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Provisional text

JUDGMENT OF THE COURT (First Chamber)

10 January 2019 (\*)

(Reference for a preliminary ruling — Judicial cooperation in criminal matters — Principle of mutual recognition of confiscation orders — Framework Decision 2006/783/JHA — Article 12(1) and (4) — Law governing the execution — Law of the executing State authorising recourse to imprisonment for the non-execution of the confiscation order — Conformity — Law of the issuing State also authorising recourse to a term of imprisonment — Lack of effect)

In Case C-97/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the rechtbank Noord-Nederland (District Court, Northern Region, Netherlands), by decision of 1 February 2018, received at the Court on 12 February 2018, in the criminal proceedings against

**ET,**

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President, C. Toader, A. Rosas and L. Bay Larsen, judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Netherlands Government, by J.M., Hoogveld and M. Bulterman, acting as Agents,
- the German Government, by T. Henze, M. Hellmann and E. Lanckenau, acting as Agents,
- the Austrian Government, by G. Hesse, acting as Agent,

– the European Commission, by R. Troosters and S. Grünheid, acting as Agents,  
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,  
gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 12 of Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ 2006 L 328, p. 59).

2 The request has been made in proceedings concerning an application made by the Openbaar ministerie (Public Prosecutor, Netherlands) for authorisation to enforce a term of imprisonment aimed at pursuing the execution, in the Netherlands, of a confiscation order issued on ET in Belgium.

## **Legal context**

### **EU law**

3 Recitals 1, 7, 8 and 13 of Framework Decision 2006/783 state:

‘(1) The European Council, meeting in Tampere on 15 and 16 October 1999, stressed that the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union.

...

(7) The main motive for organised crime is financial gain. In order to be effective, therefore, any attempt to prevent and combat such crime must focus on tracing, freezing, seizing and confiscating the proceeds from crime. It is not enough merely to ensure mutual recognition within the European Union of temporary legal measures such as freezing and seizure; effective control of economic crime also requires the mutual recognition of orders to confiscate the proceeds from crime.

(8) The purpose of this Framework Decision is to facilitate cooperation between Member States as regards the mutual recognition and execution of orders to confiscate property so as to oblige a Member State to recognise and execute in its territory confiscation orders issued by a court competent in criminal matters of another Member State. This Framework Decision is linked to Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property [OJ 2005 L 68, p. 49]. The purpose of that Framework Decision is to ensure that all Member States have effective rules governing the confiscation of proceeds from crime, inter alia in relation to the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime.

...

(13) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [TEU] and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. ...’

4 Article 1 of that Framework Decision provides:

‘1. The purpose of this Framework Decision is to establish the rules under which a Member State shall recognise and execute in its territory a confiscation order issued by a court competent in criminal matters of another Member State.

2. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU], and any obligations incumbent on judicial authorities in this respect shall remain unaffected.’

5 Article 2 of that Framework Decision contains the following definitions:

‘For the purposes of this Framework Decision:

(a) “issuing State” shall mean the Member State in which a court has issued a confiscation order within the framework of criminal proceedings;

(b) “executing State” shall mean the Member State to which a confiscation order has been transmitted for the purpose of execution;

(c) “confiscation order” shall mean a final penalty or measure imposed by a court following proceedings in relation to a criminal offence or offences, resulting in the definitive deprivation of property;

...’

6 Article 7(1) of that Framework Decision provides:

‘The competent authorities in the executing State shall without further formality recognise a confiscation order which has been transmitted in accordance with Articles 4 and 5, and shall forthwith take all the necessary measures for its execution, unless the competent authorities decide to invoke one of the grounds for non-recognition or non-execution provided for in Article 8, or one of the grounds for postponement of execution provided for in Article 10.’

7 Article 12 of Framework Decision 2006/783, entitled ‘Law governing execution’, provides, in paragraphs 1 and 4:

‘1. Without prejudice to paragraph 3, the execution of the confiscation order shall be governed by the law of the executing State and its authorities alone shall be competent to decide on the procedures for execution and to determine all the measures relating thereto.

...

4. The executing State may not impose measures as an alternative to the confiscation order, including custodial sanctions or any other measure limiting a person’s freedom, as a result of a transmission pursuant to Articles 4 and 5, unless the issuing State has given its consent.’

### **Netherlands law**

8 Article 22(1)(a) and (3) of the Wet wederzijdse erkenning en tenuitvoerlegging geldelijke sancties en beslissingen tot confiscatie (Law on the Mutual Recognition and Enforcement of

Financial Penalties and Confiscation Orders), of 27 September 2007 (Stb. 2007, No 354; ‘Law on recognition and enforcement’), provides:

‘1. A confiscation order liable to recognition shall be recognised and executed under Netherlands law. In so far as the confiscation order:

(a) seeks payment of a sum of money to the State for the purpose of recovering unlawfully obtained gains, the order shall be executed in accordance with Article 577b(1) and Article 577c of the [Wetboek van Strafvordering (Code of Criminal Procedure)], with the proviso that the [raadkamer van de rechtbank Noord-Nederland (pre-trial chamber of the District Court, Northern Region, Netherlands)] has jurisdiction to deal with the claim for the granting of leave to enforce a term of imprisonment pending payment;

...

3. An alternative penalty or measure shall be enforced only after the competent authority in the issuing Member State has granted permission to do so. ...’

9 Article 557c(1) of the Code of Criminal Procedure reads as follows in relation to terms of imprisonment:

‘If the convicted party fails to comply with the judgment or appeal judgment in which payment of a sum of money to the State for the purpose of recovering unlawfully obtained gains was imposed, and full recovery against his assets under Articles 574 to 576 has not been possible, the court may, on application by the public prosecutor, grant leave for the enforcement of a term of imprisonment for a maximum of three years.’

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

10 By judgment of the hof van beroep te Antwerpen (Court of Appeal, Antwerp, Belgium) of 20 December 2012, a confiscation order for EUR 800 000 was imposed on ET. That judgment became final and the enforcement of the confiscation order was taken over by the Netherlands, acting as executing Member State within the meaning of Article 2(b) of Framework Decision 2006/783.

11 It is in that context that the public prosecutor lodged an application before the referring court, the rechtbank Noord-Nederland (District Court, Northern Region, Netherlands), based on Article 22 of the Law on recognition and enforcement, seeking leave to enforce a term of imprisonment against ET, on the ground that the sum of EUR 652 119.19 was outstanding and that it suspected there to be invisible financial flows.

12 ET submits that the application made by the public prosecutor is inadmissible and, in the alternative, unfounded. In that regard, ET argues that a term of imprisonment is not only a ‘measure’ for the purposes of Netherlands criminal law, but also a punitive penalty within the meaning of Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (‘the ECHR’), and within the meaning of Article 49(1) of the Charter of Fundamental Rights of the European Union. Furthermore, ET argues that applying a term of imprisonment constitutes an aggravation of the confiscation order, of which enforcement is sought, rendering it unlawful.

13 The referring court, in the light of the case-law of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) according to which the measure of imprisonment provided for in Article 577c of the Code of Criminal Procedure must be considered to be a ‘penalty’ within the meaning of Article 7 of the ECHR, harbours doubts as to the compatibility of that case-law with Framework Decision 2006/783.

14 In those circumstances, the rechtbank Noord-Nederland (District Court, Northern Region, Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Can Article 12(1) of Framework Decision [2006/783] be interpreted as meaning that, when a confiscation order transferred by an issuing State is executed in the Netherlands, a term of imprisonment pending payment as referred to in Article 577c of the Netherlands Code of Criminal Procedure may be applied, having regard to, inter alia, the decision of the Hoge Raad [der Nederlanden (Supreme Court of the Netherlands)] of 20 December 2011 to the effect that a term of imprisonment pending payment must be deemed to be a penalty within the meaning of Article 7(1) of the ECHR?’

(2) Does it make any difference to the possibility of applying a term of imprisonment pending payment whether the law of the issuing State also makes provision for the possibility of applying a term of imprisonment pending payment?’

### **Consideration of the questions referred**

#### **The first question**

15 By its first question, the referring court asks, in essence, whether Article 12(1) and (4) of Framework Decision 2006/783 must be interpreted as precluding the application of a law of an executing Member State, such as that in the main proceedings, which, for the purpose of enforcing a confiscation order adopted in an issuing State, authorises, where necessary, a term of imprisonment to be imposed.

16 Firstly, it must be noted that, pursuant to Article 1 of Framework Decision 2006/783, read in the light of recitals 1 and 8 thereof, that that Framework Decision is intended, based on the principle of mutual recognition, which is a cornerstone of judicial cooperation in civil and criminal matters, and in order to facilitate cooperation between Member States in matters of mutual recognition, to establish the rules according to which a Member State recognises and executes in its territory an order for confiscation made by a court or tribunal with jurisdiction in criminal matters of another Member State.

17 In that regard, the Court of Justice has acknowledged that both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, C-216/18, PPU, EU:2018:586, paragraph 36).

18 Next, pursuant to Article 7 of Framework Decision 2006/783, the executing State’s competent authorities are required to recognise a confiscation order which has been transmitted in accordance with the provisions of that Framework Decision, without any further formality being required, and must take all the measures necessary for its execution without delay.

19 Thus, only the grounds explicitly provided for by that Framework Decision enable, should the case arise, the executing State to refuse to recognise or execute the confiscation order, in accordance with Article 8, or to postpone the execution thereof, pursuant to Article 10 of that decision.

20 Finally, under Article 12(1) of Framework Decision 2006/783, the execution of the confiscation order shall be governed by the law of the executing State and its authorities alone shall be competent to decide on the procedures for execution and to determine all the measures relating thereto.

21 Under Article 12(4), the prior agreement of the issuing State is required for the adoption of a measure which would replace the confiscation order.

22 It follows, therefore, from a combined reading of those two paragraphs of Article 12 of the Framework Directive that, as a general rule, it is for the execution State's competent authorities to decide, in accordance with the law of that State, the manner in which the execution is to be carried out and the most adequate measures to execute the confiscation order. However, as a special rule, in accordance with paragraph 4 of that article, the prior agreement of the issuing State is required if the measure envisaged by the executing State were to appear to replace that order.

23 In the light of those considerations, it needs to be examined whether Framework Directive 2006/783 precludes a measure to execute by a term of imprisonment, such as that provided for in the Netherlands legislation and as interpreted by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

24 As a preliminary point, it should be recalled that, as regards the interpretation of provisions of national law, the Court is in principle required to base its consideration on the description given in the order for reference. According to settled case-law, the Court does not have jurisdiction to interpret the internal law of a Member State (judgment of 16 February 2017, *Agro Foreign Trade & Agency*, C-507/15, EU:C:2017:129, paragraph 23 and the case-law cited).

25 However, a term of imprisonment may, according to the information provided in the documents before the Court of Justice, be applied upon request from the public prosecution service against the person concerned by a confiscation order, on the condition that that person does not voluntarily pay the amount for which he was sentenced and is not insolvent. That execution measure leaves the obligation to pay in place, so that the person on whom a term of imprisonment has been imposed may, at any time, be freed from it by paying the debt. Imprisonment would be limited in time, in so far as the length of detention cannot exceed three years and the imposed duration depends, inter alia, on partial payments possibly made.

26 In that regard, it follows from the order for reference that, according to Article 22(1)(a) of the Law on recognition and enforcement, a term of imprisonment constitutes a means to execute, in accordance with Netherlands law, a confiscation order issued in another Member State, for the purpose of paying to the State an amount of money obtained unlawfully where the sentenced person does not comply with the judgment or order imposing such payment. According to Article 21(3) of that law, an alternative penalty or measure shall be enforced only after the competent authority in the issuing Member State has given its consent.

27 In that context, a term of imprisonment, for the purpose of executing a confiscation order, cannot be considered to be an alternative to that order, within the meaning to Article 12(4) of Framework Decision 2006/783, and does not constitute an additional sanction or a modification of

such an order imposed in the issuing State. Consequently, its adoption does not require the prior consent of the issuing State.

28 As argued by all of the parties which submitted observations, the application of a term of imprisonment seeks to pursue the objective of Framework Decision 2006/783 which consists, as recalled in paragraph 16 of the present judgment, in facilitating cooperation between Member States in particular as regards the execution of confiscation orders, by pressuring the person concerned who refuses to pay the amount owed, although he is capable of doing so.

29 That finding is not called into question by the fact that terms of imprisonment have been characterised as a ‘penalty’, within the meaning of Article 7 of the ECHR, by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), as noted by the referring court. Such a classification has no influence on the competent authorities’ ability, provided for in Article 12(1) of Framework Decision 2006/783, to determine the conditions of execution of the confiscation order and to implement all the measures it deems to be the most adequate to carry out the execution, in order to pursue the objective of Framework Decision 2006/783, while respecting, as stated in recital 13 thereof, the fundamental rights of the person concerned.

30 In the light of those considerations, the answer to the first question is that Article 12(1) and (4) of Framework Decision 2006/783 must be interpreted as not precluding the application of the legislation of an executing State, such as that at issue in the main proceedings, which, for the purpose of enforcing a confiscation order adopted in an issuing State, authorises, where necessary, a term of imprisonment to be imposed.

### **The second question**

31 By its second question, the referring court asks whether the fact that the legislation of the issuing State also authorises possible recourse to a term of imprisonment has any bearing on the application of such a measure in the executing State.

32 In that regard, as noted in paragraph 17 above, in accordance with Article 12(1) of Framework Decision 2006/783, the execution of the confiscation order is governed by the law of the executing State.

33 That provision is based on the principle of mutual recognition, which implies that there is mutual trust as to the fact that each Member State accepts the application of the criminal law in force in the other Member States, even though the implementation of its own national law might produce a different outcome (see, to that effect, judgment of 23 January 2018, *Piotrowski*, C-367/16, EU:C:2018:27, paragraph 52).

34 It would adversely affect the objective pursued by Framework Decision 2006/783, as set out in paragraph 16 of the present judgment, if the application of an execution measure in the executing Member State were governed by the national law of the issuing State or subject to the conditions provided for in that law.

35 In the light of those considerations, the answer to the second question is that the fact that the legislation of the issuing State also authorises possible recourse to a term of imprisonment has no bearing on the application of such a measure in the executing State.

### **Costs**

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 12(1) and (4) of Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders must be interpreted as not precluding the application of the legislation of an executing State, such as that at issue in the main proceedings, which, for the purpose of enforcing a confiscation order adopted in an issuing State, authorises, where necessary, a term of imprisonment to be imposed.**
2. **The fact that the legislation of the issuing State also authorises possible recourse to a term of imprisonment has no bearing on the application of such a measure in the executing State.**

[Signatures]

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\* Language of the case: Dutch.

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