

CJEU: Executing MS May Impose Imprisonment for Non-Execution of Foreign Confiscation Order

Thomas Wahl

Can a Member State apply a term of imprisonment pending payment in order to execute a confiscation order adopted in another EU Member State? This was the main question the CJEU dealt with in the [case C-97/18 \(“ET”\)](#). The Court’s judgment was based on a reference for a preliminary ruling from the rechtbank Noord-Nederland (District Court, Northern Region, the Netherlands) and concerned the interpretation of Art. 12 of Framework Decision (FD) 2006/783/JHA on the application of the mutual recognition principle to confiscation orders.

In the case at issue, the Netherlands took over the enforcement of a confiscation order imposed on *ET* by the Court of Appeal, Antwerp/Belgium. The Dutch public prosecutor sought leave to enforce a term of imprisonment against *ET*, since more than €650,000 of the ordered €800,000 were still outstanding, and *ET* was suspected of invisible financial flows. *ET* argued that the application for a term of imprisonment is unlawful and contradicts Art. 7(1) ECHR, Art. 49(1) CFR.

The referring court indeed confirmed that the measure of imprisonment constitutes a penalty within the meaning of Art. 7 ECHR according to the case law of the Supreme Court of the Netherlands. First, the rechtbank Noord-Nederland expressed doubt as to whether the Dutch executing authorities may apply the measure of imprisonment pending payment within the scheme of the EU’s FD 2006/783/JHA. Second, the court asked whether application of the measure also requires the issuing state to provide for the possibility of applying a term of imprisonment pending payment.

As regards the first question, the CJEU stated that Art. 12(1) and (4) of the FD posits that, as a general rule, it is up to the executing 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 by which to execute the confiscation order. However, as a special rule (in accordance with para. 4), prior agreement of the issuing State is required if the measure envisaged by the executing State were to appear to replace that order. It must therefore be examined whether these rules preclude a measure such as that in question.

In this context, the CJEU observed that the term of imprisonment is applied as leverage against a person who is not willing to pay, but capable of paying the amount owed. The person concerned may, at any time, be released from imprisonment if he/she pays the debt. Furthermore, the measure is limited in time and duration, depending, *inter alia*, on partial payments possibly made. The adoption of such imprisonment is neither an alternative to the order nor an additional sanction. Consequently, it does not require the prior

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consent of the issuing State. It is completely up to the executing State how to pursue the objectives of the FD.

The classification of the term of imprisonment as a “penalty” by the Dutch Supreme Court, within the meaning of Art. 7 ECHR, has no influence on the competent authorities in implementation of all necessary measures for execution of foreign confiscation orders.

As to the second question, the CJEU briefly noted that it follows from Art. 12(1) of the FD that the legislation of the issuing State has no bearing on the application of the measure in question in the executing State.

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