

Regulation on Freezing and Confiscation Orders

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News

The European Parliament and the Council adopted a regulation on the mutual recognition of freezing orders and confiscation orders. The new legal framework ([Regulation \(EU\) 2018/1805](#)) was published in the Official Journal of the EU of 28 November 2018 (O.J. L 303/1).

The Regulation replaces the provisions of Framework Decision 2003/577/JHA as regards the freezing of property and Framework Decision 2006/783/JHA as of 19 December 2020. It should be noted, however, that the existing framework continues to apply to Denmark and Ireland, which are not bound by the new Regulation.

The Regulation aims at making the freezing and confiscation of criminal assets across the EU quicker and simpler. The reform was considered necessary because the existing pre-Lisbon legal framework was underused and complex. Depriving criminals of their assets is an important tool in fighting organised crime and terrorism. According to a 2016 Europol study, however, only an estimated 1.1% of criminal profits are currently confiscated in the EU.

The legislative proposal was controversially discussed; *eucrim* closely monitored the development of the legislation. See: *eucrim* 4/2016, p. 165 (Commission proposal), and *eucrim* 2/2017, p. 73; *eucrim* 3/2017, p. 117; *eucrim* 4/2017, p. 176; *eucrim* 1/2018, p. 27; and *eucrim* 2/2018, p. 102.

The major “innovation” is that, for the first time, the EU legislator chose a Regulation and not a Directive to govern future cooperation in an area mutually enforcing Member States’ orders. Against the opposition of several Member States (including Germany), which favoured a Directive, the provisions of the Regulation will be directly applicable, thus hindering Member States from implementing the EU instrument into their national legal orders. Recital 53 concedes, however, that “(t)he legal form of this act should not constitute a precedent for future legal acts of the Union in the field of mutual recognition of judgments and judicial decisions in criminal matters.”

The key features of the new Regulation are as follows:

- The scope has been formulated broadly. According to recital 14, “(t)his Regulation should cover freezing orders and confiscation orders related to criminal offences covered by Directive 2014/42/EU, as well as freezing orders and confiscation orders related to other criminal offences.” Thus, the Regulation is not limited to particularly serious crimes with a cross-border dimension.
- It is only decisive that the issuing State issue a freezing or confiscation order “within the framework of proceedings in criminal matters.” On the one hand, orders issued within the framework of proceedings

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Published in
2018, Vol. 13(4) *eucrim* pp 201
– 202

ISSN: 1862-6947

<https://eucrim.eu>



in civil and administrative matters have been excluded from the scope of the Regulation. On the other hand, so-called “non-conviction based orders” must be recognised even if such orders might not exist in the legal system of the executing State (cf. recital 13).

- Grounds for non-recognition and non-execution are provided for in Art. 8 (for freezing orders) and Art. 19 (for confiscation orders). The most hotly debated issue during the negotiations was whether the Regulation should include a (more or less general) refusal ground if fundamental rights were infringed in the issuing state. Germany (in the Council) and the EP favoured the introduction of such a refusal ground; however, the final text was a compromise: Art. 8(1)(f) and Art. 19(1)(h) formulate a refusal ground in the style of the recent CJEU case law in *Arranyosi & Căldăraru* containing a similar refusal ground in cases of European Arrest Warrants. As a result, non-recognition because of fundamental rights infringements will only be possible in exceptional situations.
- The Regulation foresees several time limits for the recognition and execution of the freezing and confiscation orders respectively. They have been designed to ensure quick and efficient cooperation. As regards freezing orders, for instance, the executing authority should start taking concrete measures necessary to execute such orders no later than 48 hours after the decision on the recognition and execution thereof has been taken. The text of the Regulation does not, however, mention any legal consequences in case of delay.
- The Regulation contains only a few rules on legal remedies. In essence, reference is made to national law. According to Art. 33, “affected persons” have the right to effective legal remedies in the executing State against the decision on the recognition and execution of freezing orders pursuant to Art. 7 and confiscation orders pursuant to Art. 18. The right to a legal remedy must be invoked before a court in the executing State in accordance with its law. This also includes challenges against measures during the process of execution of the orders (Art. 23(1)). However, the substantive reasons for issuing the freezing order or confiscation order must be challenged before a court in the issuing State (Art. 33(2)).
- The Regulation pays special attention to the restitution of frozen property to victims. Accordingly, the compensation and restitution of property to victims should have priority over the disposal of frozen or confiscated property (recital 45). The notion of “victim” is to be interpreted in accordance with the law of the issuing State, which should also be able to provide that a legal person could be a victim for the purpose of this Regulation.
- Property claims must be demanded in the issuing State (Art. 29(1)). If there is a decision to reconstitute frozen property to the victim, the issuing authority must inform the executing authority. The executing authority must then take the necessary measures to ensure that the frozen property is restituted to the victim as soon as possible, in accordance with the procedural rules of that State. However, this obligation is subject to three conditions: (1) the victim’s title to the property is not contested; (2) the property is not required as evidence in criminal proceedings in the executing State; and (3) the rights of affected persons are not prejudiced (Art. 29(2)).
- In order for the affected person to assert his/her claims, he/she must be informed by the executing authority on the execution of a freezing or confiscation order (Art. 32). “Affected person” is defined in Art. 2(10) as “the natural or legal person against whom a freezing order or confiscation order is issued, or the natural or legal person that owns the property that is covered by that order, as well as any third parties whose rights in relation to that property are directly prejudiced by that order under the law of the executing State.”

The annexes of the Regulation contain standardized forms for freezing and confiscation certificates, which can be used to ensure that EU states act faster and communicate more efficiently.

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The project is co-financed by the [Union Anti-Fraud Programme \(UAFP\)](#), managed by the [European Anti-Fraud Office \(OLAF\)](#).



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