

# Freezing and confiscation under the EU–UK Trade and Cooperation Agreement

New Journal of European Criminal Law  
2021, Vol. 0(0) 1–13

© The Author(s) 2021

Article reuse guidelines:

[sagepub.com/journals-permissions](https://sagepub.com/journals-permissions)

DOI: 10.1177/2032284421995244

[journals.sagepub.com/home/nje](https://journals.sagepub.com/home/nje)



**Vânia C. Ramos** 

Carlos Pinto de Abreu e Associados, Lisbon, Portugal

**Gary Pons**

5 St Andrews Hill, London, UK

## Abstract

This contribution presents a critical and practical analysis of the changes the EU–UK Trade and Cooperation Agreement brings to the recognition and enforcement of freezing and confiscation orders. It provides an overview of how this area of law may develop in the future post-Brexit.

## Keywords

Brexit, freezing, confiscation, mutual legal assistance, European criminal law, 2003/577/JHA, Regulation (EU) 2018/1805, 2006/783/JHA

## Introduction

Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders<sup>1</sup> (2018 Regulation) replaced the provisions of Framework Decision 2003/577/JHA<sup>2</sup> as regards the freezing of property for confiscation purposes (FD 2003) and Framework Decision 2006/783/JHA<sup>3</sup> (FD 2006) from 19

1. European Parliament and Council Regulation (EU) 2018/1805 of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders [2018] OJ L 330/1, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1805>> accessed 10 January 2021 (2018 Regulation).
2. Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [2003] OJ L 196/45, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003F0577>> accessed 10 January 2021 (FD 2003).
3. Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [2006] L 328/59, <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006F0783>> accessed 10 January 2021 (FD 2006).

## Corresponding author:

Vânia Costa Ramos, Advogada, Carlos Pinto de Abreu e Associados, Alameda Quinta de Santo Antonio, 13-C, Lisbon 1600-675, Portugal.

Email: [vaniacostaramos@carlospintodeabreu.com](mailto:vaniacostaramos@carlospintodeabreu.com)

December 2020.<sup>4</sup> It is self-evident that this will have little practical effect given that the Trade and Cooperation Agreement (TCA)<sup>5</sup> will take effect from 1 January 2021.

Title XI of Part 3 of the TCA bears the description ‘Freezing and Confiscation’, but it also includes provisions on mutual legal assistance (MLA) in relation to asset tracing, which substitute the ‘international cooperation’ chapters of the relevant Council of Europe (CoE) Conventions.<sup>6</sup>

As outlined in the text, these CoE Conventions and their explanatory reports are relevant interpretive tools, since many of the TCA’s provisions resemble the provisions in the Conventions. The CoE Treaty Office provides an update of the entire CoE-status.<sup>7</sup>

It is useful in practical terms to compare the TCA with FD 2006 in respect of confiscation orders and FD 2003 as regards the freezing of property. Furthermore, FD 2003 and FD 2006 will be applicable to freezing orders and confiscation orders received before the end of the transition period. Directive 2014/41/EU (EIO Directive) will apply to European Investigation Orders (EIO) for investigative assistance received before that date.<sup>8</sup>

## Relevant new provisions

Unlike all previous provisions, Title XI is not divided into sections or chapters. This makes the reading and interpreting of it harder, particularly because it includes a broad range of provisions regulating different aspects of the freezing and confiscation of instrumentalities, proceeds of crime and other property liable to confiscation.

Adopting the corresponding sections in the 2005 CoE Convention, Title XI appears to contain the following subjects: (i) Objective and general principles and definitions<sup>9</sup>; (ii) Investigative

- 
4. See recital 52 and articles 39 and 40 of the 2018 Regulation. The Framework Decisions will still apply between Member States not bound by the Regulation and in the relations between these and those bound by the Regulation.
  5. Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, [2020] OJ L 444/14, <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2020.444.01.0014.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.444.01.0014.01.ENG)> accessed 10 January 2021 (TCA). All provisions cited in this piece without further reference belong to the TCA.
  6. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CoE [2005] European Treaty Series – No. 198, <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198>> accessed 10 January 2021 (CoE 2005 Convention); Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, CoE [1990] European Treaty Series – No 141, <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/141>> accessed 23 January 2021 (1990 CoE Convention).
  7. Differently than the EU, which does not have a centralised website showing the existing Conventions to which it is a party, the entire CoE Conventions can be accessed at <<https://www.coe.int/en/web/conventions/full-list>> accessed 23 January 2021. On this website, you may also access the relevant lists of state parties, declarations, reservations, as well as the explanatory reports to the Conventions.
  8. European Parliament and Council Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L 130/1, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0041>> accessed 10 January 2021 (EIO Directive). See Art 62(1)(c), (e) and (l), Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C1 384/1, <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12019W/TXT\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12019W/TXT(02))> accessed 23 January 2021 (Withdrawal Agreement).
  9. Art. LAW.CONFISC.1 to 2.

assistance<sup>10</sup>; (iii) Provisional measures<sup>11</sup>; (iv) Confiscation<sup>12</sup>; (v) Grounds for refusal<sup>13</sup>; (vi) Notification and protection of third parties' rights<sup>14</sup>; (vii) Procedural and other general rules.<sup>15</sup> The provisions in (i) and (v) to (viii) apply to the three types of cooperation in Title XI, namely, investigative measures, freezing and confiscation.

## Summary of main changes

### *Removal of the principle of mutual recognition*

The most obvious change, which is not confined to this Title, is that the doctrine of mutual recognition has been replaced by an agreement to cooperate to the widest extent possible, which is a feature of MLA instruments.<sup>16</sup>

Mutual recognition was not only the cornerstone of judicial cooperation as set out in the First Recital of both FDs, but as the eighth recital of FD 2006 stresses, the purpose of the Framework Decision is to facilitate mutual recognition between Member States as regards confiscation orders so as to oblige a Member State to recognise and execute a confiscation order.<sup>17</sup>

This means that instead of a legal regime focused on treating the decisions of a requesting State as if they were domestic decisions, subject to certain exceptions, we now have a regime in which there is only an obligation to assist other States. This obligation to assist is limited to what is expressly set out in the TCA. In all other circumstances, the limitations to international cooperation imposed by domestic law will apply. In this respect, the TCA follows the approach of previous MLA agreements, with some particular provisions that reflect the historical relationship between the UK and the EU Member States.

### *Introduction of special provisions regarding MLA for the purpose of obtaining information and evidence*

Unlike the 2003 FD and the 2006 FD, the section related to confiscation (instead of that related to MLA<sup>18</sup>) contains an obligation to assist in relation to investigation and obtaining evidence. This obligation includes

1. the identification and tracing of a person's instrumentalities and assets, which includes providing and securing evidence connected to them,

---

10. Art. LAW.CONFISC.3 to 7.

11. Art. LAW.CONFISC.8 to 9.

12. Art. LAW.CONFISC.10 to 14.

13. Art. LAW.CONFISC.15 to 18.

14. Art. LAW.CONFISC.19 to 20.

15. Art. LAW.CONFISC.21 to 34.

16. See, e.g. Art 7(1) 1990 CoE Convention; Art 15(1) 2005 CoE Convention.

17. The editors of 'The Palgrave Handbook of Criminal and Terrorism Financing Law' illustrate this point in respect of the 1999 Tampere European Council: 'Mutual recognition must be built on harmonisation of confiscation laws but also, most importantly, on mutual trust, which demands respect for the rule of law'. – see C King, C Walker, J Gurulé (eds.), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Springer, Cham 2018) 399.

18. On this section, see Oehmichen and Keith, in this issue.

2. responding to requests for information in respect of bank accounts and safe deposit boxes,
3. providing information and monitoring banking transactions.<sup>19</sup>

These were not specifically provided for in the FDs or in the 2018 Regulation and were previously dealt with via requests for MLA and more recently via European Investigation Orders in relation to criminal proceedings. Corresponding provisions were however included in the 1990 and 2005 CoE Conventions.<sup>20</sup>

There is also a freestanding ability for a State to forward to another State information that may be of assistance to that State, even though no request for that information has been made.<sup>21</sup> This is consistent with the agreement to cooperate and was also included in the 1990 and 2005 CoE Conventions.<sup>22</sup>

Finally, MLA provisions relating to the service of documents in relation to freezing and confiscation orders have also been introduced in this Title.<sup>23</sup> FD 2003 and 2006 did not have such provisions. The 1990 and 2005 CoE Conventions had similar provisions.<sup>24</sup>

### Freezing

The term ‘freezing order’ which was contained in FD 2003 and in the 2018 Regulation has been replaced by the term ‘provisional measure’ which is designed to cover the freezing or seizing of the relevant item of property. Again, this is not entirely new; the same wording was used in the 1990 and 2005 CoE Conventions.<sup>25</sup>

Whereas previously in respect of the UK there needed to be a restraint order that had been made by a Crown Court, which would then be transmitted for the purpose of a recognition, it appears that a court order is no longer needed. It is sufficient that a criminal investigation or proceedings have commenced and that a request is made to freeze or seize property.

Art LAW.CONFISC.8(1), (2) and (9) correspond to provisions in the 1990 and 2005 CoE Conventions<sup>26</sup>; the provisions in Art LAW.CONFISC.8(3) to (6) correspond to Art 9(1) and (3) to (6) of the 2018 Regulation. These provisions implement a principle of equal treatment of foreign freezing requests in relation to their priority and also a deadline for execution of urgent requests where there are grounds to believe that the property will be immediately removed or destroyed. The deadline for execution of these urgent requests under Art LAW.CONFISC.8(4) is 96 h, which is longer than the deadline of 48 h in Art 9(3) 2018 Regulation for urgent requests, and the general 24 h deadline in Art 5(3) 2003 FD. There is an obligation to inform and consult with the requesting State where the requested State is unable to comply with this time limit. The expiry of this time limit does not affect the validity of the request for freezing.<sup>27</sup>

---

19. See Art LAW.CONFISC.4, LAW.CONFISC.5 and LAW.CONFISC.6. The UK and the EU may notify each other that the relevant provisions will also apply to accounts held in financial institutions other than banks.

20. See Art 8 1990 CoE Convention and Art 16, 18 and 19 2005 CoE Convention.

21. See Art LAW.CONFISC.7.

22. See Art 10 1990 CoE Convention and Art 20 2005 CoE Convention.

23. See Art 19.

24. See Art 21 1990 CoE Convention and Art 31 2005 CoE Convention.

25. See Art. 7(2)(b), 11 and 12 1990 CoE Convention and Art 15(2)(b) and (3), 21 and 22 2005 CoE Convention.

26. See Art. 11(1) and (2) and 12(2) 1990 CoE Convention and Art 15(2)(b) and (3), 21(1) and (2) and 22 2005 CoE Convention.

27. See Art LAW.CONFISC.8(5) and (6).

Once provisional measures have been executed by the requested State, it is bound to inform the requesting State of any changes that might lead to a variation of the measures. In this regard, one should underline that provisional measures adopted under this Title are subject to the principle of necessity and proportionality.<sup>28</sup> This requirement stems from the European Convention on Human Rights (ECHR), as well as, for EU Member States, the Charter of Fundamental Rights of the European Union (CFREU).<sup>29</sup> The 2018 Regulation had already included a provision laying down a corresponding provision, but the 2003 FD merely referred to it in a recital.<sup>30</sup>

As in the 2003 FD, the requested State shall give the requesting State the opportunity to present its reasons in favour of maintaining the provisional measures.<sup>31</sup>

## *Confiscation*

Article LAW.CONFISC.10 provides that a State which has received a request for the confiscation of property ‘shall enforce the confiscation order made by the court of the requesting State in relation to such property’ or submit the request to its competent authority with a view to obtaining an order for confiscation and then enforcing it. This provision is similar to the freezing provision in that it concentrates on the request rather than the transmission of the order for confiscation.

As in the FDs, the TCA contemplates the enforcement of both confiscation orders concerning an amount of money and confiscation orders concerning specific items of property. It provides for a different procedure in relation to each.<sup>32</sup>

The difference between mutual recognition and the requirement to cooperate becomes evident when the provisions relating to how a state enforces the confiscation order are considered. The natural consequence of Brexit is that the procedure for enforcing a confiscation order is entirely governed by the domestic law of the requested State.

The approach a requested State shall take is set out in Art LAW.CONFISC.10(5). Previously, the requested State was required to recognise the confiscation order. Such an approach is obviously inconsistent with the policy which underlies Brexit, and accordingly it has been replaced with a requirement to cooperate to the widest extent possible under its domestic law.

Art LAW.CONFISC.10(6) permits the measures allowing the seizure, detention and forfeiture of property and assets to include the making of applications to the civil courts.<sup>33</sup>

The requirement that the requested State take a decision on recognising and executing the confiscation order within 45 days of the receipt of the confiscation certificate that was contained in the 2018 Regulations<sup>34</sup> has been maintained. Art LAW.CONFISC.10(7) requires that the requested State take a decision on executing the confiscation order within 45 days of receipt of the request. If it cannot comply with the 45 day requirement, the requested State is required to inform the requesting State and consult with it concerning the most appropriate next steps.<sup>35</sup>

---

28. See Art LAW.CONFISC.1(5).

29. Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.

30. See recitals 15 and 21 and Art 1(3) 2018 Regulation and recital 4 2003 FD.

31. See Art LAW.CONFISC.9(2). This provision was also present in Art 12(2) 1990 CoE Convention and 22(2) 2005 CoE Convention.

32. See Art LAW.CONFISC.10(3) and (4).

33. See Art LAW.CONFISC.10(6).

34. See Art 20 2018 Regulation.

35. See Art LAW.CONFISC.10(8).

The great unknown of this agreement is precisely how this will be interpreted in practice. Each EU state has its own experience of enforcing the confiscation orders of UK courts and vice versa. The effect of the change from mutual recognition to a duty to cooperate is that the court of the requested State has in principle more freedom to decide how far it goes in enforcing a confiscation order.

### *Procedure for making the request*

The request unsurprisingly needs to be made in writing in a prescribed form which is contained in ANNEX LAW-8. There is a prescribed form for a provisional or freezing request and a prescribed form for confiscation. The form broadly requires the same information as the certificate that was required under the provisions of the FDs.

### *Grounds for refusal – Applicable to all three types of cooperation*

The most important changes for lawyers that specialise in the recognition and enforcement of freezing orders for confiscation purposes and confiscation orders relate to the grounds for refusing to recognise. These are provided for in Art LAW.CONFISC.15. The structure of this provision has no correspondence with the structure of the provision on grounds for refusal established in FD 2003.<sup>36</sup> On the contrary, it closely follows the structure and text of the corresponding provision of the 2005 CoE Convention.<sup>37</sup>

None of the refusal grounds are established as a mandatory ground for refusal in the TCA. But some will likely be established as mandatory refusal grounds in domestic law (e.g. lack of dual criminality for confiscation and coercive measures, *ne bis in idem*).

The TCA provisions include refusal grounds which apply to all three types of cooperation.<sup>38</sup> The main grounds for refusal of execution in respect of all three types of cooperation are the principle of *ne bis in idem* (double jeopardy) and dual criminality.

This means that dual criminality control in regard to freezing measures is now necessary even for those offences which were previously listed in Art 3(1) FD 2003 (subject to change where there is a notification under Art 15(2) of the TCA. This allows for the reintroduction of a list of offences exempt from dual criminality control similar to the one in force in FD 2003, on the basis of reciprocity).

In respect of confiscation orders, dual criminality control applies subject to a change in case of notification under Art 15(2) of the TCA, which allows for the reintroduction of a list of offences exempt from dual criminality control similar to the one in force in FD 2006, on the basis of reciprocity.

Dual criminality as a refusal ground only applies to investigative assistance where the request involves coercive action. This provision is similar to the corresponding provision in the 2005 CoE Convention.<sup>39</sup> This will lead to litigation since coercive action is not defined. Investigative assistance may not necessarily require such action, depending on how you define coercive measures. These provisions are identical to those in the 2005 CoE Convention, and the corresponding

---

36. See Art 7 FD 2003.

37. See Article 28 2005 CoE Convention.

38. Art 15(1) and (2).

39. See Art 28(1)(g), first sentence, 2005 CoE Convention.

explanatory report is a useful tool to understand the TCA in this regard.<sup>40</sup> Under the EIO Directive previously applicable, the refusal on the basis of lack of dual criminality was also limited to certain investigative measures; namely, it could not be invoked in relation to non-coercive measures.<sup>41</sup>

Technical defects in the request are also covered by the TCA.<sup>42</sup> If a request is deficient, the requested State may ask for further information and set a time limit for this to be provided. The consequence of failing to respond is not explicitly laid down in the TCA, but a defective request may lead to a refusal of cooperation, particularly if the defect affects the essential elements for the requested State to assess. FD 2003 did have a provision stating that defects could lead to a refusal if the certificate was ‘incomplete or manifestly incorrect’.<sup>43</sup> FD 2006 also contained a ground of refusal where the certificate was not produced, was incomplete, or did not manifestly correspond to the order.<sup>44</sup> In the absence of a similarly expressed provision in the TCA, domestic provisions will apply.

Finally, the TCA also includes provisions establishing a limitation on domestic grounds of refusal. Requested States may not invoke (i) banking secrecy; (ii) lack of liability of legal persons for confiscation; (iii) death of natural persons or dissolution of legal persons; and (iv) the circumstance that the person subject to the order is mentioned both as the author of the underlying criminal offence and of money laundering (self-laundering).<sup>45</sup>

Although this regime resembles the 2005 CoE Convention, it should be noted that in the TCA the general grounds for refusal, applicable to all three types of cooperation measures, have been curtailed when compared to the 2005 CoE Convention. The latter included general refusal grounds that are not included in the TCA. These relate to (i) incompatibility to the fundamental principles of the legal system of the requested Party; (ii) likelihood of prejudice to the sovereignty, security, order public or other essential interests of the requested Party; (iii) lesser importance of the case; and (iv) tax offences. It remains to be seen what is the consequence of these differences since some of these refusal grounds implement domestic constitutional provisions which will normally remain applicable in international cooperation.

The TCA further includes specific refusal grounds in respect of investigative assistance and provisional measures,<sup>46</sup> and for confiscation.<sup>47</sup>

---

40. See §§ 217 and ff, Explanatory Report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS 198), <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3813>> accessed 10 January 2021.

41. See Art 10(2)(d) and 11(2) EIO Directive and Oehmichen and Keith, in this issue. This is notwithstanding the interpretative disputes around the interplay between Article 10(1) and (2) and Article 11(1).

42. See Art LAW.CONFISC.26.

43. Art 8(1)(c) FD 2003.

44. Art 8(1) FD 2006.

45. See Art 15(9). This corresponds to Article 28(8) 2005 CoE Convention. In relation to this topic, EU Law obliges states to criminalise self-laundering – see recital 11 and Art 3(5) European Parliament and Council Directive (EU) 2018/1673 of 23 October 2018 on combating money laundering by criminal law (sixth Anti-Money-Laundering Directive) OJ L 284/22.

46. See Art LAW.CONFISC.15(3) and (4).

47. See Art LAW.CONFISC.15(5) and (6).

### *Specific grounds for refusing to recognise investigative assistance or provisional measures*

FD 2003<sup>48</sup> established the following grounds for refusal:

1. Technical grounds relating to the certificate,
2. The principle of *ne bis in idem* (or double jeopardy),
3. The principle of dual criminality for non-list offences,
4. Immunity and privilege.

As is set out above, the TCA permits the refusal to recognise on the basis of all of these grounds, with the exception of immunity and privilege.

In relation to immunity and privilege, it may well still permit a refusal to recognise under the TCA, given that this refusal ground would fall under the additional specific refusal grounds applicable to requests for provisional measures. The TCA includes specific refusal grounds for requests for provisional measures in situations where such measures would not be permitted in a similar domestic case, would not be permitted at all under domestic law or would require authorisation by a judicial authority acting in relation to criminal offences.<sup>49</sup> Again, these correspond to the 2005 CoE Convention, making the corresponding explanatory report a useful tool to understand the TCA in this regard.<sup>50</sup>

Furthermore, these additional specific refusal grounds also apply to investigative assistance implying coercive action. These should be analysed against the backdrop of the EIO Directive which was previously applicable.

Under the EIO Directive, there were eight refusal grounds, established as optional:

1. Immunity and privilege, including freedom of press,
2. Jeopardy to national security interests, informants or use of classified intelligence,
3. Measure not authorised in a similar domestic case for proceedings that are not formally criminal,
4. The principle of *ne bis in idem* (or double jeopardy),
5. Territorial jurisdiction of the executing State in respect of the underlying extraterritorial criminal offences in the issuing State,
6. Incompatibility with the executing State's obligations in accordance with Article 6 of Treaty on the European Union (TEU)<sup>51</sup> and the CFREU,
7. The principle of dual criminality for non-list offences,
8. Investigative measure in the executing State limited to a list or category of offences that does not include the offence underlying the European Investigation Order (EIO).

---

48. See Art 7 2005 CoE Convention.

49. See Art LAW.CONFISC.15(3) and (4).

50. See §§224 and ff, Explanatory Report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS 198), <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3813>> accessed 10 January 2021.

51. Consolidated version of the Treaty on European Union [2012] OJ C 326/13 (TEU).



The latter two did not apply to the investigative measures that had to be available according to Art 10(2) EIO Directive, which included non-coercive measures.<sup>52</sup>

Most refusal grounds set out in the EIO Directive could fall in the refusal grounds set out in the TCA for investigative assistance requiring coercive action. Their existence in practice will vary according to the domestic laws of each State. For obvious reasons, Art 6 of the TEU and the Charter will not be applicable in the UK, but it does remain applicable in the EU Member States.<sup>53</sup>

### *Specific grounds for refusing to recognise a confiscation order*

Article 8 of the 2006 FD identifies grounds for refusal:

1. Technical grounds relating to the certificate,
2. The principle of ne bis in idem (or double jeopardy),
3. The principle of dual criminality for non-list offences,
4. Immunity and privilege,
5. The right of a third party in the executing State,
6. Absence of the defendant,
7. Territorial jurisdiction of the executing State in respect of the underlying criminal offences,
8. The confiscation order was ordered under extended power of confiscation,
9. Limitation due to the passage of time.

In addition to the refusal grounds in Title XI of the TCA set out above, there are additional specific grounds for refusing confiscation requests, which correspond to the provisions of the 2005 CoE Convention.<sup>54</sup> These include:<sup>55</sup>

1. Confiscation is not permitted by the domestic law in respect of the type of offence to which the request relates;
2. Confiscation is contrary to the principles of the domestic law of the requested State concerning the limits of confiscation in respect of the relationship between an offence and an economic advantage/proceeds or property that might be qualified as its instrumentalities (without prejudice of confiscation of property in order to satisfy a value confiscation order equivalent to the value of proceeds);
3. Passage of time according to the requested State's laws;
4. The request does not relate to a previous conviction, or a decision of a judicial nature or a statement in such a decision that an offence or several offences have been committed, on the basis of which the confiscation has been ordered or is sought (without prejudice to the procedure referred to in Art LAW.CONFISC.10(5) and (6));
5. Lack of enforceability of the confiscation order or ongoing ordinary means of appeal in the requesting State;
6. The request relates to a confiscation order resulting from a decision rendered in absentia.

---

52. See Art 10(2)(d) and 11(2) EIO Directive and Oehmichen and Keith, in this issue.

53. See Oehmichen, W. Schomburg and Kayß, in this issue.

54. See Art 28(4), (5) and (6) 2005 CoE Convention.

55. See Art LAW.CONFISC.15(5).

Again, these correspond to the 2005 CoE Convention, making the corresponding explanatory report a useful tool to understand the TCA in this regard.<sup>56</sup>

A relevant difference is the provision concerning the grounds of refusal in respect of the passage of time. FD 2006 limited the application of this ground for refusal to those cases in which the acts fell within the jurisdiction of the executing State under its own criminal law. This jurisdictional limitation no longer applies in the TCA context. For States that consider statute of limitation due to the passage of time a substantive rule, subject to the constitutional principle of legality, doubts may be raised as to whether this refusal ground should also apply to pending proceedings.

While not every ground of refusal that is set out in FD 2006 is expressly retained, the majority are. Those which are not may well lead to refusal in any event given that the duty to cooperate to the widest extent possible set out in Article LAW.CONFISC.1 could be interpreted as to the widest extent permissible in domestic law.

### *Restriction of use of information obtained by cooperation under title XI*

Title XI of the TCA allows requesting States to make the execution of the request conditional upon the use or transmission of the evidence/information being limited to what is specified in the request, unless the requested State consents to an additional use ('speciality principle').<sup>57</sup> It prohibits the additional use of the information if the requesting State does not provide consent.<sup>58</sup> This was an area which was subject to controversy under the EIO Directive<sup>59</sup> but is now clearly established and goes beyond the 1990 and 2005 CoE Conventions, making speciality generally applicable even in the absence of a Declaration to that end by the relevant States.<sup>60</sup>

The TCA also contains provisions on the protection of personal data. These require a more detailed analysis which exceeds the scope of this piece.<sup>61</sup>

### *Rights of third parties*

Article LAW.CONFISC.20, which applies to cooperation requests both for provisional measures and for confiscation, provides that the requested State shall recognise any decision issued by the requesting State regarding the rights of third parties, unless the third party did not have an adequate opportunity to assert their rights, the decision is incompatible with a decision already taken in the requested State on the same matter, or is contrary to ordre public of the requested State or its domestic law in respect of exclusive jurisdiction. These provisions correspond to those in the 2005 CoE Convention.<sup>62</sup> There were no similar explicit provisions in the 2003 and 2006 FDs or in the 2018 Regulation.

56. See §§227 and ff, Explanatory Report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CoE [2005] European Treaty Series – No. 198, <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3813>> accessed 10 January 2021.

57. See Art LAW.CONFISC.30(1).

58. See Art LAW.CONFISC.30(2).

59. See, JB Silva, 'The speciality rule in cross-border evidence gathering and in the European Investigation Order – let's clear the air' 19 (2019) 485.

60. See Art 32 1990 CoE Convention and Art 42 2005 CoE Convention.

61. Art LAW.CONFISC.30(3) to (5).

62. Art 32 2005 CoE Convention.

## Legal Remedies

FD 2003 and 2006 both had provisions on legal remedies,<sup>63</sup> and the TCA replicates them in relation to provisional measures and confiscation orders.<sup>64</sup> However, the TCA provisions are much briefer. They merely state that the requested States have the obligation to provide effective legal remedies in order to preserve the rights of affected persons.<sup>65</sup> The substantive reasons underlying the requested measures may not be challenged in the requested State. On the other hand, the TCA states that persons served with provisional measures or confiscation orders issued in another state shall be informed upon service of documents of what legal remedies are available to them under the domestic law of the requesting State.<sup>66</sup> This new explicit and clear provision is welcome.

This division of legal remedies across jurisdictions raises several issues, in particular relating to the rights of the defence both of persons targeted by the measures, as well as of third parties, and the legal and procedural fragmentation that arises. This is a complex issue that has often been raised in the context of international cooperation in criminal matters. This is beyond the scope of this article, but practitioners should consider the possibility of, in any given case, challenging measures on the basis of these limitations.<sup>67</sup>

Legal remedies in the context of investigative assistance are not regulated, which is a shortcoming in comparison with the provisions of Art 14 EIO Directive. Articles 13 ECHR and 47 CFREU (for EU Members States) remain applicable in any event.

## The Relevant Bodies

The FDs allowed each Member State to designate a competent authority which would be capable of issuing a certificate and transmitting both the freezing order and the confiscation order.<sup>68</sup> In England and Wales, it was the Crown Court that issued the certificate upon an application by the prosecutor, but it was the prosecutor that would actually transmit it.

The TCA uses the terminology ‘central authority’ in respect of who will be responsible for answering requests which is a throwback to MLA.<sup>69</sup> In the United Kingdom, the designated authority is the United Kingdom Central Authority (UKCA) which is a branch of the Home Office. The TCA also allows the EU to designate a Union body which itself would be competent to make and execute requests.<sup>70</sup>

The removal of the requirement to provide a certificate suggests that UK courts will have little involvement in issuing requests for the enforcement of confiscation orders, which is different from the position under the FDs, but reflects the position where the UK seeks enforcement of confiscation orders in certain countries outside the EU. Currently, there are no regulations made under the European Union (Future Relationship) Act 2020 setting out the mechanics of how requests are to be made; it remains to be seen what the precise mechanism will be.

---

63. See Art 11 FD 2003 and Art 9 FD 2006.

64. See Art LAW.CONFISC.34.

65. Similar to what was already stated in Art 11(1) FD 2003 and Art 9(1) FD 2006.

66. See Art LAW.CONFISC.19(3).

67. For further details, see, only as an example, with further references, M Luchtman, ‘Transnational Law Enforcement Cooperation – Fundamental Rights in European Cooperation in Criminal Matters’ (2020) 28 *EurJCrimeCrLCrJ* 14.

68. See Art LAW.CONFISC.4(2).

69. See Art LAW.CONFISC.21.1.

70. Art. LAW.CONFISC.21.2.

## *What Happens to the Confiscated property?*

In relation to confiscated property and how the states will deal with it, the focus on victims which the 2018 Regulations introduced is maintained. Similar provisions were not found in FD 2003 and 2006. The priority in the TCA is to return the property to the requested State so that it can compensate their victims or return it to its legitimate owners.<sup>71</sup> This reflects the policy contained within Article 30 of the 2018 Regulations, even if the terms are drastically different. Article 30 requires the issuing State to issue a decision concerning restitution to the victim. Where no such decision has been issued, the executing State keeps the entirety of confiscated property valued under €10,000; where the confiscated property exceeds this, the executing and issuing States divide the property equally. This remains the same in the TCA.

## **Temporal Application**

FD 2003 and FD 2006 will be applicable to freezing orders and confiscation orders received before the end of the transition period. The EIO Directive will apply to requests for investigative assistance received before that date by means of an EIO.<sup>72</sup>

The TCA applies to those received after the end of the transitional period.

In certain Member States, there could be legal disputes about whether this is in line with constitutional protections, where the TCA regime created a right for an individual and is not applicable merely because the request was received before the transitional period.

## **Conclusion**

Overall, the TCA contains many similarities to FDs and the Conventions. It is a shame that the provisions on legal remedies have been watered down and left entirely to the domestic law of the requested State, although it is probably an inevitable political consequence of Brexit. This may adversely affect many who are subject to the investigative measures and the freezing and confiscation orders contained in Title XI of the TCA and will inevitably lead to litigation.

The Explanatory Notes to the European Union (Future Relationship) Bill 2020 sets out that in relation to asset freezing and confiscation, the TCA provides for more limited grounds for refusal of a request allowing for the broadest cooperation possible.<sup>73</sup> While the intention may well be to limit the grounds of refusal, the practical effect of moving from mutual recognition to a duty to cooperate will be a divergence of the legal systems. In reality, the grounds upon which a requested State can refuse a request are broadly similar to what they were before. Where there are some differences, the TCA regime resembles the 2005 CoE Convention. This underlines and emphasises the point that what the TCA achieves is a return to mutual legal assistance principles and mechanisms, even if it is to an 'upgraded version'.

The development of European Legislation in relation to freezing and confiscation has involved a large degree of harmonisation between the different proceeds of crime laws of each Member State.

---

71. See Art LAW.CONFISC.12(2).

72. See Art 62(1)(c), (e) and (l), Withdrawal Agreement.

73. The European Union (Future Relationship) Act 2020 is the statutory provision enacted by the UK Parliament to bring the TCA into effect in UK Law. These Explanatory Notes were prepared by the Cabinet Office in order to assist the reader of the Bill to understand what the provisions will mean in practice and are <https://publications.parliament.uk/pa/bills/cbill/58-01/0236/en/20236en.pdf> accessed 10 January 2021.

The TCA marks a move away from harmonisation and a return to divergence. The obvious practical effect of that will be that each requested State will adopt a different approach to recognition and enforcement of confiscation orders.

Organised crime is international in its nature and extent. Brexit will not affect this; organised crime does not respect international borders, but it does benefit from the extent to which they can hamper the efforts of law enforcement. The need for law enforcement authorities to make requests relating to the confiscation orders will not decrease as a result of Brexit. If anything, it is likely to increase because of the nature of organised crime and because of the familiarity that law enforcement has with international cooperation across Europe.

The likelihood of more requests in relation to the investigation, prosecution and punishment of international crime will provide an opportunity to view with interest how courts across Europe react to the arguments which focus upon the divergence of laws and the importance of the law in the requested State.

### **Declaration of conflicting interests**

The author(s) declared no potential conflicts of interest with respect to the research, authorship and/or publication of this article.

### **Funding**

The author(s) received no financial support for the research, authorship and/or publication of this article.

### **ORCID iD**

Vania C Ramos  <https://orcid.org/0000-0003-3141-0179>