Guidelines on the practical implementation of the Reg. (EU) 2018/1805

(ed. A.M. Maugeri, University of Catania)

1) **Issuing guidelines for the implementation of the Regulation in order to overcome the difficulties in its interpretation** (Poland "In the opinion of the enforcers, it appears that the REG provisions are largely too vague and hence interpretation problems arise during their application"; Netherlands "It would be helpful that the EU provides more information/guidelines on how to apply the Regulation in practise").

2) **Improving the use of ARO (asset recovery offices), even in the apparent absence of a criminal investigation, to identify assets of suspects in other countries** (*Spain*)

3) **Improving the role, tools and staff of ARO** (*Spain*; *Germany* claims that the "AROs lack a central register and staff"; on the contrary Netherlands affirms "An ARO request is thus very useful instrument to acquire up to date information on if the suspect(s) have (valuable) assets in a certain Member State in order to decide if it is expedient to send an EFO"; *Romania*).

4) It would be useful if in each MS there would be **a national expert centre/central authority that could assist the national competent authorities with, and e.g. provide guidelines** on, both issuing and executing EFOs. And could also act as an

intermediary in cross-border cases. This role could e.g. be fulfilled by the AROs. **(***Netherlands*; *Germany*: "For federal states like Germany is important to mention that a central national expert authority - bundesebene - is needed; this authority has to be introduced under the Ministry of Justice as assisting expert authority for prosecutors and judges including not only legal staff but also for tax for financial investigations, IT for cryptoassets etc.").

5) **Improving the cooperation between tax authorities and judicial authorities** (reporting, cooperation, exchange of information for administrative purposes and asset recovery) (*Spain*).

6) **Improving the contacts via the FIUs of the MSs involved or networks of FIUs** (e.g. the Egmont Group of Financial Intelligence Units).

7) **Increasing the powers of administrative/judicial authorities respectively foresee simplified procedures in relation to winding-up of a company** (conduit companies or missing traders) **or to retrieving the VAT number** (*Spain*).

8) **To receive the banking information in electronic format** (*Spain*: "In case of complex financial investigations, it is necessary to request large amounts of banking information which will be fed into the databases of the investigating authority. For this purpose, it would be preferable to receive the banking information in electronic format. Against this background, the EIO form should provide a box for such requests. It should also be ensured that banks and other financial institutions, as well

as executing authorities, are able to process such information in electronic format- Establishing a JIT solely for the purpose of conducting a financial investigation, if such is possible under the law of the countries involved").

9) Establishing a joint investigation team solely for the purpose of conducting a financial investigation, if such is possible under the law of the countries involved **(***Eurojust; France***).**

10) Even if the EIO has the aim to gather evidence, in the praxis it is used to promote investigation also about the assets and so the proposal of France: **Stressing that the EIO can be delivered first in order to identify the assets that could be seized**, **to investigate on the origins of the assets**, on the origins of the transactions, on the bank accounts for instance, on the account's holders, etc, before the delivery of a freezing certificate. Joint Investigative Teams can also lead to the elements that can allow to deliver a freezing certificate (*France*).

11) Cooperation between public prosecutor's offices and **financial intelligence units is essential for an efficient system for tackling money laundering (***Eurojust***).**

12) The use of highly skilled experts to perform house searches with a focus on digital devices and to take copies of relevant electronic evidence, with the aim of obtaining access to **crypto wallets belonging to the main suspect (***Eurojust***).**

13) Including the consideration of asset recovery precautionary measures within the framework of a joint investigation team.

14) It is important to be able to quickly obtain up-to-date information on assets in other Member States (nb. the use of the EIO does not suffice, since it takes too long to get the necessary information); competent authorities should be encouraged **to send an ARO request prior to sending an EFO (***Netherlands; Romania; Spain***)**

15) It should be more standard for issuing authorities to contact with the receiving / executing authority – even prior to sending an EFO – to discuss the case and what information the executing authority needs to be able to execute the EFO as quickly as possible – and also to discuss certain specific needs/requests of the issuing authority **(***Netherlands***).**

16) Issuing guidelines to harmonize the practice of filling in the freezing certificate (which is not sufficiently clear for Member States in the praxis) (*Lithuania*; *Romania*: "In order for the recognition procedure to be fast, it is necessary to complete the certificates in as much detail as possible and, as far as possible, to send a translation of the freezing order in a known international language"; *Spain*).

17) Training of the competent authorities on the correct completion of the freezing/confiscation certificates and on the insertion of relevant national legislation (in some cases the sections E(1) and (2) of the Regulation freezing

certificate (Annex I) are incompletely filled in, and references to the relevant articles of the national law of the Member State are not always included) (*Lithuania*) (See Policy Recommendation 12).

18) **Improving the communication about the execution of the EFO by the executing authority to the issuing authorities, also in order to avoid that the frozen assets in the other Member State, which are not registered in the national case file, "are not included in the decision on confiscation in the case"** (*Netherlands*).

19) **Accepting EFOs in English, at least in urgent cases (***Netherlands***).**

20) If an EFO needs to be executed on a specific date, **it is important that the EFO is sent in time to the competent executing authority**. And not at the last minute. E.g. some countries still have standard periods after which a seizure will be lifted if the EFO is not renewed in time **(***Netherlands***).**

21) **All Member States should make sure that national legislation and practise is in line with the Regulation (***Netherlands***).**

22) Authorities competent for recognition of EFOs should also be competent to perform (or order) financial investigations to (1) investigate the whereabouts of the assets, (2) to trace and identify other assets of the suspect, and to fit. perform house searches to find the assets of the suspect **(***Netherlands***)**.

23) Avoiding "simultaneous transmission of EIOs/LoRs for banking and financial information through parallel channels", because this has occasionally hindered, rather than expedited, the initiation of the process of execution by creating duplicities, overlapping and internal confusion as to its reception (*Spain*).

24) The EU should come with an explanatory note on how to interpreted and apply article 7 (1) *"… and shall take the measures necessary for its execution in the same way as for a domestic freezing order…"* **(***Netherlands***).**

It would be better to improve the interpretation of art. 7 of REG in the way that the EFO itself forms a basis to conduct investigations to all seizeable goods in every MS ("The Netherlands has interpreted article 7 of Regulation 2018/1805 in the way that the EFO itself forms a basis to conduct investigations to all seizeable goods in The Netherlands. Since this would also be done in case of a Dutch freezing order. Because we have experienced that this is not the practise in all Member States, we have verified with the European Commission (EC) if we interpreted article 7 of the Regulation correctly. The EC has confirmed that article 7 of the Regulation is intended to also form the basis

for conducting financial investigations after receiving an EFO from another Member State") **in order to avoid wasting time** ("Since we have experienced that not yet all Member States apply article 7 of the Regulation in this way, in some cases we do use/need the European Investigation Order (EIO) to request investigations into the existence of valuable property in the other Member State. The problem with this is that the execution of an EIO can still

take quite a long time and valuable time is lost when waiting for the response. Especially with bank accounts and crypto currency it is important to receive information without any delays in order to be able to freeze the assets as soon as possible").

Also, in consideration of this issue: "Problem is that, other than the ARO request, there is no effective way to perform cross-border financial investigations once the confiscation order has become irrevocable. In many Member States financial investigations are not possible after final conviction. Via an ARO request hidden assets are not found. And in most cases the assets will be hidden after final conviction, therefore, an effective instrument to also trace hidden assets in the execution phase of a confiscation order is lacking. The EFO under the regulation might be able to form part of the answer to this problem, if all Member States make the use of the EFO possible in the execution phase and make effective use of the possibility of article 7 of the Regulation".

25) Improving the possibility of article 18 (5) of the Regulation, since in that case it is not necessary to also send an EFO next to the ECO

(*Netherlands***).** The inability to apply article 18(5) of the Regulation (when it is not possible to send a freezing order once the confiscation order has become irrevocable) in the execution Member State. In most Member States the convicted will be informed

that a request for recognition of a confiscation order is received and the convicted has the opportunity to express his view on the request (f.i. if he thinks that one of the grounds for refusal is applicable) prior to the competent authority deciding on the recognition of the request. This also gives the convicted the opportunity to hide the assets he has in the requested Member States prior to execution of the confiscation order. Therefore, **it is essential that Member States have the possibility to freeze assets prior to recognition of a confiscation order**. **The most efficient way to do so is via the possibility of article 18 (5) of the Regulation**, since in that case it is not necessary to also send an EFO next to the ECO.

26) Clarifying the procedure to extend a previous certificate

(*Portugal:* "In addition, some colleagues also pointed out that it is unclear how they should proceed when what is at stake is merely an extension of the previous certificate. For example: Portugal sends Spain a certificate freezing the funds in 3 bank accounts belonging to "A". After the execution, Portugal discovers, in the same case and on the basis of the same facts, that "A" has 2 more bank accounts. What should Portugal do? It should send another certificate. Some colleagues are receiving informal "extension" requests via email. Others are receiving new freezing certificates*").*

27) Clarifying that, notwithstanding the fact that the executing authorities sometimes require more information about the property to be seized (as required in the freezing order under the Framework Decision), **this is no longer necessary under the Regulation (***Netherlands***).**

28) **Executing authorities have to inform the issuing authority about the terms of the freezing orders.** "Not in all Member States national law is in alignment with the Regulation. Although the Regulation prescribes that property subject to a freezing order shall remain frozen until a confiscation order is transmitted or the issuing authority withdraws the freezing order (art. 12 Regulation), some Member States still have standard periods after which the freezing needs to be renewed or otherwise the freezing is lifted. Member States do not always actively inform the issuing authority about these terms" **(***Netherlands***).**

29) Member States which have the possibility of **interlocutory sale, should apply this more often when freezing assets (in order to get the value) (***Netherlands***)**

30) It would be practical/desirable if **frozen assets would be managed by specialized asset management offices (***Netherlands; Italy; Bulgaria***)**

31) Clarifying "**how costs should be shared** when the seizure certificate is sent to another state in order for the property to be returned to the victim" (*Portugal*: "On the other hand, difficulties have been encountered regarding how costs should be shared when the seizure certificate is sent to another state in order for the property to be returned to the victim").

32) Where possible, and in accordance with the legal principles of each Member State, the adoption of an interpretation of a Member State's criminal code to allow a **civil recovery order to be recognised** with an undertaking by the given Member State's judiciary to cooperate internationally in criminal matters (*Eurojust*).

33) **Clarifying, via Eurojust, where appropriate, the valid legal basis to freeze funds for restitution to the victims**.