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THE FREEZING OF ASSETS WITH A CROSS-BORDER DIMENSION

Slovenian-Croatian cooperation: Case study

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INTRODUCTION

Money makes the world go round.[1] Its role, especially in Western societies is incredibly important. It is what drives people on both sides of the law. Gaining large amounts of assets is one of the most important characteristics and usually one of the main goals of organised criminal groups. To this end, they run cross-border criminal activities and acquire assets, not only in their national State but in other Member States and third countries as well. One of the basic principles of contemporary criminal law is that no person shall retain the property gained through or owing to the committing of a criminal offence.[2] Assuring that this principle is implemented presents one of the most pressing challenges for prosecutorial and judicial authorities. There is, therefore, an increasing need for effective international cooperation on asset recovery and mutual legal assistance in such cases. To this end, competent authorities should be given the means to trace, freeze, manage and confiscate the proceeds of crime. This is a way to stop the proceeds of crime being laundered and reinvested in legal or illegal business activities and it also aims at compensating victims and provides more funds to invest back into law enforcement activities or other crime prevention initiatives.[3] Recent research[4] estimates that illicit markets in the European Union generate about 110 billion EUR, i.e. approximately 1% of the EU's GDP in 2010. However, and although existing statistics are limited, the amount of money being recovered from proceeds of crime within the EU is only a small proportion: 98.9% of estimated criminal profits are not confiscated and stay at the disposal of criminals.

One of the instruments, enabling the national courts and prosecutors to successfully seize such illegal proceeds, is a freezing order, i.e. a decision issued or validated by an issuing authority in order to prevent the destruction, transformation, removal, transfer or disposal of property with a view to the confiscation thereof. On the other hand, a freezing order represents a significant limitation to a person's right to property[5] and it must, therefore, be limited in time in compliance with the right to a fair trial[6] and the principle of proportionality[7].

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[1] The quotation '*money makes the world go round*' was first coined in the musical play 'Cabaret', written in the 1960's.

[2] The principle is implemented in contemporary criminal legislations, including the Art. 74/1 of the Slovenian Criminal Code (Official Gazette of the Republic of Slovenia, nos. 50/12, 6/16, 54/15, 38/16 and 27/17).

[3] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the EU, OJ L 127, 29.4.2014.

[4] *Criminal asset recovery in the EU, Survey of Statistical Information 2010-2014* [online]. [Last accessed 15. 3. 2018 at 13:33]. Available at <https://www.europol.europa.eu/newsroom/news/does-crime-still-pay>

[5] Guaranteed by Art. 33 of the Constitution of the Republic of Slovenia (Ustava Republike Slovenije (Official Gazette of the Republic of Slovenia nos. 33/91, 42/97 - UZS68, 66/00 - UZ80, 24/03 - UZ3a, 47, 68, 69/04 - UZ14, 69/04 -

Taking into account both these aspects, i.e. the need for an efficient confiscation of the proceeds of crime while ensuring that basic legal principles are observed, brings its own complexities to the criminal procedure, which rise especially if the court case includes judicial cooperation with the authorities of another state. While freezing orders present a very effective instrument for combatting cross-border organised crime, certain issues may arise in practice, due to different safeguards, guaranteed in the national legislations of the (Member) States involved.

The present paper presents issues in the execution of a freezing order on the basis of a real-life judicial case in which a high-profile drug lord was on trial in Croatia. A freezing order, preventing him from disposing of his property, was issued by the Croatian courts and was (partially) executed in Slovenia. The paper highlights the advantages of such cooperation and at the same time draws attention to possible glitches in the system. Attention will also be paid to possible future developments on the matter since a new regulation on the mutual recognition of freezing orders might become reality.

INTERNTIONAL COOPERATION IN THE AREA OF FREEZING ORDERS IN PRACTICE: A CASE STUDY

It all began with 14 million euros worth of cocaine

A. A., a Croatian and B. B., a Bosnian national, took part in a joint criminal operation with intent to gain financial profit. Their continuous cooperation resulted in the trafficking of large quantities of the narcotic drug cocaine. From 2000 to 2007 they bought the drug on the European drug market and also imported it from South American countries. During this time, they organised the smuggling of cocaine on at least twenty occasions which resulted in the acquisition of more than 100 kilograms of cocaine. The drug was intended for distribution not only in Croatia, but it also supplied the Italian, Spanish, Dutch and other European markets. Furthermore, in 2006, the defendants also personally participated in the manufacturing of 100 kilograms of cocaine, produced in an illegal drug factory in the Republic of Colombia. Altogether, the defendants jointly bought 200 kilograms of cocaine, smuggled at least 100 kilograms of it, and sold the entirety of the purchased drug. The profit of their endeavour amounted to at least 7.140.000,00 EUR for each of them.

UZ43, 69/04 - UZ50, 68/06 - UZ121,140,143, 47/13, 47/13 in 75/16 -UZ70a)) and Art. 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 20. 3. 1952).

[6] Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4. 11. 1950).

[7] Art. 22 of the Constitution of the Republic of Slovenia, see footnote 5.

A. A. and B.B., with the consent of C. C., D. D., E. E. and F. F., then invested these criminal proceeds. In order to hide the true source of these funds, they bought a yacht, real estate in different European countries and deposited money on a number of bank accounts in various European banks. Their criminal activities did not go unnoticed by the Croatian authorities, which charged them with drug trafficking, money laundering and participation in a joint criminal operation. But since the assets of the defendant A. A. in the amount of 4.760.058,27 EUR were deposited in a Slovenian bank, and the Croatian authorities issued a freezing order regarding these funds, the criminal case became relevant for Slovenian authorities as well.

The cooperation with Slovenian authorities prior to Croatia's accession to the EU

In the autumn of 2007, the District Court in X in Slovenia received a request from the Croatian District Court in Y, invoking the Agreement between the Republic of Slovenia and the Republic of Croatia on legal assistance in civil and criminal matters.[8] The request was submitted with a freezing order of the District Court in Y, dated 30 October 2007. The order was issued regarding a number of assets belonging to the suspects, namely three immovable properties in Croatia, one in Germany, and several bank accounts in Croatia and Slovenia, including an A.A.'s deposit in a Slovenian bank, amounting to 4.760.058,27 EUR. According to the order, the assets were to be frozen until the final decision against A.A. and B.B. would be adopted in the Croatian criminal proceedings. For the duration of the freezing, the suspects or third persons, authorized by the suspects, were prevented from disposing of this property. The freezing order was based on the reasonable suspicion that the frozen assets in question were in fact proceeds of the organised criminal activity since the suspects were unemployed at the time and had no legal sources of income. The Croatian Court further justified the freezing on the reasonable suspicion that the suspects might dispose of such property if the order would not be executed and enforced.

At the time, Croatia has not yet entered the EU. The Slovenian-Croatian cooperation in this matter was regulated by the above mentioned bilateral agreement and the 1999 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[9] Pursuant to Art. 11 of the Convention, Slovenia was obliged to take the necessary provisional measures, in this case, the freezing of assets, at the request of another Party, i.e. Croatia. In other words, the Slovenian Court was obliged to issue a measure, which would prevent A.A. from disposing of his assets.

[8] Official Gazette of the Republic of Slovenia, no. 42/1994, 13. 7. 1994.

[9] Convention adopted on 8. 11. 1990 (ETS No. 141); Both Slovenia and Croatia ratified the Convention in 1997 (Official Gazette of the Republic of Slovenia, no. 41/1997, 11. 7. 1997 and Official Gazette of the Republic of Croatia, no. 14/1997, 9. 10. 1997).

Consequently, on 27 December 2007, the investigating judge of District Court in X ordered the Slovenian bank in question to freeze the assets on the A.A.'s bank account in the total sum of 4.760.058,27 EUR, invoking similar reasons as the Croatian Court. The duration of the freezing was limited to three months.

Before the passing of three months, the Croatian Court requested its Slovenian counterpart to extend the measure for an additional year. The Slovenian Court extended the validity of the freezing order for three months only, invoking time limitations prescribed in the national legislation. Art. 12/1 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime in fact prescribes that the provisional measures shall be carried out as permitted by and in accordance with the domestic law of the requested Party, i.e. Slovenia, to the extent not incompatible with such law, in accordance with the procedures specified in the request. The differences between the Slovenian and Croatian provisions on the freezing of assets and the application of Slovenian legislation generated the first difficulties in the inter-State cooperation.

For a period of time and before the procedure at hand began, neither of the two national legislations provided for a specific time limitations for the freezing of assets. The Croatian Criminal Procedure Act[10] still does not provide for any absolute time limit for the freezing of assets (Art. 557.e) which can continue for up to 60 days after the final decision on the confiscation of property. On the other hand, prior to the cooperation in the present case, the Slovenian legislation had to be amended following a decision by the Constitutional Court of the Republic of Slovenia.[11] In 2004, the Court assessed the constitutionality of the Criminal Procedure Act (CPA) which, at the time, contained no provisions expressly limiting the duration of freezing property, meaning the freezing was limited only by the ending of the criminal procedure. The Court ruled that this allowed for an excessive and disproportional interference with the right to private property and the presumption of innocence, referred to in Articles 33 and 27 of the Constitution of the Republic of Slovenia.[12] Consequently, the CPA was amended in 2005[13] and now clearly determines the time limits for the permissible duration of freezing for each phase of the criminal procedure.

[10] Zakon o kaznenom postupku, Official Gazette of the Republic of Croatia, nos. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14 and 70/17.

[11] Constitutional Court's Ruling no. U-I-296/02 of 20. 5. 2004 (Official Gazette of the Republic of Slovenia, no. 68/2004).

[12] See footnote 5.

[13] Act Amending the Criminal Procedure Act (CPA-G) (Zakon o spremembah in dopolnitvah Zakona o kazenskem postopku, ZKP-G, Official Gazette of the Republic of Slovenia, no. 101/05).

The Slovenian CPA[14] provides for the temporary securing of the claim for the confiscation of the proceeds, the measure equivalent to the freezing of assets, in Articles 502-502-e and restricts the duration of the measure in Art. 502.b:

- During the pre-trial procedure and after the opening of a judicial investigation, led by the investigative judge, the freezing of property may last three months.
- After the indictment has been submitted to the Court, the freezing of property may not last longer than six months.
- These two time limits may be extended for the same time periods.

Another very important aspect of the Slovenian national legislation is that the extension of a freezing measure is subject to a proposal, filed by the state prosecutor (Art. 502 and 502.c/1). If such a motion is not put forward, the Court is obliged to lift the measure.

Pursuant to the said provisions, from the start of the criminal case in 2007 until the Croatian state prosecutor filed an indictment in October 2008, the extension of the measure could only be achieved through individual extensions, each time in the space of three months. The Croatian Court had to demand such prolongation every time the previous order was approaching its expiration. After the filing of the indictment, this time-frame was extended to six months. Nevertheless, in a demanding high-profile case, such additional tasks undoubtedly presented a burden for the Croatian Court. What is even more striking is that there were significant differences in national legislations, even though the two countries are neighbours and constituted federal units of the Socialist Federal Republic of Yugoslavia. The common history and shared legal tradition did not prevent the two countries from encountering issues due to their differences. It is not difficult to imagine that problems of an even larger scale could arise if the differences between the States involved were even more substantial.

A very welcome step forward was the adoption of the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.[15] Croatia ratified the Convention in 2008, while Slovenia did so in 2010.[16] The Convention added an important amendment regarding the application of national law by the requested Party. While the 1999 Convention provided for a strict application of the national law, the newly adopted Convention softened the approach. It still envisages the application of the internal

[14] Zakon o kazenskem postopku, Official Gazette of the Republic of Slovenia, nos. 63/94, 70/94, 72/98, 6/99, 66/00, 111/01, 56/03, 43/04, 101/05, 14/07, 68/08, 77/09, 91/11, 47/13, 87/14 and 66/17.

[15] Convention adopted on 16. 5. 2005 (ETS No. 198).

[16] Official Gazette of the Republic of Slovenia, no. 24/2010, 22. 3. 2010 and Official Gazette of the Republic of Croatia, no. 5/2008, 13. 8. 2008.

law for the execution of provisional measures on the freezing of assets. It provides, however, that where the request concerning one of these measures specifies formalities or procedures which are necessary under the law of the requesting Party, even if unfamiliar to the requested Party, the latter shall comply with such requests to the extent that the action sought is not contrary to the fundamental principles of its law (Art. 15/3).

In practice, this had very concrete consequences for the Slovenian-Croatian cooperation in the case at hand. Prior to the ratification of the 2005 Convention, the Slovenian investigative judge strictly complied with the 3 months' time limitation in the pre-trial phase and later the 6 months' limitation after the filing of the indictment, provided in Art. 502.b of the Slovenian CPA. As already stated, the judge initially refused to accept the Croatian requests for extensions of the measure in the duration of a year. Following the ratification of the 2005 Convention, the Slovenian investigative judge considered that the requested extension of the measure for the duration of a year did not contravene the basic principles of Slovenian law and could finally follow the Croatian proposal. The investigative judge based this decision Art. 7/2 of the bilateral Agreement between the Republic of Slovenia and the Republic of Croatia on legal assistance in civil and criminal matters, which, similarly to the 2005 Convention, also provides that a request can be executed pursuant the legislation of the requesting State, provided this does not contravene the legal principles of the executing State. This provision was part of the bilateral agreement since its beginning and was, therefore, part of the applicable law since the begging of the case at hand. It appears, however, that the ratification of the 2005 Convention provided the necessary shift for the Slovenian investigative judge to adopt a softer approach. The decision to extend the validity of the freezing for a year, in fact, coincides with the ratification of the 2005 Convention in Slovenia.

A facilitated cooperation between EU Member States

It is very likely that the cooperation would have been much simpler, if Croatia had been an EU Member State from the beginning of the criminal procedure. The EU, in fact, gives its Member States an important tool in ensuring an effective freezing of assets in procedures, involving cross-border cooperation. The main goal, sought by the Council Framework Decision 2003/577/JHA on the execution of orders freezing property or evidence[17], is to give the competent judicial authorities and efficient tool to easily freeze movable property, thus securing it for a possible later confiscation. The Framework Decision envisages that this goal can be best achieved through the application of the principle of mutual recognition (Rec. 2).

[17] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003, OJ L 374, 27.12.2006.

International mutual recognition in criminal matters involves the enforcement in the executing state of a decision made in the issuing state in order to effectively fight international criminal activities. It represents a significant departure from the international assistance between States, rooted in the principle of state sovereignty, which always required a form of review process. Mutual recognition, therefore, enables a faster recognition and execution of decisions which is crucial in the area of freezing assets.[18]

In the last two decades, the leading thoughts, guiding the evolution of the cooperation in criminal matters between EU Member States, stemmed from the Conclusions of the Tampere European Council of 15 and 16 October, namely that the principle of mutual recognition "should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union" and that it "should apply both to judgments and to other decisions of judicial authorities."[19] While representing an important step towards an efficient international cooperation, the idea of mutual recognition was undoubtedly bold. In fact, another Member State may not deal with a certain criminal matter identically or even similarly to one's own State and a comparable authority may not even exist in that state, or would not be authorized to take such a decision, or would have taken an entirely different decision in a comparable case. Regardless of such differences, according to the principle of mutual recognition, the results will be that decisions in criminal matters can be accepted as equivalent to decisions taken in one's own State. In other words, there is a presumption of equivalence *in abstracto* ('the decisions are accepted as equivalent'), even in the absence of equivalence *in concreto* ('a Member State may not deal with a matter in the same way or in a similar way' or 'a comparable authority may not exist').[20]

In the Framework Decision, the principle of mutual recognition is implemented through the demand that the competent judicial authorities of the executing State shall recognize a freezing order "without any further formalities being required and shall forthwith take the necessary measures for its immediate execution in the same way as for a freezing order made by an authority of the executing State" (Art. 5/1). In contrast with the traditional forms of international cooperation, which usually envisage an adoption of a separate decision or order by the executing State, the principle of

[18] *Comparative Law Study of the implementation of mutual recognition of orders to freeze and confiscate criminal assets in the European Union* [online]. [Last accessed 21 March 2018 at 12:00]. Available at <http://knjiznica.sabor.hr/pdf/E_publikacije/Comparative_law_study_of_the_implementation_of_mutual_recognition.pdf>, p. 33.

[19] *Tampere European Council; 15 and 16 October 1999; Presidency Conclusions* [online]. [Last accessed 21 March 2018 at 11:43]. Available at <http://www.europarl.europa.eu/summits/tam_en.htm>

[20] C. Janssens, The Principle of Mutual Recognition in EU Law (Oxford: Oxford University Press, 2013), p. 175-6.

mutual recognition skips this step. The mutual recognition simplifies this procedure since the executing authority merely recognizes and executes a decision, issued by another Member State.

The Framework Decision provides for an additional departure from more traditional forms of international cooperation in criminal matters. One of the cornerstones of traditional cooperation in criminal matters, rooted in state sovereignty and the principle of reciprocity, namely the requirement of dual criminality, was partially abolished.[21] Pursuant to the provision of Art. 3/2, if the freezing order is issued for one of the catalogue offences, listed in the said provision of the Framework Decision, and if such offense is also punishable in the issuing State by a custodial sentence of a maximum period of at least three years, it shall not be subject to verification of the double criminality of the act. In cases which do not meet the said criteria, the executing State may subject the recognition and enforcement of a freezing order, issued for the purpose of subsequent confiscation of property, to the condition that the laws of the executing State allow for the freezing in relation to the acts, for which the order was issued.

The Framework Decision also regulates the process of transmission and execution of the freezing order. In order for its transmission and execution to be efficient, the freezing order must be transmitted to the executing State with the certificate (Art. 9) and a request for confiscation requiring either enforcement of a confiscation order that has been issued in the issuing State or confiscation in the executing State and subsequent enforcement of any such order, or an instruction in the certificate that the property shall remain frozen in the executing State pending the before mentioned requests. The process of transmission and execution of the freezing order must be direct and speedy. The issuing State shall transmit it directly to the competent judicial authority for execution by any means capable of producing a written record under conditions allowing the executing State to establish authenticity (Art. 4/1).

The outcome of the case and the lifting of the freezing order

Notwithstanding the possibility of a simplified cooperation after Croatia's accession to the EU in 2013, the final outcome of the proceedings was nevertheless unsatisfactory. The trial against A.A. continued and in April of 2012 he was acquitted of all charges. Notwithstanding the acquittal, the District Court in Y denied the defendant's proposal to lift the freezing order. The same motion was filed before the Slovenian Court. The defendant's lawyers argued that because of the acquittal verdict, the grounds for a continued freezing of A.A.'s assets no longer existed. The Slovenian Court denied the motion, highlighting that the acquittal was not yet final since the state prosecutor

[21] *Ibid*., p. 170.

lodged an appeal before the Supreme Court of the Republic of Croatia. In May of 2013, the Croatian Supreme Court annulled the decision on the acquittal and referred the case back to the District Court. It is important to note that by this time, A.A.'s assets in Slovenia have already been frozen for six years.

Croatia implemented the 2003/577/JHA Framework Decision in its Act on judicial cooperation in criminal matters with Member States of the EU already in 2010[22], specifying in Art. 133 that it will enter into force on the date of accession of the Republic of Croatia to the European Union, meaning on 1 July 2013. It is therefore not understandable why the Croatian authorities kept on relying on pre-EU instruments on the cooperation between the two States, even after Croatia's EU membership.

In any event, the Slovenian national legislation came into play once more. The Slovenian CPA does not provide only for time limits, requiring a periodical assessment as to whether the freezing order is still justified, which, as stated, presented issues at the very outset of the judicial cooperation with Croatia. In addition, the CPA also provides for absolute time limits for the freezing of property. Pursuant to Art. 502.b of the CPA, the total duration of freezing shall not exceed:

- one year: before the opening of a judicial investigation or before submitting the indictment, if the judicial investigation was not initiated,
- two years: during the judicial investigation,
- three years: after the indictment has been submitted to the court.

Until the execution of the final court decision on confiscation, the total duration of freezing of property may not be longer than ten years.

If the CPA provisions resulted in hindrances in the Slovenian-Croatian cooperation throughout the proceedings, the absolute time-limits proved to be fatal for an ultimately successful confiscation of A.A.'s assets in Slovenia. In 2016, the Slovenian investigative judge urged the Croatian authorities that the Slovenian legislation prescribes an absolute time-limit for the freezing of assets in the duration of ten years. Following this warning, Croatia sent its first request, in which the execution of the freezing order was requested on the basis of the Framework Decision. In November 2016, the Slovenian investigative judge received a Croatian freezing order, together with a certificate, as envisaged by Art. 9 of the Framework Decision. The Croatian authorities filed the request invoking this new legal basis and thus finally departed from the pre-EU provisions on international

[22] Zakon o pravosodnoj suradnji u kaznenim stvarima s državama članicama EU, Official Gazette of the Republic of Croatia, no. 91/2010.

cooperation. They were, however, not successful. Invoking the absolute ten-year time-limit, provided by the Slovenian CPA, the investigative judge decided, in March 2017, to lift the freezing measure.

The decision was then subject to an appeal, filed by the Slovenian state prosecutor's office. On 27 March 2017, the High Court in X issued a decision, partially modifying the investigative judge's decision to definitively lift the measure. It decided that the freezing shall remain in place until 27 December 2017, taking into account the freezing of A.A.'s assets in Slovenia was first introduced by the investigative judge on 27 December 2007. The High Court was confronted with the assessment as to whether there was a possibility to extend the measure beyond the absolute ten-year time limit, prescribed by the CPA. It examined whether this was possible either on the basis of the 2005 Council of Europe Convention or on the basis of the Framework Decision 2003/577/JHA. It decided that in neither case the freezing may exceed ten years. As to the first possibility, the High Court invoked Art. 15/3 of the 2005 Convention which, as said, provides that the requested Party may apply the law of the requesting Party, as long as the latter is not contrary to the fundamental principles of the requested Party's law. The High Court concluded that the freezing may never last for more than ten years because that would contravene national legal principles. The Court also noted that the time-limits were enacted following a ruling of the Slovenian Constitutional Court. The absolute time limitation was regarded by the High Court as a crucial safeguard in the guaranteeing of the defendant's rights to fair trial and private property.

The High Court reached an identical conclusion on the basis of the examination of the Framework Decision, which provides that the property shall remain frozen in the executing State until that State has responded definitively to a request for confiscation requiring either enforcement of a confiscation order that has been issued in the issuing State or confiscation in the executing State and subsequent enforcement of any such order (Art. 6/1). However, after consulting the issuing State, the executing State may in accordance with its national law and practices lay down appropriate conditions in the light of the circumstances of the case in order to limit the period for which the property will be frozen. If in accordance with those conditions, it envisages lifting the measure, it shall inform the issuing State, which shall be given the opportunity to submit its comments. (Art. 6/2). Slovenia implemented the Framework Decision in its Act on International Co-operation in Criminal Matters between the Member States of the EU.[23] It provides, in Art. 205, that the property shall remain frozen until a decision is made regarding its confiscation. If the issuing State does not

[23] Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije (Official Gazette of the Republic of Slovenia, nos. 102/07, 9/11, 48/13, 37/15).

indicate the envisaged date for the final decision on confiscation, or it does not request the confiscation when issuing the freezing order, the Slovenian court, after having consulted with the issuing State, shall determine the maximum admissible duration of freezing the property with regard to the permissible total duration of freezing for a certain phase of proceedings under the law of the Republic of Slovenia. The Slovenian court shall also act this way if the envisaged date of the final decision on confiscation exceeds the time limits of permissible total duration of freezing for a certain phase of proceedings under the law of the Republic of Slovenia.

The High Court concluded that not even the said provision of the Framework Decision and its implementation in the national system allowed for an extension of the measure over the ten-year limit. It based its reasoning on the ECJ *Pupino*[24] case. In the latter, the ECJ dealt with the question of the binding nature of framework decisions adopted on the basis of Title VI of the Treaty on European Union, dealing with police and judicial cooperation in criminal matters. It noted that the nature of framework decisions is formulated in terms identical with those in the third paragraph of Article 249 TEC[25], concerning directives. It involves an obligation on the part of the national authorities to interpret them in conformity with national law. Thus, when applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34/2/b TEU[26]. However, and what proved crucial for the case at hand, according to the ECJ, the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity. Similarly, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*. Following the reasoning, put forward in the *Pupino* judgment, the High Court concluded that not even a broad understanding of the principle of conforming interpretation can lead to the conclusion that the absolute ten-year limit can be extended. Following this decision, the investigative judge ordered an immediate release of A.A.'s funds in January 2018.

ANALYSIS OF THE CASE: LESSONS LEARNT

The outcome of the presented case proves that the tools for judicial cooperation might not suffice for a successful conclusion of such cooperation. Differences in national legislations still represent

[24] Case C-105/03, Judgment of the Court (Grand Chamber) of 16. 6. 2005.

[25] Treaty establishing the European Community, OJ C 325, 24. 12. 2002.

[26] Treaty on European Union, OJ C 191, 29. 7. 1992.

great obstacles for the carrying out of a successful judicial cooperation. In order to achieve such goals, the necessary approximation of legislation is of equal importance.[27] In the case at hand, however, the legal framework was determined by documents which, at least in part, regulated that the execution of the order should be based on the legislation of the executing State, i.e. Slovenia. This is a very common feature of legal documents, regulating international cooperation or mutual recognition. It is not only a logical choice since the execution will be carried out in that specific state, it also stems from the sovereignty principle.[28] Even the 2005 Convention, which softened the approach on the utilisation of the law of the requested Party, draws the line at the fundamental principles of the requested Party's law. Furthermore, the Council Framework Decision 2003/577/JHA gave the Member States the option to invoke their national law and practices in order to limit the duration of the freezing measure (Art. 6/2). Slovenia implemented the said provision in the Act on International Co-operation in Criminal Matters between the Member States of the EU, stating that the time-limits, prescribed by the relevant national legislation, also apply to the execution of another Member State's freezing decision. This specific implementation is subject to the position, adopted by the ECJ, in the *Pupino* case, which obliges Member States to interpret domestic law in conformity with the wording and purpose of framework decisions. However, even the ECJ left a margin of appreciation to the Member States, explaining that this obligation does not go as far as to demand an interpretation *contra legem* or one that would contravene the basic legal principles of the Member State in question.

In short, the Slovenian judicial authorities were in no way obliged to discard the basic principles, enshrined in the Slovenian Constitution and its legislation. While the time-limits for the duration of freezing orders may not be seen as such a principle, the underlying reasoning can and should be understood precisely as that. The time-limitation serves as a safeguard when it comes to balancing the interests of an effective prosecution of criminal offences on one hand, and the guaranteeing of the defendant's right to property and fair trial on the other. It should be kept in mind that this was the reasoning behind the decision of the Slovenian Constitutional Court which ultimately resulted in the amendment of the CPA regarding the time-limits of freezing orders. It would, therefore, be very difficult to argue that the final Slovenian decision to lift the freezing measure should have been different. It should be noted that the CPA provisions were already interpreted in the broadest way possible. The ten-year time-limit is an absolute limit which demands that a final decision on confiscation has already been issued. It is envisaged as the maximum time from the ordering of the

[27] See footnote 20, p. 167.

[28] *Ibid*., p. 171.

measure to the execution of the actual confiscation. This was not the case in the analysed judicial cooperation since the re-trial in Croatia was not yet approaching its termination. Had the Slovenian authorities opted for an even stricter approach, the measure would have been lifted after three years of the indictment, i.e. in October 2011. Instead, the measure was extended for additional six years. The national law was, in accordance with the Pupino judgment, applied in the broadest way possible.

On the other hand, the High Court argued that the intermediate time-limitations, prescribing the maximum time for a freezing in each phase of a criminal procedure (pre-trial, judicial investigation, trial) should not be applied where the Slovenian court executes a freezing order of another Member State. Different national systems provide for a variety of procedures which do not contain the same steps and phases. A literal application of the CPA would mean that for a defendant, tried in a Member State where the proceedings do not foresee a judicial investigation, the time-frame, foreseen for the judicial investigation, could not be applied. This would give such a defendant an advantageous position in comparison to a defendant, tried in a Member State where such phase is prescribed. If the maximum time-limit is applied to all instances, such discrepancies can be avoided. Additionally, the High Court's position, if applied to the initial phases of the analysed case, would simplify the cooperation since there would be no need to demand a strict application of the periodic prolongation of the measure, as prescribed by the Slovenian legislation.

Missed opportunities

The way in which the case was handled is also a reminder that other instruments exist at the EU level which were, unfortunately, not taken advantage of. At the time of criminal proceedings before the Croatian Court, A.A. was serving a prison sentence in Italy for a different drug-related crime, for which he was found guilty before an Italian Court. He was released from prison in 2017. This gave the authorities of the involved Member States two options, which were never initiated.

Once Croatia entered the EU, i.e. on 1 July 2013, the Act on judicial cooperation in criminal matters with Member States of the EU[29] came into force. The Act implements, *inter alia*, the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States.[30] For the purpose of conducting the criminal proceedings against A. A., Croatia could have issued a European arrest warrant to Italy for his temporary transfer (Art. 18/1/b)

[29] See footnote 22.

[30] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18. 8. 2002.

or conditional surrender (Art. 24/2 of the 2002/584/JHA Council Framework Decision). His presence in Croatia and availability for the judicial proceedings would have undoubtedly accelerated the course of the trial. In this manner, Croatia would have had a better chance of issuing a final decision in its criminal proceeding against A. A. before the time limits for the freezing order in Slovenia expired. There appear to have been no grounds for neither mandatory nor optional non-execution of the European arrest warrant (Art. 3 and 4 of the 2002/584/JHA Council Framework Decision), so it is very likely that Italy would have transferred or temporarily surrendered A. A. upon the Croatian request.

Another possibility for a faster criminal procedure in Croatia, which could have resulted in a successful confiscation of assets in Slovenia, are Eurojust's coordination meetings (Art. 7 of the Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime).[31] Eurojust's coordination meetings bring together both law enforcement and judicial authorities from Member States and third States, allowing for strategic, informed and targeted operations in cross-border crime cases and the resolution of legal and practical difficulties resulting from the differences in the different legal systems in the European Union. Eurojust ensures the information exchange between the competent authorities and assists them in providing the best possible coordination and cooperation. It offers logistical support and may organise and facilitate coordination meetings between the judicial authorities of different Member States to help resolve legal issues and practical problems. In the present case, the judicial authorities of the three neighbouring Member States could have exchanged information about the defendant's whereabouts, discuss the option of defendant's temporary transfer or conditional surrender. The meeting would also have given the opportunity to the Slovenian judicial authorities to stress the importance of time limits for the freezing, prescribed in our national law.

In order to successfully confiscate the assets, the Member States could have also explored the option of Italy issuing a confiscation order[32] in relation to the assets, deposited on A.A.'s Slovenian bank account. If the conviction of the Italian Court also found A.A. guilty of gaining a financial profit, Italy would have had the opportunity to confiscate the already frozen assets. This would require some coordination between the Member States involved. Once it was clear that the freezing order in Slovenia would expire before the Croatian proceedings would be terminated, Croatia could have agreed to a termination of the freezing in relation to the Croatian proceedings. In this way,

[31] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime OJ L 063, 6. 3. 2002.

[32] On the basis of Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24. 11. 2006.

Italy could have stepped in and issued a confiscation order for the same assets. Similarly, the same manoeuvre could have been executed immediately after the freezing expired in December 2017. This would, of course, result in Italy's confiscation of assets which were initially related to a Croatian case. Croatia would thus never become the final beneficiary of the confiscated assets, however, the main goal of assets confiscation, which is to prevent the defendant to access his assets, would still be accomplished.

WHAT IS NEXT IN THE AREA OF MUTUAL RECOGNITION OF FREEZING ORDERS: A PROPOSAL FOR A NEW REGULATION

The 2003/577/JHA Framework Decision gave the Member States a powerful tool for achieving the effective freezing of assets through the application of the principle of mutual recognition. In practice, however, the mutual recognition principle for judicial decisions on asset freezing encountered a few obstacles, the most hindering problem being that the Council Framework Decision has not been implemented or has been implemented only partially by some Member States. A study, carried out by the European Commission even found that the Framework Decision is seldom used, sometimes because mutual assistance instruments are faster, more practical and more efficient.[33] This goes against the very idea of mutual recognition being a better tool than international assistance. To this end, on 21 December 2016, the European Commission put forward a Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders. The Regulation is intended to replace the Framework Decision 2003/577/JHA as well as the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. The mutual recognition of freezing and confiscation orders would be regulated by only one legislative act and, more importantly, it would be directly applicable in the Member States.[34] This factor by itself would already represent an important step forward in creating a common instrument in the area of mutual recognition of freezing orders. Another proposed change, that might prove advantageous in making the mutual recognition of freezing orders a truly common instrument, is not only the improved Certificate form but also the proposed form for the issuing of the freezing

[33] See footnote 18, p. 75.

[34] *Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders* [online]. [Last accessed 21 March 2018 at 14:09]. Available at <https://eur-lex.europa.eu/legal-ontent/EN/TXT/?uri=CELEX:52016PC0819>, p. 5.

order itself. The idea behind this proposed change is that the certificate would no longer be accompanied by a domestic freezing order but rather by a standardized form.[35]

On 8 December 2017, the Council reached a general approach in relation to the proposed Regulation and agreed on a draft Regulation which will serve as the basis for the negotiations with the European Parliament in the framework of the ordinary legislative procedure.[36] What is interesting in relation to the presented case is the change, proposed regarding the duration of freezing orders. The Framework Decision envisages that the property shall remain frozen in the executing State until that State has responded definitively to a confiscation request. It may, however, limit the duration of the measure in accordance with its national law. The executing State must inform the issuing State, which has to be given the opportunity to comment. However, the final decision on whether it will lift the measure on such grounds is in the hands of the judicial authority in the executing State (Art. 6/2). Under the proposed Regulation, the executing State would no longer have such power. It could request the issuing authority to limit the period for which the property shall be frozen, but if the issuing authority would not agree with such proposal, the property would have to remain frozen.[37]

At the same time, the proposed Regulation text provides that the execution of the freezing order shall be governed by the law of the executing State and its authorities shall be solely competent to decide on the procedures for the execution thereof and to determine all the measure relating thereto.[38] In its Explanatory Memorandum, annexed to the Regulation proposal, the Commission clearly states that the law of the executing State applies to the enforcement of the decision, including safeguard measures where decisions are adopted in the executing State relating to the freezing order or confiscation order.[39] It is not difficult to see how this could become a problem if a Slovenian judicial authority was entrusted with the execution of a freezing order. The measure might, in fact, reach the time limits, prescribed in the CPA, obliging the executing authority to lift the freezing order. It is unclear whether in this case the Slovenian judge would have to abide by the decision of the issuing State to keep the property frozen, as envisaged by Art. 14/2. In case the judge of the issuing State would insist on the position that the measure must continue to be

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[35] *Ibid*., p. 6.

[36] *Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders – Outcome of the discussions in the (JHA) Council on 8 December 2017* [online]. [Last accessed 21 March 2018 at 13:57]. Available at <http://data.consilium.europa.eu/doc/document/ST-15451-2017-INIT/en/pdf >

[37] *Ibid*., p. 34

[38] *Ibid*., p. 49

[39] See footnote 34, p. 16.

executed, the Slovenian judge would potentially be demanded to disregard the national legislation, which is a direct result of a decision of the Slovenian Constitutional Court. In other words, even the application of the proposed Regulation might result in situations where the application of national law could present an obstacle for the execution of a freezing order of another Member State.

TO BE CONTINUED...

The freezing and confiscation of assets is most often not considered as the most important part of criminal proceedings and may sometimes be seen as somewhat peripheral to it. The correct approach should, in our view, put a lot more emphasis on a successful freezing and eventual confiscation of defendant's assets. The two measures hit the organized crime where it hurts the most: by taking away their proceeds, they not only lose what they gained though criminal activities, more importantly, they are prevented from re-investing the assets in future criminal endeavours. The freezing and confiscation of criminal proceeds is, therefore, not only a question of justice and sanctioning, it is also an important tool in crime prevention.

The defendant A.A., who was the central figure in the Croatian-Slovenian case, was arrested in Slovenia not long ago. The arrest was based on the suspicion that he was the leader of an organised criminal group, which smuggled more than 100 kilos of cocaine from South America to Europe between January 2017 and March 2018. Croatia issued a European arrest warrant, requesting his surrender from Slovenia. The decision of the Slovenian judicial authorities on the surrender was, at the time of writing of the present paper, not yet final. It is very likely, however, that he will be surrendered to Croatia. According to the European arrest warrant, A.A. is suspected of paying a total sum of 300.000,00 EUR for cocaine, which was smuggled from South America to Europe in shipping containers. He is again suspected of operating with large sums of money in order to run his drug trafficking business. If the suspicions are confirmed, it will mean that not even previous convictions and criminal proceedings against him put a stop to his criminal endeavours.

These last developments really put the analysed case in perspective. What strikes the most is that huge sums of money were deposited in bank accounts, owned directly by A.A. and other defendants. The tracing of money was therefore relatively simple if we take into account that organized criminal groups are usually much more inventive when it comes to hiding their criminal proceeds. The money in A.A.'s Slovenian bank account was frozen for ten years. It took a lot of effort from different actors to get to a point in the proceedings, where such freezing became reality. And it is, therefore, not difficult to feel somewhat bitter when seeing the final outcome of the Slovenian-Croatian cooperation, especially considering that not all options were taken advantage of.

REFERENCES

International law

- Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4. 11. 1950;
- Agreement between the Republic of Slovenia and the Republic of Croatia on legal assistance in civil and criminal matters (Off. Gaz. of the Republic of Slovenia, no. 24/2010, 22. 3. 2010);
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, adopted on 8. 11. 1990 (ETS No. 141);
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, adopted on 16. 5. 2005 (ETS No. 198).

EU law

- Treaty establishing the European Community, OJ C 325, 24. 12. 2002;
- Treaty on European Union, OJ C 191, 29. 7. 1992;
- Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU, replacing certain provisions of the above-mentioned Council framework decisions, OJ L 127, 29.4.2014;
- Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003, OJ L 374, 27.12.2006;
- Council Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property, OJ L 68, 15.3.2005, OJ L 159M, 13.6.2006;
- Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002;
- Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63, 6.3.2002;
- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006.

National law

- The Constitution of the Republic of Slovenia - Ustava Republike Slovenije (Off. Gaz. of the RS, nos. 33/91, 42/97 - UZS68, 66/00 - UZ80, 24/03 - UZ3a, 47, 68, 69/04 - UZ14, 69/04 - UZ43, 69/04 - UZ50, 68/06 - UZ121,140,143, 47/13, 47/13 and 75/16 - UZ70a);
- Slovenian Criminal Code: Kazenski zakonik (Off. Gaz. of the RS, nos. 50/12, 6/16, 54/15, 38/16 and 27/17);
- Criminal Procedure Act: Zakon o kazenskem postopku (Off. Gaz. of RS, nos. 63/94, 70/94 - popr., 25/96 - odl. US, 39/96 - odl. US, 5/98 - odl. US, 49/98 - ZPol, 72/98, 6/99, 66/00, 111/01, 32/02 - odl. US, 110/02 - ZDT-B, 44/03 - odl. US, 56/03, 116/03 - uradno prečiščeno besedilo, 43/04, 68/04 - odl. US, 96/04 - uradno prečiščeno besedilo, 101/05, 8/06 - uradno prečiščeno besedilo, 40/07 - odl. US, 14/07, 32/07 - uradno prečiščeno besedilo, 40/07 - ZDT-E, 102/07 - ZSKZDČEU, 21/08 - odl. US, 23/08 - ZBPP-B, 65/08 - odl. US, 89/08 -

odl. US, 68/08, 118/08 - skl. US, 77/09, 88/09 - odl. US, 29/10 - odl. US, 58/11 - ZDT-1, 91/11, 32/12 - uradno prečiščeno besedilo, 47/13, 87/14, 8/16 - odl. US, 64/16 - odl. US, 65/16 - odl. US, 16/17 - odl. US and 66/17);

- Act on International Co-operation in Criminal Matters between the Member States of the European Union: Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije (Off. gaz. of the RS, nos. 102/07, 9/11, 48/13, 37/15);
- Criminal Procedure Act of the Republic of Croatia: Zakon o kaznenom postupku (Off. Gaz. of the Republic of Croatia, nos. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14 and 70/17);
- Act on International Co-operation in Criminal Matters between the Member States of the European Union of the Republic of Croatia: Zakon o pravosodnoj suradnji u kaznenim stvarima s državama članicama EU (Off. Gaz. of the Republic of Croatia, no. 91/2010).

Case law

- Constitutional Court's ruling n. U-I-296/02 of 20 May 2004 (Off. gaz. of the RS, no. 68/2004 and OdlUS XIII, 41);
- Judgment of the Court of the European Union (Grand Chamber) of 16 June 2005, Case C-105/03.

Bibliography

- C. Janssens, The Principle of Mutual Recognition in EU Law (Oxford: Oxford University Press, 2013).

Internet sources

- Criminal asset recovery in the EU, Survey of Statistical Information 2010-2014 [online]. [Last accessed 15 March 2018 at 13:33]. Available at <https://www.europol.europa.eu/newsroom/news/does-crime-still-pay>
- Comparative Law Study of the implementation of mutual recognition of orders to freeze and confiscate criminal assets in the European Union [online]. [Last accessed 21 March 2018 at 12:00]. Available at <http://knjiznica.sabor.hr/pdf/E_publikacije/Comparative_law_study_of_the_implementation_of_mutual_recognition.pdf>
- Tampere European Council; 15 and 16 October 1999; Presidency Conclusions [online]. [Last accessed 21 March 2018 at 11:43]. Available at <http://www.europarl.europa.eu/summits/tam_en.htm>
- Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders [online]. [Last accessed 21 March 2018 at 14:09]. Available at <https://eur-lex.europa.eu/legal-ontent/EN/TXT/?uri=CELEX:52016PC0819>
- Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders – Outcome of the discussions in the (JHA) Council on 8 December 2017 [online]. [Last accessed 21 March 2018 at 13:57]. Available at http://data.consilium.europa.eu/doc/document/ST-15451-2017-INIT/en/pdf
- Front page image: http://c7.alamy.com/comp/ACR1G2/500-euro-note-in-ice-block-ACR1G2.jpg [Last accessed 27 March 2018 at 8:50].