



**COUNCIL OF
THE EUROPEAN UNION**

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COVER NOTE

from : P. Skytte Christoffersen, Ambassador, Permanent Representative
date of receipt : 13 June 2002
to : Javier SOLANA, Secretary-General/High Representative of the European Union

Subject : Communication from the Kingdom of Denmark:
– Initiative by the Kingdom of Denmark with a view to Council adoption of a draft Framework Decision on the execution in the European Union of confiscation orders

Sir,

Having regard to the Treaty of the European Union, and in particular Article 31(a) and Article 34(2)(b) thereof, I enclose herewith an initiative by the Kingdom of Denmark with a view to the adoption by the Council of a draft Framework Decision on the execution in the European Union of confiscation orders.

I request that, in accordance with Article 17 of the Council's Rules of Procedure, this initiative be published in the Official Journal and forwarded to the European Parliament for its Opinion.

(Complimentary close).

(s) P. Skytte Christoffersen

Draft Framework Decision
on the execution in the European Union of confiscation orders

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(a) and Article 34(2)(b) thereof,

Having regard to the initiative by the Kingdom of Denmark,

Having regard to the Opinion of the European Parliament,

Whereas:

- (1) The European Council, meeting in Tampere on 15 and 16 October 1999, stressed that the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union.
- (2) According to paragraph 51 of the conclusions of the Tampere European Council of 15 and 16 October 1999, money laundering is at the very heart of organised crime, and should be rooted out wherever it occurs; the European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime. In that connection, the European Council calls for the approximation of criminal law and procedures on money laundering (e.g. tracing, freezing and confiscating funds) (cf. paragraph 55 of the conclusions).

- (3) All Member States have ratified the Council of Europe Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. The Convention obliges signatories to recognise and enforce a confiscation order made by another party, or to submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it. The Parties may refuse requests for confiscation *inter alia* if the offence to which the request relates would not be an offence under the law of the requested Party, or if under the law of the requested Party confiscation is not provided for in respect of the type of offence to which the request relates.
- (4) The Council Framework Decision of 26 June 2001 lays down provisions on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime. Under that Framework Decision, Member States are also obliged not to make or uphold reservations in respect of the provisions of the Council of Europe Convention concerning confiscation, in so far as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year.
- (5) On 30 November 2000 the Council adopted a programme of measures to implement the principle of mutual recognition of decisions in criminal matters, giving first priority (measures 6 and 7) to the adoption of an instrument applying the principle of mutual recognition to the freezing of evidence and property. Moreover, pursuant to paragraph 3.3. of the programme, the aim is to improve enforcement in one Member State of a confiscation order, *inter alia* for the purpose of restitution to a victim of a criminal offence, issued in another Member State, taking into account the existence of the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990. With a view to achieving this aim, it must be examined in particular whether the grounds for refusal of enforcement of a confiscation measure in Article 18 of the 1990 Convention are all compatible with the principle of mutual recognition.

- (6) Finally, on 30 November 2000 the French Republic, the Kingdom of Sweden and the Kingdom of Belgium submitted a proposal for a Framework Decision on the execution in the European Union of orders freezing property or evidence.
- (7) The main motive for organised crime is financial gain. In order to be effective, therefore, any attempt to prevent and combat such crime must focus on tracing, freezing, seizing and confiscating the proceeds from crime. It is not enough merely to ensure mutual recognition within the European Union of temporary legal measures such as freezing and seizure; effective control of economic crime also requires the mutual recognition of orders to confiscate the proceeds from crime.
- (8) The purpose of this Framework Decision is to facilitate cooperation between Member States as regards the recognition and execution of orders to confiscate proceeds so as to oblige a Member State to recognise and execute in its territory confiscation orders issued by judicial authorities of another Member State. The draft Framework Decision is linked to a Danish draft Framework Decision on confiscation of the proceeds of crime, which is being submitted at the same time. The aim of the proposal is to ensure that all Member States have effective rules governing the confiscation of proceeds from crime, *inter alia* in relation to the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime.
- (9) Cooperation between Member States, based on the principle of mutual recognition and immediate execution of judicial decisions, presupposes confidence that the decisions to be recognised and enforced will always be taken in compliance with the principles of legality, subsidiarity and proportionality. It also presupposes that the rights granted to the parties or bona fide interested third parties will be preserved.

- (10) This Framework Decision respects the fundamental rights and principles recognised in Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, notably Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to confiscate property for which a confiscation order has been issued when objective grounds exist for believing that the confiscation order was issued for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or that that person's position may be prejudiced for any of these reasons.
- (11) This Framework Decision shall not prevent any Member State from applying its constitutional rules, *inter alia* relating to due process,

HAS ADOPTED THE FOLLOWING FRAMEWORK DECISION:

Article 1

Objective

1. The purpose of this Framework Decision is to facilitate cooperation between Member States as regards the recognition and execution of confiscation orders so as to oblige a Member State to recognise and execute in its territory a confiscation order issued by a judicial authority of another Member State.
2. This Framework Decision shall not have the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 2
Definitions

For the purposes of this Framework Decision,

- (a) "issuing State" shall mean the Member State in which a judicial authority, as defined in the national law of the issuing State, has issued, validated or in any way confirmed a confiscation order within the framework of criminal proceedings;
- (b) "executing State" shall mean the Member State in whose territory the property to be confiscated is located;
- (c) "confiscation" shall mean a penalty or measure ordered by a court following proceedings in relation to a criminal offence or offences, resulting in the definitive expropriation of property;
- (d) "property" shall mean property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such property, which the competent judicial authority in the issuing State considers is the proceeds of an offence, or equivalent to either the full value or part of the value of such proceeds;
- (e) "proceeds" shall mean any economic advantage derived from criminal activities. It may consist of any form of property;
- (f) "order" shall mean a final penalty or measure imposed by a competent judicial authority in respect of an offence whereby confiscation is ordered.

Article 3

Determination of the competent authorities

1. The issuing judicial authority shall be the court of the issuing State which has issued the confiscation order.
2. The executing judicial authority shall be the judicial authority of the executing State which is competent under the law of that State.
3. Each Member State shall inform the General Secretariat of the Council of the competent authorities under its law. If a Member State so desires, it may inform the General Secretariat of the Council of the central authority through which a request for execution of a confiscation order may be transmitted.

Article 4

Transmission of confiscation orders

1. A confiscation order within the meaning of this Framework Decision, together with a certificate as provided for in this Article, may be transmitted to a Member State in which the natural or legal person against whom the order has been issued has property or income, is normally resident or, in the case of a legal person, is registered or has its head office.
2. The certificate, the standard form for which is given in Annex 1, shall be signed, and its contents certified as accurate, by the competent authority in the issuing State.

3. The order or a certified copy thereof, together with the certificate, shall be transmitted by the competent judicial authority in the issuing State directly to the judicial authority in the executing State which is competent to execute it by any means which leaves a written record under conditions allowing the executing State to establish authenticity.

4. If the judicial authority competent to execute the order is not known to the judicial authority in the issuing State, the latter shall make all necessary enquiries, including via the contact points of the European judicial network, in order to obtain information from the executing State.

5. Where the judicial authority in the executing State which receives an order has no jurisdiction to recognise it and take the necessary measures for its execution, it shall, ex officio, transmit the order to the judicial authority which is competent to execute it, and shall inform the competent authority in the issuing State accordingly.

Article 5

Offences

1. The following offences, if they are punishable in the issuing State by a custodial sentence of a maximum of at least 3 years as defined by the law of the issuing State, shall give rise to execution on the basis of a confiscation order without verification of the double criminality of the act:

- participation in a criminal organisation ,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,

- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- smuggling of human beings,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and product piracy,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- motor vehicle crime,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Tribunal,
- unlawful seizure of aircraft/ships,
- sabotage.

2. The Council may decide to add other categories of offence to the list contained in paragraph 2 at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the TEU. The Council shall consider, in the light of the report submitted by the Commission pursuant to Article 19, whether the list should be extended or amended.

3. For offences other than those covered by paragraph 1, the executing State may make the recognition and execution of a confiscation order subject to the condition that the acts for which the order was issued constitute an offence which permits confiscation under the law of the executing State, whatever the constituent elements or however it is described under the law of the executing State.

Article 6

Recognition and execution of orders

1. The competent authorities in the executing State shall recognise and execute an order which has been transmitted in accordance with Article 4 without further formality, and shall forthwith take all the necessary measures for its execution, unless the competent authorities decide to invoke one of the grounds for non-recognition or non-execution provided for in Article 7.

2. If a request for confiscation concerns a specific item of property, the parties may agree that confiscation in the executing State may take the form of a requirement to pay a sum of money corresponding to the value of the property.

Article 7

Reasons for non-recognition or non-execution

1. The competent authority in the executing State may oppose the recognition and execution of the order if the certificate provided for in Article 4 is not produced, is incomplete, has not been translated into one of the official languages of the executing State or manifestly does not correspond to the order.

2. The competent authority in the executing State may also oppose the recognition and execution of the order if it is established that:
 - (a) a confiscation order has been issued against the person concerned in respect of the same acts
 - in the executing State or
 - in any State other than the issuing or the executing State, and that order has been executed, is in the process of being executed or can no longer be executed under the law of the State in which the judgment was issued,

 - (b) in one of the cases referred to in Article 5(3), the confiscation order relates to acts which do not constitute an offence under the law of the executing State; however, in relation to taxes, duties, customs duties and exchange activities, execution of a confiscation order may not be refused on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain the same types of rules concerning taxes, duties, customs duties and exchange activities as the law of the issuing State,

 - (c) there is immunity or privilege under the law of the executing State, which makes it impossible to execute the confiscation order,

- (d) third party rights under the law of the executing State make it impossible to execute the confiscation order,
- (e) a confiscation order in respect of a criminal offence was issued against a natural or legal person *in absentia*, and the person concerned was not served with the order in person or otherwise informed of the date and place of the hearing which led to the order *in absentia*, provided that the person concerned has not had an opportunity to challenge or appeal against the order in the issuing State,
- (f) the confiscation order relates to criminal offences which:
 - under the law of the executing State, are regarded as having been committed wholly or partly within its territory, or in a place equivalent to its territory, or
 - were committed outside the territory of the issuing State, and the law of the executing State does not permit legal proceedings to be taken in respect of such offences where they are committed outside that State's territory,
- (g) the judicial authorities in the executing State have decided not to institute legal proceedings in respect of the offence which forms the basis for the confiscation order, or where the person concerned has had another final judgment delivered against him in respect of the same acts in a Member State, thereby precluding further legal proceedings,
- (h) under the law of the executing State, the period of limitation has expired with regard to the issuing or execution of a confiscation order in connection with the offence which forms the basis for the confiscation order, and the executing State is competent under its own law.

3. Before deciding not to recognise or execute an order, the competent authority in the executing State shall consult the competent authority in the issuing State. The competent authority in the issuing State shall be requested *inter alia* to supply without delay any information which is needed for the decision to recognise and execute the confiscation order. If it is obvious that the confiscation order cannot be executed, it shall not be necessary to consult the issuing State.

Article 8

Legal remedies

1. Member States shall put in place the necessary arrangements to ensure that any interested party, including bona fide third parties, have legal remedies with suspensive effect against a confiscation order executed pursuant to Article 6, in order to preserve their legitimate interests. The action shall be brought before a court in the issuing State or in the executing State in accordance with the national law of each State. The executing State shall take the necessary measures to hold the property while the relevant order is being issued.
2. The substantial reasons for issuing the confiscation order can be challenged only in an action brought before a court in the issuing State.
3. If the action is brought in the executing State, the judicial authority of the issuing State shall be informed thereof and of the grounds of the action, so that it can submit the arguments that it deems necessary. It shall be informed of the outcome of the action.
4. The issuing and executing States shall take the necessary measures to facilitate the exercise of the right to bring an action mentioned in paragraph 1, in particular by providing adequate information to interested parties.

5. The issuing State shall ensure that any time limits for bringing an action mentioned in paragraph 1 are applied in a way that guarantees the possibility of an effective legal remedy for interested parties.

Article 9

Postponement of execution

1. The competent judicial authority may postpone the execution of a confiscation order transmitted in accordance with Article 4:

- (a) in the cases referred to in Article 8, or
- (b) where its execution might damage an ongoing criminal investigation, until such time as it deems reasonable, or
- (c) in cases where it is considered necessary to have the order or parts thereof translated, until such time as the translation is made available.

2. A report on the postponement of the execution of the confiscation order, including the grounds for the postponement and, if possible, the expected duration of the postponement, shall be made forthwith to the competent authority in the issuing State by any means capable of producing a written record.

3. As soon as the ground for postponement has ceased to exist, the competent judicial authority shall forthwith take the necessary measures for the execution of the confiscation order and inform the competent authority in the issuing State thereof by any means capable of producing a written record.

Article 10

Decision in the event of multiple requests

1. If two or more Member States have each issued one or more confiscation orders against one or more persons, and the persons concerned in the executing State do not have sufficient means to enable all of the orders to be executed, the decision on which of the confiscation orders is or are to be executed shall be taken by the judicial authority in the executing State with due consideration of all the circumstances, in particular the involvement of frozen assets, the relative seriousness and the place of the offence, the extent to which the confiscated amount is to be used to cover compensation claims and the dates of the respective orders.
2. The judicial authority may consult Eurojust with a view to taking the decision referred to in paragraph 1.

Article 11

Law governing execution

1. Without prejudice to paragraph 3 of this Article, the execution of the order shall be governed by the law of the executing State and its authority alone shall be competent to decide on the procedures for execution and to determine all the measures relating thereto.
2. Any part of the amount in the case of confiscation of proceeds that is recovered in whatever manner in any State other than the executing State shall be deducted in full from the amount which is to be confiscated in the executing State.

3. An order for confiscation from a legal person shall be executed even if the executing State does not recognise the principle of criminal liability of legal persons.
4. A confiscation order shall be executed even if the natural person who is the subject of the confiscation order subsequently dies or the legal person which is the subject of the confiscation order is subsequently dissolved.
5. The executing State may not impose a custodial sentence or any other measure limiting a person's freedom as an alternative legal remedy as a result of a request pursuant to Article 4, unless the issuing State has given its consent to this in the request.

Article 12

Amnesty, pardon, review of order

1. Amnesty and pardon may be granted by the issuing State and also by the executing State.
2. Only the issuing State may decide on an application for review of the order.

Article 13

Termination of execution

1. The competent authority of the issuing State shall forthwith inform the competent authority of the executing State of any decision or measure as a result of which the order ceases to be enforceable or shall be withdrawn from the executing State for any other reason.

The executing State shall terminate execution of the order as soon as it is informed by the competent authority of the issuing State of that decision or measure.

Article 14

Sharing of assets

Confiscated assets or proceeds of the sale of confiscated property shall, after deduction of the executing State's costs, be returned to the issuing State unless otherwise agreed between the issuing State and the executing State.

Article 15

Information on the result of the execution

The competent authority of the executing State shall without delay inform the competent authority of the issuing State by any means which leaves a written record:

- (a) as soon as execution of the order has been completed
- (b) of the total or partial non-execution of the order for the reasons referred to in Article 7, Article 12(1) or Article 13.

Article 16

Languages

1. The certificate shall be translated into the official language or one of the official languages of the executing State.
2. Any Member State may, when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities.

Article 17

Costs

Without prejudice to Article 14 on the sharing of assets, Member States may not claim from each other the refund of costs resulting from application of this Framework Decision.

Article 18

Relationship with other agreements and arrangements

This Framework Decision shall not affect the application of more favourable provisions concerning the execution of confiscation orders in bilateral or multilateral agreements or arrangements between Member States.

Article 19

Implementation

1. Member States shall take the necessary measures to comply with this Framework Decision by 30 June 2004.
2. Member States shall communicate to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations resulting from this Framework Decision. On the basis of a report established on the basis of this information by the Commission, the Council shall, no later than 31 December 2004, assess the extent to which Member States have taken the necessary measures to comply with this Framework Decision.

3. The General Secretariat of the Council shall notify the Member States and the Commission of the declarations made pursuant to Article 16(2), and of the contact points designated under Article 3(3).

Article 20

Entry into force

This Framework Decision shall enter into force on the day of its publication in the Official Journal.

ANNEX I TO THE FRAMEWORK DECISION

Certificate, see Article 4

1. Issuing State
 2. Competent authority issuing the order
 - 2.1. Name
 - 2.2. Address
 - 2.3. Telephone/fax/email (including international dialling code)
 - 2.4. Language(s) in which it is possible to communicate with the issuing authority
 3. Details of the person to whom the confiscation order applies
 - 3.1. Name
 - 3.2. Last known address
 - 3.3. Location of property to be confiscated (if known)
 4. Details of the order
 - 4.1. Type and extent of the confiscation
 - 4.2. Indication of the provisions infringed and the extent to which they are covered by the list in Article 5(1)
 - 4.3. Description of the facts constituting the offence
 5. Status of the order
- Confirm that:
- 5.1. The order is final
 - 5.2. Execution of the order is not barred by statutory time limitations

6. Notification of proceedings

Confirm that the person to whom the confiscation order applies has been duly notified of:

- 6.1. The proceedings against him
- 6.2. Any procedures and deadlines for appeal

7. Partial execution of the order

State whether:

- 7.1. Any part of the amount to be confiscated has already been confiscated
- 7.2. If so, the amount which has been confiscated

8. Alternative legal remedy

- 8.1 Does the issuing State allow the application of alternative legal remedies?
- 8.2 Can the issuing State agree to application of an alternative legal remedy in this case?
 - 8.2.1 If so, alternative legal remedies should be listed together with the maximum penalty in each case.

Done at

Signature and/or stamp

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