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## RECOVER – JUST-2022-JCOO – GA no. 101091375 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)?

First of all, let us make a couple of preliminary remarks:

- The Spanish judicial criminal system is organised territorially and with the Investigating Courts (Juzgados de Instrucción) leading the investigation phase before referring the case to trial courts.
- At cross-border level within the mutual recognition regime the above mentioned judicial system has an impact in the jurisdictional organisation of competent authorities with the prominent role of the Investigating Judge as issuing and executing authority of freezing orders together with the competence of the first instance court (Juzgado de lo Penal) as executing authority of the confiscation orders.
- EU legal instruments in the field of assets recovery prior the REG were transposed into national legislation by Law 23/2014 of 20 November 2014 on the Mutual Recognition of Judicial Decisions in Criminal Matters in the European Union (LMR), a compilation where you can find the transposition of former FDs 2003 (Title VII) and 2006 (Title VIII). However, after the entry into force of the REG in 19 December 2020, due to the lack of any legal adaptation, a number of inconsistencies between this piece of Spanish legislation and the new legal framework arose with the subsequent disfunctionalities.

Being said this, as regards to statistics the MoJ is the responsible national institution for the collection of statistics under the general reporting obligation of the courts as competent

issuing and executing judicial authorities on the basis of all the mutual recognition instruments referred to in the LMR by timely sending a copy to the MoJ.

At the level of the Public Prosecution Office we can provide the statistics produced by our CMS (so-called CRIS) but this data are limited to incoming freezing or confiscation certificates received at our District and Specialised Prosecution offices (PPOs) before we send them to the competent Investigating court.

So, if we have a look at the available statistics produced by the **CGPJ's Judicial Statistics Service** under the REG regime we can provide you the following statistics:

- total number of cases resulting at the application of the REG in 2021 are the following:

<b>2021</b>	<b>Issued</b>	<b>executed</b>
<b>Freezing certificates</b>	47	42
<b>Confiscation certificates</b>	3	3

- total number of cases resulting at the application of the REG in 2022 are the following:

<b>2022</b>	<b>Issued</b>	<b>executed</b>
<b>Freezing certificates</b>	33	52
<b>Confiscation certificates</b>	6	1

So, according to data produced by the **CGPJ's Judicial Statistics Service**, the total number of cases derived from the application of the REG in 2021 and 2022 are the following:

<b>2021-2022</b>	<b>Issued</b>	<b>Executed</b>
<b>Freezing orders</b>	80	94
<b>Confiscation orders</b>	9	4

If we compare these figures with the figures stemming from the **Spanish Public Prosecution Office (PPO) case management system (CRIS)** as regards the freezing certificates received by the Prosecutors, surprisingly you can find some discrepancies, as a total of 67 Annexes I (freezing certificates) were received at the Spanish PPOs in 2021 (more than the 42 received and finally executed by the Investigating Courts):

<b>PPOs</b>	<b>Freezing certificates</b>
Fiscalía Provincial de Madrid	19
Fiscalía Provincial de Málaga	12
Unidad de Cooperación Internacional FGE	9
Fiscalía Provincial de Alicante	7
Fiscalía Provincial de Valencia	5
Fiscalía Provincial de Cádiz	4
Fiscalía Provincial de Barcelona	3
Fiscalía Provincial de Tarragona	2
Fiscalía Provincial de Sevilla	1
Fiscalía Antidroga	1
Fiscalía Provincial de Girona	1
Fiscalía Provincial de Huelva	1
Fiscalía Anticorrupción	1
Fiscalía de la Comunidad de Murcia	1

And as total of 96 Annexes I (freezing certificates) were received by the prosecutors in 2022 (that figure neither fits with the 52 finally executed certificates by the Investigating Courts in the very same year):

<b>PPOs</b>	<b>Freezing certificates</b>
Fiscalía Provincial de Málaga	23
Unidad de Cooperación Internacional FGE	14
Fiscalía Provincial de Barcelona	13

Fiscalía Provincial de Madrid	12
Fiscalía Antidroga	11
Fiscalía Provincial de Valencia	10
Fiscalía Comunidad Autónoma Baleares	5
Fiscalía Provincial de Alicante	4
Fiscalía Provincial de Almería	1
Fiscalía Provincial de Pontevedra	1
Fiscalía Provincial de Palencia	1
Fiscalía Provincial de Cádiz	1
Fiscalía de Comunidad Autónoma Cantabria	1

Furthermore, Spanish Public Prosecution Office (PPO) has received a total of 87 freezing certificates up to date in 2023. Namely,

PPOs	Freezing certificates
Fiscalía Provincial de Madrid	19
Fiscalía Provincial de Málaga	18
Unidad de Cooperación Internacional FGE	17
Fiscalía Antidroga	8
Fiscalía Provincial de Barcelona	7
Fiscalía Provincial de Valencia	5
Fiscalía Provincial de Cádiz	3
Fiscalía Provincial de Almería	3
Fiscalía Provincial de Las Palmas	2
Fiscalía Provincial de Girona	2

Fiscalía Provincial de Alicante	1
Fiscalía Provincial de Álava	1

On top of this, in accordance with the statistical data available in the **Spanish Assets Recovery & Management Office (ORGA)** Annual Report these are the relevant figures about incoming certificates transmitted via AROs (incoming & outgoing) since 2021:

<b>2021</b>		Issuing Member States	Other States	outgoing
Freezing certificates	10	SE, DE, LT, FR (3), NL (4)	UK (2)	
Confiscation certificates	4	SE, FR, NL (2)	UK (1), DK (1)	
<b>2022</b>				
Freezing certificates	14	PL (1), DE (2), FR (4), NL (7)		1 towards FR
Confiscation certificates	2	PT (1), IT (1)	UK (4)	
<b>Until september 2023</b>				
Freezing certificates	11	FI, IT, PL, BE (2), FR (3), NL (3)	DK	1 towards DE
Confiscation certificates	3	NL, FR, BE	dk (2)	

Total amount of money recoved by ORGA and deposited in the Treasury bank account pending of a final confiscation decision: 956.457,9 EUROS

Total amount of money recoved by ORGA and deposited in the Treasury bank account pending of Afinal disposal after a final confiscation decision: 4.661.612,6 EUROS.

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

See the answer to question num. 1.

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)

This information is not available in the data produce by the CGPJ's Judicial Statistics Service.

We can only provide the information related to the freezing orders received at the PPOs. As regards to freezing orders (Annex I REG certificates) received at the PPO in 2021 the issuing Member States were the following:

- The Netherlands 23
- Lithuania 6
- Poland 5
- Germany 4
- Belgium 4
- Portugal 3
- Finland 3
- Hungary 3
- Romania 3
- Sweden 3
- France 3
- Italy 2
- Slovenia 2
- Austria 1
- Bulgaria 1
- Luxembourg 1

In 2022 the issuing Member States were the following ones:

- The Netherlands 38

- France 15
- Luxembourg 9
- Italy 8
- Portugal 5
- Belgium 5
- Germany 4
- Lithuania 4
- Slovenia 3
- Poland 2
- Finland 2
- Czech R. 1

In 2023 (up to date) the issuing Member States were the following ones:

- France 20
- The Netherlands 19
- Portugal 11
- Germany 9
- Poland 7
- Belgium 6
- Lithuania 4
- Luxemburg 4
- Hungary 3
- Austria 1
- Slovakia 1
- Slovenia 1
- Rumania 1

As previously reflected in the table referred to the data collected by the ORGA on the freezing and confiscation certificates the relevant issuing Member States are the followings:

Freezing orders: 10 (The Netherlands 4, France 3, Sweden 1, Germany 1, Lithuania 1)

Confiscation: 5 (The Netherlands 2, Sweden 1, UK 1, France 1)

In addition, in 2022:

Freezing: 15 (The Netherlands 7, France 5 – one of them is an issued certificate, Germany 2, Poland 1)

Confiscation: 2 (Portugal 1, Italy 1).

Up to September 2023:

Freezing: 12 (France 3, The Netherlands 3, Belgium 2, Poland 1, Germany 1 –it is an issued certificate Finland 1, Italy 1)

Confiscation: 3 (The Netherlands 1, France 1, Belgium 1).

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)?

This information is not available in the data produce by the CGPJ's Judicial Statistics Service.

We can only provide the information related to the freezing orders received at the PPOs. Most of the upcoming freezing orders are issued based on direct confiscation.

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.

In the framework of the Public Prosecutor's NCBC files (so-called *procedimiento de decomiso autónomo*), In Spain Public Prosecutors are entitled to conduct the financial enquires, with the valuable support of the Spanish ARO, since 2015 as provided in Article 803 ter q) (3) of the Criminal Procedure Code «Public Prosecutors may address financial



institutions, public organizations and registries and individuals or incorporated entities so that they provide, within the framework of their specific regulations, a list of the assets of the enforcement debtor that they are aware of.”.

The practical experience is limited to the Antidrug PPO and the Provincial PPO in Madrid.

In the Antidrug PPO, in 2022 a protocol on assets recovery with specific instructions fostering the exercise of the NCBC request by the prosecutors was released (attached to this questionnaire). This soft rule document encourages Prosecutors to start this procedure together with the indictment in the main criminal proceedings against those investigated who are not absconders, deceased, or exempt from criminal responsibility, when there are any. When the special NCBC process is triggered by the Prosecutor, the necessary precautionary measures should be adopted to assure their continuity when they have been agreed upon in the main criminal proceedings.

The number of NCBC procedures started at the Antidrug PPO in 2022 were 6.

As for the Provincial PPO in Madrid, in 2020 was created the assets recovery and NCBC position<sup>1</sup>. The Prosecutor in charge contacts with the rest of the Madrid Prosecutors and conducts investigations to trace assets with the ORGA's help. While in 2021 he conducted two investigations, last 2022 he conducted 10 (7 for drug trafficking, 2 for aggravated fraud and one for money laundering and organized crime). One of the drug trafficking investigations results in the filing of a complaint within the special NCBC process.

Last 2022 PPO's Annual Report makes a reference, as a matter of interest, to a resolution issued by Examining Court nº. 11 in Málaga where the Judge accepted the demand for autonomous confiscation (NCBC) filed by the Prosecutor's Office against the assets of an accused in respect of whom the statute of limitations for the crime had been previously decided, considering that NCBC is possible in cases of prescription.

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<sup>1</sup> Unfortunately, due to the load of work of the office, the Prosecutor who holds the position also has to dedicate his time to cybercrime, hate crimes and organized crime when if he were exclusively devoted to this new position numbers would be far better.

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

This information is not available in the data produce by the CGPJ's Judicial Statistics Service.

We can only provide the information related to the freezing orders received at the PPOs.

- illicit trafficking in narcotic drugs and psychotropic substances, (15)
- illicit trafficking in weapons, munitions, and explosives,
- corruption related offences,
- Tax fraud, including PIF crimes, (3)
- Money laundering, (43)
- counterfeiting currency, including of the euro,
- computer-related crime, (1)
- organized or armed robbery, (2)
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling/online fraud (67),
- racketeering and extortion, (1)
- forgery of administrative documents and trafficking therein (3),
- trafficking in stolen vehicles, (2)
- organized crime, (1)
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, (1)

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

This information is not available in the data produce by the CGPJ's Judicial Statistics Service.

8) In order to identify the asset to be seized/confiscated, have specific investigations been carried out beforehand?

Yes

If yes, was a European Investigation Order or other mutual assistance instrument used for this purpose? Please, provide a detailed answer.

A well-developed financial investigative system is a precondition for a successful confiscation. So efficient investigative and provisional measures in place are needed to identify, trace, seize and freeze rapidly property which is liable to confiscation. Access of LEA to the information on property (land Register, company register, tax data...) is necessary to identify and trace proceeds of crime. In addition, banking information can show money flow, persons involved and their relations and is an important source of identification, tracing and freezing of the ill-gotten gains.

Although REG softens the need to identify the assets to be seized by the issuing authority, it is inherent to the proportionality check that justify the issuing of a certificate. Articles 13 and 22 of the REG allow the executing authority to desist from the execution of the certificate when is not possible to execute the certificates when the property cannot be located, once the corresponding prior consultation has been carried out. Therefore, a prior financial investigation is needed to minimally locate the assets (even at the national level, art. 146 (2) b) LRM refers to the existence of leads that allows the localization of assets in the executing Member State). In that sense, art. 146 LRM allows financial intelligence to be collected to fill out the certificate through computer records and specialized organizations (SEPBLAC/ORG)

In addition, under the mutual recognition regime banking information is envisaged as a specific investigative measure for obtaining of cross-border criminal evidence in Directive 2014/41/EU on the European Investigation Order (EIO) in criminal matters. European judicial authorities in the framework of criminal proceedings, may issue an EIO for obtaining information and documents related to accounts of any nature held by the person subject to criminal proceedings, in a bank or other non-bank financial institution, in accordance with the provisions of Articles 26 to 28 of the EIO DIR. Said provisions distinguish three different measures, depending on the coercive level. An EIO may be issued in order to determine whether any natural or legal person subject to a given criminal proceedings holds or controls one or more accounts of whatever nature, in any bank located in the territory of the executing

State. If so, to obtain all the details of the identified account and related banking operations carried out during a defined period, including the details of any sending or recipient account, a different request within the EIO should be filled in. Finally, an EIO can be issued for the purpose of executing an investigative measure requiring the gathering of evidence in real time, continuously and over a certain period of time. In Spain, access to banking information requires a production order which can be issued either by the Public Prosecutor or by an examining magistrate. Therefore, an EIO can be issued and executed by Public Prosecutors when banking information is at stake. However, as monitoring of bank accounts is considered an intrusive measure impacting the financial privacy of the client, this measure needs a specific authorization from the Investigating Judge (Art. 588 *octies* of the Spanish Criminal Procedure Code)

Recital n° 27 of the EIO DIR Preamble clarifies that “An EIO may be issued to obtain evidence concerning the accounts, of whatever nature, held in any bank or any non-banking financial institution by a person subject to criminal proceedings. This possibility is to be understood broadly as comprising not only suspected or accused persons but also any other person in respect of whom such information is found necessary by the competent authorities during criminal proceedings”.

In Spain Public Prosecutors are well placed to issue EIOs, spontaneously exchange financial information (based on article 7 of the 2000 Convention) and even promote the setting up of JiT aimed at financial investigations.

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.

**Obstacles:** uncertainty, ambiguity, and legal issues:

- Lack of an updated domestic law adapting our LRM to the REG. Currently, Spanish judges and Courts (Who are the competent issuing and executing authorities in Spain) are still not sufficiently familiar with the REG on the mutual recognition of freezing orders and confiscation orders and its direct application in the Spanish criminal law system is unprecedented.

- According to the Spanish legal system, both criminal and civil action deriving of it (compensation for victims) are examined in the same criminal trial and judgment. REG, (as well as the previous EU legislation), does not allow a civil recovery order to be recognized, which led to a lack of undertaking by the Spanish judiciary to cooperate internationally in this field.
  
- Issues relating to determining who is considered a victim in given executing Member State, who can apply for compensation and how to ensure proportionate compensation of all victims when the amount frozen is not enough to be restituted to all victims.
  
- While in the MLA instruments cooperation phase, freezing and confiscation orders could be issued together with requests for financial investigation within the same MLA request, after the TFUE, the asymmetric implementation of FDs 2003 and 2006 led to a lack of legal certainty. This situation was finally overcome with the REG. At least partially as forms/templates of Annex I and II of REG replaced former forms of the FDs among 25 Member States (except DK and IE) but still a previous and separate EIO (or a MLA request in case of DK and IE) is needed for the financial measures of investigation. At the end, in the previous scenario a single 2 pages MLA request based on CoE 1990 and 2005 could envisage both financial investigation and precautionary measures while in the current case scenario, the two-fold approach with a previous EIO/MLA request for financial investigations plus the freezing certificate is still needed when the location and value of assets are unknown at the time the request is drafted.
  
- REG forms are perceived by practitioners as unnecessarily complicated as they require information not always available when the form is to be completed. General perception that the REG involves additional cumbersome formalities. A single 2 pages-MLA request based on CoE 1990 and 2005 envisage both financial investigation and precautionary measures and are still needed in cases involving Member States that have not yet implemented EU instruments or when the location and value of assets are unknown at the time the request is drafted.

**Legal and practical issues** identified in Eurojust's casework 2019 in asset tracing are still valid in relation to the financial investigation for the purpose of tracing assets under the REG regime:

- Identification of the beneficial owner of the criminal assets, which is made difficult by the existence and use of shell companies (Shell companies (and strawmen's) or letterbox companies, by the identification of extraneous elements in the companies' structures or by the fact that suspects usually do not act under their own name to hide the financial trail that would show the illicit origin of the money, still play a substantial role in the VAT fraud chains, fraud schemes and in the money laundering circuits (low registering threshold, non-identification of real beneficial owner or pretended economic activities).
- Difficulties in and importance of establishing beneficial ownership in third-party confiscation.
- Actual identification of the assets abroad and the use of AROs, including in relation to value-based confiscation orders, that raise jurisdictional issues as the issuing authority does not know to which MS send the order.
- Difficulties in persuading the executing authority to conduct enquiries, and, in some cases, insufficient awareness of the existence of AROs and their role.
- Poor contacts via the FIUs of the MSs involved or networks of FIUs (e.g. the Egmont Group of Financial Intelligence Units), although some networks proved helpful in establishing contacts.
- The existence of a central bank register and public registers for companies and for property in the countries involved would have accelerated execution of the EIO/LoR.
- Simultaneous transmission of EIOs/LoRs for banking and financial information through parallel channels has occasionally hindered, rather than expedited, the initiation of the process of execution by creating duplicities, overlapping and internal confusion as to its reception.
- Required channel for transmission of banking information, associated with the urgency of its receipt due to the risk of expiration of the statute of limitations.
- Delays stemming from deficiencies in the content of the certificates (e.g. poor description of the facts)
- Notification of the owners of the bank accounts and the need to take into consideration their related procedural rights before the identified information can be transmitted to the executing State have also caused delays.
- Financial investigations targeted to persons who are not suspects, sometimes posed difficulties, as in some national legal systems financial investigations do not apply to assets that have been passed on to third parties.

**Best practices:**

- The use of AROs, even in the apparent absence of a criminal investigation, for the purpose of identifying assets from suspects in other countries.
- Cooperation between tax authorities and judicial authorities should be improved (reporting, cooperation, exchange of information for administrative purposes and asset recovery)
- Increasing the powers of administrative/judicial authorities respectively foresee simplified procedures in relation to winding-up of a company (conduit companies or missing traders) or to retrieving the VAT number.
- Companies which are offering *all in one service* (external launders) play a significant role and should be held liable systematically
- In case of complex financial investigations, it is necessary to request large amounts of banking information which will be fed into the databases of the investigating authority. For this purpose, it would be preferable to receive the banking information in electronic format. Against this background, the EIO form should provide a box for such requests. It should also be ensured that banks and other financial institutions, as well as executing authorities, are able to process such information in electronic format- Establishing a JIT solely for the purpose of conducting a financial investigation, if such is possible under the law of the countries involved.

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

This information is not available in the data produce by the CGPJ's Judicial Statistics Service.

11) Which grounds for refusal are applied?

Having in account that within the REG the grounds for refusal are optional, it seems that the principal grounds should be the incomplete or wrong certificate and the lack of double incrimination out of the 32 eurocrimes. However, again, there is not information about that in the CGPJ's Judicial Statistics Service data and none Prosecutor has reported to us any appeal in this matter.

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...

As the REG itself is directly applicable without any domestic legal transposition as of December 19 in all Member States (except in IE and DK) and the Spanish legislator has not approved so far, any legal reform to adapt our LRM) there is a lack of consistency between the Union Law and the national legal framework. In any case, the direct application implies the tacit repeal of Titles VII and VIII of the LRM and specifically if any provision not compatible with the REG. To assist national authorities when they have to face how to apply the new legal regime of seizure and forfeiture the CGPJ, GPO and the MoJ issues a Note providing guidelines for the correct application of LRM in line with the REG.

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

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

Prosecutors apply REG in all the cases they received a certificate and must send it to the Examining Judge together with a well founded report. However, as stated at the beginning of the questionnaire, in Spain is the Examining Judge who has the power for executing the certificate".

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

As previously mentioned, Prosecutors are not executing or issuing authority but only receiving authority.

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 regarding the other involved State(s) and/or with regard to the type of measure to be recognized and enforced?



Mostly the doubts arise with regard to legal and practical internal aspects in order to ensure the execution.

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

Regarding a freezing order: under Article 144(1) of Law 23/2014 of 20 November 2014 on mutual recognition of decisions in criminal matters in the European Union, the competence to issue a freezing certificate — by means of which a freezing order is transmitted to another Member State — are the Spanish Courts or Judges that carried out the seizure and is conducting the criminal proceedings in which the measure is to be adopted.

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

About a freezing order, the recognition and execution of a freezing order transmitted by an issuing authority of another Member State are entrusted to the investigating judge who would be competent if the offence had been committed in Spain. Under Article 144(2) of Law 23/2014 of 20 November 2014, the investigating Judge (*Juez de Instrucción*) in the place where the property to be frozen is located is the competent executing authority.

Whenever the issuing authority does not know the location of the property to be frozen, the freezing certificate shall be sent, for the sole purpose of determining the location of the property, to the International Cooperation Unit at the Prosecutor's General Office in Madrid (UCIF), which shall forward it to the investigating magistrate in the locality where the property is located for enforcement of the freezing order.

So, the International Cooperation Unit at the Prosecutor's General Office in Madrid (UCIF) has been designated by the notification made by Spain in December 2020 as the "central authority", whose function regarding freezing orders is limited to that of being a receiving prosecutorial authority when any preliminary enquiry should be made for the sake of the eventual competence clarification.

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

Given that under Spanish law, the enforcement of sentences (including a confiscation decision) is entrusted to the relevant Trial Court, the Law provides that the latter is competent to issue confiscation certificates following final confiscation decisions handed down by the courts.

Regarding a confiscation order Article 158(1) of Law 23/2014 of 20 November 2014, provides that the Criminal Courts or Judges in charge of the enforcement of the sentence are the competent judicial issuing authorities.

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

On the other hand, the enforcement of a confiscation order – via the issuing of a confiscation certificate – is also the responsibility of the first instance trial courts. Regarding a confiscation order: under Article 158(2) of Law 23/2014 of 20 November 2014 the competent executing authority is the first instance criminal court (*Juez de lo Penal*) of the locality where any of the property to be confiscated is located. When the issuing authority does not know where the item to be confiscated is located but the certificate does indicate the place of residence or registered office of the person in respect of whom the order has been issued, the first instance criminal court (*Juez de lo Penal*) of that place will be competent, even if it is later found that the property is located in a different district or that the person has moved.

If the issuing authority does not know the location of the property to be confiscated or the place of residence or registered office of the person in respect of whom the order has been issued, the confiscation certificate shall be sent, for the sole purpose of determining the location of the property, to the *International Cooperation Unit* at the General Prosecutor's Office in Madrid (UCIF), which shall forward it to the Criminal Judge in the locality where the property is located for enforcement of the confiscation order.

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

Article 158(2) of Law 23/2014 of 20 November 2014

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.

Besides the competence of the International Cooperation Unit at the General Prosecutor's Office in Madrid (UCIF) when the issuing authority does not know the location of the property to be frozen or confiscated as a prosecutorial centralized authority, whose function is limited to that of being a receiving prosecutorial authority when any preliminary enquiry should be made for the sake of the eventual competence clarification, in order to identify the competent authority for issuing or executing a freezing or confiscation order in another EU Member State in general terms the EJM ATLAS is the most suitable and reliable telematic tool to be used.

On top of that, Article 6(3) of Law 23/2014 provides that the Ministry of Justice (MoJ) is the central authority, although it only carries out the functions described in its article 7(1) and, therefore, is just responsible for providing material assistance to the judicial authorities in order to resolve problems that may arise in matters related to all the mutual recognition instruments referred to in the Law. The role of the MoJ in relation to freezing and confiscation orders is limited due to the rule of direct transmissions between judicial authorities and given the experience gained by the Spanish judicial authorities and the existence of various national networks, together with their counterparts in other Member States. However, as previously mentioned the MoJ is also responsible for the collection of statistics under the general reporting obligation for courts wherever they are competent to issue or execute a decision on the basis of all the mutual recognition instruments referred to in the LMR to send a copy to the MoJ.

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

When Spain is the executing State under REG the main practical problem encountered by the Spanish authorities still relates to deficiencies in the content of the certificate

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.

The Spanish judges specialized in international cooperation in criminal matters are familiar with the tools provided for the competent authorities on the European Judicial Network website, particularly the Judicial ATLAS. Any non-specialist Judge who needs to identify an applicable instrument can seek advice from contact-point magistrates or specialist prosecutors. These persons are always known to their colleagues in each province and are all available for any enquiries that may be necessary.

The Spanish PPO believe that the EJM Atlas should be reviewed by Spain to update the list of contact points providing specific feedback about their specific areas of expertise and competence in this field, which would make it easier to determine to whom and where send a particular query regarding to the application of the REG.

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.

Given that the Spanish Prosecutors are not entitled to issue a certificate, we do not need to use any tool regarding the issue under REG.

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?

The Spanish Courts are aware of the role played by Eurojust and make extensive use of the possibilities offered by this EU agency.

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

Although we think the principal channel is the direct transmission with a bit of help from the Liaison Magistrates or/and Eurojust, not being the PPO issuing authority, we do not have enough data to confirm it, because the Statistics of the CGPJ do not issue this aspect.

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

As Public Prosecutors are the SPoC for EIOs many of the freezing or confiscation orders are also received at the PPO. Most of them arrive by telematic channels and directly from the issuing authority. Sometimes France or The Netherlands employ their Liaison Magistrate as well.

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 / Based on the Regulation / Based on the national law of the executing State / Based on the customary law principle of international comity with assurance of reciprocity.

The underlying freezing order is needed as Spain did make the declaration provided under Article 4(2) of The Regulation. So, when a freezing certificate is transmitted with a view to the recognition and execution of a freezing order, the issuing authority is to transmit the original freezing order (national judicial decision) or a certified copy thereof together with the freezing certificate. Spain also makes the declaration under Article 14(2) that, when a confiscation certificate is transmitted with a view to the recognition and execution of a confiscation order, the issuing authority is to transmit the original confiscation order or a certified copy thereof together with the confiscation certificate. However, as a translation of

those national judicial decisions is not needed, no problems arisen in relation to the lack of translation of those national judicial decisions. Therefore, in several cases Public Prosecutors as receiving authorities requested the issuing authorities for the underlying national freezing order.

In a couple of cases the International Cooperation Unit at the General prosecutors Office and the PPO at the Audiencia Nacional opened a consultation procedure with the issuing authority asking him or her to send the proper REG Annex I instead of the provided Art. 9 of 2003/577 FDs certificate.

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

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? As receiving authorities, translation is not usually a concern. We have a bilateral treaty with Portugal excluding the obligation of translate and most of the specialized Prosecutors are able to understand English, French and Italian. As for the rest of languages, although it is true that sometimes translations have a poor quality, IA translators exists nowadays to help the executing authority.

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.

It is not frequent, nevertheless, despite have Spain declared that certificate must be translated into Spanish, in urgent cases certificates may be received by Public Prosecutors in English or French as far as the translated version arrives as soon as possible before it is referred to the competent Court.

**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 based on the cooperation with police

authorities or FIUs (Financial Intelligence Units)? Yes / No. If yes, please provide a detailed answer.

In the field of international cooperation, it is worth mentioning the Spanish FIU (SEPBLAC) is entitled to suspend a transaction in progress at the request of other FIU when there is feedback of the commission of money laundering and/or financing of terrorism, for the purposes of analyzing the transaction and communicating the results to the requesting authorities<sup>2</sup>.

In relation to the suspension of ongoing operations, art. 48 bis (5) Spanish AMLFT Law 10/2010 only provides for the possibility of FIU passive cooperation as executing authority: "At the request of the Financial Intelligence Unit of another Member State of the EU, the Executive Service will be empowered to suspend a transaction in progress, when there are indications of money laundering or financing of terrorism so that by the Financial Intelligence Unit the requesting Financial Intelligence proceeds to analyze the transaction, confirm the suspicion and communicate the results of the analysis to the competent authorities. In cases of suspension due to indications of terrorist financing, it will inform the Secretariat of the Terrorist Financing Activities Surveillance Commission. When there is prior authorization from the requesting Financial Intelligence Unit the suspension will be agreed upon under the responsibility of the requesting Financial Intelligence Unit and will be effective for a maximum period of one month. After this period, the suspension will cease unless it is judicially ratified or extended at the request of the Public Prosecutor's Office."

Therefore, the possibility of executing this precautionary measure, from the cross-border perspective, depends on the request of a foreign FIU and is limited to suspicions of possible MLFT crimes. In any case, the suspension is temporarily limited and must be ratified issuing/validating a freezing certificate by a judicial authority of the Member State from which the FIU request originally came once the transaction has been analyzed and the suspicion confirmed. Upon the reception of the certificate the Spanish Investigating Court where the bank account is opened upon the request of the Public Prosecutor will decide on the

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<sup>2</sup> See 2013 MONEYVAL Research Report "The postponement of financial transactions and the monitoring of bank accounts."

execution of the certificate with the consequent ratification and extension of the existing suspension within the thirty days deadline<sup>3</sup>.

Therefore, we are in front of a two-fold process, in which the first decision is made by an administrative authority (the FIU of the country where the suspicious transaction comes from), with the suspension being applied at the administrative level by the SEPBLAC, in order to allow to the requesting FIU the analysis of the suspicious transaction causing the transfer and, where appropriate, confirm it and communicate the results of the analysis to the competent authorities. In the event that the suspicion of money laundering is confirmed, the administrative suspension must be ratified at source by a judicial authority by issuing a letter rogatory or, if it is an EU Member State, by issuing a freezing order certificate (except Ireland, which would have to issue a rogatory commission for this purpose), to be executed by a Court of Investigation of the place where the bank account is located.

There is not a legal framework at the national nor at international level in relation to the extension or judicial ratification of said administrative measure. However, the existence of a short deadline and its natural provisional nature claims for a Speedy and well-organized coordination at a national level after the competent specialized Prosecutor receives the freezing certificate issued by a judicial authority of the Member State where the suspension was triggered by the FIU. Therefore, to fulfill the existing legal gap a good practice could be that in these urgent cases, SEPBLAC could inform the International Cooperation Unit of the General Prosecution Office (UCIF) to coordinate with the competent PPO and with the foreign and Spanish judicial authorities concerned the fast-track execution of the upcoming freezing certificate within the legally established period of 30 days.

See Case study 1 in ANNEX 1

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<sup>3</sup> MONEYVAL Research Report on *"The postponement of financial transactions and the monitoring of bank accounts"*, reflects how the duration of this deadline varies from country to country, embracing from 24 h in Malta to 30 days in Spain or 90 days in Estonia and even 6 months in Austria, where the bank holder must be informed.



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? There are not major issues in this question. If needed a law enforcement previous investigation can be ordered by the Prosecutor. If even in this case a territorial competent authority is not found, the residual competence of the “Audiencia Nacional” regarding the EIO would be applicable by analogy.

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 Case Study 2

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

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

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 regarding certificates issued on the basis of confiscations without conviction)? Please, provide a detailed answer.

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.

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.

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. See answer to question 9. The most common mistake is not to mention the maximum amount to be freezed in cases of cash or money within bank accounts.

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.

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.

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 regard to any instrument of judicial cooperation (European Investigation Orders - EIOs, rogatory letters, Joint Investigation Teams) and of police cooperation (INTERPOL o 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). As receiving authorities and unique authority for receiving the EIOs in Spain and executing the vast majority of those ones referred to financial investigations, previous EIOs usually led to the issue of a certificate.

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 about the description / location of the asset to be frozen or confiscated? Please, provide a detailed answer.

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 regarding the description / location of the asset to be frozen or confiscated? Please, provide a detailed answer. Although as already explained Prosecutors do not execute certificates but translated them to the Investigating Judge with a motivated report, the Prosecutors do not refuse to present the certificate to the Judge or join to the certificate a report asking for refusal without prior consultation with the issuing authority. Nevertheless, sometimes they are not answering.

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

48) Both as issuing authority and as executing authority, have you ever dealt 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.

See case study 2.1

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.

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

A Note on the practical implementation of the REG (so-called *Nota Instructiva*) was issued by the MoJ, CGPJ and FGE in 2021 (see attached)



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

Based on article 3 (15) of the Organic Law of Public Prosecutors (EOMF) that includes among the functions of the Spanish Public Prosecutor's Office, "To promote and, where appropriate, facilitate international judicial assistance provided for in international laws, treaties and conventions" and, taking into account , the deep structural and organic review that our institution has undergone after the EOMF's reform of 2007, which allows PP's to set up a network of in international cooperation Prosecutors; as well as the innovative jurisprudence of the CJEU on the concept of judicial authority in relation to mutual recognition legal instruments (EAW/EIOs) and the positive national experience on the application of new Art. 187 (2) of the LRM, appointing PPs as EIO's receiving authority (following the so-called SPoC approach), which has improved the rationality and efficiency of incoming EIOs regime in Spain, it was considered to be appropriated to extend said successful formula to other mutual recognition instruments, particularly those that exist in the area of asset recovery.

While the existing legal vacuum due to the non-existence of an International Criminal Judicial Cooperation Law in Spain is to be filled by providing us with a minimum national regulatory architecture in this area, the urgent need to adapt our current legislation to the Regulation 2018/1805 on the mutual recognition of freezing and confiscation orders triggered the launching by the Government of a Draft Bill aimed to reform our current Law 23/2014, of November 20, on mutual recognition (LRM).

## **II.- Proposal for legal reforms in Spain (as reflected in the GPO 2022 Annual Report)**

In view of the projected reforms and in relation to the functional scope of Public Prosecutors, The PPO upcoming Annual Report submits the two following proposals:

**ii.a/.** - The reform of the LRM in order to designate the Public Prosecutor as single judicial authority (SPoC) for receiving seizure and confiscation certificates.

Justification: The reform that we propose, in line with the Proposal for a Directive on confiscation and recovery of assets of May 25, 2022 in order to facilitate the recovery of assets as an effective mechanism to fight organized crime, guaranteeing that the crime is not profitable, by strengthening the capacities of the Public Prosecutor's Office, as the key judicial authority in the early phases of the asset recovery cycle. In this way, once an OEI has been executed by the PP (as SPoC -Single Point of Contact- for EIOs and main financial investigation actor in Spain), for the sake of due efficiency and taking into account its status as a EU judicial authority, it should also be legally empowered to receive the freezing certificate from the same issuing authority, maximizing the cooperation contacts already established and the consultation procedures already opened with the issuing Member State, while making it easier for the issuing authority to choose the right authority to which the certificate should be sent, optimizing reception timing.

The designation of the prosecutor as SPoC in relation to freezing certificates, would facilitate the practice of the simultaneous issuance of both OEI form and 2018 Regulation Annex I certificate, (that possibility already existed with the previous mutual assistance regime), avoiding the dysfunctions of the current "twofold process" whenever the Directive and the Regulation has to be coordinated, preventing the freezing order from having to be subsequently and necessarily be shipped separately to the Dean Court of the territorially competent Investigating Judge in Spain for its allocation (which normally ignores the previous financial-patrimonial investigation coordinated by the Public Prosecutor who has already executed the EIO issued with view to obtaining banking information or the relevant patrimonial investigation). This solution could considerably reduce any delay and the subsequent risk of disappearance of assets, namely by the withdrawal of funds from the investigated accounts, which actually, makes impossible the execution of any freezing order.

The proposed reform is in line with the approach which inspired the declaration notified by Spain to the European Commission on December 18, 2020, in relation to article 2 (9) of the Regulation's executing authorities, which includes the International Cooperation Unit of the general Prosecutor's Office as centralized receiving judicial authority within the Spanish PPO in relation to freezing and confiscation "for the sole purpose of determining the location

of the asset to be seized", only when the issuing authority does not know the place of its location and/or when the issuing authority does not know the location of the asset to be frozen "nor the place of residence or registered office of the person in front of whom issued the resolution", for the sole purpose of determining the location of the property. We understand that the proposed legal reform should extend and dig in the approach of said declaration to the rest of the International Cooperation PPs at a district level, recognizing them as the sole receiving authority for freezing certificates to be sent to Spain.

Said provision would also make it possible to overcome the current dysfunctions derived from the existing triple competence for the recognition of resolutions that are clearly interrelated (prosecutor for the OEI, Investigating Judge for freezing certificates and First Instance Criminal Court for confiscation certificates), which generates enormous confusion in the European issuing authorities. In addition, the reception of freezing and confiscation certificates by the Public Prosecutors would also ensure the coordination needed in the execution of these instruments at the national level.

Finally, the proposal to designate the PPs as receiving authority would facilitate the need to fully account for the statistics, in accordance with article 35 of Regulation 2018/1805, which obliges Member States to collect data on seizure and confiscation that have been received and executed, and statistics must be sent annually to the Commission. Indeed, in view of the difficulty in complying with the provisions of Article 6 of the LRM, in relation to the mandatory notification to the Ministry of Justice, the assumption by the Public Prosecutor of receiving the freezing and confiscation certificates, would make it possible to register such resolutions within the PPO's case management system (so-called CRIS/CJI), which is a complex and complete computerized management system for international cooperation files at the national level that the International Cooperation Public Prosecutors have at their disposal and it is working very well. Thus the precise and reliable statistics available at PPO level in relation to OEIs as well as other relevant information on the issuing Member States, type of offences and case-related life feedback, could be extended to the assets recovery field in relation to incoming freezing and confiscation certificates received in Spain.

ii.b/. The reform of the LRM to designate the Public Prosecutor's Office as the authority for the execution of freezing resolutions in urgent cases.

Complementary to the previous proposal, in order to advance in the strengthening of the capacities of the Spanish judicial authorities in the first phases of the asset recovery cycle and its greater national cohesion and coordination; exceptionally and for cases of urgency, PPO proposes the recognition of Public Prosecutor as an authority, not only for receiving, but also for executing freezing orders extending to the scope of mutual recognition, the approach of art. 53 of the Spanish Law 9/2021 which assigns the Spanish European Delegate Prosecutor the power to freeze assets. In addition, Art. 11 of the Proposal for a Directive on asset recovery and confiscation requires Member States to take the necessary measures to ensure that illicit assets can be frozen quickly and, where necessary, with immediate effect to avoid their dissipation. These measures include – in addition to the measures set out in the Confiscation Directive - the possibility for AROs to take temporary urgent freezing measures until a formal freezing order can be issued. As the Spanish ARO is hosted in the Ministry of Justice and it is not a judicial authority, the Spanish PPO considers a reasonable reform to provide PPs with this competence beforehand with an specific safeguard establishing that the freezing order shall remain in place only for as long as necessary and that the property should be returned immediately if it is not confiscated.

Justification: First of all, it is important to highlight that there are no obstacles of a constitutional nature that prevent the recognition of this competence on patrimonial precautionary measures to the Spanish Public Prosecutor, since, as occurs in relation to financial investigation (see Supreme Court judgement no. 986/2006 of June 19), the freezing of assets for the purpose of confiscation does not limit fundamental rights, provided that the right to effective judicial protection, due process and defense is respected.

Proposals for legal reform: Thus, we propose the following wording of articles 144(2) and 158(2) of the LRM.

Article 144 (2): "2. The Public Prosecutor's Office is the competent authority in Spain to receive freezing certificates issued by the competent authorities of other Member States.

Once registered and after having acknowledged receipt to the issuing authority, the Public Prosecutor's Office of the place where the assets are located is entitled to recognize and execute the freezing certificate in urgent cases.

After the execution of the urgent freezing orders, the Public Prosecutor will inform the Decree issued in recognition and execution, to the extent possible and without delay, to the affected persons of whom it is aware, in accordance with the provisions of our legal system. legal. In the event that the affected person opposes the freezing order recognized by the Public Prosecutor, the Decree will be communicated immediately to the First Instance Criminal Court and, in any case, within a maximum period of twenty-four hours, stating the reasons that justified the adoption of measure, the action carried out, the way in which it has been carried out and its result. The Criminal Judge, also in a reasoned manner, will revoke or confirm said Decree within a maximum period of seventy-two hours from when it was issued."

Article 158 (2) of the LRM: "2. The Public Prosecutor is the competent authority in Spain to receive confiscation certificates issued by the competent authorities of other Member States. Once registered and after having acknowledged receipt to the issuing authority, the Public Prosecutor will send the certificate of confiscation to the First instance Criminal Court of the place where any of the assets subject to confiscation are located.

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

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

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



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?

## **ANNEX 1**

### **Case study 1**

In March 2021 PPO Málaga received a freezing certificate issued by the Chief Prosecutor of the Vilnius Regional Prosecutor's Office (Lithuania) in the framework of a ML investigation opened in February 2021 on the basis of a Lithuanian FIU notification of a suspicious operation. In this scam scheme the German victims made transfers based on contracts that misleadingly stated that they were investing in a real state project. More than 1.300.000,00 EUROS were transferred to accounts in Spain, Greece and Hungary hold by shell companies for services supposedly provided, which, did not exist.

The investigation led by the Lithuanian PPO reveals that more than 900.000,00 EUROS were transferred to Spanish bank accounts. The ML Spanish connection was clear, and the freezing order identified a specific bank account with IBAN number opened in the name of a Spanish shell company in Málaga and the amount of 20.000,00 EUROS transferred in February 2021 from a Lithuanian bank account opened at a Lithuanian Bank entity. This amount was allegedly fraudulently transferred without any clarification of the type of trade or service provided by the beneficiary Spanish company to the investigated person to justify it.

On March 2021, the SEPBLAC as Spanish FIU informed PPO at the Audiencia Nacional, based on Art. 48 bis (6) of AMLTF Law 10/2010 that this Unit has requested Banco XXX, S.A. the immediate suspension of the above-mentioned transaction received in the account in Málaga. The aforementioned Art 48 bis (6) of the Spanish AMLTF provides that the suspension will cease within a period of one month, unless it is ratified or extended judicially at the request of the Public Prosecutor's Office. This postponement was based on in the request made in March by the FIU of Lithuania. The very same day, Vilnius PPO issued the freezing certificate based on the REG to block funds up to the amount of 20,000 EUROS in the identified Spanish bank account.

Since the suspicious operation was analyzed and corroborated and the bank account was opened in a branch of Banco XXX, S.A. in Málaga, PPO at the Audiencia Nacional sent immediately via email the scanned copy of the freezing certificate issued by the Lithuanian PPO with the domestic freezing order for its rapid recognition and execution.

Considering that the provisional nature of the administrative suspension PPO Málaga submitted the certificate with the relevant report pro its recognition and execution before the on duty Investigating Court in Málaga for the immediate ratification and extension of the existing suspension with a view to guaranteeing a subsequent confiscation underlying its urgent nature due to the narrow deadline provided under the Spanish legislation. It was pointed out in the Public Prosecutor's Decree dated the 18<sup>th</sup> March 2021 that the execution, in any case, should be decided before the 8<sup>th</sup> April 8 2021. However due an internal disagreement on the competence between Investigating Judges the execution of the freezing certificate was decided after the above-mentioned deadline when the funds had been withdrawn.

Lesson learnt: There is a need for an internal protocol to fulfill the existing legal gap. A good practice could be that in these urgent cases, SEPBLAC could inform the International Cooperation Unit of the General Prosecution Office (UCIF) to coordinate with the competent PPO and with the foreign and Spanish judicial authorities concerned the fast-track execution of the upcoming freezing certificate within the legally established period of 30 days. In addition, *lege ferenda* Spanish Public Prosecutors should have competence to receive all incoming freezing certificates and at least in these cases to ratify and extend existing FIUs suspensions of suspicious operations.

## **ANNEX II**

**Case study 2 (The certificate received at the Anticorruption PPO was issued before REG, but executed after)**

In the 2022 Annual Report of the General Prosecution Office there is reference to a cross-border confiscation involving the application of the former FDs 2003 and 2006 and in its disposal phase the New REG. This Italian-Spanish case could be a good case study for this project because many of the practical and legal issues under discussion are included.

In May 2019 the Anticorruption PPO received a confiscation certificate in accordance with Art. 4 of the 2006 Framework Decision from the PPO Milan. The confiscation of specific assets was requested (properties and vehicles, previously seized by virtue of a MLA request sent by the same PPO in 2013 with successive additional requests. The crimes investigated in Italy were tax fraud and punishable insolvency.

Finally, the decision taken by the Court in the conviction sentence was the confiscation of the value of all seized assets up to the limit of approx. 36 million euros. However, in Art. 4 certificate, unlike the new one, value-based confiscation as such was not legally provided. For this reason, the Italian issuing authority indicated in Section k).1 that if the confiscation refers to specific assets, it takes the form of an order to pay an amount corresponding to the value of those specific goods.

The freezing of real estate was carried out in a different way (preventive seizure, prohibition of disposal or both) depending on the "preferences" of the different Investigating Courts from the place where properties were located or the different Land Registers. In all cases it was necessary to mention and apply the lifting of the corporative veil (art. 20 of the Ley Hipotecaria), because the assets were in the name of a shell company. Additionally, as the final confiscation order was delayed and the seizure had been carried out in 2013, in 2017 PPO Milan requested the extension of the preventive annotation of the frozen properties upon a previous reminder of the Spanish PPO to avoid its "ex officio" expiration by the Land Register.

Since properties were spread throughout Spain, the confiscation certificate was sent to the Criminal Court of Tarragona, which was where most of the properties to be seized were located. However, all the properties in Tarragona had already been foreclosed under a mortgage in favor of a bank, prior to the court's precautionary annotation, so the Court Clerk decided to simply discontinue the file. Luckily the PPO convince him that the Court was competent to carry out the confiscation of all assets, not just those in his territory. In

any case, the rights of third parties in good faith (mortgagees, in this case) were respected. The issue of third parties and the need to notify affected persons arose, since the formal owner of the assets was a Spanish company that had no representative (its sole manager had resigned some time ago) and had no activity, but since the real owner was the convicted person, had been notified of the confiscation in Italy and had withdrawn legal remedies, it was considered that no further notifications were necessary.

The Spanish Assets Recovery Office (ORGA) oversaw the selling of the goods, which were successfully auctioned and around 3 million euros were collected. Surprisingly, there were hardly any problems with registering the assets in the name of their new owners.

After contacting PPO Milan, the Spanish Prosecutor proposed a 50% sharing agreement and they accepted it, indicating the current account to which the transfer should be made. In 2022 under the application of the REG a transfer of 1.5 million euros were made to the Milan Prosecutor's Office and the Treasury, respectively, and the case was closed. In principle the 50% split wasn't clear at all, since it was a tax crime and punishable insolvency case, and the Italian authorities could discuss whether there were victims in Italy or not but finally the Italian PPO accepted the 50% distribution approach with our any discussion.

The certificate was sent directly from PPO Milan to the Anti-Corruption PPPO in Madrid, with a key intermediation of the Spanish liaison magistrate in Italy who met the Italian Prosecutor and inform him about the application of the 2006 FD. This case has meant an income of 1.5 million euros for the Spanish Treasury with minimal effort. Perhaps, the Spanish Minister of Justice should reconsider the need to post a Liaison Magistrate in Rome again.