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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 - Question on the issue of "scope"

1. INTRODUCTION

In December 2016, the Commission submitted a proposal for a Regulation on the mutual recognition of freezing and confiscation orders. The COPEN Working Party discussed this instrument during several meetings, making substantial progress: various articles can now be deemed to be agreeable by all Member States. CATS discussed and solved two selected issues at its meeting on 22 September.¹

¹ Doc. 11970/17.

Freezing and confiscation of property related to criminal activities is a very efficient tool to combat financing of terrorism and other serious crime, as it prevents the infiltration of illegal assets into the legal economy. The EU has recognised the importance of cross-border cooperation in the area of freezing and confiscation, and therefore two Framework Decisions have been adopted,² laying down rules on mutual recognition and enforcement of freezing orders and confiscation orders. The aim of the new proposed Regulation is to improve and strengthen the existing system of mutual recognition of freezing and confiscation.

During the negotiations at Working Party level, the question on what type of confiscation orders should be covered by the proposed Regulation has been raised. The Presidency would like to ask the Council to provide guidance on the fundamental issue of "scope", so as to facilitate reaching a general approach by the end of this year.

2. QUESTION FOR COUNCIL

In the proposal presented by the Commission, the scope of the instrument is defined as to apply to freezing orders and confiscation orders issued within the framework of "criminal proceedings". Additionally, civil and administrative confiscation regimes are explicitly excluded from the scope of the proposed Regulation.

It is worth noting that there are different systems of confiscation in place in the Member States, including various forms of non-conviction based confiscation. The regimes of purely civil and administrative confiscation cannot be covered on the basis of Article 82(1) TFEU. However, the discussions in the Working Party have shown that some Member States, notably Italy, seem to have confiscation systems that, while being clearly linked to criminal activities, are not conducted in the course of criminal proceedings. As from the outset of the discussions, the Italian delegation, supported by some other delegations, observed that the proposed wording of the scope of the Regulation as defined in Art. 1(1), with the words "criminal proceedings", posed a problem, since its system of so-called "preventive confiscation" would be excluded.

² Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

Italy explained that under this system, confiscation orders are issued by a criminal court in proceedings that are not aimed at convicting the person for committing a specific offence, but are based on proven facts that assets are derived from criminal activities, while also taking into account previous criminal behaviour of the person. The system is a "preventive" system in the sense that confiscation orders issued under this system aim at preventing the re-use of property which is proved to have derived from criminal activities committed in the past.³

According to Italy, its system of confiscation would not fall, at least not entirely, within the notion of "*criminal proceedings*" as currently used in the proposed Regulation. However, Italy suggested using the concept of Article 82(1) TFEU and referring to "*proceedings in criminal matters*". This would allow to include its system of preventive confiscation, whereas freezing and confiscation orders issued within the framework of proceedings in civil and administrative matters would explicitly be excluded.

Italy confirmed that fundamental rights and similar procedural safeguards as in criminal proceedings, notably foreseen by the six Directives on procedural rights, are adequately respected, and that confiscation orders issued under its system of preventive confiscation have a clear link with criminal activities and therefore fall in principle within the framework of proceedings in criminal matters.

During the meetings of the COPEN Working Party, most recently on 28 September 2017, a number of Member States indicated that they could support or at least accept the modification requested by Italy. Member States stressed that the mutual recognition of (freezing orders and) confiscation orders in the European Union would be greatly enhanced if this system could benefit from the application of the Regulation. It was underlined that the Italian system is considered to be one of the most effective confiscation systems in the European Union. Member States would not be obliged to have themselves such a system, but they should merely be able to recognize and execute confiscation orders issued by Member States under such a system. Such orders are already recognised in several Member States.⁴

³ The Italian system of preventive confiscation is described in more detail in Annex II of doc. 9475/17 and in W. doc. 10443/2017.

⁴ E.g. Crisafulli case in France (*Chambre criminelle de la Cour de Cassation*, 13 November 2003, case 03-80371).

Some other Member States expressed doubts about the advisability of accepting this modification. They observed that the Italian system of preventive confiscation seems to be of a hybrid nature (criminal/administrative), and they wondered whether this system would be covered by the legal basis of Art. 82(1) TFEU. These Member States also inquired whether in the Italian system there is a link between confiscation order and a criminal offence, or whether the procedural rights of the persons concerned would be adequately respected.

In order to address these concerns, the Presidency invited the Council Legal Service to give its opinion on this issue. The opinion of the Legal Service is set out in doc. 12708/17.

The Presidency considers that the decision on the extension of the scope to include the systems of preventive confiscation, such as the Italian system, is a political one and therefore guidance by the Ministers is required.

In the light of the foregoing, the Council is invited to indicate whether certain systems of preventive confiscation, such as Italian system, should fall within the scope of the Regulation, provided that the confiscation order is clearly linked to criminal activities and that appropriate procedural safeguards apply.
