

# Note on the Regulation (EU) 2018/1805 of **Eurojust**

- In its “Note on the Regulation (EU) 2018/1805 **Eurojust** highlights that
- “It is worth noting that the term ‘proceedings in criminal matters’ differs from [the] term ‘criminal proceedings’ used in FWD 2003 on freezing orders and **might cover [a] broader area of application**”.

European Commission, Commission Staff Working Document: Analysis of non-conviction-based confiscation measures in the European Union, Brussels, 15.4.2019 (OR. en) 8627/19 JAI 413 COPEN 172 DROIPEN 62, SWD (2019)1050 final, 11.04.2019, 5

- Furthermore, the European Commission has recently underlined that, for the purposes of the Regulation,
- the provision can be considered to have been adopted in the context of a “procedure in criminal matters”, provided that **there is a connection with a crime**
- 5: “It applies to all freezing and confiscation orders issued within the framework of proceedings in criminal matters. For confiscation orders, a link to a criminal offence (by means of a final penalty or measure imposed by a court following proceedings) is required. Thus, the Regulation covers classic conviction-based confiscation as well as extended confiscation and non-conviction based confiscation if these are issued within the framework of proceedings in criminal matters”.

The establishment of the link with the crime is emphasized in some recent judgments of the ECtHR, as in the ECHR *Todorov and others v. Bulgaria*, n. 50705/11, 2021

- When examining the forms of extended confiscation, also in the light of art. 5 of Directive 42/2014 and of recital 21,
- the ECtHR recognizes the correctness of the procedure for ascertaining the illicit origin of property (for all *Balsamo v. San Marino*),
- **«to ascertain a link between proceeds and criminal activity - understood in a broad sense and demonstrable even with presumptions -**,
- **in the absence of which the confiscation represents a disproportionate sacrifice of the right of ownership pursuant to art. 1 I Pr. ECHR».**
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# *notwithstanding* the case law of the European Court of Human Rights

- The English version does not use the inclusive expression '**without prejudice**' but rather the adversative '*notwithstanding...*';
- the respect of the case law of the European Court of Human Rights - required by the expression 'without prejudice' - should lead to the **exclusion** from the scope of the Directive of **preventive confiscation and other models of non-conviction based confiscation**,
- which the Court **does not include in its broad and autonomous notion of 'criminal matters'** and removes from the application of the related safeguards (attributing to them a preventive or restorative nature).

# While '*notwithstanding*'

- seems to express the European legislator's **awareness** of the impossibility of adopting the notion of 'criminal matters' of the European Court of Human Rights with its so-called Engel criteria,
- if one **does not want to restrict the scope of the Regulation** and
- **the mutual recognition.**



Proceedings in criminal matters may also include **criminal investigations by the police and other law enforcement authorities** (recital 13).

■ It should be unacceptable, under the rule of law, for the Regulation to refer to forms of freezing and confiscation that are not adopted in the course of a judicial proceeding, but during the investigation phase,

■ and which already constitute seizure, and even more the confiscation,

**form of limitation of a citizen's right**, such as the **right of property** guaranteed by Art. 1 of ECHR Protocol 1 and Art. 17 of the Charter of Fundamental Rights of the European Union

■ Also the definition of **confiscation** of the Art. 2, n. 2 of Regulation refers to a **measure taken by a judicial authority**

■ also the **freezing** pursuant to Art. 2, n. 8, at least, **must be validated by a a court or a public prosecutor** in the issuing

## with the safeguards of criminal matter in the Member State

- the Regulation demands that the confiscation is applied not only in a proceeding in criminal matter, but with
- the safeguards of criminal matter in the Member State

# Safeguards (follows) Art. 1 Regulation

- 2. This Regulation shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles enshrined in Article 6 TEU.



As specified in recital no. 17, the Regulation also respects the fundamental rights provided for

- in the ECHR and
- in the European Charter of Fundamental Rights.
- This means that **Art. 49 (Principles of legality and proportionality of criminal offences and penalties) and**
- **50 (Right not to be tried or punished twice in criminal proceedings for the same criminal offence) of the European Charter of Fundamental Rights, and**
- **Art. 7 ECHR (No punishment without law), as interpreted by the ECtHR, shall be respected**
- In relation to Art. 50 of the Charter, it is important to stress that **the grounds for refusal in Art. 8 of the Regulation, include where “executing the freezing order would be contrary to the principle of ne bis in idem”**. The respect of this principle, in particular, is a reason for non-recognition already provided for, with a similar formulation, by articles 7 and 8 of FD 2003/577 and 2006/783.

# And (recital 18)

- The procedural rights set out in Directives 2010/64/EU [\(6\)](#),
- 2012/13/EU [\(7\)](#),
- 2013/48/EU [\(8\)](#),
- (EU) 2016/343 [\(9\)](#),
- (EU) 2016/800 [\(10\)](#) and
- (EU) 2016/1919 [\(11\)](#) of the European Parliament and of the Council should apply, within the scope of those Directives, to criminal proceedings covered by this Regulation as regards the Member States bound by those Directives.

Not only, but above all the safeguards of the criminal matter (recital 18)

- “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”.**

# Among the Ground for refusal ex art. 8 Reg. the respect for the safeguards

- executing the freezing order would be contrary to the principle of *ne bis in idem*;
- 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**.

# proceeding in criminal matter

- some **perplexities** remain about the concept of proceedings in criminal matters and, in particular,
- the possibility of including within the scope of the Regulation
- **any national procedure** aimed at applying forms of confiscation of proceeds and instruments of the crime,
- **regardless of the domestic qualification** and
- the **relevant legislation** used in the Member States

# hybrid proceedings

The problem is that in this area of law **there are different types of proceedings that can be called hybrid:**

they take place **before the criminal court**, but **without the guarantees of the criminal matter**, or

they take place before a **non-criminal court**, but concern **the proceeds or instruments of crime** (such as the proceedings to enforce the Italian preventive confiscation or the Spanish *decomiso sin sentencia*, Art. 127 ter CP, Ley organica 1/2015)

Notably, within the category of hybrid measures that characterize the adoption of extended or non-conviction-based forms of confiscation, there are

**procedures defined by the national legislature as civil or administrative** or intended for the adoption of forms of confiscation that fall under civil or administrative matters,

but that fall **squarely within the definition of proceedings relating to a crime**, as they relate to the proceeds or instruments of crime,

such as proceedings to apply forms of **civil recovery or civil forfeiture** (although Ireland does not comply with the Regulation, Irish civil forfeiture).



model adopted by the Regulation:  
German confiscation without conviction  
(Explanatory Report to the original proposal)

- in the sector of the fight against organised crime and terrorism adopted in the law of reform of confiscation 13.4.2017, BGBl.I S. 872 (implementation of the Directive 42/2014) in the German system of law § 76, § 4
- “if, based on all circumstances of the case, the court is convinced that an object is the proceeds of a crime, even if the person affected by the confiscation cannot be prosecuted or convicted for this crime”  
(Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung).

- German criminal order provided also before some forms of forfeiture applied independently of the determination of guilt (§ 76a I StGB, §§ 440 - 441 StPO; § 74, Abs. 2 n. 2, Abs. 3 - 74d StGB)
- With the recent reform the possibility to apply confiscation without conviction is extended

In comparative law it is necessary to distinguish **three hypotheses** (models) of separation between the procedure aimed at applying the confiscation and the criminal trial.

■ *Firstly, the hypothesis in which the "ancillary" patrimonial proceeding*

- is part of a more complex criminal proceeding, from which it is separated for practical reasons, in order to guarantee in a more efficient way the determination of an aspect – the criminal origin of the assets – which is sufficiently independent from the object of the main proceedings, as is the case for the confiscation pursuant to articles 70 ff. Swiss StGB or for the British confiscation, or for the US criminal forfeiture
- Something similar occurs in the Italian legal system, which allows the application of the extended confiscation pursuant to Art. 240 bis (included in the model of extended confiscation of Art. 14 Directive 2024/1260) in the enforcement procedure (Article 676 Code of Criminal Procedure) pursuant to Art. 183-quater Leg. Decree 271/1989, § 1 (introduced by Legislative Decree no. 21/2018).

*Secondly, the hypothesis in which it is possible to proceed "autonomously" for the purpose of applying the confiscation even*

- if it is not possible to proceed *in personam*, or because the criminal proceedings have been terminated prematurely for some reason (statute barred, amnesty), as stated by § 76a StGB (Selbständige Anordnung) which allows for the confiscation of proceeds when the prosecution or conviction of a particular person is not possible
- or Art. 578 bis Italian Code of Criminal Procedure for the extended confiscation when the crime is statute barred or amnestied, or § 20b Austrian StGB for the *Erweiterter Verfall* (extended public acquisition/confiscation) if the person concerned cannot be prosecuted or convicted of some specific listed crimes, or Articles 109 (2) and 110 (5) Portuguese Criminal Code which allows for confiscation without a conviction in cases where the perpetrator has died, is absconding or fleeing, the prosecution is time barred, and there is immunity or an amnesty or other cases of exemption from liability or extinction of criminal liability
- Art. 15 Directive 2024/1260

# Finally, there is the hypothesis in which the patrimonial measure is applied in a non-*stricto sensu* criminal proceeding

- – substantially through an *actio in rem* – but, in general, of a *punitive* or *civil/administrative* nature.
- Such is the case for the **Italian preventive confiscation** under Art. 24 of Legislative Decree 159/2011 or, in any case,
- for the forms of confiscation without conviction recently introduced in **Bulgaria, Spain (2015), Slovakia (2011) and Slovenia (2012), Romania (2007)**, for the civil forfeiture (North America, Australia, Ireland, UK).
- This is **the most problematic case** because sometimes this type of proceeding is considered by the national legislature to be **civil or administrative**;
- however, even in this case, the proceeding is related to a crime and concerns the proceeds or instruments of crime, therefore it falls **under the autonomous concept of ‘proceedings in criminal matters’** of Art. 1 of the Regulation and Recital 13.
- The question is whether the guarantees of criminal matters are recognized in these proceedings.



# Procedural safeguards: art. 8 of the directive n. 42/2014

- In this direction it will be very important to implement the application of the art. 8 of the directive in relation to the safeguards of the proceeding, ensuring to the persons affected by the measures the right to an
  - **effective remedy** and
  - **a fair trial** in order to uphold their rights;
  - **adversarial judicial proceeding**



In recital no. 15 it is pointed out that cooperation between Member States,

- based on the principle of mutual recognition and immediate execution of judicial decisions, demands mutual trust that decisions will be recognized and executed
- in compliance with the principles of
- **legality,**
- **subsidiarity** and
- **proportionality** (the same is foreseen in recital 9 of Framework Decision 783/2006), and that
- **the rights of third parties in good faith will be guaranteed.**

It also provides for the protection of third parties in good faith by establishing, first of all,

- the obligation to inform the parties involved in the execution of a seizure order, and
- to specify the reasons behind the measure, as indeed provided for in art. 8 of the Directive n. 42/2014, and the available remedies (Article 21), and
- the obligation of Member States to **provide legal remedies in the executing State** (Article 33) is also imposed for all interested parties,
- including third parties in good faith (as well as the obligation of the requesting State for the seizure to inform the requested State of the existence of third party interests in good faith, Article 14).

ECJ 14.1.2021, C-393/19 (*Okrazhna prokuratura – Haskovo e Apelativna prokuratura*).

The Court of Justice affirmed the principle that Article 2(1) of Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property,

- read in the light of Article 17(1) of the Charter of Fundamental Rights of the European Union,
- must be interpreted as **precluding a national law which permits the confiscation of an instrumentality used to commit an aggravated smuggling offence where that property belongs to a third party acting in good faith.**
- **2. Article 4 of Framework Decision 2005/212/JHA, read in the light of Article 47 of the Charter of Fundamental Rights, must be interpreted as precluding a national law which permits the confiscation, in the context of criminal proceedings, of property belonging to a person other than the person who committed the criminal offence, without the former being afforded an effective remedy.**

# Ne bis in idem

- This is a reason for non-recognition already provided for, with a similar formulation,
- by articles 7 and 8 of framework decisions 2003/577 and 2006/783,
- The identical formulation contained in the articles 8 and 19 of the Regulation appear happier and more suitable to include additional cases with respect to those set forth in the aforementioned articles 6

# Issue:

- The hybrid confiscation proceedings of the MS
- have to respect the safeguards of the criminal matter
- In order to apply the Regulation, it is important to verify if the confiscation is adopted in a
- proceeding in criminal matter with the connected safeguards

# complete jurisdictionalization

- The Regulation could moreover represent
- **a challenge to provide for a complete jurisdictionalization** within the criminal law
- of proceedings seeking to enforce forms of non-conviction based confiscation,
- in order to guarantee mutual recognition



# follows

- an incentive to adopt a model of trial against property compliant with criminal law guarantees,
- starting from the standard of criminal proof of the illicit origin of the goods,
- if we want to guarantee the mutual recognition of the forms of extended confiscation envisaged in the European legal systems,
- for example the extended confiscation pursuant to art. 240 bis of the Italian criminal code or the Italian preventive confiscation.

# Art. 240 bis c.p. Italian Extended confiscation

- Measure of security with preventive nature
- (C. cost., ord. n. 18/1996, Basco; Supreme Court, VI, n. 1600/1996 )
- “atypical asset security measure, replicating the characteristics of the anti-mafia preventive measure ..and the same preventive purpose ” (Cass. S.U., n. 29022/2001, Derouach; Cass. S.U., n. 33451/2014; C. V, n. 1012/2017; Cass. I, n. 19470/2018; Cass. II, n. 5378/2018; Cass. VI, n. 54447/2018;
- **no punishment, non- retroactivity principle, no safeguards of criminal matter**

## when applied by the judge of the execution?

- the powers of the enforcement judge are **residual** powers and
- the confiscation is allowed to be pronounced *inaudita altera parte* (the judge can decide *de plano* on the basis of the request and the elements proposed by the public prosecutor or *ex officio*; the Chamber hearing can only take place following an objection) and
- against the decisions of the execution judge **it is not possible to appeal,**
- but only **to recourse to Cassation** – to the Supreme Court - (a practice considered constitutional by Constitutional Court in sentence no. 106/2015).

## **Art. 578 bis c.p.p.: it is possible to apply after prescription or amnesty**

- When the confiscation in particular cases provided for in the first paragraph of article 240 bis of the criminal code ...has been ordered, the appellate judge or the court of cassation, in declaring the crime extinguished by prescription or amnesty, they decide on the appeal solely for the purposes of confiscation, after ascertaining the accused's responsibility