

RECOVER
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RECOVER

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

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OPENBAAR MINISTERIE

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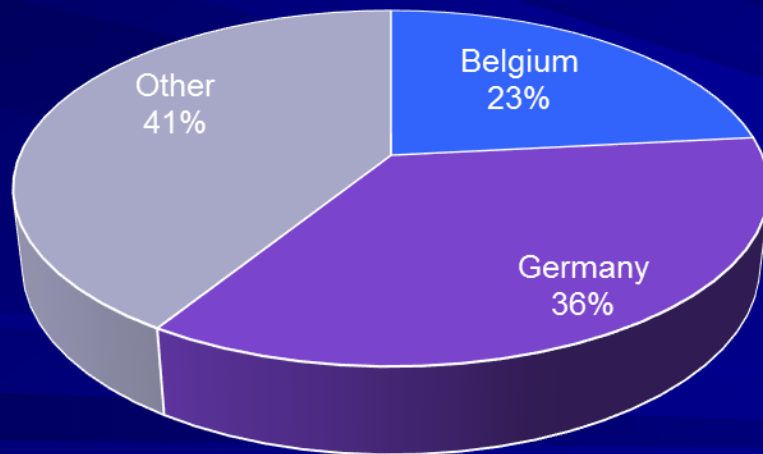
Content

- Some statistics
- Competent authorities
- Forms of freezing and confiscation
- Problems and good practise

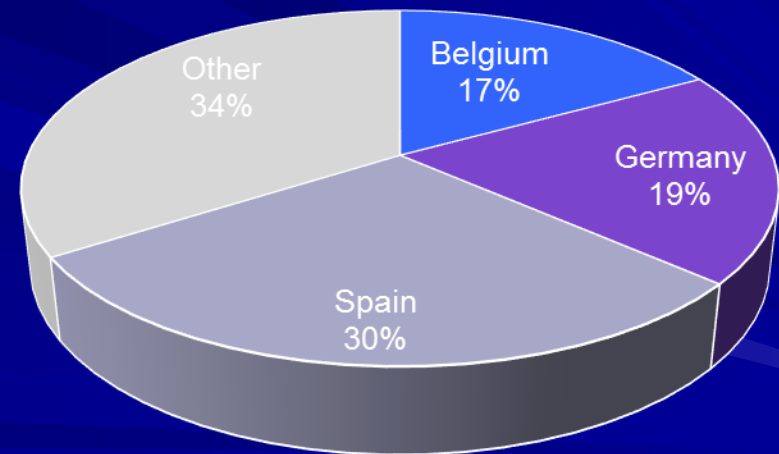
Statistics (2021-2022)

European Freezing Order	2021	2022	Total	Countries
Incoming	93	89	182	18
Outgoing	125	122	247	21

Incoming

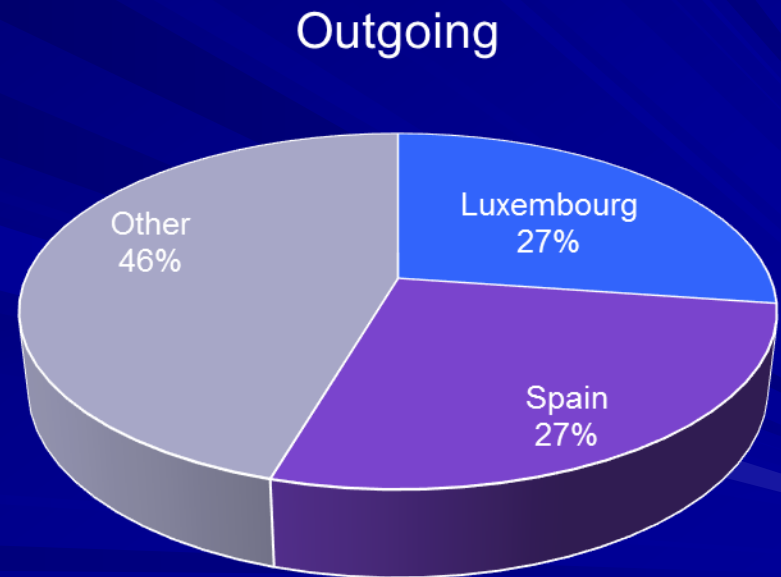
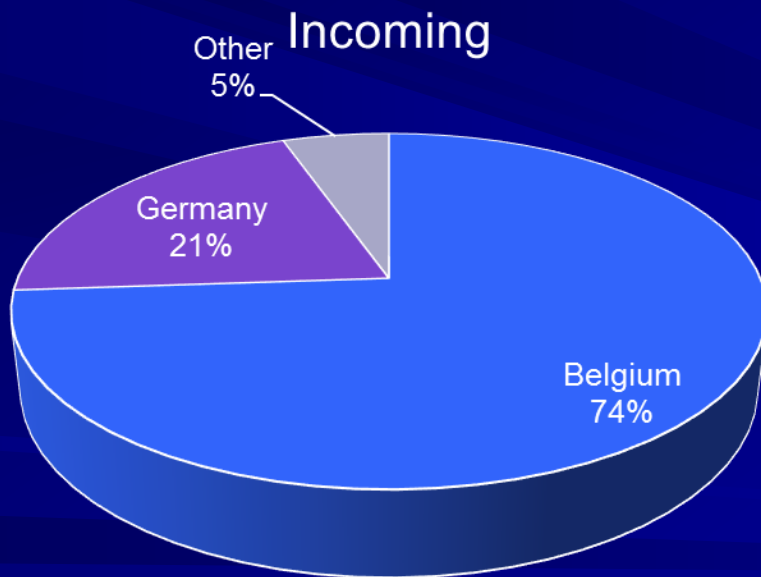


Outgoing



Statistics (2021-2022)

European Confiscation Order	2021	2022	Total	Countries
Incoming	29	63	92	7
Outgoing	12	10	22	10



Competent authorities under Regulation

- Freezing orders:
 - Outgoing: public prosecutor
 - Incoming: public prosecutor
- Confiscation orders:
 - Outgoing: Minister of Justice and Security (central authority: CJIB)
 - Incoming:
 - recognition – public prosecutor
 - execution – Minister of Justice and Security >
 - via agency: CJIB

Models of freezing under Regulation 2018/1805

- § 94 CCP
 - Without court authorization
 - Aim: direct (object) confiscation
 - Relation objects – criminal offence
 - Court decides on objects
- § 94a CCP
 - With court authorization
 - Aim: value confiscation
 - All assets (legal and illegal)
 - No court decision on objects
- Combination 94 CCP and 94a CCP possible

Models of confiscation under Regulation 2018/1805

- Direct (object) confiscation:
 - forfeiture with freezing, § 33 et seq. cc
 - forfeiture without freezing, § 34 cc
- Punishment > decision object in verdict
- Relation object – criminal offence
- Third party confiscation, § 33a, subsection 2, cc
 - third party acted in bad faith – or – unknown third party
- Forfeiture without freezing:
 - Object needs to be surrendered
 - Or payment of assessed value of the object
 - Alternative sanction: detention (ordered by court)

Models of confiscation under Regulation 2018/1805

- Value confiscation - § 36e cc
 - decision on proceeds of the criminal offence,
 - decision on the payment order
 - no decision on the objects
- Non-punitive measure, separate decision next to criminal case
- Extended confiscation
 - Calculation of proceeds per criminal offence > also other offences not part of the criminal conviction
 - Calculation of proceeds per period > unexplained wealth
- Third party confiscation
 - Object has been transferred to third party to avoid confiscation
 - Third party knew or could reasonably suspect this to be the case

Models of confiscation under Regulation 2018/1805

- NCBC / other models of confiscation: withdrawal from circulation, art. 36b cc, security measure:
 - relation object – criminal offence
 - uncontrolled possession is in violation of the law or contrary to public interest
 - object needs to be frozen
- Ownership is no requirement
- Criminal conviction not requirement > criminal offence does needs to be established
- Only form of NCBC in the Netherlands

Normative problems

- Use potential of EFO to full extend – art. 7(1) REG – financial investigations
- Restitution of money to victim in case of frozen bank accounts
- Freezing of assets for victim compensation / restitution

Practical problems

- Need for up to date information on assets, including balance of bank accounts
- Time needed for drafting, translating, sending, executing freezing orders vs urgent requests
- Quality of certificates / use of correct certificate
- Difficulties in (understanding of) communication between competent authorities
- Securing assets in execution phase (ECO)

Good practices (1)

- Align laws of MS with the intent/purpose of art. 7(1) of the REG:
 - authorities competent for EFO should also be competent to perform financial investigations on 1) whereabouts of assets; 2) trace other assets of suspects in MS, even if they are different from the ones indicated in the EFO
- Send an ARO request prior to sending EFO/ECO:
 - financial investigations via ARO's are quicker for verifying active bank accounts and (in some MS) balance checks (avoid issuing unsuccessful EFO). ARO's in all MS should be competent.

Good practices (2)

- Shorten time needed for sending EFO:
 - sending EFO in English for urgent requests
 - sending certificates to central authority specialized for urgent requests
- Suggestions for improvement:
 - adopting urgent freezing/interim measures before issuing EFO
 - soft freezing crypto currency via direct contact exchange before issuing EFO

Good practices (3)

- Issuing authorities should specify if they are requesting the freezing for object or value-based confiscation
- Specify request for financial investigations in certificate to locate the property or trace property of equivalent value
- Improve education and training of practitioners.
- It could be useful to draft a guide/handbook for correctly drafting certificates (already in place in NL)

Good practices (4)

- Improve mutual understanding of communication through:
 - the use of standard forms for f.i.:
 - (1) confirmation of receipt, including contact details of executing authority
 - (2) recognition/refusal
 - (3) result of execution EFO: assets frozen, estimated value
 - preliminary contact between authorities before sending EFO

Good practices (5)

- Possibility of sending EFO when ECO is irrevocable (no notice to affected person)
- art. 18 (5) REG.: freezing assets without EFO prior to recognition of ECO.

Suggestion to include a specific section in the ECO certificate to expressly request for freezing/securing assets prior to recognition of ECO.

Good practices (6)

- Suggestions to improve cross-border cooperation for compensation/restitution to victims:
 - EU harmonized rules for banks and law enforcement how to deal with requests for freezing and restitution of transferred funds in case of fraud, swindling, cybercrime, etc.
 - Extend scope of freezing order under REG (will make execution of victim compensation measures under FD 2005/214/JHA easier)