

**PROJECT RECOVER – CRIME DOESN'T PAY**

**POLICY RECOMMENDATIONS ABOUT THE  
CONCEPT OF “PROCEEDINGS IN CRIMINAL  
MATTERS”**

1) **AFFIRMING A VERY BROAD INTERPRETATION OF THE CONCEPT OF “PROCEEDING IN CRIMINAL MATTER”**; as the EU Commission has recently underlined, for the purposes of the Regulation, the provision can be considered adopted in the context of a "procedure in criminal matters" to the extent that a **connection with a crime is present**<sup>1</sup>. It is enough that the **proceeding in front of a judicial authority regards the proceeds and/or instruments of the crime**.

In the recital 13 it is specified that “proceedings in criminal matters” is an **autonomous** concept of Union law interpreted by the Court of Justice of the European Union, notwithstanding the case law of the European Court of Human Rights.

This reference to the Court of Justice seems appropriate because the adoption of a regulation in a more direct and immediate manner call into question the Court of Justice pursuant to Art. 267 TFEU as an interpreter in its original capacity, intended to resolve the interpretative doubts of Member States in its application.

Always in the recital 13 it is clarified that “The term therefore covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence”; this expression “proceedings in relation to a criminal offence” is repeated in art. 2 in the definition of confiscation: “a final deprivation of property ordered by a court *in relation to a criminal offence*” (in the original proposal “proceeding for a crime”). It is important to verify this “relation to a criminal offence”, that there is a *link* between the assets to confiscate and a crime; so, it is

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<sup>1</sup> European Commission, *Commission Staff Working Document: Analysis of non-conviction-based confiscation measures in the European Union*, Brussels, 15 April 2019 (OR. en) 8627/19 JAI 413 COPEN 172 DROIPEN 62, SWD (2019)1050 final, 11.04.2019, 55: “The Regulation extends the scope of freezing and confiscation orders compared to the former mutual recognition framework. It applies to all freezing and confiscation orders issued within the framework of proceedings in criminal matters. For confiscation orders, a link to a criminal offence (by means of a final penalty or measure imposed by a court following proceedings) is required. Thus, the Regulation covers classic conviction-based confiscation as well as extended confiscation and non-conviction based confiscation if these are issued within the framework of proceedings in criminal matters. It will, however, not apply to freezing or confiscation orders issued within the framework of proceedings in civil or administrative matters. The confiscation Regulation closes an important lacunae and has the potential to vastly improve cross border cooperation by providing law enforcement authorities with an efficient tool to confiscate the proceeds of organised crime even when they are laundered or hidden in other EU Member States”.

enough that the proceeding in front of a judicial authority regards the proceeds and/or instruments of the crime. Also the Directive 2011/99/EU extends the concept of "European protection order" to any measure aimed at protecting an individual from acts of others with criminal relevance, even where such measures are adopted outside of stricto sensu criminal proceedings<sup>2</sup>.

In the context of a debate on the matter by the EU ministries of Justice (UE, Cons. JAI, 12/13 October 2017), it was specified that also certain preventive confiscation systems are included in the Regulation scope. Provided that the choice to confiscate «soit clairement en rapport avec des activités criminelles et que des garanties procédurales appropriées s'appliquent».

**2) DEMANDING THE RESPECT FOR THE ESSENTIAL SAFEGUARDS FOR CRIMINAL PROCEEDINGS SET OUT IN THE CHARTER:** “the essential safeguards for criminal proceedings set out in the Charter should apply to *proceedings in criminal matters that are not criminal proceedings but which are covered by this Regulation*” (RECITAL 18). **The application of the Regulation as challenge to improve the safeguards of the “proceedings in criminal matters”.**

The Regulation demands that the confiscation is applied not only in a proceeding in criminal matter, but with the safeguards of criminal matter in the Member State.

In this direction, first of all, in the art. 1, 2, the European legislator has established that “this Regulation shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles enshrined in Article 6 TEU. As specified in recital no. 17, the Regulation also respects the fundamental rights provided for in the ECHR and in the European Charter of Fundamental Rights”. This means, first of all, that Artt. 49 and 50 of the European Charter of Fundamental Rights, and artt. 6 e 7 ECHR as interpreted by European Court HR, have to be respected.

the recital 18, it is also established that the procedural rights set out in Directives 2010/64/EU [\(9\)](#), 2012/13/EU [\(10\)](#), 2013/48/EU [\(8\)](#), (EU) 2016/343 [\(9\)](#), (EU) 2016/800 [\(10\)](#) and (EU) 2016/1919 [\(11\)](#) of the European Parliament and of the Council should apply, within the scope of those Directives, to criminal proceedings covered by this Regulation as regards the Member States bound by those Directives.

Not only, but above all in the recital 18 it is clarified that “In any case, the safeguards under the Charter should apply to all proceedings covered by this Regulation. In particular, the essential safeguards for criminal

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<sup>2</sup> Direttiva 2011/99/UE del Parlamento europeo e del Consiglio del 13 dicembre 2011 sull'ordine di protezione europea, considerando n. 9 e 10. Sul punto v. S. OLIVEIRA E SILVA, *Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders*, p. 205.

proceedings set out in the Charter should apply to *proceedings in criminal matters that are not criminal proceedings but which are covered by this Regulation*".

The affected can challenge the application of mutual recognition by proving that the fundamental guarantees of criminal matters have been violated in the concrete case (a specific violation of fundamental rights) and, therefore, claiming the application of the ground for refusal provided for by art. 8, F) and 19, h)<sup>3</sup>.

It follows that "the notion of "proceedings in criminal matters" seems to refer, in addition to criminal proceedings in the strict sense, also to those judicial proceedings which (i) are connected to a crime, in the sense that they concern property related to criminal conduct, and (ii) despite their initial classification or nature as civil proceedings or administrative under national law, have procedural guarantees similar to those of a criminal trial or, rather, attract the essential guarantees of law criminal. ..."<sup>4</sup>.

**3) ALSO WITH STRUMENT OF SOFT LAW, IT WOULD BE VERY IMPORTANT TRYING TO CLARIFY THE CONCEPT OF "PROCEEDINGS IN CRIMINAL MATTERS",** as stressed also by the Italian member of Eurojust, Filippo Spiezia, and the Partners in the first Workshop.

ABOVE ALL

**3) CLARIFYING THE NECESSARY SAFEGUARDS OF THE PROCEEDINGS IN CRIMINAL MATTERS IN ORDER TO APPLY THE REGULATION**

The challenge for the European Legislator could be to clarify which are the minimum and essential safeguards which have to be guaranteed in a national proceeding in order to be included in the Regulation's scope. The mutual recognition strategy must be based on mutual trust and confidence among the competent authorities and its implementation would require a change of approach by the

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<sup>3</sup> S. OLIVEIRA E SILVA, *Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders: A headlong rush into Europe-wide harmonisation?*, in NJECL 2022, 206 s.: „The European legislator's efforts to tighten up the terms of the grounds for refusal and prevent an 'excess of guarantees' from hindering the machinery of mutual recognition has led to some truly disconcerting redundancies. The *exceptionality* of the situation and the *specificity* of the circumstances of the case are not enough; it is also necessary that the violation is *manifest*, that the right affected is of particular importance and that the conviction of the executing authority as to the likelihood of such an attack is based on *substantial* grounds and on *specific and objective* evidence”.

European legislator. Until now the European legislator has always applied an approach more concerned with effectiveness than with the respect of safeguards, subject to demanding “at least” a specific model of confiscation "minimalist in terms of efficiency", allowing MS to introduce more extended powers of confiscation but with fewer safeguards, without concern for a minimum of essential respect for constitutional safeguards. The prospect for the future may be represented by the effort to identify minimum safeguards in the presence of which MSs should apply non-conviction based confiscation, even if they do not adopt this model.