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**REFORM PROPOSALS OF NATIONAL LAW****RECOVER – JUST-2022-JCOO – GA no. 101091375****WP 3****Reform proposals of national law****List of the documents**

- 1.Reform proposals of national law from Bulgaria**
- 2.Reform proposals of national law from Germany**
- 3.Reform proposals of national law from Italy**
- 4.Reform proposals of national law from Lithuania**
- 5.Reform proposals of national law from Poland**
- 6.Reform proposals of national law from Portugal**
- 7.Reform proposals of national law from Romania**
- 8.Reform proposals of national law from Spain**
- 9.Reform proposals of national law from the Netherlands**

With regard to the dissemination and communication activities we highlight that the main results of the 3<sup>rd</sup> workpackage are available in the official website and in the related database of RECOVER <http://recover.lex.unict.it/>

## **1. Reform proposals of national law from Bulgaria**

Proposals for changes in the national legislation with a view to ensuring better implementation of the Regulation in practice

1. to introduce a strict order for the management of the property subject to confiscation;
2. to provide for the possibility of re-opening criminal proceedings when the prerequisites of Art. 422 of the Criminal Procedure Code are met.

## **2. Reform proposals of national law from Germany**

There is no evident need for reform of the German law in order to better guarantee the application of the Regulation. §§ 96a IRG et seq. got already reformed with a last change through Art. 6 of the Law from 19.12.2022 (BGBl. I S. 2632) as implementing provisions for the Regulation (EU) 2018/1805.

## **3. Reform proposals of national law from Italy**

A new law, aiming to adapt the Italian domestic legal framework to the Regulation – particularly, as regards the competent issuing and executing Authorities – will likely go through soon.

## **4. Reform proposals of national law from Lithuania**

The Prosecutor General's Office does not have the right of legislative initiative. In addition, we do not see the need for national reform at the moment. However, in light of the Proposal for Directive On Asset Recovery and Confiscation (hereinafter – the Proposal), we see that there will be a need for new legislation and organisational measures.

## **5. Reform proposals of national law from Poland**

It appears that in order to harmonise the application of the REG across all Member States, reform and the introduction of more detailed solutions require REG rather than national legislation.

## **6. Reform proposals of national law from Portugal**

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.

## **7. Reform proposals of national law from Romania**

- 1. Prosecutor's Offices:** There is a vulnerability in the application of the provisions of the Regulation regarding the information of the affected parties, even if such information is postponed, in the context where in real estate matters the law provides for the publication of measures of freezing under the penalty of unenforceability towards its third parties. Thus, the risk cannot be excluded that upon a simple consultation of the registers in which such forms of publicity are carried out, the person concerned will become aware of the measure in question. We appreciate that the legislation related to the possible investigative tactics and the taking of the freezing orders must provide for the coordination with the steps necessary to prove the minimum suspicion of involvement of the person concerned in the facts that can lead to taking such measures in such a way that the disclosure of the procedural quality and respectively of the measure of freezing, taken under the conditions of the law, to shelter the stolen asset from under the power of the measure, at the same time as guaranteeing the right of defence of the suspected person.
- 2. Courts:** An express provision is required regarding the national remedy granted in the case of the recognition of a confiscation order. As we mentioned in point 12, the national legislation does not specify very clearly what is the remedy against the decision to recognize the confiscation order. Some of the courts grant the right of appeal, which can be filed within 10 days of notification, other courts grant the right of contestation, which can be filed within 3 days of notification. Also, if recognition of a confiscation order is refused, the issuing state should have the right to appeal. Such an aspect is not expressly regulated in the Regulation. Also, even if it were to be appreciated that they would have such an appeal, there is the question of the existence of very short terms in which such appeals must be formulated. Perhaps an express provision in this matter, possibly with the obligation of the executing state to communicate the solution to the issuing state at least in a frequently used language would be welcome.

3. **ANABI:** the recommendation aims to establish an obligation for member states to clearly designate which authorities have the capacity to conclude sharing agreements of sums obtained as a result of the execution of the confiscation order. We also recommend that a more extensive provisions of this matter be carried out - for example, for the simple freezing and confiscation of the sums from a bank account in which a substantial sum is located, it may sometimes seem unjustified to retain 50% by the state of execution.

## **8. Reform proposals of national law from Spain**

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:

- 1) 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.

- 2) 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 a 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. 32 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.

## **9. Reform proposals of national law from the Netherlands**

### **EFO**

1. Also introduce the possibility to transfer an EFO for freezing orders in the execution phase.
2. Accept EFOs in English, at least in urgent cases.
3. Remove time limits for the duration of a freezing order from the national law.
4. Empower the competent authorities with a competence to perform or order financial investigations.
5. AROs should get access to information on bank transactions and balances.

### **ECO**

1. Make it possible to freeze property prior to recognition of a confiscation order, without requiring a separate EFO (art. 18, par.5, Regulation).
2. Introduce the possibility to search for assets/perform financial investigations once a confiscation order has become irrevocable, prior to recognition of a confiscation order. Both nationally as on request of another Member State.