the rules on *in absentia* proceedings (the latter only if the confiscation order is linked to a final conviction); respect for the rights of bona fide third parties; an obligation to inform interested parties of the execution of a freezing order, the reasons for the action and the legal remedies available; and the obligation to provide legal remedies in the executing Member State. Moreover, Directive 2014/42/EU already lists the safeguards applicable to the freezing and confiscation orders covered by it. Finally, the Commission points out that all criminal law procedural safeguards apply, including the relevant articles of the European Convention on Human Rights and of the EU Charter of Fundamental Rights, as well as the [EU legislation](#) setting the common procedural rights and minimum standards in criminal proceedings.

Advisory committees

Neither the European Economic and Social Committee nor the Committee of the Regions has adopted an opinion on the proposal.

National parliaments

The deadline for the submission of reasoned opinions on the grounds of [subsidiarity](#) was set for 9 May 2017. On 19 April 2017, the [Czech Senate](#) adopted a reasoned opinion asserting that the draft legislative act did not comply with the principle of subsidiarity. In particular, the Senate raised doubts about the Commission's choice of a regulation as the form of the proposed legal instrument, taking the view that a directive would have been more appropriate in light of the different confiscation and asset freezing systems in the EU Member States. The European Commission sent its reaction to the Czech Senate in July 2017, stating that after careful analysis of the legal nature of the instrument, a regulation would be the most appropriate form in order to ensure its uniform application in all Member States and to increase its effectiveness.

The German Senate (Bundesrat) also adopted a [reasoned opinion](#) on 31 March 2017. While welcoming the objective pursued by the proposal, the Bundesrat considered that a directly applicable regulation would render difficult its implementation by legal practitioners across the EU who would also have to comply with the relevant national rules and with other EU legislation on mutual recognition. Similarly to the Czech Senate, the Bundesrat suggested that a directive would be preferable, as its provisions would be inserted into the relevant national laws, avoiding thus a regime of different regulatory layers. Furthermore, the Bundesrat argued that the proposal had a direct effect on national provisions on criminal law and procedure going beyond mutual recognition as set out in Article 82(1) TFEU. It also advocated the inclusion of grounds for refusal based on fundamental rights. Finally, the German Senate raised concerns about the numerous and strict deadlines in the proposal and the many obligations for information and consultation, which would increase the administrative burden and thwart the goal of speedy and efficient cross-border asset

recovery. The Commission [replied](#) in July 2017 offering additional explanations to the objections raised.

Stakeholders' views¹³

The [conclusions](#) of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the EU Member States, held in December 2014, already expressed the position that the EU framework on freezing and confiscation of criminal assets needed to be simplified. The forum members also welcomed the 2014 statement by the European Parliament and Council on the need for a new legislative proposal on the mutual recognition of freezing and confiscation orders. While acknowledging concerns relating to the impact of the mutual recognition of non-conviction based confiscation orders on fundamental rights, the forum members argued that EU legislative action could be considered to support non-conviction based asset recovery, including the definition of a limited non-conviction based confiscation remedy with minimum safeguards that could enjoy mutual recognition at EU level.

At a June 2016 conference, experts and stakeholders from all Member States discussed a series of [aspects](#) in connection with strengthening the mutual recognition of freezing and confiscation orders. According to the [Commission](#), the discussions clearly concluded that there was a need for a new legal instrument to cover all modern forms of confiscation (including NCBC) and include effective remedies for third parties as well as provisions on victims' compensation.

Academic views

In June 2017, the Meijers Committee (standing committee of experts on international immigration, refugee and criminal law) issued a [comment](#) on the Commission's proposal, addressing a series of aspects in the light of the negotiations on the text. Firstly, regarding the form of a regulation for the proposed instrument, the Meijers Committee considers the Commission's argument 'largely unpersuasive', as judicial authorities would be required to apply and interpret unfamiliar terms and rules structured differently from national criminal law. On non-conviction based confiscation and how it might run counter the presumption of innocence, the Committee questions the provisions of the proposal, whereby the substantive reasons for issuing the freezing or confiscation order cannot be challenged before a court in the executing state (but only in the issuing state). Regarding the rights of third parties, the Meijers Committee recommends they should have the possibility to bring an action before a court in the issuing state as well. Finally, it recommended clarification regarding the conditions under which an out-of-court settlement might be deemed to be a decision finally disposing of the case and therefore triggering a *ne bis in idem* effect.

Other [experts](#) have pointed to a series of meaningful improvements the proposal is expected to bring, despite the fact that it does not introduce 'a revolutionary approach to asset recovery'. In particular, the added value of the proposed instrument stemmed from it being a regulation not depending on national transposition, from the reduced list of grounds for refusal to execute an order, and from its scope extending to every type of freezing and confiscation order issued in criminal proceedings. It has also been underlined that it is the first time an international instrument on asset recovery has included provisions on victim compensation. Other [researchers](#) have also highlighted the strong points of the Commission's proposal, especially the choice of a regulation, the inclusion of victims' rights to compensation and restitution, the elimination of extended confiscation from the list of grounds for refusal to recognise and execute an order, and the introduction of standard certificates, clear deadlines and requirements to communicate between the competent authorities.

Legislative process

The European Parliament

The proposal for a regulation was referred to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) which appointed Nathalie Griesbeck (ALDE, France) as rapporteur. The Committee [adopted](#) its report on 11 January 2018 (47 votes in favour, 2 against and 1 abstention) and, on 17 January 2018, Parliament as a whole confirmed the mandate for trilogue negotiations with the Council.

In its position, Parliament [welcomed](#) the Commission's choice of a regulation as opposed to a directive as the form of mutual recognition instrument for freezing and confiscation orders, as it would improve clarity and legal certainty and eliminate transposition problems, thus leading to more rapid and effective enforcement in cross-border cases.

Another essential aspect advocated by Parliament was respect for fundamental rights and procedural safeguards. In this sense, Parliament proposed including a non-recognition and non-execution clause based on failure to respect fundamental rights among the list of grounds for refusal. It also suggested making most grounds for non-recognition and non-execution compulsory and including references to the EU Charter for Fundamental Rights. Parliament sought to reinforce procedural safeguards, in particular the right to information and to an effective remedy for all concerned, as well as the procedural rights of third persons affected by the freezing or confiscation order.

In addition, Parliament suggested improvements to the procedures for the recognition and execution of freezing and confiscation orders. For purposes of simplification, Parliament proposed coordinating the mutual recognition procedures for freezing and confiscation orders, specifically recommending that both types of order be accompanied by a standard certificate. Moreover, with a view to improving efficiency, proposed amendments to the Commission's text shorten the deadlines for recognition and execution of confiscation orders or include new deadlines for the obligation of Member States' authorities to communicate and inform each other throughout the procedure. The supporting role of central national authorities is also emphasised in Parliament's position.

Parliament's position also promoted the best possible management of frozen and confiscated assets and their reuse for social purposes, for the compensation of victims, victims' families, and businesses that are victims of organised crime, or in order to combat organised crime. Among the proposals figured the creation of a national fund in each Member State to guarantee appropriate compensation for the families of police officers and public servants killed in the line of duty and police officers and public servants permanently disabled in the line of duty.

The Council

The Council working party on Cooperation in Criminal Matters (COPEN) first [debated](#) the Commission's proposal on 13 January 2017. A series of [meetings](#) were then held over the year. The main [issues](#) that generated debate within the Council were:

- the choice of a regulation over a directive as the [form of the legal instrument](#): in May 2017 a [blocking minority](#) had emerged opposing the form of a regulation, so the matter was referred to a higher political level for a final decision;
- the deadlines, which were considered to be too tight by various Member States;
- the addition of compliance with fundamental rights as additional grounds for non-recognition and non-execution of freezing and confiscation orders;
- the scope, in particular whether certain systems of preventive confiscation should also be covered by the proposed regulation, provided that the confiscation order was clearly

linked to criminal activities and that appropriate procedural safeguards applied. In October 2017, EU ministers broadly [agreed](#) that these systems should be covered.

The Council agreed its [general approach](#) on 8 December 2017 and on that basis the Presidency began negotiations with the European Parliament. A [statement](#) by Germany was annexed to the minutes of that meeting explaining its rejection of Council's general approach, namely the failure to include in the text 'clear and transparent wording emphasising compliance with fundamental rights in the recognition and enforcement of decisions', at least to take account of the most recent case-law of the Court of Justice of the EU.

The first trilogue meeting was held on 23 January 2018. In February 2018, the Council Presidency issued a [table](#) comparing the positions of the three institutions. Following six trilogue meetings, on 20 June 2018, Parliament and Council agreed on the [text of the regulation](#),¹⁴ which now includes grounds for non-recognition and non-execution in cases of a manifest breach of fundamental rights, under strict conditions, as well as a clear definition of the 'affected persons' and an explicit obligation to inform them both of the execution of a freezing or confiscation order (to the extent possible) and of the legal remedies available. The scope of the regulation has been clarified: it will apply to freezing and confiscation orders issued 'within the framework of proceedings in criminal matters'; the text also establishes that the essential safeguards of criminal proceedings set out in the EU Charter should also 'apply to proceedings in criminal matters covered by the regulation, which are not criminal proceedings'. The deadlines were extended to 45 days for the decision to recognise and execute a confiscation order and, in the case of freezing orders, to 48 hours for the recognition and another 48 hours for its execution, in urgent cases. Extensive provisions on victims' rights to restitution and compensation have also been agreed.

Parliament adopted the agreed text at its October I 2018 plenary session and subsequently, on 6 November 2018, the Council adopted Parliament's position. The final act was signed by the co-legislators on 14 November and published in the Official Journal on 28 November, as [Regulation \(EU\) 2018/1805](#). While it is in force as of 19 December 2018, the regulation only applies 24 months after that date (from 19 December 2020). It includes an obligation for the Commission to evaluate the application of the instrument, at the latest five years after the date of its application, and every five years thereafter. The corresponding report to be submitted to Parliament, Council and the EESC should include an assessment of the interaction between the respect for fundamental rights and the mutual recognition of freezing and confiscation orders, as well as of the application of the relevant provisions relating to the management and disposal of frozen and confiscated property, the restitution of property to victims and the compensation of victims.

EP SUPPORTING ANALYSIS

Vikolainen V., [Mutual recognition of freezing and confiscation orders](#), Initial Appraisal of the Commission Impact Assessment, EPRS, European Parliament, June 2017.

OTHER SOURCES

[Mutual recognition of freezing and confiscation orders](#), European Parliament, Legislative Observatory (OEIL).

ENDNOTES

¹ Definitions are based on the Commission's [Impact Assessment](#), accompanying the proposal for a regulation on the mutual recognition of freezing and confiscation orders, SWD(2016) 468 final, 21 December 2016, pp. 8-9.

² The Council of Europe (CoE) [Convention on laundering, search, seizure and confiscation of the proceeds from crime](#) (8 November 1990), ratified by all CoE Member States and the 2005 [Convention on laundering, search, seizure and confiscation of the proceeds of crime and on the financing of terrorism](#). The latter entered into force on 1 May 2008, but has been [ratified](#) by only 19 EU Member States. Both conventions include many grounds for refusing to execute freezing and confiscation orders. Several other international treaties aim at encouraging cooperation in the area of asset freezing and confiscation, examples include: the UN Convention against illicit traffic in narcotic drugs and psychotropic substances (1988); the [UN Convention against transnational organized crime](#) (2000) and the [UN](#)

[Convention against corruption](#) (2003). See S. Peers, EU Justice and Home Affairs Law, Fourth Edition, Vol. II, Oxford EU Law Library, 2016.

- ³ Mutual recognition in criminal matters means that a [judicial decision](#) taken by a competent judicial authority of a Member State must be executed in another Member State with no need of prior recognition, on the assumption that judgments to be recognised and enforced comply with the principles of legality, subsidiarity and proportionality.
- ⁴ Namely, counterfeiting currency, money laundering, human trafficking, facilitation of irregular entry or residence, sexual exploitation, drug trafficking and terrorism.
- ⁵ For extended confiscation, the directive lowers the burden of proof compared with Framework Directive 2005/212. The court thus needs only to be '*satisfied* that the property in question is derived from criminal conduct'. As a minimum, extended confiscation should be allowed at least for the criminal offences enumerated in its Article 5: corruption in the private and public sectors; participation in a criminal organisation, child pornography, interference with information systems and data, etc.
- ⁶ The directive provides for third-party confiscation if the proceeds or the property were acquired from the suspected person, knowing those assets were intended for confiscation. Member States should preserve the rights of bona fide third parties.
- ⁷ The directive further includes in Article 4 the conditions that 'criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.'
- ⁸ As of 22 May 2017, aspects of the framework decision relating to the freezing of evidence were replaced by [Directive 2014/41/EU](#) establishing the European investigation order in criminal matters.
- ⁹ These include: a defective freezing certificate (the standard form is annexed to the framework decision), the existence of an immunity or privilege under the law of the executing state, and evidence from the certificate that the legal assistance sought would breach the *ne bis in idem* principle (no one shall be tried twice for the same offence).
- ¹⁰ A Member State may issue confiscation orders to several other Member States, and it may receive for execution multiple confiscation orders relating to the same person from other Member States.
- ¹¹ The additional reasons for refusal besides a defective certificate, immunity or privilege in the executing state, the *ne bis in idem* principle and the double incrimination rule, if applicable, relate to: the protection of rights of any interested party; violation of defence rights in the issuing state; cases where the offence was committed wholly or partially on the territory of the executing state or of a third country and the law of the executing state does not authorise prosecution in a foreign court; cases where the execution of a confiscation order is barred by statutory time limitations in the executing state, provided the acts fall within the jurisdiction of that state under its own criminal law; extended confiscation cases; finally, in cases of amnesty and pardon granted by the issuing or executing state.
- ¹² Sums equal to or less than €10 000 go to the executing state, while higher amounts are divided equally between the two. In the case of property other than money, the executing state can sell it and then proceed as indicated above, transfer it to the issuing state, or dispose of it in accordance with its domestic law.
- ¹³ This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.
- ¹⁴ The preamble of the agreed text now includes a provision that the legal form of the act (i.e. regulation) should not constitute a precedent for other future legislative instruments in the field of mutual recognition in criminal matters.

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