Meijers Committee
standing committee of experts on international
immigration, refugee and criminal law

CM1705 Comment on the Draft Regulation on the mutual recognition of freezing and confiscation orders

6 June 2017

On 21 December 2016, the European Commission submitted a proposal for a Regulation on the mutual recognition of freezing and confiscation orders (COM(2016) 819 final). In this comment, the Meijers Committee wishes to express its concerns as to several aspects of the proposal. Moreover, with a view to future negotiations on the proposed Regulation, this letter contains a number of recommendations on how to respond to its troubling aspects.

1. The choice of the proposed instrument

The Commission's argument to propose a *regulation* – a novelty in the field of mutual recognition – is largely unpersuasive. It is correct that the direct application of a regulation prevents a possibly slow and inadequate transposition of EU law into national systems. However, problems may very well arise nonetheless when judicial authorities would be required to apply and interpret unfamiliar terms and rules that have been structured differently from national criminal law. Therefore, *if* a regulation would be adopted, potential problems of the kind must be anticipated to avoid an adverse effect on legal certainty and legal uniformity.

In any case, the principles of subsidiarity and proportionality require a thorough underpinning of why the proposed action is needed, not only concerning the contents of proposed legislation, but also with regard to the choice of the proposed legal instrument. Regarding the latter, a solid underpinning is currently lacking. References to subsidiarity and proportionality in the explanatory memorandum to the proposed Regulation and in the accompanying Impact Assessment (SDW(2016)468 final) merely relate to the contents of the proposal; no solid argument has been given for why the instrument of a regulation would comply with subsidiarity and proportionality. The Meijers Committee strongly recommends repairing this lacuna before entering any negotiations on the substance of the proposal.

A question that also needs to be addressed in this regard is if and how direct application of obligations to mutually recognise foreign freezing and confiscation orders could raise issues under the principle of legality – as enshrined in Article 49 of the EU-Charter on Fundamental Rights – especially where the foreign order could not have been handed down by the authorities of the executing state. Would the principle of legality not entail that the exercise of such interfering powers requires a basis in national criminal law?

2. Communication

For obvious reasons, Article 6(1) of the draft Regulation proposes that the transmission of a confiscation order to one or more other Member States will not restrict the issuing Member State's right to execute the order itself. However, in order to avoid as much as possible, the simultaneous execution of confiscation orders in various Member States, it is strongly recommended to provide for a strict obligation for Member States to inform each other upon the successful execution of a confiscation order.

3. Non-conviction based confiscation and the presumption of innocence

Compared to Directive 2014/42/EU, the draft Regulation contains an important expansion, namely to include non-conviction based confiscation. Apparently, in 2014 the European legislator still found that the time had not yet come to oblige the Member States to introduce non-conviction based confiscation in their national laws. Directive 2014/42/EU does include rules on situations in which the defendant was unfit to stand trial and on extended confiscation, in which a court did make a positive assessment that the property in question was derived from criminal conduct. It is unclear why Member States would normally require a final conviction in domestic cases, while at the same time recognizing foreign confiscation orders which do not result from a final conviction. There are good reasons why the Directive is restrictive in these matters: non-conviction based confiscation could run counter to the presumption of innocence, as it takes away property from citizens who have not been convicted of a criminal offence. It does not necessarily have to breach that presumption, since adequate safeguards could make non-conviction based confiscation compatible with human rights. The draft Regulation entitles any interested party to legal remedies, such as the ones included in Article 8 of Directive 2014/42/EU. These remedies must be brought before a court in the executing Member State (Article 33). This provision would entail that affected persons would "have an effective possibility to challenge the circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct" (Article 8(8), Directive 2014/42/EU). However, Article 33(2) of the draft Regulation provides that “The substantive reasons for issuing the freezing or confiscation order shall not be challenged before a court in the executing State”. Does this mean that the affected person cannot bring an action in the executing state when that action is based on substantive reasons for issuing the order? Or that the Court in the executing Member State in fact cannot conduct a full test? In what way, then, are these provisions presumed to constitute effective procedural safeguards which are necessary to legitimize the recognition of non-conviction based confiscation?

4. Rights of third parties

The draft Regulation includes the possibility of mutually recognizing third-party confiscation. According to recitals 15 and 34, the rights of bona fide third parties will be preserved and these parties will have legal remedies against the recognition of a freezing order or a confiscation order. Article 33 of the draft Regulation provides that they will be able to bring an action before a court in the executing state. In some situations, however, the third party will be a resident of the issuing state, or of another state, and could be in a better position to bring an action in the issuing state than in the executing state. In that case, it could be that the possibility to bring an action in the executing state is not an effective remedy. In Article 14 (6), the draft Regulation shows that this is a real situation for which adequate solutions must be found. It would also not be contrary to the principle of mutual recognition if an action could be brought before a court in the issuing state. The Meijers Committee therefore recommends that it should be possible for third parties to bring their actions before a court in the issuing state as well.

5. Confiscation settlements and the *ne bis in idem* principle

In the draft Regulation, both the recognition of confiscation orders and the recognition of freezing orders can be refused if their execution would be contrary to the *ne bis in idem* principle (Article (9)(1)

(b) and Article 18(1)(b), respectively). The draft Regulation, however, does not contain any further explanation or elaboration as to the meaning of this ground of refusal. More specifically, it does not explain whether this ground of refusal would be applicable in a case in which the prosecution service in one Member State reached an out-of-court settlement on the confiscation of certain assets, while subsequently that Member State or another receives a confiscation order relating to the same assets. What is important in these cases is the question under which conditions the out-of-court settlement is deemed to be a decision finally disposing of the case, thereby triggering a *ne bis in idem* effect. The Meijers Committee recommends clarification with regard to these situations.