



EUROPEAN COMMISSION

*Brussels, 10.7.2017
C(2017) 4615 final*

*Ms Malu DREYER
President of the Bundesrat
Leipziger Straße 3 - 4
D – 10117 BERLIN*

Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders {COM(2016) 819 final}.

This proposal forms part of a broader package of ambitious measures designed to strengthen the European Union's capacity to fight the financing of terrorism and organised crime adopted by the Commission on 21 December 2016, thereby delivering on the commitments made in its Action Plan for strengthening the fight against terrorist financing of 2 February 2016¹.

Confiscating assets generated by criminal activities is a very efficient tool to fight crime as it deprives criminals of the proceeds of their illegal activities.

The proposed Regulation will facilitate the cross-border recovery of criminal assets and lead to more efficient freezing and confiscation of funds from illicit origin in the European Union without cumbersome formalities. Recovered assets will be used for the compensation of victims, where national legislation allows for it. It also provides additional funds to invest back into law enforcement activities or other crime prevention initiatives or to be used for other public interest or social purposes.

The Commission welcomes the Bundesrat's broad support for the aim of the proposal but notes certain doubts relating to the nature of the proposal (Regulation), the empowerment of the Commission to amend the annexes through delegated acts and the introduction of (too) strict deadlines for freezing and confiscation orders. The Commission also notes the Bundesrat's request to introduce additional grounds for refusal based on fundamental rights

¹ COM(2016) 50 final.

and on time-limitation in the executing state and to foresee specific rules with regard to the management and disposal of confiscated property in case of victims' compensation.

The Opinion of the Bundesrat has been made available to the Commission's representatives in the ongoing negotiations with the co-legislators.

Discussions between the Commission and the co-legislators (the Council and the European Parliament) concerning the proposal started in January this year and are ongoing.

The Commission remains hopeful that an agreement on this proposal will be reached in the near future. In response to the more technical points in the Opinion the Commission would like to refer the Bundesrat to the attached annex.

The Commission hopes that the additional explanations provided address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Věra Jourová
Member of the Commission*

ANNEX

The Commission has carefully considered the issues raised by the Bundesrat in its Opinion and is pleased to offer the following observations.

Point 2: The Commission has carefully analysed the choice of the legal nature of this instrument. It considers that a regulation is the most appropriate form to be used for a mutual recognition instrument for the following reasons:

A regulation is directly applicable and provides greater legal certainty. It will avoid the transposition problems that the current Framework Decisions 2003/577/JHA and 2006/783/JHA were subject to (until now some Member States still have not transposed the Framework Decisions, several Member States have not complied with the requirements of the Framework Decisions and many Member States have transposed the Framework Decisions into their national law in a different manner).

Whereas a directive would give Member States a margin for transposition, national legislation might vary between Member States. Although in the case of harmonisation measures, the necessity to leave this margin to Member States to adapt it to their national situation may well be justified, the situation is different with mutual recognition instruments, which concern only cross-border procedures.

Moreover, mutual recognition instruments provide a tool to practitioners that should be easy to work with. Procedures for the recognition of judicial decisions should be effective and uniformly applied in all the Member States. To ensure uniformity in the application of mutual recognition instruments, a directly applicable act in the form of a regulation is needed.

In the area of civil law, several mutual recognition instruments have been adopted in the form of a regulation and have proven to be efficient². Judges and other practitioners have applied the regulations and national law in parallel without any particular problems. There is no specific reason why this could not be done in the area of criminal law.

Point 3: The Commission underlines that the objective of this proposal is to facilitate the mutual recognition of freezing and confiscation orders in cross-border cases. This results clearly from the title of the proposed Regulation, its subject-matter (Article 1) and the corresponding recitals. Moreover, the proposed Regulation is based on Article 82(1) (a) of the Treaty on the Functioning of the European Union which supports action in the field of mutual recognition of judgments and judicial decisions in criminal matters. The Commission has never intended with this proposal to establish minimum rules which lead to the harmonisation of rules on freezing and confiscation.

² For example, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1.

Article 13 of the proposal, to which the Bundesrat refers in its Opinion, lays down the conditions for issuing and transmitting a freezing order in cross-border cases and has to be seen against this background. The purpose of this Article is to align the proposal with Article 6 of the Directive 2014/41/EU regarding the European Investigation Order³, thereby ensuring that the same conditions apply to freezing for evidence and freezing for subsequent confiscation.

As regards Article 36 of the proposal which foresees the empowerment of the Commission to adopt delegated acts in order to amend the certificate and the form set out in the annexes I and II of the proposal, the purpose was to create a faster and more flexible procedure for amendments than a complex legislative procedure. The exercise of this delegation is subject to strict conditions and the European Parliament and the Council have the right to object to any amendment and to revoke the delegation of powers at any time (see Article 37).

Point 4: The proposed Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It should be applied in accordance with those rights and principles⁴. Moreover, given that the scope of the proposal is limited to freezing and confiscation orders issued "within the framework of criminal proceedings", all six European Union Directives⁵ which concern the procedural rights of suspects and accused persons in criminal proceedings should be applied⁶.

Against this background and at the current advanced stage of European integration in the area of criminal law, the Commission considers that it is not necessary to include an explicit ground for refusal based on fundamental rights concerns. The principle of mutual trust could be undermined by such a wide and very general ground for refusal (as foreseen in Article 11 of Directive 2014/41/EU regarding the European Investigation Order).

Moreover, recent case-law of the European Court of Justice in the context of the European Arrest Warrant⁷, to which the Bundesrat refers to in its Opinion, clarified that where the executing authority has substantial grounds to believe that there is a real risk of inhuman or degrading treatment in a specific case, it must postpone its decision and request additional information from the issuing authority. If the existence of that risk cannot be discounted within a reasonable time, the executing authority must decide whether the procedure should

³ OJ L 130, 1.5.2014, p. 1–36

⁴ See recital 17.

⁵ Directive 2010/64/EU on the right to interpretation and translation (OJ L 280, 26.10.2010, p. 1-7), Directive 2012/13/EU on the right to information (OJ L 294, 6.11.2013, p. 1-12), Directive 2013/48/EU on the right of access to a lawyer, Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial (OJ L 65, 11.3.2016, p. 1-11), Directive 2016/800/EU on procedural safeguards for children (OJ L 132, 21.5.2016, p. 1-20), Directive 2016/1919/EU on legal aid (OJ L 297, 4.11.2016, p. 1-8).

⁶ See recital 18.

⁷ Judgment of 5 April 2016 in joint cases C-404/15 and C-659/15, Aranyosi and Caldaru (ECLI:EU:C:2016:198).

be brought to an end. This jurisprudence shows that even if there is no explicit ground for refusal related to fundamental rights, mutual recognition can be refused in serious cases.

Therefore, a much wider explicit ground for refusal in the Regulation is unnecessary and would considerably hamper the efficiency of the mutual recognition instrument.

Point 5: The Commission welcomes the general support of the Bundesrat for deadlines for freezing and confiscation orders and more efficient communication and consultation between the competent authorities.

Freezing as a precautionary measure needs to be carried out quickly, short deadlines are therefore proposed for the recognition and execution of freezing orders. The execution of confiscation orders can take place within a longer time period, however, clear deadlines are also proposed to ensure efficient cross-border procedures.

The deadlines foreseen in the proposal were set by the Commission after consultation of experts acting in the field of freezing and confiscation. However, the Commission acknowledges that deadlines may differ from one Member State to the other depending on the respective national procedures. It is important for the Commission that the deadlines are realistic and workable in practice.

Point 6: One of the main objectives of the proposal is to strengthen the legal framework for the mutual recognition of freezing and confiscation orders in cross-border proceedings and to make the system more efficient and effective. Against this background, the Commission, after careful reflection, has not taken over all of the grounds for refusals foreseen in the Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders, including Article 8(2)(h) on statutory time limitation, to which the Bundesrat refers. The Commission considers that the law of the issuing State is decisive in this regard, as this is where the crime is prosecuted and tried. Taking into account also the law of the executing State would undermine the principle of mutual recognition.

Point 10: The proposed Regulation aims at improving the protection of victims of crime in cross-border cases. In cases where the victim has been granted a decision on compensation or restitution and the assets have been confiscated in another Member State following the mutual recognition procedure, the victim's right to compensation or restitution will have priority over the issuing and executing State's interests. The provision ensures that victims do not lose their rights in another Member State. At the same time, it does not introduce any new rights for victims where such rights do not exist under national law. The Commission will examine more closely the provisions of the German draft law transposing Directive 2014/42/EU and the possible need of specific rules with regard to the management and disposal of confiscated property in case of victims' compensation.