



Freezing and Confiscating the Proceeds of Crime in the European Union

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Abstract: In this paper we have conducted a brief examination of Directive 2014/42/EU of the European Parliament and of the Council of April 3, 2014 on the freezing and confiscating the proceeds of crime committed in the European Union, an important legal instrument in the architecture of judicial cooperation in criminal matters within the Member States. This paper continues the research conducted in the field of judicial cooperation in criminal matters which have resulted in the publication of works in this area. The innovations of the paper are represented by the conducted examination, and the expressed critical opinions, opinions aimed at contributing to the improvement of European legislative system. The paper can be useful to academics and practitioners in the field of judicial cooperation in criminal matters in the European Union.

Keywords: extended confiscation; judicial cooperation in criminal matters; confiscation applied to third parties

1. General Considerations on the Need and Importance of Adopting the European Legal Instrument

The conducted analyses highlight that the main reason that encourages the development of cross-border organized crime, including mafia-type criminal organizations that operate in one or more states, is financial gain.

In order to prevent and combat more effectively the crime of this kind, we consider it necessary for the competent judicial authorities of each state to have the legal means and necessary logistics for detecting, freezing and confiscating the proceeds of this type of crime.

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Another practical way of preventing and combating this type of crime is represented by intensifying the specific activities of judicial cooperation in criminal matters between the authorities with responsibility for assets recovery and mutual assistance domain.

Also, another effective method of considered prevention was providing severe judicial sanctions and also their enforcement to those who committed crimes in this category.

Under these circumstances, at the level of European Union there were adopted several legal instruments in order to ensure the freezing, seizure and confiscation of proceeds of crime.

Thus, in April 2014 at the EU level, the legislative framework that ensures the freezing, seizure and confiscation of assets was represented by Joint Action 98/699/JHA, the Council Framework Decision 2001/500/JHA, the Council Framework Decision 2003/577/JHA, the Council Framework Decision 2005/212/JHA and the Council Framework Decision 2006/783/JHA.

Subsequent reports of the Commission (after the entry into force of the legislation listed above) in connection with the implementation of the Framework Decision 2003/577/JHA, 2005/212/JHA and 2006/783/JHA it was shown that the regimes existing by extended confiscation and mutual recognition of freezing and confiscation orders do not enjoy full effectiveness, the main obstacle being represented by the differences in the law of the Member States.

Meanwhile, the conducted analyses have shown that it is necessary to clarify the concept of assets derived from the offenses referred to, in order to include direct assets obtained from criminal activity and all indirect benefits derived from it, including reinvestment or transformation of direct products. Such products may include any type of goods, including those transformed or converted, in whole or in part, in other goods combined with a good acquired from legitimate sources, to the estimated value of the combined products. These products may include income or other benefits derived from proceeds of crime or products which have been transformed, converted or that were combined with those products (Directive 2014/42/EU, Preamble, par. 11).

Against this background, it was mandatory the adoption of a new European legal instrument designed to contribute to improving the freezing and confiscation of tools and proceeds of crime, namely Directive 2014/42/EU of the European

Parliament and of the Council of April 3, 2014 on the freezing and confiscation of instruments and offenses committed in the European Union.

Under this European legal instrument the confiscation of tools and proceeds of crime or property with a value that corresponds to those instruments or products should be possible, being subject to a judgment of conviction for committing one or more crimes, the sentencing could occur also *in absentia*, even with the suspect invoking a disease or evade the enforcement of criminal proceedings (Directive 2014/42/EU, preamble, par. 15).

For the purposes of the examined European legal instrument, the term *disease* must be understood in the sense of the impotence of suspected or accused person to participate in criminal proceedings for a longer period and, therefore, these procedures cannot continue under normal conditions. The persons concerned can prove that in fact with a medical certificate; the court is not obliged to take account these certificates if deemed unsatisfactory. However, the person has the right to be represented in criminal proceedings by a lawyer (Directive 2014/42/EU, Preamble, par. 16).

Given the wide range of criminal activities carried out by criminal groups in order to combat the activities of organized crime, with the sentencing of guilty physical entities, it is imposed also the confiscation of both property related to crime and other property considered by the court as products from committing other crimes. This approach corresponds to the concept of extended confiscation. In the implementation of Council Framework Decision 2005/212/JHA Member States there were chosen different options which have led to conceptual differences in terms of extended seizure, this approach affecting directly the activity of cross-border cooperation in cases of confiscation (Directive 2014/42/EU, preamble, par. 19).

Given the importance of the institution, the extended confiscation should be possible if the court considers that the goods in question are the result of criminal activities in a lax manner; thus the Member States may revise their national law, that is sufficient for the court to assess on the basis of probabilities or it can assume reasonably that it is significantly more likely that the goods in question have been obtained from criminal activities than from other activities. In these cases, the court must examine the circumstances of the case, including the facts and evidence available on which a decision could be taken on extended confiscation. Thus the fact that the value of the property of a person is disproportionate to a person's legal

income could lead between those facts the court to conclude that the assets are derived from criminal activity; also the Member States to impose a requirement to provide for a certain period of time in which assets could be considered to have originated from criminal activities (Directive 2014/42/EU, Preamble, par. 21).

At the level of the European Union there has been a general practice adopted by the suspected or accused persons by which, in order to avoid confiscation of goods or products resulting from crime, even those that may be subject to extensive confiscation, they transfer these assets to a third person.

From this point of view, the current EU legislative framework does not contain binding rules on confiscating those categories of assets, even from that third party.

Thus, in order to be subject to confiscation, the acquisition by third parties regards situations where, for example, the assets were acquired, directly or indirectly, through an intermediary, by the third party from a suspect or accused person. In such circumstances, the seizure should operate at least in cases where the third party knew or should have known that the purpose of the transfer or acquisition was to avoid confiscation, based on facts and concrete circumstances, including the fact that the transfer had been free of charge or in return for the payment significantly lower than the market value of the assets. These rules should cover both individuals and legal persons, and should not affect the good-faith third parties (Directive 2014/42/EU, Preamble, par. 24).

Under the European legislative act, the Member States are free to define confiscation applied to third parties as an ancillary or alternative measure to direct confiscation, as appropriate, in accordance with the national legislation.

Under the existing norms, the confiscation is leading to the final deprivation of property; conservation; however, it can be a precondition for confiscation, presenting importance when making a confiscation order; goods are preserved through freezing. At the same time, in order to prevent the disappearance of goods before issuing a freezing order, the competent authorities should have the right to take immediate measures in order to ensure the availability of those goods.

However, because the goods are often preserved for the seizure, freezing and confiscation are closely related. In connection with these terms, it is clear that in some legal systems, freezing in order to confiscate is considered to be a separate procedural measure with provisional feature, that can be followed by a confiscation decision (Directive 2014/42/EU, Preamble par. 26 and 27).

Given the direct effect of orders on freezing property which limits ownership, it is necessary that these measures to be maintained only for the period necessary to ensure availability, in order to prevent disappearance and to ensure the control of the court.

Also the frozen assets for the purpose of possible seizure need to be properly managed to avoid losing their economic value. To this end, the Member States will need to take various steps, such as the possibility of selling or transferring the goods (to reduce losses), establishment of national offices centralized for asset management (Directive 2014/42/EU, Preamble, par. 31 and 32).

Since the measures for freezing and confiscation of crime instruments affecting in their substance both the rights of the suspected or accused persons and third parties who are not prosecuted, it is necessary to provide specific guarantees and remedies in order to ensure that their fundamental rights are respected. The compliance of this right includes the right to be heard for the third parties who claim that they own the goods in question or who claim to have other patrimony rights (“real rights” *ius in re*), and the right of usufruct. Thus, the order of freezing property should be communicated to the affected person immediately after its execution. For reasons relating to the investigation, the competent authorities may delay the order communication by the affected person (Directive 2014/42/EU, Preamble, par. 33).

The seized goods will be used only in the public interest and for social objectives, such as: projects of law enforcement, crime prevention (Directive 2014/42/EU, Preamble, par. 35).

The enforcement of the provisions of European legal instrument examined will be achieved in compliance with the following legal acts: Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation within criminal proceedings¹, the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings², Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and procedures concerning the European arrest warrant, and also the right for a third person to be informed of deprivation of liberty and the right to communicate with third parties, and with consular

¹ Published in the Official Journal L 280 of 26.10.2010, p. 1.

² Published in the Official Journal L 142 of 01.06.2012, p. 1.

authorities during the deprivation of liberty¹ and the Directive (EU) 2016/343 Parliament the European Council of March 9, 2016 on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings.²

2. Subject Matter, Scope Definition

The examined legislative act establishes a number of minimum rules concerning the freezing of assets for possible subsequent confiscation and concerning the confiscation of property in criminal matters and without bringing prejudice to the procedures that Member States could use to confiscate the goods concerned (Directive 2014/42/EU, art. 1).

In terms of scope, we mention that according to art. 3, the examined European legislative instrument applies to offenses certified by:

- a) Convention against corruption involving officials³;
- b) Council Framework Decision 2000/383/JHA of 29 May 2000 on strengthening, by criminal sanctions and of other nature, the protection against counterfeiting, with the introduction of the euro⁴
- c) Council Framework Decision 2001/413/JHA of 29 May 2000 on strengthening, by criminal sanctions and of other nature, the protection against counterfeiting, with the introduction of the euro⁵;
- d) Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instruments and proceeds of crime⁶;
- e) Council Framework Decision 2002/475/JHA on combating terrorism⁷;
- f) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector¹;

¹ Published in the Official Journal L 294 of 06.11.2013, p. 1.

² Published in the Official Journal L 65/1 of 11.03.2016.

³ Published in the Official Journal C 195, of 25.06.1997, p. 1.

⁴ Published in the Official Journal L 140, of 14.06.2000, p. 1.

⁵ Published in the Official Journal L 149, of 02.06.2001, p. 1.

⁶ Published in the Official Journal L 182, of 05.07.2001, p. 1.

⁷ Published in the Official Journal L 164, of 22.06.2002, p. 3.

g) Council Framework Decision 2004/577/JHA of 25 October 2004 on establishing the minimum provisions on the constituent elements of criminal acts and penalties applied in the field of illicit drug trafficking domain²;

h) Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime³;

i) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating human trafficking and protecting its victims, and replacing Council Framework Decision 2002/629/JHA⁴;

j) Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating sexual abuse, sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA⁵;

k) Directive 2013/40/EU of the European Parliament and of the Council of August 12, 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA.⁶

There will also be envisaged also other legal instruments, in the event that such instruments specifically provide that the examined provisions of the legislative act applies to offenses harmonized within them (Directive 2014/42/EU, art. 3).

In order to avoid interpretations which are not according to the will of the legislator, within the legislative European act it was conducted a definition of used terms, as follows:

- “*Products*” means any economic advantage obtained directly or indirectly from an offense; it may consist of any type of property and includes any subsequent reinvestment or transformation of the direct products and any valuable benefits;
- “*Assets*” means goods of any kind, whether tangible or intangible, movable or immovable, and legal documents or instruments evidencing a title or a right over such assets;
- “*Instrument*” means any instrument used or intended to be used in any way, in whole or in part, to commit one or more offenses;

¹ Published in the Official Journal L 192, of 31.07.2003, p. 54.

² Published in the Official Journal L 335, of 11.11.2004, p. 8.

³ Published in the Official Journal L 300 of 11.11.2008, p. 42.

⁴ Published in the Official Journal L 101 of 15.04.2011, p. 1.

⁵ Published in the Official Journal L 335, of 17.12.2011, p. 1.

⁶ Published in the Official Journal L 218, of 14.8.2013, p. 8.

- “*Confiscation*” means a final dispossession of goods ordered by a court in relation to a crime;
- “*Freezing*” means temporarily prohibiting the transfer, destruction, conversion, disposition, movement of property or temporarily assuming custody or control of property;
- “*Offense*” means a crime covered by any of the mentioned instruments (Directive 2014/42/EU, art. 2).

3. Freezing Assets

In order to ensure the success of a possible confiscation, the Member States shall take the necessary measures to enable the freezing of property subject to an ongoing criminal investigation.

These measures must be ordered by a competent authority (usually a judge) and it must include urgent action to be taken in order to preserve that property and thus avoiding its extinction, alienation or damage.

It can be the object of freezing measure with a view to possible subsequent confiscation and the property in the possession of third parties (Directive 2014/42/EU, art. 7).

4. Confiscation and the Extended Confiscation

4.1. Confiscation

In order to transpose into the national law the provisions of the examined European legislative act, the Member States shall take the necessary measures to enable confiscation, total or partial, tools and goods or assets whose value corresponds to such instruments or products, under the condition that there is a final conviction of an offense that can result also after a procedure in absentia.

If confiscation is not possible due to evasion motivated by illness or due to effective evasion of a suspected or accused person from legal proceedings, the Member States shall take the necessary measures to allow the confiscation of products and instruments in cases where there have been initiated criminal proceedings on an offense that is likely to generate, directly or indirectly, economic benefits, and such procedures could result in a conviction if the suspected or

accused person should be able to appear before the court (Directive 2014/42/EU, art. 4).

4.2. Extended Confiscation

In the opinion of the European legislator the extended confiscation involves the adoption of legislation by each Member State, allowing the total or partial confiscation, property of a person convicted as a result of an offense that is likely to generate, directly or indirectly, economic benefits when, under the circumstances of the case, including the available facts and evidence, such as the fact that the value of the property is disproportionate to the income of the convicted person, the court considers that the goods were obtained from criminal activities.

Regarding the notion of crime used by the legislator, it includes at least the following:

- a) active and passive corruption in the private sector as provided for in art. 2 of Council Framework Decision 2003/568/JHA, as well as active and passive corruption involving officials of EU institutions or the Member States, provided for in art. 2 and 3 of the Convention against corruption involving officials;
- b) offenses relating to participation in a criminal organization, as provided in Art. 2 of Council Framework Decision 2008/841/JHA, at least in cases where the crime has generated economic benefits;
- c) The inducement or recruiting a child to participate in pornographic performances or benefits or exploitation of a child in any way to this end, if the child is over the age of sexual consent, as provided in art. 4, par. (2) of Directive 2011/93/EU; distribution, dissemination or transmission of child pornography, as provided in art. 5, par. (4) thereof; offering, supplying or making available child pornography, as provided in art. 5, par. (5) thereof; production of child pornography, as provided in art. 5, par. (6) thereof;
- d) the legal impairment of the system's integrity and illegal impairment of data integrity, as provided for in articles 4 and 5 of Directive 2013/40/EU, in the case it was affected a significant number of systems using a tool referred to in art. 7 of that Directive, designed or adapted primarily for that purpose; importing, distributing or otherwise making available intentionally the instruments used to commit crimes, at least when there are minor cases, as provided in art. 7 of that Directive;

e) an offense punishable by a maximum sentence of deprivation of liberty of at least four years, according to the relevant instrument provided for in the art. 3 or, in the case where that instrument does not contain a threshold for punishment in accordance with national legislation (Directive 2014/42/EU, art. 5).

4.3. Confiscation Applied to Third Parties

In order to transpose into their national legislation the provisions of the examined European legislative act, the Member States shall take the necessary measures to allow confiscation or other goods whose value corresponds to products which, directly or indirectly, were transferred to a suspect or accused person or a blamed person by third party, or have been acquired by third parties from a suspected or accused person, at least in cases where the third party knew or should have known that the purpose of the transfer or acquisition has occurred for free in return for money significantly lower than the market value of the goods.

In all circumstances it will proceed so as not to bring prejudice to the third parties of good faith (Directive 2014/42/EU, art. 6).

5. Guarantees in the Issuing State of the Freezing and/or Seizure Order

In order to exercise the procedural rights by the persons against whom measures of goods confiscation were ordered, the Member States shall take measures in order to ensure to those persons the right to a remedy and a fair trial.

Furthermore, the Member States shall take the necessary measures to ensure that the freezing order of the assets is communicated to the affected person as soon as possible, after execution. Such disclosure shall include at least briefly the grounds for the judgment in question. Where necessary, as not to jeopardize the criminal investigation, the competent authorities may defer the communication of freezing order of assets to the affected person.

Regarding the order freezing of assets, it remains in force only as long as it is necessary for the preservation of goods for possible subsequent confiscation.

The Member States should provide in their national laws effective opportunity for the person whose property is affected by the freezing order to react before a court in accordance with the procedures established in the national legislation. Such procedures may provide that, when the initial freezing order was adopted by a

competent authority other than the court, such an order must be submitted first for approval or examination by the courts, before they can be attacked before a court.

Frozen goods that are not subsequently confiscated shall be returned immediately.

The Member States shall take the necessary measures to ensure that any confiscation of goods is justified and that this is communicated to the affected person.

There will be taken steps to enabling that person to appeal before a court the confiscation order.

Without bringing prejudice to Directive 2012/13/EU and 2013/48/EU, people whose goods are affected by the confiscation decision are entitled to be assisted by a lawyer throughout the proceedings for confiscation in determining the products and instruments to exercise their rights. These people will be informed by the judicial authorities about the existence of this right and the possibility to make use of it.

Also, on extended confiscation proceedings, the person concerned will benefit from the effective possibility of challenging the circumstances of the case, including the concrete facts and evidence available based on which those goods are considered assets derived from criminal activities; while third parties have the right to claim a title of ownership or other real rights, including in the case of confiscation of their assets.

In the event where, as a result of an offense, the victims make claims against the person who is subject to the measure of confiscation provided for under the legislative act under examination, the Member States shall adopt measures to ensure that the seizure order does not prevent victims to get compensation based on the complaints (Directive 2014/42/EU, art. 8).

6. Confiscation and Effective Enforcement. Managing Frozen and Confiscated Assets

Recent judicial practice highlights the tendency of the criminal elements that after conviction, to take concealment of goods measures that are the subject to confiscation ordered by the court. This is possible due to the relatively large periods of the main judgment and on the appeal.

To avoid this situation, Member States shall take the necessary measures to enable the identification and pursuit of assets to be frozen and confiscated even after a final judgment of conviction or following the proceeds for applying art. 4, par. (2) and to ensure effective enforcement of a confiscation order, if it was already issued such a ruling (Directive 2014/42/EU, art. 9).

Ensuring proper management of frozen assets for possible subsequent confiscation would be a constant concern of the Member States, including through the establishment of central offices; the competence of these offices will include also the possibility of sale or transferring assets if needed (Directive 2014/42/EU, art. 10).

In order to verify how the Member States transpose in their national laws the provisions of the examined legislative act, the Commission will receive annually, the following statistics:

- the number of executed freezing orders;
- the number of executed confiscation orders;
- the estimated value of frozen goods, at least for the frozen goods for a possible subsequent confiscation at the time of freezing;
- the estimated value of the recovered goods at the time of confiscation.

Where available, the Member States shall send to the Commission annually the following statistics:

- the number of requests for enforcement of freezing orders in another Member State;
- the number of requests for enforcement of orders confiscation in another Member State;
- the value or estimated value of the property recovered following the execution in another Member State (Directive 2014/42/EU, art. 11).

6. Conclusions and Some Critical Opinions

As it results from the conducted examination, the European legislative act establishes a set of legal rules designed to contribute to the improvement of the judicial system of each Member State in terms of identification, freezing and confiscation of instruments and offenses committed in the European Union.

We consider that the adoption of this law was imposed, due to the need to reduce opportunities for development of cross-border organized crime groups, by freezing and subsequent confiscation of proceeds of crime.

No doubt that the actions by which there are confiscated large sums of money or other goods available to the structures of cross-border organized crime is a blow to these criminal organizations, with direct effects on the evolution of these groups.

After properly assessing the opportunity and the need to adopt the European legal instrument, we may formulate some critical opinions which we consider to be useful to the European legislator and Member States in terms of amendments to the current legislation.

Thus, the first element that we highlight the most is how this legislative act is drafted in the way it was meant to be an effective legal support to the judicial authorities of the Member States towards improving their national laws and to improving their cooperation on this segment.

Although this was the intention of the European legislator, an intention which can be deduced from the research of the provisions contained in the preamble of the legislative act, in its content, the legal instrument lacks a set of rules which are absolutely necessary.

Thus, a first set of rules that are missing from the content of European Legal act is represented by the legal rules that provide some concrete procedures for transmitting a freezing order or a confiscation judgment by the enforcement Member State. This was necessary because, in the judicial practice there are situations where, in the course of criminal investigations, there are identified some goods that are to be subjected to freezing, in order to confiscate them on the territory of another Member State.

In this context, how to proceed in a particular case, as the one described above?

Another set of rules that are missing are the ones that should regulate the recognition and enforcement of a freezing or a confiscation order. This is crucial as any document issued by a judicial authority of another Member State is undergoing a process of recognition and subsequently of execution by the judicial authorities of the executing State.

A particular problem is related to the extended confiscation institution, as it requires extensive work, involving the execution of specific activities and by other than judicial organs (the intelligence services of the Member States); these

activities are executed in particular to identify goods subject to this procedure, goods that can be in several states; in the content of the European legal instrument there is no provision regulating this situation.

Another insufficiently clarified issue is linked to respecting the property rights of third parties who are in a Member State other than that in which the freezing or confiscation order was issued. In those circumstances, the third party has the possibility to appeal these measures, and the court must decide. We ask ourselves, how can the court solve such a case, unless he has at least some elements arising from the administered evidence on the file, which can be found in another state?

All these elements should be clarified by the European legislator, because as it is shown, this legislative act seems to be rather a document which aimed at improving the national laws of the Member States, without the ties with the complex task of judicial cooperation in criminal matters between Member States issuing freezing or confiscation orders and instruments of crime.

One last problem which we are reporting regards the need to replace the provisions of art. 3, the contents of which the European legislator has provided the scope, resuming to a few legislative acts. We appreciate that the scope of the freezing and confiscation of instrument and proceeds of crime must include all offenses following which the organized crime groups earned profits.

As a general conclusion we appreciate the usefulness of adopting this European legal instrument, but also the need to improve it.

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