

The management of frozen and confiscated assets abroad & third parties' rights

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The new Directive (EU) no. 2024/1260 and the management of frozen and confiscated assets

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CHAPTER IV: Management

- Chapter IV (Articles 20-22) regulates the asset management phase.
- The provisions require Member States to ensure that frozen or confiscated assets are **managed efficiently** until their final destination,
- with a view to **preserving the value of the assets** and **minimising management costs**.
- Harmonisation of the relevant rules would facilitate cooperation in the mutual recognition of seizure and confiscation orders under Regulation 1805/2018 .
- To achieve this objective, Member States are required to carry out a **preliminary assessment of the costs** that will be incurred in the management of the property ('pre-seizure planning') (Art. 20, n. 4) .

ART. 20: TO PREVENT THE ACQUISITION BY CONVICTED PERSONS

- 2. Member States are encouraged to take appropriate measures to prevent property from being acquired, in the course of its disposal further to a confiscation order,
- by persons convicted in the criminal proceedings in which the property was frozen.

Art. 20

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3. Member States shall ensure the efficient management of frozen and confiscated property until its disposal further to a final confiscation order.
- 4. Member States shall ensure that, where justified by the nature of the property, competent authorities responsible for the management of frozen property assess the specific circumstances of property that might become the object of a confiscation order in order to minimise its estimated management costs and to preserve the value of such property until its disposal.
- **Such an assessment shall be carried out when preparing or, at the latest, without undue delay after executing the freezing order.**

- In a much more detailed and complex manner, **Italian Legislative Decree 159/2011** provides for the obligation of the judicial administrator to provide, pursuant to Article 36, within thirty days of his appointment,
- a detailed report on the seized assets and,
- pursuant to Article 41, a **detailed report on the economic status of the seized company** and
- on the '**concrete possibilities of continuation or resumption of the activity**'.

Article 28 of the Regulation (Management and destination of property subject to freezing and confiscation)

- In this direction, Article 28 of the Regulation also provides that
- " The executing State shall manage the frozen or confiscated property with a view to preventing its depreciation in value ";
- as stated in the Inception Impact Assessment 2021 there is a problem of **"inefficient management of frozen and confiscated property.**
- Once frozen and/or confiscated, **assets quickly depreciate in value with various management needs for which law enforcement and judicial authorities are not always equipped.**
- The difficult management of assets and their depreciation make it difficult to compensate victims when there are provisions in that direction and to reconvert assets for social purposes”.

Article 28

Management and disposal of frozen and confiscated property

- 1. The management of frozen and confiscated property shall be governed **by the law of the executing State.**
- 2. The executing State shall manage the frozen or confiscated property with a **view to preventing its depreciation in value.**
- To that end, the executing State, having regard to Article 10 of Directive 2014/42/EU, shall be able **to sell or transfer frozen property.**
- 3. Frozen property and money obtained after selling such property in accordance with paragraph 2 **shall remain in the executing State until a confiscation certificate has been transmitted and the confiscation order has been executed,** without prejudice **to the possibility of restituting property under Article 29.**
- 4. The executing State **shall not be required to sell or return specific items** covered by a confiscation order, where those items **constitute cultural objects,** as defined in point (1) of Article 2 of Directive 2014/60/EU of the European Parliament and of the Council [\(18\)](#). This Regulation **shall not affect the obligation to return cultural objects under that Directive.**

This problem is emphasized when the object of the confiscation is a company,

- **Carrying on the economic activity should be guaranteed**
- **if it is a viable business that is able to stay on the market under legal conditions.**
- Legislation and practice are very different in Member States in this area,
- also in view of the **reluctance of prosecutors to confiscate active businesses,**
- capable of guaranteeing employment and producing profit,
- but **difficult to manage once seized and confiscated** (Project-ARIEL_Final- report, 2015).

ART. 22 "Asset Management Office"

- Article 22, in particular, requires Member States to establish at least one "Asset Management Office" responsible for
- **directly managing frozen and confiscated property until their disposal on the basis of a final confiscation order,**
- or to **provide support and expertise** to other authorities responsible for asset management and planning under Art. 20,
- to **cooperate with other authorities responsible for the tracing and identification,** freezing and confiscation of assets, and
- to **cooperate with other authorities responsible for the management** of frozen and confiscated assets in cross-border cases.
- In Italy this should be the National Agency for Confiscated Assets

Article 22

Asset management offices

- 1. Each Member State shall set up or designate at least one competent authority to function as an asset management office for the purpose of the management of frozen and confiscated property until the disposal of that property further to a final confiscation order.
- 2. Asset management offices shall have the following tasks:
- (a) to ensure the efficient management of frozen and confiscated property, either through directly managing frozen and confiscated property or through providing support and expertise to other competent authorities responsible for the management of frozen and confiscated property and planning in accordance with Article 20(4);

- (b) to cooperate with other competent authorities responsible for the tracing and identification, freezing and confiscation of property pursuant to this Directive;
- (c) To cooperate with other competent authorities responsible for the management of frozen and confiscated property in cross-border cases

transferring or selling frozen property before the confiscation order is issued ("provisional sale")

- Art. 21 requires Member States to provide for the possibility to transfer or sell frozen property before the confiscation order is issued ("provisional sale").
- The requirements that could alternatively lead to such a sale are the following:
 - a) the property subject to freezing is perishable or rapidly depreciating;
 - b) the storage or maintenance costs of the property are disproportionate to its market value;
 - c) the management of the property requires special conditions and expertise which is not readily available

A series of safeguards

- are provided to protect the interests of the subject of the ablatory measure;
- in deciding on the sale, the interests of the owners of the assets must be taken into account (also in the sense of the fungibility of the same),
- they must be **notified of this intention** and
- they must be **guaranteed the right to be heard** before the decision of provisional sale is taken .
- This possibility of pre-sale is likely to represent a blatant violation of the right of ownership where the legitimate owner in the event of non-confiscation order confirmation is given back the mere tantundem;
- it is provided for by Italian Legislative Decree n. 159/2011 at Article 40, c. 5-ter, for movable assets if the assets "cannot be managed without danger of deterioration or significant diseconomies".

Recital 43

- In accordance with national law, **the decision on the sale of a property of a specific nature might be subject to prior approval by a national competent authority.**
- Before taking such a decision, Member States should ensure that **the affected person,** with the exception of cases where the affected person has absconded or cannot be located, **is notified** and, except in cases of urgency, **is given the opportunity to be heard before the sale.**
- Member States should provide for the possibility of an **appeal against an order for an interlocutory sale.**
- Member States should provide for the possibility for a court **to suspend the execution of such an order,**
- for example where necessary to safeguard the legitimate interests of the affected person,
- in particular where there is a risk of irreparable harm.
- Member States can also provide for the possibility of giving **the appeal suspensory effect by law.**
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Recital 43: Alternative to the sale

- Member States should be able to require **the costs for the management of frozen property to be charged to the owner or beneficial owner of the property,**
- for instance as **an alternative to the ordering of an interlocutory sale,**
- and in the case of a final conviction

The protection of victims

- Recital 5: An effective asset recovery system further requires the effective management of frozen and confiscated property in order to maintain the value of that property for the State or for the restitution for victims.

Victims: recital 37

- Considering that criminal activities can inflict great harm on victims, it is essential to protect their rights, including **the rights to compensation and restitution**.
- Therefore, Member States should take appropriate measures to ensure that **victims' claims to restitution and compensation** against the person who is subject to a confiscation measure as a result of a criminal offence **are taken into account** in asset-tracing, freezing and confiscation proceedings, including in cross-border cases.
- Moreover, in order to facilitate the compensation and restitution of property to victims, it is necessary to facilitate the tracing of property that might become the object of such claims as well as the exchange of information between authorities competent for asset tracing and authorities competent for deciding upon claims by victims or executing such decisions

In relation to the phase of destination of property, art. 18

- Article 18, Compensation of victims, requires that
- the rights **to compensation of victims or legal persons**, as defined in national law, who have suffered damage as a result of an offence covered by this Directive be **respected** and,
- (n. 1“Member States shall take appropriate measures to ensure that where, as a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure provided for under this Directive, such claims are taken into account within the relevant asset-tracing, freezing and confiscation proceedings.
- 4. Where a victim is entitled to the restitution of property that is or might become subject to a confiscation measure provided for under this Directive, Member States shall take the necessary measures to reconstitute the property concerned to the victim, under the conditions set out in Article 15 of Directive 2012/29/EU).
- in any case
- N. 5 “Member States shall take the **necessary measures to ensure that the execution of confiscation measures provided for under this Directive does not prejudice victims’ rights to obtain compensation.** ’
- In turn, recital 22 provides for the possibility of freezing property 'also with a view to its possible subsequent restitution or in order to ensure compensation for the damage caused by a criminal offence' and, finally, recital 29 (Council version) specifies that 'Member States may provide for rules on the applicable mechanisms by which property, or the value thereof, confiscated for the State budget or another public budget, may be used for compensation to victims, for public interest or social purposes, or for other purposes defined by national law'.

Article 18

Compensation of victims

- 1. Member States shall take appropriate measures to ensure that where, as a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure provided for under this Directive, such claims are taken into account within the relevant asset-tracing, freezing and confiscation proceedings.
- 2. Member States shall enable competent authorities responsible for asset-tracing investigations pursuant to Article 4 to provide, upon request, to the authorities responsible for deciding upon restitution and compensation claims or executing such decisions, any information on assets identified that might be relevant for the purposes of such claims. Member States may also enable competent authorities responsible for asset-tracing investigations pursuant to Article 4 to provide such information without such a request being made.
- 3. Member States shall ensure that asset recovery offices may trace and identify instrumentalities and proceeds or property which is or might become the object of a decision to compensate or to reconstitute property to a victim, at least where asset recovery offices act in cross-border cases in accordance with Article 5(2), point (b), and where the decision is issued by a court having competence in criminal matters in another Member State in the course of the criminal proceedings.
- 4. Where a victim is entitled to the restitution of property that is or might become subject to a confiscation measure provided for under this Directive, Member States shall take the necessary measures to reconstitute the property concerned to the victim, under the conditions set out in Article 15 of Directive 2012/29/EU.
- 5. Member States shall take the necessary measures to ensure that the execution of confiscation measures provided for under this Directive does not prejudice victims' rights to obtain compensation. Member States may decide to limit such measures to situations in which the lawful assets of the offender are not sufficient to cover the total amount of compensation.

REGULATION: **Restitution of frozen property to the victim** (*Article 29*)

- 1. Where the **issuing authority** or another competent authority of the issuing State **has issued a decision**, in accordance with its national law, **to retribute frozen property to the victim**,
- the issuing authority **shall include information on that decision in the freezing certificate or communicate information on that decision to the executing authority at a later stage**
- 2. Where the executing authority has been informed of a decision to retribute frozen property to the victim as referred to in paragraph 1,
- it **shall take the necessary measures to ensure** that, where the property concerned has been frozen, **that property is restituted as soon as possible to the victim, in accordance with the procedural rules of the executing State**, where necessary via the issuing State, provided that:

Provided that:

- a) the victim's **title to the property is not contested**;
- b) the property **is not required as evidence** in criminal proceedings in the executing State; and
- c) the **rights of affected persons are not prejudiced**
- The **executing authority shall inform the issuing authority where property is transferred directly to the victim.**
- 3. Where the **executing authority** is not satisfied **that the conditions of paragraph 2 have been met**,
- it **shall consult with the issuing authority without delay and by any appropriate means in order to find a solution.**
- If no solution can be found, **the executing authority may decide not to reconstitute the frozen property to the victims**

Art. 30 REGULATION Disposal of confiscated property or money obtained after selling such property

- **FIRST OF ALL THE DESTINATION TO THE VICTIM**

- 1. Where the issuing authority or another competent authority of the issuing State has issued a decision, in accordance with its national law, either to reconstitute confiscated property to the victim or to compensate the victim, the issuing authority shall include information on that decision in the confiscation certificate or communicate, at a later stage, information on that decision to the executing authority.
- 2. Where the **executing** authority has been informed of a decision to reconstitute confiscated property to the victim as referred to in paragraph 1, it **shall take the necessary measures to ensure that, where the property concerned has been confiscated, that property is reconstituted as soon as possible to the victim**, where necessary via the issuing State. The executing authority shall inform the issuing authority where property is transferred directly to the victim.
- 3. Where it is not possible for the executing authority to reconstitute the property to the victim in accordance with paragraph 2, but money has been obtained as a result of the execution of a confiscation order in relation to that property, **the corresponding sum shall be transferred to the victim for the purposes of restitution**, where necessary via the issuing State. The executing authority shall inform the issuing authority where money is transferred directly to the victim. Any remaining property shall be disposed of in accordance with paragraph 7.
- 4. Where the executing authority has been informed of a decision to compensate the victim as referred to in paragraph 1, and money has been obtained as a result of the execution of a confiscation order, **the corresponding sum, in so far as it does not exceed the amount indicated in the certificate, shall be transferred to the victim for the purposes of compensation, where necessary via the issuing State**. The executing authority shall inform the issuing authority where money is transferred directly to the victim. Any remaining property shall be disposed of in accordance with paragraph 7.
- 5. Where proceedings to reconstitute property to, or compensate, the victim are pending in the issuing State, the issuing authority shall inform the executing authority accordingly. **The executing State shall refrain from disposing of the confiscated property until the information on the decision to reconstitute property to, or compensate, the victim has been communicated** to the executing authority, even in cases where the confiscation order has already been executed.

destination

- The Directive 42/2014 invites Member States to **reuse confiscated property for public interest or social purposes**, without introducing an **obligation** (Article 10(3)) and
- Article 30, no. 6(d) of Regulation 1805/2018, on mutual recognition, states that '**property may be used in the public interest or for social purposes in the executing State in accordance with its law, subject to the consent of the issuing State**'
- (Recital 47: 'Frozen and confiscated property **could be used**, as a priority, for projects to combat and prevent organised crime and for other projects of public interest and social benefit').

Art. 30 REGULATION Disposal of confiscated property or money obtained after selling such property

- 6. Without prejudice to paragraphs 1 to 5, property other than money that has been obtained as a result of the execution of the confiscation order shall be disposed of in accordance with the following rules:
 - A) the property may be **sold**, in which case the proceeds of the sale are to be disposed of in accordance with paragraph 7;
 - B) the property may be transferred to the issuing State provided that, where the confiscation order covers an amount of money, the issuing authority has given its consent to the transfer of property to the issuing State;
 - C) subject to point (d), if it is not possible to apply point (a) or (b), the property may be disposed of in another way in accordance with the law of the executing State; or
 - D) the property may be used for public interest or social purposes in the executing State in accordance with its law, subject to the consent of the issuing State

- 7. Unless the confiscation order is accompanied by a decision to reconstitute property to the victim or to compensate the victim in accordance with paragraphs 1 to 5, or unless otherwise agreed by the Member States involved,
- **the executing State shall dispose of the money** obtained as a result of the execution of a confiscation order as follows:
 - a) if the amount obtained from the execution of the confiscation order is **equal to or less than EUR 10 000**, the amount shall accrue to the executing State; or
 - b) if the amount obtained from the execution of the confiscation order is **more than EUR 10 000**, 50 % of the amount **shall be transferred by the executing State to the issuing State.**

ART. 31 COSTS

- 1. Each Member State shall bear its own costs resulting from the application of this Regulation, without prejudice to the provisions relating to the disposal of confiscated property set out in Article 28.
- 2. The executing authority may submit a proposal to the issuing authority that the costs be shared where it appears, either before or after the execution of a freezing order or confiscation order, that the execution of the order would entail large or exceptional costs.
- Such proposals shall be accompanied by a detailed breakdown of the costs incurred by the executing authority. Following such a proposal the issuing authority and the executing authority shall consult with each other. Where appropriate, Eurojust may facilitate such consultations.
- The consultations, or at least the result thereof, shall be recorded by any means capable of producing a written record.

there is no binding provision on the destination of the property; Article 19 merely states that

Article 19

• **Further use of the confiscated property**

- 1. Member States **are encouraged** to take the necessary measures to allow the possibility of using confiscated property, where appropriate, **for public interest or social purposes**.
- 2. Without prejudice to applicable international law, Member States **may use** the instrumentalities, proceeds or property confiscated in relation to the offences referred to in Directive (EU) 2024/1226 to **contribute to mechanisms to support third countries affected by situations in response to which Union restrictive measures have been adopted**, in particular in cases **of war of aggression**. The Commission may provide guidance on the arrangements for such contributions.

RECITAL 38: SOCIAL REUSE

- The social reuse of confiscated property sends **a visible message to society in general regarding the importance of values such as justice and legality,**
- reaffirms the **prevalence of the rule of law** in communities more directly affected by organised crime,
- and builds the **resilience** of those communities against criminal infiltration in their social and economic fabric, as observed in those Member States that have already adopted such social reuse measures.
- Therefore, Member States **are encouraged to take the necessary measures to allow for the possibility to use confiscated property for public interest or social purposes,**
- so that it is possible to maintain confiscated property as State property for **justice, law enforcement, public service, social or economic purposes** or
- to transfer such confiscated property to the authorities from the **municipality or region** where it is located so that **those authorities can use it for such purposes,** including for assignment to **organisations carrying out work of social interest.**
- The use of confiscated property for such purposes is without prejudice to the budgetary autonomy of Member States

The introduction of specific legislation on the use of confiscated assets

- Despite the introduction of specific legislation on the use of confiscated assets for purposes of public or social interest in 19 Member States (Belgium, Bulgaria, Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Austria, Poland, Portugal, Romania, Slovenia) (Commission Report 2020),
- as stated in the Inception Impact Assessment 2021
- 'confiscated assets are **currently not routinely used to compensate crime victims or to return profits to society through their use for social purposes**'.
- "The social re-use of crime proceeds and instrumentalities is exclusively a matter for the Member States and is not a legal obligation".
- The European legislator did **not consider it appropriate to introduce stringent obligations imposing the social re-use** of crime proceeds and instrumentalities,
- correctly considering that such a provision **could not be justified in terms of subsidiarity and proportionality of EU intervention**.

Social purposes

- However, it is certainly desirable that the definitively confiscated assets are **reused for social purposes** (such as financing in the fields of education, social protection and social inclusion)
- with a **widespread and long-term positive social impact**,
- which also creates **social consensus** on the use of seizure and confiscation instruments
- that sometimes also have a negative impact on the economic resilience of certain social contexts (just think of the frequent cases where the seized company goes into liquidation with consequent job losses).