Articles

Freezing and Confiscating Criminal Assets in the European Union

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"*If we want to disrupt and eliminate organized crime activities, taking the money is much more effective than sending a few people to prison and leaving the dirty money outside*"[1]. Monica Macovei, European Parliament Member

A. Introduction

Confiscating the proceeds of crime was first recognized as an effective way to punish lucrative organised criminal activities at the end of the 1980 s. It even became apparent that some offenders feared this punishment more than they did a prison sentence. Whereas a prison term can boost a professional criminal's reputation and earn him points with his gang or criminal organisation (in addition to the opportunity it provides to recruit new members for the organisation), the crime becomes pointless if the proceeds are confiscated: if the gang or organisation cannot take advantage of the goods or funds acquired through commission of the crime, its very existence is threatened, in the same way that a company's existence is threatened if it stops making profits.

Because they fear confiscation, offenders and their criminal organisations hide their assets, reinvesting the proceeds of crime into the legal economy, often acquiring luxury goods or real estate with the dirty money. And at last, once they know they are under investigation, they dispose of these assets, selling them and hiding the sale proceeds or transferring them to family members or to more or less opaque, fictitious companies that, if possible, are located abroad or in secrecy jurisdictions, that is, countries that do not cooperate with others. It is therefore important to identify and track down criminal proceeds well before sentencing. It is also essential to seize – or freeze[2]– them as early on in the investigation as possible (once there is a firm suspicion the offence has been committed), just as individuals are placed in pre-trial detention to keep them from escaping. Freezing assets has, for example,

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[1] Guest Editorial, *eucrim* 2/2013, p. 33 (https://eucrim.mpicc.de/archiv/eucrim_13-02.pdf).

[2] The difference between the two terms will be discussed below (section II(A)(2)).

enabled Italian judicial authorities to successfully combat the mafia by immobilising large portions of their assets early on.

International conventions: The international community first considered tracing, seizing and confiscating criminal assets in the context of combating drug trafficking. Article 5 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December, 1988, contains a very long to-do list designed to foster both the confiscation of drug-trafficking proceeds by states' parties and interstate mutual legal assistance in this area.

After this first treaty was adopted, the Council of Europe (COE) very quickly prepared its own Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, which was adopted on 8 November, 1990, and has been ratified by all COE member states. As this Convention aims to combat serious crime as a whole, its scope is not limited to drug trafficking. It advises states parties to adopt laws that recognize the offence of money laundering and provide for the confiscation of criminal proceeds, and to take measures to foster interstate cooperation (Articles 7 to 10). However, since the struggle against crime requires states to constantly adapt to new forms of criminality, the Convention's provisions had to be broadened to include the financing of terrorism, as well as to be refined and modernised. A new convention was, therefore, adopted in Warsaw on 16 May, 2005: the COE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. This more recent COE text entered into force 1 May, 2008[3], but only 16 of the 28 EU Member States have ratified it[4].

In the meantime, on 15 November, 2000, the UN adopted the Convention on Transnational Organized Crime (called the Palermo convention). Article 12 of that Convention covers confiscation and seizure, Article 13 covers international cooperation for confiscation purposes, and Article 14 covers disposal of criminal proceeds and/or confiscated assets. In addition, the United Nations Convention against Corruption of 31 October, 2003, includes provisions on freezing and confiscating assets (Article 31), as well as on international cooperation for confiscation purposes (Article 55). It also provides mechanisms for recovering assets through international cooperation for purposes of confiscation (Article 54) and restitution (Article 57)[5].

European Union: Confiscating criminal assets has become a priority of criminal justice policy in the European Union[6] as well as in a growing number of its

[3] In May, 2015, the Convention had been ratified by 26 States.

[4] Missing from this list are, in particular, three large western states – France, Germany and Italy – as well as Luxembourg, a major financial centre.

[5] D. Vlassis, D. Gottwald and J. Won Park, "Chapter V of UNCAC: Five years on experiences, obstacles and reforms on asset recovery", in *Emerging trends in asset recovery*, G. Fenner Zinkernagel, Ch. Monteith and P. Gomes Pereira (eds.), Bern, P. Lang, 2013, p. 161-172.

[6] Communication from the Commission to the European Parliament and the Council of 20.11.2008, Proceeds of crime, 'Ensuring that crime does not pay', COM(2008) 766 final; Commission from the Commission to the European Parliament and the Council of 22.11.2010, The EU Internal Security Strategy in Action: Five Steps into a More Secure Europe, COM(2010) 673 final; Report of the European Parliament of 26.9.2013 on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken (2013/2107(INI)).

member states today. Some of these states are producing specialized guides for their crime-fighting authorities[7], and the Union is boosting its efforts to train the states' investigation authorities in this regard[8]. In terms of normative policy, the European Union's specific role is to foster the adoption of rules that facilitate judicial cooperation between its member states. No one is unaware of the fact that offenders take advantage of the free movement of capital within the Union and its open internal borders to move the proceeds of their crimes quickly from one member state to another. It is, therefore, necessary to be able to confiscate property located in one member state even when the person who acquired the property through criminal activities was convicted in another – or several other – member state(s). Similarly, if an investigation reveals that a suspect owns property abroad, it must be possible to freeze that property quickly at the request of the investigating member state's judicial authorities.

In just fifteen years (1998-2014), the European Union adopted no less than seven legal instruments, taking, as usual, the accomplishments of the Council of Europe as a foundation for its legal apparatus related to criminal matters.

The European Union's first text in the area of freezing and confiscating assets was Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime[9]. Adopted at the urging of the United Kingdom, it encourages member states to take a certain number of practical measures, such as producing a guide to their legislation to be translated into the official languages of the Community[10]; establishing direct contacts among the various member states' investigators, investigating magistrates, and prosecutors[11]; and identifying and sharing best practices[12]. The Joint Action also requires Member States to limit their reservations to the COE Convention of 8 December 1990[13]. It was rapidly followed by Council Framework Decision 2001/500/JHA of 26 June 2001[14], which has the same name and almost the same content as the Joint Action[15].

The European Union then adopted five other instruments, which follow different methods of integration and the interrelationship of which sometimes raises uncomfortable questions. In keeping with the Tampere precept of mutual recognition being "the cornerstone of judicial cooperation", the Union first instituted

[7] In France, see the *Guide des saisies et confiscations*, Direction des affaires criminelles et des grâces, Ministère de la Justice, 203 pages.

[8] See, in particular the financing of the CEIFAC (European College of Financial Investigations and Analysis of Financial Crime), which is hosted by the University of Strasbourg and trains investigators from the 28 member states. www.ceifac.eu.

[9] OJ L 333 of 9 of December 1998, p. 1. The joint action was adopted by the Council on the basis of Article K.3 of the Treaty on European Union.

[10] Article 2 of the joint action.

[11] Article 4 of the joint action.

[12] Article 6 of the joint action.

[13] Article 1 of the joint action.

[14] OJ L 182 of 5 July 2001, p. 1.

[15] An important innovation of framework decision 2001/500 was to establish equal-value confiscation (Article 3). This will be discussed below in the context of framework decision 2003/577 on the execution of orders freezing property or evidence and Directive 2014/42.

mutual recognition of national freezing and confiscation orders under Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence[16] and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders[17]. However, it became clear that these instruments were difficult to implement when the assets concerned had not been precisely identified and located before the orders were issued. There first had to be a phase of cooperation through national asset-recovery offices, which Member States were asked to create by Council decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime[18]. Moreover, it rapidly became apparent that greater harmonisation was required with respect to national procedures, as they varied widely despite the progress made through Council of Europe instruments. At the same time, the legal harmonisation accomplished with regard to confiscation through Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property[19] proved inadequate to bring about the benefits expected from framework decision 2006/783/JHA on mutual recognition of confiscation orders[20]. In order to make mutual recognition work properly with respect to both freezing and confiscation, 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[21] was adopted to set out the requirements for harmonisation.

B. Mutual recognition of freezing and confiscation orders

The European Union was particularly active in the first decade of the 2000 s with regard to mutual recognition, such that framework decisions 2003/577 on freezing and 2006/783 on confiscating assets were merely new threads to be woven into an already dense normative fabric.

I. The normative context

Soon after the European arrest warrant was adopted in 2002, the EU began applying mutual recognition to the freezing and confiscation of criminal assets. At the same time, it was concerned with facilitating European judicial cooperation in gathering evidence, which was subject to the Convention on Mutual Assistance in Criminal Matters among Member States of the European Union of 29 May 2000.

[16] OJ L 196 of 2 August 2003, p. 45.
[17] OJ L 328 of 24 November 2006, p. 59.
[18] OJ L 332 of 18 December 2007, p. 103.
[19] OJ L 68 of 15 March 2005, p. 49.
[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 of 17.12.2007, COM(2007) 805 final.
[21] OJ L 127 of 29 April 2014, p. 39.

From a theoretical point of view, it was thought that both issues (freezing and confiscating on the one hand, judicial cooperation in evidence gathering on the other) could be treated together and, moreover, that the issue of freezing (a pre-trial protective measure) could be distinguished from confiscation (a post-conviction penalty). This resulted in a rather odd normative framework.

Freezing: The first EU text to be adopted was Framework Decision 2003/577 on the execution in the European Union of orders freezing property or evidence. Since possession of certain types of property can constitute proof of criminal activity and the freezing of property for protective purposes and the gathering of evidence both occur before trial, freezing assets for evidentiary purposes and freezing assets to confiscate them are treated together. Despite its simple, "efficient" appearance, this solution does not satisfy practical expectations, because the operations have different purposes. When assets are frozen for confiscation, the seized property need not be transferred until after conviction, whereas in the case of freezing assets for evidentiary purposes, transfer must take place prior to trial. The scope of the framework decision is therefore limited solely to freezing the assets; the text does not cover the transfer of the frozen assets to the requesting State[22].

Aftermath of freezing – confiscation or obtaining of evidence: In both cases, a second cooperation request must be sent, this time with respect to the transfer of the frozen assets. If the assets were frozen for confiscation, the post-freezing transfer is carried out pursuant to a confiscation request[23], though since the entry into force of framework decision 2006/783, which will be discussed later, such transfers may also be carried out in the context of mutual recognition.

If the assets were frozen for evidentiary purposes, however, the transfer of property is still subject to the Convention on Mutual Assistance in Criminal Matters among Member States of the European Union of 29 May 2000. This means that the second act of cooperation the requesting State's judicial authority must ask for is not based on mutual recognition, but on mutual legal assistance. This is like separating the arrest of a suspect by a requested state from that state's surrender of the suspect to the requesting state, such that only the order for the person's arrest is subject to mutual recognition, while her transfer must follow the old extradition procedure. Despite its readily apparent clumsiness, this is the mechanism applicable to the freezing of evidence. The process is made slightly smoother by Article 10(3) of framework decision 2003/577, which prohibits executing states from refusing, due to an "absence of double criminality", to execute a request submitted with a freezing order and asking for the transfer of an item of evidence. That provision only applies, however, if the offence concerned falls within one of the 32 categories of offences for which mutual recognition has

[22] S. Gless, "§ 39 Sicherungstellung von Vermögensgegenstände oder Beweismitteln in der EU", in *Europäisches Strafrecht*, Sieber, Brünner, Satzger, v. Heintschel-Heinegg (eds.), Baden-Baden, Nomos – C. H.Beck , 2nd ed, 2015, n° 1 (p. 694) ; S. de Biolley, V. Santamaria, L. Surano, G. Vernimmen-Van Tiggelen and A. Weyembergh, "La phase présentencielle et l'obtention de la prevue", in *L'enquête, les poursuites et les sanctions*, ed. I. Andoulsi, p. 47–120, esp. p. 64. Anthemis, Coll. Pratique du droit pénal européen devant les juridictions nationales, 2011.

[23] Article 10 (1) (b) of framework decision 2003/577.

eliminated the requirement of double incrimination and which are punished in the issuing state by a custodial sentence of at least three years. In other words, requests for classic mutual assistance attached to orders to freeze evidence based on mutual recognition are subject to mutual recognition.

European evidence warrant: To remedy this situation, the evidence warrant was created by Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters[24]. Despite its adoption, however, this instrument has been a failure. In fact, just after it was adopted several Member States made it known that they would not transpose its provisions.

One of the reasons is that the evidence warrant concerns only the *obtaining* of evidence, not its *gathering.* This is because one of the goals of the evidence warrant was to use mutual recognition to complete the process started by having evidence frozen pursuant to framework decision 2003/577. But this meant that when evidence must be gathered through a hearing or a search-and-seizure procedure, for example, the procedure was subject to classic mutual assistance. Practitioners rightly pointed out that it was too complicated to first write an international letter rogatory to have evidence gathered, and then use an evidence warrant to have it surrendered.

European investigation order: The result of this intricate structure is that the entire normative framework had to be rethought. The freezing of assets for evidentiary purposes is now treated separately from freezing for confiscation purposes: it is carried out pursuant to a new instrument, the European investigation order, created by Directive 2014/41/EU of the European Parliament and of the Council of 3 April concerning the European Investigation Order in criminal matters[25]. The Member States must transpose this mutual recognition instrument, which establishes a single, coherent regime for gathering evidence of crimes in the European Union, by 22 May, 2017.

In this article, only the freezing of assets for the purposes of confiscation will be discussed. The two instruments based on mutual recognition will be presented, first concerning freezing orders, then confiscation orders.

II. Mutual recognition of freezing orders: framework decision 2003/577

The framework decision was supposed to have been transposed by the Member States by 2 August, 2005, but seven of the 25 Member States missed this deadline, which made it difficult to put the new procedure into practice. Significant progress has been made since then: in 2014[26], 25 of the 28 Member States had transposed the framework decision[27]. However, the Commission's Report of 22 December,

[24] OJ L-350 of 30 December 2008, p. 72.
[25] OJ L-130 of 1 May 2014, p. 1.
[26] General Secretariat of the Council of the European Union, 14 May 2014, Doc. 9617/14.
[27] The 3 missing States are Greece, Italy, and Luxembourg.

2008, assessing the Member States' transposition measures indicates that "several omissions and misinterpretations were found in the national laws"[28]. These problems should nonetheless be corrected progressively as the Council of Europe's Convention on Action against Trafficking in Human Beings (2005) is ratified and Directive 2014/42 is transposed.

Another weakness of Framework Decision 2003/577 is that it has not eliminated classic mutual legal assistance in cooperation between EU Member States with regard to the freezing of assets. The requesting judicial authority is free to choose between the customary method of international letters rogatory on the one hand, or mutual recognition under the framework decision on the other. This is a significant difference from the European arrest warrant, which replaced the old extradition procedure between EU Member States[29]. Consequently, framework decision 2003/577 is not implemented as often as could be expected[30].

1. Definitions

Freezing order: In Article 2(c), the framework decision defines a "freezing order" as a "temporary prohibition of the destruction, conversion, movement, transfer or disposal of property"[31]. Although "freeze" is often used synonymously with "seize", it actually has a broader meaning: a decision to freeze assets makes it possible not only to physically seize the asset (traditional seizure), but also to implement protective measures, such as mortgaging the asset. In this case the asset is not physically seized. It is up to the Member States to decide which measures taken according to their national law will be considered "orders" within the meaning of the framework decision, but Article 1 of that decision requires "orders" to be issued by a judicial authority.

Property and connection to the offence: "Property" is defined in Article 2 (d) as "property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property". This very broad definition is reproduced almost word for word in Article 2(2) of Directive 2014/42.

With respect to the connection between such property and an offence, the framework decision provides that freezing orders must concern property identified as the proceeds or the instrumentality of an offence, or be equivalent to either the full value or part of the value of such proceeds. In the first case (especially for property identified as the proceeds of an offence), the investigative authorities must prove that

[28] COM(2008) 885 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0885:EN:NOT.

[29] Article 31 of Council framework decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

[30] On the problems with implementing this framework decision in the French legal system, see Cl. Lafont, "L'Union européenne et la captation des avoirs criminels: difficultés de mise en œuvre et préconisations", in *Garantir que le crime ne paie pas. Stratégie pour enrayer le développement des marchés criminels*, ed. Ch. Cutajar, Presses universitaires de Strasbourg, 2010, p. 256-259.

[31] The short definition in the English version of the framework decision, "property that could be subject to confiscation", seems to be a mistake. The definition given here is therefore a translation from the French.

there is a link between the person's property and the offence this person committed. This burden of proof may be easy to meet in the case of a painting the offender stole from a museum and hung in her living room, but usually the criminal proceeds have been converted into money or consist of money that has then been used to buy property of some kind. It is therefore very difficult, if not impossible, for the investigation authorities to prove a connection between the property and an offence. This is why the framework decision provides for recognizing orders freezing assets that represent the value of the criminal proceeds[32]. This rule lightens investigators' workload by making it easier to freeze property, but they are still required to provide evidence to support their estimate of the value of the criminal proceeds.

2. Offences covered by the framework decision

In theory, the framework decision applies to all freezing orders, regardless of the offence being prosecuted. But national procedural laws are not necessarily as broad in scope as Union law[33], which is probably a good thing: the European arrest warrant applies only to offences punishable, in the issuing state, by a custodial sentence of at least one year, and this has not proved to be overly restrictive. In the future, Article 3 of Directive 2014/42 will not only harmonise the framework decision's scope throughout the Union, it will also limit it, because it asks member states to provide freezing measures only for the most serious transborder crimes.

For offences falling within one of the 32 categories of offences enumerated in Article 3 – the same list as for the European Warrant Arrest –mutual recognition is made easier by the fact that the requirement of double incrimination has been eliminated (provided the offence is punishable by a custodial sentence of at least three years in the Member State issuing the freezing order, which is often the case). The executing judicial authority must therefore recognise and execute the freezing order even if the conduct does not constitute an offence according to that authority's national law. This is one of the most important practical advantages to choosing mutual recognition rather than traditional mutual legal assistance.

3. Procedure for issuing, transmitting and executing freezing orders

Issuing: When a judicial authority wants to have an asset frozen in another EU Member State, it must first issue a freezing order according to its national procedural law. It must also establish a certificate warranting that the measure ordered is accurate[34]. A standard form for the certificate is provided in the annex to the framework decision. Its main sections contain information concerning the issuing and executing judicial authorities, the freezing order and its purpose (evidence or confiscation), the

[32] Article 2(d) refers to property that the competent judicial authority considers "equivalent to either the full value or part of the value" of the criminal proceeds.

[33] According to Article 3(4) (2) of the framework decision, except for cases where double incrimination is not required, "the executing State may subject the recognition and enforcement of a freezing order… to the condition that the acts for which the order was issued constitute an offence which, under the laws of that State, allows for such freezing".

[34] Article 9(1) of the framework decision.

property at issue (which must be described and its location indicated), the suspect, the offence, and the remedies possible in the issuing state. The certificate is the key item in the case file: it provides the basis for recognition of the freezing order.

Transmitting: The issuing judicial authority then transmits its freezing order and the certificate directly to the competent judicial authority for execution[35]. The usual cooperation methods may of course be used to identify the competent authority (European judicial atlas, liaison magistrates, European judicial network, or national Eurojust representatives). Transmission may be made "by any means capable of producing a written record under conditions allowing the executing State to establish authenticity". Only the certificate needs to be translated into an official language of the executing state[36]. Translation of the freezing order is not required, making this procedure much more streamlined than international letters rogatory.

Executing: The judicial authority of the executing state recognizes the decision "without any further formality being required", which means no exequatur (enforcement) proceedings need be held, and orders its immediate execution unless there is a reason to refuse or delay execution (see *infra,* 4.). It makes its decision and informs the issuing state as soon as possible – whenever feasible, within 24 hours of receipt of the freezing order[37]. If coercive measures are necessary in order to implement the freezing order, they must be taken in accordance with the law of the executing State[38].

The property may remain frozen until the executing state "has responded definitively to any request" to confiscate property. If the freezing order is lifted, the issuing judicial authority must immediately inform the executing judicial authority[39].

Legal remedies: As executing a freezing order constitutes an infringement of property rights, it should be subject to appeal. The *Jeremy F.* case brought before the Court of Justice of the European Union by the French *Conseil constitutionnel* (Constitutional Council) in 2013[40] showed that the silence of framework decision 2002/584 as to the ability to appeal a European arrest warrant was embarrassing. Framework decision 2003/577 addresses this issue in Article 11, which provides that execution of a freezing measure must be subject to appeal, but appeal does not suspend execution. This remedy may be sought before a court in the issuing or in the executing state. However, appeals concerning the "substantive reasons for issuing the freezing order" must be made in the issuing state.

4. Denied or delayed execution

It goes without saying that mutual recognition means an issuing state's orders must be executed in the executing state, although each European instrument

[35] Article 4(1) of the framework decision.
[36] Article 9(2) of the framework decision.
[37] Article 5(3) of the framework decision.
[38] Article 5 of the framework decision.
[39] Articles 6 and 10 of the framework decision.
[40] CJEU, Case C-168/13 PPU, 30 May 2013.

provides its own exceptions to that rule. In particular, Article 7 (1) of framework decision 2003/577 lists grounds for not recognizing or executing[41] freezing orders that include defects in the certificate, the existence of immunity or a privilege in the executing state, violation of the rule of *ne bis in idem*, and, in cases where double incrimination is still required, the absence of criminalisation of the conduct in the executing state. When refusal to execute is based on a defect in the certificate, the executing authority may grant the issuing authority time to remedy the defect. If the certificate is missing but the authority "considers that the information provided is sufficient", it may exempt the issuing judicial authority from the requirement[42]. When execution is refused or impossible because the property has been destroyed, the executing authority must inform the issuing authority immediately[43].

In addition, the executing authority may delay execution in three cases: when execution may damage an ongoing criminal investigation; when the property has already been frozen and delaying execution will prolong the freeze until after the first measure has been lifted; and in cases where the property is already subject to an order "made in the course of other proceedings [not necessarily criminal] in the executing State"[44]. The issuing authority must be informed of the delay, as well as "of any other restraint measure to which the property concerned may be subjected"[45].

It took three years after framework decision 2003/577 was adopted for the logical follow-up to freezing orders for confiscation purposes, that is, confiscation orders, to become subject to mutual recognition. Fortunately, the Union took a more prudent approach to integration than it had for freezing orders[46]: Member States first undertook to harmonise their laws on confiscation through Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property[47], then adopted framework decision 2006/783 implementing mutual recognition of confiscation orders.

III. Mutual recognition of confiscation orders: Framework decision 2006/783

Framework decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders was to have been implemented by 24 November, 2008, but as of 31 March 2015, six Member States still had not transposed it[48]. In its report of 23 August, 2010 on the implementation of this

[41] Union law does not distinguish between non-recognition and non-execution. The grounds for refusal listed in Article 7 of the framework decision may constitute either non-recognition or non-execution under national law.

[42] Article 7(2) of the framework decision.

[43] Article 7(3) and (4) of the framework decision.

[44] Article 8(1)(a)-(c) of the framework decision.

[45] Article 8(2 to 4) of the framework decision.

[46] The Union limited itself to the harmonisation suggested by the Council of Europe with regard to freezing procedures (1990 Convention).

[47] O.J. L 68 of 15.3.2005, p. 49.

[48] General Secretariat of the Council of the European Union, 31 March 2015, Doc. 7574/15. The missing Member States are Estonia, Greece, Ireland, Italy, Luxembourg, Slovakia.

framework decision[49], the European Commission found that national implementing provisions are generally satisfactory, especially regarding the abolition of double criminality checks and the recognition of decisions without further formality. However, the Commission was dismayed that the national legislation of almost all Member States included several additional grounds for non-execution of confiscation orders. It encouraged the Member States that had not correctly transposed the framework decision to review their legislation and those that had not transposed it all to adopt similar measures quickly.

Just as framework decision 2003/577 did not replace traditional procedures of mutual legal assistance between the Member States with respect to freezing assets, framework decision 2006/783 does not affect the application of bilateral or multilateral agreements between Members States concerning confiscation[50]; it merely provides an additional avenue of cooperation, based on mutual recognition.

While confiscating property located abroad is certainly easier when it is already subject to a freezing order, this is not required for mutual recognition of confiscation orders. Framework decision 2006/783 can therefore be applied even when the offender's property is not subject to any protective measures. Of course, if the property has previously been frozen, framework decision 2006/783 may apply regardless of the cooperation method used for the freezing: either execution of a foreign freezing order (mutual recognition implemented through framework decision 2003/577) or issuing of a national freezing order on request of the foreign authority transmitted through traditional legal assistance.

1. Definitions

Confiscation order: Building on framework decision 2005/212 harmonizing national laws on confiscation[51], Article 2(c) of framework decision 2006/783 defines confiscation as "a final penalty or measure imposed by a court following proceedings in relation to a criminal offence or offences, resulting in the definitive deprivation of property." Consequently, mutual recognition applies only if confiscation was ordered in the scope of a criminal conviction. But subject to certain conditions, EU member states allow property to be confiscated even when the person suspected of having committed the offence that made its acquisition possible has not been convicted[52]. Such "civil" or "preventive" confiscations[53], which target the illegally acquired property rather than its owner, are feared by criminals

[49] COM(2010) 428 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0428:FIN:EN:PDF

[50] Article 21 of framework decision 2006/783.

[51] Article 1 of framework decision 2005/212.

[52] Bulgaria, Italy, Ireland and England and Wales. For a description of civil confiscation under U.S. law and preventive confiscation under Italian law, see J.-F. Thony, "Renversement, allègement ou contournement de la charge de la preuve? Quelques expériences nationales et internationales de confiscation des biens en matière de blanchiment ou de terrorisme," in *Le champ pénal, Mélanges en l'honneur de R. Ottenhof*, Dalloz, 2006, p. 269 et s., spéc. p. 279-285.

[53] Ch. Monteith, "Non-conviction based forfeiture," in *Emerging trends in asset recovery*, G. Fenner Zinkernagel, Ch. Monteith and P. Gomes Pereira (eds.), Bern, P. Lang, 2013, p. 257-263.

but cannot be executed in other member states under framework decision 2006/783. Judicial authorities may then revert to traditional mutual legal assistance procedures, which are more flexible in this regard. For example, the French Court of cassation (supreme court for civil (non-administrative) matters) ruled that a request from Italy to have a building located in France confiscated as a preventive measure, should be executed on the basis of the Council of Europe Convention of 8 November 1990 on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime, even though French law does not contain any preventive measures comparable to the Italian measure[54].

Property and connection to an offence: Property is defined here the same way it is in framework decision 2003/577, but the requirements for proving a connection between the property and an offence are less strict. According to both Article 2(e) of framework decision 2006/783 and Article 1 of framework decision 2005/2012, criminal proceeds are "any economic advantage derived from criminal offences." These framework decisions specify that such an advantage may consist of "any form of property", and define "property" by repeating the definition set out in framework decision 2003/577. As discussed below[55], that definition was clarified by Directive 2014/42 to make clear that indirect proceeds of crime may also be frozen or confiscated.

In addition to providing for "value" confiscation, which follows the same rules as in the context of freezing orders, framework decision 2006/783 provides for "extended powers" of confiscation (also called extended confiscation). Extended confiscation reaches "any or all of the assets held by a person found guilty" of a certain number of serious offences, even when the connection between the property and an offence is not formally proven, as long as the court is "fully satisfied" that the property has criminal origins[56]. If the confiscation order falls within the scope provided for by Union law[57], the executing member state must recognize the confiscation order issued pursuant to extended powers. However, if the extended confiscation powers result solely from the issuing state's law, the executing judicial authority may refuse to recognize the order[58].

2. Offences covered by the framework decision

The framework decision provides for the usual mechanism of eliminating the requirement of double incrimination for 32 categories of offences, provided the offence at issue is punishable under the law of the issuing state by a custodial

[54] French Court of cassation, criminal division, 13 November 2003, *Crisafulli*, Petition no. 03-80.371, Bull. crim. no. 74, p. 289. See the comments by Cl. Ducouloux-Favard and Y. Monnet, *Gazette du Palais* 2004 nos. 121 to 125, 30 April to 4 May, "jurisprudence", p. 7, and nos. 172 to 174, 20-22 June, "jurisprudence", p. 16.

[55] See IV B 1.

[56] In this regard, Article 2(d)(iii) refers to Article 3 of framework decision 2005/212 of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities, and Property.

[57] More precisely, by Article 5(2) of Directive 2014/42 which, according to Article 14 of that directive, replaces the scope that was originally provided for in Article 3 of framework decision 2005/212.

[58] Article 8(2)(g) of framework decision 2006/783, see also Article 8(3).

sentence of at least three years[59]. This does not mean the framework decision does not apply to other offences, but that the authorities in the executing state will determine whether the conduct in question constitutes an offence under the law of that state. Moreover, these authorities may subject mutual recognition of the confiscation order to the requirement that their national legislation provide for confiscation in such cases[60].

3. Procedure for issuing, transmitting and executing confiscation orders

Issuing and transmitting: Generally speaking, the same procedure applies as for mutual recognition of freezing orders. After it has issued a confiscation order according to its national law, the issuing authority transmits it and the corresponding certificate (for which a form is provided in the annex to framework decision 2006/783) to the competent executing authority. This authority is the one of a Member State in which there are "reasonable grounds to believe" that the natural or legal person concerned by the confiscation order has property or income.

When the confiscation order targets specific property, the issuing authority transmits the order and certificate to the Member State where it "has reasonable grounds to believe" the property is located. In other cases, the issuing authority transmits the confiscation order to the Member State where the natural or legal person against whom the confiscation order has been issued "is normally resident or has its registered seat"[61]. Transmission of a confiscation order does not restrict the right of the issuing State to execute the confiscation order itself. If it does so, the issuing authority must inform the executing authority, which deducts the amount thus recovered from the amount still to be confiscated[62].

Executing: Confiscation orders must be recognized and executed "without further formality" and "forthwith". However, the authorities of the issuing and executing states may agree on specific means for executing the confiscation order. Value confiscation has certain clear advantages in this regard. For example, the authorities may decide that, subject to certain conditions, confiscation will take the form of a requirement to pay an amount of money corresponding to the value of the property concerned. If money cannot be recovered, the confiscation order may be executed by confiscating "any item of property available"[63]. In all cases, the executing authority must inform the issuing authority of how it intends to respond to the confiscation order: execution, non-execution, or application of other measures[64].

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[59] Article 6(1) of framework decision 2006/783.
[60] Article 6(3) of framework decision 2006/783.
[61] Article 4 of framework decision 2006/783.
[62] Article 14 of framework decision 2006/783.
[63] Article 7 of framework decision 2006/783.
[64] Article 17 of framework decision 2006/783.

Article 12 of the framework decision expressly addresses the issue of the law governing execution, which framework decision 2003/577 does not. This Article reiterates the rule of *locus regit actum,* according to which a request for judicial cooperation is executed according to the law of the executing state. It provides a significant exception, however, for confiscation orders issued against legal persons. Such orders must be executed even if the executing State does not recognise the criminal liability of legal persons. In addition, provided the issuing state agrees, the executing state may apply other measures, including custodial sanctions, as an alternative to the confiscation order.

Plurality of executing States: Confiscation orders may also be transmitted to several executing states if different items of property covered by the confiscation order are likely to be located in those States. The same applies if the issuing authority has reasonable grounds to believe that a specific item of property is located in any states specified in the confiscation order, or if confiscation of a specific item of property involves action in more than one executing State. If money is to be confiscated, the confiscation order may only be transmitted to several Member States simultaneously if the underlying property has not been frozen and the value of the property that may be confiscated in any one executing State is not likely to cover the full amount sought under the confiscation order[65].

When a confiscation order has been sent to several executing states, the total value of the property or funds confiscated may not exceed the value sought under the confiscation order. The issuing authority must immediately inform the executing authorities of any execution carried out in another state if there is "a risk that execution beyond the maximum amount may occur"[66].

Multiple confiscation orders: If an executing state receives several confiscation orders concerning the same person and that person does not have enough property or money in that state for all the orders to be executed, it must determine which order(s) to execute. To do so, it will take into account various circumstances, such as the existence of a freezing measure predating one of the confiscation orders, the seriousness of the offence, its place of commission, and the date of the confiscation order[67].

Legal remedies: According to framework decision 2006/783, the remedies against execution of confiscation orders shall be brought only before the courts of the executing state[68], whereas framework decision 2003/577 also allows appeals before the courts of the issuing State. Moreover, the action may have suspensive effect under the law of the executing State. However, if the remedies concern the substantive reasons for issuing the confiscation order, the challenge must be brought before a court of the issuing State[69].

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[65] Article 5 of framework decision 2006/783.
[66] Article 14(2) and (3) of framework decision 2006/783.
[67] Article 11 of framework decision 2006/783.
[68] Article 9 of framework decision 2006/783.
[69] Articles 9(2) and 13(2) of framework decision 2006/783.

4. Grounds for non-execution

The framework decision sets out the same grounds for non-recognition or non-execution[70] as does framework decision 2003/577 (defective certificate; immunity or privilege; rule of *ne bis in idem;* requirement of double incrimination not satisfied, if applicable) and adds numerous others in its very long Article 8. There is, thus, once again a difference between the regimes for recognizing freezing orders and confiscation orders. These additional grounds include: protection of the rights of any interested party, including good-faith third parties; violation of defence rights in the issuing state when ordering confiscation – which shows how fragile the Member States' "mutual trust" is; and execution of the confiscation order is time barred according to the law of the executing state, if this law is applicable to the conduct.

One of the reasons for refusal warrants particular criticism because it indirectly limits the jurisdiction of the courts in the issuing states in a manner one would have thought was no longer possible in the Union: execution may be denied if the offence was committed wholly or partially in the executing state or a third country and the law of the executing state does not authorise prosecution of the offence in a foreign court.

Another ground to refuse to execute is that the confiscation order was issued pursuant to extended powers provided for by the law of the issuing state[71]. However, when these extended powers are provided for in framework decision 2005/212, denial is prohibited. As long as the confiscation order does not fall within the obligatory scope of that framework decision[72], the executing state need only execute the confiscation order "to the extent provided for in similar domestic cases under national law"[73].

Two final reasons for blocking confiscation are set out in Article 13 of framework decision 2006/783: amnesty and pardon, which may be granted by the issuing or the executing state. Such a long list of reasons for barring execution of confiscation orders certainly reduces the effectiveness of the whole framework decision.

5. Disposal of confiscated assets

Article 16 of the framework decision addresses the difficult question of how to divide the recovered funds between the issuing and executing states. In particular, it provides that amounts less than EUR 10,000 go to the executing state, whereas other amounts are shared 50/50 between the two. Property other than money may be sold and the proceeds distributed as just mentioned; "may be transferred to the issuing State" with that State's consent; or may be distributed according to the law

[70] As with framework decision 2003/577, the distinction between non-recognition and non-execution has no effect on Union law; it simply helps illustrate the variety of national regimes.

[71] Article 8(2)(g) of framework decision 2006/783. See *infra*, IV B 1.

[72] See article 3 § 2 of framework decision 2005/212.

[73] Article 8(3) of framework decision 2006/783.

of the executing State. In the end, preference is given to the State that actually confiscated the property or money within its borders.

C. Interstate cooperation to identify criminal assets

Before assets may be frozen or confiscated, they must be identified. This is the goal of so-called "financial investigations" (or "asset-recovery investigations"), which are increasingly being conducted by specialised investigators at the same time as the classic forensic investigation is being conducted[74]. At the transnational level, regardless of whether mutual legal assistance or mutual recognition is implemented, foreign assets also need to be identified and located before they may be frozen or confiscated.

Each type of asset is indicated in a manner and by institutions specific to the country in which it is located. For example, a public institution maintains records containing the names of real property owners (title registry). This institution must be contacted to determine whether a person owns a particular piece of property or, more broadly, what property a particular person owns. For bank accounts, some countries have a file (e.g., FICOBA in France) listing all bank-account holders and the numbers of their accounts at banks in that country. National investigators have access to such files subject to certain conditions, but this is certainly not the case for foreign investigators. This explains why cooperation had to include the identification of criminal assets.

An important issue is whether such tasks are to be performed by the executing authority or the judicial authority requesting mutual legal assistance. For various reasons, the latter now perform them and the so-called asset recovery offices (ARO), created through decision 2007/845, play a key role in helping them identify and locate criminal assets.

I. Identifying the assets before requesting judicial cooperation

Identifying assets is almost impossible for national investigators when a suspect or convicted person owns property abroad. Investigators may suspect that a person has a bank account in one country, owns real estate in another, and securities in yet another, but they are not in a position to verify their suspicions.

To overcome this difficulty, judicial authorities had developed the habit of sending international letters rogatory asking their foreign counterparts to conduct the long and costly research and then freeze or confiscate the property they had identified. While logical in itself, this approach, which shifts a large part of the investigation to the foreign authorities, came up against practical realities. Requested authorities were rarely inclined to spend money and mobilise human

[74] B. Petit, "Une nouvelle approche de la lutte contre la criminalité organisée : la prise en compte du volet financier des enquêtes", *Actualité juridique Pén*al 2012, p. 148; Ph. Aktinson, "Asset Tracing", in *Emerging Trends in Asset Recovery*, G. Fenner Zinkernagel, Ch. Monteith and P. Gomes Pereira (eds.), Bern, P. Lang, 2013, p. 219-233.

resources for the benefit of a foreign investigation, especially since, economically speaking, the targeted offenders did not necessarily cause harm in the country where they had invested their criminal proceeds. On the contrary, they brought in funds and thus played at least a minimal role in the national economy. Requested judicial authorities therefore frequently took a passive attitude towards requests for legal assistance of this type. At best, they delayed acting on them.

While practical experience made it possible to get around some of the more cumbersome aspects of mutual legal assistance[75], today it seems increasingly important for the request for assistance ("request to search for assets abroad") to be preceded by a preparatory phase of police cooperation and thereby internationalise the financial investigation. In such a phase, the investigators responsible for tracking down the suspects' assets first call on their foreign counterparts to identify and locate the assets held abroad. They then transmit the information obtained through an exchange of police information to their judicial authority so that it may name such assets with precision in its request for legal assistance. There are, however, a few third countries outside the European Union[76] that only respond to requests for judicial, not police, cooperation regarding locate assets.

When the freezing or confiscation of property located abroad is carried out through a mutual recognition procedure, the tracing work cannot be transferred to the executing authority because to be recognized and executed, the freezing or confiscation order must accurately describe the property subject to the measure and its location[77].

II. The role of asset recovery offices

To give some consistency to the preparatory cooperation phase, specialized institutions called Asset Recovery Offices (ARO) were progressively set up in various places throughout the world. In the European Union, Member States were each required to set up an ARO by decision 2007/845 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime. At the end of 2010, 22 of the 27 member states had established an ARO as required by the decision[78].

According to decision 2007/846, the purpose of an ARO is to facilitate "the tracing and identification of proceeds of crime and other crime related property

[75] Such as the spontaneous transmitting of information or the exchange of experts. See R. Wyss, "Proactive cooperation within the mutual legal assistance procedure", in *Emerging trends in asset recovery*, G. Fenner Zinkernagel, Ch. Monteith and P. Gomes Pereira (eds.), Bern, P. Lang, 2013, p.105-113.

[76] Morocco, for example.

[77] Framework decisions 2003/577 and 2006/783 do not provide for requesting investigations for the purpose of identifying property to be frozen or confiscated. See Cl. Lafont, "L'UE et la captation des avoirs criminels ; difficultés de mise en œuvre et préconisations", in *Garantir que le crime ne paie pas. Stratégie pour enrayer le développement des marchés criminels*, Ch. Cutajar (ed.), Presses universitaires de Strasbourg, 2010, p. 256-259.

[78] Report from the Commission to the European Parliament and the Council based on Article 8 of the Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime of 12.4. 2011, COM(2011) 176 final.

which may become the object of a freezing, seizure or confiscation order made by a competent judicial authority in the course of criminal or, as far as possible under the national law of the Member State concerned, civil proceedings"[79]. As AROs cooperate with each other, investigators can ask their national AROs to identify assets abroad[80]. AROs help local investigators draft their requests in the appropriate terms and transmit them to the foreign ARO in question, and also process the requests received from their counterparts abroad[81]. AROs may also spontaneously exchange information to the extent permitted by national law[82].

According to the Commission report of 2011[83], access to financial information (notably to bank account information) and centralised land registers is the AROs' biggest challenge, partly because several member states lack national land and bank-account registers.

The AROs are part of international networks, the oldest of which is the Camden Asset Recovery Interagency Network (CARIN). Set up under the auspices of Europol in The Hague in 2004, it originally included only a few EU Member States, but under the influence of decision 2007/845/JHA, it has been expanded to include all of them[84]. In addition, the European network has created contact points in numerous third countries such that today it links more than fifty countries and covers a sizable portion of the planet. This network also includes nine international organisations as either observers or partners: the Egmont Group, Eurojust, Europol (which runs the secretariat), the International Criminal Court, the International Monetary Fund, INTERPOL, OLAF, the United Nations Office on Drugs and Crime (UNODC), and the World Bank. Given this international context, the World Bank and UNODC teamed up to publish a Guide for Practitioners[85].

Setting up the AROs was a decisive step toward implementing the policy of confiscating criminal assets. To perfect the mechanism and render it fully operational internationally, national freezing and confiscation procedures must be made consistent with each other through legal harmonisation.

D. Harmonizing national procedures for freezing and confiscating criminal assets

"Legal harmonization" does not mean that the laws of the Member States are made uniform such that they are all identical, but that they are made as similar as needed to facilitate mutual recognition of judicial decisions within the meaning of Article 82(2) of the Treaty on the Functioning of the European Union. The

[79] Article 1 of decision 2007/846.
[80] Article 2 of decision 2007/846.
[81] Article 3 of decision 2007/846.
[82] Article 4 of decision 2007/846.
[83] COM(2011) 176 final, cited above.
[84] On the French ARO, see J.-M. Souvira, P. Mathys and S. Defois, "La plate-forme d'identification des avoirs criminels (PIAC), outil à disposition des enquêteurs et magistrats", *Actualité Juridique Pénal* 2012, p. 134.
[85] *Asset Recovery Handbook. A Guide for Practitioners*, J.-P. Brun, L. Gray, C. Scott, K. M. Stephenson, STAR (Stolen Asset Recovery Initiative), the World Bank and UNODC, 264 pages.

purpose is clearly to make national rules consistent with each other in the context of judicial cooperation. This is why the Union adopts so-called "minimum rules", which the Member States must transpose into their national legislation[86].

Confiscation was the first target of legal harmonisation in the Union, which took its first step towards harmonisation in this area by adopting Council Framework Decision 2005/212 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property. That was followed by Directive 2014/42 on the freezing and confiscation of proceeds of crime in the European Union, which the Member States must transpose no later than 4 October 2016[87]. Since the United Kingdom and Denmark opted out of the legislation adopted in connection with the area of freedom, security and justice, they did not take part in drafting this directive and are not subject to it[88].

Unlike framework decision 2005/212, Directive 2014/42 addresses freezing as well as confiscation, and improves on the framework decision in three areas: it clarifies which offences may be subject to confiscation measures; broadens the scope of confiscation and freezing powers; and institutes procedural guarantees for the persons concerned.

I. Criminal offences concerned by freezing and confiscation

None of the previous texts told Member States which offences they should make subject to freezing measures. Article 3 of Directive 2014/42 fills this void. With regard to confiscation, the Directive maintains the broad scope provided for in framework decision 2005/212.

1. Offences concerned by freezing

Member States must make freezing applicable in the context of investigations conducted for a series of offences incorporated into Article 3 by reference to European instruments (conventions, framework decisions, and directives) concerning these offences. These are, for the most part, the "eurocrimes" set out in Article 83(1) of the Treaty on the Functioning of the European Union: corruption (of officials and private corruption), fraud and counterfeiting of means of payment, money laundering, terrorism, illicit drug trafficking, organised crime, trafficking in human beings, sexual exploitation of women and children, and computer crime.

2. Offences concerned by confiscation

Pursuant to framework decision 2005/212 Article 2, confiscation should be applicable to criminal offences punishable by a custodial sentence of more than one

[86] Directive 2014/42, Article 1(1): "This Directive establishes minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters".

[87] O.J. L-127/39 of 29 April 2014. Concerning the delay, see the correction published in OJ L-138/114 of 13 May 2014.

[88] See points 43 and 44 of the Directive's preamble. Ireland, however, indicated its desire to take part in the Directive. See the preamble, point 42.

year. The goal is obviously to make it widely applicable: in France, simple theft (committed once by an unarmed individual without forced entry) is subject to a maximum of three years' imprisonment. And since this article was not replaced by Article 3 of Directive 2014/42[89], the Members States must give confiscation the broader scope it enjoys under the framework decision.

As a result, confiscation applies to a much broader array of offences than freezing does. This is logical because a person targeted by a confiscation order has already been found guilty, whereas a person subject to a freezing measure is still presumed innocent, and European lawmakers believed that except in cases involving serious offences, one's property rights could not be restricted in the absence of a conviction[90].

II. New freezing and confiscation powers

To give judicial authorities broader powers, Directive 2014/42 modifies and expands the definitions of the legal concepts set out in the framework decisions discussed above. Most of the changes concern confiscation, but the revised definition of "criminal proceeds" must be examined first, as it increases the opportunities to freeze as well as to confiscate property. The consequences these broader confiscation powers have on the related freezing measures will be examined last.

1. Direct and indirect proceeds of crime

Article 2 of the directive clarifies that "criminal proceeds" are not necessarily the direct proceeds of the offence: "proceeds" means "any economic advantage derived directly or indirectly from a criminal offence"[91]. For example, if artwork is purchased with the money stolen from a bank or received as a bribe, it constitutes indirect proceeds of the offence and can therefore be confiscated. However, it will be difficult for investigators to prove the connection between the artwork and the illicit money. Value confiscation discussed above in the context of framework decision 2003/577 therefore continues to be very useful.

In addition, according to the new definition, criminal proceeds "may consist of any form of property and include any subsequent reinvestment or transformation of direct proceeds and any valuable benefits".

2. Extended powers of confiscation

Value confiscation: Article 4(1) of the directive states that confiscation may be operated on "property the value of which corresponds to [criminal] instrumentalities or proceeds". Already practiced under framework decisions 2001/500, 2003/

[89] Directive 2014/42 Article 14.

[90] An exception to this rule is being carved out, however, since confiscation without a conviction is now possible in some cases, as discussed below.

[91] Pursuant to directive 2014/42 Article 14, Article 2 of that directive replaces Article 1 of framework decision 2005/212.

577, 2005/212 and 2006/783, so-called "value" or "equivalent-value" confiscation makes it possible to confiscate money when other assets constitute the proceeds of the offence and vice versa. For example, artwork purchased with money from bribes may be confiscated, even when the purchase with such money is not proven, and the money received for the sale of a stolen work of art may be confiscated.

Note that under the directive, value confiscation is not subject to the requirement that the property constituting the direct or indirect proceeds of the crime be unrecoverable, as was the case under framework decision 2001/500[92]. The Member States must therefore take a broad approach to value confiscation – which, in practice, is the most effective – and cannot require that it be impossible to recover the criminal assets[93].

Confiscation by default: Article 4(1) also requires Member States to allow confiscation to be ordered in a greater number of legal proceedings, including in absentia. Recall that there is a European instrument that harmonises the procedural rights of persons tried in absentia to facilitate mutual recognition of judgments issued this way (Council Framework Decision 2009/299 of 26 February 2009 enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial[94].

Confiscation without a criminal conviction: As mentioned above, mutual recognition applies only to confiscation orders issued when an offender has been convicted. In other words, confiscation must be ordered as punishment or a preventive measure (*mesure de sûreté*) to which the offender is subject. But some Member States have developed highly effective confiscation measures that may be implemented even if, for various reasons, the accused has not been convicted: he/she absconded, is dead or exempt from liability, or, quite simply, the investigators did not gather enough evidence to support an indictment.

Directive 2014/42 tries to generalise these procedures throughout the Union by detaching the definition of confiscation from the requirement of a criminal conviction. It therefore replaces the old definition set out in 2005/212[95] with one according to which confiscation is "a final deprivation of property ordered by a court in relation to a criminal offence"[96]. Of course, the court must first establish a connection between the property targeted by the confiscation order and a criminal

[92] Article 3 of framework decision 2001/500 reads: "Each Member State shall take the necessary steps to ensure that its legislation and procedures on the confiscation of the proceeds of crime also allow, *at least in cases where these proceeds cannot be seized*, for the confiscation of property the value of which corresponds to such proceeds" (emphasis added). Pursuant to Article 14 of directive 2014/42, that directive replaces Article 3 of framework decision 2001/500.

[93] J.-F. Thony, *supra*, esp. p. 287-291.

[94] OJ L 81 of 27 March 2009, p. 24.

[95] According to Article 1of framework decision 2001/500, confiscation means "a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property".

[96] Article 2(4) of the directive.

offence, but it does not necessarily have to have convicted the person affected by the order of that offence.

Moreover, when confiscation cannot be ordered after a trial in absentia and the person's absence is due to illness or their having absconded, Member States must allow confiscation in another form[97]. They must, therefore, make confiscation possible without a conviction in cases where criminal proceedings have been initiated but have not resulted in a judgment, provided (i) the proceeding concerns an offence that is liable to give rise, directly or indirectly, to an economic benefit, and (ii) it could have resulted in a conviction had the suspect or accused person been able to stand trial. Member States are of course free to extend confiscation without a conviction to other situations, but any future expansion of European mutual recognition procedures will probably be limited to such confiscation as described in the directive.

Extended confiscation: Extended confiscation is an extremely efficient way to combat criminal organisations: it allows for confiscating property that has not been proven to have a connection with the offence for which the suspects are being prosecuted, but for which they are unable to establish legal ownership. For this to occur, the court must be "satisfied that the property in question is derived from criminal conduct" (Article 5 of the Directive[98]). The burden of proof has been made significantly lighter since framework decision 2005/212: confiscation may be ordered as long as there is a probability that the property is linked to criminal conduct[99]. According to the Directive, in order to establish that probability, the court must consider "the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person".

However, the scope of application of extended confiscation under the Directive is narrower than under Framework Decision 2005/212. The Directive provides that extended confiscation must be implemented by Member States in cases of criminal offences likely to give rise, directly or indirectly, to economic benefit[100], which means at least corruption in both the private and public sectors, participation in a criminal organization, child pornography, and interference with information systems and data, as well as all the offences that can give rise to freezing[101], provided they are punishable by a custodial sentence of at most four years[102].

Confiscation of the assets of third parties: Moreover, the Directive requires Member States to provide for the confiscation of criminal assets that are not – or are no longer – the property of the person convicted. The goal of this measure is to

[97] Article 4(2) of the directive.

[98] According to Article 14(1) of the directive, Article 5 replaces Article 3 of framework decision 2005/212.

[99] M. Kilchling, "§ 16 Geldwäsche" in *Europäisches Strafrecht*, Sieber, Brünner, Satzger, v. Heintschel-Heinegg (eds.), Baden-Baden, Nomos – C. H.Beck , 2nd edition, 2015, no. 21, p. 336.

[100] Article 5(1) of the directive.

[101] Article 5(2)(e) of the directive refers to Article 3, which was discussed before under "offences concerned by freezing".

[102] Article 5(2) of the directive.

frustrate the attempts by some criminals to render their organisations insolvent by transferring ownership of their criminal proceeds to their spouses or children, or to legal persons. Confiscation of the assets of third parties applies as soon as a person is suspected or prosecuted, which means that a criminal conviction is not necessary. National laws must make such confiscation possible "at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation"[103]. The rights of bona fide third parties, whose property cannot be confiscated, are protected[104].

3. New powers with regard to freezing?

According to the Directive, "freezing" means not only the temporary prohibition of the transfer, destruction, conversion, disposal or movement of property, but also temporarily assuming custody or control[105]. Unfortunately, this expanded definition is unclear with regard to the property that may be subject to a freezing order. In particular, do the proactive methods involved in confiscation without a criminal conviction, extended confiscation, and confiscation of third-party assets also apply to freezing?

According to Article 7(1) of the Directive, "Member States shall take the necessary measures to enable the freezing of property with a view to possible subsequent confiscation". Since the type of confiscation is not specified, this statement may be taken to mean that any property that may be confiscated may also be frozen – a rule followed in France pursuant to the so-called Warsmann Act (law no. 2010-768 of 9 July 2010). However, Article 7(2) confuses matters by providing that "property in the possession of a third party, as referred to under Article 6, can be subject to freezing measures for the purposes of possible subsequent confiscation". Does that mean property that may be subject to extended confiscation or confiscation without a conviction is not subject to the same regime? Is Article 7(2) trying to say that third parties are also likely to be targeted by freezing orders? From a literal and purely systematic standpoint, the answers are not clear and the Directive's wording is unfortunate. Teleologically speaking, it seems reasonable to think that European lawmakers wanted to make it possible to freeze all types of assets likely to be subject to confiscation, including those in the possession of third parties. Article 7(2) should, therefore, be read as *also* enabling the freezing of assets referred to in Article 6.

III. Safeguards

A major contribution of Directive 2014/42 is that it sets out a series of safeguards intended to protect both persons affected by freezing or confiscation measures and victims of criminal offences punished by confiscation. Concerning the victims, the

[103] Article 6(1) of the directive.
[104] Article 6(2) of the directive.
[105] Article 2(5) of the directive.

directive makes clear that confiscation should not prevent them from seeking compensation for their claims. As for the procedural guarantees provided for persons targeted by a freezing or confiscation measure, they are welcome not only from an axiological standpoint as a necessary counterweight to the considerable powers granted criminal justice authorities, but also because their transposition into national legislation will enable Member States' judicial authorities to work with laws that are more similar to each other, and therefore to trust each other more. Mutual trust among national judicial authorities is the political foundation for the principle of mutual recognition. The failures to execute freezing orders that occasionally have been observed even though no official grounds for denying execution have been cited may become rare through such progressive – "race to the top" – harmonisation of citizens' procedural guarantees.

More specifically, Directive Article 8 first sets out a guarantee applicable to both freezing and confiscation, namely the right to appeal enjoyed by the person whose property is targeted. It then sets out guarantees specific to freezing, and others specific to confiscation.

1. Right to appeal

The right of citizens to appeal freezing and confiscation orders was set out in earlier texts, including the framework decisions setting up mutual recognition[106]. But the right to "an effective remedy and a fair trial", which may be exercised only if the person concerned by the measure is duly informed thereof[107], is now the guiding principle in this area, as indicated by its placement Article 8(1). The paragraphs that follow merely clarify issues with regard to challenging freezing and confiscation orders.

A person whose property is affected by a freezing order must be able to appeal that order to a court in accordance with procedures set out in national law. However, national law may provide that when the freezing order has not been issued by a judicial authority, it must be submitted to a judicial authority before it can be challenged in court[108].

For confiscation, however, the appealing party must always be able to bring the appeal before a court[109]. More specifically, for extended confiscation, which involves the most serious infringement of individual rights, the directive requires national law to provide that the affected person shall have an effective opportunity to challenge the circumstances of the case, including the facts and evidence on the basis of which the property was deemed to be derived from criminal conduct.

[106] Article 4 of framework decision 2005/212, Article 11 of framework decision 2003/577 and Articles 9 and 13 of framework decision 2006/783.

[107] Articles 8(2) and 8(6), 2nd phrase, of the directive.

[108] Article 8(4) of the directive.

[109] Article 8(6) of the directive.

2. Guarantees specific to persons affected by freezing orders

With regard to freezing orders, the new guarantees provided by the directive are that property must not be frozen longer than necessary to preserve it, and that if freezing is not followed by confiscation, the property must be returned immediately[110]. As basic as they seem, these guarantees warrant being stated explicitly. Unfortunately, the right to be assisted by counsel is provided for with regard to confiscation, but not freezing.

3. Guarantees specific to persons affected by confiscation orders

The directive then sets up safeguards to protect persons affected by confiscation orders. Member States must ensure that persons whose property is affected by a confiscation order have "a right of access to a lawyer" throughout the confiscation proceedings and that they are informed of that right[111]. Moreover, third parties are entitled to claim title or other property rights, including if their property is being or has been confiscated[112].

E. Conclusion

Fifteen years of work on the freezing and confiscation of criminal assets, no fewer than seven legal instruments adopted by the Union … for results that only start to be felt in the practice of judicial cooperation. Moreover, Union law must be updated as framework decisions 2003/577 and 2006/783 on mutual recognition have become obsolete because they do not apply to the most effective freezing and confiscation orders recently established under directive 2014/42, which the Member States will soon transpose. Mutual recognition, therefore, needs to be extended to confiscation without criminal conviction and confiscation of the assets of third parties. In addition, the recognition of freezing orders that guarantee the efficiency of these confiscations will have to be provided for. It would probably make sense to adopt only one instrument – a directive based on Article 82 of the Treaty on the Functioning of the European Union – dealing with the mutual recognition of both freezing and confiscation orders. Since the seizure of objects for evidentiary purposes is now covered by the European investigation order, the freezing for confiscating purposes and the confiscation itself may be covered by the same instrument.

The accumulation of texts has therefore not come to an end. Perhaps more clearly than in other areas of European criminal law, studying the freezing and confiscation of criminal assets, shows just how much the Union is groping for solutions to implement its criminal justice policy.

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[110] Articles 8(3) and 8(5).
[111] Article 8(7) of the directive.
[112] Article 8(9) of the directive.