

# ***FREEZING***

and  
Confiscation Orders

Robert Musumeci

# Biography



Dr Robert Musumeci obtained a PhD in Law from the University of Malta with his dissertation entitled 'Judicial Interpretation of Maltese development planning law. Eliciting the added value' after having been previously selected by the same University for the prize of Best Doctor of Laws Thesis Award in 2016 for his work entitled 'The Development Planning Act 2016 – A critical Appraisal'. Prior to being admitted to the Maltese Bar, Dr Musumeci had graduated as a perit in 1997 and then moved on to also obtain a Masters Degree in Conservation Technology in Masonry Buildings in 2004. He is a former chairperson of the Building Industry Consultative Council (BICC) and was later appointed as a government consultant in the reform which led to Malta Environment and Planning Authority's demerger, the establishment of the Lands Authority, the introduction of a regulatory framework for Estate Agents, the drafting of the constitutional amendments pertaining to the Gender Balance in Parliament Reform and the setting up of the Building Construction Authority. Dr Musumeci is also a senior lecturer in planning law and administrative law at the University of Malta. Dr Musumeci also penned the books 'Selected Principles of Maltese Planning Law', 'Decoding Administrative Law' and 'Servitujiet'. Dr Musumeci is the first to hold warrants to practice both as a lawyer and a perit in Malta

**PREAMBLE**

Freezing orders are preventive measures designed to temporarily restrain assets associated with suspected criminal activities. They serve as an indispensable tool for preserving the status quo and ensuring that the assets are available for confiscation if eventually proven to be derived from criminal conduct. Therefore, freezing orders are often employed during ongoing investigations to prevent the dissipation of assets, ensuring that the full extent of criminal proceeds can be identified and recovered.

On the other hand, confiscation involves the permanent deprivation of assets that have been proven to be derived from criminal actions. It is a punitive measure aimed at removing the economic benefits gained through criminal conduct and acts as a deterrent to future criminal behavior. In Malta, the legal reality is that an individual's assets and all of their property can be subjected to "attachment" for a full year, even in the absence of filed charges. Presently, there are no existing laws that permit a person facing charges to request the exclusion of specific property from the scope of a freezing order during the protracted proceedings before criminal courts. To illustrate, property legally donated by a relative, with no connection to the alleged crimes, cannot be spared from the freezing order throughout these extensive legal proceedings. Therefore, upon a person being charged, all assets, irrespective of whether they constitute proceeds of a crime, face freezing. If the individual is subsequently found guilty of a relevant offense, the confiscation of all their property in favour of the State follows. Subsequently, the convicted individual is compelled to initiate new civil proceedings to determine which properties will be confiscated and which may be retained. This process underscores the challenging and lengthy legal path that individuals charged with offenses must navigate in order to safeguard their assets in the face of legal actions by the State.

**DIRECTIVE 2014/42/EU**

At the European Union level, **DIRECTIVE 2014/42/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL** was enacted on 3 April 2014 with a view to address the freezing and confiscation of instrumentalities and proceeds of crime within the European Union. This directive was formulated with the principal aim of combating cross-border organized crime, including criminal organizations of a mafia-type, primarily motivated by financial gain. It aims for the effective prevention and combat against organized crime by neutralizing the proceeds of crime.

Indeed, while the primary focus of this directive is on combatting cross-border organized crime, it articulates essential principles that hold equal relevance in the broader context of freezing and confiscation, including within the Maltese legal framework. A crucial aspect of this Directive lies in the incorporation of the concept of proportionality into its text. This emphasis underscores the necessity for a balanced and reasonable approach in the implementation of measures related to the confiscation of property in criminal matters. Indeed, the said directive recognizes the importance of ensuring that the severity of measures is commensurate with the circumstances of each case, preventing excessive or unnecessary actions. The following stipulations detailed in this Directive serve as evidence for my assertion:

*'(17) When implementing this Directive in respect of confiscation of property the value of which corresponds to instrumentalities, the relevant provisions could be applicable where, in view of the particular circumstances of the case at hand, such a measure is proportionate, having regard in particular to the value of the instrumentalities concerned. Member States may also take into account whether and to what extent the convicted person is responsible for making the confiscation of the instrumentalities impossible.'*

*'(21) Extended confiscation should be possible where a court is*

*satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities. In this context, the court has to consider the specific circumstances of the case, including the facts and available evidence based on which a decision on extended confiscation could be issued. The fact that the property of the person is disproportionate to his lawful income could be among those facts giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct.'*

Let's break down the relevant sections of these three provisions:

1. **(17):** This paragraph emphasizes the importance of proportionality in the context of confiscation of property. It suggests that the application of relevant provisions should be based on a case-by-case assessment, taking into account the particular circumstances. The measure of confiscation should be proportionate, especially in relation to the value of the instrumentalities involved. The Member States are also given the flexibility to consider the convicted person's responsibility in preventing confiscation.
2. **(21):** This paragraph discusses extended confiscation and acknowledges that it should be possible when a court is satisfied that the property is derived from criminal conduct. However, it also clarifies that it is not necessary to conclusively establish that the property is derived from criminal conduct. Instead, Member States may allow the court to consider, for example, the balance of probabilities or reasonable presumption based on specific circumstances, facts, and evidence. The concept of proportionality is reflected in the consideration of whether the property is disproportionately large in comparison to the individual's lawful income.

The aforementioned rationale is promptly reflected in the initial Article 5 concerning Extended Confiscation, which articulates:

*'Article 5*

*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 that the property in question is derived from criminal conduct.'*

Let's break down the evaluation of Article 5:

- 1. Case-by-Case Basis:** The statement emphasizes that the decision to confiscate property is based on the circumstances of the case. This approach aligns with the principle of proportionality, as it allows for a nuanced assessment that takes into account the unique aspects of each situation.
- 2. Consideration of Specific Facts and Evidence:** The inclusion of "specific facts and available evidence" in the decision-making process is crucial for ensuring that the confiscation is proportionate and justified. It implies that the decision is not arbitrary but is grounded in concrete information related to the case.
- 3. Disproportionate Value to Lawful Income:** The statement introduces the concept that the value of the property should be disproportionate to the lawful income of the convicted person. This criterion is a key factor in determining whether the property is derived from criminal conduct. It aligns with the principle of proportionality by providing a tangible benchmark for evaluating the legitimacy of the property in question.

4. **Partial Confiscation Option:** The flexibility to enable partial confiscation, as opposed to confiscating the entire property, adds another layer of proportionality. This allows for a more tailored response, where only the portion of the property deemed derived from criminal conduct is confiscated, avoiding an overly broad measure.

The provisions discussed above share a common guiding principle – proportionality. They underscore the importance of conducting a case-specific assessment, taking into account concrete facts and evidence, establishing a benchmark tied to lawful income, and allowing for the flexibility of partial confiscation. The overarching objective is, therefore, to ensure that any measures taken or penalties imposed are reasonable and do not exceed what is necessary to achieve a legitimate aim.

It might be well argued that the emphasis on proportionality here is more prominently placed in the context of confiscation rather than freezing orders. Some argue that freezing orders, designed as a preventive measure, seek to temporarily secure assets to facilitate a comprehensive investigation into purported criminal activities. In contrast, confiscation constitutes a more conclusive and punitive action, leading to the permanent deprivation of assets proven to be derived from criminal conduct.

As a result, some argue that freezing orders may lack proportionality. However, I hold a different perspective. When both freezing orders and confiscation are integral components in addressing the same criminal activity, there exists an intricate connection with a shared objective: the dismantling of criminal enterprises and the disruption of the financial infrastructure supporting the detected illegal activity. This highlights the importance of maintaining, both freezing and confiscation orders, despite their distinct purposes, as forms of penalties or restrictions imposed on individuals in response to suspected criminal activities.

## THE ECHR PERSPECTIVE

What I am expressing here is indeed in line with the decisions of the European Court of Human Rights. Let's examine the instance of **Apostolovi vs Bulgaria** decided on November 7, 2019<sup>1</sup>. In this case, the applicants, Stoyan Apostolov and Milena Apostolova, a married couple and Bulgarian nationals, raised concerns about the freezing of their assets during the criminal proceedings against Mr. Apostolov for conducting banking business without a license. The freezing order, implemented shortly after his charges in November 2008, impacted 35 bank accounts and three immovable properties, with the primary objective being to secure funds for any potential fine or confiscation order resulting from the criminal proceedings. Eventually, he received a one-year suspended prison sentence.

The couple sought the lifting of the freezing order, highlighting the necessity to access funds for their son's medical expenses. Unfortunately, the courts rejected this request, citing the ongoing criminal proceedings but partially unfroze Ms. Apostolova's assets since charges were solely brought against her husband.

In 2013, Mr. Apostolov made a second request to lift the freezing order, resulting, at least, in the unfreezing of all his assets, except one immovable property, in January 2014.

Still, Ms. Apostolova pursued damages claims against the authorities and the court found that the prosecutor should have verified ownership before freezing the assets and awarded damages for the psychological distress caused by the freezing and the inability to cover her son's medical treatment.

Eventually, the Apostolova couple approached the Strasbourg court, relying on

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<sup>1</sup> *Apostolovi v Bulgaria* App no 32644/2009 (ECtHR, 7<sup>th</sup> November 2019)



Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights, contending that the freezing of their assets was unlawful and unjustified. The European Court of Human Rights ruled in their favour, stating, among other things:

*'It is not in dispute that the freezing order with respect to the first applicant's assets amounted to an interference with his possessions. It was the domestic courts' duty to satisfy themselves that the freezing of the first applicant's assets would not cause him more damage than that which inevitably flows from such measures.'*

## THE MALTESE PERSPECTIVE

Justice Minister Jonathan Attard has unveiled legislative amendments in **Bill 76<sup>2</sup>**, titled "**Draft Law Amending Various Legislation on the Combatting of Crime Proceeds**". This proposal addresses amendments to several laws, including the **Malta Financial Services Authority Act**, the **Prevention of Money Laundering Act**, the **Prevention of Financial Markets Abuse Act**, and the **Proceeds of Crime Act**.

The proposed legal changes bring forth a standardized procedure for seizure, freezing, and confiscation orders, aiming to rectify imbalances between the pursuit of justice and the rights of the accused. Significant amendments involve the reduction of the validity period for seizure orders, the provision of appeal rights for freezing orders, and the establishment of criteria for confiscation. The newly enacted law applies to cases occurring after the amendment, with transition modalities determined by the Court.<sup>3</sup> Having said this, Justice Shadow Minister Karol Aquilina criticized these amendments, describing the logic as "perverse" and highlighting the perceived unfair burden on the prosecution to declare frozen assets. Aquilina went on further to say that with this Bill, government is trying

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<sup>2</sup> <https://robertmusumeci.com/asset-freezing-before-criminal-guilt/>

<sup>3</sup>

<https://one.com.mt/imressaq-abbozz-ta-ligi-li-jemenda-ligijiet-varji-dwar-ir-rikavat-mill-kriminalita/>

to protect former politicians.<sup>4</sup>

I prefer not to engage in the political discourse, but I would like to allude to what the criminal court, presided over by Honorable Justice Edwina Grima, outlined in the 2021 decree in the case of **Ir-Repubblika ta' Malta vs Progress Company Limited et al.**<sup>5</sup> I won't try to rephrase or offer a legal interpretation. Instead, I'll just copy and paste the pertinent text for readers to directly evaluate how the Maltese Courts perceive the current situation:

.... filwaqt li huwa d-dmir tal-Istat li juri li t-tehid jew l-indhil sehh tassew fl-interess pubbliku jew ġenerali, hemm qbil li, fejn jidhol dak li jitqies bhala "interess pubbliku", l-Istat igawdi firxa wiesgħa ta' diskrezzjoni. Madankollu, l-mod kif titwettaq dik id-diskrezzjoni jrid jgħaddi mill-għarbiel tal-bilanċ mistenni bejn l-interessi tas-soċjetà u dawk tal-individwu mġarrab bit-twettiq tagħha, u dan kemm jekk l-għemil ikun ta' tehid ta' proprjetà u kif ukoll jekk ikun "semplicement" dwar indhil fl-użu tagħha.

... *There must be a relationship of proportionality between the means that are employed and the aim or aims of the legislation. This involves assessing whether a 'fair balance' has been struck between the requirements of the 'general interest' and those of the individual concerned<sup>4</sup>*

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[https://www.maltatoday.com.mt/news/national/126525/opposition\\_mps\\_question\\_governments\\_motivation\\_in\\_fasttracking\\_amendments\\_to\\_freezing\\_orders\\_framework](https://www.maltatoday.com.mt/news/national/126525/opposition_mps_question_governments_motivation_in_fasttracking_amendments_to_freezing_orders_framework)

<sup>5</sup> *Ir-Repubblika ta' Malta vs Progress company Limited et.* (Criminal Court decree delivered on 30<sup>th</sup> June 2021)



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