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WP3

Questionnaire on the practical obstacles and legal issues arising in the implementation of REG

1) On the basis of the official statistics in Your country how many are the cases of application of the Regulation no. 1805/2018 (thereinafter: REG)?

It is not possible to collect complete and very reliable statistics. There is no authority in charge of collecting all the data. The ARO has his own data, the public prosecutor's office has also some data and finally the judiciary has some data to. So, if one doesn't join all these statistics there is the risk of missing something but if you join all together you can also count twice. Despite not having a central authority in these cases, and the requests are sent directly one need something for statistical proposes.

Even so, the overall figure is 39 cases.

2) How many are the cases as issuing authority and how many as executing authority?

Issuing authority - 29;

Executing authority - 10

3) With which States? (please, provide the total number of cases handled with each State, taking care to specify whether these are as issuing or executing authority)

It was not possible to ascertain the exact figures for each state. However, it was possible to verify that Portugal issued freezing certificates to: France, Spain, Belgium, Croatia, Holland Hungary.

Portugal received requests from Belgium, France, Spain, Hungary and Italy.

4) Which model of freezing (seizure) order or confiscation order (direct confiscation, confiscation of the equivalent value, confiscation against third parties, extended confiscation, confiscation without conviction) based the issuance of the certificate in these cases (both as issuing authority and as executing authority)?

Due the lack of complete reliable statistics, It was not possible to obtain detailed data. However, a significant number of requests concerned confiscation for the equivalent value in classic confiscation, usually in the context of crimes with an identified victim.

5) In the praxis have you ever had cases in your country concerning a freezing or confiscation certificate unrelated to a conviction, for example on the basis of a confiscation ordered also if the crime is statute barred or in case of the offender death or because the perpetrator remained unknown? Yes / No. If yes, please provide more details.

Portugal received and executed a freezing order issued in an Italian preventive measure procedure. Apart from that no such cases were reported.

6) Which types of crime were the basis for issuing the certificates? Please, provide a detailed answer.

In general, the crimes that motivated the issue of the freezing certificate were scams (CEO fraud and other online scams). There were also cases of tax fraud, criminal association, money laundering and tax fraud, as well as embezzlement of goods placed under public authority.

7) What type of assets were the subject of the seizure (freezing order)/confiscation underlying the certificates? Please, provide a detailed answer.

In the vast majority of cases, the assets that have been frozen are bank accounts. There are also artworks, jewelry, real estate and even restaurants.

8) In order to identify the asset to be seized/confiscated, have specific investigations been carried out beforehand? Yes / No. If yes, was a European Investigation Order or other mutual assistance instrument used for this purpose? Please, provide a detailed answer.

There have been cases where the sending of the certificate was preceded by the issuing of a EIO with a view to ascertaining the suspect's assets. It's not very common for this to happen, especially since it's possible to obtain such information through cooperation between AROs or police cooperation.

9) Both as issuing authority and as executing authority, which are the main obstacles to mutual recognition deriving from the type of seizure/confiscation or the type of seized/frozen asset? Please, provide a detailed answer.

Until now no obstacles were identified in this regard.

10) In how many cases has recognition been refused (both as executing authority and as issuing authority)?

No case was reported.

11) Which grounds for refusal are applied?

See previous answer.

12) Which problems have arisen in these first years of REG application? E.g., difficulties in identifying the competent authority as executing State, inconveniences related to the translation of the certificate or of the orders to be applied, difficulties in identifying the assets to be confiscated, problems connected to the guarantee of the right to effective legal remedies (art. 33), impossibility to execute orders (art. 22), multiple orders for the same person or assets...

The main problem is the lack of knowledge. If the law enforcement authorities don't know the importance of freezing and confiscation at national level, how they are going to do it abroad.

Even so, the experience reported by the prosecutors involved in this area points to the lack of adequate know-how on the distinction between the application of the Regulation and the EIO. There are seizure requests that arrive via the EIO.

On the other hand, difficulties have been encountered regarding how costs should be shared when the seizure certificate is sent to another state in order for the property to be returned to the victim.

In addition, some colleagues also pointed out that it is unclear how they should proceed when what is at stake is merely an extension of the previous certificate. For example: Portugal sends Spain a certificate freezing the funds in 3 bank accounts belonging to "A". After the execution, Portugal discovers, in the same case and on the basis of the same facts, that "A" has 2 more bank accounts. What should Portugal do? It should send another certificate. Some colleagues are receiving informal "extension" requests via email. Others are receiving new freezing certificates.

13) Have you ever applied the REG on the mutual recognition of freezing and confiscation orders?

Yes / No

Yes

14) If yes, how many times? Once / From 1 to 5 times / More than 5 times

More than 5 times

15) Have you applied the REG as executing or issuing authority?

Both

16) Have you had doubts about the application of the REG to the case at issue? Yes / No. If yes, were the doubts related to the scope of the Regulation with regard to the other involved State(s) and/or with regard to the type of measure to be recognized and enforced?

As mentioned above, there are still doubts about the scope of the regulation and the EIO. This is probably once again due to the lack of adequate training in the different Member States.

17) Which authorities in your State are competent to issue a freezing certificate pursuant to Article 2(8) of the REG?

There are some doubts in Portugal about this issue. The understanding we have is that they can be issued by the Public Prosecutor's Office or by the judge, depending on what is at stake.

If the case is at the investigation stage, it falls under the jurisdiction of the Public Prosecutor's Office. However, some seizures fall under the jurisdiction of the investigating judge (seizure of bank accounts, etc.) and the freezing of licit assets needed to guarantee value confiscation or unexplained wealth confiscation also falls under the jurisdiction of the investigating judge.

What we have argued is that, in these cases, the investigating judge is competent to make the decision in question, but the completion and sending of the Regulation certificate will be the responsibility of the Public Prosecutor's Office.

18) Which authorities in your State are competent to execute a freezing certificate pursuant to Article 2(9) of the REG?

The Public Prosecutor's Office is responsible for enforcement. However, there are acts that depend on the intervention of the investigating judge.

On the operational field the ARO as exclusive competence to execute the freezing order but only on demand of the public prosecutor's office.

19) Which authorities in your State are competent to issue a confiscation certificate pursuant to Article 2(8) of the REG?

Only the criminal judge who decides on the execution of the sentence can issue the certificate.

20) Which authorities in your State are competent to execute a confiscation certificate pursuant to Article 2(9) of the REG?

The certificate is presented to the Public Prosecutor's Office, which sends it to the judge for execution and then if it is the case, the ARO should really enforce it.

21) Do you know the legal basis of this competence?

For judicial authorities: Article 231; 469 and 470 of the Code of Criminal Procedure.

For the ARO: article 9, law number 45/2011, form 30 Mai.

22) In order to identify the competent authority for issuing or executing a freezing or confiscation order in another EU Member State, to whom did you ask for information (or in practice to whom the competent authorities in your country ask for information)? EU Commission / EU Council / European Judicial Network / Eurojust / Ministry of Justice / Colleagues

Through the atlas of the European Judicial Network, and in more complex cases through Eurojust.

23) Was the information received complete and correct? Yes/No. Please, provide a detailed answer.

The information obtained through the European Judicial Network and Eurojust is, in general, sufficient to determine the competent judicial authorities to which the certificate should be sent.

Whenever Eurojust's intervention has been requested, no difficulties have arisen in this regard.

24) According to your experience or to the available studies and data, are the competent authorities in your country aware of the practical tools for judicial cooperation (in particular "Judicial Atlas", "Judicial Library" and "Compendium") available on the website of the European Judicial Network?

Yes / No. Have you ever used one or more of the above mentioned "tools"? Yes / No. If yes, have you faced difficulties in using them? Yes / No / Please provide a detailed answer.

Most public prosecutors are familiar with these tools and use them, as they are also useful for judicial cooperation in criminal investigations. What's more, there are magistrates specializing in judicial cooperation in practically every county, who act as contact points for these issues.

Even so, one doesn't know if all the public prosecutors and above all the judges are aware of these tools.

25) According to your experience, in your country are the issuing and executing authorities aware of the role which is played by Eurojust in the application of the REG?

Yes, all prosecutors should be aware of the existence of EUROJUST and its role in this area. However, they make less use of this body than would be desirable.

Relating to judges the situation is may be perhaps worse. In both cases there are no reliable data.

26) Which channels the issuing authorities in your country use to transmit the freezing or confiscation order? Ministry of Justice / Eurojust / Liaison Magistrate / Direct transmission to the foreign executing authority / Other / Not applicable

The certificate is transmitted directly to the judicial authority of the executing state. In more complex cases, the intervention of EUROJUST is requested. There are also cases in which it is sent to the Liaison Magistrate (Spain, France, Holland, etc.).

27) By which channels the executing authorities in your country receive the freezing or confiscation orders? Ministry of Justice / Eurojust / Liaison Magistrate / Direct transmission from the issuing foreign authority / Other / Not applicable

Directly from the judicial authority of the Issuing State.

28) In the application of the REG as issuing authority, have problems arisen in relation to the lack of transmission of the order (national judicial decision)? Or to the lack of translation of the order (national judicial decision)? Has the translation been required into the official language of the executing State or into another language which that State has formally accepted? Yes / No. If yes, by whom and on which legal basis? By the foreign executing authority / by the central authority of the executing foreign State / by the Ministry of Justice / by Eurojust / On the basis of the Regulation

/ On the basis of the national law of the executing State / On the basis of the customary law principle of international comity with assurance of reciprocity

The certificate was always accompanied by the relevant national decision. Requests for cooperation are always translated before they are sent. The regulation certificate is no exception. Moreover, the regulation requires this translation. The certificate is always sent in the language of the issuing country.

29) Is the reimbursement of translation costs asked to the executing State? Yes / No

No. Translation is the responsibility of the requesting state.

30) Has any difficulty arisen because of the lack, incompleteness and/or insufficient quality of the translation of the certificate and/or of the underlying national measure? Yes / No. If yes, how has it been solved?

No difficulties were reported in this regard.

31) Whether as issuing or as executing authority, have you ever had experience of cases where, due to the urgency of the freezing or confiscation, the translation of the certificate into English was requested/accepted (instead of the translation into the official language of the other State or into another language(s) which that State has formally declared to accept)? Yes / No. If yes, please provide a detailed answer.

No urgency was identified in any of the cases flagged up by colleagues. One can guess that will be no problem at all.

32) Whether as issuing or as executing authority, have you ever had experience of cases where, due to the urgency of freezing (seizure) or confiscation, the execution of the certificate was preceded by the freezing of the asset on the basis of the cooperation with police authorities or FIUs (Financial Intelligence Units)? Yes / No. If yes, please provide a detailed answer

There is a case, where following the request of the Spanish CARIN contact point the ARO asked for the urgent freezing of a bank account until the formal request was issued.

Cooperation with the FIUs for these purposes may not always work, since they act in the context of crime prevention, not repression.

33) Which are the major, theoretic and/or practical, difficulties you have faced in identifying the competent authority to issue or execute a freezing or confiscation certificate?

Considering the previous answers, there are no particular difficulties.

34) When problems arose and the proceeding ended with the recognition of the freezing or the confiscation, how were these problems solved? Please, provide a detailed answer.

See previous answer

35) Have any additional documents or information been provided? Yes / No. If yes, please provide a detailed answer

See previous answer

36) Were there any meetings with the competent authorities? Yes / No. If yes, please provide a detailed answer, specifying whether representatives of the central authorities, Eurojust and/or Liaison Magistrates attended the meetings.

See previous answer

37) How and where did the above mentioned meetings take place? By videoconference on an online platform/ In presence at the premises of the issuing authority / In presence at the premises of the executing authority / In presence at the headquarters of the central authority of the issuing State / In presence at the headquarters of the central authority of the executing State / In presence at the premises of Eurojust / In hybrid format

See previous answer

38) If you are an issuing authority and you have had experience in issuing certificates, which are the difficulties encountered in filling in the freezing or confiscation certificate (in particular with regard to certificates issued on the basis of confiscations without conviction)? Please, provide a detailed answer.

No specific difficulties were reported in completing the questionnaire, nor was it possible to ascertain any cases of requestes based in confiscation without conviction issued by Portugal.

39) In your opinion are the information contained in the model of the freezing or confiscation certificate complete, clear and precise? Please, provide a detailed answer.

In essence, the form contains the relevant and necessary information for the request to be executed. However, there are aspects that could be improved, namely the distinction between "affected persons". It would be useful to distinguish between defendants and third parties. This is because it could happen that the certificate is requested to seize the property of a third party who is not a suspect in the proceedings. This could influence, for example, the type of notifications in the state of execution, and the timing of such notification.

On the other hand, it would also be useful for the form to include a topic on the moment of notification of the execution of the measure. There are situations in which, given the need to safeguard the criminal investigation in the requesting state, the executing state must wait for a certain time to notify the person concerned. There is no such possibility in the certificate for the notification of the person concerned to be coordinated with the requesting state.

Finally, as pointed out above, it would be appropriate for the form to be adapted for cases of " extension ". In other words, whenever a new request had to be made for new property in relation to the same facts and the same suspect, a simple addition could be submitted.

40) In your opinion are there any necessary or appropriate changes and/or additions to the model of the freezing or confiscation certificate? Please, provide a detailed answer.

See previous answer

41) If you are an executing authority and you have had experience in executing certificates, which are the deficiencies and/or mistakes made by the foreign issuing authority in filling in the freezing or confiscation certificate? Please, provide a detailed answer.

No aspects were highlighted in this regard.

42) In your opinion are the information contained in the model of the freezing or confiscation certificate complete, clear and precise? Please, provide a detailed answer.

See previous answer - 39

43) In your opinion are there any necessary or appropriate changes and/or additions to do in the model of the freezing or confiscation certificate? Please, provide a detailed answer.

See previous answer - 39

44) Are you aware, both as issuing authority and as executing authority, of cases where the identification and/or location of the property to be frozen / confiscated has taken place through prior consultations among the competent authorities of the two States, or has been preceded by targeted investigations? Please, provide any useful details, with particular regard to any instrument of judicial cooperation (European Investigation Orders - EIOs, rogatory letters, Joint Investigation Teams) and of police cooperation (INTERPOL or other) used in the above mentioned investigations as well as with regard to the involvement of AROs (Asset Recovery Offices) and/or existing networks in this field (as StAR - Stolen Asset Recovery and CARIN - Camden Asset Recovery Interagency Network).

Identifying assets in another country is an investigative step which follows the same rules as a criminal investigation. There are cases where, in the course of a criminal investigation, assets belonging to those targeted in an EU Member State are identified. In the context of specific asset and financial investigations, it has been announced as good practice in Portugal to use specific cooperation mechanisms between AROs. In most cases, the freezing certificate is intended to guarantee the payment of the value of the benefits, so it is not a question of identifying a specific asset in another state, but only the existence of enough assets to pay that value, so an asset survey, which is usually carried out by the AROs, is sufficient.

45) If you are an issuing authority and you have had experience in issuing certificates, have you ever received the refusal of the execution without prior consultation with the foreign executing authority pursuant to Art. 8(2) and 19(2) of the REG? Yes / No. If yes, have there been cases where the refusal was due to the incompleteness of the certificate with regard to the description / location of the asset to be frozen or confiscated? Please, provide a detailed answer.

No cases of refusal were reported.

46) If you are an executing authority and have had experience of receiving certificates, have you ever refused the execution of a certificate without prior consultation of the issuing foreign authority pursuant to Art. 8(2) and 19(2) of the REG? Yes / No. If yes, have there been cases where the refusal

was due to the incompleteness of the certificate with regard to the description / location of the asset to be frozen or confiscated? Please, provide a detailed answer.

No cases of execution refusal were reported.

47) Both as issuing authority and as executing authority, have you ever deal with cases of concurrence of certificates concerning the same asset? Yes / No.

No cases have been reported.

48) Both as issuing authority and as executing authority, have you ever deal with cases of concurrence of certificates concerning several assets, which were located in one single State or in different States? Yes / No. If yes, was there the need to coordinate the execution of the certificates? Yes / No. If yes, how was the need for coordination met? Was Eurojust involved? Were the central authorities of the issuing and/or executing State involved? Please, provide a detailed answer. 5

Portugal has already received certificates of seizure for different assets located in different parts of the country, which were to be executed on a specific date, because there were assets to be executed in other states as well. In this case, the procedures are coordinated through Eurojust.

49) Did the type of seizure/freezing order cause any particular problem? In particular, how was the problem resulting from the absence of a subsequent confiscation order solved? Please, provide a detailed answer.

No difficulties have been reported in this regard. The absence of a declaration of confiscation must lead to the seizure being lifted immediately.

50) Please, provide detailed guidelines on the practical implementation of the REG in light of your experience.

51) Please, provide detailed reform proposals of national law to better guarantee the application of the REG in the praxis.

In Portugal, there is a very serious problem with the requirements for the application of precautionary freezing measures. In fact, the requirements for freezing the assets in order to guarantee payment of the value based confiscation are so restrictive that they are sometimes impossible to apply in

practice. This is because, in Portugal, it is necessary to be previously constituted as a defendant, to demonstrate periculum in mora and also to demonstrate strong evidence of a crime. Until 2017, there was a system for cases under Law 5/2002, of January 11, in which the periculum in mora was waived in cases where there was strong evidence of a crime. In our view, this was the ideal system.

52) Please, provide detailed proposals of harmonization to better guarantee the application of the REG in the praxis.

Under Directive 42/2014, as well as the proposed directive of May 2022, there is currently no particular need for substantive harmonization in this area. However, we believe that all states should have, as a minimum standard: A classic value-based confiscation mechanism, a confiscation mechanism without conviction in classic confiscation, an extended confiscation mechanism and an unexplained wealth confiscation.

53) Please, provide detailed reform proposals of the REG and of EU soft law explicative instruments for its implementation.

More training is needed among public prosecutors and judges and also among the investigative authorities.

54) Please, provide detailed policy recommendations in light of the collected data in order to improve the REG application

It would be essential for states to collect precise statistics on the application of the Regulation, with reference at least to the number of requests sent and received and the offences involved. This is not currently the case in Portugal, where no statistics are collected on the regulation.

55) Do you have some data about the gender of the person affected by freezing and confiscation orders? Have you faced any genders issue in applying the REG?

There is no data in this regard. There is no problem or difficulty in applying the Regulation taking into account the gender of the persons affected.