

RECOVER (GA 101091375) – Mutual recognition of freezing and
confiscation orders between efficiency and the rule of law
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What about the implementation of the Directive of 2024 and safeguards in France?

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General elements about French Law

- ▶ Many Acts on the subject:
 - ▶ A central and long text about confiscation: art. 131-21 penal code
 - ▶ Since 1994, 9 legislative amendments of this article, in particular:
 - ▶ Loi n° 2010-768 du 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale which is the act that creates the AGRASC (our national asset recovery office)
 - ▶ Loi n°2024-582 du 24 juin 2024 améliorant l'efficacité des dispositifs de saisie et de confiscation des avoirs criminels which considers that now the confiscation of property is equivalent to an eviction order (whereas until now it was necessary to go through cumbersome procedural formalities to obtain the eviction of the confiscated property)
- ▶ Rich Case-Law: Constitutional Council and Court of Cassation

Confiscation = an extensive notion

What will change with the implementation of the Directive?

Focus about confiscation hypothesis in the directive (1)

Directive 2024/1260	French Law
Confiscation (art. 12)	✓ Art. 131-21 PC
Confiscation form a third party (art. 13) « where a national court has established, based on the concrete facts and circumstances of a case, that the relevant third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation »	✓ Art. 131-21 PC as interpreted by the Criminal Chamber of the CC « confiscation applies to all (...) property, of which the convicted person is the owner or, subject to the rights of the owner in good faith, of which he or she has free disposal ». For the Criminal Court, it must interpreted as meaning that the third party who is the legal owner of the property is not acting in good faith when 'he knows that he has only apparent legal ownership' (Crim., 4 sept. 2024)

Focus about confiscation hypothesis in the directive (2)

Directive 2024/1260	French Law
<p>Extended confiscation (art. 14) « 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 that the property is derived from criminal conduct ».</p>	<p>✓ Art. 131-21 PC: -Explicit presumption: In the case of serious offences that have resulted in a profit (offence punishable by at least 5 years' imprisonment), if the convicted person cannot justify the origin of his assets, these assets may be confiscated; they are presumed to be of unlawful origin, unless proven otherwise (which presupposes that the person concerned, has been "invited to explain the assets whose confiscation is envisaged and to justify their origin": Cass. crim, 23 May 2024). -Implicit presumption: 'Where the law punishing the offence so provides, confiscation may also relate to all or part of the property belonging to the convicted person or (...) of which he has free disposal'. Some authors even describe this text as an irrebuttable presumption.</p>

Focus about confiscation hypothesis in the directive (3)

Directive 2024/1260	French Law
<p>Non-conviction based confiscation (art. 15)</p> <p>Confiscation of property where criminal proceedings have been initiated but could not be continued in particular because of illness, absconding, death of the suspected or accused person</p>	<p>?</p> <p>No: According to recent case law, the death of the accused 'extinguishes the public prosecution, which extends its effects to the confiscation penalty' (Cass. crim., 7 May 2024). However, if the assets were seized, judges may refuse to return the assets.</p> <p>In other words, confiscation is not possible without a conviction, but the seized assets may not be returned if they are dangerous or if they constitute the instrument or direct or indirect proceeds of the offence (art. 481 of the Criminal Procedure Code). In this case, the judges must take care to rule on 'the objective characterisation of the offence, without imputing it to the deceased or ruling on the latter's guilt'.</p> <p>Case law has here found a compromise between the prohibition laid down by the European Court of Human Rights, in the name of the right to the presumption of innocence, on finding a person guilty of an offence when the public prosecution was extinguished by his death (ECHR, 12 April 2012, Lagardère v France) and the possibilities offered by European Union texts for confiscation without conviction.</p>

Focus about confiscation hypothesis in the directive (4)

Directive 2024/1260	French Law
<p>Confiscation of unexplained wealth linked to criminal conduct (art. 16)</p> <p>confiscation of property identified in the context of an investigation in relation to a criminal offence, provided that a national court is satisfied that the identified property is derived from criminal conduct committed within the framework of a criminal organisation and that conduct is liable to give rise, directly or indirectly, to substantial economic benefit.</p>	<p>Not explicitly but French law provides for a combination of presumptions which may be close to this scenario.</p> <p>In some cases, as explained above, confiscation applies to property that has no established link with the offence (first presumption).</p> <p>Furthermore, the offence for which the individual has been convicted may also be based on a presumption (second presumption): the offence of failing to justify resources corresponding to one's lifestyle (C. pén., art. 321-10-1); the offence of 'presumed' money laundering (C. pén., art. 324-1-1).</p> <p>In these cases, in a way, this a form of confiscation of unexplained wealth linked to criminal conduct, isn't it?</p> <p>By the way, article 16 will be one of the challenges in transposing the Directive, and the French legislator, who is fond of confiscation, will no doubt be quick to respond</p>



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