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Management of the Frozen Assets in Europe

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INTRODUCTION

- Principal goal
 - Protect property, reduce deterioration
- EU legislative framework
 - Directive 2014/42/EU, art. 10
 - Regulation (EU) 2018/1805, art. 28
- Plan of the presentation:
 - Institutional aspects
 - Disposal methods
 - Management in the context of mutual recognition

1. INSTITUTIONAL ASPECTS

(A) A MULTIPLICITY OF 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
- Public prosecutor
- Ministry of Finance, Public Prosecution Service, bailiff, registrar, police, notary, private actors

1. INSTITUTIONAL ASPECTS

(B) ASSET MANAGEMENT OFFICE

- EU legislative framework :
 - Directive 2014/42/EU, art. 10.
 - Regulation (EU) 2018/1805, recital 47.
- AMO exist in studied MS (except in Germany)
- Studied MS in 3 categories :
 - Centralized approach with specialized institutions (FR, IT)
 - Centralized approach with non-specialized institutions (BE, NL, RO)
 - Decentralized approach (DE)
- Partnership agreements with private or public actors

2. DISPOSAL METHODS

(A) CONSERVATION

- AMO, Registry
- Risks :
 - Disproportionate storage costs
 - Deterioration
- Owner, possessor or third party, with use restrictions (« freezing » versus « seizure »)
- Costs of « freezing »:
 - Storage costs OK but :
 - Ensuring that use restrictions are respected
 - Ensuring that the frozen asset does not lose in value
- « Conservation » : passive or active management?
 - « with due diligence », « principles of prudent and passive management » (BE, RO)
 - « low-risk financial instruments » (FR, IT)

2. DISPOSAL METHODS

(B) SALE (PRE-CONFISCATION SALE, « INTERIM SALE »)

▪ Economic reasons

- Perishable assets
- Rapidly depreciating property
- Asset with a disproportionate storage or maintenance costs

▪ Technical reasons

- Asset too difficult to administer (DE, NL)
- Asset without known owner (BE, FR, RO)
- Asset frozen over a period of time (BE, NL, RO)
- Asset has not been claimed in time (FR)

▪ Conditions

- Asset must be replaceable (BE, NL)
- Asset must have a easily determinable value (BE, NL)
- Asset no longer necessary to ascertain the truth (BE, FR)
- Real estate (BE, FR, IT) but not frequently
- Company (IT)

▪ Owner's consent

- Informed (BE)
- Heard (DE)
- Explicit consent, with exceptions (RO)
- Legal remedies (BE, DE, RO)

2. DISPOSAL METHODS

(B) SALE (PRE-CONFISCATION SALE, « INTERIM SALE »)

- Types of sales
 - Priority to a sale by public auction (BE, DE, RO)
 - But private treaty if risk of selling to individuals associated with the criminal enterprises
- Proceeds of the sale
 - Negatively impacted by the reputation of the previous owner (Mafia)
 - Deposited into a bank account (controlled by the AMO)
 - Quid of the interests if there is no confiscation order : reimbursement (BE), to the AMO, for a fund allocated to improving justice and public security (FR, IT)

2. DISPOSAL METHODS

(C) SOCIAL RE-USE

- Proceeds of crime given back to society (>< transfer of the asset to the state budget)
- Symbolic impact
 - Transparent return to the public of assets misappropriated from society
 - To enhance the trust of citizens in public institutions
- Economic impact
 - Re-inject the funds of criminal organisations into legal activities
- Beneficiaries : « social » versus « institutional » re-use
 - Police (BE, IT)
 - Institutions of the State for purposes of justice, civil protection, environmental protection (IT)
- Re-use only after a confiscation order : FR, RO
- No (real) possibility of re-use : DE, NL
- Sale > re-use (except IT)
- Criticisms
 - Competition or attempts of manipulation by civil society organisation
 - Deteriorating and depreciating in value
 - Institutional re-use

2. DISPOSAL METHODS

(D) RENT

- Not explicitly provided for in the laws
- If the sale is not opportune
 - Real estate (BE, IT)
 - Corporate assets (IT)

3. MANAGEMENT AND MUTUAL RECOGNITION

(A) INSTITUTIONAL ASPECTS

- Decisions relating to the management of frozen asset « shall be governed by the law of the executing State » (Regulation (EU) 2018/1805, art. 28, par. 1)
- AMO (*cf. supra*)

3. MANAGEMENT AND MUTUAL RECOGNITION

(B) DISPOSAL METHODS

■ Conservation

- In the executing State until transmission of confiscation certificate (Regulation (EU) 2018/1805, art. 28, par. 3)

■ Sale

- Minimize economic depreciation
- Regulation (EU) 2018/1805, art. 28, par. 2 (it refers to Directive 2014/42/EU, art. 10)
- Money in the executing State until transmission of confiscation certificate (Regulation (EU) 2018/1805, art. 28, par. 3)
- Cultural objects : executing State not be required to sell (Regulation (EU) 2018/1805, art. 28, par. 4) :
 - Only « confiscated » property
 - Never an obligation to sell : “the executing State “shall be able to sell (...) frozen property” (Regulation (EU) 2018/1805, art. 28, par. 2)

3. MANAGEMENT AND MUTUAL RECOGNITION

(B) DISPOSAL METHODS

- Social re-use?
 - Contradiction between Recital 47 and art. 30 of the Regulation (EU) 2018/1805
- Destruction?
 - Not explicitly mentioned in Regulation (EU) 2018/1805
 - But : decisions relating to the management « shall be governed by the law of the executing State » (Regulation (EU) 2018/1805, art. 28, par. 1)

3. MANAGEMENT AND MUTUAL RECOGNITION

(C) OBLIGATION TO INFORM AFFECTED PERSONS

- For execution of a freezing order : Regulation (EU) 2018/1805, art. 32, par. 1
- Not explicitly for decisions relating to the management of frozen property...
 - But : Regulation (EU) 2018/1805, art. 28, par. 1
 - Thus : it depends on the law of the executing State

3. MANAGEMENT AND MUTUAL RECOGNITION

(D) LEGAL REMEDIES

- For recognition and execution of a freezing order :
Regulation (EU) 2018/1805, art. 33, par. 1
- Not explicitly for decisions relating to the management of frozen property...
 - But : Regulation (EU) 2018/1805, art. 28, par. 1
 - Thus : it depends on the law of the executing State

3. MANAGEMENT AND MUTUAL RECOGNITION (E) COMPENSATION FOR THE DAMAGE SUFFERED

- For damage resulting from execution of a freezing order : Regulation (EU) 2018/1805, art. 34, par. 1
- Not explicitly for decisions relating to the management of frozen property...
 - But : Regulation (EU) 2018/1805, art. 28, par. 1
 - Thus : it depends on the law of the executing State

3. MANAGEMENT AND MUTUAL RECOGNITION (F) STATISTICS

- Regulation (EU) 2018/1805, art. 35
- Not explicitly for decisions relating to the management of frozen property...

3. MANAGEMENT AND MUTUAL RECOGNITION (G) MODEL FOR THE FREEZING CERTIFICATE

- No specific section about decisions relating to the management of frozen property... but
- Section F “Need for specific formalities at the time of execution”?

3. MANAGEMENT AND MUTUAL RECOGNITION

(H) CONCLUSION

- Difficulties at the level of
 - Obligation to inform affected persons
 - Legal remedies
 - Compensation for the damage suffered
 - Statistics
 - Model for the freezing certificate
- Are linked to
 - "management" is not a key concept of the Regulation (key concepts = "recognition and execution of freezing orders")

CONCLUSION

- Pre-seizure planning
- Value-based seizure
- « Public confidence in the justice system »

Thank you for your attention.

