The right of defence under Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders

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Abstract
The article analyses the position of persons affected by the mutual recognition procedures under Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, assessing whether the rights of defence that can be exercised therein are sufficient to effectively safeguard the interests of such persons.

Keywords
Assets recovery, freezing orders, confiscation orders, mutual recognition, defence rights

The political-criminal context
In a wander, even if fleeting, through the world of asset recovery we come across a mantra: crime cannot and must not pay, and the State must attack criminals where it hurts them most, in their profit.1 This is often followed by a lament: the measures and instruments at our disposal have not proved sufficient or effective enough to respond to the political-criminal need to deprive criminals of

1. See, among many others, Katalin Ligeti/Michele Simonato, ‘Asset Recovery in the EU: towards a comprehensive enforcement model beyond confiscation? An introduction’, in Katalin Ligeti/Michele Simonato (eds.), Chasing Criminal Money (Hart Publishing 2017) 1; and Pedro Caeiro, ‘Sentido e função do instituto da perda de vantagens relacionadas com o crime no confronto com outros meios de prevenção da criminalidade reditícia (em especial, os procedimentos de confisco in rem e a criminalização do enriquecimento “ilícito”)’ (2011) 2 Revista Portuguesa de Ciência Criminal, 267, 273–276.
the profits they make from crime since only a tiny part of criminal gains are subject to freezing and/or confiscation. The problem is even more acute in the case of organised and transnational crime. The response to this smart crime must be smart enforcement, including the provision of original measures for the freezing and confiscation of assets, which overcome the restrictions and formal barriers of legal personality and autonomy of individuals and legal entities. Additionally, they must overcome issues surrounding proof of the crime and the criminal origin of assets whose possession is unexplained and inexplicable. This also includes the creation of procedural mechanisms that facilitate and streamline judicial cooperation between states.

All of this, and much more, has been driving national and European laws and treaties and the discourses and doctrinal analyses emerging on the matter. This has led to a proliferation everywhere of procedural and criminal institutes of the most varied order and nature,2 with assumptions and purposes that are also obviously diverse, giving rise to extensive and complex normative domains, where problems are significant and clear but indisputable solutions are scarce. This is why, in a kind of vicious circle, there is a growing body of complaints about the difficulties inherent in this patchwork, especially in terms of the transnational implementation of the political and criminal programme to combat criminal profit. It is in this framework that the regimes established by Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union3 appear to us, and now, additionally, the rules introduced by Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing and confiscation orders (hereinafter, the Regulation).4

2. For instance, ordinary confiscation (conviction based confiscation), extended confiscation, third-party confiscation, value-based confiscation and non-conviction based confiscation – European Commission, Commission Staff Working Document, Impact Assessment, SWD(2016) 468 final, 21.12.2016, p. 9. See Johan Boucht, The Limits of Asset Confiscation On the Legitimacy of Extended Appropriation of Criminal Proceeds (Hart 2017), 27 ff. and 67 ff.; and Jon Petter Rui/Ulrich Sieber, ‘Non-Conviction-Based Confiscation in Europe. Bringing the Picture Together’, in Jon Petter Rui and Ulrich Sieber (eds.), Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction (Duncker & Humblot 2015) 245 ff.

3. For a general approach to this Directive 2014/42/EU and the criminal policy context in which it is embedded, Michele Simonato, ‘Directive 2014/42/EU and Non-Conviction Based Confiscation: a Step Forward on Asset Recovery?’ (2015) 6, 2 NJECL 213–228; Anna Maria Maugeri, ‘La Direttiva 2014/42/EU relativa alla confisca degli strumenti e dei proventi da reato nell’Unione Europea tra garanzie ed efficienza: un “work in progress”’ (2015) 1 Diritto Penale Contemporaneo 300 ff.; and Pedro Caieiro, ‘O confisco numa perspetiva de política criminal europeia’, in Maria Raquel Desterro Ferreira et al. (eds.), O Novo Regime de Recuperação de Ativos à Luz da Diretiva 2014/42/EU e da Lei que a Transpõe (INCM 2018) 21 ff.

4. For an overview of this new Regulation, see Sofia Miranda, ‘Borderless enforcement of freezing and confiscation orders in the EU: the first regulation on mutual recognition in criminal matters’ (2019) Era Forum, https://doi.org/10.1007/s12027-019-00581-x, 2019; Franz Meyer, “Recognizing the Unknown – the New Confiscation Regulation” (2020) EuCLR, 10, 2, 140–170; Anna Maria Maugeri, ‘Il regolamento (UE) 2018/1805 per il reciproco riconoscimento dei provvedimenti di congelamento e di confisca: una pietra angolare per la cooperazione e l’efficienza’ (2019) Diritto Penale Contemporaneo; João Conde Correia, ‘Reconhecimento mútuo de decisões de apreensão e de confisco: o Regulamento (UE) 2018/1805 do Parlamento Europeu e do Conselho de 14 de novembro de 2018’ (2019) 39 Julgar 183 ff.; and Anaúbel Miranda Rodrigues, ‘O Regulamento (UE) 2018/1805, de 14 de novembro de 2018, relativo ao reconhecimento mútuo das decisões de apreensão e perda como pedra angular da cooperação judiciária na União Europeia – eficácia versus direitos fundamentais?’, in M. R. Desterro Ferreira et al. (eds.), Cooperação Internacional para Efeitos de Recuperação de Ativos (Almedina 2021) 34 ff. About the status quo ante, see Matthias J. Borgers, ‘Confiscation of the Proceeds of Crime: The European Union Framework’, in C. King and C. Walker (eds.), Dirty Assets. Emerging Issues in the Regulation of Criminal and Terrorist Assets (Farnham, Ashgate 2014) 27–45, and Juliette Lelieur, ‘Freezing and confiscating criminal assets in the European Union’ (2015) 2 EuCLR 279–303.
As this is the criminal policy line that has been followed by the European Union and the Member States in this field of asset recovery for decades, it is not surprising that the Regulation on the mutual recognition of confiscation orders has been proposed by the European Commission with the following objectives: in general, i) to freeze and confiscate more assets deriving from criminal activities in cross-border cases in order to prevent and combat crime, including terrorism and organised crime and ii) to enhance the protection of victims’ rights in cross-border cases; and specifically, iii) to improve the mutual recognition of freezing and confiscation orders in cross-border cases by extending the scope of mutual recognition instruments, iv) to provide simpler and faster procedures and certificates and v) to increase the number of victims receiving cross-border compensation.5

The subordinate position of those affected

The proposal6 that culminated in Regulation (EU) 2018/1805 was not guided by any objectives linked to the protection of people affected7 by transnational freezing and confiscation actions and the substantive and procedural rights that should be recognised and guaranteed to them. As Franz Meyer puts it, ‘the confiscation regulation treats human rights issues with remarkable non-chalance’.8 This is symptomatic, namely, of a lesser consideration of their interests when compared to the public and private interests (of the victims) that direct the normative program of transnational asset recovery. Since strengthening the protection of the rights and guarantees of people affected by confiscation orders was not raised as an objective to be met by the new Regulation, it is not surprising that this safeguard has been relegated to a secondary level. It essentially boils down to a generic proclamation of some basic rights (right to information, Article 32; right to effective legal remedies in the State of enforcement, Article 33) and the express provision of various (exhaustive) grounds for non-recognition and non-execution of freezing and confiscation orders (Articles 8 and 19, respectively).9 A procedural position of subordination of the people affected by the freezing or confiscation orders is common in the field of international judicial cooperation, despite the fact that it is understood that a triangular relationship develops in which the issuing and executing States and the person concerned participate.10

The comparison between, on the one hand, the rules in the Regulation which are devoted to defining the terms under which requests for recognition and execution of confiscation orders are processed, in a detailed treatment of every step to be taken in the issuing and executing States in order to comply with such requests, and, on the other hand, the rules intended to safeguard the rights

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5. European Commission (n 2) 34.
6. See Malin Thunberg Schunke, Extended Confiscation in Criminal Law. National, European and International Perspectives (Intersentia 2017) 303–321.
7. Here, and in all other references to it in the text, we attribute the expression ‘person affected’ with the meaning contained in the definition set out in Article 2 (10) of the Regulation: “affected person” means 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’.
8. Franz Meyer (n 4) 144.
9. For a similar point of view, but regarding the EIO rules, see Giulio Illuminati, ‘Indagini transnazionali e tutela dei diritti fondamentali’, in M. Guedes Valente (ed.), Criminalidade Organizada Transnacional, I (Almedina 2019) 266 ff.
10. Miguel João Costa, Extradition Law. Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond (Brill Nijhoff 2019) 359 ff.
of people affected by such requests, which are largely programmatic in nature, reveal an imbalance which clearly maximises the chances of recognition and execution of such requests and reduces the opportunities for defence and adversarial proceedings for those affected and the effectiveness of their exercise, an imbalance that is not compensated by other standards that address this protection deficit.11

It is on this gap that we will focus our attention.

We will not discuss the specific circumstances provided for in the Regulation, which may prevent the recognition and execution of requests for freezing or confiscation addressed by the issuing State to the executing State, and which may be invoked by the person affected when he or she wishes to oppose the recognition and execution requested, using the available legal remedies (e.g. oppositions, claims, appeals and pleas of invalidity).12 When notified of recognition and execution of a confiscation order, the person concerned may have an interest in opposing recognition and execution in the executing State, arguing that the application may be formally inconsistent with the applicable rules and that there may be circumstances giving rise to grounds for non-recognition under the Regulation (Articles 8 and 19).13 These grounds include the following: the violation of the principle ne bis in idem14 [Articles 8(1)(a)) and 19(1)(a))]; the existence in the legal system of the executing State of a privilege or immunity capable of preventing the freezing or the confiscation of the property in question [Articles 8(1)(b)) and 19(1)(b))]; in exceptional situations, the manifest infringement of a relevant fundamental right as set out in the EU Charter of Fundamental Rights (CFREU), in particular the right to an effective remedy, the right to a fair trial and the right of defence [Articles 8(1)(f)) and 19(1)(h))];15,16 the rights of affected persons would make it impossible under the law of the executing State to execute the confiscation order, including where that impossibility is a consequence of the application of legal remedies in accordance with Article 33 [(Article 19(1)(e))]; the person against whom the confiscation order was issued did not appear in person at the trial that resulted in the confiscation order linked to a final conviction, unless certain circumstances are met (Article 19(1)(g)).

The viability of opposition to the freezing or the confiscation of assets, in the states involved in the procedure, depends not only on the provision of grounds that may be opposed to these decisions,
but also, of course, on the very existence of procedures and mechanisms that the person affected may resort to in order to assert his interests: the so-called effective remedies, required by Article 47 of the CFREU, Article 6 of the ECHR, Article 8 (1) of the Directive 2014/42/EU, Article 33 of the Regulation, etc. This is what we will focus on, in order to assess whether the means of defence available to those affected and the procedural rights guaranteed to them by the European legislation are suitable to ensuring the \textit{right to an effective defence} in transnational cases of asset recovery.

As we have already seen, the people affected include those suspected of committing the crime from which the seized or confiscated property was derived. It also includes third parties who have no connection with the crime but who own or possess the asset in question. According to Article 6 (1) of the Directive 2014/42/EU, property owned or possessed by a third person may be seized or confiscated if transferred by a suspect or accused person to a third party, or if was acquired by the third party from a suspect or accused person, at least if that party knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, based on concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly below the market value.\footnote{See Isidoro Blanco Cordero, ‘Modern Forms of Confiscation and Protection of Third Parties’, in Katalin Ligeti/Michele Simonato (eds.), \textit{Chasing Criminal Money} (Hart Publishing 2017) 139 ff.}

In the case of defendants and suspects, since the recovery of assets will normally take place in the context of criminal proceedings seeking to establish their criminal responsibility, they can normally oppose seizure and confiscation measures in that same procedure. Much of the defence they may use to defend themselves against criminal charges may also be useful in challenging seizure and confiscation.

The position of third parties is more delicate, as they will not normally be a party to the criminal proceedings, and their involvement in these proceedings is only justified because they hold, or appear to hold, rights over property that has been seized or confiscated. The basic rights that should always be guaranteed when there is an attack on property, in particular, the right to be heard and the right of access to a court,\footnote{Meyer (n 4) 152.} must be ensured. This is so that if they wish, they can contest the legality of the measure and its execution, contest the connection between the affected property and the crime or claim their bona fide. Such rights should be exercised within a legally defined procedure that takes due account of the special position, and difficulties, in which these third parties find themselves.

\section*{Procedural rights recognised by the Community acquis and wishful thinking concerning them}

There is a common justification for the absence in the Regulation of rules specifying the rights of defence in the context of the various procedures defined therein (for instance, by creating a specific defence procedure integrated into the processing of the recognition and the execution of confiscation orders which take place in the executing State): the rules laid down by the Directives that guarantee defendants and suspects in criminal proceedings minimum standards of procedural rights are enough to protect them in these freezing and confiscation orders. These are the rights provided for in Directives on the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU), the right to information in criminal proceedings (Directive 2012/13/EU), the right of access to a lawyer in criminal proceedings (Directive 2013/48/EU), the presumption of innocence and the right to be present at the trial in criminal proceedings (Directive (EU) 2016/343), the procedural
safeguards for children who are suspects or accused persons in criminal proceedings (Directive (EU) 2016/800) and the legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (Directive (EU) 2016/1919). Since Member States are required by these Directives to adopt a range of minimum safeguards to ensure that the procedural status of defendants and suspects in criminal proceedings is consistent with the requirements of due process under the rule of law, it is accepted that this will be sufficient to ensure effective legal remedies and due process for persons affected by the recognition and execution of confiscation orders under the Regulation.\footnote{European Commission, \textit{Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders}, Brussels, 21.12.2016, COM(2016) 819 final, SWD(2016) 468 final, p. 10.}

However, it seems to us that this position is not only over-optimistic, but even reductive.

1. To consider that the procedural rights of the people concerned are adequately protected by the fact that they already form part of the Community acquis is, in our view, wishful thinking in that it ignores the very real distance between Brussels and the offices of public prosecutors and judges in the Member States in cases where EU legislation is not effectively and properly transposed into national law or where, even though it is generally accepted in legislation, it is not spelt out in precise rules designed to regulate a given procedure.

To illustrate what we mean, some examples of the praxis in the field of asset recovery will suffice:

a) Let us begin with two cases drawn from the Bulgarian experience, brought to the attention of the ECtHR and CJEU: the case of \textit{Ünspeed Paket Servisi san. Ve Tic. A.Ş. vs. Bulgaria}, decided by the ECtHR’s judgment of 13.10.2015 (complaint no. 3503/08); and the \textit{OM} case, the subject of a preliminary ruling referral decided by the CJEU in its judgment of 14.01.2021 (case C-393/19).

In the first case, in 2007, it was a drug trafficking crime and in the second case, in 2018, it was a smuggling crime, committed by transport company drivers, without the knowledge of these companies. When the illegal loads (of drugs in the \textit{Ünspeed} case and antique coins in the \textit{OM} case) were discovered on the border between Turkey and Bulgaria, the Bulgarian authorities proceeded to seize the trucks, as they were instruments of the crimes in question, without giving the companies that owned the trucks the opportunity to intervene in the proceedings, so as to contest and challenge the decisions undermining their right to property.

Hence, the ECtHR concluded as follows: ‘the Court finds that the applicant company bore an individual and excessive burden which could have been rendered legitimate only if it had had the opportunity to challenge effectively the forfeiture of its property resulting from the criminal proceedings to which it was not a party; however, the applicant company had no such opportunity and therefore the fair balance which should be struck between the protection of the applicant’s right to property and the requirements of the general interest was upset, in violation of Article 1 of Protocol No. 1 to the Convention’ (47).

This 2015 ECtHR decision, at a time when Directive 2014/42/EU had already been published in the Official Journal of the European Union,\footnote{See Article 8 (9) of the Directive 2014/42/EU: ‘Third parties shall be entitled to claim title of ownership or other property rights, including in the cases referred to in Article 6’.} seems not to have been sufficient to change the Bulgarian praxis of denying access to courts to third parties affected by seizures and confiscation of
instrumentalities of crime. An identical situation to the Unsped case occurred again in the OM case in 2018, with the Bulgarian Court of Appeal even feeling the need to make a preliminary reference to the CJEU, which ultimately stated the obvious: ‘62. In that regard, it must also be noted that, under the first and second paragraphs of Article 47 of the Charter, everyone whose rights and freedoms guaranteed by the law of the European Union have been violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article and inter alia is entitled to a fair hearing. 63. In particular, the right to an effective remedy means that a third party whose property has been confiscated must be entitled to challenge the legality of that measure in order to recover that property where the confiscation is not justified. 64. In the present case, the referring court stressed in its order for reference that a third party whose property has been the subject of a confiscation measure has no direct access to justice under national legislation, with the result that he or she is not able to assert his or her rights effectively. 65. In those circumstances, it must be held that, in a case such as that in the main proceedings, a third party whose property is confiscated is deprived of the right to an effective remedy’.21

This Bulgarian reality shows a total disregard for the right of access to a court, on which all other rights depend. This is a reality that has persisted despite the clear proclamations of numerous European Union texts and has even been the target of censure by international courts, as happened in the Unsped case.

b) Let us continue with two Portuguese examples, which are nevertheless much less shocking than the Bulgarian ones. We are thinking about procedural practices of the Portuguese judicial authorities that show little concern for the protection of the interests of persons affected by asset recovery procedures. One of them is the frequent exceeding of the maximum time limit of 30 days established by Article 219 (1) of the Portuguese Criminal Procedure Code for the decision on appeals of orders applying to asset guarantee measures. It is a provision that seems to be a dead letter, given its systematic non-compliance by the Courts of Appeal, without there being any news of disciplinary consequences for those who infringe the legal deadline. Another is the delay, also common, in notifying people affected by seizures and distraint. It is not uncommon for those affected to learn of such procedures, not through judicial proceedings, but by outside agencies, waiting for months before the competent judicial authority deigns to order them to be notified of the elements of the case in order to gather a precise knowledge of what has been decided and carried out and to be able to react procedurally. If, in this field, even national rules are not being seen as imperative injunctions that must be obeyed within the strict terms legally prescribed, but as a kind of guideline that must be complied with as and when appropriate, it is purely naïve to be reassured about respect for the rights of those affected by the fact that they benefit from the provisions of European Union Directives.

In a less benign view, one might even oppose this assumption with the idea that the enshrining of procedural rights in such Directives ends up paving the way for procedural mechanisms based on mutual recognition that are increasingly aggressive towards people’s fundamental rights, on the assumption that, under positive law, they will enjoy the means of defence proper to a fair trial.

21. The CJEU therefore concluded that: ‘whether Article 4 of Framework Decision 2005/212, read in the light of Article 47 of the Charter, must be interpreted as precluding a national law which permits the confiscation, in the context of criminal proceedings, of property belonging to a person other than the person who committed the criminal offence, without the former being afforded an effective remedy’.
without, however, subsequently having to check whether they are in fact in a position to materialise in the real life of proceedings.\footnote{22}

2. The confidence that the procedural rights of those concerned are safeguarded by the said Directives still seems to us to be the result of a perspective that seeks to attribute to these Directives a projection and an effectiveness that they are not in a position to have in this context of judicial cooperation for the recovery of assets. This is why we say that this is a reductionist position.

Indeed, one need only think of the parallel which can be drawn between those Directives aimed at protecting the procedural rights of defendants and suspects in criminal proceedings and the legal regimes which the European Union has set up for asset recovery.

It should be recalled that, since the 2000s, several European Union texts have been in force to enable the mutual recognition of freezing and confiscation orders, in particular Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence; Framework Decision 2006/783/JHA on the application of the principle of mutual recognition of confiscation orders; and Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU. However, it was concluded that this ‘regime for the mutual recognition of freezing orders and confiscation orders is not fully effective’\footnote{23} and that ‘Framework Decisions have not been implemented and applied uniformly in the Member States, which has led to insufficient mutual recognition and sub-optimal cross-border cooperation’\footnote{24}.

Now, if even the existence of framework decisions was not sufficient to promote effective judicial cooperation in this field – and it was therefore necessary to use a legislative instrument directly applicable to the Member States, namely, the Regulation – on what basis can it be assumed that the Directives on procedural rights will be sufficient to guarantee an effective right of defence to persons affected by confiscation orders? It was understood that the effectiveness of this transnational asset recovery regime would require a Regulation. And the Regulation that was approved does justice to the nomen juris it bears: by providing in a detailed manner all the procedures inherent to requests for recognition and enforcement of freezing and confiscation orders, it is in fact a regulation in the material sense of the term. A Regulation that has a \textit{dynamic applicative vocation}, aiming, as the procedural regulation that it is, to confirm the course of the procedure. It therefore contrasts substantially with the \textit{static}, general prescriptive statements which embody a large part of the content of the procedural rights enshrined in the Directives. This casts doubt on the ability of those rules, which, moreover, need to be transposed, to ensure an effective opportunity to defend oneself.

Of course, this fear can always be countered by the existence of procedural defence mechanisms included in the Regulation of procedures aimed at the freezing and confiscation of assets that are legally provided for in both the issuing State and in the executing State. As a rule, the issuing States, the ones where the affected person will be able to discuss the substantive reasons behind the issuing

\footnote{22} See Miguel João Costa, ‘Comentário à proposta de Directiva do Parlamento Europeu e do Conselho relativa ao apoio judiciário provisório para suspeitos ou arguidos privados de liberdade e ao apoio judiciário em processos de execução de mandados de detenção europeus (COM(2013) 824 Final)’, in Pedro Caeiro (ed.), \textit{A Agenda da União Europeia sobre os Direitos e Garantias da Defesa em Processo Penal: a ‘segunda vaga’ e o seu previsível impacto sobre o direito português} (Instituto Jurídico 2015) 65 <www.uc.pt/fdjc/i/areasinvestigacao/pdfs/ebook_1_comentarios.pdf>

\footnote{23} Recital 6 of Regulation (EU) 2018/1805. See also Katalin Ligeti/Michele Simonato (n 1) 12 f.

\footnote{24} Recital 6 of Regulation (EU) 2018/1805.
of a freezing and/or confiscation order [Article 33 (2) of the Regulation], will have a procedural regime that will take into consideration the rights of the affected person, ensuring the individual of the conditions to assert their interests and defend their rights. The same will apply to the executing State, which will certainly not fail to provide the means of defence to which interested parties may have recourse in order to react to the execution of such requests [Article 33 (1) of the Regulation].

However, this possible counter-argument overlooks the fact that the legal remedies provided for in the legislations of the issuing and executing States, applicable to such procedural issues of a transnational nature, are not, as a rule, designed and regulated in this light, and are therefore not usually designed to respond to the specific and difficult problems that the transnational nature of the case is likely to raise. As the means and rights of defence of those targeted are designed for a national context, it will not always be easy to extend and reconfigure them to ensure effective protection of their interests when the case crosses national borders and involves the intervention of two or more jurisdictions. This need to reconfigure the rules and procedures of national law to accommodate a transnational procedure for the recovery of assets is, naturally, a factor of uncertainty and insecurity, giving rise to arbitrariness in the definition of the specific defence safeguards available to those affected.

Naturally, none of this is good for a full and effective exercise of the defence. If there is one thing that a person subject to criminal proceedings needs, in order to defend his or her interests, it is foreseeability. For this to happen, clear and precise rules are essential, on the basis of which shall be possible to know precisely which means of opposition and appeal are available (and unavailable), the relative deadlines and formalities, etc. All this is essential, first of all, in order to draw up a defence strategy and then to implement it. Nothing, therefore, that is compatible with open and uncertain regulations of the right of defence. These demands are exacerbated in an area such as this, where, by the very (transnational) nature of things, those affected tend to find themselves in a more difficult position to act in defence of their interests than in a typical purely national case.25 It is important to bear in mind the normal diversity of the languages of the proceedings and of the documents which must be submitted to them, the great geographical distance which may separate the person concerned from the place where the main proceedings take place and the frequent need to have recourse to several lawyers from the countries in which the request for cooperation is made and from which it is executed. This already complicated situation could become even more difficult as a result of the uncertainties arising from a lack of specific regulation of the means of defence they can rely upon.

**Legal remedies in the executing State**

It is for the executing State to choose the type of (national) procedure to be adopted to execute the request for recognition and execution of the confiscation order received: ‘The execution of the freezing order or confiscation order shall be governed by the law of the executing State and its authorities shall be solely competent to decide on the procedures for its execution and to determine all the measures relating thereto’ [Article 23 (1) of the Regulation].

If the law of the executing State does not have a system of freezing or confiscation such as that to which the issuing State’s request relates, the procedure to be followed must be the one which, having regard to its object, purpose and nature, is most similar to the one whose recognition and

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25. See Vânia Costa Ramos/Michiel Luchtman-Geanina Munteanu, ‘Improving defence rights. Including available remedies in and (or as a consequence of) cross-border criminal proceedings’ (2020) 3 *eucrim* 230, 235 ff.
enforcement is sought by the issuing State. The affected person must be made aware of the procedure that has been followed when the time comes to notify him of the execution of the request [Articles 11 (2) and 32 (1) of the Regulation].26 Such communication must clearly state the legal basis in the positive law of the executing State considered in order to comply with the issuing State’s request, as well as ‘the legal remedies available under the law of the executing State’ [Article 32 (2) of the Regulation].

If the Regulation is complied with, we believe that the position of the defence will be duly safeguarded in this respect since it will be able to rely on an unequivocal indication of the procedural means of defence available to it. For this to happen, the authority of the executing State must adopt a procedural framework already provided for in its legal system, including cases where there is no homology between the type of freezing or confiscation ordered in the issuing State and the modalities of asset recovery legally provided for in the executing State. The ad-hoc creation of a procedural right without legal backing is not acceptable, as it may generate an indeterminacy that compromises the exercise of the right to defence.

Legal remedies in the issuing State

Our positive assessment of the protection of the position of the defence with regard to the definition of the means of reaction to be recognised in the executing State and the information to be provided on these, which we consider to be sufficiently safeguarded by the Regulation, is not repeated when we look at the issuing State and the regulatory treatment given in the Regulation to these two aspects, which are of great importance to the exercise of the defence.

The Regulation follows the guiding idea that ‘each State will be able to judge challenges to decisions for which it has primary decision-making competence, in accordance with the division of tasks characteristic of international cooperation – issue vs. recognition and enforcement’.27 Consequently, it determines that ‘the substantive reasons for issuing the freezing order or confiscation order shall not be challenged before a court in the executing State’ [Article 33 (2)]. It is, therefore, in the issuing State that the affected person will be able to oppose such decisions when he intends to question them on this fundamental level. That is where the bulk of the discussion that the person concerned wishes to open in order to avoid consolidation of the apprehension and/or loss with which he or she is confronted will tend to take place.

Despite this, the fact remains that the Regulation leaves the person concerned in a state of uncertainty since it makes no mention whatsoever of information which is essential for the exercise

26. See also Recital 39 of the Regulation ‘After the execution of a freezing order, and following the decision to recognise and execute a confiscation order, the executing authority should, in so far as possible, inform affected persons known to it of such execution or such decision. To that end, the executing authority should make every reasonable effort to identify the affected persons, verify how they can be reached and inform them of the execution of the freezing order or of the decision to recognise and execute the confiscation order. In carrying out that obligation, the executing authority could ask the issuing authority for assistance, for example, where the affected persons appear to reside in the issuing State. The obligation under this Regulation for the executing authority to provide information to affected persons is without prejudice to any obligation of the issuing authority to provide information to persons under the law of the issuing State, for example, regarding the issue of a freezing order or regarding existing legal remedies under the law of the issuing State’.

27. Vânia Costa Ramos (n 12) 120, with regard to the EIO, in a rationale – the division of roles in the means of appeal against an EIO should also mirror this division [of jurisdiction between issuing (MS and executing MS) (Zimmerman, apud VÂNIA COSTA RAMOS, idem, note 21) – fully transposable to the field of asset recovery.
of the defence in the issuing State, thereby creating disorientation in precisely the areas in which the need for certainty is felt most: it is ambiguous regarding the notification to the person affected of the confiscation and/or freezing order issued by the issuing State; it does not impose a duty to communicate to the person affected of the legal remedies available in the issuing State to challenge the order; and it creates doubt as to the starting point of the period for challenging the order.

The Regulation says little about the notification of the confiscation and/or confiscation order originally taken in the issuing State. It is unclear whether the executing State must provide the affected person with a copy of the order itself. Article 32 instils the idea that it does not: the executing State must inform any affected persons it knows of such a decision [Article 32 (1)], and the information shall ‘also specify, at least in a brief manner, the reasons for the order’ [Article 32 (2)]; such a specification would not be necessary in the first place if there was a duty to provide them with a full copy of the decision. It is also doubtful whether there is an obligation on the issuing State to notify the decision, and this important point is only addressed in the recitals, in an ambiguous manner: ‘The obligation under this Regulation for the executing authority to provide information to affected persons is without prejudice to any obligation of the issuing authority to provide information to persons under the law of the issuing State, for example, regarding the issue of a freezing order or regarding existing legal remedies under the law of the issuing State’ (Recital 39).

This vagueness leads to a further imprecision as to the time at which notification must take place: if it is understood, nevertheless, taking into account what is determined by Article 8 (2) and (6) of the Directive 2014/42/EU, that the issuing State is obliged to notify the person affected of the confiscation and/or freezing order issued against him there, at what point in time must he do so? As soon as he is informed by the executing State that the order has been recognised and enforced [see Articles 9 (4) and 18 (6) of the Regulation] or only afterwards, once the proceedings opened in the executing State have been concluded?

To make matters worse, there is no express obligation to inform the person concerned of the procedural means of challenging the decision in the issuing State, of the time limits and of the starting points of these time limits.

Let us finally put ourselves in the shoes of a Portuguese citizen whose house in Portugal has been frozen by a Latvian court because it was a property that belonged to a real estate investment fund that was nothing more than a front company for laundering the criminal proceeds of a criminal organisation operating in the Baltic countries. Having purchased the house in good faith, this citizen will try to show his bona fides: that he was completely unaware of the association of the property with a criminal scheme; that he had no reason to suspect such a criminal connection; that a payment was in fact made in compliance with the purchase and sale contract, etc. To that end, he will be in his interest to present his version of the facts, attach documents, call witnesses, etc. First of all, however, he and his lawyer must know and understand the content of the decision of ordering the freezing and before whom, in what form and up to when he must present his reasons. None of this is answered in the Regulation. Must the person concerned wait for notification from Latvia and only then lodge his formal opposition with the Latvian authority competent to hear his defence? A wait that may be troubled by this doubt: but what if the time-limit for reacting is already running, having begun with the notification of the execution of the freezing decision promoted by the Portuguese State, could such a wait not entail the loss of the time-limit for defence?

28. With a similar critique under EIO, André KLIP, European Criminal Law (3rd ed., Intersentia 2016) 470.
Those doubts and questions, which are linked to the minimum conditions for the informed and effective exercise of the right of defence, show that the gaps and the vagueness of the Regulation with regard to remedies in the issuing State make it fall substantially short of what is necessary to ensure effective protection of the interests and procedural rights of the persons concerned.29

The limited scope of the Procedural Rights Directives

In addition to the above, the defence of the persons affected in these transnational cases of asset recovery may face major difficulties in aspects that are decisive for their effective exercise, namely, those related to the linguistic comprehension of procedural acts and documents relevant to the freezing and/or confiscation order and its execution, to access to the respective records, to the hiring of lawyers with technical and linguistic skills to act in the relevant jurisdictions and to the cost of such legal assistance. Affected persons may not be able to rely on the protection afforded by the procedural rights Directives to cope with these difficulties. They will therefore be dependent on the alea of an eventual protection granted by the national rights of the States involved.

It should be noted that the Regulation does not go so far as to determine the applicability of the acquis of rights and procedural safeguards contained in those Directives to the recognition and enforcement procedures it provides for. Reference to those Directives is made only in the recitals and only to acknowledge the obvious, that those Directives are applicable to the criminal proceedings in which these asset recovery proceedings take place.30

Nevertheless, there remains the possibility that the Directives themselves contain rules which must apply to these asset recovery procedures, to which the persons concerned may have recourse even if they have not been correctly transposed in due time into the national law of the States concerned, by means of the application of the principle of vertical direct effect.31

In this respect, it should first be noted that some of these Directives contain provisions specifically aimed at a judicial cooperation procedure between Member States, namely, that concerning the execution of European Arrest Warrants. This is a sign that the European law has accepted the idea that the transnational nature of this procedure raises specific problems which also require specific legislative solutions. As we have seen, the same may be understood as regards to the transnational asset recovery procedures provided by the Regulation. However, this has not resulted in a normative intervention, for example, in the Regulation itself, to provide for the applicability of these procedural rights in asset recovery transnational procedures and to regulate the terms under which they should apply. This could result in the inapplicability of certain procedural rights under the Directives to those procedures.

In fact, the subjective and objective scope of application of those Directives far from covers all the persons affected by such procedures and the procedurally relevant issues which may arise therefrom.

As a rule, the Directives’ regimes enshrining procedural rights in criminal proceedings do not cover an important core of persons affected by asset recovery decisions, namely, those who are not

29. Further critical objections in Meyer (n 4) 167 ff.
30. Recital 18: ‘The procedural rights set out in Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, (EU) 2016/343, (EU) 2016/800 and (EU) 2016/1919 of the European Parliament and of the Council should apply, within the scope of those Directives, to criminal proceedings covered by this Regulation as regards the Member States bound by those Directives’.
31. See Case 41–74, van Duyn v. Home Office [1974] ECR 1974-01337, and Sacha Prechal, Directives in EC Law (2nd edn, OUP 2005) 216 ff. and 241 ff.
defendants or suspects in the respective proceedings but who are in any case the owners of the assets covered by them or holders of rights relating to those assets which are adversely affected by them. In fact, these Directives invariably concern the rights of persons suspected or accused of having committed criminal offences, \(^{32}\) and, therefore, leave outside their scope of protection property owners and other third parties who are not themselves targets of criminal suspicion in such proceedings. Even when it comes to confiscation orders affecting the property of suspects or accused persons, they will not always be recognised as having rights in general provided by these Directives. This is notably the case for the right to legal aid where they are not deprived of liberty and are not required to be assisted by a lawyer in accordance with Union or national law \([\text{Article 2 (1) of the Directive (EU) 2016/1919}].\)

Even those who already have a procedural status that places them under the Directives – because they are suspects or accused persons in the criminal proceedings pending in the issuing State and in connection with which a request for judicial cooperation for recognition and execution of a freezing and/or confiscation order is made – may be confronted with the objection that certain procedural rights provided for in the Directives will not apply in the context of asset recovery, even if they may be decisive for the effective exercise of the right of defence. \(^{33}\) This is the case, for example, without claiming exhaustiveness, of the right to (free\(^ {34}\)) interpretation of communications between the affected person and his lawyer, if it is considered not to be necessary to guarantee the fairness of the proceedings; \(^{35}\) the right to (free\(^ {36}\)) translation of the procedural documents and documentary evidence which form the basis of the confiscation order, when they do not take the form of an indictment or judgment and are considered non-essential documents for safeguarding the possibility of exercising the right of defence and ensuring the fairness of the proceedings; \(^{37}\) the right of access to material in the file which is decisive for the confiscation order, in the event that the file is subject to judicial confidentiality; \(^{38}\) the right to receive general information to facilitate the hiring of a lawyer; \(^{39}\) and, as mentioned above, the right of a State party to the proceedings to finance the assistance of a lawyer necessary for the exercise of the right of access to a lawyer (legal aid).\(^ {39}\)

**Conclusion**

Regulation \((\text{EU}) 2018/1805\) was a further step along a path that the European Union has been treading for decades so that Member States are not left to their own devices in the difficult and

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32. See \(\text{Article 1 (2) of the Directive 2010/64/EU (interpretation and translation), Article 1 of the Directive 2012/13/EU (right to information), Articles 1 and 2 (1) of the Directive 2013/48/EU (right of access to a lawyer), Article 2 of the Directive (EU) 2016/43 (presumption of innocence and right to be present at trial) and Article 1 of the Directive (EU) 2016/1919 (legal aid).}\)

33. For further developments, albeit on a more general level, Vânia Costa Ramos/Michiel Luchtman/Geanina Munteanu \((\text{n.25}) 235 \text{ ff.}\).

34. \(\text{Article 4 of the Directive 2010/64/EU. See Maciej Fingas, ‘The Right to Interpretation and Translation in Criminal Proceedings – Challenges and Difficulties Stemming from the Implementation of the Directive 2010/64/EU’} \text{(2019) 9, 2, EuCLR 175 \text{ ff.}\)}\)

35. \(\text{Article 2 (2) of the Directive 2010/64/EU.}\)

36. See again \(\text{Article 4 of the Directive 2010/64/EU.}\)

37. See \(\text{Article 7 (Right of access to the materials of the case) of the Directive 2012/13/EU, applicable only to suspects or accused persons deprived of their liberty, for challenging the lawfulness of arrest or detention.}\)

38. \(\text{Article 3 (4) of the Directive 2013/48/EU.}\)

39. \(\text{Article 4 of the Directive (EU) 2016/1919.}\)
crucial task of recovering assets with links to crime. This is a step towards strengthening, clarifying and streamlining the mechanisms for judicial cooperation between the Member States, with the basic aim of creating the conditions for freezing and confiscating more and more assets from criminal activities in transnational cases. And rightly so.

This effort, which will inevitably lead to an increase in transnational actions for the recovery of assets, hitting more and more people in an increasingly aggressive way, has not, however, been accompanied by a strengthening of the procedural rights they should be equipped with in order to be able to confront and challenge them. While it cannot exactly be said that they have been abandoned to their fate, it is perhaps not rash to consider that they have been abandoned to whatever fate the Member States decide to reserve for them, with all the risks of inherent asymmetries and disparities. We fear that the acquis communautaire applicable in this area is not always sufficient to guarantee that they are assured the means and prerogatives of defence necessary to ensure that their remedies are effective. This risk arises for two main reasons: firstly, the limited scope of the Directives on procedural rights since they do not cover third parties (in the sense of the Article of 6 of the Directive 2014/42/EU) and the rights set out therein do not always have to apply in the sphere of asset recovery; and secondly, the lack of provision in the Regulation itself for rules clearly prescribing the terms required to present a defence to the issuing State.

It is therefore hoped that in the report on the application of the Regulation that the European Commission has been asked to present by 2025 there will be real scrutiny of ‘the interaction between the respect for fundamental rights and the mutual recognition of freezing orders and confiscation orders’, one of the points on which the report should focus (Article 38(b) of the Regulation), and that this analysis will not be seen as a mere formality to be completed. It is also hoped that, if it is found that these risks are materialising in a significant way, the European Union will, without delay, take the necessary legislative measures to ensure that the means of redress in this area are in fact effective, as is required.

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