

RECOVER
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RECOVER

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

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MUTUAL RECOGNITION

- “Criminals must find no ways of exploiting differences in the judicial systems of Member States” and “no hiding place for ... the proceeds of crime within the Union” Tampere European Council, October 15-16, 1999, Presidency Conclusions, § 5.
- **This principle has to be the cornerstone of judicial co-operation in both civil and criminal matters within the Union (§ 33);**
- it should apply both to judgements and to other decisions of judicial authorities: (§ 36) “The principle of mutual recognition should also apply to **pre-trial orders**, in particular to those which would enable competent authorities ... to seize assets which are easily movable”.

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- Tampere European Council, October 15-16, 1999, Presidency Conclusions, § 36.

harmonisation - mutual trust

- Mutual recognition has to be built
- on the **harmonisation** of the confiscation models and, first of all,
- on the **mutual trust**, which demands the **respect for the safeguards of the rule of law**.

The project RECOVER will improve

■ the implementation of the Regulation no. 1805/2018 (REG) on the mutual recognition (MR) of freezing and confiscation orders,

as fundamental tool of cooperation in the fight against organized and economic crime

This REG represents a doubly significant event

- because the principle of MR is affirmed in this sensitive field - a choice that has a strong political value considering the REG impact in terms of criminal policy and the effect of *dragging mutual recognition on substantive issues*- and is imposed with a legal provision directly applicable.

all types of freezing and confiscation orders

- It includes all types of freezing and confiscation orders covered by Directive 2014/42/EU,
- as well as other types of orders issued without final conviction;
- the MS should recognize and execute such an order issued by another MS, even if an equivalent order does not exist in its own legal system.

RECOVER CONSORTIUM

- ITALY - UNIVERSITA' DEGLI STUDI DI CATANIA
- ITALY - UNIVERSITA' CATTOLICA DEL SACRO CUORE
- ITALY – MINISTRY OF JUSTICE
- BULGARIA – GENERAL PROSECUTOR'S OFFICE
- FRANCE – MINISTRY OF JUSTICE
- GERMANY – HUMBOLDT UNIVERSITY
- LITHUANIA - GENERAL PROSECUTOR'S OFFICE
- NETHERLANDS - GENERAL PROSECUTOR'S OFFICE
- POLAND - MINISTRY OF JUSTICE
- PORTUGAL – GENERAL PROSECUTOR'S OFFICE
- ROMANIA – ASSET RECOVERY OFFICE
- SPAIN - GENERAL PROSECUTOR'S OFFICE
- (SPAIN – INTERNATIONAL AND IBERO-AMERICAN FOUNDATION FOR ADMINISTRATION AND PUBLIC POLICIES)

a network of Prosecutors, Judicial and Asset Recovery Offices (ARO) in 10 EU MS

- It creates a network of Prosecutors, Judicial and Asset Recovery Offices (ARO) in 10 EU MS
- not only to detect and overcome the legal issues in the REG interpretation,
- but also to create the substantial conditions in implementing it in compliance with the rule of law,
- increasing mutual trust and harmonisation.

RECOVER consists of the following steps:

- • **Establishing the REG subject matter:** “freezing orders and confiscation orders issued by another Member State
- **within the framework of proceedings in criminal matters” (art. 1 REG)**
- • Identifying the **national models of confiscation** covered by the REG;
- • Identifying both the **safeguards** that the proceedings in criminal matters have to respect to be covered by the REG and
- **the safeguards in the mutual recognition proceeding;**
- **detecting and overcoming the practical obstacles and the legal issues** in REG implementation, by the analysis of the first praxis
- • Analysing the issues connected to the application of the REG to **legal persons;**
- • Focusing the legal and practical difficulties in **Asset Recovery Offices’** activities
- and in the **management and disposal** of frozen and confiscated assets, and
- in the protection of **victim’s rights**

RECOVER will be realized through:

- the network of **partner MS**, to be set up by desk analysis, national reports based on questionnaires, workshop as tool of direct dialogue;
- the involvement of **non-partner MS** by interviews to experts, dissemination workshops, international seminars in the perspective of mutual learning as basis for the mutual trust.
- Best practices, guidelines, reform proposals will be collected in a comprehensive database at the disposal of all EU MS

The project is not only focused on the Regulation 1805/2018 (REG),

- because an important part of the research concerns the basis of the mutual recognition, the **harmonization** which means in this sector the Directive 42/2014 and the new Proposal of Directive;
- so the research will analyze the state of harmonization in the partner MS and also in the other MS, and the consistency of the Proposal to solve the problems.
- Furthermore, a part of the research will be also focused on the **Asset Recovery Offices** and to elaborate the proposal for the revision of the Council Decision 2007/845/JHA and
- the introduction of a Directive on AROs
- and, in the end,
- on the **correct and efficient management of frozen assets** and the connected proposal to introduce Asset Management Offices.

safeguards

- The analysis of the Regulation, in any case, concerns also other connected instruments to understand which are **the safeguards that the “proceedings in criminal matter” have to respect to be covered by the Regulation** (also taking into consideration the different system of safeguards provided for in each MS)
- (recital 17 and 18: “the procedural rights set out in Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, (EU) 2016/343, (EU) 2016/800 and (EU) 2016/1919”;
- “in particular, the essential safeguards for criminal proceedings set out in the Charter should apply”);
- the fundamental rights and safeguards are often stressed in this sector (e.g., by reversal of the burden of proof or civil standard of the proof).

RECOVER addresses eight needs, each of them associates with a specific objective in the project:

- In general the objective
- **To overcome the gap of knowledge among MS authorities about the forms of confiscation covered by the REG in each MS, regardless of the internal qualification.**
- **To study and to overcome the gap of knowledge among the MS authorities about the discipline of the REG (e.g. the confiscation's object; grounds for non-recognition and non- execution; third parties' rights).**

follows

- **To harmonise MS national legislations.**
Even if the REG is a tool of MR, the harmonization of the MS' legislations will simplify and help the implementation of the REG and improve mutual trust.
- The need for harmonisation is stressed by the *2021 Inception Impact Assessment*, where the necessity of a proposal for a Directive revising the Directive 42/2014 is evaluated.

1st OBJECTIVE

- • **To analyse** and clarify the concept of “proceedings in criminal matters” (art. 1 REG).
- • **To identify** forms of freezing and confiscation orders covered by the REG in each MS.
- • **To elaborate** a framework/chart of the forms applied across MS of freezing and confiscation orders covered by the REG, which will facilitate its implementation by the judicial authorities.

- • **To analyse** the REG and tackling the connected legal issues to elaborate clear guidelines.
- • **To elaborate** proposals of harmonisation as *condicio sine qua non* of the mutual recognition.

First of all, the concept of “proceeding in criminal matter”

- is broader than criminal proceedings and, secondly,
- in each MS there are not only forms of criminal confiscation but also **hybrid measures related to extended forms of confiscation and no conviction-based confiscation** (also defined “civil” or “administrative” but which fall perfectly within the definition of “*proceedings in relation to a criminal offence*”, recital 13). •

- 1st SPECIFIC NEED: Establishing the scope and the subject matter of the REG
- • To establish the REG scope.
- As the freezing and confiscation orders covered by the REG have to be issued “**within the framework of proceedings in criminal matters**” (Art. 1), this last concept needs to be clarified because it “*is an autonomous concept of Union law*” (recital 13).

- **2nd SPECIFIC NEED:**
- **To guarantee the respect for the safeguards of the criminal matters in national procedure and in the implementation of REG.**
- **The fundamental rights and the safeguards are often stressed in this area (first of all, because of the resort to the reversal of the burden of proof or civil standard of the proof).**

- Therefore, there is a need to understand which are the safeguards that the *“proceedings in criminal matter”* have to respect to be covered by the REG, even because their violation is a ground for refusal (art. 8 f, 19 h).
- In particular the REG has to observe the principles recognised in EU Charter of Fundamental Rights and in the ECHR (recital 17) and it specifies that *“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).

2nd OBJECTIVE

- • **To establish** the minimum safeguards in the presence of which MS should apply each form of confiscation covered by REG, also non-conviction based, even if they do not adopt that model.
- • **To identify** the fundamental rights and safeguards and the appropriate instrument for their protection in the procedure for the mutual recognition of freezing and confiscation order.

3rd SPECIFIC NEED:

- **To overcome the gap of knowledge and experience about practical obstacles and legal issues**, gap which is due to the very recent entry into force of the REG (19/12/2020):
- **a) to simplify the recognition and enforcement procedure**, in order to improve the speed and efficiency of the execution (see Inception Impact Assessment 2016);
- **b) to analyse the possible legal issues** in the first praxis, e.g. the right to effective legal remedies (art. 33), multiple orders, impossibility to execute orders (art. 22);

- **c) to identify and solve hard cases; d) to overcome the gap of knowledge of the other MS' authorities involved in the implementation of REG.**

■ 3rd OBJECTIVE

- • **To point out** the main obstacles and legal issues in the implementation of the REG and to exchange best practices
- • **To facilitate** the practical application of the REG by national authorities
- • **To stress** the different phases of the concrete procedure of the mutual recognition
- • **To detect** the best practices to be shared among partners as well as the other MS
- • **To collect** and examine relevant cases
- • **To identify** and tackle case studies
- • **To anticipate** possible problems and remedies of non-partner MS
- • **To elaborate** reform proposal of the REG and of EU soft law explicative instruments for its implementation

4th SPECIFIC NEED:

- **To detect the specific issues related to the application of the REG to legal persons and enterprises.**
- Another specific need derives from, on the one side, the important role which firms and legal persons often play in generating-profit crimes and also in organized crime and,
- on the other side, the different approaches and legislations in the MS about the possibility to apply freezing and confiscation orders to companies and enterprises
- *(Organised crime infiltration of legitimate business in Europe, Transcrime – Un. Trento (2015); European Commission, Strengthening the mutual recognition of criminal assets' freezing and confiscation orders', December 2016).*

- **4th OBJECTIVE** To assess the possibility of applying the REG to legal persons and enterprises.

5th SPECIFIC NEED

- **To evaluate the role and the powers of the Asset Recovery Offices for the enforcement of the REG.**
- The Council Decision 2007/845/JHA7 obliges MS to set up national AROs in order to ensure the fastest possible EU-wide tracing of illicit assets. However, AROs have currently limited capacity to identify and trace criminal assets both at the national level and in EU cross-border cases (Inception Impact Assessment 2021).

- **5th OBJECTIVE** To focus the legal and practical difficulties in the AROs' activities and to elaborate the proposal for the potential revision of the Council Decision 2007/845/JHA on AROs

6th SPECIFIC NEED:

- **To guarantee the correct and efficient management of frozen assets (art. 28 REG), the protection of victims' rights to restitution and compensation in cross-border cases (artt. 29-30 REG) and the **social reuse** of confiscated assets (Art. 30, n. 6 d) REG).**

- There are difficulties in managing frozen and confiscated assets efficiently and avoiding their fast depreciation;
- as a consequence the victims risk not to be compensated and the assets not to be repurposed towards social purposes (*Inception Impact Assessment 2021*).
- This problem becomes exacerbated when the object of confiscation is a company; the legislation and the praxis are very different in the MS in this field.
- The victims' compensation and the social reuse would increase the perception of a fair judicial system.

6th OBJECTIVE

- To **focus** the legal issue and obstacles to the best management and disposal of frozen and confiscated property;
- To **identify** and **share** the best practices;
- To **verify** the need to reform the REG, to introduce Asset Management Offices in all the MS and to enforce stricter rules.
- To **verify** the compensation of the victims in the first praxis, the related legal issues and practical obstacles, and the opportunity to introduce stronger obligations towards victim's compensation.

- To **foster** and promote the exchange of best legislations and practices regarding social reuse and sale of confiscated assets (art. 30 REG); •evaluating the opportunity to introduce stronger obligations.

- • To **elaborate** guidelines about: the pre-evaluation of the opportunity to start the MR procedure; the disposal of confiscated property or money obtained after selling such property.

7th SPECIFIC NEED:

- **To share the results of the research with all EU MS, even those non-partners**

7th OBJECTIVE:

- To disseminate the content and project results in order to improve the mutual trust and mutual recognition of freezing and confiscation orders
- • Dissemination materials and external presentation of the project's results to facilitate European-wide dissemination and long-term implications of the project: a handbook; guidelines aiming at concretely implementing REG; international seminars with all EU MS.

8th SPECIFIC NEED:

- **To consider the (limited) relevance of gender issues in the matter** - Recover doesn't involve gender equality issues and non-discrimination considerations *stricto sensu*. However, in the analysis of the mutual recognition procedures the project will consider the gender of the person affected by freezing and confiscation orders, verifying the significance of the results.

- **8th OBJECTIVE: To evaluate the role of the women in the infiltration of the organised crime in the licit economy and the role of business women in the generating profit crimes**