

Insights from other MS States and extra-EU States

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Answers from Czech Republic

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The application of the Regulation no. 1805/2018 – answers to the questions

1. Can You provide us with a **short list of the forms of forfeiture and seizure (as well as the related legislative provisions)** which fall under the scope of the Regulation and within the **concept of proceeding in criminal matter (Art. 1 REG)?**

In Czech criminal law there is a duality of criminal sanctions, penalties and protective measures (Section 36 of the Criminal Code)¹. The law allows for the imposition of a protective measure both independently and in addition to a sentence (Section 97, par. 1 CC).

Penalties are imposed on the perpetrator for the commission of the offence and primarily with the purpose to punish him.

The forms of forfeiture are forfeiture of property or part thereof (Section 66 CC), forfeiture of a thing (Section 70 CC), forfeiture of replacement value (Section 71 CC). All these punishments are the forms of penalties. Among the protective measures that are a form of forfeiture, we can name the following protective measures: 1) seizure of thing (Section 101 CC), 2) seizure of replacement value (Section 102 CC), 3) seizure of part of the property (Section 102a CC), 4) seizure of files and equipment (Section 103 CC).

The forms of seizure are withdrawal of the thing (Section 79 CPC²), seizure of instruments of crime and proceeds of crime (Section 79a CPC), seizure of replacement value (Section 79g CPC).

¹ Statute no. 40/2009 Coll., Criminal Code (hereinafter “CC”).

² Act. 141/1961, Criminal Procedure Code (hereinafter “CPC”).

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2. Can You give some **statistical data** about the application of the Regulation (e.g.: how many cases, which models of confiscation)?

Freezing orders

A freezing order received from another Member State is recognised by the competent Czech authority (public prosecutor or judge) by an order comprising two points within its operative part. Under the first point, the freezing order is recognised. Under the second point, the execution of the recognition decision is secured by a decision on the seizure of instruments of crime and proceeds of crime and substitute value (sections 79a to 79g of the Code of Criminal Procedure). The order is then treated in the same way as a national freezing order, i.e., without recourse to subsequent execution proceedings before the judge or the public prosecutor. It is either delivered to the relevant entity (e.g., the Cadastral Office, bank, custodian of an investment securities register, debtor of the accused), or serves as a basis for the seizure of movable property specified therein by law enforcement authorities.

The Ministry of Justice collects statistics on the proceedings before the courts and public prosecutors relating to freezing orders received from other Member States. The data for years 2020 to 2022 stand as follows.

Courts	2020	2021	2022
Freezing orders received from other Member States	4	3	4
Freezing orders which were recognised and their execution secured	2	1	1
Freezing orders the recognition and execution of which was refused	0	1	0

Public prosecutors	2020	2021	2022
Freezing orders received from other Member States	13	21	23

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Freezing orders which were recognised and their execution secured	8	11	14
Freezing orders the recognition and execution of which was refused	2	0	0

Note: Some of the freezing orders were not decided upon in the year in which they were received, or led to other procedural outcomes (e.g. withdrawal).

Confiscation orders

As far as confiscation orders are concerned, Czech legal framework of criminal sanctions and measures allowing confiscation of property in criminal proceedings (forfeiture of property, confiscation of an object, seizure of part of property, seizure of an object) is specific in that (unlike in some other Member States), the criminal sanctions in question are not “executed” in the traditional meaning of the word, i.e. in specific and separate proceedings subsequent to the decision imposing the sanction, in which the assets of the obliged person would be identified, frozen, and confiscated.

Instead, by operation of the law, on the date of the entry in legal force of the decision of the Czech court on forfeiture, confiscation or seizure, the ownership title passes from the convicted person or other obliged person to the State.

Thus, the asset in question must have been identified and, typically, frozen in the criminal proceedings prior to the issuance of such a decision, and no further execution of the court's decision is necessary. The asset is merely handed over to the state authority competent to manage it, unless such transfer took place earlier, typically on the basis of a freezing order.

The same principle to the recognition of a confiscation order received from another Member State. Thus, in such a case, assets forfeited, confiscated or seized on the basis of a recognised order become, by law, property of the Czech Republic.

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Therefore, the moment of final recognition of a decision of another Member State coincides with the moment of the enforcement of such a decision, and the categories of “recognised” and “executed” orders are effectively impossible to distinguish.

The Ministry of Justice collects statistics on the proceedings before the courts relating to the recognition of confiscation orders received from other Member States. The data for years 2020 to 2022 are as follows.

Courts	2020	2021	2022
Confiscation orders received from other Member States	1	1	1
Confiscation orders which were recognised	0	1	0
Confiscation orders the recognition and execution of which was refused	0	1	0

Note: Some of the confiscation orders were not decided upon in the year in which they were received, or led to other procedural outcomes (e.g. withdrawal).

- Which are the **problems** encountered in applying the Regulation (both in executing requests from foreign authorities in Your country and in obtaining the execution of Your requests abroad)? And which are the **grounds for refusal** applied in the praxis?

There are several problems with the Regulation³ application from our perspective.

The first complication is caused by the obligation to translate decisions on seizure or confiscation of property. The translation of the decision normally takes more than one month and during this (long) period of time the assets concerned are often lost, especially if they are funds in bank accounts.

³ Regulation (EU) 2018/1805 of the European Parliament and of the council of 14 November 2018 on the mutual recognition of freezing orders and confiscation order (hereinafter “Regulation”).

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Another problem is the delivery of decisions on seizure or confiscation of property. The decision must be served not only on the state where the property is located, but also on the owner of the property. Law enforcement authorities have to find out who is to be served with the decision, which is often very difficult as communication with foreign authorities is challenging. Often foreign authorities do not communicate at all or with considerable delay.

Another problem is the cancellation of seizures of property. It often takes a very long time for foreign authorities to lift the seizure. The Czech law enforcement authorities are then unable to close the case because they have to wait until the seizure is lifted by the foreign authorities.

4. Within your national legal system, is there any need to reform the confiscation models to comply with the guarantees required by the Reg. 1805/2018?

Guarantees required by the Regulation are given in the Czech national legislation. Article 33 of the Regulation establishes the right of the person concerned to effective legal protection in the executing State against the recognition and execution of a freezing order or confiscation order. This right can be found in national legislation in Section 238 h (5) of IJCA⁴.

Specific to the Czech Republic is the strict requirement for double criminality enshrined in the IJCA. It is the requirement of double criminality that could be a problem in relation to Article 8 (1) (e) of the Regulation. Here is stated that *“In cases that involve taxes or duties or customs and exchange regulations, the recognition or execution of the freezing order shall not be refused on the grounds that the law of the executing State does not impose the same kind of taxes or duties or does not provide for the same type of rules as regards taxes and duties or the same type of customs and exchange regulations as the law of the issuing State”*.

⁴ Act. 104/2013, International Judicial Cooperation Act (hereinafter “IJCA”).

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We do not have this legislation implemented in national legislation. In a situation where a case arises in the Czech Republic that would fall under this legislation, a complex legal question arises as to whether to comply with national legislation or whether to apply the direct effect of the Regulation.

Article 1 par. 3 of the Regulation provides that when issuing seizure or confiscation orders, issuing authorities shall ensure that the principles of necessity and proportionality are respected. This article has no explicit reflection in Czech national legislation. The requirement of necessity and, above all, proportionality is derived from case law (ruling of the Constitutional Court n. I. ÚS 2485/13).

5. Do you believe the guarantees provided for in the Reg. 1805/2018 to be sufficient? If not, why?

As a negative can be perceived that the legal regulation is not so certain and therefore it is not possible to predict with such certainty the actions of the law enforcement authorities. On the other hand, the greater discretion of law enforcement authorities allows them to respond to a diverse range of cases. Only practice will show whether greater discretion on the part of the law enforcement authorities is to the benefit of the case, or whether it would be desirable to narrow that discretion through legislation.

6. Could you give your inputs about possible guidelines on the practical implementation of the Regulation?

We are not aware of any guidelines in the Czech Republic.

7. How was the Directive 2014/42/EU transposed in Your national legal order and how did this affect national law?

Directive 2014/42/EU was implemented in the Czech legal system by Act No. 55/2017 Coll., which amended the CC and other laws. The explanatory memorandum to this amendment is unusually detailed,

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justifying why the option of extended confiscation by way of criminal law was used rather than, for example, special civil proceedings. The explanatory memorandum also seeks to address the objections raised against the proposed amendment during the comment procedure. The apparent conflict with the *ne bis in idem* principle, the presumption of innocence, or the prohibition of legal presumptions is explicitly addressed. The Act entered into legal force on 18 March 2017.

As part of the implementation, the Czech Republic has considered three different mechanisms to regulate the extended confiscation. It was considered to include this institution in a separate criminal statute: the confiscation of property would then be decided either by (a) a criminal court or (b) a civil court in a special procedure. The preferred option was to incorporate extended confiscation directly into the CC. The reason for this approach, after comparing the legislation of Western European countries, was also the fact that most EU Member States have extended confiscation of property within the meaning of Article 5 of the Directive enshrined in their general criminal legislation⁵.

In terms of the type of criminal sanction, two approaches were considered, corresponding to the existence of two types of criminal sanctions in criminal law (i.e., penalties and protective measures). The first option was a modification of the already existing penalty of forfeiture of property, through which the extended confiscation of property would be implemented. The second and finally chosen option was to proceed by introducing a new protective measure. As a result of the chosen procedure, the imposition of a protective measure does not necessarily depend on proof of the guilt of the person against whom it is applied. Where the nature of the particular case so requires, the court may then reserve the evidence necessary for the imposition of the protective measure for a separate public hearing.

Retroactive effect is prevented by a transitional provision according to which, in determining the amount of the gross disproportion between the value of the property acquired or transferred by the offender to another person or to property in a trust or similar institution and his income acquired in accordance with

⁵ Cf. House Document No. 753, 7th Election Period (2013-2017), available from www.psp.cz.

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the law, account may be taken only of the property acquired or transferred by the offender to another person or to property in a trust or similar institution as from the date of entry into force of this Act.

8. Do you have any **proposals of harmonization of MS legislation, also in consideration of the new proposal of a directive (May 2022) on freezing and confiscation orders?**

The harmonization of MS legislation should include the basic principle that there should be no unjustified differences in individual cases. This is, of course, a subjective opinion, but the requirement for equal treatment by national authorities, including equal decision-making, should be considered in harmonisation.

9. Do you have any further reform proposals, at a national or international level?

Due to the marginality (see statistics) of the agenda, there are no efforts for reform at the level of the Czech Republic.

10. Do you have any further **policy recommendations**, at national or international level?

In our view, a single point of contact in the EU that could communicate effectively with national authorities (e.g. cross-border seizures could take place through the European Public Prosecutor's Office) could help the agenda develop more.

11. **Which models of confiscation can be applied against legal persons and which are their constituent elements?**

o Could you give your inputs about **possible guidelines** on the implementation of the Regulation against **legal persons**?

o Do you have any **reform proposals** for your country in this regard?

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Legal regulation regarding legal entities is contained in special laws, namely the Act on Criminal Liability of Legal Entities and Proceedings Against Them⁶.

As in the Criminal Code, there is a duality of criminal sanctions - penalties and protective measures. The forms of forfeiture are forfeiture of property (Section 15, par. 1, letter b Act on Criminal Liability of Legal Entities), forfeiture of a thing (Section 15, par. 1, letter d Act on Criminal Liability of Legal Entities). Among the protective measures that are a form of forfeiture we can name seizure of thing (Section 26 Act on Criminal Liability of Legal Entities), seizure of part of the property (Section 26a Act on Criminal Liability of Legal Entities).

If there is a reasonable apprehension that the accused legal person will repeat the criminal activity for which it is being prosecuted, will complete the criminal act it has attempted or will carry out the criminal act it has prepared or threatened to carry out, then the legal person may be subject to restrictions on the disposal of the legal person's property, this institute is called a seizure measure (Section 33 Act on Criminal Liability of Legal Entities).

The Act on Criminal Liability of Legal Persons and Proceedings Against Them does not contain a comprehensive regulation of seizure of things or property, but only partial aspects in Section 33, and therefore the general provisions of the CPC are fully applicable. The CPC is subsidiary to Act on Criminal Liability of Legal Entities.

In relation to the legal entities can be applied the withdrawal of the thing (Section 79 CPC), seizure of instruments of crime and proceeds of crime (Section 79a CPC), seizure of replacement value (Section 79g CPC).

⁶ Act. 418/2011, Criminal Liability of Legal Entities and Proceedings Against Them (hereinafter “Act on Criminal Liability of Legal Entities”).