

RECOVER (GA101091375)

Practical obstacles and legal issues in the implementation of the Regulation 1805/2018

Reform proposals on the practical implementation of the Reg. (EU) 2018/1805 (ed.

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- 1) **Time limits for the recognition and execution of freezing and confiscation orders** (Art. 9 and 20 of the 2018 Regulation) **should be more realistic and entail legal consequences in case of non compliance with them**, which is currently missing (Poland)

- 2) **In the certificate *there are aspects that could be improved, namely the distinction between "affected persons"*** (Portugal). **"It would be useful to distinguish between defendants and third parties.** (This is because it could happen that the certificate is requested to seize the property of a third party who is not a suspect in the proceedings. This could, for example, affect the type of notifications in the executing state and the timing of such notifications)".

- 3) In the model of the freezing or confiscation certificate, it would also be useful **"to include a topic on the moment of notification of the execution of the measure"** (Portugal). "There are situations in which, given the need to safeguard the criminal investigation in the requesting state, the executing state must wait for a certain time to notify the person concerned. There is no such possibility in the certificate for the notification of the person concerned to be coordinated with the requesting state)".

- 4) **The adaptation of the freezing or confiscation certificate for cases of "extension "** (Portugal, "In other words, whenever a new request had to be made for new property in relation to the same facts and the same suspect, a simple addition could be submitted").

- 5) **Or the possibility of issuing and sending for execution a new certificate (upon learning of new facts)** after the acceptance and execution of a previous certificate for the same property has been refused for the same case (Bulgaria)
- 6) Introduction of **standardized forms for communication between authorities under the Regulation**. F.i. a standardized form for receipt of an EFO, recognition or refusal of the EFO and reporting back to the issuing authority which assets were frozen on the basis of the EFO and the value of those assets (Under Directive 2014/41/EU and Framework Decision 2005/214/JHA the use of standardised forms proved to be very useful)” (Netherlands).
- 7) **“The provisions of the REG would need to be expanded especially in the part related to the final stages of the execution of warrants, by precisely defining the legal framework for the disposal of previously secured property”** (Poland).
- 8) Member States should **align their national legislation in order to make effective use of the possibilities under article 7 of the Regulation⁷⁰⁸ (Netherlands) (see Guidelines 24)**

⁷⁰⁸Article 7: **Recognition and execution of freezing orders**

1. The executing authority shall recognise a freezing order transmitted in accordance with Article 4 and shall take the measures necessary for its execution in the same way as for a domestic freezing order issued by an authority of the executing

9) The introduction in the MS of "central register for the different assets" (Germany "There is no central register for some assets, such as real estate, boats (yachts and pleasure boats)) **and the organization of the real estate on the basis of the name of the owners** (Germany "Real estate is organised by property and not by the name of the owner, so it is not easy to find out who owns the property").

9.1. **The existence of a national central bank register and public registers for companies and for property** in the countries involved would have accelerated execution of the EIO/LoR (Spain)

10) Extending the application of the Regulation to also **freeze assets with the purpose of compensation of victims** (Netherlands; Romania: The definition of freezing order refers only to the situation of the assets that could be subject to confiscation. But, in certain member states, including Romania, the victim can claim civil compensation directly before the criminal court. Once such a request is made, the respective assets can no longer be confiscated, but will serve to repair the victim's damage. Unlike the legislation of other states, in Romania it is not possible to order the restitution of confiscated assets to the victims, because with the measure of confiscation, the assets become the private

State, unless the executing authority invokes one of the grounds for non-recognition and non-execution provided for in Article 8 or one of the grounds for postponement provided for in Article 10.

2. The executing authority shall report to the issuing authority on the execution of the freezing order, including a description of the property frozen and, where available, providing an estimate of its value. Such reporting shall be carried out using any means capable of producing a written record, without undue delay once the executing authority has been informed that the freezing order has been executed.

property of the state. **Although the Regulation mentions that the frozen assets will be able to be returned to the victim, it does not explicitly allow the assets to be frozen in order to protect the interests of the victims.** Thus, according to the definition from art. 1, "disposal order" means a decision issued or validated by an issuing authority in order to prevent the destruction, transformation, removal, transfer or disposal of property with a view to the confiscation thereof. However, if the victim requests damages in the criminal process, certain assets, which could have been subject to confiscation, will no longer fall into this category, and will be returned to the victim. In a strict interpretation, in this case, the procedure for recognizing the freezing order cannot be carried out because the freezing will not be instituted in order to obtain a confiscation measure, but in order to cover the victim's damages”).

- 11) Extending the application of the Regulation to also freeze assets for the purpose of out of court/extrajudicial confiscation orders** (e.g. settlements/transactions with a confiscation component). **(Netherlands)**

- 12) Extending the application of the Regulation to also transfer the enforcement of out of court confiscation orders** (settlements, transactions) **(Netherlands)**

- 13) It may also be desirable to create a 24/7 freezing channel and/or a central authority, for example in connection with the seizure of cryptocurrencies and bank accounts.**
(Netherlands)

14) Harmonization on rules to assure that money transferred by victims of cybercrime/online/bank fraud can be quickly frozen and restituted to the victims.

(Netherlands)

15) Harmonization on the possibilities of financial investigations once a confiscation order has become irrevocable.

16) In order to prevent the fruitless use of the EFO **it should become possible to quickly check the balance of bank accounts in another Member State.** This could for instance be via **granting the AROs with the competence to access this information and provide this information in response to an ARO request.**

17) Also, clear **harmonized rules are needed on how to order/obtain information from electronic money institutions, PSPs, crypto-asset service providers and issuers** which can operate within the whole EU on an ‘European passport’ once they acquired a license in one Member State. In order to become more effective and use the limited available resources as efficient as possible, it should at least be possible to directly order/obtain information on transactions and balance from these institutions (Netherlands).

18) Introduce the possibility of a **soft freeze/urgent freezing measure to enable the (temporary and) quick freezing of assets prior to issuing a formal freezing order.**

This should be possible in national cases, but also in cross-border cases. In relation to electronic money institutions, PSPs, crypto-asset service providers and issuers which can operate within the whole EU on an ‘European passport’ , it should be possible to order such a soft freeze directly to these institutions, even if the main office of the institution is

located in another Member State. (Subsequently the formal EFO should be send to the competent authorities of that Member State.) (Netherlands)

19) **The importance to implement the rule in art. 27 of the Directive 2024/1260 to introduce in MS, “for the purpose of managing frozen and confiscated property”, “one central register or other registers of property frozen and confiscated pursuant to this Directive”; or better the introduction of one central register of property frozen and confiscated, not only for the purpose of managing frozen and confiscated property, but accessible to all relevant authorities dealing with the mutual recognition and execution of freezing and confiscation orders ((Germany; Portugal; Romania)** (See Policy Recommendation 1). Requests under the 2018 Regulation should be registered there directly, in parallel with the transmission of the request to the cooperating Member State. This register could also be the basis for automatic statistical data in this sense at European level, as required by Art. 35 of the 2018 Regulation (*Germany; Romania*).

ROMANIA: “A specific rule was in art. 26 of Directive proposal 2022 - Establishment of centralised registers of frozen and confiscated assets.

Unfortunately, the obligation to establish a national register of all freezing and confiscation orders has been rejected by most Member States. Romania is currently implementing a unique electronic register called ROARMIS - Romanian Asset Recovery and Management Integrated System. It will contain real-time data on freezing and confiscation orders. In addition, the system provides for efficient management of non-available assets. At the same time, the system will make it easier to identify assets that have been made unavailable or confiscated following the recognition procedure in the Regulation, as it will have functions to identify files with an element of extraneousness. We presented this system at the meetings held in Brussels when we negotiated the

Confiscation Directive. However, the creation of such an electronic register must remain a possibility, according to the majority of Member States. If the part relating to substantive law, represented by the new

Directive on this subject, were to reach the same level of consolidation as the Regulation, European cooperation in criminal matters would become a normal part of the work of any practitioner of criminal law”.

20) Introducing at European level clear rules about the management of the assets and competent authorities (Germany “There are difficulties in the management of the assets when they need special treatment to maintain their value, in the establishment of AMOs and official channels for their cooperation at international and EU level, and often the prosecution offices in charge of asset management and disposal do not have relevant specialization”; Netherlands: Bulgaria: “a procedure, uniform for all countries, for the management of property subject to seizure or confiscation”); in Italy the judge appoints an **expert judicial administrator**.

21) Taking into account that the 2018 Regulation covers a wider range of confiscation models falling within its scope of application compared to the 2014 Directive and also the 2024 Directive, **it is still necessary for the European legislator not only to further harmonise confiscation forms such as the non-conviction based confiscation, but also to find a better common definition to add in Art. 3 (Definitions) (Germany).**

22) Harmonization on non-conviction based confiscation (ncbc) is important to assure that competent authorities in the Member States become more acquainted with

this type of confiscation and more comfortable with the application of the Regulation in case of ncbc (Netherlands, Portugal, Italy)

23) In addition, a concrete list of safeguards for persons affected from freezing and confiscation measures should be added to Art. 2 and 24 of the new Directive 2024/1260, including the principle of non- incrimination, the right to silence, etc. (Germany, Italy)

24) the Regulation should also include a clear list of safeguards which have to find application in cases of mutual recognition and execution of freezing and confiscation orders in the EU, such as the principle of non-incrimination, the right to silence, etc. Art. 19 (1) (h) mentions some rights such as the right to an effective remedy, the right to a fair trial or the right to defence but just in the context of the activation of an exceptional fundamental rights ground for refusal. Art. 33 of the Regulation should be therefore amended. For Art. 33 (4) of the Regulation, which refers to Art. 8 of the 2014 Directive, falls under the same critic as above. (Germany, **More clarity should be given to what is mentioned under the same Recital 18 as “the essential safeguards for criminal proceedings set out in the Charter”, which “should apply also to proceedings on criminal matters which are not criminal proceedings”, namely proceedings covered by this Regulation; Italy)**

25) Moreover, legal remedies should be granted according to Art. 33 of the 2018 Regulation not only in the executing but also in the issuing state. From Recital 18 of the Regulation is also not clear if the procedural rights from the ABC Directives should also apply to all procedures covered by the 2018 Regulation (Germany).

Reform proposals 21/24 were also included in the Workpackage 2

- 25) Harmonising the definition of victim** (in relation to the subject matter of the Regulation) and **introducing rules to ensure proportionate compensation to all victims when the amount frozen is insufficient to compensate them all** (This in order to overcome “Issues relating to determining who is considered a victim in given executing Member State, who can apply for compensation and how to ensure proportionate compensation of all victims when the amount frozen is not enough to be restituted to all victims” (Eurojust; Spain). In the REG it is imposed advance restitution of frozen property to the victim when the title to the property is not contested (Art. 29 REG); preferent and direct compensation of victims before the disposal between issuing/executing States (Arts. 29 & 30 REG recognize the victims’ rights as provided in Arts. 15 & 16 Directive 2012/19) Section K).
- 26) Improving the role of ARO** (“conferring jurisdiction on the ARO for immediate measures”) and **considering the “information obtained as a result of cooperation between AROs directly as evidence in criminal proceedings, thus avoiding duplication of proceedings and ensuring the speed of criminal proceedings”** (Romania).