

## RECOVER (GA101091375)

*The subject matter of the Regulation (EU) 2018/1805. National confiscation models*

**Extract of the proposals for legal reform annexed to the General Prosecutor's office of the Kingdom of Spain aimed to amending the Spanish mutual recognition law as regards to asset recovery matters.**

## **2. REFORMS OF THE MUTUAL RECOGNITION LAW (Law 23/2014, of 20 of November)**

2.1 DESIGNATION OF PUBLIC PROSECUTORS AS THE SOLE JUDICIAL AUTHORITY FOR RECEIVING FREEZING AND CONFISCATION CERTIFICATES. APPOINTMENT OF PUBLIC PROSECUTORS AS THE JUDICIAL AUTHORITY FOR THE EXECUTION OF URGENT CERTIFICATES, WITHOUT PREJUDICE TO A EX POST FACTO RATIFICATION BY A COURT.

On 22nd December 2022, the Council of Ministers approved a preliminary draft of an *omnibus* bill or normative package that included the reform of the Spanish Judiciary Act, the Criminal Procedure Code and the Mutual Recognition Law, the last one to be adapted to Regulation (EU) 2018/1805 on the mutual recognition of EU freezing and confiscation orders. However, the bill did not complete its pre-legislative process due to the call for early elections and the consequent dissolution of the Parliament. The initially drafted bill was submitted to the General Prosecutor's Office to be informed by the Council of Prosecutors, in accordance with the provisions of Article 14 (4), j) of the Organic Statute of the Public Prosecutors, triggering a report in which an extensive and detailed analysis of the proposed legal reforms was carried out. This brainstorming allows us to share various reflections on

some of the timely legislative improvements that could be addressed on the occasion of this legal adaptation exercise. The following proposals are in line with those already made in the 2022 annual Report, and are focus on the designation of the Spanish Public Prosecutor as SPoC for incoming freezing and confiscation certificates, aiming to improving effectiveness of asset recovery matters as a crucial mechanism in the fight against organized crime, ensuring that the crime is not profitable, by strengthening the capacities of the Spanish judicial system involving Public Prosecutors as the receiving judicial authority in the early stages of this process.

In this way, the approach inspired by the declaration made by Spain and notified to the European Commission on the 18<sup>th</sup> December 2020, in relation to Article 2 (9) of the Regulation referring to the executing authorities, which includes the UCIF as receiving authority for freezing and confiscation certificates, together with the investigating courts. Literally the declaration refers to the UCIF «(...) if the issuing authority does not know the location of the property to be frozen, the freezing certificate shall be sent, for the sole purpose of determining the location of the property, to the International Cooperation Unit of the State Prosecutor's Office, which shall forward it to the investigating magistrate in the locality where the property is located for enforcement of the freezing order». Likewise, with regard to a confiscation order Spain states that the confiscation certificate can be sent , in principle to the First Instance Criminal Court in the place where any of the property to be confiscated is located, but also «If the issuing authority does not know the location of the property to be confiscated or the place of residence or registered office of the person in respect of whom the order has been issued», the confiscation certificate shall be sent, for the sole purpose of determining the location of the property, to the International Cooperation Unit of the State Prosecutor's Office, which shall forward it to the Criminal Judge in the locality where the property is located for enforcement of the confiscation order».

Going more deeply into this approach, the upcoming legal reform of the Spanish Mutual Recognition Law should recognize the role of the Spanish Public Prosecutors or the Public Prosecutor's Office as single point of contact (SPoC) or the sole authority for the reception of incoming freezing and confiscation certificates as provided in the implementation of the EIO Directive with a very successful outcome. This provision would also make possible to overcome the current dysfunctions arising from the existing triple competence for the recognition of decisions that are clearly interlinked – Public Prosecutor as executing authority for EIO containing financial investigations, Investigating Judge for freezing orders and First Instance Criminal Courts for confiscation orders – which causes confusion among the issuing authorities.

Designating the PPO as the authority for receiving the freezing and confiscation certificates, would allow such certificates to be registered within the CRIS/CJI an advanced and dedicated case management system within the PPO, specifically dedicated to judicial cooperation requests, including for dealing with incoming freezing and confiscation orders at the national level managed by the international cooperation delegated public prosecutors. In addition CRIS is a digital tool that would provide the accurate and reliable statistical data demanded by the EU institutions in the field of asset recovery, as reflected in the EU Strategy to tackle Organised Crime 2021-2025.

In line with the broader concept of "judicial authority" set up by the ECJ, as well as considering Article 11 of the new Directive 2024/1260, 24 April, on asset recovery and confiscation which provides for the obligation of Member States to adopt the necessary measures to ensure freezing of assets with view of an eventual confiscation, including both, freezing orders and the so-called immediate measures to be adopted on the basis of the subsidiary competence established by the new Directive in recital 23: «Where the competent

authorities are unable to take immediate measures, Member States must allow asset recovery bodies to take such measures» and, taking into account that Public Prosecutors are the executing judicial authorities that currently receive all incoming EIOs containing requests for banking or financial information in our country, regardless of whether or not criminal proceedings are opened at a national level, opening the corresponding international cooperation instrumental file for their recognition and enforcement, the GPO considers that, in accordance with Article 11(2) of Directive 2024/1260, which establishes the obligation to take immediate measures, when necessary to preserve the assets until a domestic freezing is adopted by the competent Court, the Public Prosecutor is the best placed authority to adopt the so-called immediate measures. In other words, when there is an imminent risk of disappearance of the assets already identified by the PPO in the framework of the recognition or execution of a previous EIO, at least from the cross-border standpoint, Public Prosecutors should be the authority to initially execute the certificate in urgent cases, as it is the only judicial authority that is already coordinating the identification of patrimonial assets in the performance of its functions as judicial executing authority of EIOs in Spain. In this sense, the provision in paragraph 3 of the above mentioned Article 11 encouraging the national AROs to adopt immediate measures, does not contradict this request, since it is provided for «Without prejudice to the competences of other competent authorities».

For this reason, the transposition of the new Directive into the Spanish legal system (which must be carried out before 23 November 2026), is a significant opportunity for the Spanish legislator to definitively grant the PPO the competence to provisionally adopt immediate measures, when there is an imminent risk of disappearance of the assets identified by the PPO, as the judicial authority for the execution of financial investigation EIOs within the framework of the international cooperation files or, where appropriate, as the sole authority for receiving freezing and confiscation certificates, without prejudice to the ex post facto

ratification of such measures by the competent court. This reform should be addressed in the context of the still pending adaptation of the Spanish Mutual Recognition Law to the (EU) Regulation 2018/1805 and in the light of the new Directive 2024/1260.

A legislative precedent in the same direction, which may naturally be extended to the field of mutual recognition, can be found in the Spanish Organic Law 9/2021 implementing the EPPO Regulation in the Spanish legal system. This piece of legislation set out for the very first time in Spain the possibility for the European Delegated Prosecutor (EDP) to freeze assets without prejudice to a subsequent judicial ratification by the Central Judge. This law introduced the competence of adopting freezing orders for Public Prosecutors and this avenue can be explored also at a judicial cooperation level, taking into account the status of judicial authority of the PPOs in the mutual recognition field within the EU. For these reasons, it should be considered a priority in the eventual reform of the Mutual Recognition Law, before assessing other proposals of more dubious legal fit such as the possible granting of this competence to the Spanish ARO (ORGA, on the basis of Article 11 (3) of the Asset Recovery and Confiscation Directive) or to the national member for Spain at Eurojust (based on Article 8 (4) of Regulation (EU) 2018/1727 and Article 11 (3) of Law 29/2022), taking into account the organic dependence of both bodies to the Spanish Ministry of Justice as well as the ECJ case-law in this regard (in particular, judgment of 10 November 2016 in Case C-216/18 PPU, *Kovalkovas*)

In the same direction, we must insist that the designation of the PPO as the receiving authority, would simplify in practice the cases of coordinated executions of different mutual recognition instruments that are currently very complex, among other reasons due to the lack of legal coverage at European and national level. This typically occurs when the PPO receives

an EIO aimed to obtain banking information together with or announcing a subsequent freezing certificate linked to the first for assuring the available funds.

If the PPOs were competent both to receive and to provisionally execute immediate measures regarding the freezing of available assets, when there is an imminent risk of disappearance, multiple dysfunctions derived from the delays caused by the existing duality of competence would be avoided and overcome.

In this case scenario, the freezing certificate of any assets already identified by the prosecutor in charge of the execution of an IEO could be initially executed by the same prosecutor and not be sent to a Dean Court for allocation to the competent Investigating Judge, who usually overlooks the previous financial-patrimonial investigation coordinated by the Delegate Prosecutor for International Cooperation of the corresponding province. The proposed legal reform assigning Public Prosecutors the power for adopting immediate measures in relation to incoming freezing and confiscation certificates issued on the basis of Regulation 2018/1805 would efficiently eliminate any delays that could lead to the disappearance of the assets or the withdrawal of funds from the accounts under investigation, easing the subsequent judicial ratification of the freezing order. Thus, once an EIO has been executed by the prosecutor for the purposes of financial investigation, the reality depicted demands a PPO with powers to receive freezing/confiscation certificates as well as with power to execute freezing orders simultaneously or latterly issued by the same issuing authority, maximizing the cooperation contacts already established and the consultation procedures already opened with the EU issuing authorities and at the same time, it would facilitate the currently difficult task for the EU issuing authorities of finding out the competent executing authority in Spain optimizing reception times.

On the other hand, being the SPoC for the confiscation certificates, the PPO would ensure the necessary coordination in its execution with precedent freezing certificates at a national level.

Last but not least, in addition to that, the proposed reform would facilitate the full and reliable collection of statistical data, in accordance with Article 35 of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on mutual recognition of freezing and confiscation orders, which obliges Member States to collect data on such orders that have been received and enforced, given that, annual statistics must be submitted to the Commission. In this regard, we must highlight that the statistics available in 2023 reflect that PPOs receive most of the freezing certificates that are executed in our country, as well as the existing problems regarding to the proper compliance with art. 6 Mutual Recognition Law (mandatory notification to the Ministry of Justice of seizure and confiscation certificates)

Summing up the GPO believe that assigning Public Prosecutors the role and competence of receiving (SPoC) all incoming freezing and confiscation certificates, will establish rationality in the way Spanish practitioners deal with passive cooperation in the field of assets recovery, overcoming existing duplicities and overlapping allowing s a better management of existing human and material resources as well as accurate and reliable statistics. In addition assigning Public Prosecutors the competence of executing immediate measures to assure the execution of freezing orders updating our legal system to the rest of existing legal systems within EU, will efficiently eliminate any delays that could lead to the disappearance of the assets or the withdrawal of funds from the accounts under investigation, easing the subsequent judicial ratification of the freezing order