THE CONCEPT OF PROCEEDING IN CRIMINAL MATTER IN THE EU REGULATION N. 1805/2018 AND RELATED SAFEGUARDS

PROJECT RECOVER (GA 101091375)

7 NOVEMBER 2024

Anna Maria Maugeri

RECOVER
CRIME DOESN'T PAY
Co-funded by the European Union

Regulation of the European Parliament and of the Council

“on the mutual recognition of freezing and confiscation order ” 2018

(19 December 2020)

The adoption of this Regulation is a doubly important event

- **first of all, because it confirms the principle of mutual recognition in this sensitive area, following Framework decision n. 783/2006,**
- and also because it establishes mutual recognition by means of **a directly applicable legislative measure, such as a Regulation,**
- adopted in accordance with the ordinary legislative procedure pursuant to Art. 82 (1) TFEU

In the first direction Recital 13

- **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.**

With the Regulation in question, the path of mutual recognition was chosen, regardless of harmonization

- In approving Directive no. 42/2014 aimed at pursuing the harmonization of confiscation orders,
- the Parliament and the Council had, in fact, **invited the Commission to make a further effort of analysis**
- "to present **a legislative proposal on mutual recognition** of freezing and confiscation orders at the earliest possible opportunity" (…),

- "to analyse, at the earliest possible opportunity and taking into account the differences between the legal traditions and the systems of the Member States, the feasibility and possible benefits of **introducing further common rules on the confiscation of property** deriving from activities of a criminal nature**, also in the absence of a conviction** of a specific person or persons for these activities".

In the second direction, instead, as stated in the art. 41

- This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Moreover, Recital 11

- In order to ensure the effective mutual recognition of freezing orders and confiscation orders,
- the rules on the recognition and execution of those orders should be established **by a legally binding and directly applicable act of the Union**

REGULATION, art. 82, c. 1 TFUE

- The choice of a regulation pursuant to art. 288 TFEU is **remarkable in terms of effectiveness**,
- as it is **the only instrument** that, since it does not require transposition by Member States,
- **entails immediate and uniform application**

but this choice is also somewhat problematic,

- since this approach **ends up attributing direct competence to the European legislator in matters of criminal procedure**,
- even if only for the **purpose of vertical cooperation**,
- in **the absence of a more explicit and clear legislative will of the Member States** themselves in this direction:
- this is a choice of great **political value**, given the impact of this regulation on **criminal policy** and
- **the consequences of slowing down mutual recognition in substantive matters**,
- not to mention the concerns regarding the **protection of fundamental rights**

Recital 53: **The legal form of this act should not constitute a precedent**

- for future legal acts of the Union in the field of mutual recognition of judgments and judicial decisions in criminal matters.
- The choice of the legal form for future legal acts of the Union **should be carefully assessed on a case-by-case basis** taking into account, among other factors,
- the **effectiveness** of the legal act and the principles of **proportionality and subsidiarity**.

Scope: all crimes

- The Regulation should cover all crimes,
- otherwise, it is expressly stated in recital no. 14, from Directive 42/2014 which refers only to
- serious transnational crimes, the so-called 'Eurocrimes' (the ten serious crimes indicated in art. 83, c. 1) as based on art. 83 TFEU
- (even if the Directive was also based on art. 82, § 2, as well as on art. 83, § 1, and
- art. 3 extended the definition of crime to the criminal offense provided for "by other instruments legal if the latter specifically provide that this Directive applies to the offenses harmonized there").

Scope: recital 14

This Regulation should cover freezing orders and confiscation orders related to criminal offences covered by Directive 2014/42/EU,

as well as freezing orders and confiscation orders related to other criminal offences.

The criminal offences covered by this Regulation should therefore **not be limited to particularly serious crimes that have a cross-border dimension**,

as Article 82 of the Treaty on the Functioning of the European Union (TFEU) **does not require such a limitation for measures laying down rules and procedures for ensuring the mutual recognition of judgments in criminal matters**.

Art. 3 of the Regulation contains the list of serious crimes punished by a custodial sentence of a maximum of at least three years,

- for which verification of **double criminality** of the acts is not required,
- this Regulation embraced the **choice made for the first time in 2002 by the European legislator with reference to Art. 2, § 2, of Framework Decision 2002/584/JHA on the European arrest warrant** (EAW)
- this list of offences is the same as that provided for by other instruments on mutual recognition (thirty-two categories of offences);
- however, to this list is added **the offence specified in point (y) of Article 3 of the Regulation** (added following the introduction of Framework Decision 2001/413/JHA on the fight against fraud and counterfeiting of non-cash means of payment).

In the case of offences not included in the list,

- recognition may be refused
- **if the predicate offence is not a criminal offence in the executing State** (Article 3, paragraph 2; art. 8 e) and art. 19, f))
- **on the basis of the principle of double criminality**
- (while Framework Decision 2006/783/JHA requires the so-called "double confiscability")

The verification in a non-formalistic way (recital 20)

- **The assessment of double criminality must be carried out in a non-formalistic way**
- The competent authority of the executing State should verify
- whether the factual elements underlying the offence in question

(as they appear in the freezing or confiscation certificate transmitted by the competent authority of the issuing State)

would be punishable in the territory of the executing State,

if they had occurred in the executing State at the time of the decision on recognition (Recital 20).

This would be the case regardless of the label of the offence and, thus, of the

Perfect correspondence between the constituent elements of the domestic offence

- and those according to the law of the issuing authority.

Mutual recognition of seizure

- Regulation, while admitting - as provided for in Directive 42/2014, art. 8 (4) and in Directive 2024/1260 art. 11 (4)- that the **seizure order (freezing) can be ordered by a non-judicial authority,**
- and in particular "**by an authority, designated by the issuing State, which is competent in criminal matters to issue or execute the freezing order in accordance with national law, and which is not a judge, court or public prosecutor**"
- In the new Directive art. 11 (3) "Member States shall enable **asset recovery offices** to take **immediate action** pursuant to paragraph 2 where there is an imminent risk of the disappearance of the property ..The validity of such immediate action shall not exceed seven working days.
- in any case it claims that "In such cases, **the freezing order should be validated by a judge, court or public prosecutor**, before it is transmitted to the executing authority" (recital no. 22 of the Regulation).
- The Regulation allows that the **freezing order is issued or validated by a public prosecutor**;

autonomous concepts of *judicial authority*

- It is interesting to highlight that in some recent cases the European Court of Justice (ECJ) has elaborated an autonomous concepts of *judicial authority*
- “in an effort to uphold and set clear parameters to the judicialisation of the EAW process” (Framework Decision 2002/584),
- also considering that “the development of autonomous concepts of EU law can thus be seen **as a response to concerns that leaving the interpretation of key EU law terms to Member States would undermine the effectiveness of EU law**”

In particular the ECJ faced the question of whether a national public prosecutor's office can fall within the autonomous concept of a judicial authority for the purposes of mutual recognition

- and in particular for issuing an EAW.
- The Court admitted that the national public prosecutor office can fall within the "autonomous concept of a judicial authority" for the purposes of issuing an EAW
- if two parameters are respected cumulatively:
- the **independence** of the public prosecutor and
- the **availability of an effective remedy against the decision** to issue an EAW, including the proportionality of such a decision.

In the opinion of doctrine these parameters should be applied also **to the other mutual recognition instruments**

- because must be rejected the idea,
- justified by the EAW "**exceptionalism**" (due to the deprivation of liberty),
- **that "the definition of judicial authority for the purposes of issuing a mutual recognition decision may differ from that offered by the ECJ in relation to other mutual recognition instruments**,
- depending on **their context and impact**" (V.Mtsilegas)

Contra **ECJ (Grand Chamber), 8.12.2020, C-584/19, A and Others**, § 75, for EIO

- Article 1(1) and Article 2(c) of Directive 2014/41 must be interpreted as meaning that the concepts of 'judicial authority' and 'issuing authority', within the meaning of those provisions,
- **1) include the public prosecutor of a Member State** or, more generally, the public prosecutor's office of a Member State, **regardless of any relationship of legal subordination** that might exist between that public prosecutor or public prosecutor's
- 2) whereas Framework Decision 2002/584, in particular Article 6(1) thereof, **uses the concept of 'issuing judicial authority' without specifying the authorities covered by that concept,**

Article 2(c)(i) of Directive 2014/41 expressly provides that the public prosecutor is included among the authorities which, like a judge, court or investigating judge, are understood to be an 'issuing authority'".

- **3)** the Directive 2014/41, deals with **provisional measures only with a view to gathering evidence and also for the benefit of the person concerned**.

distinct objective from the European arrest warrant governed by Framework Decision 2002/584

- 4) the European investigation order governed by Directive 2014/41 pursues, in the context of criminal proceedings, a **distinct objective from the European arrest warrant governed by Framework Decision 2002/584**
- While the European arrest warrant **seeks**, in accordance with Article 1(1) of Framework Decision 2002/584, **the arrest and surrender of a requested person**, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order,
- **the aim of a European investigation order,** under Article 1(1) of Directive 2014/41, **is to have one or several specific investigative measures carried out to obtain evidence".**

- In a recent case Advocate Ćapeta has specified that
- "an EIO **must be issued by a court if so required by the law of the issuing Member State** concerning the same measure in a domestic context.

In such a case, a court is the *competent* issuing authority despite the public prosecutor being mentioned in Article 2(c)(i) of that Directive.

In short, **a public prosecutor may be an issuing authority in principle,** but **the national law applicable in a similar domestic case determines the issuing authority competent in a concrete case**"

- Advocate Ćapeta, C-670/22, Staatsanwaltschaft Berlin V M.N.

These arguments of the ECJ can be extended to the Regulation 1805/2018

- which expressly provides that the **public prosecutor is included among the authorities which, like a judge, or a court, are understood to be an 'issuing authority'** (art. 2, 8 (a) (i)) or
- which are **empowered to validate a freezing order** before it is forwarded to the executing authority, where that order has **been issued by "another competent authority" (Art. 2, 8 (a) (ii)).**
- **The objective is different from the European arrest warrant** (assuring the implementation of the confiscation);

the freezing order **does not involve the right to liberty**, but the right to property and economic freedom of the person concerned, and it is **a temporary measure**.

- Not only, but **the Regulation incorporates the conditions for issuing and transmitting a freezing order provided for in Art. 6 of EIO Directive 2014/41/EU,** so that the same conditions apply both to freezing for evidence and to freezing for confiscation.

The ECJ (Grand Chamber, C-584/19, A and Others (8.12.2020), in any case, stressed that

the Directive lays down specific provisions intended to ensure that the issuing or validation of an EIO by a public prosecutor is accompanied by **guarantees specific to the adoption of judicial decisions,**

- **specifically the principle of proportionality and the fundamental rights of the person concerned,** in particular those enshrined **in the Charter,**
- and that the order must be capable of **being the subject of effective legal remedies,** at least equivalent to those available in a similar domestic case.

- « although the European investigation order is indeed an instrument based on the principles of **mutual trust and mutual recognition**, the execution of which constitutes **the rule and refusal to execute is intended to be an exception which must be interpreted strictly** , the provisions of Directive 2014/41 however allow the executing authority and, more broadly, the executing State to ensure that **the principle of proportionality and the procedural and fundamental rights of the person concerned** are respected. First of all,
- it follows from Article 2(d) of Directive 2014/41 that **the procedure for executing a European investigation order may require a court authorisation in the executing State where that is provided for by its national law»**

(See, by analogy, judgment of 27 May 2019, OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau), C-508/18 and C-82/19 PPU, EU:C:2019:456, §45 and the case-law cited)

The same for the Regulation

- The respect of the fundamental rights in relation to freezing orders is emphasised by
- art. 1, § 3 of the Regulation which requires that
- "issuing authorities **shall ensure that the principles of necessity and proportionality are respected**",
- "when issuing freezing orders or confiscation orders";
- In this direction, **one of the ground for refusal also for the freezing order is that**
- "in exceptional situations, there are **substantial grounds to believe**, on the basis of specific and objective evidence, that the execution of the freezing 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**" (art. 8, 1 f).

art. 2, n. 8, b) demands for confiscation: authority which is **competent in criminal matters**

- Also in respect of a confiscation
- ‘issuing authority’ means: an authority which is designated as such by the issuing State and
- which **is competent in criminal matters** to execute a confiscation order
- but it is specified that the provision must be
- “a confiscation order **issued by a court in accordance with national law**”.

European Court of Justice (Grand Chamber)) 14 November 2013, case Baláž, C-60/12

- “the term ‘court having jurisdiction in particular in criminal matters’,
- within the meaning of Article 1(a)(iii) of the Framework Decision [2005/214/JHA – Application of the principle of mutual recognition to financial penalties –],
- must be interpreted as an **autonomous concept of Union law** and, if so, what **the relevant criteria are in that regard.**
- It also asks whether the Unabhängiger Verwaltungssenat comes within the scope of that term.
- In this connection, it must be stated that, ….as the Advocate General has observed in point 45 of her Opinion, the meaning of ‘**court having jurisdiction in particular in criminal matters’ cannot be left to the discretion of each Member State” (§ 25).**
- “in order to ensure that the Framework Decision is effective, it is appropriate to rely on an interpretation of the words ‘having jurisdiction in particular in criminal matters’ in which the **classification of offences by the Member States is not conclusive**” (§ 35).

- The national judge «is formally established as an **independent administrative authority**, under Paragraph 51(1) of the VStG, it none the less has, inter alia,
- jurisdiction as an **appeal body in relation to administrative offences**, including, in particular, road traffic offences.
- In an appeal of that kind, which has suspensory effect, the Unabhängiger Verwaltungssenat has **unlimited jurisdiction** and applies
- a criminal procedure which is subject to **compliance with the procedural safeguards appropriate to criminal matters**” (§ 39).

- « To that end, the court having jurisdiction within the meaning of Article 1(a)(iii) of the Framework Decision **must apply a procedure which satisfies the essential characteristics of criminal procedure**,
- without, however, **it being necessary for that court to have jurisdiction in criminal matters alone**» (§36).
- “even though the Unabhängiger Verwaltungssenat is formally established as **an independent administrative authority**, under Paragraph 51(1) of the VStG, ….
- , the Unabhängiger Verwaltungssenat **has unlimited jurisdiction and applies a criminal procedure which is subject to compliance with the procedural safeguards appropriate to criminal matters (§ 39)**.

follows

- In this respect, it should be pointed out that included, in particular, among the applicable procedural safeguards are **the principle *nulla poena sine lege***, laid down in Paragraph 1 of the VStG,
- the **principle that culpability** should arise only where there is capacity or criminal responsibility, laid down in Paragraphs 3 and 4 of the VStG, and
- **the principle that the penalty must be in proportion to the degree of responsibility and to the facts**, laid down in Paragraph 19 of the VStG (§ 40).

CGUE, JP EOOD c. Otdel «Mitnichesko razsledvane i razuznavane» /MRR/ v TD «Mitnitsa Burgas», C-752/21

- Lastly, the CJEU excluded from the notion of judicial authority - ‘as required by Article 2(4) of Directive 2014/42’ - the following

- the **Bulgarian customs authorities** competent to issue a form of confiscation, **but not as a result of or in connection with a criminal offence** and specified that confiscation *under* Article 4 of Directive 42/2014 presupposes a ***criminal offence***.

- ‘Now, it is sufficient to note that, in the main proceedings, the decision imposing an administrative penalty was issued **following proceedings of an administrative nature**,

- **proceedings which did not concern one or more offences** or, even less, an offence punishable by deprivation of liberty for a period of more than one year, as required by Article 2 of Framework Decision 2005/212.

- On the other hand, it also appears from the file available to the Court that that decision was adopted **by the Bulgarian customs authorities and not by a judicial authority**, as required by Article 2(4) of Directive 2014/42.

- Consequently, Framework Decision 2005/212 is not materially applicable in a situation where **the act committed does not constitute an offence'.**

It will be very interesting, then, the decision of the Court of Justice

- with respect to a symbolic case of confiscation following a punitive administrative offence, which should fall within the broad notion of criminal matters adopted by the European Court of Human Rights,
- but which should not fall within the notion of offence presupposed by Directive 42/2014 and Regulation 1805/2018, as well as by the new proposed directive

- Must the provisions of Article 2(1) of Framework Decision 2005/[212/JHA], in conjunction with Article 17(1) of the Charter, and having regard to the judgment of the Court of Justice of the European Union of 14 [January] 2021 in Case C-393/19, be interpreted on the basis of an *a fortiori argumentum*, as applying also in cases where the act does not constitute a criminal offence but an administrative offence, where the difference between the two consists only in the ‘large-scale’ criterion applied in the case-law according to the presumed value of the object of the smuggling.

- Must the fourth indent of Article 1 of Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property and Article 2(4) of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union are to be interpreted as meaning that the concept of ‘confiscation’' specifically means a penalty or measure which must be imposed by a court and cannot be ordered by an administrative authority, and that, from that perspective, national legislation such as Article 233(6), read in conjunction with Article 231, of the *Zakon za mitnitsite* is unlawful.

Art. 2

- **Definitions**
- For the purpose of this Regulation, the following definitions apply:
- ‘confiscation’ means **a final deprivation** of property ordered by a court **in relation to a criminal offence**;
  - (‘confiscation order’ means a final penalty or measure imposed by a court following proceedings in relation to a criminal offence, resulting in the final deprivation of property from a natural or legal person; original version 2016)

All types of confiscation orders within the framework of criminal proceedings are included (recital 13)

- in order to achieve mutual recognition of all types of orders covered, before by Directive 2014/42/EU, today by Directive 2024/1260
- **direct confiscation pursuant to** art. 12 Directive 2014/1260 (art. 4)
- **confiscation of the value** art. 12 (art. 4),
- **extended confiscation** art. 14 (art. 5),
- **confiscation of assets from a third party art. 13** (art. 6)
- **non conviction based confiscation art. 15** (art. 4, § 2 absconding and illness)
- **confiscation of unexplained wealth linked to criminal conduct art. 16**
- as well as other types of **orders issued without final conviction (recital 13)**

not only orders covered by Directive 2014/42/EU (recital 13)

- The term therefore covers **all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence,** not only orders covered by Directive 2014/42/EU.
- It also covers **other types of order issued without a final conviction.**

Non-conviction based confiscation

- In the following cases:
- death of a person,
- immunity,
- statute of limitation,
- cases where the perpetrator of an offence cannot be identified,
- or other cases where a criminal court may confiscate an asset without a conviction if **the court has decided that such asset is the proceeds of crime**
- **(Explanatory memorandum of the proposal for a Regulation)**

Actio in rem pure

- Provided that the confiscation is (art. 2) a "a final deprivation of property ordered by a court in relation to a criminal offence"
- the Regulation doesn't require – as opposed to the Directive 2014/42 – that a criminal trial has begun but the sentence cannot be pronounced,
- rather, as in the case of the *actio in rem*, it **requires an autonomous proceeding against assets related to a crime**
- **Also the new confiscation of unexplained wealth linked to criminal conduct art. 16**

Article 8: An exhaustive list of g***rounds for non-recognition and non-execution of confiscation orders***

- the **exhaustive list of *grounds for non-recognition and non-execution of confiscation orders* differs significantly** from the list contained in the 2006 Framework Decision,

- **As the grounds for refusal linked to the type of the confiscation order** (e.g. extended confiscation)

have not been included

- **thus considerably broadening and strengthening the mutual recognition framework**.

ART. 1 Subject matter

- 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**
- (as opposed to “within the framework of criminal proceedings”)

within the framework of criminal proceedings

IN THE ORIGINAL VERSION 2016

- In order to be included in the scope of the Regulation,
- these types of confiscation orders had to be issued within the framework of criminal proceedings,
- And, thus, **all safeguards applicable to such proceedings in the issuing State would have been fulfilled**

The use of the term "**proceedings in criminal matters**"

- was in fact the result of pressures from the Italian delegation – supported by some other delegations –
- which claimed that the proposed use of the words "criminal proceedings" **raised an issue in relation to the Italian system of so-called "preventive confiscation"**,
- which would be **excluded** from the current scope of the Regulation (at least partly).

This position is explained in Council of the European Union Interinstitutional File: 2016/0412 (COD)2016/0412 (COD), doc. n. 12685/17 of 2.10.2017.

- In the proposal presented by the Commission, the scope of the instrument is defined as to apply to freezing orders and confiscation orders issued within the framework of "criminal proceedings". Additionally, civil and administrative confiscation regimes are explicitly excluded from the scope of the proposed Regulation.
- **It is worth noting that there are different systems of confiscation in place in the Member States, including various forms of non-conviction based confiscation**.
- **The regimes of purely civil and administrative confiscation cannot be covered on the basis of Article 82(1) TFEU**.

(follows) Italian delegation: the words "criminal proceedings" posed a problem

- However, the discussions in the Working Party have shown that some Member States, notably Italy, seem to have
- confiscation systems that,
- while being clearly linked to criminal activities,
- are not conducted in the course of criminal proceedings.
- As from the outset of the discussions, the Italian delegation, supported by some other delegations, observed that
- the **proposed wording of the scope of the Regulation as defined in Art. 1(1), with the words "criminal proceedings", posed a problem,**
- **since its system of so-called "preventive confiscation" would be excluded**

(follows) Italy explained

- Italy explained that under this system,
- confiscation orders are issued by a criminal court
- in proceedings that are not aimed at convicting the person for committing a specific offence,
- but are based on ascertained facts which demonstrate that assets are derived from criminal activities, while also taking into account previous criminal behaviours of the person.
- The system is a "preventive" system in the sense that confiscation orders issued under this system aim at preventing the re-use of property which is proved to have derived from criminal activities committed in the past.

(follows) According to Italy,

- its system of confiscation would not fall, at least not entirely,
- within the notion of "criminal proceedings" as currently used in the proposed Regulation.
- However, **Italy suggested using the concept of Article 82(1) TFEU, which refers to "proceedings in criminal matters".**
- This would allow its **system of preventive confiscation to be included**,
- while explicitly excluding freezing and confiscation orders issued within the framework of proceedings in civil and administrative matters

(follows) Italy confirmed that fundamental rights

- **Procedural safeguards similar to those in criminal proceedings, in particular those provided for in the six Directives on procedural rights,**
- **are adequately respected**, and
- confiscation orders issued under the Italian system of preventive confiscation have **a clear link with criminal activities** and, thus,
- **in principle, fall within the framework of proceedings in criminal matters**

Extension of the scope: Italian delegation

- Quoting the notion of "criminal matter" adopted in Directive 2011/99 of 13.12.2011 on the European Protection Order for Victims
- (to allow the recognition of orders for the protection of crime victims taken by a judicial authority that is not only criminal, but also civil or administrative)

During the meetings of the Working Party on Judicial Cooperation in Criminal Matters (COPEN), on 28 September 2017

- a number of Member States indicated that they would be willing to support - or at least accept - the amendment requested by Italy.
- Some Member States stressed that the mutual recognition of (freezing orders and) confiscation orders in the European Union would be greatly enhanced if this system could benefit from the application of the Regulation.
- It was underlined that **the Italian system is considered to be one of the most effective confiscation systems in the European Union**.
- Member States would not be obliged to have such a system themselves, but **they should merely be able to recognize and execute confiscation orders issued by Member States under such a system**.
- Such orders are already recognised in several Member States

Some other Member States expressed doubts

- about the advisability of accepting this modification.
- They noted that the Italian system of preventive confiscation seemed to be of a hybrid nature (criminal/administrative)
- and questioned whether it could fall under the legal basis of Art. 82(1) TFEU.

In order to compensate for concerns about compliance with the fundamental guarantees of criminal matters in the proceedings for the adoption of non-conviction based confiscation

- Germany has demanded the **introduction of an important ground for refusal centered on the violation of individual guarantees** and
- stipulated in Art. 8(1)(f) for the freezing order: "**in exceptional situations, there are substantial grounds to believe,** on the basis of specific and objective evidence, that the execution of the freezing 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 to defence".**
- The same ground is provided **for the confiscation** order in Art. 19(1)(h).
- In any case, **the affected person may challenge the application of mutual recognition by demonstrating that the fundamental guarantees of criminal matters have been violated in the concrete case** (a specific violation of fundamental rights) and, thus, by invoking the ground for refusal provided for by Art. 8(1)(f) and 19(1)(h).

art. 1: “within the framework of proceedings in criminal matters”

- 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**
- (as opposed to “within the framework of criminal proceedings”)

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 (recital 13).
- This **reference to the Court of Justice seems appropriate, since** the adoption of a regulation in a more direct and immediate manner would call upon **the Court of Justice pursuant to Art. 267 TFEU as**

- **an interpreter in its original capacity**, which is intended to resolve the Member States' interpretative doubts of application

"PROCEEDINGS IN RELATION TO A CRIMINAL OFFENCE"

- Recital 13. "The term therefore covers
- all types of freezing orders and confiscation orders issued following
- **proceedings in relation to a criminal offence"**
- Art. 2 in the definition of confiscation: "a final deprivation of property ordered by a court **in relation to a criminal offence**" (in the original proposal "proceeding for a crime")
- .

Proceeding with a “link to a crime”

- In the light of recital 13 and art. 2, in order to establish
- if the proceeding is “in criminal matters”,
- it is ***important and enough to verify this relation to a criminal offence***,
- namely that **there is a link between the assets to be confiscated and a crime**;
- therefore,
- it is sufficient that the proceedings before a judicial authority

concern the proceeds and/or instruments of the crime

No civil or administrative proceedings (art. 1, n. 4 and recital 13)

- Art. 1, n. 4. This Regulation does not apply to freezing orders and confiscation orders issued within the framework of proceedings in civil or administrative matters.
- recital 13 Freezing orders and confiscation orders that are issued within the framework of
- **proceedings in civil or administrative matters should be excluded** from the scope of this Regulation.
- These are (should be) **proceedings that don't concern the proceeds or the instruments of crime**.

Explanatory Report to the 1990 Strasbourg Convention

- This notion of proceedings in criminal matters, as connected with a crime, accepted in the Regulation recalls the notion of procedure also “in rem” as adopted in the Explanatory Report to the 1990 Strasbourg “Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime”.
- The explanatory report specifies, in fact, that each type of procedure can be the basis for the application of a confiscation order, as long as it is conducted by a judicial authority and ***has criminal nature because it concerns the instrumentalities and the proceeds of crime***.
- The 1990 Strasbourg Convention has been the fundamental instrument of cooperation which allowed the application abroad of NCBC, first of all of the Italian preventive confiscation (e.g. in the Crisafulli case

UE, Cons. JAI, 12/13 october 2017

- This extended interpretation of “proceedings in criminal matters” adopted in the Regulation has been confirmed **in the context of a debate on the matter by the EU ministries of Justice** (UE, Cons. JAI, 12/13 October 2017).
- It was argued that **certain preventive confiscation systems would also be included in the scope of the Regulation,**
- provided that the decision to confiscate “be **clearly related to criminal activities and that appropriate procedural guarantees apply**