

Policy recommendations: general framework/chart of the forms, applied across MS, of freezing and confiscation orders covered by the REG

RECOVER (GA 101091375) – Discussing and sharing the RECOVER's results JUST-2022-JCOO (EU) / Project 101091375 Co-funded by the Justice Programme of the European Union 2021-2027



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BULGARIA

- Direct confiscation under Article 53 of the Bulgarian Criminal Code (CC) and under specific measures provided for some of the crimes in the Special Part of the CC (ML, TF, bribery, smuggling etc.)
- Confiscation of the value under Article 53 (1)(a) of the CC, Article 53, para 2 (b) of the CC and under specific measures provided for some of the crimes in the Special Part of the CC (ML, TF, bribery, smuggling etc.)
- Extended confiscation under art.44-46 of the CC
- Confiscation without conviction under Article 53 of the CC
- Confiscation against third parties under Art. 53, para. 2 of the CC and some of the specific measures in the Special Part of the CC (TF, ML, etc.)
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FRANCE

- Standard Conviction-based Confiscation (Art. 131-21 PC; Art. 131-39 PC; Art. 131-6 PC; Art. 131-14 PC; Art. 131-16 PC).
- Extended Confiscation (Art. 131-21(5) PC).
- Value-based Confiscation (Art. 131-21(9) PC).
- Non-conviction-based Confiscation (Art. 41-4 CCP; Art. 99 CCP; Art. 481 CCP).
- Third-party Confiscation (Art. 131-21(2,5,6) PC).

ITALY

- the traditional model of confiscation (art. 240 of the criminal code)
- the special forms of mandatory confiscation, provided for in criminal code or in special laws and connected seizure order (articles 321-323 of the code of criminal procedure)
- • the special forms of the value based confiscation order, provided for in criminal code or in special laws and connected seizure order (articles 321-323 of the code of criminal procedure)
- extended confiscation pursuant to art. 240 bis c.p. and connected seizure orders (articles 321-323 of the code of criminal procedure)
- preventive confiscation (art. 24 and 34 d.lgs. 159/2011) and connected seizure orders (art. 20)
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LITHUANIA

- Confiscation (Art. 72 CC).
- Extended Confiscation (Art. 72-3 CC).
- Confiscation of the value (Art. 72 and 72-3 CC).
- Confiscation against third parties (Art. 72 and 72-3 CC).
- Non-conviction-based confiscation (Art. 72 and 72-3 CC).
- Civil confiscation (law on the Civil Confiscation of property, No. XIII-2825 of 2020)

THE NETHERLANDS

- The forms of freezing orders covered by the REG are:
 - Freezing (article 94 DCC) for the purpose of forfeiture or withdrawal from circulation
 - Freezing (article 94a DCC) for the purpose of value confiscation
- The forms of confiscation orders covered by the REG are:
 - Forfeiture with seizure (O)
 - Forfeiture without seizure (O/W)
 - Withdrawal from circulation (O)
 - Value confiscation order (W)
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SPAIN

- Direct confiscation (art. 127 (1) and (2) SCC).
- Confiscation of the value (Articles 127 (3) as well as Arts. 127 quater (1) and 127 septies SCC).
- Non conviction-based confiscation -NCBC- or “autonomous confiscation” (Art. 127 ter SCC).
- Extended confiscation (Article 127 bis as well as Articles 127 quinquies and sexies SCC).
- Third-party Confiscation (Art. 127 quárter SCC).
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GERMANY

- Direct confiscation - Section 73 StGB (confiscation of proceeds of crime) and 74 StGB (confiscation of products, instrumentalities, objects of crime)
- Confiscation of the value (Section 73c , 73d , 74c StGB; Section 29a OWiG)
- Non-conviction-based confiscation -NCBC- or “autonomous/independent confiscation” (Section 76a StGB) > 76a (1-3) StGB (confiscation without conviction in cases of death, illness, absconding, time-barring etc.); 76a (4) StGB (confiscation of assets of uncertain origin)
- Extended confiscation (Section 73a StGB)
- Third-party Confiscation (Section 73b StGB , Section 29a (2) OWiG)
- Pre-trial precautionary measures: freezing of assets (Section 111b - 111q StPO)
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POLAND

- Direct Confiscation (art. 44 CC).
- Confiscation of the value.
- Extended Confiscation.
- Non-Conviction-based Confiscation

ROMANIA

- Special confiscation, which corresponds to direct confiscation, confiscation in equivalent, confiscation against third parties and non conviction based confiscation
- Extended confiscation, that can be ordered against the convicted person and against third parties, and also can be ordered as confiscation in equivalent
- both types of confiscation, special and extended, are regulated in the Criminal Code - in General Part of the Criminal Code, under Title IV "Security measures" (art. 112 and 112¹)
- Only criminal confiscation falls within the scope of the Regulation
- Both confiscation measures in criminal matters in Romania are ordered only by the criminal Courts, thus fulfilling the conditions set out in Article 1 para. 4 and recital 13 of the Regulation.
- In addition to the general provisions mentioned above (art. 112 and 112¹ Criminal Code), which define the different models of criminal confiscation in the Romanian legal system, confiscation is also provided for by specific provisions in the special part of the Criminal Code or in other special laws. These provisions do not establish new forms of confiscation, but only regulate particular applications of special confiscation and extended confiscation:

- In addition to the general provisions mentioned above (art. 112 and 112¹ Criminal Code), which define the different models of criminal confiscation in the Romanian legal system, confiscation is also provided for by specific provisions in the special part of the Criminal Code or in other special laws. These provisions do not establish new forms of confiscation, but only regulate particular applications of special confiscation and extended confiscation:
 - Corruption offences (taking bribes art. 289 Criminal Code, giving bribes art. 290 Criminal Code, influence peddling art. 291 Criminal Code, buying influence art. 292 Criminal Code);
 - Offences of money laundering and terrorist financing (Law 129/ 2019 on preventing and combating money laundering and terrorist financing, as well as amending and supplementing some normative acts - art. 51);
 - Offences of illicit drug trafficking and consumption (Law No 143/2000 on preventing and combating illicit drug trafficking and consumption - Article 16);
 - Offences against the hunting and game protection regime (Law on hunting and game protection no. 407/2006 - art. 46).

PORTUGAL

- Direct confiscation (articles 109 (1) and 110 (1) (a) and (b) PC)
- Value confiscation (articles 109 (3) and 110 (4) PC)
- Extended confiscation (unexplained wealth confiscation) (article 7.º Law no. 5/2002)
- Non-conviction-based confiscation [articles 109 (2) and 110 (5) PC]
- Third-party confiscation [articles 111 PC]

POLICY RECOMMENDATIONS ABOUT THE CONCEPT OF “PROCEEDINGS IN CRIMINAL MATTERS” (briefly)

- 1. AFFIRMING A VERY BROAD INTERPRETATION OF THE CONCEPT OF “PROCEEDING IN CRIMINAL MATTER”;**
- 2. DEMANDING THE RESPECT FOR THE ESSENTIAL SAFEGUARDS FOR CRIMINAL PROCEEDINGS SET OUT IN THE CHARTER:** “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*” (RECITAL 18). **The application of the Regulation as challenge to improve the safeguards of the “proceedings in criminal matters”.**
- 3. ALSO WITH STRUMENT OF SOFT LAW, IT WOULD BE VERY IMPORTANT TRYING TO CLARIFY THE CONCEPT OF “PROCEEDINGs IN CRIMINAL MATTERS”,** as stressed also by the Italian member of Eurojust, Filippo Spiezia, and the Partners in the first Workshop.

4) CLARIFYING THE NECESSARY SAFEGUARDS OF THE PROCEEDINGS IN CRIMINAL MATTERS IN ORDER TO APPLY THE REGULATION

5) THE APPLICATION OF THE REGULATION SHOULD REPRESENT AN INCENTIVE FOR THE ADOPTION OF A NATIONAL MODEL OF TRIAL AGAINST ASSETS THAT COMPLIES WITH THE GUARANTEES OF CRIMINAL LAW.

- **6) CLARIFYING THE CONCEPT OF COMPETENT AUTHORITY**
- **7) CLARIFYING THE RELATIONSHIP WITH THE CASE OF LAW OF ECtHR**

AFFIRMING A VERY BROAD INTERPRETATION OF THE CONCEPT OF “PROCEEDING IN CRIMINAL MATTER”;

- 1) as the EU Commission has recently underlined, for the purposes of the Regulation, the provision can be considered adopted in the context of a "procedure in criminal matters" to the extent that **a connection with a crime is present** . It is enough that the **proceeding in front of a judicial authority regards the proceeds and/or instruments of the crime**.
- In the recital 13 it is specified that “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.

This reference to the Court of Justice seems appropriate

- This reference to the Court of Justice seems appropriate because the adoption of a regulation in a more direct and immediate manner call into question **the Court of Justice pursuant to Art. 267 TFEU as an interpreter in its original capacity**, intended to resolve the interpretative doubts of Member States in its application.
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Always in the recital 13 it is clarified that

- “The term therefore **covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence**”;
- this expression “proceedings in relation to a criminal offence” **is repeated in 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”).
- It is important to verify this “**relation to a criminal offence**”, that **there is a *link* between the assets to confiscate and a crime**;
- so, it is enough that the proceeding in front of a judicial authority **regards the proceeds and/or instruments of the crime**.
- Also the Directive 2011/99/EU extends the concept of "European protection order" to any measure aimed at protecting an individual from acts of others with criminal relevance, even where such measures are adopted outside of *stricto sensu* criminal proceedings

- In the context of a debate on the matter by the EU ministries of Justice (UE, Cons. JAI, 12/13 October 2017), it was specified that also certain preventive confiscation systems are included in the Regulation scope. Provided that the choice to confiscate «soit clairement en rapport avec des activités criminelles et que des garanties procédurales appropriées s'appliquent».

NO: confiscation orders issued within the framework of proceedings in civil or administrative matters

- On the basis of Art. 1(4) “This Regulation does not apply to freezing orders and confiscation orders issued within the framework of proceedings in civil or administrative matters”,
- a category **which certainly includes measures of expropriation of property not connected to crimes.**

- This broad interpretation also **allows for the inclusion in the scope of the Regulation** of
- NCB confiscations, as highlighted by the EC (Todorov case), provided that **there is a link with a criminal offence,**
- **even if they are considered civil measures or civil proceedings in the internal system**

- In this respect it is important to **emphasise** that in the original draft of the Regulation the expression “criminal proceedings” was used in Art. 1.
- **The replacement of “criminal proceedings” with the expression “proceedings in criminal matters” was**
- **the result of the pressure from the Italian delegation, which,**
- supported by some other delegations,
- claimed that there was a risk that the **Italian system of preventive confiscation would be excluded** from the scope of the Regulation.

2) DEMANDING THE RESPECT FOR THE ESSENTIAL SAFEGUARDS FOR CRIMINAL PROCEEDINGS SET OUT IN THE CHARTER

“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*” (RECITAL 18).

The application of the Regulation as challenge to improve the safeguards of the “proceedings in criminal matters”.

- 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.**

- In this direction, first of all, in the art. 1, 2, the European legislator has established that “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, first of all, that Artt. 49 and 50 of the European Charter of Fundamental Rights, and artt. 6 e 7 ECHR as interpreted by European Court HR, have to be respected.

the procedural rights set out in Directives

- The recital 18 imposes also that 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 in the recital 18 it is clarified that

- “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*”.

The affected can challenge the application of mutual recognition

- by proving that the fundamental guarantees of criminal matters have been violated in the concrete case (a specific violation of fundamental rights)
- and, therefore, claiming the application of the ground for refusal provided for by art. 8, F) and 19, h):
- **”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.”**

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- It follows that “the notion of “proceedings in criminal matters” seems to refer,
- in addition to criminal proceedings in the strict sense,
- also to those judicial proceedings which (i) are connected to a crime,
- in the sense that they concern property related to criminal conduct,
- and (ii) despite their initial classification or nature as civil proceedings or administrative under national law,
- have procedural guarantees similar to those of a criminal trial or, rather,
- attract the essential guarantees of law criminal. ...”.

3) ALSO WITH STRUMENT OF SOFT LAW, IT WOULD BE VERY IMPORTANT TRYING TO CLARIFY THE CONCEPT OF “PROCEEDINGs IN CRIMINAL MATTERS

- as stressed also by the Italian member of Eurojust, Filippo Spiezia, and the Partners in the first Workshop.

4) **CLARIFYING THE NECESSARY SAFEGUARDS OF THE PROCEEDINGS IN CRIMINAL MATTERS IN ORDER TO APPLY THE REGULATION**

- The challenge for the European Legislator could be to clarify which are
- the **minimum and essential safeguards** which have to be guaranteed in a national proceeding in order to be included in the Regulation's scope and
- in order to **improve the mutual trust and confidence among the competent authorities,**
- which is the basis of the mutual recognition

The mutual recognition strategy must be based on mutual trust

- and confidence among the competent authorities and
- its implementation would require a change of approach by the European legislator.
- Until now **the European legislator has always applied an approach more concerned with effectiveness** than with the respect of safeguards,
- **subject to demanding “at least” a specific model of confiscation "minimalist in terms of efficiency".**

- This has allowed Member States to introduce more extended powers of confiscation
- but with fewer safeguards, without concern for a minimum of essential respect for constitutional safeguards
- (in this direction Framework decision 212/2005, Directive 2014/42/EU, and Framework decision 2006/783 -Article 2(d)(iv)- have adopted the same approach).

The new Directive try to limit the scope of the new models of NCBC

- and to **impose some safeguards** (art. 24 and 25, first of all),
- even if with some ambiguity (about the standard of the proof, the clause of proportionality only in the recital, etc.);
- and in any case, as affirmed in the recital 7, it should **“lay down minimum rules”** and
- this means that Member States can introduce more effective instruments.

an effort to better identify the minimum safeguards

- The way forward may be **an effort to better identify the minimum safeguards**
- under which Member States should apply extended and non-conviction-based confiscation,
- in order to implement the Regulation.

5) CLARIFYING THE CONCEPT OF COMPETENT AUTHORITY

- in order to ensure the effectiveness of Union law, on the one hand,
- and to uphold mutual trust stemming from the judicialization of cooperation, on the other hand,
- the ECJ has **developed autonomous concept of Union law**, in particular with regard to the “**judicial authority**” “**competent in criminal matter**”;
- the ECJ, however, **has not extended the more guaranteed interpretation adopted for the EAW** (Framework Decision 2002) **in relation to EIO** (Directive 2014/41),
- stating that “for the purpose of interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is”

- **Although it would be better to adopt the interpretation used for the EAW in order to improve the safeguards,**
- **the concepts introduced by the ECJ for EIO (Directive 2014/41) can be adopted in relation to Regulation 1805,**
- **because the latter incorporates the conditions for issuing and transmitting a freezing order provided for in Art. 6 of Directive 2014/41/EU.**
- The objective is different from that of the EAW;
- **the freezing order does not affect the right to liberty,**
- but the right to property and economic freedom of the person concerned, and it is a temporary measure.

- This means that **on the basis of Art. 2 8 (b) (i), not only the court or a judge, but also the public prosecutor can issue (or validate) a freezing order,**
- **even if he is not independent from the executive power** (independence which the ECJ requires for the EAW).
- Furthermore, on the basis of Art. 2 8 (b) (ii) **“another competent authority which is designated as such by the issuing State”**, such as law enforcement authorities,
- can issue a freezing order.
- In this latter case, however, **“before it is transmitted to the executing authority, the freezing order shall be validated by a judge, court or public prosecutor in the issuing State”**.
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- In any case, as Advocate *Ćapeta* pointed out in relation to EIO, **a freezing order must be issued by a court if the law of the issuing Member State so requires the same measure in a domestic context**

- **6) THE APPLICATION OF THE REGULATION SHOULD REPRESENT AN INCENTIVE FOR THE ADOPTION OF**
- **A NATIONAL MODEL OF TRIAL AGAINST ASSETS**
- **THAT COMPLIES WITH THE GUARANTEES OF CRIMINAL LAW**

7) CLARIFYING THE RELATIONSHIP WITH THE CASE OF LAW OF ECtHR

- **Notwithstanding the extensive case-law on the substantive concept of criminal matter,**
- **it is not possible to refer to the concept of criminal matter of the ECtHR for the purpose of applying the Regulation,**
- **since the proceedings for applying the form of confiscation without conviction have always been excluded from its scope.**
- **Indeed, recital 13 states that “proceedings in criminal matters’ is an autonomous concept of Union law”**
- **“*notwithstanding* the case law of the European Court of Human Rights”.**

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Notwithstanding has an adversative meaning

- expressing the awareness of the European legislator of the impossibility of adopting the concept of “criminal matter” of the ECtHR.

Despite the contrary opinion of the ECtHR

- **in many cases the recent forms of extended and non-conviction based confiscations could be included in the ECtHR's autonomous concept of "criminal matter" in order to apply the associated conventional safeguards**
- (confiscation is applied in relation to criminal offences - nature of the violation -;
- it entails a stigma for the persons affected, as well as a limitation of the freedom of economic initiative and of property rights, pursuing a deterrent effect - nature of the sanction -;
- it can affect all the assets of the persons concerned - severity of the sanction -).