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

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(1)(a) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure[(1)],

Whereas:

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice.

(2) Judicial cooperation in criminal matters in the Union is based on the principle of mutual recognition of judgments and judicial decisions, which has commonly been referred to as the cornerstone of judicial cooperation in criminal matters within the Union since the Tampere European Council of 15 and 16 October 1999.

(3) The freezing and the confiscation of instrumentalities and proceeds of crime are among the most effective means of combatting crime. The Union is committed to ensuring more effective identification, confiscation and re-use of criminal assets in accordance with 'The Stockholm programme — An open and secure Europe serving and protecting the citizens'[(2)].

(4) As crime is often transnational in nature, effective cross-border cooperation is essential in order to freeze and confiscate the instrumentalities and proceeds of crime.

(5) The current Union legal framework in relation to the mutual recognition of freezing orders and confiscation orders is composed of Council Framework Decisions 2003/577/JHA[(3)] and 2006/783/JHA[(4)].

(6) The Commission's implementation reports on Framework Decisions 2003/577/JHA and 2006/783/JHA show that the existing regime for the mutual recognition of freezing orders and confiscation orders is not fully effective. Those Framework Decisions have not been implemented and applied uniformly in the Member States, which has led to insufficient mutual recognition and sub-optimal cross-border cooperation.

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(7) The Union legal framework on mutual recognition of freezing orders and confiscation orders has not kept up with recent legislative developments at Union and national levels. In particular, Directive 2014/42/EU of the European Parliament and of the Council[(5)] establishes minimum rules on the freezing and the confiscation of property. Those minimum rules concern the confiscation of instrumentalities and proceeds of crime, including in the cases of illness or absconding of the suspect or accused person, where criminal proceedings have already been initiated regarding a criminal offence, extended confiscation and confiscation from a third party. Those minimum rules also concern the freezing of property with a view to possible subsequent confiscation. The types of freezing orders and confiscation orders covered by that Directive should also be included in the legal framework on mutual recognition.

(8) When adopting Directive 2014/42/EU, the European Parliament and the Council stated in a declaration that an effective system of freezing and confiscation in the Union is inherently linked to the well-functioning mutual recognition of freezing orders and confiscation orders. Considering the need to put in place a comprehensive system for the freezing and confiscation of the instrumentalities and proceeds of crime in the Union, the European Parliament and the Council called on the Commission to present a legislative proposal on the mutual recognition of freezing orders and confiscation orders.

(9) In its communication of 28 April 2015 entitled 'The European Agenda on Security', the Commission considered that judicial cooperation in criminal matters relies on effective cross-border instruments and that the mutual recognition of judgments and judicial decisions is a key element in the security framework. The Commission also recalled the need to improve the mutual recognition of freezing orders and confiscation orders.

(10) In its communication of 2 February 2016 on an Action Plan for strengthening the fight against terrorist financing, the Commission highlighted the need to ensure that criminals who fund terrorism are deprived of their assets. The Commission stated that, in order to disrupt organised crime activities that finance terrorism, it is essential to deprive those criminals of the proceeds of crime. To that end, the Commission stated that it is necessary to ensure that all types of freezing orders and confiscation orders are enforced to the maximum extent possible throughout the Union by the application of the principle of mutual recognition.

(11) In order to ensure the effective mutual recognition of freezing orders and confiscation orders, the rules on the recognition and execution of those orders should be established by a legally binding and directly applicable act of the Union.

(12) It is important to facilitate the mutual recognition and execution of freezing orders and confiscation orders by establishing rules that oblige a Member State to recognise, without further formalities, the freezing orders and confiscation orders issued by another Member State within the framework of proceedings in criminal matters and to execute those orders within its territory.

(13) This Regulation should apply to all freezing orders and to all confiscation orders issued within the framework of proceedings in criminal matters. 'Proceedings in criminal

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matters' is an autonomous concept of Union law interpreted by the Court of Justice of the European Union, notwithstanding the case law of the European Court of Human Rights. The term therefore covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence, not only orders covered by Directive 2014/42/EU. It also covers other types of order issued without a final conviction. While such orders might not exist in the legal system of a Member State, the Member State concerned should be able to recognise and execute such an order issued by another Member State. Proceedings in criminal matters could also encompass criminal investigations by the police and other law enforcement authorities. Freezing orders and confiscation orders that are issued within the framework of proceedings in civil or administrative matters should be excluded from the scope of this Regulation.

(14) This Regulation should cover freezing orders and confiscation orders related to criminal offences covered by Directive 2014/42/EU, as well as freezing orders and confiscation orders related to other criminal offences. The criminal offences covered by this Regulation should therefore not be limited to particularly serious crimes that have a cross-border dimension, as Article 82 of the Treaty on the Functioning of the European Union (TFEU) does not require such a limitation for measures laying down rules and procedures for ensuring the mutual recognition of judgments in criminal matters.

(15) Cooperation between Member States, which is based on the principle of mutual recognition and the immediate execution of judicial decisions, presupposes confidence that the decisions to be recognised and executed will always be taken in compliance with the principles of legality, subsidiarity and proportionality. Such cooperation also presupposes that the rights of persons who are affected by a freezing order or confiscation order should be preserved. Such affected persons, who can be natural persons or legal persons, should include the person against whom a freezing order or confiscation order was issued or the person who owns the property that is covered by that order, as well as any third parties whose rights in relation to that property are directly prejudiced by that order, including bona fide third parties. Whether such third parties are directly prejudiced by a freezing order or confiscation order, should be decided in accordance with the law of the executing State.

(16) This Regulation does not modify the obligation to respect fundamental rights and legal principles enshrined in Article 6 of the Treaty on European Union (TEU).

(17) This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union (the 'Charter') and the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'ECHR'). This includes the principle that any discrimination based on any ground such as sex, racial or ethnic origin, religion, sexual orientation, nationality, language, political opinion, or disability is to be prohibited. This Regulation should be applied in accordance with those rights and principles.

(18) The procedural rights set out in Directives 2010/64/EU[(6)], 2012/13/EU[(7)], 2013/48/EU[(8)], (EU) 2016/343[(9)], (EU) 2016/800[(10)] and (EU) 2016/1919[(11)] of the European Parliament and of the Council should apply, within the scope of those Directives, to criminal proceedings covered by this Regulation as regards the Member States bound

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by those Directives. In any case, the safeguards under the Charter should apply to all proceedings covered by this Regulation. In particular, the essential safeguards for criminal proceedings set out in the Charter should apply to proceedings in criminal matters that are not criminal proceedings but which are covered by this Regulation.

(19) While the rules for the transmission, recognition and execution of freezing orders and confiscation orders should ensure the efficiency of the process of recovering criminal assets, fundamental rights are to be respected.

(20) When assessing double criminality, the competent authority of the executing State should verify whether the factual elements underlying the criminal offence in question, as reflected in the freezing certificate or confiscation certificate submitted by the competent authority of the issuing State, would also, per se, be subject to a criminal penalty in the executing State if they were present in that State at the time of the decision on the recognition of the freezing order or confiscation order.

(21) The issuing authority should ensure that, when issuing a freezing order or confiscation order, the principles of necessity and proportionality are respected. Under this Regulation, a freezing order or confiscation order should only be issued and transmitted to an executing authority in another Member State where it could have been issued and used in a solely domestic case. The issuing authority should be responsible for assessing the necessity and proportionality of such orders in each case as the recognition and execution of freezing orders and confiscation orders should not be refused on grounds other than those provided for in this Regulation.

(22) 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.

(23) Member States should be able to make a declaration stating that, when a freezing certificate or confiscation certificate is transmitted to them with a view to the recognition and execution of a freezing order or confiscation order, the issuing authority should transmit the original freezing order or confiscation order, or a certified copy thereof, together with the freezing certificate or confiscation certificate. Member States should inform the Commission where they make or withdraw such a declaration. The Commission should make such information available to all Member States and to the European Judicial Network (EJN) provided for by Council Decision 2008/976/JHA[(12)]. The EJN should make that information available on the website referred to in that Decision.

(24) The issuing authority should transmit a freezing certificate or confiscation certificate, together with the freezing order or confiscation order, where applicable, either directly to the executing authority or to the central authority of the executing State, as applicable, by any means capable of producing a written record under conditions that allow the executing authority to establish authenticity of the certificate or order, such as registered mail or secured email. The issuing authority should be able to make use of any relevant

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channels or means of transmission, including the secure telecommunications system of the EJN, Eurojust, or other channels used by judicial authorities.

(25) Where the issuing authority has reasonable grounds to believe that the person against whom a freezing order or confiscation order concerning an amount of money was issued has property or income in a Member State, it should transmit the freezing certificate or confiscation certificate that relates to the order to that Member State. On that basis, the certificate could, for example, be transmitted to the Member State in which the natural person against whom the order was issued is residing or, where that person has no permanent address, is habitually residing. Where the order is issued against a legal person, the certificate could be transmitted to the Member State in which the legal person is domiciled.

(26) With a view to the administrative transmission and reception of certificates relating to freezing orders and confiscation orders, Member States should be able to designate one or more central authorities where necessary due to the structure of their internal legal systems. Such central authorities could also provide administrative support, play a coordination role and assist in the collection of statistics, thus facilitating and promoting the mutual recognition of freezing orders and confiscation orders.

(27) Where a confiscation certificate that relates to a confiscation order concerning an amount of money is transmitted to more than one executing State, the issuing State should seek to avoid the situation whereby more property than necessary is confiscated and the total amount obtained from the execution of the order would exceed the maximum amount specified therein. To that end, the issuing authority should, inter alia, indicate in the confiscation certificate the value of assets, where known, in each executing State, so that the executing authorities can take account thereof, maintain the necessary contact and dialogue with the executing authorities on the property to be confiscated, and inform the relevant executing authority or authorities immediately if it considers that there could be a risk that confiscation in excess of the maximum amount might occur. Where appropriate, Eurojust could exercise a coordinating role within its remit in order to avoid excessive confiscation.

(28) Member States should be encouraged to make a declaration stating that, as executing States, they would accept freezing certificates, confiscation certificates, or both, in one or more official languages of the Union other than their official languages.

(29) The executing authority should recognise freezing orders and confiscation orders and should take the measures necessary for their execution. The decision on the recognition and execution of the freezing order or confiscation order should be taken, and the freezing or confiscation should be carried out, with the same speed and priority as for similar domestic cases. Time limits, which should be calculated in accordance with Regulation (EEC, Euratom) No 1182/71 of the Council[(13)], should be set out in order to ensure a quick and efficient decision on the recognition of the freezing order or confiscation order and a quick and efficient execution thereof. As regards freezing orders, the executing authority should start taking the concrete measures necessary to execute such orders no later than 48 hours after the decision on the recognition and execution thereof has been taken.