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## **Extended confiscation**

**under Art. 14 of the Directive (EU) 2024/1260**

**- what should we pay attention to, enriched by the experience with  
Article 5 of the Directive 2014/42 EU**

Elżbieta Hryniewicz-Lach, AMU Poznań (PL)

Catania, 7.11.2024 RECOVER (GA 101091375)

# Research project on extended confiscation

## Extended confiscation and its justification in light of fundamental rights and general principles of EU law (2021-2025)

cooperation of specialists in legal science from **16 EU Member States**

Austria, Bulgaria, Croatia, Czechia, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania & Spain

financed by the National Science Centre, Poland (2020/39/D/HS5/01114)

performed at the Adam-Mickiewicz-University in Poznań, PL

project website <https://konfiskata.web.amu.edu.pl/en/>

## Article 14: Extended confiscation (2024)

### 1. Member States shall take the necessary measures to enable the confiscation:

- either wholly or in part, **of property** belonging to a person
- **convicted of a criminal offence,**
- where the offence committed is **liable to give rise,** directly or indirectly, to economic benefit,
- and where a national court is satisfied [*convinced*] that the property is **derived from criminal conduct.**

**2.** In determining whether the property in question is derived from criminal conduct, account shall be taken of all the circumstances of the case, including the specific facts and available evidence such as that the value of the property is disproportionate to the lawful income of the convicted person.

**3.** For the purposes of this Article, the notion of ‘criminal offence’ shall include at least the offences listed in Article 2, paragraphs 1 to 3, where such offences are punishable by deprivation of liberty of a maximum of at least four years.

## Article 5: Extended confiscation (2014)

1. Member States shall adopt the necessary measures to enable the confiscation:

- either in whole or in part, of property belonging to a person
- convicted of a criminal offence
- which is liable to give rise, directly or indirectly, to economic benefit,
- where a court,
  - on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person,is satisfied [*convinced*] that the property in question is derived from criminal conduct.

2. For the purpose of paragraph 1 of this Article, the notion of ‘criminal offence’ shall include at least the following: (...)

## Article 14 Extended confiscation (2024)

Triggering 'criminal offence' includes at least (as in the Directive 2014)

- (active & passive) **corruption** in public (*of UE & MS officials*) & in private sector
- fraud and **counterfeiting** of non-cash **means of payment**, the euro and other currencies against counterfeiting
- **money laundering**
- participation in a **criminal organization** & *criminal offences* committed within its framework (*at least in cases where the offence has led to economic benefit*)
- illicit **drug trafficking**
- **trafficking in human beings**
- sexual abuse and sexual exploitation of children and child pornography
- attacks against information systems, **illegal system interference and illegal data interference**
- **terrorism**

where such offences are punishable by deprivation of liberty of a max. of at least 4 years.

## Article 14 Extended confiscation (2024)

Triggering ‘criminal offence’ includes at least (beyond Directive 2014)

- illicit manufacturing & trafficking in firearms, their parts, components, ammunition
- fraud to the Union’s financial interests
- protection of the environment & ship-source pollution
- prevent the facilitation of unauthorised entry, transit and residence in EU
- market abuse
- violation of Union restrictive measures
- any criminal offences set out in other Union legal acts where such acts provide that this Directive applies to those criminal offences.

where such offences are punishable by deprivation of liberty of a max. of at least 4 years.

EU cannot limit the scope of triggering offences in the implementation proced.

## Issues observed by ExtConf in MS

**The origin of assets** be inferred from **red flags**, not statutory limited

- the **disproportionate value** of the property to one's lawful income
- unusual circumstances in which the assets were acquired
- large transactions in cash, quick disposal of assets
- money invested in non-cooperating legal systems (with low level of control, unusual distance between the place of residence & investments)
- unusual / complicated ownership structure of assets, **hiding one's connection with the property** (e.g. failure to report the ownership in relevant registers)
- **the affected person** - provided with reasonable conditions of defense - **does not cooperate in explaining the origin of assets**
- recent criminal activity (of similar kind) of the affected person
- close contact to criminal offenders & the reputation of the affected person

## Issues observed by ExtConf in MS

### ❑ Problematic far-reaching evidentiary facilities:

- the **mandatory** application of ExtConf

→ court discretion (no proportionality / hardship cl., but: systemic interpretation)

- the **presumption of illicit origin** of assets

→ *if in doubt, in favour of forfeiture* (but: the right to property)

- **automatic reversal of the burden of proof** when conviction for listed offences

→ no initial evidence submitted by the prosecutor (but: the right to silence)

→ *mandatory forfeiture if no counter-evidence* (but: free evaluation of evidence)

- **retrospective** (& retroactive) **asset confiscation** (but: *lex mitior*)

### ❑ legal solutions applied by courts of lower instances, but...

### ❑ annulment of CO by appeal courts (→ disproportionality!)

### ❑ risk of mandat. **general confiscation** limited by the time of asset acquisition



## Issues observed by ExtConf in MS

### ❑ Differences in legal classification & applicable (procedural) safeguards:

- the court must be satisfied or convinced?
  - *different language versions may result in different standards*
- does the presumption of innocence apply or not?
  - *different legal nature (penalty / preventive measure / restorative tool)*
- stigmatising – and thus repressive – character?
  - *confidence in the legislator vs. label fraud*

### ❑ The **right to a legal remedy**:

- ❑ shall be invoked before a court **in the executing State** – only substantive reasons for issuing CO (& FO) are not to be challenged (Art. 33 Reg. 1805/2018)
- ❑ **justifies non-execution** of CO (Art. 19.1(e) Reg. 1805/2018)

## Issues observed by ExtConf in MS

- **incompatible language versions** of EU legal acts
  - different understanding of their provisions in MS
- non-acceptance of **one common language** (even in urgent matters) by a MS
  - reciprocal refusal to enforce urgent court's decisions by other MS
- **different understanding** of legal principles (and concrete provisions)
  - lack of adequate safeguards for the affected persons
  - frustration by representatives from more cooperative MS
  - distrust & reluctance to cooperate in practice
- **inconsistency** of a provision **with higher-level act** in one MS
  - its removal from a legal system & non-enforcing an order from other MS
  - distrust, frustration & reluctance to cooperate in practice
- **shortage of staff** (judges, prosecutors, policemen) & a multitude of instruments of mutual cooperation in criminal matters
  - focus on most urgent cases

## Relevant findings

- ❑ **EU law** is sometimes perceived as a **foreign implant** to national law
  - disproportionality in value & income as sole premise of ExtConf application
  - lack of use of *the indirect effect of EU law* in legal interpretation
- ❑ **far-reaching evidentiary facilities** as an *apparent* facilitation of asset confiscation
  - applied in courts of first instance
  - annulled confiscation orders by courts of appeal (disproportionality)
- ❑ problem with legal solution **in one MS** affect **the entire EU** (→ mutual recognition)
  - **inconsistency** of a provision **with higher-level act** & its removal
  - specific classification & understanding of applicable safeguards
- ❑ organizational problems & **reluctance to cooperate** in one MSs
  - may cause problems with its application in other MS

## Article 14 of the Directive - implementation

- ❑ Implementation of Art. 14 of the Directive 1260/2024 requires verification whether:
  - all (new) **triggering offences are covered** by national law
  - the existing provisions in MS **do not limit** excessively **court's discretion**
    - *mandatory* application of ExtConf without proportionality clauses
    - the *automatic* reversal of the burden of proof
    - the presumption of illicit origin of assets
    - the scope of retrospective confiscation
    - statutory limitation of red flags for illicit origin of assets
  - the national provisions are **consistent** with **higher level legal acts** of the MS
  - the competent authorities have **enough organisational support**
    - to cooperate internally & in a cross-border cases

**Thank you for your attention!**

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**[hryniew@amu.edu.pl](mailto:hryniew@amu.edu.pl)**