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PROCEDURAL ASPECTS OF FREEZING IN EUROPE. A COMPARATIVE ANALYSIS

Table of content: 1. Introduction: 1.1. Freezing in the criminal policy of the EU. 1.2. Interest and difficulties of the comparison. 2. Physionomy of the procedures: requirements for the use of freezing. 2.1.Convergence of national frameworks: a relative increase in similarities. 2.1.1. The concept of freezing. 2.1.2. The legal framework for freezing: a reflection of national procedures. 2.2. Divergence of national frameworks: the persistence of differences. 2.2.1. The variety of special frames. 2.2.2. The competent authorities. 3. Remedies and guarantees: safeguards against the use of freezing. 3.1. The application of general guarantees. 3.2. Specific guarantees. 3.2.1. Enforcement of a freezing order. 3.2.2. Challenging a freezing order.

1. Introduction

1.1. Freezing in the criminal policy of the EU

While European law enforcement systems have long had "freezing", and in particular "seizure" mechanisms, the approach of such a measure consisting in temporarily placing assets under the control of justice has been profoundly renewed at international[1] and European level over the last twenty years. At the international level, several instruments have led to the development of seizures for the purpose of confiscation in the Member States. At EU level, the field of seizures has been – as a continuation of the field of confiscations – one of the 'privileged areas'[2] where EU law and criminal law have been brought together.

As a result of the desire to bring the fight against crime to the patrimonial (economic) field, such a strategy has led national and European legislators to develop and enhance the use of the confiscation measure. To this end, seizures have quickly become an essential tool, i.e. serving no longer only as measures at the service of the truth (probational function), but also (and above all) as measures ensuring the enforcement of confiscations that may be ordered at the end of criminal proceedings, whether they are proceedings conducted within the national framework or those conducted in another Member State of the Union. Indeed, according to the now famous formula, in order to ensure that the 'crime does not pay',[3] the confiscation measure had to be incurred more

[1] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna 1988), United Nations Convention against Transnational Organized Crime (Palermo, 2000), United Nations Convention against Corruption (Merida, 2003). At the level of the Council of Europe: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 1990).

[2] Lionel Ascensi, *Droit et pratique des saisies et confiscations 2019-2020*, Dalloz, 2019, 00.005.

[3] Communication from the Commission to the European Parliament and the Council - Proceeds of organised crime : ensuring that 'crime does not pay', COM/2008/0766 final.

frequently. However, in order to ensure that such a measure is effectively implemented, it was necessary to organise the placing under judicial control (and the management) of confiscable assets from the pre-trial phase of the criminal proceedings. Convinced of the crucial role played by an effective link between confiscation and seizure, national and European legislators have been driven to promote the deployment of mechanisms designed to organise, facilitate and consolidate this link.
This general context, drawn up briefly, already points out all the interest but also all the difficulties of comparing the legal systems, and, in this case, the German, Belgian, French, Italian, Dutch and Romanian systems.

1.2. Interest and difficulties of the comparison.

On the one hand, the increasing attention and renewed approach of national lawmakers towards seizure has led to numerous and recent transformations of the applicable legal frameworks, which has led to a relative instability or uncertainty in the analysis and comparison. On the other hand, while the objective of this collective research - dedicated to confiscation measures in Europe - requires isolating and focusing attention on the legal mechanisms that organise the freezing and confiscation relationship, the fact remains that domestic systems are not designed in this way and, on the contrary, mix various provisions that are both specifically founded and activated by this link and more generally applicable to all types of seizure. In other words, the main difficulties include legal frameworks that have sometimes been built up in successive layers as national texts have been reformed and European instruments transposed, without, in particular, the different types of seizures and procedures being distinguished according to a clear and common criterion; in particular, without the criterion of the purpose of the seizure (probative, compensatory, patrimonial, etc.) constituting the distinctive criterion. These difficulties do not in any way detract from its interest in the comparison, quite the contrary. This is all the more so as the Union has recently adopted the first Union regulation in this field in criminal matters.[4] The comparison thus makes it possible to evaluate recent changes and anticipate the promised transformations while placing them within the framework of the Union's criminal policy, whose ambitions, failures and successes (real or potential) are thus usefully revealed.

It is true, however, that these difficulties require a delicate exercise. What is required is to unravel complex legal frameworks, the complexity of which is fuelled by several and combined factors. First, as mentioned above, the complexity results from the fact that the applicable provisions and standards are not only recent but also evolving – as further amendments are expected as a result of the entry into force of the Regulation. Second, it then results from the regular extension of the scope of freezing procedures, due, on the one hand, to the broadening of the concept of freezing itself within EU law (whether in terms of the type of procedure likely to be included, the procedural framework or the competent authorities concerned) and, on the other hand, to the broadening of the scope of the freezing (as the scope of the confiscation expands). Finally, the complexity results from a weak harmonisation strategy undertaken by the Union, so that the internal diversity

[4] Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders (OJ EU| L 303/1).

of national procedures[5] is maintained or even reinforced while no rationalisation is undertaken.

It is this ambition to go beyond the acknowledgement of complexity that guides the comparative analysis. To achieve this, it is proposed to differentiate, according to a very traditional distinction, between the conditions for the use of freezing procedures in a first part, from the safeguards against the use of freezing procedures, in a second part.
Thus, the first part, by specifying the scope of national measures, will make it possible to identify the features of these procedures, while the second, by presenting remedies and guarantees against freezing procedures, will make it possible to identify the basis for safeguards which guarantee, as required by the EU, respect for fundamental rights.

2. Physionomy of the procedures: requirements for the use of freezing.

The complexity and variety (within each national system) of the procedures examined here makes it difficult to establish any typology or classification. Nevertheless, the comparison makes it possible to identify constants, and thus the common points or points of convergence of the systems (2.1), but also to isolate variants, and thus differences or points of divergence between the systems (2.2.).
In so doing, the degree of approximation of systems, possible points of friction or tension and, consequently, the triggers and obstacles to the circulation of freezing orders within the Union, which are known to be as much conditioned as they are conditioned by the effectiveness of the domestic mechanisms in place, are revealed.

2.1.Convergence of national frameworks: a relative increase in similarities.

The comparative analysis results in the uncovering of an apparent paradox. Indeed, the fact that national systems are converging does not necessarily imply the fostering of mutual recognition.

2.1.1. The concept of freezing.

In the legal systems under consideration, it is through "seizure" procedures that Member States implement EU law requirements relating to freezing.
The concept of "freezing" appears broader and has the advantage of encompassing, for the purposes of mutual recognition, all measures aimed at "prevent[ing] the destruction, transformation, removal, transfer or disposal of property with a view to [its] confiscation".[6] The regulation thus joins the directive that defines freezing as: "the temporary prohibition of the transfer, destruction, conversion, disposal or movement of property or the temporarily assuming the custody or control of property".[7]
Framework Decision 2003/577 was aimed at "any measure taken by a competent judicial authority in the issuing State to temporarily prevent any destruction, transformation, removal, transfer or disposal of property subject to confiscation or evidence" (French version translated). More laconically, the English version of the Framework Decision

[5] Diversity within and between national procedures.

[6] Art. 2 Règlement 2018/1805.

[7] Art. 2 Directive 2014/42.

provides that the terms "freezing order" mean "property that could be subject to confiscation or evidence".
Thus, gradually, the nature of the authority responsible for the issuing of the freezing order, has disappeared from the definition, while the temporary nature of the measure has been highlighted, as has the variety of legal operations that constitute its manifestation.
The inclusive approach - for the purposes of harmonisation and mutual recognition - thus allows European rules to be based on the very wide variety of national provisions without disrupting (or therefore erasing) their particularities and, as the case may be, their inconsistencies.

On this common basis, all the systems under study have in common that they provide for mechanisms - sometimes specific or separate, sometimes combined or confused with existing mechanisms - aimed at guaranteeing the future confiscation of property and having as their main features: a temporary nature, of indeterminate duration, inscribed mainly in the pretrial phase and therefore subject to the regimes and guarantees that characterize that phase.

Thus, first of all, the domestic procedures converge with regard to the objective pursued, which is to guarantee the effective execution of any confiscation measure. This confirms the finding of the "Comparative law study of the implementation of mutual recognition of orders to freeze and confiscate criminal assets in the European Union"[8], which concluded that "in practice, freezing orders are used for similar purposes in all Member States"[9].
The purpose of confiscation, often introduced recently as a result of the adaptation of national legislation to European requirements, is indeed present everywhere. However, depending on the case, it is isolated - and benefits from a specific regime - or linked to other objectives - whose regime it follows. In this respect, the design and construction of the confiscation mechanism seems to be crucial. Thus, the "confiscatory purpose" may vary the applicable legal framework. However, this variation may be further increased depending on the type of confiscation envisaged (extended, non-conviction based) and the type of asset to be confiscated (immovable, intangible, etc.). And, it is not always easy to understand the reasons and legitimacy of these variations, especially when, as in France, for instance, the choice between one legal framework and another is partly open to the authorities.

Such variations can also be explained by the fact that the nature of the measure is not perfectly and uniformly established. As already noted in the above-mentioned comparative study, depending on the system, freezing can be designed as a coercive or precautionary measure. However, in all the systems studied, although seizures may be ordered after conviction, the common denominator is the possibility of seizures during

[8] Luxembourg: Publications Office of the European Union, 2014 (available online).

[9] P. 46.

the pre-trial phase, pending a confiscation order. It should also be noted that, with some reservations, the measure is in principle optional and not mandatory.[10]

Thus, the other significant common denominator is the nature of the measure itself, which results both from its provisional nature[11] (and therefore its liability to revocation/termination) and from its inclusion in the pre-trial phase. The supreme or constitutional courts[12] then deduce from this the inapplicability of the guarantees of Articles 6 and 7 o fthe ECHR. In view of the autonomisation of the confiscatory purpose, it is questionable whether the weakness of the standard of protection lies in the combination of these two characteristics (provisional, on the one hand, and falling within the pre-trial phase, on the other) or only in one and in particular its provisional and revocable nature.

This question is linked to the issue of time limits (to request and/or pronounce the measure) and the issue of the duration of the measure. Indeed, most of the systems studied are characterised by the absence of a time frame for the measure: no deadlines nor time limits are set for the measure. However, the common explanation put forward is precisely due to the provisional nature of the measure and the purpose pursued: once this purpose has been achieved (or as soon as it is established that it cannot be achieved), the measure must cease. In this sense, the provisional nature of the measure seems to take precedence over any other consideration that may affect or should determine its regime. However, this statement must be qualified immediately since, as mentioned above, the regime (the conditions for the application and enforcement of the measure) varies according to the type of confiscation envisaged and/or the object to be confiscated.

2.1.2. The legal framework for freezing: a reflection of national procedures.

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[10] In Germany, if they are "cogent reasons to believe that the assets are liable to confiscation", the seizure is the rule. In Romania, seizure is mandatory in case of mental illness. In Italy, only the "impeditive" form seems obliagtory. In France, where confiscation is mandatory, seizure should follow the same regime.

[11] In Germany and in France : it is a « provisional measure » ; in Belgium, according to the Court of cassation it is a « precautionary measure which does not have the character of a penalty" ; in Italy, it is a "precautionary measure", which, as regards the type of seizure that is of primary interest here, is called « preventive ». As for the Netherlands and Romania, although not explicitly specified in the national reports, the approach to seizure for the purpose of confiscation appears similar.

[12] In 2005, the Belgian Court of Cassation held that "a freezing measure is a precautionary measure which does not have the character of a penalty." It follows that the guarantees attached to Articles 6 (fair trail) and 7 (legality) of the European Convention on Human Rights do not extend to them (Cass. 22 June 2005, *Pas.*, 2005, n° 365). This Court also stated that "the freezing provided for in Articles 35 and 35ter of the C.C.P, the formalities of which are specified in Article 37 of the C.C.P., are consistent with Article 1 [of Additional Protocol n° 1 of the European Convention on Human Rights]. These provisions also satisfy the principle of legality and the rule of law » and that "the respect of the procedural safeguards provided for by the law at the time of the freezing is neither prescribed on penalty of nullity, nor substantial" (Cass., 17 October 2006, *Pas.*, 2006, n° 403). In France, the Constitutional Council (Conseil constitutionnel) has found the provisions governing the special criminal seizures consistent with the Constitution. The Council stated that sufficient guarantees are provided, sine the measures are ordered by a magistrate and can only refer to assets likely to be confiscated in case of a criminal conviction, since any person claiming rights on the asset may request the public prosecutor, the general prosecutor or the investigating judge to release the seizure, and since appeals can be lodged before the investigation chamber of the Court of appeal against the orders allowing the seizure (CConst., déc. n°2016-583/584/585/586 QPC du 14 october 2016, Société Finestim SAS et autre [Saisie spéciale des biens ou droits mobiliers incorporels], JORF, 16 october 2016 text n° 48).

In addition to the fact that the notion of freezing is understood in all the systems studied through seizure measures, designed - exclusively or not - as provisional measures belonging to the pre-trial phase and as such - except in special cases - subject to the rules and standards of this phase of the procedure, its legal framework is commonly implemented within the national code of criminal procedure. It is therefore in principle within this Code that seizure procedures for the purpose of confiscation are regulated. Only one important reservation should be noted: the mechanism provided for by the so-called anti-mafia code in Italy and the regime - of an administrative nature - applicable to legal persons.

This common point noted, then emerges the very wide variety of seizure mechanisms for the purpose of confiscation. Another common point then appears: there is no unitary regime in the systems studied.

All of them distinguish not only seizures for other purposes (compensatory,[13] probative,[14] or other[15]), but they also provide for different regimes within seizures for confiscatory purposes. These regimes are generally differentiated by considering two criteria: on the one hand, the investigative framework (flagrante delicto, preliminary investigation, "instruction", financial investigation, anti-mafia or corporate proceedings) and on the other hand, the type of confiscation, which is itself determined either by the nature of the seized asset (movable, intangible) or by the nature of the confiscation itself (value/ equivalent, extended, general). Thus, the regime of confiscatory seizures appears to be determined first in Belgium and Romania by the investigation framework, and then within each investigation framework by the type of confiscation susceptible to be considered. Italy seems to adopt, although in a singular way, a similar structure distinguishing in particular the anti-mafia framework and the framework specific to legal persons. In France, Germany, or the Netherlands, it is first and foremost the type of confiscation that appears to be decisive, although the investigative framework also influences the seizure measures that may be considered.

In any case, it is above all the variety of national mechanisms that emerges from a more in-depth examination of national procedures that should now be considered.

2.2. Divergence of national frameworks: the persistence of differences.

Just as the convergence of systems does not necessarily foster mutual recognition, divergences do not necessarily hamper mutual recognition.

However, it is necessary to distinguish between the question of the variety of "special" procedures for seizures for the purpose of confiscation (2.2.1) and that of the difference between the competent authorities (2.2.2).

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[13] This is particularly the case in Romania, where seizures are made in order to guarantee the property interests of the State and the civil party.

[14] The distinction between evidentiary seizures and seizures for the purpose of confiscation is characteristic of most of the States studied, in particular Germany, Belgium, Italy (see following note) and France. With regard to the latter, the distinction is doubled and complicated by a main distinction between ordinary law seizures (probationary and for the purpose of confiscation) and special seizures (only for the purpose of confiscation).

[15] Italy distinguishes three main forms, the last of which is of particular interest here: first the conservative seizure (art 316-320 CPP), then the probative seizure (art 253-263) and finally the preventive seizure (art 321-323 CPP). The Netherlands also distinguishes three forms, all applicable to seizure for the purpose of confiscation: seizure to secure forfeiture, withdrawal and value freezing.

2.2.1. The variety of special frames.

While the national codes of criminal procedure generally constitute the common base for seizure procedures for the purpose of confiscation, the Codes then reflect the variety of seizure procedures. This variety, as noted above, is based on different criteria (mainly the investigative framework and the type of confiscation). Despite differences, however, the seizure regime appears, first and foremost, to be determined by the choices (and criteria) that governed the construction of the confiscation framework.
This allows for a distinction to be made between systems that provide for one, two or three forms/types of seizures that may contribute to the objective of confiscation.
Belgium, Italy and Romania thus seem to retain one form of seizure for the purpose of confiscation. It is called "preventive seizure" in Italy and differs from conservative and probative seizure. However, it is divided into three regimes: the one set out in the CPP (art. 321-323 CPP), the one of the Anti-Mafia Code and the one deriving from provisions applicable to legal persons. Similarly, in Belgium and Romania, the framework for seizure varies according to the procedural framework in which the measure is taken.
Germany and France then distinguish two forms of seizures for the purpose of confiscation on the basis of a different distinctive criterion but which in both cases is linked to the construction of the legal framework for confiscation. In Germany, the CPP distinguishes between the seizure of criminal proceeds on the one hand and the freezing in order to secure value confiscation on the other. In France, the CPP distinguishes between ordinary law seizures on the one hand and so-called special seizures on the other. While at first sight the distinction covers the distinction between evidentiary seizures and patrimonial seizures, it appears that this overlap is in reality only partial. Of course, special seizures only pursue a patrimonial purpose. They must be implemented in the event of confiscation of assets, when the property concerned is immovable, intangible or rights, or, finally, when the seizure is carried out without deprivation of possession. But seizures under ordinary law may also have a patrimonial purpose. Consequently, apart from the above-mentioned cases in which the special seizure procedure is required, the ordinary law procedure may apply.
Finally, in the Netherlands, three forms of seizure are provided for, reflecting exactly the three types of criminal confiscation provided for: forfeiture, withdrawal and value freezing. In addition, there is the special framework applicable to financial procedures (art. 126 CPP and f).
Thus, within each legal system, a variety of procedures are often applicable - sometimes, as highlighted in the French and Dutch reports, with risks of overlaps. This variety leads to little or no variation in the competent authorities. On this point, however, the relative internal unity (i. e. within each system) does not extend to convergence on a comparative scale, as we will see.

2.2.2. The competent authorities.

As pointed out in the introduction and as highlighted in the above-mentioned comparative study, the competent authority criterion has gradually disappeared from the European definition of the concept of freezing, both for harmonisation purposes (Art. 2 of the Directive) and for mutual recognition purposes (Art. 2 of the Regulation).

This is due first of all to the fact that the requirement of a "judicial" authority, as provided for in the Framework Decision, departed too far from the practices and provisions of many Member States which entrust the prosecution service, or even the police, with the execution of seizures. This role of the Public Prosecutor's Office and the police is confirmed by the comparative analysis, even if it tends to be combined with the prior (authorization) or subsequent (validation) intervention of the judge.
Union law also reflects this involvement of the judge so that the disappearance of (i. e. silence on) the competent authority in the definition of freezing is only relative insofar as the Directive states in Article 8(4) that "Member States shall provide for the effective possibility for the person whose property is affected to challenge the freezing order before a court, in accordance with procedures provided for in national law. Such procedures may provide that when the initial freezing order has been taken by a competent authority other than a judicial authority, such order shall first be submitted for validation or review to a judicial authority before it can be challenged before a court". As for the Regulation, it states in recital 22 that: "In some cases, a freezing order may be issued by an authority, designated by the issuing State, which is competent in criminal matters to issue or execute the freezing order in accordance with national law, and which is not a judge, court or public prosecutor. In such cases, the freezing order should be validated by a judge, court or public prosecutor, before it is transmitted to the executing authority".

Within the systems under study, as regards authorities vested with the power to request or order freezing measures, half of the Member States entrust the prosecutor and, under his/her control, the police forces to enforce pre-trial seizures. In criminal justice system which have kept the institution of investigating judges, these magistrates also owe jurisdiction to implement such measures. More precisely, two situations may be distinguished: in some countries (Belgium, France, Romania), the prosecutor is the relevant authority, mainly in charge of ordering freezing; in other countries (Germany, Netherlands and Italy), Courts are primarily vested with such a prerogative, and it is only in case of an emergency that the prosecutor and/or police officers may proceed on their initiative.

In more detail, within the first group of countries, in Belgium first, the public prosecutor and the investigating judge may order freezings or seizures during the preliminary investigation, either *in flagrante delicto* or in proactive inquiries, in special inquiry into economic benefit or within a judicial investigation. The enforcement of the measure may be delegated to police officers.
Then, in France, the public prosecutor, the investigating judge and, subjected to their previous authorization, judicial police officers, may enforce seizures or implement the acts necessary for the seizure of estates and their conservation[16]. Such measures (common law seizures) may be implemented at any stage of the investigation. Nonetheless, this common law framework is complicated by the multiplication of derogatory proceedings, which involve other actors in the undertaking of special seazures. The 2010 *circulaire* relating to the implementation of the Loi du 9 juillet 2010, provides that, in the context of an *in flagrante delicto* or preliminary investigation, the prosecutor shall request the authorization of the freedoms and custody judge (*JLD*). Besides, at the preliminary investigation stage, the previous authorization of the JLD, granted on request of the public

[16] Art. 706-42 CCP.

prosecutor and by reasoned order, is required to enforce patrimonial, immovable or intangible assets seizures, seizures without deprivation[17].
Finally, in Romania, the prosecutor at the investigation stage and the Court or the Preliminary Chamber Judge at Preliminary Chamber or trial stage, owe jurisdiction to order freezing measures[18] to prevent risks of concealment, destruction, disposal or dissipation of the assets that may be subject to criminal confiscation or extended confiscation or if they feel it necessary to secure the payment of a fine, of court fees or of damages.

Within the second group of countries, in Germany first, criminal courts owe primary jurisdiction to order freezing measures. Nonetheless, when justified by an emergency, seizure may also be ordered by the prosecution service or by police and customs officers; a court confirmation is nonetheless required when immoveable estates were seized[19].
Then, in the Netherlands, the public prosecutor owes jurisdiction to order freezing measures with the aim of confiscation, but subjected to a prior authorization from an examining magistrate (*rechter-commissaris*). Furthermore, in « criminal financial investigations »[20] , the examining judge may deliver a general authorization providing the public prosecutor with the power to issue freezing orders without requesting further specific authorizations. Finally, police officers may, subjected to the authorization of the examining magistrate, carry out seizures on their own initiative in the course of enforcing others of their specific investigation prerogatives[21].
Finally, similarly, in Italy, preventive seizures may be ordered by a judge on request of the public prosecutor[22]. But, in case of an emergency making the awaiting for the Court decision likely to impair the proceedings, the seizure may be ordered by the public prosecutor and judicial police officers may also act on their own initiative, subjected to an a posterior control of the public prosecutor. Preventive seizures may also be ordered by the President of a criminal Court, acting if necessary *ex officio*, on ground of the *Anti-Mafia Code*[23]. In case of an emergency, seizure may be ordered before any hearing, on request of either the district Prosecutor, the National Anti-Mafia and Counter-Terrorism Prosecutor, the Chief of Police or the Director of the Anti-Mafia Investigation Directorate. The decision must then be approved by the court itself[24].

3. Remedies and guarantees: safeguards against the use of freezing.

In the same way as the distinction made in Article 8 of the Directive, a distinction must be made between the general guarantees (3.1.) applicable to all measures and to all persons (suspect, victim, third party) and the specific guarantees for freezing (3.2.).

3.1. The application of general guarantees.

[17] Art. 706-150 to 706-158 CCP.
[18] Art. 249 (1) CCP
[19] sections 111b ff. StPO; section 111j StPO.
[20] Art. 126 until 126fa CCP
[21] Art. 103 CCP.
[22] Article 321(1) CPP
[23] Article 20 of Legislative Decree no. 159 of 2011
[24] Article 22 of Legislative Decree no. 159 of 2011

In addition to the general affirmation that the Directive (cons. 33 and 38) and the Regulation (Art. 1.2) generally respect fundamental rights, the right to an effective remedy is particularly guaranteed.
This requirement is specifically recalled by the Directive in Article 8.1: "Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights".
This requirement is largely met in the systems studied which provide remedies against the decision to seize and/or the conditions for its execution, including the (non-)return of property.
These are ordinary law appeals applicable to measures taken during the pre-trial phase and/or appeals specially organised to challenge decisions and the execution of freezing measures (this is particularly the case for appeals relating to the return of property). Remedies are generally not suspensive and the availability of an appeal is variable.
The control exercised generally concerns the legality and proportionality of the measure; it is on this occasion that the evidentiary conditions required for the adoption of the measure are assessed. These tend to be limited to the verification of the potential confiscability of assets in all systems, possibly with a special condition of subsidiarity/proportionality of seizure (BE, RO).

3.2. Specific guarantees.

In addition to the "general" right to an effective remedy, the Directive lists guarantees specifically attached to freezing measures, whether in respect of the implementation of the freezing (3.2.1) or the challenging of the freezing (3.2.2).

3.2.1. Enforcement of a freezing order.

As for the implementation of the freezing measures, two guarantees, specifically set out in the Directive,[25] concern the right to information and deadlines. With regard to the latter, it has been seen that while national systems do not provide for pre-determined time limits for the execution of the freezing measure, all procedures imply that the measure must cease (and the remedies for claiming cessation by any interested person are organised for this purpose) as soon as the conditions for its adoption are no longer met.
With regard to the right to information, that is to the communication of the freezing order, subject to the silence on this point in the case of Italy and Romania, the systems studied lay down the conditions for this communication. These are more or less detailed and explicit. The communication in Germany is based on the analogous application of the procedure applicable to probationary seizure. In France, notification is explicitly provided for; it may be postponed for the purposes ("*nécessités*") of the investigation. The same is

[25] Member States shall take the necessary measures to ensure that the freezing order is communicated to the affected person as soon as possible after its execution. Such communication shall indicate, at least briefly, the reason or reasons for the order concerned. When it is necessary to avoid jeopardising a criminal investigation, the competent authorities may postpone communicating the freezing order to the affected person.
(8.2)
The freezing order shall remain in force only for as long as it is necessary to preserve the property with a view to possible subsequent confiscation (8.3).

true in Belgium, where the Court of Cassation has specified that notification is a formality without nullity, the absence of notification not being in itself an infringement of the rights of the defence. In the Netherlands, finally, the seizure for value freezing must be notified.

3.2.2. Challenging a freezing order.

In line with the requirements of the Directive, two special guarantees concern the challenging of the freezing measure: on the one hand, the right to restitution of property[26] and, on the other hand, compensation in the event of wrongful freezing.

The right to restitution is guaranteed by the consequences that must be drawn in all systems from the provisional nature of the measure: as soon as the conditions for the seizure are no longer met, the property must be returned. However, as in France, restitution may be subject to the existence of a prior request by the owner of the property. The right to restitution is also limited in cases where the property must be destroyed and/or presents a danger.
Finally, with regard to the hypothesis of wrongful freezing, when it is organised, it is the procedure - often very restrictive - of the State's liability that applies (BE, DE, FR, NL); it may be combined with a civil compensation procedure (DE, NL, RO).
Finally, the possibility of obtaining compensation for a freezing order is generally organised, either before the criminal courts or before the civil courts. Various restrictions may limit this compensation. In Germany, for example, the claim for compensation is excluded if the court has confiscated the assets[27], or if the accused intentionally or grossly negligently caused the seizure[28]. In France, although the law provides for the possibility for the owner who regains possession of his property to obtain compensation, this is not a general right, as it relates only to "the loss of value that may have resulted from the use of the property"[29]. Compensation is therefore only available in relation to the loss of value in respect of the property itself, and not the losses incurred from being deprived from use of the property. If the property has been disposed of in the course of proceedings, the amount received on the sale is returned without being re-assessed according to changing market values.

[26] Frozen property which is not subsequently confiscated shall be returned immediately. The conditions or procedural rules under which such property is returned shall be determined by national law (8.5).
[27] section 5 para 1 No. 4 StrEG
[28] section 5 para 2 StrEG
[29] Art. 41-5, par. 3, CCP.