

Case C-8/24**Request for a preliminary ruling****Date lodged:**

9 January 2024

Referring court:

Visoki kazneni sud Republike Hrvatske (Croatia)

Date of the decision to refer:

4 October 2023

Appellant:

D. d.o.o.

Other party to the proceedings:

Županijsko državno odvjetništvo u Zagrebu

[...]

The Visoki kazneni sud Republike Hrvatske (Criminal Court of Appeal of the Republic of Croatia), [...] examining the appeals of the public prosecutor and of the company D. d.o.o. with its registered office in Z. against the judgment of the Županijski sud u Zagrebu (County Court, Zagreb) of 25 November 2022 [...], submits the following request pursuant to Article 267(3) of the Treaty on the Functioning of the European Union ('the TFEU'):

REQUEST FOR A PRELIMINARY RULING
(anonymised version)**I Information about the referring court:**

Referring court: Visoki kazneni sud Republike Hrvatske (Criminal Court of Appeal of the Republic of Croatia)

[...]

II Parties in the present case:

1. The commercial company D. d.o.o. with its registered office in Z. (Republic of Croatia) [...] [...]

[...]

2. The Županijsko državno odvjetništvo u Zagrebu (Zagreb County Public Prosecutor's Office), which is the authority competent to apply for the registration and approval of the confiscation order issued by the Okrožno sodišče v Mariboru (Regional Court, Maribor, Republic of Slovenia).

[...]

III Subject matter of the main proceedings and relevant facts

(a) *Succinct presentation of the main proceedings*

- 1 The Criminal Court of Appeal of the Republic of Croatia is examining the appeals of the public prosecutor and of the commercial company D. d.o.o. brought against the judgment of the County Court, Zagreb,¹ which recognised the confiscation order contained in the judgment of the Regional Court, Maribor.² The confiscation order applies to the shares of L.Z. d.d., which are subject to a temporary freeze to secure the confiscation of proceeds [of crime].
- 2 The Republic of Slovenia (Regional Court, Maribor) submitted to the Zagreb County Public Prosecutor's Office the confiscation certificate ('the certificate') referred to in Article 14 of 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 ('Regulation 2018/1805') as well as a translation of the introduction, operative part, and part of the grounds of the first-instance judgment containing the confiscation order and a translation of the introduction and operative part of the second-instance judgment dismissing the appeals against the first-instance judgment and making the confiscation order final as a result.³ Consequently, the Zagreb County Public Prosecutor's Office made a request to the County Court, Zagreb, to recognise and execute the confiscation order.

¹ Judgment of the County Court, Zagreb, of 25 November 2022. [...]

² Judgment of the Regional Court, Maribor (Republic of Slovenia) of 27 May 2020 [...], upheld by the judgment of the Court of Appeal (Republic of Slovenia) of 24 November 2021. [...]

³ The Republic of Croatia, in accordance with Article 14(2) of Regulation 2018/1805, made a declaration stating that when a confiscation certificate is transmitted to it with a view to the recognition and execution of a confiscation order, the issuing authority must transmit the original confiscation order or a certified copy thereof together with the confiscation certificate.

- 3 The referring court hearing the appeal has doubts as to whether the property subject to the confiscation order falls within the scope of Article 2(3) of Regulation 2018/1805 and, therefore, has doubts as to the rights of the affected person in the context of respect for the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union ('the Charter'), the breach of which rights may in exceptional situations constitute grounds for non-recognition and non-execution of a confiscation order as indicated in Article 19(1)(h) of Regulation 2018/1805, which will be explained below in detail.

(b) Succinct presentation of the facts and procedure in the main proceedings

Information contained in the confiscation certificate:

- 4 The certificate shows that the Regional Court, Maribor, issued a confiscation order,⁴ in which it ruled that shares in L.Z. d.d. ('L.Z.') were to be confiscated from the commercial company D. d.o.o. ('D.'), with its registered office in Z., namely 31 669 shares held in the account of the trustee H.V. d.d. ('H.V.') and 25 250 shares held in the account of the trustee P.B. d.d. ('P.B.') (that is to say, a total of 56 919 shares in L.Z. d.d.).
- 5 In its certificate, the Regional Court, Maribor, described the shares in L.Z. as the proceeds of a criminal offence [...] in accordance with Article 2(3)(a) of Regulation 2018/1805 and subject to confiscation [...] without a final conviction [...], following proceedings in relation to a criminal offence in accordance with Article 2(3)(d) of that regulation.
- 6 The Regional Court, Maribor, stated in Section F of the certificate that it had issued a confiscation order in connection with the criminal offence of acting to the detriment of creditors⁵ and the criminal offence of money laundering,⁶ the latter criminal offence being included in the list set out in Article 3(1) of Regulation 2018/1805 (laundering of the proceeds of crime).

6.1. The Regional Court, Maribor, concluded, therefore, that the evidentiary proceedings had demonstrated that all the statutory criteria of the criminal offence of acting to the detriment of creditors had been fulfilled, since in June 2013 Mr J. T., as a nominee director of the insolvent company I.J.S. d.d. ('I.J.S.'), acting on the instructions of Mr D. R., together with Mr T. V., as a director of the company V. K. d.o.o. ('V.K.'), and Mr D. K., as a director of the company M. d.o.o. ('M.'), carried out legal transactions in order to defraud, and act to the

⁴ Order of the Regional Court, Maribor, dated [...] 27 May 2020, which became final on 22 December 2021.

⁵ The criminal offence of acting to the detriment of creditors under Article 227(2) of the KZ-1 (Criminal Code).

⁶ The criminal offence of money laundering under Article 245(3), read in conjunction with Article 245(1), of the KZ-1 (Criminal Code).

detriment of, the creditors of I.J.S. It is relevant to the present proceedings that the Regional Court, Maribor, found that in this manner, V.K. acquired the claims of I.J.S. and 56 919 shares in L.Z. – which secured one of the claims and which, until the recapitalisation in 2018, constituted 53.57% of the ownership rights – without actual payment, that is to say, by merely assuming the obligation to pay under the concluded contracts. In this manner, significant damage was caused to the creditors of I.J.S. – the companies [Z.E.H.] and Z.D.H. d.d. ('Z.D.H').

6.2. The Regional Court, Maribor, found that the shares in L.Z. were subsequently disposed of in order to conceal their origin. Thus, in July 2013, Mr J. T., as a director of I.J.S., acting on the instructions of Mr D. R., and Mr D. R., as a director of D., entered into an agreement whereby I.J.S. sold to D. a claim on V.K. On the same day, Mr D. R., as a director of D., and Mr T. V., as a director of V.K., entered into a share sale agreement, whereby V.K. sold 56 919 shares in L.Z. to D., which fulfilled its obligation to pay the sale price by assuming the debt of V.K. to I.J.S.

6.3. The Regional Court, Maribor, found that the L.Z. shares in question had been subject to a temporary freeze, but during a short period (from 16 September to 20 October 2014) when the shares were not frozen – namely on 13 October 2014 – they had been transferred to escrow accounts, making it impossible to identify their beneficial owners.

6.4. The Regional Court, Maribor, found that all the persons involved, with the exception of Mr J. T., who was merely a fictitious director, had been aware of what they were doing, had known that their conduct was illegal, had engaged in that conduct deliberately, and also that their criminal offences had been proven in respect of both action and intention.

6.5. The Regional Court, Maribor, further stated that the confiscation of the proceeds [of crime] was ordered on the basis of the public prosecutor's reasoned request made in the prosecutor's closing speech after extensive evidentiary proceedings.

7 In Section H of the certificate, the Regional Court, Maribor, stated that a representative of D., Mr Z. Z., had appeared in person before the court.

7.1. The Regional Court, Maribor, further clarified that Mr Z. Z. had been questioned during the main hearing and advised in accordance with Article 500 of the ZKP (Slovenian Code of Criminal Procedure) that he was testifying in the context of the possible confiscation of the proceeds of another beneficiary –D. – and that in connection with the determination of those proceeds [of crime] he had the right to submit evidence and, with the consent of the presiding judge, also to ask questions, and, furthermore, that he had been advised about the possible confiscation of those proceeds: 56 919 shares in L.Z.

7.2. The Regional Court, Maribor, stated that at that time Mr Z. Z. had testified that he was aware of the temporary freeze, that he considered the temporary freeze

to be unjustified, and for that reason had already appealed through his lawyer to the County Court, Zagreb, but the appeal had been unsuccessful. He also stated that he would appeal if the shares were confiscated.

7.3. The Regional Court, Maribor, further stated that it had served excerpts from the 27 May 2020 judgment containing the confiscation order (the introduction, operative part, and part of the grounds concerning the confiscated proceeds and the available remedies), together with their translation into Croatian, on D., which received the judgment on 13 October 2020, but did not appeal against it.

7.4. The judgment of the Regional Court, Maribor, became final on 22 December 2021, after the Višje sodišče (Court of Appeal, Slovenia) upheld it. The judgment of the Court of Appeal was served on D. on 12 January 2022. The certificate was issued on 17 February 2022.

Information contained in the provided excerpts from the judgment of the Regional Court, Maribor

8 It follows from the judgment of the Regional Court, Maribor, that a panel of that court conducted criminal proceedings against the defendants Mr Lj. P., Mr F. J., Ms M. V. S. and Mr S. Z. on the basis of an indictment drawn up by the Specializirano državno tožilstvo Republike Slovenije (Specialised Public Prosecutor's Office of the Republic of Slovenia) on 29 May 2017, supplemented on 23 October 2017 and amended on 21 April 2020, in which the defendants were charged with the offence of abuse of position and power under Article 244(2), read in conjunction with Article 244(1), and Article 25 of the Kazenski zakonik (Slovenian Criminal Code).

9 After the main hearing on 22 May 2020, in the presence of the abovementioned defendants, their lawyers and the public prosecutor, the Regional Court, Maribor, delivered its judgment on 27 May 2020, acquitting the defendants.

9.1 Thus, according to the operative part of the judgment, the defendants were acquitted of the charges that between 11 and 25 July 2007, acting as accomplices, they had used their positions and powers in the course of their business activities to obtain substantial benefits for I.J.S.

9.1.1. According to the charges, Z.D.H., represented by the chair of its management board, Mr F. J., entered into a loan agreement with a bank. As collateral for the loan, Z.E.H., represented by the chair of its management board, Mr S. Z., pledged shares in H., C.C. and B., and subsequently [the bank] transferred the funds to Z.D.H., which in the meantime – represented by management board member Mr Lj. P. – entered into a loan agreement with Z.E.H. for the same amount, and Z.E.H., represented by Ms M. V. S., entered into a loan agreement for a similar amount with the I.J.S., represented by nominee director Mr D. Š. As collateral for the latter loan, I.J.S., notwithstanding the fact that it was over-indebted, submitted two blank promissory notes and a promissory note

agreement. In this way, the defendants acted to the detriment of Z.E.H., which no longer held the pledged securities and, despite having sold the pledged securities, was left with a debt to the bank as the lender. At the same time, they obtained significant benefits for I.J.S.

9.2. The operative part of the judgment of the Regional Court, Maribor, also includes the decision to confiscate from the D. with its registered office in Z. a total of 56 919 shares in L.Z. for the benefit of the Republic of Slovenia under Article 498a(1)(1) of the *Zakon o kazenskem postopku* (Slovenian Code of Criminal Procedure), but the decision on how to carry out the confiscation is to be made in the executing State.

- 10 The grounds of that judgment indicate that the decision to confiscate the shares was based on the outcome of the evidentiary proceedings, which demonstrated that Mr J.T., as a nominee director of the insolvent I.J.S., acting on the instructions of Mr D. R., Mr T. V., as a director of V.K., and Mr D. K., as a director of M., committed, in 2013, the criminal offence of acting to the detriment of creditors, that is to say, the criminal offence of money laundering (as previously described in paragraph 6 of this request and its subparagraphs).

10.1. On 27 January 2020, a panel of the Regional Court, Maribor, questioned a representative of D. d.o.o., Mr Z. Z.; he was advised of his rights by the court and testified as stated in paragraphs 7.1 and 7.2 of this request.

10.2. Furthermore, it follows from the judgment that on 22 May 2020 the Regional Court, Maribor, held the main hearing in open session in the presence of the public prosecutor, the four defendants and their counsels, and that in his closing speech the public prosecutor requested that D. be subject to confiscation of proceeds.

10.3. Moreover, in the grounds of the judgment it is stated that the criminal offence of acting to the detriment of creditors was the subject of a preliminary investigation (which involved a house search and the ordering of a temporary freeze in connection with a request for the confiscation of proceeds), such that the case file [...] also relates to that criminal offence, but that criminal offence was not included in the subsequent indictment.

10.4. It also follows from the grounds of the judgment that, in the meantime, Mr J. T. died, and Mr D. R. was questioned as a witness in the case at issue.

10.5. It is further pointed out in the grounds of the judgment that the decision to confiscate the shares was made in the proceedings in which the defendants were acquitted rather than in the special non-contentious proceedings conducted by another court panel after the judgment had become final, but D., as the beneficiary of the improperly obtained proceeds, was not adversely affected by that fact. That is because it is possible to appeal against a judgment and the time limit for lodging an appeal is longer than in the case of an order, the appeal is heard by a court of the same instance, and the panel conducting the non-contentious proceedings and

the investigating judge would not be able to gather and examine more evidence than the panel hearing the case.

- 11 The referring court has also been provided with the introduction and operative part of the judgment of the court of appeal, which shows that a panel of that court dismissed the public prosecutor's appeal and upheld the first-instance judgment of the Regional Court, Maribor, at a hearing held on 24 November 2021 in the presence of all the defendants, their lawyers, and the public prosecutor from the appellate prosecutor's office.

Arguments of the parties:

(a) Pleas raised by the appellant – D.:

- 12 In its appeal, D. alleges that the Regional Court, Maribor erred in stating that the person in charge at the company (Mr Z. Z.) had appeared in person at the court proceedings that ended in a final conviction (Section H of the certificate).

12.1. D. states that the person in charge at the company participated in the hearing as a witness.

12.2. D. states that the hearing attended by Mr [Z. Z]. did not result in a confiscation order, as the public prosecutor only requested the confiscation of proceeds later in his closing speech.

12.3. D. states that the proceedings concerning the temporary freeze in which D. lodged an appeal with the County Court, Zagreb, are separate and distinct proceedings from those in which the Regional Court, Maribor, acquitted the defendants and issued the confiscation order.

- 13 D. disputes that the proceedings in which the confiscation order was issued were proceedings on whose basis the confiscation order could be recognised and executed in accordance with Regulation 2018/1805, and argues that the rights and freedoms enshrined in the Charter have clearly been breached.

13.1. D. states that the criminal proceedings concerned charges that the criminal offence of abuse of position and power had been committed in 2007, and that the confiscation order is based on findings of fact contained in the grounds of the judgment regarding other criminal offences committed by other persons during a different period. Those persons did not participate in the proceedings. In that regard, D. refers to the Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation of 25 May 2022, COM(2022)0245, which provides for the confiscation of assets from third parties without a conviction in cases where criminal proceedings have been initiated but the proceedings cannot be continued due to the illness, absconding, death, immunity from prosecution of the suspected or accused person or amnesty granted to the

suspected or accused person or expiry of the time limits prescribed by national law, but not in cases of acquittal.

13.2. D. argues that the company could not effectively participate in the proceedings because the person in charge at the company was summoned once to the hearing as a witness, and also because the judgment of the Regional Court, Maribor, which the company received was not translated into Croatian in full, but only in excerpts, and as a result its right to language, and consequently its right to defence, access to a tribunal and effective remedy were violated. D. also disputes that it received the excerpts from the judgment, as stated in the certificate, on 13 October 2020. The company claims that it only received the judgment at its own request in February 2022, and thus after the certificate had been issued, and proposes that the opinion of a handwriting expert be sought to verify that fact.

(b) The position of the public prosecutor:

- 14 The public prosecutor argues that the essence of the present proceedings is that the defendants were acquitted of the charges of abuse of position and power by allowing undue benefits to be obtained from the acquisition of shares in L.Z., and subsequently all those shares were transferred for nil consideration to D., against which a confiscation order was issued.

14.1. The public prosecutor believes that no procedural requirements concerning D. were breached during the proceedings, since the person in charge was advised of his right to submit evidence and to ask questions, and was also made aware of the possibility that the shares could be confiscated, and did not appeal against the judgment, excerpts of which were served on the company. With respect to the confiscation procedure itself, the public prosecutor notes that the confiscation took place in accordance with the Slovenian Code of Criminal Procedure, and under recital 13 of Regulation 2018/1805, the fact that there is no such provision in the laws of the Republic of Croatia is irrelevant to the decision to recognise and execute the confiscation order in accordance with the abovementioned regulation.

14.2. The grounds raised in the appeal by the Zagreb County Public Prosecutor's Office concern the manner in which the confiscation order was executed and are irrelevant to this request for a preliminary ruling.

IV Provisions of national law relied on:

- 15 In the present case, Regulation 2018/1805 is directly applicable (Article 288(2) TFEU).

(a) Law of the Republic of Croatia

- 16 In the appeal proceedings, under Article 480(1) of the *Zakon o kaznenom postupku* (Croatian Code of Criminal Procedure) [Narodne novine (Official

Gazette) Nos 152/08, 76/09, 80/11, 91/12 – resolution of the Ustavni sud (Constitutional Court, Republic of Croatia), 143/12, 56/13, 145/13, 152/14, 70/17, 126/19 and 80/22, ‘ZKP/08’]:

‘The court of second instance may, at a session or on the basis of the hearing held, reject an appeal as lodged out of time or inadmissible, or dismiss an appeal as unfounded and uphold the judgment at first instance, or set aside the judgment and refer the case back to the court of first instance for review and adjudication, or amend the judgment at first instance.’

(b) *Law of the Republic of Slovenia*

17 Article 498 of the Code of Criminal Procedure of the Republic of Slovenia

‘(I) In addition to cases where criminal proceedings are concluded with a judgment finding the suspect guilty, monies or property of illegal origin under Article 245 of the Kazenski zakonik (Criminal Code) and bribes unlawfully given or accepted under Articles 151, 157, 241, 242, 261, 262, 263 and 264 of the Criminal Code shall also be confiscated:

(1) if the statutory criteria of a criminal offence under Article 245 of the Criminal Code have been fulfilled, indicating that the monies or property under said article are proceeds of crime. [...]

(3) The panel shall issue a special order (Article 25 (6)) on this matter upon a reasoned request from the public prosecutor; prior to that, the investigating judge shall, at the request of the panel, gather information and examine all circumstances relevant to establishing the illegal origin of the monies, property or bribes unlawfully given or accepted.

(4) A certified copy of the order referred to in the preceding paragraph shall be served on the owner of the confiscated monies or property or [giver or receiver of the] bribe, if his or her identity is known. [...]

(5) The owner of the confiscated monies or property or [giver or receiver of the] bribe shall have the right to appeal against the order referred to in paragraph 2 of this Article if he or she believes that the confiscation has no legal basis’.

V. Provisions of European Union law whose interpretation is sought:

18 *Charter of Fundamental Rights:*

Article 47 – Right to an effective remedy and to a fair trial

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.’ [...]

19 *Regulation 2018/1805:*

Article 1 – Subject matter

‘1. This Regulation lays down the rules under which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State within the framework of proceedings in criminal matters.

2. This Regulation shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles enshrined in Article 6 TEU.’

Article 2 – Definitions

[...]

(3) “property” means property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title or interest in such property, which the issuing authority considers to be:

(a) the proceeds of a criminal offence, or its equivalent, whether the full amount of the value or only part of the value of such proceeds;

[...]

(d) subject to confiscation under any other provisions relating to powers of confiscation, including confiscation without a final conviction, under the law of the issuing State, following proceedings in relation to a criminal offence;’

Article 19 – Grounds for non-recognition and non-execution of confiscation orders

‘1. The executing authority may decide not to recognise and not to execute confiscation orders only if:

[...]

(h) in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the confiscation order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence.’

Article 33 – Legal remedies in the executing State against the recognition and execution of a freezing order or confiscation order

‘1. Affected persons shall have the right to effective legal remedies in the executing State against the decision on the recognition and execution of [...] confiscation orders pursuant to Article 18. [...]

2. The substantive reasons for issuing the freezing order or confiscation order shall not be challenged before a court in the executing State’. [...]

- 20 *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 European Union ('Directive 2014/42/EU')*

Article 8 – Safeguards

[...]

‘7. Without prejudice to Directive 2012/13/EU and Directive 2013/48/EU, persons whose property is affected by a confiscation order shall have the right of access to a lawyer throughout the confiscation proceedings relating to the determination of the proceeds and instrumentalities in order to uphold their rights. The persons concerned shall be informed of that right.’ [...]

VI Succinct presentation of the reasoning in the request for a preliminary ruling

- 21 The Criminal Court of Appeal of the Republic of Croatia is examining the appeals against the judgment of the court of first instance (County Court, Zagreb), which recognised the confiscation order issued by the Regional Court, Maribor. The law does not provide for an ordinary remedy against the rulings of the Criminal Court of Appeal of the Republic of Croatia, and thus under Article 267(3) TFEU, due to existing doubts concerning the interpretation of Regulation 2018/1805, the court is in principle obliged to request a preliminary ruling from the Court of Justice of the European Union (judgment of the Court of 6 October 2021, *Conorzio Italian Management*, C-561/19).
- 22 First of all, it should be noted that the Republic of Croatia, in addition to the certificate, also requires the original confiscation order (Article 14(2) of Regulation 2018/1805); in the case at hand, these are the judgments of the Regional Court, Maribor, and of the Court of Appeal. The judgments were served on the referring court (as well as on D., as will be discussed below) only in excerpts that the Regional Court, Maribor, considered relevant to the present proceedings, that is to say, the introduction and operative part (pages 1–4), an excerpt from the grounds of the judgment (pages 63–71) and information on the remedies available (pages 71–72) from the judgment of the Regional Court, Maribor, and the introduction and operative part of the judgment of the Court of Appeal.

22.1. On the basis of the documents thus served, it may be concluded that the Regional Court, Maribor, conducted criminal proceedings against the four defendants⁷ concerning the offence of abuse of position and power committed in 2007. The description of the facts related to the criminal offence of which the defendants were acquitted, included in the operative part of the judgment, does not contain a single reference to shares in L.Z., while the grounds pertaining to that part of the judgment were not served. Additionally, the four defendants participated in those criminal proceedings, in the course of which they were acquainted with the charges and had the opportunity to challenge them with the assistance of their lawyers, and they were ultimately acquitted of those charges. In giving its reasons for the acquittal, the Regional Court, Maribor, referred, *inter alia*, to events that occurred after 2007, specifically in 2013, in which events the four defendants were no longer involved, and which concerned other persons.⁸ Those grounds of the judgment provided the basis for issuing a confiscation order.

23 Therefore, in the present case, the confiscation order is based on an acquittal.

23.1. Hence, the first question that the court wishes to raise is whether the term ‘proceedings in relation to a criminal offence that may result in confiscation of property, including confiscation without a conviction’ within the meaning of Article 2(3) of Regulation 2018/1805 also includes criminal proceedings concluded with an acquittal.

24 If the answer to the first question is in the affirmative, the Criminal Court of Appeal of the Republic of Croatia has further doubts.

25 In the present case, the acquittal was accompanied by a confiscation order, which was based on the findings contained in the grounds of the judgment that concerned another criminal offence, committed by other perpetrators and not by the defendants. It is therefore a criminal case rather than a civil-law request as in the main proceedings in the case heard by the Court of Justice which gave rise to the judgment of 19 March 2020, *Agro in 2001* (C-234/18, ECLI:EU:C:2020:221).

25.1. Under the Croatian Code of Criminal Procedure, confiscation of proceeds is possible following a conviction or a judgment which finds that the suspect committed the unlawful act that is the subject of the charge in proceedings against property. However, such proceedings are conducted upon the motion of the competent prosecutor, while the operative part of the judgment identifies the criteria of the unlawful act as a result of which the proceeds were obtained, and the persons in respect of whom the confiscation of proceeds is requested may participate in the proceedings and challenge all elements relating both to the unlawful act itself and to the facts that determine the confiscation of proceeds; they also have the right to representation.

⁷ Defendants: [...]

⁸ Other persons: [...]

25.2. Notwithstanding the above, the referring court also considered the objectives of Regulation 2018/1805 in terms of facilitating the mutual recognition and execution of confiscation orders, and in particular recital 13 thereof, which states that there are no obstacles to recognising orders that do not exist in the legal system of the executing State.

25.3. In addition, the Criminal Court of Appeal of the Republic of Croatia also had in mind Directive 2014/42/EU, which, through the adoption of minimum rules, seeks to approximate the Member States' confiscation regimes, thus facilitating mutual trust and effective cross-border cooperation. Thus, under the directive, which also covers money laundering, confiscation of proceeds occurs in the event of a final conviction for a criminal offence (Article 4(1)) or in special proceedings where the criminal proceedings initiated cannot be completed as a result of the illness or absconding of the suspected or accused person (Article 4(2)). At the same time, it is understood that the directive regulates minimum rules and that individual national laws may provide for a broader framework than that set out in the directive.

25.4. In the present case, it appears from the grounds of the judgment of the Regional Court, Maribor, that one of the persons who, according to those grounds, was involved in committing the criminal offence of acting to the detriment of creditors, Mr J. T., has in the meantime died, but the Regional Court, Maribor, did not even find that he had committed a criminal offence. No such information is available, however, with regard to the other persons (Mr T. V. and Mr D. K.), while Mr D. R., according to the grounds of the judgment, was heard as a witness in the case. In addition, the Regional Court, Maribor explicitly states in its judgment that a preliminary investigation was conducted with respect to the criminal offence of acting to the detriment of creditors (it does not specify which suspects the investigation concerned), but it did not result in charges.

25.5. In this connection, it should be noted that the operative part of the judgment of the Regional Court, Maribor, does not contain information about the perpetrators or a description of the criminal offence on the basis of which that court issued the confiscation order.

25.5.1. In that regard, the referring court also bore in mind the Court's judgment of 12 October 2023, *Inter-Consulting*, C-726/21, ECLI:EU:C:2023:764, which was published during the drafting of the present request for a preliminary ruling. Although that judgment concerns other sources of EU law, the Court notes the importance not just of the operative part of the judgment, but also of the facts cited in the grounds that were the subject of the preliminary investigation, as well as all other relevant information.

25.5.2. That case, however, concerned the application of the *ne bis in idem* principle, and thus the mutual trust of Member States in their respective criminal justice systems: each Member State consents to the application of the criminal law in force in other Member States even when the outcome would be different if its

own national law were applied. The purpose of that is to ensure, in the area of freedom, security and justice, that a person whose trial has been finally disposed of is not prosecuted for the same acts. As the referring court understands it, a set of facts known to the (law enforcement) authorities of one State resulted in a final judgment on which the *ne bis in idem* prohibition is based.

25.5.3. Unlike in that case, however, the essence of the problem in the case at hand is the absence of charges, that is to say, no motion was put forward to determine the elements and perpetrators of the criminal offences on which the court based the confiscation order, which then logically affected the scope of examination of the case and the predictability of that scope for the participants in the proceedings, especially since the formal request concerning the confiscation of shares was only made in the closing speech.

25.6. In view of the above, assuming that the answer to the first question is in the affirmative, the next question that should be asked is whether ‘proceedings in relation to a criminal offence that may result in confiscation of property, including confiscation without a conviction’ within the meaning of Article 2(3) of Regulation 2018/1805 also include criminal proceedings concluded with a judgment of acquittal that includes an order to confiscate property as undue proceeds derived from another criminal offence, which is not the criminal offence of which the defendants were acquitted, and in whose commission the defendants were not involved, but rather persons against whom no indictment was brought.

- 26 If that question is also answered in the affirmative, the referring court has further questions related to whether the rights enshrined in the Charter were respected in the proceedings during which the confiscation order was issued, as doubts in that regard have been raised by the appellant – D.

26.1. Consequently, it should be stated that the Criminal Court of Appeal of the Republic of Croatia considers the principle of mutual recognition, and thus also Article 33(2) of Regulation 2018/1805, according to which the substantive reasons for issuing the confiscation order cannot be challenged before a court in the executing State, to be a cornerstone of judicial cooperation.

26.2. However, the referring court is also mindful of the procedural safeguards of Directive 2014/42/EU, as interpreted by the Court of Justice in its judgment in Joined Cases C-845/19 and C-863/19 (judgment of 21 October 2021, *Okrazhna prokuratura – Varna*, C-845/19 and C-863/19, ECLI:EU:C:2021:864).

26.3. All of this has been highlighted in the context of doubts concerning the meaning of the principle of mutual recognition, since under Article 19 of Regulation 2018/1805, it is only in exceptional situations that the executing authority can decide not to recognise a confiscation order on the grounds that it fails to comply with the rights set out in the Charter.

- 27 Indeed, the Regional Court, Maribor, states in the grounds of the judgment that ‘events that occurred several years later cannot result in a conviction’, only [for

the court] to continue to deal with those events in relation to which it finds evidence of criminal offences of acting to the detriment of creditors and money laundering, which offences, however, involve different people.

27.1. Moreover, it follows that the criminal offence of acting to the detriment of creditors was examined during the preliminary investigation, which, however, did not result in an indictment.

27.2. In the present case, the person in charge at D., which was the beneficiary of the improperly obtained proceeds, participated in one hearing, although the appellant D. claims that on that occasion Mr [Z. Z.] was questioned as a witness, which remains to be verified; he was certainly advised of the possibility of the shares being confiscated and about his right to submit evidence and ask questions in the proceedings. It follows that, on that occasion, Mr [Z. Z.] was not advised of his right to a lawyer throughout the confiscation proceedings relating to the determination of the proceeds under Article 8 of Directive 2014/42/EU (see the Court's judgment in Cases C-845/19 and C-863/19).

27.3. Furthermore, at the time of his participation in the hearing on 27 January 2020, the request concerning the confiscation of proceeds had not yet been submitted, since the public prosecutor only made such a request, as confirmed in the certificate, in his closing speech in May 2020. Accordingly, the court conducted the trial on the basis of the indictment brought in 2017, and Mr D. R. (director of D. until 2 July 2018) was also questioned as a witness during the proceedings.

27.4. It follows from the above that the participation of D. in the proceedings, which presupposes its knowledge of the subject matter of the proceedings and their possible consequences, was based on: the fact that the shares were frozen in the case against the four defendants (who would later be acquitted); the fact that the company, through its lawyer, lodged an appeal against the order of the County Court, Zagreb, which recognised the freezing order (issued as an interim measure in the case against the four defendants); and the fact that in the proceedings against the four defendants the company's representative was advised by the court of the possibility of the shares being confiscated and of his right to ask questions and submit evidence, before the prosecutor formally submitted the confiscation request.

27.5. Moreover, the case file shows that D. as the [legal] person affected by the order, that is to say, the beneficiary of the undue proceeds, was only served with excerpts from the judgment of the Regional Court, Maribor, while in the view of the referring court, the entire judgment is an essential document (see Article 3(2) of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings with regard to the rights of suspected and accused persons), and thus the standards of access to an impartial court require that the entire judgment be served.

27.6. Finally, it should be noted that the Regional Court, Maribor, stated that excerpts from the judgment were served on D., which did not appeal against that judgment. D., on the other hand, claims that it did not receive the judgment, and to that end requests that evidence be taken (proof of service and a handwriting expert's report), which gives rise to the question of the scope of verification and consultation with the issuing authority in the context of the meaning of the principle of mutual recognition and Article 33 of Regulation 2018/1805, which stipulates that the substantive reasons for issuing the confiscation order cannot be challenged before a court in the executing State.

28 In the light of the above, the Court of Criminal Appeal of the Republic of Croatia wonders whether it is contrary to Regulation 2018/1805, Article 1(2) thereof, and Article 47 of the Charter, to recognise a confiscation order issued in criminal proceedings in which an affected person, within the meaning of Article 2(10) of Regulation 2018/1805:

- was not summoned to participate in all stages of the criminal proceedings;
- was not advised of his or her right to a lawyer throughout the proceedings;
- did not receive the full text of the judgment containing the confiscation order in a language he or she understood, but only excerpts from that judgment, and did not appeal against the judgment thus served.

VII Questions referred for a preliminary ruling:

I Does the term 'proceedings in relation to a criminal offence that may result in confiscation of property, including confiscation without a conviction' within the meaning of Article 2(3) of Regulation 2018/1805 also include criminal proceedings concluded with an acquittal?

II Does the term 'proceedings in relation to a criminal offence that may result in confiscation of property, including confiscation without a conviction' within the meaning of Article 2(3) of Regulation 2018/1805 also include criminal proceedings concluded with a judgment of acquittal that includes an order to confiscate property as undue proceeds derived from another criminal offence, which is not the criminal offence of which the defendants were acquitted, and in whose commission the defendants were not involved, but rather persons against whom no indictment was brought?

III Is it contrary to Regulation 2018/1805, Article 1(2) thereof, and Article 47 of the Charter of Fundamental Rights, to recognise a confiscation order issued in criminal proceedings in which an affected person, within the meaning of Article 2(10) of the regulation:

- was not summoned to participate in all stages of the criminal proceedings;

- was not advised of his or her right to a lawyer throughout the proceedings;
- did not receive the full text of the judgment containing the confiscation order in a language he or she understood, but only excerpts from that judgment, and did not appeal against the judgment thus served.

Zagreb, 4 October 2023

[...]

WORKING DOCUMENT