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CENTER FOR
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DEMOCRACY

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Research Innovation and Development Lab



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AROs' Activities and Pre-evaluation of the Opportunity of Mutual Recognition Procedure

*Obstacles and Inefficiencies in the Implementation of the Reg. (EU) 2018/1805
Results from the FORCE Project*

This project was funded by the European Union's Justice Programme

Workshop, 19th June 2024

Project objectives

General one → Improving judicial cooperation in the recovery of illicit assets

Specific ones

1. To remedy to the lack of knowledge on the EU cooperation instruments for freezing and confiscation
2. To fill the gap of harmonized rules and practices
3. To ease cooperation regarding freezing and confiscation orders

Project Phases

**The path to the realization of FORCE
Common Standards and Recommendations**

explorative phase



proactive phase

April 2022-March 2024



For more information see
<https://projectforce.eu/>

Explorative phase

Two main activities

- 1 Desk Research
regarding all MS



Comparative Report on Desk Research

- 2 Interviews with
selected practitioners



Report on confiscation and freezing practical issues

For more information see
<https://projectforce.eu/>

Proactive phase

Three main results

- ❖ An **online database** offering information on national freezing/confiscation procedures
- ❖ A **Massive Online Open Course (MOOC)** and **podcasts** in order to enhance awareness of the Regulation 2018/1805 and to train practitioners on its use
- ❖ A **set of recommendations** about concrete issues for an effective and efficient cooperation → *Force Common Standards and Recommendations*

Desk research activities

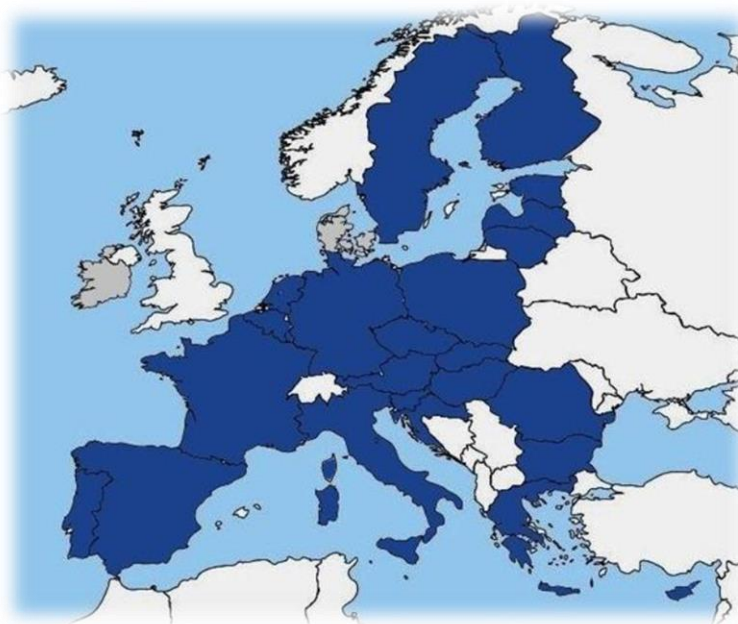
First Milestone

MS involved

25 Countries (Ireland
and Denmark not bound)

Staff involved

Staff of the partners +
subcontractors for languages we do
not understand directly



Comparative Report on Desk Research

Report Structure

- Introduction
- Implementation strategies
- Instructions on specific subjects
- Summary of the national legal frameworks



Direct applicable **without the need to be implemented**

However almost all **MS felt the need to introduce** additional internal rules or amend the existing laws

Objectives →

- 1) To prepare the domestic legislative framework to host the Regulation
- 2) To facilitate the application of the Regulation

Most common implementation strategies

- introduction of **special laws** implementing the Regulation
- introduction of **laws amending Codes** (Criminal Code/Code of Criminal Procedure)
- introduction of **both** special laws and laws amending the Codes
- introduction of **laws amending other national laws**, such as laws devoted to the prevention and suppression of money laundering activities or laws regarding mutual cooperation in criminal matters
- introduction of **soft law documents**, i.e. internal judicial instructions covering legislation's gaps

Problem: different implementation strategies
could generate cooperation shortcomings

Most common areas of intervention

Document contents and accepted channels of transmission

- Sometimes, law indicated the **details to be inserted** in the request

- Declarations regarding the necessity to transmit also **a copy of the original order**, together with the freezing or confiscation certificate

- Chosen **communication channels**: e-mail, telefax, electronic mail or other secure technical means, postal service, secure telecommunications system of the European Judicial Network or Eurojust; SIENA

Competent authorities for the issuing, the recognition and the execution of the orders

- Indication of the Ministry of Justice (or other **central authorities**) as a sorter for the subsequent forwarding to the competent internal authorities
- Suggestions or obligation to use the **contact points** of the European Judicial Network (EJN) established for each Member States
- Creation and/or indication of a **specific authority** as the receiver of the orders (e.g. an “Asset Recovery Offices”)

Languages admitted and required translations

- The only language accepted for the translation of the certificate is often **the language of the executing authority** and sometimes also English or other vehicular languages (German, French)
- For a few MS, in **urgent cases** a translation into English is acceptable, subject to the condition of reciprocity
- Translation of the **original order** is usually not required, even if its transmission is required (sometimes translation is required whether the information in the certificate are not considered enough)

Timing

- For procedure regarding freezing order indication of a decision to be taken “without delay”, or “**no later than next working day**”
- Regarding freezing certificate, a decision must be taken within **24 hours** by its receipt
- Sometimes procedure for freezing are formally considered always urgent, or at least a **priority**

Obligations of Translation for the issuing authorities



Problems to face

- a. poor quality of translation, in particular with regard to languages other than English
- c. lack of translators
- d. loss of quality in cases of indirect translations (e.g., from Slovenian-English-Italian)
- e. difficulty in assessing the quality of the translation

Proposed solutions

- translation of the certificate **in English** must always be accepted (at least for urgent cases)
- translation of the most important parts of the **original order** in English (at least for most challenging cases)
- translation in a language known by the **affected person** intending to invoke a remedy (at least after the execution)
- at EU level, a **central list** of authorized translators

Grounds for non-recognition and non-execution of orders

➤ **Duty to consult** issuing authority before deciding not to recognize or execute the order

➤ **Notification** of the refusal without delay

➤ Some MS (badly) **reproduced only some grounds** in the domestic laws

➤ Introduction of **new grounds**. See for example Malta: “the foreign confiscation order is based on a manifest error of law or of fact”

➤ A few MS implemented some refusal grounds based on **lacking or wrong contents** of the request or on **the lack of remedies** for the affected persons

➤ Provisions for **connecting internal rules** with the Regulation’s grounds, or stating that the **violation of the internal rules**, reproducing regulation provisions, causes the refusal

The compliance with offenders' and third parties' rights, especially the possibility of challenging orders before a Judge

- **Notification** of the decision and possibility to appeal for the affected persons
- **Notification** regarding the destination of confiscated assets

- Provisions regarding **grounds for appeal, competent court**, persons entitled to challenge a decision (public prosecutor, owner, third parties, accused persons), timing for the appeal and decision on it, **effects of the appeal** (suspensive effect)

The compliance with victims' rights

- Decision not to return confiscated properties to the victims must be **reasoned**
- **Appeal** against the decision not to return the property to the victims
 - Procedures to return confiscated properties to the victims are considered **urgent**
- Involvement of the **Minister of Justice** in order to agree with the issuing or executing Member State in respect of the transfer, use, division or return to the victim

Interviews phase and consultation sessions

MS involved

- **15 MS** → partners' States and others according to the desk research results
- **63 interviewees** → 51 magistrates and 11 lawyers

Report on confiscation and freezing practical issues

Report Structure

- Introduction
- Answers of judges
- Answers of lawyers
- Conclusive remarks

Second Milestone

Staff involved

Staff of the partners +
a few subcontractors

Operative hurdles

- Difficulty to **reach** practitioners
- **Reluctance** to be interviewed
- Reluctance to sign **privacy policy**
- Lack of knowledge of the Regulation due to **limited application**

Modus operandi

- Two **different questionnaires**, one for judges and prosecutors, one for lawyers
- Interviewees contacted **on our own initiative**, or **suggested** by other interviewees

Consultation sessions

- Validation of Common Standard and Recommendations
 - Practitioners and academics
- Debate on mutual recognition topics

General findings

- Practitioners believe that domestic **hard/soft provisions** are useful even if the source of law in issue is a Regulation: (i) better understanding of the Regulation; (ii) solving practical issues (e.g., notification to the affected persons; distribution of competence at the domestic level; jurisdiction issues)
- **EUROJUST** and **EJN** have been confirmed as important channels of communication
 - **Channels used** → email, fax, eurojust, SIENA (importance of EJN website)
E-Codex Regulation (2022/850/EU)
Regulation digitalisation of Justice (2023/2844/EU)
- No one reported issues regarding **double criminality** clause
 - No one applied the **fundamental rights** non-recognition ground
- **No specific formalities but specific requests:** for example a specific date for the execution or a request of simultaneous execution
- An **appropriate measure** always exists → if the measure is requested in the application of the mutual recognition instrument, it exists

Timing

- some think Regulation's timing are reasonable; others deem it too demanding
- not so many urgent requests
- no good opinion of time limits imposed in the certificate by issuing authorities (considered against mutual trust and cooperation)

Problems experienced by the executing authorities:

- difficult to check the **maximum sentence** of the other State's offenses and the respect of the **double criminality principle**
- some parts of the certificate are often **uncompleted**
- there are problems in the **translation**
- mistakes in the certificate as for the **qualification** of the measure requested (EIO or confiscation instead of freezing)
- employment of a **certificate other than the official one**
- mistakes relating to the properties or their **location**
- **multiple orders** for the same group of assets, or orders with an enormous number of properties, sometimes related to more than one proceedings

BUT

before rejecting they try to talk, sometimes directly,
sometimes with the intermediation of Eurojust

Relationship between judges and public prosecutors

- an application of the **public prosecutor** is generally required at the beginning of the relevant issuing/executing proceedings
- public prosecutors are more often responsible for the execution of incoming orders and in general for the freezing orders
- **judges** hold a crucial role as competent authorities in relation to confiscation orders and they often have to authorize public prosecutors' initiatives

Main obstacles for the cooperation

- too **rigid structure** of the certificate and lack of required information regarding the legislative and procedural framework of the issuing MS
- lack of relevant **information**
- authorities do not report back or report **late**
- communication/**coordination** issues among Member States
- double criminality **check**
- different approach and **practice** among Member States
- **language** issues (poor translation and lack of interpreters)
- lack of **meeting** among magistrates
- lack of **training** activities
- lack of **experience** → not so many cases per year (under 2k in 2 years)
- lack of specialized jurisdictions and offices
- **differences** among different MS (normative differences; holidays differences; different practices and approaches);
- **lack of uniform legal culture**
- **lawyers** often have **not clear** how mutual **recognition works**

- some lawyers want to **celebrate a new process** in contesting the recognition and execution of the order
- **lack of access to documentation** for lawyers
- need for a **time limit** of **freezing orders**
- assessing what it are **proceedings in criminal matters**
- Recognition of an order even if the measure does not exist under national law (**recital 13**)

Suggestions

- raising **awareness** among practitioners
- **training** for magistrates and police bodies
- drafting more specific **guidelines**
- fostering **communication** among MS authorities
- more opportunities and contexts to **exchange** experiences, opinions and practices
- **harmonising** the management of the assets

CSR Four Pillars

**Minimum use of
grounds for refusal**

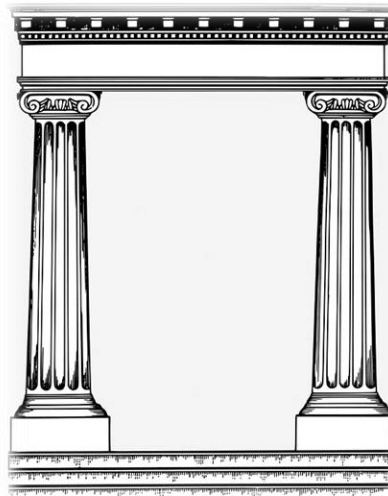


They should only be
invoked as a last resort

Dialogue



It is the best way to prevent mutual distrust
and lack of cooperation, as it allows to
solve problems that could lead to a refusal



**Recognition of as many
orders as possible**



In order to grant cooperation
to its maximum extent

Necessity and proportionality



these principles characterise every
mutual recognition instrument and
want to avoid arbitrary use of FCO

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4. Competent Authorities
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8. Third and Fourth Phase: Recognition and Execution of the Order
9. Grounds for Non-Recognition and Non-Execution
10. Duty to Inform affected person(s) and Legal Remedies
11. Management and Disposal of Frozen and Confiscated Property
12. Restitution of Frozen Property to the Victim



Field of application

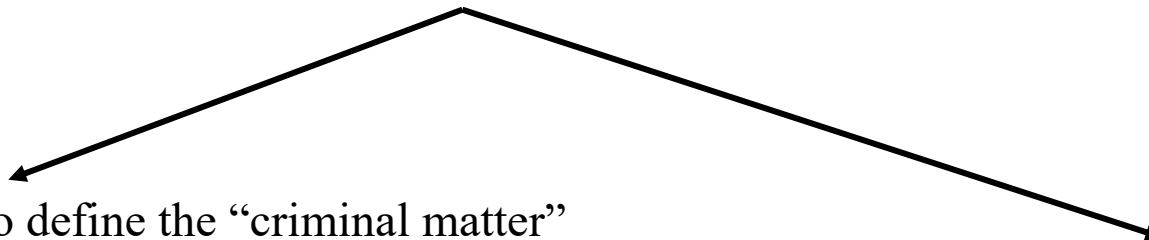
The meaning of «Criminal Matters»

Art. 1, par. 1: “this Regulation lays down the rules under which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State **within the framework of proceedings in criminal matters**”

What are Proceedings in «Criminal Matters»?



Our solution



Adoption of **three criteria** to define the “criminal matter”
(C.J.EU, Grand Chamber, 20 March 2018, Menci, C-524/15):

- (1) the legal classification of the offence under national law
- (2) the intrinsic nature of the offence and
- (3) the degree of severity of the penalty

Art. 3, that lists criminal offences not requiring a verification of the double criminality, could be helpful too

«All types of orders»

Recital 13: “The term [Proceedings in criminal matters] therefore covers **all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence** [...]. It also covers other types of order issued without a final conviction. While such orders might not exist in the legal system of a Member State, the Member State concerned should be able to recognise and execute such an order issued by another Member State. Proceedings in criminal matters could also encompass criminal investigations by the police and other law enforcement authorities”

This means that **every order linked to a crime**, according to the previous criteria, may be issued and should be recognised



Most sensitive issue → Non-conviction based confiscation (“NCBC”)

As stated by various judgments of the C.J.EU and the ECtHR, NCBC must be established and regulated by **law**, serve a **legitimate purpose** and **be proportionate** to the aim pursued, ensuring a reasonable balance between the public interest and the individual’s property rights; moreover, individuals affected should have the **right to challenge** the recovery of their assets before a judge

Art. 15 Directive 2024/1260/EU: problem solver??? Maybe partially

Confiscation from a third party (art. 13), extended confiscation (art. 14), confiscation of unexplained wealth linked to criminal activities (art. 16)