

# CJEU: National Legislation Must Allow Third Parties to Appear as a Party in Confiscation Proceedings

Thomas Wahl

In its judgement of 21 October 2021 (Joined Cases C-845/19 and C-863/19 - *Criminal proceedings against DR and TS*), the CJEU clarified specific provisions of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. The CJEU precludes national legislation which allows for confiscation, in favour of the State, of property allegedly belonging to a person other than the perpetrator of the criminal offence, without that person having the right to appear as a party in the confiscation proceedings.

## Facts of the case

Two Bulgarian citizens were sentenced to a term of imprisonment and a fine in Varna (Bulgaria) for possession of highly dangerous narcotics without authorisation and with the intent of distribution. During a search of their respective homes, conducted in the context of pre-trial proceedings, a sum of money had been discovered.

Following the criminal conviction, the Okrazhna prokuratura – Varna (Regional Public Prosecutor’s Office, Varna) applied to the Okrazhen sad Varna (Regional Court, Varna) for confiscation of this sum of money, in accordance with the Bulgarian criminal code. Before the court, the defendants stated that these sums of money belonged to family members. In accordance with national law, the family members could take part in the proceedings before the court.

The Okrazhen sad Varna (Regional Court, Varna) refused to authorise the confiscation of the sums of money, taking the view that the criminal offence of which the persons concerned had been convicted (i.e. possessing narcotics for the purposes of their distribution) did not have the purpose of generating economic benefit and that the persons concerned had neither been charged with nor convicted of said criminal offence. The Public Prosecutor’s Office brought an appeal against the judgment of the Okrazhen sad Varna (Regional Court, Varna) before the referring court, arguing that the first instance court had not applied Art. 53(2) of the Bulgarian Criminal Code in the light of Directive 2014/42.

## Question referred

In these circumstances, the Apelativen sad – Varna (Court of Appeal, Varna) decided to stay the proceedings and ask the Court of Justice whether Directive 2014/42 only applies in cross-border situations. It further referred questions concerning the extent of the confiscation provided for by this directive and the scope of the right to an effective remedy by a third party who claims, or in respect of whom it is claimed, that he or she is the owner of property that is subject to confiscation.

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ISSN: 1862-6947

<https://eu crim.eu>



## Findings of the Court

The judges in Luxembourg found that the possession of narcotics for the purpose of their distribution lies within the scope of Directive 2014/42, even though all the elements inherent in the commission of this offence are confined to a single Member State. The Court also found that Directive 2014/42 provides for the confiscation of property belonging to the perpetrator in respect of which the national court hearing the case is satisfied that it derives from other criminal conduct. The CJEU pointed out that it is necessary that the proceeds whose confiscation are being contemplated arise from the criminal offence in respect of which the perpetrator is ultimately convicted.

With regard to extended confiscation, the CJEU establishes two steps to determine whether a criminal offence is liable to give rise to economic benefit:

- First, Member States may take into account the *modus operandi*, for example whether the offence was committed in the context of organised crime or with the intention of generating regular profits from criminal offences;
- Second, the national court must be satisfied on the basis of the circumstances of the case, including the specific facts and available evidence, that the property was derived from criminal conduct.

The CJEU further found that confiscation from a third party presupposes establishing that a suspected or accused person has transferred proceeds to a third party or that a third party has acquired such proceeds and that that third party was aware of the fact that the purpose of the transfer or acquisition was to avoid confiscation. The Directive further requires Member States to take the necessary measures to ensure that the persons affected by the measures, including third parties who claim or in respect of whom it is claimed that they are the owner of the property whose confiscation is being contemplated, have the right to an effective remedy and a fair trial in order to uphold their rights.

In cases of extended confiscation, the Directive 2014/42 includes the right to be heard for third parties who claim that they are the owner of the property concerned, or who claim that they have other property rights. Since the Bulgarian law does not afford such a right, it is contrary to EU law.

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