

*The Application of the Reg. (EU) 2018/1805
to Legal Persons and Enterprises*

***Policy Recommendations for the application of the Reg. (EU) 2018/1805 to legal
persons***

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

- 1) Establish national-level agreements among authorities for handling foreign security and confiscation requests, from receipt to execution.**

Bulgaria emphasises the significance of deliberating the establishment of agreements at the national level among authorities responsible for security orders and confiscations. Such agreements would entail a mechanism of action from the moment a foreign judicial act, requesting property security or confiscation, is received, spanning the process of the act's recognition until its execution by the competent body. France, on the other hand, stresses the necessity of proportionality in applying confiscation measures, aligning with the principles of the European Convention on Human Rights. Recommendations from France emphasise ensuring that confiscation respects property rights and the private and family life, necessitating a careful evaluation of confiscation's impact on these rights.

- 2) Ensure proportionality in confiscation measures, respecting European Convention on Human Rights principles, with clarified procedures and proof standards.**

France advocates for clarifications on confiscation application procedures, the standard of proof required, and conditions for reversing the burden of proof. This includes a push for greater transparency and consistency in these areas to guarantee fair and effective

enforcement, alongside the systematic collection and analysis of data to inform policy decisions and evaluate the effectiveness of current measures.

3) Treat companies as affected parties with enhanced procedural safeguards in confiscation proceedings and implement measures to deter corporate crime.

Germany brings attention to the procedural role of companies in confiscation proceedings, viewing them as parties affected by confiscation rather than defendants. This perspective suggests enhancing procedural safeguards for companies, potentially aligning their rights more closely with those of defendants in criminal cases to ensure equitable treatment. Moreover, Germany identifies a need for more robust measures to prevent corporate involvement in crime, which could include improved due diligence, compliance programs, and corporate governance standards.

4) Clarify procedures and standards for applying confiscation models to legal persons for consistent application and legal certainty.

Lithuania contributes by highlighting the comprehensive nature of its legal framework regarding the application of confiscation measures to legal persons. However, it sees value in further clarifying the procedures and standards for applying different models of confiscation. This clarification could aid in ensuring the consistent application across cases and enhancing legal certainty for legal persons engaged in criminal proceedings.

5) Strengthen legal entities' rights in confiscation proceedings and improve preventive measures against corporate crime.

Lithuania highlights the importance of strengthening procedural safeguards in confiscation proceedings involving legal entities. This entails bolstering the rights of legal persons, particularly in terms of representation, participation, and the ability to effectively challenge confiscation measures. Additionally, enhancing preventive measures like compliance programs and corporate governance standards is crucial for deterring criminal activities within these entities. The noted absence of specific statistical data on the application of confiscation measures against legal persons calls for improved data collection and transparency, which would aid in evaluating the effectiveness of current measures and inform future policy development.

- 6) Explore and potentially expand specific penal measures for legal persons to complement confiscation and address corporate crime more effectively.**

Portugal's legal framework includes specific penal measures for legal persons, such as judicial supervision and injunctions, which complement confiscation rather than serve as alternatives. Exploring and potentially expanding these measures could provide a more nuanced toolkit for addressing corporate crime involvement.

- 7) To provide guidelines on the application of confiscation to legal persons, enhance asset recovery mechanisms, and**

- 8) To define the Public Prosecution Service's civil-law role in asset management.**

The Netherlands underscores the need for further clarification or guidelines on scenarios involving the application of all forms of confiscation to legal persons, especially regarding

indirect effects on assets and conditions for third-party confiscation. Developing more robust mechanisms for asset recovery, particularly in cases of indirect benefit from criminal activities or complex corporate structures, is deemed essential. Additionally, expanding and clearly defining the civil-law role of the Public Prosecution Service in managing assets to prevent criminal involvement could include measures like dissolving legal entities involved in criminal activities and appointing administrators over assets.

9) Clarify liability conditions for legal persons.

10) Increase specialised training for law enforcement and judiciary on corporate crime and asset confiscation.

Poland emphasises the need to clarify conditions of liability for legal persons, particularly regarding organisational fault and identifying responsible individuals, to address practical challenges in attributing liability. Increasing awareness and providing specialised training for law enforcement and judiciary on the complexities of legal persons' liability and asset confiscation is advocated to improve the effectiveness of these measures.

11) Address challenges in applying criminal liability to legal persons by increasing training and considering the inclusion of more crimes, especially in trade and commerce.

Spain's experience with the practical application of the criminal liability of legal persons framework initially proves problematic due to the lack of experience and training among legal practitioners and law enforcement agencies. It suggests that further consideration might be

needed for the inclusion of a wider range of crimes, especially those occurring in trade and commerce.

12) Encourage more Member States to join a European network of practitioners to enhance cooperation and effectiveness in combating corporate crime.

Romania expresses hope for more Member States to join the effort, aiming to create a real European network of practitioners in this matter, thus enhancing cooperation and effectiveness in addressing corporate crime across the continent.

13) Foster less invasive instruments aimed at promoting the therapeutic management of enterprises in compliance with the principle of proportionality.

In this context, the discovery of new types of intervention is gradually getting well-accepted following an approach entailing a ‘therapeutic’ management of enterprises that are temporarily afflicted by criminal viruses/elements. The analysed judicial (compulsory) administration could be an interesting alternative (Article 34 Legislative Decree No. 159/2011) to confiscation, as could the new instrument of judicial control of enterprise (Article 34 bis Legislative Decree No. 159/11). They are less invasive instruments that can sever a company’s ties with crime while, at the same time, maximising the chances of that business’s continued survival. The mechanism of judicial administration (Article 34 Legislative Decree No. 159/11) provides an alternative to traditional ablating measures against enterprises, as a method of intervention against forms of mafia penetration within fundamentally sound and legal. It can be applied for purposes of combating illegality that has not yet reached a level of risk requiring the use of the seizure aimed at confiscation, but that

nonetheless satisfies the appetites of organised crime. In the praxis, the adoption of an organisational, management and control model (compliance program) by the company subjected to judicial administration, is particularly interesting and increases the value of this measure as a robust safeguard against the reiteration of unlawful conduct that need to be reined in.

The new mechanism of Judicial control (Article 34 bis Legislative Decree No. 159/2011) is inspired by an approach that enhances a company's prospects through an intervention from outside the enterprise aimed at facilitating its reinstatement into economic legality, inspired in turn by flexible decision-making models that honour the principle of proportionality and impose the least possible invasion. The judicial intervention pursuant to Article 34, does not give rise to the 'freezing' of the entire governance, but it guarantees the continuity of the management.

In a wider European perspective, the proposal of these alternative instruments to confiscation should be considered as a tool to combat the traditional mafias, which are increasingly 'looking outside' their physical borders. Also, in general, they tackle the infiltration of organised and economic crime in the legal economy. This proposal is inspired, on the one hand, by the principle of proportionality, with a view to ensuring balance between sanctioning response against the weight of the individual action. On the other hand, there is the need to ensure that the entire sanctioning system is rational and flexible, in that it provides a range of measures with appropriate degrees of severity. Ultimately, these instruments are designed to strike the fine balance between the need to repress illegality and the need to safeguard the 'social value' of the enterprise.

14) Ensure full compliance with the principle of mutual recognition and mutual trust.

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As far as it is not expressly forbidden by their national legislations, the Member States, when acting as Executing State – even if it is not expressly allowed by the said legislations – in view of a full compliance with the principle of mutual recognition and mutual trust, should grant the requested freezing/confiscation of legal persons' illicit assets, when such a measure is provided for by the domestic law of the Issuing State.