

Freezing and Confiscation

Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence

Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders

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

Set of Case Studies – Guide for Trainers

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Freezing and Confiscation

A. I. Case 1 scenario:

The prosecutor in Prague has started an investigation into an organised crime group that has specialised in trafficking in women and minor girls. The women and girls mainly come from the Czech Republic and Slovakia and are transported to exclusive brothels in Cyprus. The prosecution finds out that this has been going on rather successfully and unnoticed by the official channels for a decade already. Hundreds of women have already become victims and were forced into sexual slavery. The criminal group, consisting of the Czech national A, the Cypriot B and the Russian C must have earned millions of Euro's with this criminal activity. Through the information exchange with the colleagues in Cyprus, the Czech authorities learn that A owns several houses in Paphos, B runs a casino in Larnaca and C has a yacht in Limassol. In addition, it is presumed that each of the three may hide lots of cash on their property.

Questions:

1. *How does your legal system provide for freezing and confiscation?*
2. *Before the Czech prosecution starts to make arrests and warn the perpetrators that they know their whereabouts, they also wish to freeze the proceeds with a view to confiscation after conviction. What can the Czech prosecution do?*
3. *Which legal instrument is applicable?*
4. *How and to whom will a request be sent?*
5. *How will the Cypriot authorities freeze the objects?*
6. *What must happen if the Russian national C claims that the yacht seized is not his, but his brother's?*
7. *Imagine two years after freezing the property and goods, A and B are convicted to 15 years' imprisonment each for trafficking women and girls as an organised crime. The Prague court also ordered the proceeds in Cyprus from their crimes confiscated. C is acquitted. What will the Czech authorities request?*
8. *How will the Cypriot authorities respond?*
9. *How would you answer the questions above if the assistance is requested on or after 19 December 2020?*

A. II. Exercises:

Find the following executing competent authorities and the languages to be used in the Certificate:

1. The prosecutor in Bologna, Italy, would like to freeze a couple of ferrari's owned by a mafia organization also active in Liège, Belgium.

Competent authority:

Language:

2. The Irish authorities receive a request for confiscation from Luxembourg concerning proceeds from money laundering that were invested in Cork.

Competent authority:

Language:

3. A Spanish prosecutor who successfully prosecuted a group of counterfeiters recently obtained information that millions of euro's are kept in a Kopenhagen bank.

Competent authority:

Language:

4. In which cases will your answer be different after 19 December 2020?

Competent authority:

Language:

A. III. Case scenario 2:

The competent Maltese authority in Valetta receives a request from Sweden concerning the Swedish national Halvarson to confiscate his assets in Malta. Halvarson has recently been convicted by a Swedish court to seven years imprisonment for production of and trafficking in chemical drugs. Also, the estimate proceeds from crime to a value of 10 million Swedish Kroner are confiscated. The Swedes find out that Halvarson is co-owner of luxurious holiday resort in Birżebbuġa with a value of approx 38 million euro.

Questions:

1. *What is the basis for the request?*
2. *Which authorities are involved on both sides?*
3. *What will the Maltese authorities confiscate?*
4. *Halvarson wishes to object to the confiscation. Where and how can he do that?*
5. *The other co-owner of the holiday resort, Mark Innocent, is a man with an undisputable reputation. He has never been in contact with anything illegal, always paid taxes on time and is without a criminal record. Innocent is not happy with attempts to seize his property and wishes to undertake action against it. What can he do?*
6. *How would you answer the questions above if the assistance is requested on or after 19 December 2020?*

Part B. Additional notes for the material

Directive 2014/42, that partly replaced its predecessor Framework Decision 2005/212, CANNOT BE USED as a tool for the training. The training must be based on Framework Decision 2003/577 on Freezing Orders and Framework Decision 2006/783 on Confiscation Orders. That is, however, not all. This situation changed on 19 December 2020 when 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 will replace FD 2003/577 and FD 2006/783 for those Member States that are bound by the new regulation.¹

Part C. Methodological approach

I. General idea and core topics

The focus of these exercises is first to raise awareness that this modality of cooperation is still in a process of transition and that the currently applicable legislation is scattered. This finds its origin in the different systems the Member States have when it comes to freezing and confiscation. The result is that the practitioner is confronted with a panoply of different legal instruments. It means on the one hand, that in many situations more than one legal instrument could give a legal basis. For instance, lots of property that could be frozen or confiscated, might have been seized already as evidence under the 2000 EU Convention or the EIO. On the other hand, it may also lead to cases in which there is no such legal basis at all. This changed as of 19 December 2020 when Regulation 2018/1805 enters into force. This Regulation will not only replace the Framework Decisions, but also harmonise the applicable legislation the very same day, as a Regulation applies directly in the national legal order and does not require national implementation.

In preparing for their authorities, court staff must spend definitively more time in preparing the requests as situations may be rather complex and we also need to face the period of transition. This may cause delay or even lead to an impediment for cooperation. Especially on freezing, quick and urgent action is often absolutely necessary.

The Cases and its questions have been designed to allow the trainer and participants to deal with:

¹ That is all Member States, except Ireland and Denmark. For those two the Framework Decisions continue to apply in their relations with all other Member States.

1. The structure and basic presumptions of mutual recognition in general and in the specific context of freezing and confiscation of instrumentalities and proceeds of crime in the European Union on the basis of the current Framework Decisions;
2. The structure and basic presumptions of mutual recognition in general and in the specific context of freezing and confiscation of instrumentalities and proceeds of crime in the European Union on the basis of Regulation 2018/1805;
3. Finding which authorities are involved on both sides;
4. Learning how to complete the exercises;
5. How the tasks between the issuing authority and the executing authority have been divided;
6. How contact between the authorities can be established and what kind of information must be exchanged;
7. What the consequences of a freezing order subsequently are for confiscation in the executing Member State;
8. The role the defence may play in trying to lift freezing and/ or confiscation;
9. The role a third party may play in trying to lift freezing and/ or confiscation.

II. Working groups and structure of the seminar

In advance of the seminar the trainer will send a one-page questionnaire to get to know the experience of the participants on the FDs and its practice. S/he will also ask what expectations they have and which questions they would like to see answered. The information thus obtained will be used in the presentation as well as influence the choices that must be made in varying the level of tasks to be discussed and potential additional questions. It is important to have this information available as it may be expected that among the participants the level of experience, their linguistic capabilities and daily tasks in practice may vary. It may be expected that no many participants have experience with this form of cooperation. More complicated issues can then be left out.

The trainer will provide the participants with a brief presentation (Power point) highlighting the important features of Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or

evidence and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. S/he will spend more time on 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– of all three instruments scope, definitions, freezing and confiscation, object v. value confiscation, competent authorities, grounds for refusing, time limits, governing law, subsequent decisions, obligations for the Member States will be dealt with (**approx. 15-20 min**).

NB for trainers: Depending on when the training is held: **after 19 December 2020 is decisive** on where the emphasis must be. After 19 December 2020 most attention should go to the Regulation. The Framework Decisions from then onwards remain important in the relations with Denmark and Ireland only.

Case scenario 1 is designed to deal both with very basic issues, as well as a more in-depth analysis of several problems that may occur. The participants will work in groups of 4-5 and will have a laptop connected to the internet in order to answer the questions. Especially the websites of EJN, Eurlex and the Court of Justice are recommended. It is intended that participants learn to use these websites to obtain the information they need and to use it in solving the problems at stake. Solving Case scenario 1 and answering the questions should take **approx. 1 hour and 40 minutes**. Groups may be formed by bringing participants of the same experience level together.

A 10-minute break is recommended at this point.

Solving the **exercises** from point A.II should take around **10 minutes** as they are meant to help the participants in understanding the mechanism for finding a competent authority and the language to be used in the Certificate. After having already consulted the EJN website, this exercise can also be used as a control exercise. In case solving Case scenario 1 took much more time than anticipated, this exercise could be skipped and given as homework.

Case scenario 2 will force the participants to deal with issues that cannot be found in the text of the Framework Decision, however, they do apply to the practice of it and require a prompt answer. The participants will work in groups of 4-5 and will have a laptop connected to the internet in order to solve the questions. Solving Case scenario 2 should take **approx. 40-45 minutes**.

Any remaining questions should be discussed at the end of the seminar (for **approx. 5-10 minutes**).

III. Additional material

All participants will **bring** a copy of:

- Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence;
- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders;
- 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.

All three comprising the Forms in the Annex. Also, the participants will also bring or have access to their national provisions implementing the Framework Decisions and legislation that facilitates the use of the Regulation.

(note for the trainers: It will be interesting to see and check whether participants have been able to obtain all three relevant texts. If time permits, this is a moment to train them to use eurlex and [the consolidated version of legal texts](#))

It is essential to stimulate using online tools!

IV. Recent developments

Please check whether there are any new cases pending or preliminary reference made to the Court of Justice over the last three months. If not, the question can be put to the participants why there is no recent case.

The answer is that these procedures hardly lead to cases in which references are being made. Concerning the Regulation, the explanation is very simple. The instrument is too recent to have led to matters of interpretation.

Part D. Solutions

A. I. Case 1 scenario

Questions:

Q1. How does your legal system provide for freezing and confiscation?

This is in essence a question of national criminal procedure. It aims at creating awareness among the participants of their national procedural rules concerning freezing and confiscation. In addition, the question aims at demonstrating that Member States still have quite diverse proceedings on this. This situation will change with the directly applicable Regulation.

Q2. Before the Czech prosecution starts to make arrests and warn the perpetrators that they know their whereabouts, they also wish to freeze the proceeds with a view to confiscation after conviction. What can the Czech prosecution do?

Before an authority may be able to send a freezing order, it must know where the assets are. One cannot randomly send freezing orders throughout the European Union. The Czech authorities first need to know whether there are assets in Cyprus. They can do so in a derivative way via a request for information or evidence based on the 2000 EU Mutual assistance convention or the EIO. Unfortunately, there is no legal instrument that gives the legal basis directly to obtain information about whereabouts of assets.

Q3. Which legal instrument is applicable?

Before 19 December 2020 Framework Decision 2003/577 is applicable. After that date, it is Regulation 2018/1805.

One of the purposes of FD 2003/577 is to freeze property for subsequent confiscation and that is exactly what the Prague prosecutor wants (Art. 2 FD). The offences at stake qualify as trafficking in human beings, sexual exploitation of children and participation in a criminal organisation. All three are listed in the list of Article 3(2) FD for which no double criminality must be checked.

Articles 2 and 3 of the Regulation stipulate the same, albeit with different wording.

Q4. How and to whom will a request be sent?

Article 4 FD states that the freezing order (using the certificate) must directly be sent from the issuing authority to the competent executing authority. Article 4 states that it must be a *judicial authority*. Depending on whether there was judicial oversight by a judge (see Bob Dogi case referred to in the set on the EAW), the Prague prosecutor can send the order to Cyprus.

To whom must it be sent? EJN's [Judicial Atlas](#) has three categories that could be applicable:

- 501. Sequestration of assets
- 502. Freezing of bank accounts
- 504. Interim measures in view of confiscation

All three are relevant, so they can all be checked and then we will see whether it results in the same authority. That is the case:

Name:	Unit for Combating Money Laundering (MOKAS)
Address:	Law Office of the Republic, P.O. Box 23768
Department (Division):	
City:	Nicosia
Postal code:	1686
Phone number:	+357 22446018
Mobile phone:	
Fax number:	+357 22317063
Email Address:	mokas@mokas.law.gov.cy

Article 4 of Regulation 2018/1805 states that the certificate must be directly sent to the executing authority. We do not know yet (as of 31 May 2020) whether Cyprus has issued a declaration as meant in Article 24(2) Regulation 2018/1805, nor does the EJN website already refer to the Regulation. This provision allows Member States to declare a central authority competent.

Q5. How will the Cypriot authorities freeze the objects?

Article 5 FD states that Cyprus will recognize the freezing order without any further formality on the basis of its national law, unless a ground for non-recognition applies. The case description does not indicate the application of refusal grounds. A similar rule concerning the freezing order is found in Articles 7 and 23 Regulation.

Q6. What must happen if the Russian national C claims that the yacht seized is not his, but his brother's?

Article 11 FD 2003/577 stipulates that the Member States' freezing must provide legal remedies for bona fide third parties. The third party can choose between the issuing or the executing Member State. However, the substantive reason for the order can only be challenged before a court in the Czech Republic and will be decided on the law of the Czech Republic (Art. 11(2)). The brother of C may also bring an action before the court in Cyprus. In such a case the issuing authority will be informed thereof (Art. 11(3)).

Article 33 Regulation states that the legal remedy against the freezing order is in the executing Member State. The substantive reasons cannot be challenged in the executing Member State (Art. 33(2)). Article 33(4) Regulation clarifies that the legal remedies that may exist in the issuing Member State as a result of implementing Article 8 of Directive 2014/42 on Freezing Proceeds of Crime must be respected.

Q7. Imagine two years after freezing the property and goods, A and B are convicted to 15 years imprisonment each for trafficking in women and girls as an organised crime. The Prague court also ordered the proceeds in Cyprus from their crimes confiscated. C is acquitted. What will the Czech authorities request?

We now enter a different stage. The criminal proceedings are no longer pending, but have resulted in a final decision. A and B are found guilty and C is acquitted. This means that concerning A and B the temporary measure of freezing can be replaced by the permanent measure of confiscation. Concerning C, the issuing Czech authorities will have to inform the Cypriot authorities that the freezing order has been lifted (Art. 6(3) FD)). As a result of that Cyprus will also lift the measures as soon as possible.

Concerning A and B confiscation will be requested on the basis of FD 2006/783. Following the assistance of Atlas at the EJM website we see that it is the same authority to which also the confiscation order must be sent to. The Czech authorities will use the certificate provided in the FD.

Article 14 of Regulation 2018/1805 states that the certificate must be directly sent to the executing authority. We do not know yet (as of 31 May 2020) whether Cyprus has issued (or will do so) a declaration as meant in Article 24(2) Regulation 2018/1805, nor does the EJM website already refer to the Regulation. This provision allows Member States to declare a central authority competent.

Q8. How will the Cypriot authorities respond?

They will execute the order as soon as possible, following Article 7 FD 2006/783. However, it is their choice whether they confiscate a specific item of property, or whether they confiscate other assets of a similar value (Art. 7 (2)). Article 18 Regulation maintains these rules.

NB for trainers: It would be quite informative to ask participants what their country of origin would do here. The basic question is whether it applies object or value confiscation.

Q9. How would you answer the questions above if the assistance is requested on or after 19 December 2020?

Both issuing Member State and executing Member State must apply the Regulation. Above, the answers on the basis of that Regulation have been given already.

A. II. Exercises:

Find the following executing competent authorities and the languages to be used in the Certificate:

1. The prosecutor in Bologna, Italy, would like to freeze a couple of Ferrari's owned by a mafia organization also active in Liège, Belgium.

The Italian issuing authority is:

Name:	Office of the Public Prosecutor attached to the Court of first instance of BOLOGNA
Address:	Via Garibaldi 6
Department (Division):	
City:	BOLOGNA
Postal code:	
Phone number:	051201111
Mobile phone:	
Fax number:	
Email Address:	procura.bologna@giustizia.it

It will send the order to:

Name:	Parquet du procureur du Roi de Liège division LIEGE
Address:	Palais de Justice - Annexe Nord Rue de Bruxelles 2/0004
Department (Division):	
City:	Liège
Postal code:	4000
Phone number:	+ 32.(0)4.222.78.22
Mobile phone:	
Fax number:	+ 32.(0)4.222.72.47
Email Address:	commissions.rogatoires.liege@just.fgov.be

We know the location of the Ferrari's in Liège and on the EJM website the relevant box can then be ticked. Also on the website we find that the Belgian authorities require: "[The certificate should be should be drawn up in or translated into Dutch, French, German or English.](#)"

2. *The Irish authorities receive a request for confiscation from Luxembourg concerning proceeds from money laundering that were invested in Cork.*

We do not know which authority in Luxembourg sends the request. So, it will be either the Court in Diekirch or the Court in Luxembourg city.

It is unclear to which Irish authorities the confiscation order must be sent, as the EJM website reports that the implementation of FD 2006/783 is still ongoing. See the [status of implementation of the Framework Decision](#).

When I checked this on 31 May 2020, the site mentioned that it was last reviewed on 27 May 2020. That was really up to date!

The language to be used is [Irish or English](#).

3. *A Spanish prosecutor who successfully prosecuted a group of counterfeiters recently obtained information that millions of Euros are kept in a Copenhagen bank.*

It is most likely that the Spanish prosecutor wishes to obtain confiscation. The description states that he successfully prosecuted, so we may presume a conviction. Spain has decentralised the possibility to request. Without knowing where the prosecutor is based, we cannot answer the question.

The EJM website forces you to tick boxes that are multi-interpretable. However, the result is the same when ticking FD 2996/783 instead of the 2000 EU Convention:

Name:	Ministry of Justice
Address:	Slotsholmsgade 10
Department (Division):	
City:	Copenhagen K
Postal code:	1216
Phone number:	0045 72 26 84 00
Mobile phone:	
Fax number:	0045 33 93 35 10
Email Address:	jm@jm.dk

On the EJM website we find that the Danish authorities require that the request is [formulated in Danish](#)

4. In which cases will your answer be different after 19 December 2020?

As stated before, we do not know yet which declarations as meant in Article 24(2) Regulation 2018/1805 concerning the competent issuing and executing authorities Member States will make. However, we do know that Regulation 2018/1805 is not applicable to Ireland and Denmark. As a result of that, it is certain that nothing will change for these two Member States.

A. III. Case scenario 2, the continuation of Case 1:

Questions:

Q1. What is the basis for the request?

The confiscation will be requested on the basis of FD 2006/783. The authorities will use the certificate provided in the FD.

Since 19 December 2020 Regulation 2018/1805 has given the legal basis. Article 14 of Regulation 2018/1805 states that the certificate must be directly sent to the executing authority. We do neither know yet (as of 31 May 2020) whether Sweden or Malta have issued a declaration as meant in Article 24(2) Regulation 2018/1805, nor does the EJN website already refer to the Regulation. This provision allows Member States to declare a central authority competent.

Q2. Which authorities are involved on both sides?

We have no information in the description about the location of the Swedish prosecution. Concerning Malta, we learn that the competent authority is in Valletta. That must then be:

Name:	Office of the Attorney General
Address:	The Palace
Department (Division):	
City:	Valletta
Postal code:	CMR0002
Phone number:	+356 21 238189 / 235315 / 225401 / 225402
Mobile phone:	
Fax number:	+356 21 240738
Email Address:	ag@gov.mt

NB: if participants do this rather fast, one can give the exercise to fill in the certificate of FD 2006/783 and see where questions come up. Similarly, as 19 December 2020 has passed, the certificate of the Regulation can be filled in.

Q3. What will the Maltese authorities confiscate?

They will execute the order as soon as possible, following Article 7 FD 2006/783. However, it is their choice whether they confiscate a specific item of property, or whether they confiscate other assets of a similar value (Art. 7 (2)). Article 18 Regulation maintains these rules. **NB for trainers:** It would be quite informative to ask participants what their country of origin would do here. The basic question is whether it applies object or value confiscation.

Q4. Halvarson objects to the confiscation. Where and how can he do that?

Article 9 FD 2006/783 stipulates that the Member States' freezing must provide legal remedies for any interested party and bona fide third parties. The objecting party can choose between the issuing or the executing Member State. However, the substantive reason for the order can only be challenged before a court in Sweden and will be decided on Swedish law (Art. 9(2)). Article 33 Regulation states that the legal remedy against the freezing order is in the executing Member State. The substantive reasons cannot be challenged in the executing Member State (Art. 33(2)). Article 33(4) Regulation clarifies that the legal remedies that may exist in the issuing Member State as a result of implementing Article 8 of Directive 2014/42 on Freezing Proceeds of Crime must be respected.

Q5. The other co-owner of the holiday resort, Mark Innocent, is a man with an undisputable reputation. He has never been into contact with anything illegal, always paid taxes on time and is without a criminal record. Innocent is not happy with attempts to seize his property and wishes to undertake action against it. What can he do?

Mr Innocent has the same tools as stated under answer 4 concerning the sentenced person.

Q6. How would you answer the questions above if the assistance is requested on or after 19 December 2020?

These answers have been given above already. The case does not relate to a Member State to which the Regulation does not apply (Denmark, Ireland).