



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
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Opinion

Title

DG JUST – Proposal for a Regulation on Mutual Recognition of Freezing and Confiscation Orders

(version of 31 October 2016)*

(A) Context

Too few criminal assets are frozen and confiscated in the EU in cross-border cases. This arguably provides a fertile environment for criminals, including terrorist organisations, to hide assets in other Member States. The Council and the Parliament have called on the Commission to improve the current legal framework in this regard. This impact assessment examines ways to do this.

The current legal framework for the cross-border recovery of criminal assets within the EU consists of four main instruments. Two are mutual recognition instruments, meaning that Member States recognise and enforce when necessary judicial authority decisions of other Member States. The other two are harmonisation instruments, meaning common minimum standards apply across Member States.

Only few cross-border freezing and confiscation orders are currently issued. The impact assessment argues that there are at least four reasons for this. First, the framework does not cover all types of freezing and confiscation orders. Second, EU rules are not consistently transposed into national law. Third, procedures and certificates are complex and inefficient. Fourth, instruments lack provisions to compensate victims.

(B) Overall opinion: POSITIVE WITH RESERVATIONS

The Board gives a positive opinion on the understanding that the report shall be adjusted in order to integrate the Board's recommendations with respect to the following key aspects:

(1) The report should include additional elements on the context of this initiative, the problems that it aims to address and their urgency. It should in particular better describe the shift in opinion since 2014 and the political imperative to act now. It should also develop the relative importance of the different elements of the problem and clarify whether they are due to shortcomings of the current legal framework or to a lack of application.

(2) The issue of victims' compensation needs to be better integrated in the overall intervention logic.

* Note that this opinion concerns a draft impact assessment report which may differ from the one adopted.

(3) The presentation of options needs to depict a more realistic baseline scenario fully reflecting the upwards trend in the use of confiscation and freezing orders, including cross-border cases. The report should also provide additional clarifications on the content of the other options.

(4) The description of impacts should better specify the expected practical implications, burdens and benefits for Member States of implementing the proposed initiative, and should consider the technical and political feasibility of the different options.

(5) The outcomes of the meeting with Member States experts on 17 November 2016 as well as the different stakeholders' views should be integrated throughout the report in order to enrich the problem definition, the calibration of the different options and their likely impacts.

(6) In the absence of an evaluation, the report should clarify the extent to which the conclusions of the 17 November experts meeting and the wider political feasibility of the various options determine the eventual choice of a preferred option.

The lead DG shall ensure that the report is adjusted accordingly prior to launching the interservice consultation.

(C) Further considerations and recommendations for improvements

(1) The presentation of this initiative should further explain the dynamic context in which it takes place and the shifting perceptions towards confiscation and freezing orders across the EU. It should provide additional elements on the stage of the transposition of Directive 2014/42/EU. This should entail a more extensive description of the national frameworks and practices, explaining the extent to which and the reasons why Member States go further than what was prescribed in the 2014 Directive. These elements should help clarify the timing of the proposed initiative, its relevance and the political need to act now.

The **problem definition** should make a clearer case for this initiative and the need to act now. In the absence of a public consultation and evaluation, the lead DG should enrich the evidence base with lessons from other experiences with mutual recognition in criminal matters (e.g. evaluations of the European Arrest Warrant), possible evaluations conducted by Member States when transposing Directive 2014/42/EU, or concrete examples of shortcomings in the current regime. It should better distinguish between the part of the problem related to the legal framework itself and the part related to its incomplete implementation. A table listing all specific issues faced under the current situation (e.g. timing, unclear concepts, ...) could help illustrate where each individual problem resides and clarify the relative importance and expected trend of each element of the problem.

(2) The problem and objective of victims' compensation currently appear as a side issue. Its integration with and contribution to the overall objective of the initiative as well as the interlinkage with the existing legal framework should be clearer. In particular, the report should include more details on how this aspect will be implemented in the proposed initiative.

(3) The report should explain why some options are discarded (e.g. infringement proceedings, a scope limited to Eurocrimes) and discuss relevant instruments for the ones that are retained (e.g. a European Asset Freezing order). The baseline should be developed to objectively reflect the increasing trend in the confiscation and freezing of assets (including in the costs-benefits calculations). As a result, the baseline and option 2 appear equivalent and need reconsideration. The report should include additional explanations on

options 3 and 4 (e.g. regarding the planned fundamental rights safeguards for the person concerned and concrete measures to ensure victims' compensation) in order to assess their impacts more thoroughly. The degree to which option 3 goes beyond the scope of Directive 2014/42/EU should be clarified and assessed in the analysis of options.

(4) The description of impacts should include a more robust analysis of the practical implications for Member States of implementing this initiative. In the absence of sound data, the report should present more illustrative examples comparing the processes for issuing and executing cross-border orders under the current and proposed regimes. It should also differentiate between the impacts on specific (groups of) Member States, based on factors such as their legal system, their degree of implementation of existing instruments or their use of confiscation and freezing orders. The report should analyse the political feasibility of the options in the light of possible differences between the legal systems and the sensitivity for fundamental rights issues between Member States.

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated into the final version of the impact assessment report.

(D) Procedure and presentation

The Board regrets that the planning for this initiative did not foresee sufficient time to conduct an evaluation of the existing framework and an open public consultation and that both requirements received exemption. Such input would have usefully informed this impact assessment, given its overall weak evidence base.

The results of the targeted consultation and the information collected during the meeting with Member States on 17 November should be better reflected throughout the main report. As far as possible, it should also highlight the different stakeholders' views on the key problems, the different options to address them and their impacts (e.g. Member States, prosecutors, defence lawyers and others).

(E) RSB scrutiny process

Reference number	2016/JUST/024
External expertise used	No
Date of RSB meeting	23/11/2016