

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

**Policy recommendations: the interpretation of the subject matter
of the Regulation (EU) 2018/1805**

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**1. AFFIRMING A VERY BROAD INTERPRETATION OF THE CONCEPT
OF “PROCEEDING IN CRIMINAL MATTER”**

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**⁶⁶⁷. It is enough that the **proceeding in front of a judicial authority regards the proceeds and/or instruments of the crime**.

In 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 to be appropriate because the adoption of a regulation in a more direct and immediate manner calls into question **the Court of Justice pursuant to Article 267 TFEU as an interpreter in its original capacity**, intended to resolve the interpretative doubts of Member States in its application.

⁶⁶⁷ European Commission, *Commission Staff Working Document: Analysis of non-conviction-based confiscation measures in the European Union*, Brussels, 15 April 2019 (OR. en) 8627/19 JAI 413 COPEN 172 DROIPEN 62, SWD (2019)1050 final, 11.04.2019, 55: “The Regulation extends the scope of freezing and confiscation orders compared to the former mutual recognition framework. 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. It will, however, not apply to freezing or confiscation orders issued within the framework of proceedings in civil or administrative matters. The confiscation Regulation closes an important lacuna and has the potential to vastly improve cross border cooperation by providing law enforcement authorities with an efficient tool to confiscate the proceeds of organised crime even when they are laundered or hidden in other EU Member States”.

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 Article 2, with respect to 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. Hence, it is enough that the proceeding before a judicial authority regards the proceeds and/or instruments of the crime. Also, Directive 2011/99/EU extends the concept of ‘European protection order’ to any measure aimed at protecting an individual from acts of others which do have criminal relevance, even where such measures are adopted out of *stricto sensu* criminal proceedings⁶⁶⁸.

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*».

On the basis of Article 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, provided that there is a link with a criminal

⁶⁶⁸ Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, Recitals n. 9 e 10. See S. OLIVEIRA E SILVA, *Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders: A headlong rush into Europe-wide harmonisation?*, in *NJECL* 2022, p. 205.

offence, even if they are considered civil measures or civil proceedings in the internal system⁶⁶⁹.

In this respect it is important to emphasise that in the original draft of the Regulation the expression “criminal proceedings” was used in Article 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 a 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 also with the safeguards of criminal matter in the Member State.

In this direction, first of all, in the Article 1, 2, the European lawmakers have 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 Articles 49 and 50 of the European Charter of Fundamental Rights, and Articles 6 e 7 ECHR, as interpreted by European Court HR, have to be respected.

⁶⁶⁹ 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, 55.

Recital 18 also imposes 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.

Additionally, 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 person 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 Article 8, F) and 19, h)⁶⁷⁰.

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. ...”**⁶⁷¹.

⁶⁷⁰ S. OLIVEIRA E SILVA, op. cit., 206 s.: „The European legislator’s efforts to tighten up the terms of the grounds for refusal and prevent an ‘excess of guarantees’ from hindering the machinery of mutual recognition has led to some truly disconcerting redundancies. The *exceptionality* of the situation and the *specificity* of the circumstances of the case are not enough; it is also necessary that the violation is *manifest*, that the right affected is of particular importance and that the conviction of the executing authority as to the likelihood of such an attack is based on *substantial* grounds and on *specific and objective* evidence”.

⁶⁷¹ Cfr. R. MORÁN MARTÍNEZ, *España como país ejecutor de decisiones de embargo y decomiso en el reglamento (UE) 2018/1805*, in N.R GARCÍA AND I BERDUGO GÓMEZ DE LA TORRE (eds.), *Decomiso y recuperación de activos. Crime doesn't pay* ([Tirant lo Blanch](#) 2020), 267.

3. ALSO, VIA INSTRUMENTS OF SOFT LAW, IT WOULD BE VERY IMPORTANT TRYING TO CLARIFY THE CONCEPT OF “PROCEEDINGS IN CRIMINAL MATTERS”, as also stressed by the Italian member of Eurojust, Filippo Spiezia, and the Partners in the first Workshop.

And ABOVE ALL

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

The challenge for the European lawmakers 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 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 lawmakers have 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 212/2005⁶⁷², Directive 2014/42/EU⁶⁷³, and Framework decision 2006/783 – Article 2(d)(iv) – have adopted the same approach).

The new Directive aims at limiting the scope of the new models of NCBC and at imposing some safeguards (Article 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 recital 7, it should “lay down minimum rules” and this means that Member States can introduce more effective instruments.

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 is⁶⁷⁴”.

⁶⁷² Article 3, n. 2 “Each Member State shall take the necessary measures to enable confiscation under this Article at least.”; Case C-234/18 *Komisija v. BP and others* (19.3.2020)

⁶⁷³ Article 4, n. 2. “Where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation”; but also, in Article 5 and 6 is used the expression “at least”.

⁶⁷⁴ ECJ, X (*European arrest warrant – Double criminality*), C-717/18, (3.3.2020) EU:C:2020:142, § 21 and the case-law cited.

Although it would be better to adopt the interpretation used for the EAW 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 Article 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 based on Article 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 Article 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”. In this meaning, it is possible to include the criminal investigation in the concept of proceedings in criminal matters, as stated in recital 13. In any case, as Advocate Čapeta 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 context⁶⁷⁵.

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 LAW⁶⁷⁶.

⁶⁷⁵ Advocate Čapeta, C-670/22, Staatsanwaltschaft Berlin V M.N. (26.10.2023), §§ 60 – 61.

⁶⁷⁶ See A.M. MAUGERI, ‘Il Regolamento (UE) 2018/1805 per il reciproco riconoscimento dei provvedimenti di congelamento e di confisca: una pietra angolare per la cooperazione e l’efficienza’ (2019) DPC Riv. Trim., 40; S. BORDERLESS, ‘Enforcement of freezing and confiscation orders in the EU: the first regulation on mutual recognition in criminal matters’ (2020) ERA Forum 20, 421.

7. CLARIFYING THE RELATIONSHIP WITH THE CASE LAW OF ECtHR

As analysed above, 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”. Notwithstanding has an adversative meaning⁶⁷⁷, 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).

In any case “the ECtHR makes a distinction between proceedings of civil and criminal nature, where this distinction is decisive for which part of article 6 ECHR is applicable. Article 6 paragraph 1, where it concerns proceedings of civil nature, *e.g.*, the NCBC where the proceeding concerns civil rights, like the right to property. Or article 6 paragraphs 1, 2 and 3 when the proceeding (also) concerns a criminal charge.

The distinction between proceedings in civil matters and proceedings in criminal matters within the EU law is relevant for determining if a procedure falls under the EU instruments

⁶⁷⁷ C. GRANDI, *Mutuo riconoscimento in materia penale e diritti fondamentali. Il nodo delle confische* (Giappichelli 2023), 200 (note 151).

for cooperation in criminal matters under Charter 4 (Judicial cooperation in criminal matters) of the Treaty on the functioning of the EU.

Where the NCBC thus can be a proceeding with a civil nature for the ECtHR, and thus is not a criminal proceeding, it can be at the same time a proceeding in criminal matters in the context of EU law when the NCBC procedure is a proceeding in relation to a criminal offence. However, in that case essential safeguards for criminal proceedings should apply to that (non-criminal) proceeding.

Recital 18 of Regulation 2018/1805 states that *“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.”*

Which safeguards should be considered essential is not explicitly stated in the recitals. However, some indication can be found in article 8 and 19 of the Regulation: *“in particular the right to an effective remedy, the right to a fair trial or the right of defence.”*

And also, in the case law of the European Court of Justice with regards to the term ‘court having jurisdiction in particular in criminal matters’ (C-60/12 and C-150/21):

The term ‘court having jurisdiction in particular in criminal matters’, set out in Article 1(a)(iii) of the Framework Decision, is an autonomous concept of Union law and must be interpreted as covering any court or tribunal which applies a procedure that satisfies the essential characteristics of criminal procedure and, in particular, has unlimited jurisdiction and applies a procedure which is subject to compliance with the procedural safeguards

appropriate to criminal matters (judgment of 14 November 2013, Baláž, C-60/12, EU:C:2013:733, paragraphs 39 and 42).

Without, however, it being necessary for that court to have jurisdiction in criminal matters alone (judgment of 14 November 2013, Baláž, C-60/12, EU:C:2013:733, paragraph 36).

That court must have full jurisdiction to examine the case as regards both the legal assessment and the factual circumstances and must have, *inter alia*, the opportunity to examine the evidence and to determine on that basis the responsibility of the person concerned and the appropriateness of the penalty (judgment of 14 November 2013, Baláž, C-60/12, EU:C:2013:733, paragraph 47).

In the judgment of 7 April 2022, D.B., C-150/21 (ECLI:EU:C:2022:268, paragraphs 43 and 44) the *kantonrechter* is considered to be a court having jurisdiction in particular in criminal matters since it may rule on issues of law and fact and on the proportionality of the fine imposed in relation to the offence committed and the proceedings before that court are subject to procedural safeguards appropriate to criminal matters.

In particular, those safeguards relate to the manner in which the documents relating to the case are brought to the attention of the person concerned, the hearing in open court to which that person is summoned, the possibility of being assisted or represented, the hearing of witnesses and experts and the use of an interpreter” (Janne Lise de Boer LLM, Legal adviser (international criminal law) Public Prosecution Service, National Office for Serious Fraud, Environmental Crime and Confiscation, Judicial Asset Recovery Office (ARO)).