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# Recent Developments in EU Criminal Law



Annual Conference on White Collar Crime in the EU 2019 – ERA Academy

1. Regulation on mutual recognition of freezing and confiscation orders
2. Directive on the use of financial information
3. EPPO and EIO: what effect on white collar crimes investigations?
4. Proposal to amend the OLAF Regulation

***Regulation 2018/1805 on the mutual  
recognition of freezing orders and  
confiscation orders***

Single instrument for mutual recognition and execution of freezing and confiscation orders



- Very limited recovery rate of criminal assets at EU level
- Improve cross-border cooperation in asset recovery by remedying the shortcomings of the previous legal framework

- **Council Framework Decision 2003/577/JHA** on the execution in the EU of orders freezing property and evidence
- **Council Framework Decision 2006/783/JHA** on the application of the principle of mutual recognition to confiscation orders



## **SHORTCOMINGS:**

- Complicated procedures and unevenly implemented in MS
  - ✓ *Form of regulation for the first time in criminal law*
- Limited scope and obsolete with respect to Directive 2014/43/EU laying down minimum common rules on freezing and confiscation measures
  - ✓ *Broad scope of application*

every type of freezing and confiscation order issued '*within the framework of proceedings in criminal matters*'  
(Art. 1, 2 and Recital 13)

- 1. Freezing orders for the purpose of confiscation** adopted by:
  - A court, judge or public prosecutor
  - Another authority competent under national law with validation of a court, judge or public prosecutor
- 2. Confiscation orders imposed by a court following proceedings in relation to a criminal offence** (not in civil and administrative proceedings)
  - Ordinary criminal confiscation
  - Extended confiscation
  - Third-party confiscation
  - Criminal non-conviction-based confiscation

*Broader than  
Directive 2014/43!*

# Main features of mutual recognition (1)

Structure similar to the European Arrest Warrant:

- **Standard certificate** transmitted directly to the executing authority of the MS where:
  - Reasonable grounds to believe that the person has property or income
  - The specific item of property is located
- **Duty to recognize and execute the order** in the same way as for a domestic order, **according to the law of the executing State**
- **Non verification of double criminality** for a list of 32 offences
- **Exhaustive list of grounds for refusal** (art. 8) and postponement of execution (art. 10)

# Main features of mutual recognition (2)

- **Short deadlines for recognition and execution:**
  - Freezing orders: in cases of urgency, 48 hours for recognition and 48 hours for execution
  - Confiscation orders: 45 days for recognition and execution with same speed as for domestic orders
  
- **Priority to right to restitution or compensation of the victim:**  
where a decision of restitution or compensation has been taken in the issuing State

# What about fundamental rights?

- **Ground for refusal of execution** (Art. 8(f) and 19(e)): if ‘*in exceptional situations*, there are substantial grounds to believe, on the basis of specific and objective evidence that the execution (...) would, in the particular circumstances of the case, entail a *manifest breach of a relevant fundamental right* as set out in the Charter’
- **Obligation of the executing authority to inform the affected person after execution** on the issuing authority, the reasons and the legal remedies available (Art. 32)
- **Legal remedies for affected persons** (Art. 33): before a court but left to national law:
  - Executing State: against the decision to recognise and execute
  - Issuing State: against the substantive reasons for the order (art. 8 Directive 2014/43)

***Proposal for a Directive on  
facilitating the use of financial  
information for the prevention,  
detection, investigation or  
prosecution of certain criminal  
offences***

# Proposal for a Directive on the use of financial information

COM proposal  
of 17 April  
2018



EU Parliament  
position of 17  
April 2019

- Strengthening **access and use of financial information by LEAs and FIUs for prevention, investigation and prosecution of serious crimes** (including asset recovery)
- **Art. 87(2) TFEU**: complements AML preventive framework (4 and 5 AMLDs) with police cooperation measures

1. **Lack or delayed access by LEAs to centralised bank account registry**
  - Established by 5 AMLD: allow identification of any person holding a bank account in the State
  - Only for AML purposes and not immediate direct access
  - Practice of blanket requests to banks
2. **Lack of common rules on exchange of information between FIUs and LEAs – among FIUs**
  - Different structures of FIUs is further obstacle: administrative, judicial or hybrid
  - LEA access to different type of information of FIU
  - Only for AML purposes

# Measures: Access to bank account information

## 1. Access by LEAs to bank account information held in the national centralised bank accounts registry (Art. 4)

- direct and immediate
- for all serious crimes, not only AML

defined by MS, but including:

- Asset Recovery Offices
- tax and anti corruption authorities if criminal investigations competence
- NOT Europol national units: LEAs (and FIUs) shall be entitled to reply to requests from Europol



LEAs

# Measures: national cooperation between FIUs and LEAs

## 1. Requests for financial information by LEAs to FIUs (Art. 7)

- FIUs are ‘required to cooperate and able to reply to requests’: less stringent than in the proposal (duty to reply) to safeguard autonomy of FIUs
- Same exceptions as under 4AML but duty to give a reasoned refusal
- Extended to all serious crimes
- Any type of financial information already held by FIU

## 2. Requests for law enforcement information by FIUs to LEAs (Art. 8)

- For AML purposes
- LEAs are ‘required to reply in a timely manner’

# Measures: international cooperation among FIUs and LEAs

## 1. Exchange of financial information between FIUs (Art. 9)

- Only in exceptional and urgent cases
- Only for terrorism and associated organised crime
- No strict time limits as in the original proposal, only 'promptly'
- No possibility to refuse

## 2. Exchange of financial information between LEAs (Art. 10)

- Financial information obtained from national FIU
- Only for AML and TF

***EPPPO and EIO:***

***What effects on white collar crime  
investigations?***



- Independent EU body established by **Regulation 2017/1939/EU**
- Powers: investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, the criminal offences affecting the financial interests of the EU
- Not exclusive, but shared competence with national authorities

## **Material competence**, art. 22:

- offences under PIF Directive 2017/1371
- Participation in criminal organisation for the purpose of committing PIF offences
- Any other criminal offence 'inextricably linked' to such offences

## **Conditions for exercise its competence**, art 25:

- Damage of minimum 10.000 euro
- If less, only if it has repercussions at EU level or EU officials as suspects

# Opening of investigations: at EU or national level?

- **Exercise of competence by EPPO**, art. 25: initiation of investigation or right to evocation
  - Duty to report to EPPO any criminal conduct
  - Duty to inform EPPO on initiation or existence of investigations at national level
  - Duty on national authorities to refrain from exercising their competence on the same facts
- **Conflicts of jurisdiction**: *Kompetenz-Kompetenz* on national authorities, not EPPO
- **Referral of the case to national authorities**, art. 34: if investigation reveals that offence is outside its competence or conditions to exercise it, or for less serious offences there is no need to prosecute at EU level

- **Directive 2014/41/EU:** unified regime for cross-border evidence gathering in criminal proceedings (also against legal entities)
- Mutual recognition: direct contact between judicial authorities, limited set of grounds for refusal, time-limits, no verification of double criminality for many white collar crimes
- *Forum regit actum:* measure executed according to modalities indicated by IS save for respect of fundamental principles of law of ES
- Specific investigative measures:
  - Bank and financial accounts information
  - Banking and financial operations
  - Real time monitoring of banking and financial operations
  - Interception of communications
  - Freezing orders for evidence purposes

# ***Proposal to amend the OLAF Regulation***

# Proposal to amend the OLAF Regulation



Commission  
Proposal of  
23 May 2018



Parliament  
Position of 16  
April 2019

- **Regulation no. 883/2013:** current legal framework on OLAF's mandate, investigative powers and procedural safeguards
- Objectives:
  1. Adapt the functioning of OLAF to the establishment of the European Public Prosecutor
  2. Enhance the effectiveness of OLAF's investigations

# What role for OLAF after EPPO?

**Complementarity model:** close cooperation and information exchange with aim to avoid duplication of work (regulated also in Art. 101 EPPO Regulation)

1. **Duty to report to EPPO** and preliminary evaluation of allegations (also Art. 24 EPPO Reg)
2. **No parallel investigations:** duty not to open and to interrupt where EPPO is investigating, save for:
  1. **Investigative support at the request of EPPO** (art. 101(3) EPPO Reg): according to OLAF procedural safeguards, not EPPO
  2. **Complementary investigations on its own initiative:** aimed at administrative action in duly justified cases unless EPPO objects
3. **Exchange of information:** reciprocal access to case management systems and consultation mechanisms

# Measures to enhance the effectiveness of OLAF's investigations

- 1. VAT matters are included in OLAF's mandate**
- 2. Law applicable to on-the-spot checks and inspections:** depends on the economic operator's attitude toward the investigative measure
  - Submits to the check : only EU law
  - Resistance: assistance by national authorities is required thus national law is applicable

(GC, T-48/16 *Sigma Orionis*, 3 May 2018)
- 3. Access to bank account information:** FIUs duty to grant access upon OLAF's request (as part of general duty of assistance by MS) in compliance with national law
- 4. Admissibility as evidence of OLAF reports:** principle of assimilation to national administrative reports is replaced by principle of admissibility for administrative and judicial proceedings of non-criminal nature at national and EU level

*Thank you for your attention!*

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