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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 - Questions on a ground for non-recognition and on the management and disposal of frozen and confiscated property / costs

1. INTRODUCTION

In December 2016, the Commission submitted its proposal for a Regulation on the mutual recognition of freezing and confiscation orders. The Working Party discussed this instrument during several meetings, firstly under Maltese Presidency and now under Estonian Presidency, and substantial progress has been made towards reaching agreement on the text. The current paper is submitted to CATS in order to obtain guidance on two issues so as to facilitate the negotiations at the level of the Working Party. The Presidency aims at reaching a general approach by the end of this year.

2. QUESTIONS FOR CATS

A: Ground for non-recognition based on fundamental rights

Three Member States (CZ/DE/AT) would like to add, in Art. 9 (freezing) and 22 (confiscation) a ground for non-recognition based on human rights, worded along the following line: "*there are substantial grounds to believe that the execution of the freezing / confiscation order would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter*".

In support of this addition, the three Member States advanced inter alia the following arguments:

- The Directive on the European Investigation Order (EIO, 2014/41/EU) – the most recent instrument for mutual recognition in criminal matters – expressly provides for a ground for non-recognition based on fundamental rights (see art. 11(1) under (f) of that Directive). The EIO Directive is applicable in case of freezing for evidentiary purposes, while the new proposed Regulation would apply to freezing for the purpose of ensuring confiscation. Therefore, inconsistency between the instruments should be avoided.
- The CJEU has analysed the necessity of this ground for non-recognition in the context of the Framework Decision on the European Arrest Warrant (2002/584/JHA) (case C-404/15, Aranyosi and C-659/15 PPU, Caldararu). While the EAW Framework Decision does not foresee a ground for non-recognition based on fundamental rights, a number of Member States have included such provision in their implementing legislation.
- Although the principle of mutual recognition is founded on mutual trust between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter, such presumption has to be rebuttable, e.g. if the person concerned raises substantial concerns in the proceedings for recognition by the executing authority. An example showing the need for a ground for non-recognition based on fundamental rights could be described as a situation where a person affected by a freezing order or a confiscation order had/has no possibility at all to lodge an appeal against the freezing order or the confiscation order in the issuing Member State; this would not be in line with the Charter (Art. 47).

- The ground for non-recognition based on fundamental rights should be of exceptional nature, which could be clarified in a recital.

Supporting COM's proposal which does not foresee a ground for non-recognition based on fundamental rights, a large number of other Member States, however, opposed inserting such a ground for refusal, or expressed doubts about it for following reasons:

- All Member States are bound to the ECHR and to the Charter, which has the same value as the Treaties. In accordance with its Art. 51(1), the Member States must respect the Charter when they implement EU law, including this Regulation. This is made clear in Art. 1 of the proposed instrument.
- The proposed Regulation will cover freezing and confiscation orders issued under criminal law. This means that criminal law safeguards will apply, including the right to a fair trial enshrined in Article 6 ECHR and the relevant EU legislation on procedural rights.
- The insertion of a ground for non-recognition based on fundamental rights could risk undermining the mutual recognition of freezing and confiscation orders. The proposed ground is very wide and could be applied extensively by executing authorities, hampering the efficiency of the new instrument.
- The case-law of the CJEU has clarified, in the context of the European Arrest Warrant, where such a ground for refusal does not exist, that the executing authority must request additional information from the issuing authority when it has substantial ground to believe that there is a real risk of breach of fundamental rights in a specific case. If the existence of that risk cannot be discounted within a reasonable time, the executing authority must decide whether the procedure should be brought to an end (case Aranyosi and Caldaru). The proposed ground for non-recognition gives a much broader leeway to executing authorities.

In the light of the foregoing, CATS is invited to indicate whether a ground for non-recognition based on fundamental rights should be inserted in Art. 9 and 22 of the instrument.

B: Management and disposal of frozen and confiscated property / costs

Art. 31 on the management and disposal of frozen and confiscated property, and Art. 32 on costs have been discussed several times in the Working Party. As regards Art. 31, concerning the disposal of confiscated property, COM in its proposal took over the rules of Article 16 of Framework Decision 2006/783/JHA (up to EUR 10.000 for the executing State, after 50%-50% between executing and issuing State). Concerning costs, it was provided in Art. 32 that each Member States shall bear its own costs, but where the execution of an order entails large or exceptional costs, the executing authority may submit a proposal to the issuing authority that the costs be shared. This proposal reflects the current system for disposal of confiscated property in the field of mutual recognition of freezing and confiscation orders, and generally constitutes the common approach regarding costs in mutual cooperation in criminal matters. COM explained that this system works well in practice and was chosen to avoid extra administrative work concerning calculating costs. A number of Member States indicated their support for maintaining this approach in the Working Group.

Some Member States considered the proposed system as not sufficiently balanced as the executing State would get 50% of the confiscated assets or all the assets if the amount is equal to or less than EUR 10 000. IT proposed that it would be more appropriate to give all the assets to the issuing State, while deducting the costs borne by the executing State first. ES, considering that the executing State could have born a lot of costs (e.g. for asset recovery and asset management), suggested that Art. 31 and 32 should be examined together and reimbursement of costs incurred during the execution of confiscation orders should be limited to costs that are duly justified by invoices corresponding to the services received; administrative costs should be left out. After compensation of victims, the remaining funds should be divided between the executing and the issuing State in a new proportion. Several Member States, who considered the current system not appropriate, showed support towards the ES proposal.

Taking into account the concerns raised by some Member States, PRES proposed keeping fixed divisions, but making them more progressive in relation to the amount concerned. This proposal aims to avoid the administrative burden deriving from calculating the costs or dealing with invoices, and at the same time still maintains a financial incentive for executing authorities to cooperate. Following the discussion in the Working Group, and in the light of the ES proposal, PRES suggested merging Art. 31 and 32 into one article, taking into account the deduction of costs in each individual case, whereas keeping a more progressive fixed division for disposal of property.

In the light of the foregoing, CATS is invited:

- B1) to indicate whether the executing State should have the right to deduct the costs, demonstrated by invoices, in each individual case, or whether the executing State should only be allowed to claim reimbursement of large or exceptional costs, as was foreseen in the Commission proposal (Art. 32);**
- B2) to state, as regards the disposal of money obtained as a result of the execution of a confiscation order, whether a more progressive division by fixed but decreasing proportions as proposed by PRES, or the rule as proposed by the Commission (up to EUR 10 000 for executing State, afterwards 50%-50% for executing and issuing State), would be preferable.**