

**Janne Lise de Boer LLM**

**OPENBAAR MINISTERIE**

# **Regulation (EU) 2018/1805**

## **Grounds for non-recognition**

Recover, Grant Agreement No. 101091375



# Content

- General remarks
- Grounds for non-recognition

# Regulation (EU) 2018/1805

## General remarks – some open doors

- Art. 288 TFEU  
A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States (art. 288 TFEU).
- Principle of sincere cooperation – art. 4(3) TEU – **all institutions**
  - Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
  - The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
  - The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

## **Common goal – objectives of the Regulation**

- Maintaining and developing an area of freedom, security and justice
- Ensuring more effective identification, confiscation and re-use of criminal assets
- Improve mutual recognition and cross-border cooperation
- Ensure that criminals who fund terrorism are deprived of their assets

# Mutual trust and mutual recognition

- The principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regards to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (..).  
(Opinion 2/13 of the CJEU, 18 December 2014, p.191)
- Mutual recognition – the executing authority should recognise...
- Exhaustive list grounds for non-recognition

## Restrictive interpretation

- CJEU: “In view of the fact that the principle of mutual recognition (...) means that (...) the Member States are, as a rule, obliged to recognise a decision (...) which has been transmitted (...) without any further formality being required, and to take without delay all the measures necessary for its enforcement, the grounds for refusal to recognise or enforce such a decision must be interpreted restrictively.” (C-396/11, p. 36; C-60/12, p.29; C-579/15, p. 19; C-367/16, p. 48)

## Margin of discretion

- “The executing authority **may** decide not to recognise or execute a freezing/confiscation order only where:...”
- All grounds for non-recognition are ‘optional’
- This means that the executing judicial authority must have a margin of discretion as to whether or not it is appropriate to refuse to execute the request (see by analogy C-579/15, opinion C-268/17, p. 60; C-514/17).
- Member States cannot provide in national law that judicial authorities are required to refuse to execute (...) falling within the scope of those grounds, without having the opportunity to take into account the circumstances specific to each case (C-665/20 PPU)

# Consultation

- In any of the cases referred to in paragraph 1, before deciding not to recognise or execute the freezing order, whether wholly or partially, **the executing authority shall consult the issuing authority** by any appropriate means and where appropriate, shall request the issuing authority to supply any necessary information without delay.
  - Art. 8 (2) and 19 (2)



# Regulation (EU) 2018/1805 – grounds for non-recognition

<b>Ground for non-recognition</b>	<b>EFO, art. 8</b>	<b>ECO, art.19</b>
Ne bis in idem	Sub a	Sub a
Privilege or immunity	Sub b	Sub b
Certificate incomplete or manifestly incorrect	Sub c	Sub c
Territoriality	Sub d	Sub d
<b>Rights of affected persons</b>	-	Sub e
Double criminality	Sub e	Sub f
<b>In absentia</b>	-	Sub h
Fundamental rights	Sub f	Sub h

# Ne bis in idem

- Article 50  
No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.
- Article 54 Convention implementing the Schengen Agreement  
A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the **same acts** provided that, if a penalty has been imposed, **it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.**

## Ne bis in idem (2)

- CJEU (C-436/04) - the relevant criterion for the purposes of the application of article 54 of the Convention is identity of the material acts, understood as the existence of **a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.**
- The recognition procedure itself is not a criminal procedure. In the recognition procedure the substantive grounds of the order, and the validity of initiated prosecution may not be assessed. Article 6 ECHR thus does not apply to the recognition procedure. The transfer of a freezing or confiscation order itself does not result in the imposition of a penalty within the meaning of art. 7 ECHR.
  - See by analogy ECHR Monedero Angora v. Spain (dec.), 41138/05, 7 October 2008

# Certificate incomplete or manifestly incorrect

- The freezing/confiscation order may be refused if the certificate is incomplete or manifestly incorrect and has not been completed following the consultation.
- Definition of freezing and confiscation order
- Reasonable grounds
- Original or certified copy of the freezing/confiscation order
- Translation – only of the certificate

# Territoriality

- The freezing/confiscation order may be refused if it relates to a criminal offence committed, wholly or partially, outside the territory of the issuing State and, wholly or partially, in the territory of the executing State and the conduct in connection with which the freezing order was issued does not constitute a criminal offence under the law of the executing State.
- Not relevant if under the law of the executing state a confiscation order could have been issued in connection to the criminal offence committed.

## Double criminality

- article 3(2) “For criminal offences other than those referred to in paragraph 1, the executing State may make the recognition and execution of a freezing order or confiscation order subject to the condition that the acts giving rise to the freezing order or confiscation order constitute a criminal offence under the law of the executing State, whatever its constituent elements or however it is described under the law of the issuing State.”
- Only requirement is that the act constitutes an offence under the law of the executing State. It is not possible to set conditions concerning the nature or height of the penalty foreseen under the law of the executing state (C-463/15)

## Double criminality (2)

- The recognition of a freezing/confiscation order may be refused in a case falling under Article 3(2), the conduct in connection with which the freezing/confiscation order was issued does not constitute a criminal offence under the law of the executing State (...)
- The law of the issuing State is relevant for determining if one of the listed offences of art. 3(1) applies. The executing State is bound by the assessment made by the authority in the issuing State. Where the authority of the issuing State classifies an offence as coming under one of the categories of offences included in the list, the executing State is, in principle, obliged to recognise and enforce that decision. (CJEU, 6 October 2021, C-136/20, ECLI:EU:C:2021:804, p. 42).

## In absentia

- - The confiscation order may be refused if the person against whom the confiscation order was issued did not appear in person at the trial that resulted in the confiscation order linked to a final conviction, unless (in short)
  - (i) the person was summoned in person
  - (ii) the person has given a mandate to a lawyer (...) to defend that person at the trial and was actually defended by that lawyer at the trial
  - (iii) the person (...) expressly stated that he or she did not contest the confiscation order, or did not request a retrial or appeal within the applicable time limits



# Fundamental rights

- A freezing/confiscation order may be refused where in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the freezing/confiscation order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence.
- The creation of an area of freedom, security and justice within the Union is based on mutual trust and a presumption of compliance by other Member States with Union law and, in particular, with fundamental rights, this makes that only in exceptional situations the recognition can be refused on the basis of this ground.

## Fundamental rights – some case law

- ECLI:NL:RBDHA:2022:5725, court of The Hague, 19 April 2022
  - freezing order – concerns regarding the judicial system in the issuing state – no substantial grounds for assuming a real risk for manifest breach of fundamental rights in this particular case.
- ECLI:NL:RBNNE:2021:5357, Court of Noord-Nederland, 29 September 2021
  - confiscation order – concerns relating to conditions in prison during strike and possibility to appeal the confiscation order - no substantial grounds for assuming a real risk for manifest breach of fundamental rights in this particular case.
- ECLI:NL:RBNNE:2022:4188, Court of Noord-Nederland, 12 October 2022
  - confiscation order – concerns period between the confiscation order becoming final and its transfer – no breach of fundamental right – ‘reasonable time’ referred to in article 6 ECHR does not apply – only statutory limitation period for execution.