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Mutual recognition of freezing and confiscation orders, between efficiency and the rule of law.

Practical obstacles and legal issues arising in the implementation of REG in Spain

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REG (UE) 2018/1805

Uncertain Scope of application:

- REG Replaces FDs 2003/577 and 2006/783
(already transposed & compiled in Law 23/2014 on MR)
- REG Directly aplicable in Spain since **19.12.2020**
Nota Instructiva 2021/**still waiting for legal updates**
- Civil confiscation orders are not envisaged:
proceedings in criminal matters is not equivalent
to *criminal proceedings* (used in FDs)/**still waiting
for CJEU case-law**

¿What about IE/DK and UK?

Remaining piecemeal approach:

- DM 2003/577/JHA is still applicable with DK for freezing and evidence assurance
- Between ES and IE the CoE ML 1990 Convention is applicable for freezing orders
- DM 2006/783/JAI is still applicable with DK and IE (notif. by IE 26/05/2016)
- Between UE and UK the TCA is in force since the 1st January 2021

Main REG features

- MR regime is based in standardised forms
- Short deadlines, 48 h. recognition + 48 h. execution for freezing orders and 45 days for confiscation
- *Judicial validation* (art. 2 (8) b) ii) by a Judge/Prosecutor (A Judge in Spain)
- Proportionality assesment by the issuing authority (art.1.3)
- Certificates must be translated into Spanish
- Spain made a declaration and incoming freezing/confiscation certificates must attach the relevant national decision

Spanish issuing authorities

- Freezing orders: Investigating Judges (Art. 144 (1) LRM)
- EDP for crimes they are competent to investigate (REG 2017/1939 + LO 9/2021)
- Confiscation orders: Trial Courts in charge of the enforcement of the sentence (art. 158 (1) LRM)
"Juzgados de ejecutorias"

Spanish executing authorities

- Freezing order of properties or freezing order to block bank accounts, the Investigating Court where the property or the bank account to be frozen is located (Art. 144 (2) LRM)
- Confiscation order of properties, the first instance Trial Court where any of the property to be confiscated is located

UCIF as receiving authority

- When the location of the property or the bank account are unknown, the freezing certificate must be sent, for the sole purpose of determining the location of the property, to the **International Cooperation Unit of the General Prosecutor's Office (UCIF)**
- Likewise for the confiscation certificate when the assets' location or residence of the person affected is unknown

Main REG novelties

- Advance restitution of frozen property to the victim when the title to the property is not contested (Art. 29 REG)
- Preferent and direct compensation of victims before the disposal between issuing/executing States. (Arts. 29 & 30 REG recognize the victims rights as provided in Arts. 15 & 16 Directive 2012/19) Section K

a priori EIO aimed at

- gathering banking information
- EIO's provisional measures –art. 203 LRM- are aimed at assuring evidence, not freezing ill-gotten gains: **blocking bank accounts always needs a freezing certificate**
- For simultaneous execution of OEI and certificates is needed to fill in
 - EIO's form Section E (3) / Section D
 - Section B (urgency) / Section D of Annex I REG

Banking Information

- OEI Tít. X LRM
 - Arts. 186 (5), a) and b) definition of Bank and financial entities/accounts data
 - Two-fold regulation: Arts. 198 y 199 (active)/217, 218 y 219 (passive)
- EIOs aimed at gathering bank information could be issued by the PPO in pre-judicial financial inquiries and in NCBC proceedings

Assets tracing & financial investigations

- Art. 145 (2) b) LRM: "When it seems that the assets are in other MS."
- Tracing of assets via AROs, CARIN,...
- Spontaneous exchange of Information
- Previous consultation with potential executing authority (role of PPO)
- EIOs for gathering bank information
- JIT with financial objectives

Assets tracing difficulties

- Identification of the beneficial owner of the criminal assets
- Limited use of FIUs' competences,
- Lack of central bank accounts registers and on companies BO
- Holder's right to be heard
- Financial privacy? (CJEU 16.07.2015 Coty Germany Gbmh, C-580/13)
- Identifying proceeds of crime converted into virtual assets,...

Issuing a freezing certificate

- *A priori* freezing judicial decision in place
- “Documented” in the certificate (art. 147 (1) + REG): filling in Annex I is mandatory (LMR’s Annex X only with IE y DK)
- Annex I cannot be adapted, modified or simplified in any way, ...not handwritten!
- In those cases it will be refused (previous consultation_Art. 8 (1) c) and (2) REG.
- No equivalent document could be accepted (as provided in art. 19 (2) b) LRM)

Attached documents

- ES (like IT) notified the need to attach the judicial decision regarding incoming freezing certificates (in line with Art. 7 LRM)
- No need to be translated

Where to send the certificate?

- When the location of the property is unknown: UCIF
- If the location is known: direct transmission (Annex I Section A, in line with Art. 25 REG)
- Visit EJN website ATLAS (www.ejn-crimjust) or alternatively RJE, Eurojust, (art. 4.8 REG)
- ¿Language? Certificate translated to Spanish, no need of judicial decision translated

		TRANSMISSION THROUGH A CENTRAL AUTHORITY	NECESSARY TO ATTACH THE ORDER	LANGUAGES ACCEPTED
	AT	No information available		
	BE	NO	NO	NL, FR, DE, EN
	BG	No information available		
	HR	NO	YES	HR, EN (in urgent cases)
	CY	YES	YES	GR, EN
	CZ	NO	YES	CZ, SK
	EE	YES	NO	EE, EN
	FI	NO	NO	FI, SV, EN
	FR	NO	NO	FR
	DE	NO	NO	GE
	GR	No information available		
	HU	NO	YES	HU (EN, FR, DE in urgent cases)

		TRANSMISSION THROUGH A CENTRAL AUTHORITY	NECESSARY TO ATTACH THE ORDER	LANGUAGES ACCEPTED
	IT	YES	NO	IT
	LV	YES	YES	LV
	LT	NO	YES	LT
	LU	YES	YES	FR, DE, EN
	MT	No information available		
	NL	YES	Would like	NL, EN
	PL	YES	YES	PL
	PT	NO	NO	PT
	RO	No information available		
	SK	NO	YES	SK, CZ
	SI	NO	May demand	SI, EN
	ES	NO	YES	ES
	SV	NO	YES	SV, EN

Bona fide Third party assessment

- Rights of persons who are affected by a freezing order or confiscation order should be preserved (Recital 15 REG)
- Whether third parties are directly injured by a freezing/confiscation order, should be decided in line with the law of the executing State (Recital 15)
- Is the third party *bona fide* assessment a substantive reason to be challenged before the issuing State or not? (art. 33.2)

Freezing and confiscation of properties



Freezing and confiscation of real state

- ✓ “*locus regit actum*” (arts. 7.1 and 23.1 REG)
- ✓ Any precautionary measure adopted by the Investigating Court has to be validated by the Land Register
- ✓ Freezing order or disposal banning?
- ✓ Requirements of *tracto sucesivo* principle: Investigating Courts’ cover letters attaching the freezing order should reflect any leads on the link of the investigated person with the formal owner of the property (Art. 20 LH *in fine*)

Figures?

CGPJ's Judicial Statistics Service

2021	issued	executed
Freezing certificates	47	42
Confiscation certificates	3	3

Figures?

CGPJ's Judicial Statistics Service

2022	issued	executed
Freezing certificates	33	52
Confiscation certificates	6	1

Figures?

PPO's case management system CRIS

2021	2021	2022
Freezing certificates	67	96
Received at UCIF	9	14

Up-to-date in 2023 PPOs have received 87 freezing certificates (19 at PPO Madrid, 18 at PPO Málaga, 17 at UCIF)

Many thanks for your attention!