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NOTE

From:	Presidency
To:	CATS
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Subject:	Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders - Legal form of the instrument (Regulation or Directive)

Introduction

In December 2016, the Commission submitted a proposal for a *Regulation* on the mutual recognition of freezing and confiscation orders (15816/16 + ADD 1 + ADD 2 + ADD 3). The Working Party on Cooperation in Criminal Matters (COPEN) examined this proposal at four meetings (on 13 January, 16/17 February, 29/30 March and 3/4 May 2017). The most recent document is 8005/17. The fifth and last meeting under Maltese Presidency is foreseen to be held in mid-June.

From the start of the discussions, the legal form of the instrument (a Regulation) has been a topical discussion. At the meeting of the Working Party on 4 May, the group discussed this issue once again, taking account of the examination of the instrument during the last months. In the light of this discussion, the Presidency is seeking guidance from CATS.

Differing positions

Several Member States stated that they would (strongly) prefer that the instrument would be put in the legal form of a Directive. They observed that similar instruments in the past had also been presented in the form of Directives (or Framework Decisions under the Amsterdam Treaty), see e.g. Framework Decision 2003/577/JHA on freezing orders and Framework Decision 2006/783/JHA on confiscation orders.

The Member States noted that, since Directives have to be transposed in national law, this allows them to adapt the provisions to their specific needs and gives them the necessary flexibility to make the instrument work well. Member States also said that it would be easier for practitioners to maintain all legislation in one place (their national codes), and not to have a separate EU instrument which they should also take account of.

The Commission, supported by several other Member States, insisted that a Regulation would be an appropriate legal form for the instrument. Adopting Regulations for mutual recognition in criminal matters is possible under Article 82(1)(a) of the Treaty on the Functioning of the European Union (TFEU). This would in no way be a precedent for measures aimed at establishing minimum rules, for which the Treaty does not allow the adoption of Regulations, see Articles 82(2), 83(1) and 83(2) TFEU.

The Commission underlined the advantages of a Regulation for a mutual recognition instrument: since Regulations are, at the same time, directly applicable in the Member States and the exact same instrument applies in all Member States - without alterations, because no transposition is needed - the system of mutual recognition of freezing and confiscations order could become much more effective. In the area of mutual recognition in civil matters, Regulations are used to the satisfaction of all interested parties.

Directives are implemented by different national laws in Member States, meaning that freezing and confiscation orders would not be recognized in a uniform way throughout the European Union, thereby considerably hampering the efficiency of the new instrument. The large discretion left to Member States and the lack of directly applicable provisions was one of the issues identified in the impact assessment accompanying the Commission's proposal with regard to the two current instruments (Framework Decisions of 2003 and 2006 on freezing and confiscation).

It was acknowledged that if a Regulation is used, it would be necessary to avoid any ambiguities, in particular as regards the provisions concerning the *recognition* of freezing and confiscation orders and cross-border aspects. The Commission said that it was ready to work with Member States in order to ensure that the drafting of the Regulation would be clear, detailed and precise. The Commission underlined, however, that the Regulation could leave some room to Member States, in particular as regards the *execution* of freezing and confiscation orders.

The Austrian delegation suggested a different approach, namely by splitting the instrument in two: the provisions regarding the mutual recognition of *confiscation orders* could be retained in a Regulation, whilst the provisions regarding the mutual recognition of *freezing orders* would be included in a Directive, which should be aligned with Directive 2014/41/EU on the European Investigation Order. AT observed that freezing is also possible under the EIO Directive (for evidential purposes), and that having two sets of rules in instruments with a different legal form might lead to substantial practical problems.

The Commission expressed misgivings on the Austrian suggestion. The Commission highlighted that the split into two different legal instruments would not solve the issue of alignment with the EIO Directive, which is rather linked to the content of the instrument (e.g. proportionality in issuing freezing orders) than to its form. This suggestion would go against the efficiency of mutual recognition for freezing orders and would lead to inconsistencies between the legal frameworks for confiscation and freezing of assets, which need to be coherent. In addition, this would lead to a complex legal framework of freezing and confiscation instead of the targeted simplification and alignment of current rules.

No new proposal needed

The Presidency observes that the Council itself could decide to change the legal form of the instrument (from a Regulation to a Directive) or to split the instrument in two. No new proposal of the Commission would be needed. Such changes have been carried out in other files as well.¹

However, since the instrument is dealt with under co-decision, the European Parliament would have to agree with any change of the legal form. Furthermore, in the absence of unanimity in the Council, the Commission will also have to agree with such a change, at the latest at the time of adoption of the instrument.

Question for CATS

At the CATS meeting of 24 May 2017, delegations will be invited to express their views on the legal form of the instrument.

On the basis of the input provided by CATS, the Presidency will consider the way forward.

¹ See the opinion of the Council Legal Service in doc. 6021/13 (in particular para. 8 to 11).