



**JUSTICE briefing on the draft framework  
decision on the application of the principle of  
mutual recognition to confiscation orders**

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1. JUSTICE is a UK based human rights and law reform organisation working in the field of human rights, criminal justice, EU justice and home affairs, discrimination and asylum. JUSTICE has a long history of EU work, particularly relating to judicial cooperation in criminal matters.
2. This paper outlines some preliminary issues arising from the text of the draft Framework Decision on the application of the principle of mutual recognition of confiscation with the EU.
3. This paper has been prepared for JUSTICE by Paul Garlick QC to whom we express our gratitude.

**Human rights provision**

4. JUSTICE recognises the importance of the principle of mutual recognition of confiscation orders made by one member state of the EU by another member state. Such mutual recognition is essential to combat organised and trans-national crime and to deal effectively with money laundering within the EU. Whilst all member states have a present obligation to enforce confiscation orders under the provisions of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990, the Framework Decision seeks to limit the grounds on which a member state can refuse to enforce a confiscation order made in another member state. Whilst JUSTICE recognises that the proposals in the Framework Decision are a necessary special application of the mutual recognition principle of judicial decisions within the EU, an important question for consideration is whether the present proposals adequately safeguard the human rights of both defendants (i.e. those in respect of whom a confiscation order has been made) and interested third parties.
5. JUSTICE acknowledges that Paragraph (9) the Preamble to the Framework Decision does make reference to the fact that the principle of mutual recognition and execution

of judicial decisions presupposes that enforcement of such decisions will always be taken in compliance with the principles of legality, and that the rights granted to the parties (which would include the defendant and bona fide interested third parties) will be preserved. Further, Paragraph 10 of the Preamble also makes express reference to the fact that the Framework Decision respects the fundamental rights and principles recognised in Article 6 of the Treaty On European Union and the Charter of Fundamental Rights of the European Union. Importantly, Paragraph 10 of the Preamble also expressly provides that nothing in the Framework Decision may be interpreted as prohibiting refusal to execute a confiscation order ‘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’.

6. However, neither paragraph (9) or (10) of the Preamble creates a positive right on the part of the executing State to refuse to enforce a confiscation order, not being an enforceable part of the Framework Decision. At most, paragraphs (9) and (10) are an aid to interpretation of the Articles.
7. Equally, whilst Article 1(2) provides that the 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, there is no express provision which recognises the right of an executing State to refuse to enforce a confiscation order made in circumstances which would violate those rights or principles.
8. JUSTICE is concerned that the Framework Decision should contain a positive provision within one of the Articles providing that the competent authorities in the executing State may refuse to recognise and execute a confiscation order where objective grounds exist for believing that the execution of the confiscation order would violate a person’s fundamental rights as enshrined in Article 6 of the Treaty on European Union, or would otherwise violate the principles set out in paragraph 10 of the preamble. This is particularly necessary as Article 8(2) of the draft Framework Decision provides that the substantial reasons for issuing the confiscation order can be challenged only in an action brought in the issuing State.
9. To this end, JUSTICE suggests including a clause in Article 7 in the following terms:

## Article 7 Reasons for non-recognition or non-execution

The competent authority in the executing State may refuse to recognise and execute the order if objective grounds exist for believing that the execution of the order would result in a violation of any of 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, or 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.

### **Conversion of the amount to be confiscated into the currency of the executing State**

10. Article 6(3) of the draft Framework Decision provides as follows:

If a confiscation order concerns an amount of money, the competent authorities of the executing State shall, if necessary, convert the amount to be confiscated into the currency of the executing State at the rate of exchange obtaining at the time when the confiscation order was issued.

11. JUSTICE is concerned that the present wording of this provision may cause an injustice either to the issuing State, or, equally, to a defendant against whom a confiscation order has been made, where there has been a substantial change in rate of exchange of the currencies of the issuing State and executing State between the time of issuing the confiscation order and enforcement by the executing State. Whilst in the vast majority of cases the confiscation order will be made in Euros, there are circumstances in which an injustice could result if there was a substantial change in the conversion rate between, for instance, pounds Sterling and the Euro between the time of issuing and enforcing the order. Where there has been a change in the conversion rate, this could operate against the interests of the issuing State or a defendant. Where the value of the currency of the issuing State has fallen (as against the value of the currency of the executing State) the defendant will be required to pay less to satisfy the order. Equally, where the value of the currency of the issuing State

has risen, the defendant will be required to pay more in the currency of the executing State to satisfy the order than was envisaged by the issuing state at the time of calculation of the amount to the order. This could result in a longer period of custody being imposed in default of payment. JUSTICE suggests that the conversion should be calculated at the date of the enforcing of the confiscation order, except where that would result in the defendant having to pay less money in the currency of the executing State than he would have done had the conversion rate been calculated at the time of the issuing of the order, in which case the conversion rate should be that which existed at the time of the issuing of the order.