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MANAGEMENT OF FROZEN ASSETS. A COMPARATIVE ANALYSIS

I. Freezing

Introduction

The EU legislative framework about the management of frozen property is composed of the Directive 2014/42/EU and the Regulation (EU) 2018/1805. The main goal of the management of seized assets is to protect the property and reduce its deterioration[1]. Taking action as soon as the items are seized is important: "it would be impossible to achieve the (…) objectives of confiscation if the value of the property that is seized and to be confiscated depreciated"[2]. Furthermore, the practice in some MS (Belgium, the Netherlands) shows that it is less easy to confiscate assets if they have not been previously seized. Italy is the MS with the longest experience in the field of management of assets and in particular when the seizure concerns real estate or businesses.

1. Institutional aspects of the management of frozen assets

a. Multiple actors

The decisions relating to the management of frozen property are usually made by the same (judicial) authorities as the ones who ordered the freezing (*cf. supra*). The public prosecutor (and, in some MS, the investigative judge) remains a central decision-maker. In France, the judge of freedoms and detention, and in Romania, the judge of rights and freedoms also play a role in decisions relating to the management of frozen property.

Nevertheless, the implementation of this decisions relating to the management of frozen property involves the intervention of many different actors depending on the MS. Thus, the implementation of the decision, which depends on the type of the asset, is undertaken by the Ministry of Finance and Tax Authorities (the Netherlands, Belgium, Romania), by the Ministry of Foreign Affairs (Romania), by the Public Prosecution Service (the Netherlands, France, Germany), by the bailiff (the Netherlands, Germany, Romania), by

[1] B. VETTORI, T. KOLAROV, A. RUSEV, *Disposal of confiscated assets in the EU Member States. Law and Practices*, Sofia, Center for the Study of Democracy, 7 and 19.

[2] B. VETTORI, T. KOLAROV, A. RUSEV, *op.cit.*, 19.

the registry (Italy, Belgium, Germany), by the police (Belgium, France, Germany), by a notary (Belgium, Germany, the Netherlands), by private administrators and companies (Germany, Italy, France, Belgium, Romania)...

b. Asset Management Office

To overcome the disadvantages associated with this multitude of actors, Directive 2014/42/EU invites the MS to provide centralized offices to ensure the adequate management of frozen property (art. 10). The recital 47 of the Regulation (EU) 2018/1805 also mentions the concept of "national centralized office". The studied MS (except Germany) have implemented an Asset Management Office (AMO). In Belgium, there is the COSC (Central Office for Seizure and Confiscation), in France, there is the AGRASC (Agency for Management and Recovery of Assets Seized and Forfeited), in Italy, there is the ANBSC (National Agency for Administration and Destination of Assets Seized and Confiscated), in the Netherlands, there is the LBA (Landelijke Beslag Autoriteit) and in Romania, there is the NAMSA (National Agency for the Management of Seized Assets).

In accordance with these institutional aspects, the studied MS can be divided in three categories[3]: a centralized approach with specialized institutions (France, Italy), a centralized approach with non-specialized institutions (Belgium, the Netherlands, Romania) and a decentralized approach (Germany). Theoretically, the first approach minimizes the communication problems, allows a high level of specialization and can produce more accurate statistics.

c. Private asset manager

The MS have understood that even with an efficient AMO, it often makes more commercial sense to outsource certain functions. Thus, a court-appointed asset manager can deal efficiently with complex assets (Belgium, France, Germany, Italy). The AMO can judiciously conclude different types of partnership agreements with private or public actors (e.g. in the context of seizures of jewelry, antiques, real estate, company…)[4]. The management of businesses (Italy, France) remains one of the most complex managements

[3] B. VETTORI, T. KOLAROV, A. RUSEV, *op.cit.*, 23 to 31.

[4] G8 CRIMINAL LEGAL AFFAIRS SUBGROUP, *Best Practices for the Administration of Seized Assets*, 2005, 5.

[5], often ending (in 90% of cases in Italy) in bankruptcy[6]. In those cases, it is particularly interesting to name an independent (from the private sector) and insured asset manager[7]. In Italy, the judicial administrator of the seized company must be chosen from a special register. This judicial administrator (often accounting experts) is automatically able to carry out all the acts of ordinary administration. In order to carry out the extraordinary administration, the judicial administrator will need a specific authorization of the judicial authority.

2. Disposal methods

a. Conservation

If the frozen assets do not involve disproportionate storage costs or if there is no risk of deterioration, the MS allow that these frozen assets be stored (in tribunal registries, with AMO…). For these reasons, some legislators (Belgium) have clearly indicated that this conservation in kind should not be the preferred solution for frozen assets.

The frozen asset will be kept in the custody of responsible public entities, by the owner or possessor or by a third party (e.g., a bank). This distinction allows us to understand the difference in vocabulary sometimes made between the terms "freezing" and "seizure". There is a "freezing" when the asset is in the hands of the owner or possessor or in the hands of a third party (Belgium, the Netherlands, Germany, Italy). They must then respect the use restrictions related to the assets: the transfer, the destruction, the conversion, the disposition or the movement of the asset are temporarily prohibited or limited. One talks of "seizure" when the asset is stored in the custody of law enforcement.

Theoretically, freezing seems to be the best choice to keeps cost (storage cost) at a minimum. This is why, for example, in France, the general principle is that the owner of the frozen asset is responsible for the management of the asset, and it is only under special circumstances that the asset will be put under the management of AGRASC. In the same

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[5] AGRASC (France) and ANBSC (Italy) are the two AMO with the best experience in the management of complex assets, like companies.

[6] BASEL INSTITUTE on GOVERNANCE, *The Need for New EU Legislation Allowing the Assets Confiscated from Criminal Organisations to be Used for Civil Society and in Particular for Social Purposes*, Brussels, European Parliament, 2012, 51 and 89. This high failure rate can be explained by a phenomenon called "crisis of legalization". Indeed, the management of the company by the judicial administrator will cause significant costs (regularization of employees, payment of taxes, adaptation of workplaces to health standards...).

[7] G8 CRIMINAL LEGAL AFFAIRS SUBGROUP, *op. cit.*, 6.

way, in Belgium, regarding the management of dematerialized securities, the current good practice is to not necessarily transfer these securities to an account opened with the COSC but to continue to have them be managed by the financial institution from which these securities are frozen. The person continues to be informed by their financial institution and to be liable for management fees, which reduces the legal costs.

Nevertheless, it would be a mistake to assume that freezing does not entail expenses. Indeed, putting into place an efficient control of the respect of use restriction involves costs as well. In order to ensure the observance of these use restrictions, some MS under study (Belgium, the Netherlands, Germany) provide for freezing with a bond: the assets may be handed back to the person against a payment. Ensuring that the frozen asset does not lose in value (in view of a possible confiscation) also features costs and is not easy to put into practice. For instance, it is necessary to ensure that the owner maintains the real estate in a state of repair, and continues to pay mortgage…

In the management of seized assets, some MS are more reluctant than others. Thus, in Belgium, the management must be done "with due diligence" and "in accordance with the principles of prudent and passive management". Likewise, in Romania, the NAMSA preserves the movable assets and ensures that the sums seized are available when a final decision is made. In Germany, the management aims at maintaining the asset's value rather than earning profits. Other MS accept more active managements to ensure the enhancement of the assets and to make profits (France, Italy)[8]. For instance, in Italy, Equitalia giustizia Spa (a public company) the sums are managed dynamically by low-risk financial instruments.

b. Sale or transfer

For technical or economic reasons, the MS authorize a pre-confiscation sale. The MS use different arguments to justify a pre-confiscation sale ("interim sale"). Regarding economic reasons, we find in relevant legislations formulations referring to "perishable assets" (Belgium, Romania), "rapidly depreciating property" (Belgium, France, Germany, Romania) and "asset with a disproportionate storage or maintenance costs" (Belgium, France, Germany, Romania, the Netherlands). However, no MS provides for interim sale "to defray the cost of maintaining the value of other assets, such as paying a mortgage"[9]. Regarding technical reasons, we find in legislations formulations sending one back to "assets too difficult to administer" (the Netherlands, Germany), "assets without a known owner" (Belgium, France, Romania), "assets frozen over a period of

[8] B. VETTORI, T. KOLAROV, A. RUSEV, *op.cit.*, 78.

[9] UNODC, *Effective management and disposal of seized and confiscated assets*, Vienna, Unodc, 2017, 20.

time" (two years in the Netherlands, one year for motor vehicles in Romania, three months for motor vehicles, boats and airplanes in Belgium), "assets that have not been claimed in time" (France) and "assets in the case of which the public prosecutor did not make a decision within the appointed time to authorize a sale." (the Netherlands). The following assets are often presented as particularly susceptible to a interim sale: vessels, aircraft, cars, animals[10].

This pre-confiscation sale is not authorized for all assets. There are conditions to authorize this measure: the asset must be "replaceable" (Belgium, the Netherlands), the asset must have an "easily determinable value" (Belgium, the Netherlands), or no longer be "necessary to ascertain the truth" (Belgium, France). Some MS allow a pre-confiscation sale for real estate (Belgium, France, Italy), while others do not allow it (Romania). In practice, it would seem that the pre-confiscation sale does not frequently involve real estate. Italy also provides for the sale of companies.

It is preferable that the pre-confiscation sale be made with the owner's consent. Indeed, the requirement of the owner's consent allows to "strike a balance between the cost-efficiency of asset management and the legitimate interest of the owner in the preservation and return of the asset when a confiscation order is not granted"[11]. Some MS do not explicitly provide for this consent requirement (Belgium, France[12]) while others provide not only for such consent (Romania) but also formally provide that the asset's owner could be the person formulating the request (Romania). The person concerned ought to be heard (Germany) and informed (Belgium, Germany) about the sale. Furthermore, MS may provide for remedies so that concerned parties may oppose the sale (Belgium, Germany, Romania). To avert the sale, some MS accept that an interested party provides security against the return of the asset (Belgium, the Netherlands, Germany).

In any event, there are situations where such consent is not desirable and is not required for the economic or technical reasons explained above. For instance, in Romania, the asset can be capitalized without the owner's consent when, within one year from the distraint ordering date, the value of the seized goods has decreased significantly, i.e. by at least 40% compared to the time of enforcing the asset freezing. The MS that allow a pre-confiscation sale without the owner's consent require often a court decision or a decision of another authority such the AMO or the prosecuting authority (Belgium, the Netherlands).

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[10] G8 CRIMINAL LEGAL AFFAIRS SUBGROUP, *op. cit.*, 3.

[11] OPEN-ENDED INTERGOVERNMENTAL WORKING GROUP ON ASSET RECOVERY, *Draft non-binding guidelines on the management of frozen, seized and confiscated assets*, Vienna, United Nations, 2018, 4.

[12] The AGRASC does not have to obtain the consent of the owner of the seized property. Only economic interests are taken into account.

The studied MS give priority to a sale by public auction (sometimes online) (Belgium, Germany, Romania) but, circumstances permitting, they accept a sale through private treaty (Belgium, Romania). For instance, it is necessary to be attentive to the "risk of selling such property to individuals or entities associated with a criminal enterprise"[13]. The proceeds of the sales are sometimes negatively impacted by the reputation of the previous owner (e.g.: real estate of the Mafia), by the rights of bona fides third party (immovable properties with mortgage, properties under shared ownership). The MS should provide for assumptions in which "the identity of buyers should be protected to avoid retaliation by the former possessor"[14]. The costs of the sale are borne by the buyer (Belgium) or by the defendant (the Netherlands).

The proceeds of the pre-confiscation sale are deposited into a bank account usually controlled by the AMO with the aim of executing the future confiscation order (Belgium, France, Romania, the Netherlands). If the proceeds of this sale (deposited into a bank account) accrue interest, it's important that the law determines who receives said interest if, in the end, there is no confiscation order. In which case, some MS reimburse the capital and the interest to the person (Belgium), other MS retain the interest for the funding of the AMO or for a fund allocated to improving justice and public security (France, Italy). For instance, in France, the proceeds of asset's sales of drug-related cases are deposited in a specific fund and are allocated to the public services involved in the fight against drug trafficking[15].

c. Social re-use

The term "social re-use" has a symbolic impact: "this method allows the transparent return to the public of assets misappropriated from society"[16]. This allows "to enhance the trust of citizens in public institutions"[17]. The re-use of seized assets have also an economic impact. The re-use "of crime proceeds for social purposes [allows] to re-inject the funds of criminal organizations into legal and transparent economic activities"[18]. This also allows "to create jobs in regions that are under heavy influence of criminal economy"[19]. The social re-use is therefore different from a traditional transfer of the

[13] B. VETTORI, T. KOLAROV, A. RUSEV, *op.cit.*, 42.

[14] OPEN-ENDED INTERGOVERNMENTAL WORKING GROUP ON ASSET RECOVERY, *op. cit*., 6.

[15] BASEL INSTITUTE on GOVERNANCE, *op. cit.*, 35.

[16] B. VETTORI, T. KOLAROV, A. RUSEV, *op.cit.*, 9.

[17] B. VETTORI, T. KOLAROV, A. RUSEV, *op.cit.*, 42.

[18] B. VETTORI, T. KOLAROV, A. RUSEV, *op.cit.*, 46.

[19] BASEL INSTITUTE on GOVERNANCE, *op. cit.*, 50.

assets to the state budget[20]. These assets are not mixed with other public resources and "proceeds of crime are openly given back to society"[21].

Not everyone share this enthusiasm for the re-use of assets. As such, some critics are favorable to the fact that assets go into the state budget: "there is no risk of competition or attempts of manipulation by civil society organizations or other groups that could hope to become the beneficiary of confiscated monies that the state wants to use for social purposes"[22].

The social re-use of assets is also criticized when it is actually a "institutional re-use", this means that the beneficiary is not the civil society but a state institution. The "interim" re-use by the police is sometimes portrayed as "inappropriate because it signals to the public that the police can cavalierly target and take property and use it without the imprimatur of the court"[23]. To avoid a conflict of interest, Belgium and France do not authorize that the assets be used personally by law enforcement representatives involved in the seizure[24].

Some countries do not permit the interim use of asset "because of the inherent risk of the asset deteriorating over time and depreciating in value as a result of its use"[25]. If this interim re-use is permitted, it is necessary to ensure that the asset will be returned in a fit state. To do this, it is necessary to provide, as means of guarantees, a compensation or a damage claim in the event of deterioration of the asset due to the use.

The fundamental right of the owner "could potentially be violated, particularly if a court later orders the return of the asset"[26]. Despite these comments, some studied MS authorize the re-use of seized assets. But from one MS to another; there are differences in the types of assets involved and in the types of possible beneficiaries.

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[20] B. VETTORI, T. KOLAROV, A. RUSEV, *op.cit.*, 33.

[21] B. VETTORI, T. KOLAROV, A. RUSEV, *op.cit.*, 34.

[22] BASEL INSTITUTE on GOVERNANCE, *op. cit.*, 49.

[23] TH. S. GREENBERG, L. M. SAMUEL, W. GRANT, L. GRAY, *Stolen Asset Recovery. A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, Washington, The World Bank, 2009, 89.

[24] G8 CRIMINAL LEGAL AFFAIRS SUBGROUP, *op. cit.*, 2.

[25] UNODC, *op. cit.*, 24.

[26] UNODC, *op. cit.*, 24.

In Belgium, the Federal Police can use the seized assets to fight or prevent acts committed within the framework of a criminal organization[27]. This institutional re-use must respect a principle of proportionality (the asset concerns acts committed within the framework of a criminal organization), a principle of purpose (the asset must be useful to the fight against criminal organization) and a principle of subsidiarity (the police not already have similar assets in sufficient numbers).

Italy is the MS that most frequently resorts to this re-use with real estate. Beneficiaries are various and one can as such talk both of 'institutional re-use' and 'social re-use'. Italy is the most transparent country (a lot of information is available on the internet) with regards to beneficiaries of social re-use[28]. Italy is also the MS seeking to ensure that social re-use be done to the benefit of 'regional' community, where the asset has been seized. The idea being that this social re-use may allow for "compensating local communities affected by serious and organized crime"[29]. Before the confiscation, the re-use is mainly "institutional" (the beneficiaries are the police or others bodies of the State for purposes of justice, civil protection or environmental protection) and concerns assets seized within the frame of some criminal cases (drug trafficking, road traffic regulations, driving under the influence of drugs or alcohol, illegal immigration…).

The Dutch and German laws do not provide for such re-use. In Romania, re-use concerns the immovable property and the beneficiaries are public institutions, administrative authorities or non-governmental organizations. For procedural reasons, public beneficiaries ("institutional re-use") are favored over private ones ("social re-use"). It is not, however, a case of interim re-use as it only concerns confiscated assets (*cf. infra*). In France, the police services, the gendarmeries units or services of the customs administration may also be authorized (by the public prosecutor) to use (free of charge) the movable assets, when these services or units carry out judicial police missions. It is not, however, a case of interim re-use as it only concerns confiscated assets (*cf. infra*).

In practice, it seems that the sale is a disposal method much more used than the re-use of asset. The MS which resorts most often, and has for a long time, to this re-use of assets, is Italy. The Italian situation may be explained by the fact that serious and organized crimes of the Mafia do not always have identifiable victims. And so, "If society as a whole

[27] There is a second possible beneficiary: a scientific institution can use the asset for didactic or scientific reasons.

[28] BASEL INSTITUTE on GOVERNANCE, *op. cit.*, 39.

[29] BASEL INSTITUTE on GOVERNANCE, *op. cit.*, 50.

is perceived as a victim (…), it can be argued that the compensation can take the form of re-use"[30].

Some difficulties concerning interim sales can be found in the interim re-use of asset: mortgages, property under joint ownership, third party claims, the re-use benefits to a criminal organization… There are also specific difficulties: the costs for restoration before the asset can be used.

d. Rent

Even if national legislations do not explicitly provide for it, renting out of seized assets is a practice occasionally encountered, especially if selling is considered pas opportune. This possibility is limited in its application. Renting out concerns mainly real estate (Belgium, Italy) and corporate assets (Italy).

e. Destruction

The MS allow the destruction of hazardous assets and assets that poses a threat to public safety (e.g. drugs, counterfeit goods)[31]. Some MS (Belgium) also explicitly provide for a destruction for economic reasons: the conservation of the property has a disproportionate cost compared to the value of the property (e.g. obsolete electronic equipment).

If the administering of the evidence so requires, the taking of samples, or a photographic or video recording of the property should take place before it is destroyed.

f. Restitution to the victim

Even if the procedures are different in the studied MS, victims can usually all obtain restitution of seized property. This right to the restitution is the consequence of the property right he/she owns on the asset. This restitution can be postponed for the needs of an investigation or after the confiscation order (*cf. infra*).

[30] B. VETTORI, T. KOLAROV, A. RUSEV, *op.cit.*, 38.

[31] UNODC, *op. cit.*, 25.

3. Costs related to management of frozen property

In France, "the owner or property holder managing the seized property, or AGRASC when the seized property is put under its management, are responsible for the costs of managing such seized property"[32]. In Belgium, costs related to the management of seized property are legal costs that are taxed by the AMO. In the Netherlands, Romania and Germany, the system is similar: the state (public prosecutor's office) bears the costs of managing but in the execution phase, this cost will be borne by the convict.

The management of frozen property can be a costly business. Some MS (France, Italy) have put into place a national fund (replenished among others by the profits from sums seized or acquired by the management of assets seized) to allow the AMO to pay its operation costs. In addition, AGRASC is financed from the profits of sums seized. With such a mechanism, AGRASC was promptly able to self-finance itself.

4. Protection of bona fide third party

MS provide that frozen assets can be given back to a third party (Belgium, France, Germany, the Netherlands, Italy). For the protection of bona fide third parties to be infringed, these persons must be able to challenge the decisions relating to the management of frozen property. The concept of "affected persons" provided for by the Regulation (EU) 2018/1805 (art. 2 and 33) is interesting because it allows to include third parties in the persons who can challenge the decisions relating to the management of frozen property.

In practice, "it is not always possible or easy to distinguish legitimate third parties from persons associated with the suspect or acting at the suspect's behest. (…) The following factors need to be assessed: Did the third party take action to prevent the offence? Is the third party implicated in any other related offence? Does this third party have a legitimate interest in the property and have an arm's length relationship with the suspect? Did the third party act diligently according to the law in the creation of the interest in the asset?"[33].

5. Possibility to claim damages suffered by a wrongful management of frozen assets

[32] BASEL INSTITUTE on GOVERNANCE, *op. cit.*, 35.

[33] UNODC, *op. cit.*, 27.

The State's civil responsibility may be engaged if the asset is wrongfully managed. However, the studied MS have not provided for a specific procedure, the person concerned can initiate a civil liability procedure against the State. In Germany, the freezing of assets creates a contractual relationship between the State and the person affected. France has been particularly severe in this regard, as no compensation can be claimed by the owner in case the asset is sold prior at a price he/she regards as undervalued. Since the sale is made publicly and competitively on the market, there is an irrefutable presumption of sale at the correct price.

Case law does not seem to be abundant in any studied MS and chances of success seem thin, since the obligation of management is considered more like an obligation of means than like an obligation of result. For instance, in Germany, the state is liable only for intentional and negligent violation of professional duties of civil servants who have caused individual harm or damages.

6. Statistics and databases

At the interim management stage, the databases must allow for "keeping track of the costs incurred in the management (…) of seized assets to ensure that such cost do not exceed the value that may ultimately be recovered from realization of the asset"[34]. Such databases must allow to produce accurate statistics and thus enhance accountability of the system.

Except for Italy, the MS find it difficult to provide statistics on decisions relating to the management of frozen property. These difficulties are related, in the different MS, to the multiplicity of actors charged with enforcement of these decisions (*cf. supra*). Indeed, the databases of some AMO have improved in recent years (Belgium, France, the Netherlands). The following is a set of criteria that could be used as a guide for the construction and improvement of these databases[35]: all agencies involved in the process should provide information on their activities; information should be collected by a centralized agency, in a centralized and customized database ; said database should be structured so as to cover all the phases of the process (investigation, seizure, custody, administration and disposal); the nature, the description, the physical location, the condition, the value and the identity of the owner of the asset should be recorded (and updated).

[34] UNODC, *op. cit.*, 59.

[35] UNODC, *op. cit.*, 47 and 60; TH. S. GREENBERG, L. M. SAMUEL, W. GRANT, L. GRAY, *op. cit.*, 87.

7. Management of frozen property in the context of mutual recognition

a. Institutional aspects of the management of frozen assets

No European text specifies what authorities are responsible for the decisions relating to the management of frozen property. It is simply provided that decisions relating to the management of frozen property "shall be governed by the law of the executing State" (Regulation (EU) 2018/1805, art. 28, par. 1).

The MS are encouraged to "ensure the adequate management of property frozen (…) for example by establishing centralized offices" (Directive 2014/42/EU, art. 10, par. 1 and recital 32; Regulation (EU) 2018/1805, recital 47). We have noticed that all the studied MS have a AMO (except Germany).

b. Disposal methods

1. Conservation

Frozen property shall remain in the executing State until a confiscation certificate has been transmitted and the confiscation order has been executed (Regulation (EU) 2018/1805, art 28, par. 3).

Recital 35 of the Directive 2014/42/EU specify that the MS must "take appropriate action to prevent criminal or illegal infiltration". This demand is missing from the directive as such.

2. Sale or transfer

National legislations must provide for "the possibility to sell or transfer property where necessary" (Directive 2014/42/EU, art. 10, par. 2). The objective is to avoid or minimize the economic depreciation of frozen assets (Directive 2014/42/EU, recital 32; Regulation (EU) 2018/1805, art. 28, par. 2).

Money obtained after selling such property shall remain in the executing State until a confiscation certificate has been transmitted and the confiscation order has been executed (Regulation (EU) 2018/1805, art. 28, par. 3).

The executing State shall not be required to sell cultural objects (Regulation (EU) 2018/1805, art. 28, par. 4). This affirmation is surprising in two counts at least. First, it only concerns confiscated property, or it could also make sense in the case of frozen property. Secondly, this formulation seems to suggest that in the case of other assets, the executing State could be forced to sell. However, article 28, par. 2 makes no mention whatsoever of such a constraint: the executing State "shall be able to sell (…) frozen property".

3. Social re-use?

Frozen property could be earmarked, as a matter of priority, for law enforcement and organized crime prevention projects and for other projects of public interest and social utility (Regulation (EU) 2018/1805, recital 47).

Is it relevant to provide for such assignment in the case of frozen assets but for which there has not been a decision of confiscation made yet? There is besides a contradiction between recital 47 and the text of the Regulation itself, since Regulation provides for this use for public interest or social purposes only for the confiscated property (art. 30, par. 6, point d).

4. Destruction

The Regulation (EU) 2018/1805 does not explicitly mention the destruction of frozen property. But the article 28 provides that the decisions relating to the management "shall be governed by the law of the executing State".

5. Restitution to the victim

The Regulation (EU) 2018/1805 restates that the notion of 'victim' is to be interpreted in accordance with the law of the issuing State (recital 45). A legal person could be a victim (recital 45).

The priority given to victim's rights to compensation and restitution over executing and issuing States' interest was not provided for in Directive 2014/42/EU (art. 8, par.10) and in the Proposal of regulation COM/2016/0819 final (recital 32 and art. 31, par. 5) only for the confiscated property. In the Regulation (EU) 2018/1805, this priority for the victims concern also the frozen property (recital 45 and art. 29).

The decision to restitute frozen property to the victim is made by the competent authority of the issuing State (Regulation (EU) 2018/1805, art. 29, par. 1). This issuing authority informs the executing authority of this decision to restitute frozen property to the victim (art. 29, par. 1 and 2). The executing authority should take the necessary measures to ensure that the frozen property is restituted "as soon as possible" (recital 46; art. 29, par. 2). The executing authority should be able to transfer the frozen property to the issuing State or be able to restitute this property directly to the victim (recital 46).

For frozen property to be returned to the victim, it is necessary that (Regulation (EU) 2018/1805, art. 29, par. 2; recital 46):

- the victim's title to the property not be contested;

- the property not be required as evidence in criminal proceedings in the executing State;

- the rights of affected persons not be prejudiced (in particular the rights of bona fide third parties).

Where an executing authority is not satisfied that these conditions have been met, it shall consult with the issuing authority in order to find a solution. If no solution can be found, the executing authority may decide not to restitute the frozen property to the victim (Regulation (EU) 2018/1805, art. 29, par. 3).

c. Costs related to management of frozen property

The costs related to management of frozen property must be borne by the executing State (Regulation (EU) 2018/1805, recital 49 and art. 31, par. 1). But, if the executing State has had large or exceptional costs, for example "because the property has been frozen for a considerable period of time" (Regulation (EU) 2018/1805, recital 49), it may propose to the issuing State that the costs be shared (Regulation (EU) 2018/1805, art. 31, par. 2). Such proposals shall be accompanied by a detailed breakdown of the costs incurred by the executing authority. Following such a proposal the issuing authority and the executing authority shall consult with each other. Where appropriate, Eurojust may facilitate such consultations (Regulation (EU) 2018/1805, art. 31, par. 2).

d. Obligation to inform affected persons

The obligation to inform affected persons is provided for the execution of a freezing order (Regulation (EU) 2018/1805, art. 32, par. 1). But this obligation is not provided for decisions relating to the management of frozen property. Indeed, the Regulation (EU) 2018/1805 limits itself to affirm that « the management of frozen (…) property shall be governed by the law of the executing State (art. 28, par. 1). It thus seems that information of affected persons with regard to these decisions depend on what is provided by the law of the executing State.

e. Legal remedies

The Regulation (EU) 2018/1805 provides for legal remedies in the executing State against the recognition and execution of a freezing order (art. 33). But this Regulation does not provide for legal remedies for the decisions relating the management of frozen property. It thus seems that the existence or not of legal remedies for the decisions relating the management of frozen property depend on the law of the executing State (Regulation (EU) 2018/1805, art. 28, par. 1).

The formulation retained by Directive 2014/42/EU concerning legal remedies seem broader than the one provided for by the Regulation (EU) 2018/1805. Indeed, article 8, par. 1 of this Directive provide that "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". However, among these "measures provided for this Directive", one should take into account "necessary measure (…) to ensure the adequate management of property frozen", provided in article 10. So, in the matter at hand, this Directive imposes, unlike the Regulation (EU) 2018/1805, legal remedies.

Article 33, par. 4 of the Regulation (EU) 2018/1805 specifies: "This Article is without prejudice to the application in the issuing State of safeguards and legal remedies in accordance with Article 8 of Directive 2014/42/EU". But, with regard to decisions relating to the management of frozen property, the legal remedies should be provided for in the executing State (since it is an authority of the executing State that has taken the decision relating to the management).

f. Compensation for the damage suffered

The Regulation (EU) 2018/1805 provide for reimbursement to an affected person in the case of damage resulting from the execution of a freezing order (art. 34). But the article 34 of this Regulation does not provide for reimbursement for the decisions relating the management of frozen property. It thus seems that the existence or not of reimbursement to an affected party for the decisions relating the management of frozen property depend on the law of the executing State (Regulation (EU) 2018/1805, art. 28, par. 1). As such, an affected person could receive reimbursement only if this procedure be possible in the internal law of the executing State.

The procedure enabling an executing State to be reimbursed by the issuing State for any damages paid to the affected person, provided for in article 34 of the Regulation (EU) 2018/1805 does not apply here.

g. Statistics

The Regulation (EU) 2018/1805 require that the MS collect comprehensive statistics (art. 35). However, it was never required that statistics be collected regarding the decisions relating to the management of frozen property.

h. Reporting and review

Every five years, the Commission shall submit a report to the European Parliament, to the Council and to the European Economic and Social Committee on the application of Articles 28, 29 and 30 in relation to the management and disposal of frozen property, the restitution of property to victims and the compensation of victims (Regulation (EU) 2018/1805, art. 38).

i. Traces of decisions relating to the management of frozen property in the model for the freezing certificate

The is no specific section of the freezing certificate dedicated to decisions relating to the management of frozen property. Only the Section K is dedicated to a decision to restitute frozen property to the victim.

If the issuing authority wishes to send a specific request to the executing authority about the management of the frozen property, it seems to us that it could use point “Need for specific formalities at the time of execution” of the F Section.

j. Conclusion

Difficulties noted at the level of obligation to inform affected persons, legal remedies, compensation for the damage suffered, demands at the level of statistics and at the level of the model for the freezing certificate are correlated to the fact that the Regulation (EU) 2018/1805 evokes only in passing the question of management. Indeed, the two key concepts of the Regulation (EU) 2018/1805 are "recognition" and "enforcement" of freezing and confiscation orders. The two main chapters (II and III) of the Regulation (EU) 2018/1805 are entirely devoted to these, but there is no chapter devoted to the next stage, that of management. Only sparse dispositions are mentioned in a chapter devoted to "general provisions" that we find some

elements relating to management. This situation is regrettable. It might have been interesting to define the concept of "execution of freezing order" more broadly to include all subsequent decisions relating to the management of frozen property.

II. Freezing of third-parties' assets

The rules on asset management and disposal apply irrespective whether the freezing order has been addressed to the defendant or a third party. As there are no peculiarities, the foregoing explanations apply accordingly.

Conclusion

After this overview of the issues at hand, it seems to us that the management of frozen property could be facilitated in at least two ways.

First, before the seizure, MS could consider more closely what is called "pre-seizure planning". This pre-seizure planning can be defined as "the process of evaluating assets and confiscation scenarios prior to freezing or seizure of property"[36]. The objectives of pre-seizure planning are numerous. "If the asset is left in the custody of the owner, pre-seizure planning assists in devising the kind of restrictions that ought to be placed on the use of the assets as well as the measures needed to monitor compliance with such restrictions. If the asset is to be seized, pre-seizure planning will focus on determining the best way to avoid high costs for storing it and to manage legal liabilities as well as reputational risk. The objective is for law enforcement to fully assess the options available for securing an asset in a way that best preserves its value and to evaluate and mitigate the risks associated with the freezing or seizure of that asset"[37]. The aim is to determine "what property is being targeted for seizure, how and when it will be seized"[38]. The AMO "should have the capacity to provide advice and support to law enforcement officials on questions relating to the costs of storage, maintenance, security and disposal of the asset"[39]. From this perspective, the work of AGRASC (France) must be considered best practice.

Secondly, the introduction of the possibility of value-based seizure should allow MS to "avoid some of the challenges posed by the need to manage complex assets"[40]. The value-based seizure and confiscation feature however so-called symbolic complications: the criminals retain the asset

[36] UNODC, *op. cit.*, 27.; G8 CRIMINAL LEGAL AFFAIRS SUBGROUP, *op. cit.*, 2; TH. S. GREENBERG, L. M. SAMUEL, W. GRANT, L. GRAY, *op. cit.*, 85.

[37] UNODC, *op. cit.*, 27 and 28.

[38] G8 CRIMINAL LEGAL AFFAIRS SUBGROUP, *op. cit.*, 2.

[39] UNODC, *op. cit.*, 63.

[40] UNODC, *op. cit.*, 30; B. VETTORI, T. KOLAROV, A. RUSEV, *op.cit.*, 37.

and this seems "to defeat one of the objectives of criminal asset confiscation, namely maintenance of public confidence in the justice system"[41].

We take the advantage of this latter remark to stress the omnipresence of a rhetoric triggered at the trust of the public in discourses correlated with justifications of seizure (and confiscation). This is particularly the case with social re-use of assets and, to a lesser extent, in the case of the use of information technology systems (databases, statistics), promoted in the name of demands of "transparency" and "accountability"[42]. These discourses did illustrate the emergence of a new basis for the sentence focused on public opinion or more specifically on the perception that the (conservative) political world has of expectations of a certain (repressive) public opinion[43]. It is thus the public trust in the administration of justice, rather than the protection of society (deterrent, denunciation, rehabilitating) which becomes central. Is it positive for criminal politics to rely on the perceptions of a public often poorly informed of the functioning of criminal justice[44]?

[41] B. VETTORI, T. KOLAROV, A. RUSEV, *op.cit.*, 38.

[42] G8 CRIMINAL LEGAL AFFAIRS SUBGROUP, *op. cit.*, 2 and 3.

[43] R. DUBE, M. GARCIA, « L'opinion publique au fondement du droit de punir : fragments d'une nouvelle théorie de la peine ? », *Déviance et Société*, 42, 2, 2018.

[44] This issue can be formulated in the following way: it does not matter if "in the reality of facts" a measure does not protect society effectively, it matters on the other hand that, "in the reality of perceptions", a measure makes it possible to reinforce the confidence of the public in the administration of justice.