

RECOVER

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

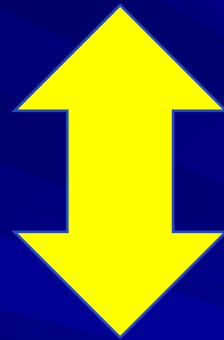
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**The safeguards in the EU Reg. 2018/1805
and in the new Directive 1260/2024**

Reg. 2018/1805

Scope of application



Relevant safeguards

Reg. 2018/1805

Art. 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.**

Recital 13: ‘Proceedings in criminal matters’ is an autonomous concept of Union law interpreted by the Court of Justice of the European Union, **notwithstanding the case law of the European Court of Human Rights.**

- ‘nonobstant’ (FR); ‘nao obstante’ (PT); ‘ungerichtet’ (DE); ‘fermo restando’ (IT); ‘sin perjuicio’ (ES)

ECtHR

«Under the nomen juris of confiscation, the States have introduced ante delictum criminal prevention measures, criminal sanctions (accessory or even principal criminal penalties), security measures in the broad sense, administrative measures adopted within or outside criminal proceedings, and civil measures in rem. Confronted with this enormous range of responses available to the State, **the Court has not yet developed any consistent case-law based on principled reasoning**».

Separate opinion P. Pinto de Albuquerque, *Varvara c. Italia* (2013)

EU

‘Court having jurisdiction in particular in criminal matters’ “is an autonomous concept of Union law and must be interpreted as covering any court or tribunal which applies a procedure that satisfies the **essential characteristics of criminal procedure**” (CJEU, 14 November 2013, C-60/12, M. Baláz, § 42)

EU Commission staff working document, *Analysis of non-conviction based confiscation* (2019): «**a link to a criminal offence** (by means of a final penalty or measure imposed by a court following proceedings) is required».

Reg. 2018/1805

The procedural rights set out in Directives [based on Art. 82 TFEU] should apply [...] to criminal proceedings covered by this Regulation [...].

In any case, the safeguards under the Charter should apply **to all proceedings covered** by this Regulation.

In particular, the **essential safeguards** for criminal proceedings set out in the Charter should apply to **proceedings in criminal matters that are not criminal proceedings** but which are covered by this Regulation.

ABC Directives

Non-regression clause

“Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR or other relevant provisions of international law or the law of any Member State which provides a higher level of protection”

(e.g. Art. 13 Dir. 2016/343)

Directive 2016/343

Presumption of innocence

Art. 6 – Burden of proof

1. Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. This shall be without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law.

2. Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.

Directive 2016/343

Presumption of innocence

Recital no. 22 “The **burden of proof** for establishing the guilt of suspects and accused persons **is on the prosecution, and any doubt should benefit the suspect or accused person.** [...]

Presumptions of fact or law concerning the criminal liability of a suspect or accused person [...] **should be confined within reasonable limits**, taking into account the importance of what is at stake and **maintaining the rights of the defence**, and the means employed should be reasonably proportionate to the legitimate aim pursued. **Such presumptions should be rebuttable and in any event, should be used only where the rights of the defence are respected.**

Safeguards

- Art. 47, 48, 49, 50 Charter
- Including presumption of innocence (Art. 48 Charter – Art. 6 par. 2 Convention recalled by Art. 53 Charter; Directive 2016/343)
- What about non-conviction based confiscations considered to be not “criminal in nature” (according to ECtHR case-law)?

Reg. 2018/1805 – negotiations

German delegation

- “Guaranteeing cross-border asset recovery as comprehensively as possible is consistent with the principle of mutual trust. However, cooperation reaches its limits when, in altogether exceptional cases, fundamental rights are no longer safeguarded ...
- Unfortunately a majority could not be found for anchoring fundamental rights in the text ...
- Although Germany, like the other Member States, sees the need to improve cross-border cooperation in the area of asset recovery, in light of the above Germany is not in a position to agree to the general approach contained in the current text of the Regulation”.

Reg. 2018/1805

- Article 19(h) ground for refusal when

“in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the 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”.

Directive 2024/1260

- Recital no. 51 This Directive should be implemented without prejudice to [ABC] Directives
- Recital no. This Directive should provide for specific safeguards and judicial remedies in order to guarantee the protection of the fundamental rights of such persons in the implementation of this Directive in line with the right to a fair trial, the right to an effective remedy **and the presumption of innocence** as enshrined in Arts. 47-48 of the Charter.
- Guarantees: “only” under Arts. 23-24

Directive 2024/1260

Art. 16 - Confiscation of unexplained wealth linked to criminal conduct

- 1. Member States shall take the necessary measures to enable, where, in accordance with national law, the confiscation measures of Arts. 12-15 not be applied, the confiscation of property identified in the context of an investigation in relation to a criminal offence, provided **that a national court is satisfied that the identified property is derived from criminal conduct** committed within the framework of a criminal organisation and that conduct is liable to give rise, directly or indirectly, to substantial economic benefit.
- Italian version: “purché l'organo giurisdizionale nazionale **sia convinto** che i beni identificati derivino da condotte criminose»

“The confiscation Regulation treats human rights issues with remarkable nonchalance”

F. Meyer, *Recognizing the Unknown – the New Confiscation Regulation*, *European Criminal Law Review*, (10)2020

➤ *... so does the Directive*

ECtHR - Cavallotti v. Italy

Application no. 29614/16

- 1) Did the (acquittal) decisions of the domestic courts reflect the opinion that they were guilty, notwithstanding the absence of a formal finding of guilt? **If so, has there been a violation of the presumption of innocence, guaranteed by Article 6 § 2 of the Convention.**

- 2) Taking into account the characterisation of the contested measure under the domestic law and case-law its nature and purpose, the procedures involved in its making and implementation and its severity, **did the [antimafia] confiscation [...] amount to a criminal “penalty” [...] within the meaning of Article 7 § 1 the Convention ?**