



## PRACTICAL CHALLENGES TO THE MUTUAL RECOGNITION OF FREEZING AND CONFISCATION ORDERS IN THE EU

### Policy Brief

The European Union's ambitious endeavour to fortify judicial cooperation across its Member States, mainly through the regime for mutual recognition of freezing and confiscation orders, as stipulated in Regulation (EU) 2018/1805, represents a critical step towards the seamless enforcement of judicial decisions across national borders. This Regulation, designed to enhance the efficacy of cross-border legal actions against crime, underscores the EU's commitment to ensuring that justice transcends the confines of national legal systems. However, the practical application of the Regulation by legal professionals—judges, prosecutors, and lawyers—has surfaced various challenges illuminating the complexities and divergences inherent in the Union's diverse legal landscape. These practical challenges reveal significant insights into the operational hurdles that beset the mutual recognition and enforcement of judicial orders across the European Union. Difficulties span a broad spectrum, from the effectiveness of legal remedies and the implications of time limits on enforcement measures to barriers in communication and procedural uncertainties. Such challenges impede the streamlined application of the Regulation and highlight the nuanced interplay between national legal traditions and the overarching objectives of EU judicial cooperation.

### Challenges Faced by Judges and Prosecutors

A predominant issue highlighted by the respondents revolves around the **ambiguity and need for more**

#### KEY POINTS

- Ambiguity exists regarding authorities' powers in executing orders across EU states. A lack of practical experience in applying the Regulation hampers its effectiveness.
- Magistrates and lawyers express divided views on the merits of a set timeframe for urgent freezing orders. Most magistrates need more experience handling such requests.
- Primary obstacles to order execution are deficiencies in cross-border communication, legal inconsistencies, and lack of harmonisation, which are the main barriers to smooth order execution.
- The standard certificate introduced by Regulation 2018/1805 is widely considered helpful and complete. However, some legal practitioners note issues around consistency, clarity, improper filling, and inability to encapsulate all relevant contextual facts.
- Lawyers have legal remedies to challenge freezing and confiscation orders, but none hold suspensive power. They indicate a willingness to legally challenge certified orders violating fundamental rights or based on incomplete certificates.

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**experience** regarding the execution capabilities of judges and public prosecutors under the Regulation. This ambiguity is partly attributed to the **absence of common standards** delineating the powers and responsibilities attributed to the relevant authorities across different Member States. The variation in procedural requirements – where some jurisdictions necessitate a public prosecutor’s application to initiate confiscation measures, while others empower judges to enforce these orders *ex officio* – exemplifies the inconsistency in the application of the Regulation. This **lack of uniformity** complicates the procedural landscape and amplifies the oversight role of public prosecutors, traditionally limited to managing execution measures. Additionally, the widespread inexperience with the Regulation underscores the pressing **need for specialised training** and the establishment of dedicated units within public prosecutor offices to handle confiscation and freezing orders more effectively.

The timing for executing orders, particularly urgent freezing orders, represents another contentious area. The magistrates across the EU reflect a divergence in opinions regarding the feasibility of adhering to specific timelines, expressing difficulties in meeting the stipulated deadlines. This viewpoint discrepancy is further complicated by general inexperience with urgent freezing orders. The need for more consensus on the **necessity and practicality of imposing definitive time limits** for implementing measures emanating from the Regulation points to a broader issue of preparedness and capacity among the judiciary. Complications arising from the execution of freezing and confiscation orders and the transfer of property for confiscation predominantly stems from communication and coordination deficits among relevant authorities across Member States. The **challenge of identifying responsible authorities** and eliciting timely responses is compounded by varying legal frameworks and magistrates’ limited training and practical experience concerning the Regulation. These procedural discrepancies often leave authorities grappling with non-domestic measures mandated by the issuing state, **necessitating ad-hoc solutions** such as executing equivalent domestic actions, consulting Eurojust, or directly engaging with issuing authorities. To address these challenges, Member States have adopted measures to bridge the existing gaps. These include enhancing practitioner training, developing detailed guidelines, and improving inter-state communication systems like the Schengen Information System. Such initiatives

are geared towards raising awareness and fostering a more uniform and informed regulation application across the EU.

Challenges related to the standard certificates used to enforce orders have also been identified as a point of contention. While most magistrates find the certificates comprehensive and valuable, concerns were raised about their consistency, **lack of clarity**, and the burden they impose. Challenges such as improper filling, insufficient information, and translation issues further exacerbate the difficulties in effectively completing and processing these certificates. Moreover, the current format of the certificates needs to address scenarios involving double criminality or offence limits.

Regarding using legal remedies to challenge orders, magistrates in various Member States have reported instances where suspects availed themselves of such measures. However, none reported refusing an order on fundamental rights or double criminality, suggesting **a nuanced interplay between legal oversight and the operationalisation of the Regulation**.

The majority of magistrates across the EU recognise the conception and adoption of hard and soft law provisions as facilitating factors. These additional guidelines have been instrumental in clarifying the Regulation’s application, resolving practical challenges, and ensuring a more consistent national application. Conversely, a minority of magistrates perceive these provisions as overly concise, advocating for a more direct application of the Regulation.

## Challenges Faced by Lawyers

A central concern among lawyers pertains to the **availability of legal remedies** for challenging certificates in the context of recognition and execution procedures under the Regulation. While lawyers acknowledge the existence of legal avenues to contest freezing and confiscation orders, a notable gap was identified in the suspensive effect of such challenges. In essence, the appeal proceedings, although provisioned, continue the implementation of the measures in question, thereby placing a significant limitation on the efficacy of legal challenges. This scenario is further complicated by the rare instances of legal practitioners contesting certificates, especially in executing states or on the grounds of double criminality, highlighting a potential area of legal uncertainty and underutilisation of available remedies.

The issue of time limits within certificates, particularly concerning the **duration of measures taken due to an order**, presents another area of divergence among lawyers. The debate mirrors that of the magistrates, with opinions split between the necessity of a specified timeframe for lifting measures and the potential detriment such limitations could pose to the Regulation's objectives. The consensus leans towards allowing the issuing authority's court to quash or renew orders within a reasonable timeframe, suggesting a preference for flexibility and judicial discretion in managing the persistence of orders.

Lawyers also identify significant obstacles in executing freezing and confiscation orders, predominantly from **communication challenges and the need for harmonisation** across Member States. The diversity in legal and administrative approaches complicates the enforcement landscape, underscoring the need for enhanced coordination and a unified approach to address these disparities effectively.

The awareness of hard and soft law provisions relating to the Regulation's implementation within national frameworks is widespread among the legal practitioners surveyed. These provisions are recognised for facilitating the application of the Regulation at the national level, offering guidance and clarity in its operationalisation. However, the determination of national competent authorities and the procedural aspects of relevant proceedings stipulate significant areas for improvement. These areas of concern suggest **more precise guidelines** and more defined processes to streamline the Regulation's application across different jurisdictions.

Another set of challenges relates to the certificates used in enforcing the Regulation, particularly concerning their completeness and clarity. The potential **incompleteness or lack of clarity in information provided by issuing authorities** raises concerns about the effectiveness and efficiency of the certification process, indicating a critical area for improvement.

## What's Next?

The practical challenges encountered by judges, prosecutors, and lawyers in the implementation of Regulation (EU) 2018/1805 provide a comprehensive view of the hurdles that currently impede the seamless mutual recognition and enforcement of freezing and confiscation orders across the European Union. These challenges, rooted in the EU's diversity of legal systems and procedural nuances, highlight a critical need for harmonisation and enhanced cooperation among Member States.

The intricacies of applying the Regulation, as evidenced by the difficulties in executing orders, the variability in legal remedies, and the disparities in procedural interpretations, **call for an integrated approach to reform**. Such an approach should include bolstering legal clarity through refined guidelines, expanding training programs to build judicial and legal expertise, and fostering mechanisms for efficient communication and collaboration across jurisdictions. Moreover, the feedback from legal professionals underscores the paramount importance of ensuring that the Regulation respects and upholds fundamental rights throughout its application. This dual focus on enhancing operational efficiency and safeguarding rights is essential for fostering trust and confidence in the EU's judicial cooperation framework.

Addressing the identified practical challenges is not merely about streamlining legal processes but also about **strengthening the very fabric of judicial cooperation** within the European Union. By taking concerted steps towards harmonisation and clarity, the EU can significantly enhance the effectiveness and efficiency of the mutual recognition regime for freezing and confiscation orders. Such advancements are crucial for combating cross-border crime and reinforcing the rule of law across Member States, thereby contributing to a safer and more just European Union.

**FORCE (Freezing Orders and Confiscation orders: Effort for Common Standards)** aims at improving judicial cooperation in the recovery of illicit assets by investigating practical obstacles to the implementation of **Regulation (EU) 2018/1805** on the mutual recognition of confiscation and freezing orders. It also seeks to mitigate disparities in training by creating comprehensive resources for legal professionals, policy-makers, scholars and the general public.

**FORCE** seeks to bridge the gaps between legal systems across the EU by highlighting the existing national provisions and strengthening the mutual cooperation and understanding between practitioners who deal with the practical application of the Regulation.

To achieve this goal, **FORCE** has developed a comprehensive Digital Ecosystem, which incorporates the following modules that could help practitioners in their efforts to ensure that judicial decisions related to the freezing and confiscation of assets derived from criminal activities can be recognized and enforced across all EU Member States more effectively and efficiently than before.



A **Knowledge Sharing Repository**, an interactive map of information regarding freezing and confiscation rules and practices in all EU Member States. For each EU MS a web interface displays the description of the inner freezing and confiscation instruments; links to the relevant legislation and soft law; list of contact points and authorities competent for CFO; useful contacts such as victims' associations, services and organizations dealing with the administration of confiscated properties; and links to national legal persons registers.



A **Virtual Learning Environment** on the Regulation and its implementation, developed to effectively train practitioners and to raise awareness on the existing EU instruments in the field of mutual recognition of freezing and confiscating orders. It hosts an Online Open Course and Case simulations to further assist in the bridging of national discrepancies or lack of training in relation to CFO.



A **FORCE Community**, a digital forum facilitating the information exchange between practitioners and experts, working in the field of freezing and confiscation orders. The registered users can also share opinions and suggestions related to FORCE's products and their efficacy.