

ASSET FREEZING

before
Criminal Guilt

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

The issue of permitting confiscation orders for assets linked to crime before a trial involves a nuanced balance between law enforcement objectives and human rights considerations.¹ Advocates argue that allowing pre-trial confiscation orders can prevent individuals involved in criminal activities from disposing of their illicit assets, ensuring that the proceeds of crime are preserved for potential restitution or penalties. Additionally, the anticipation of pre-trial confiscation may act as a deterrent, dissuading individuals from participating in criminal activities due to the risk of having their assets seized before a trial. Pre-trial confiscation can also enhance law enforcement effectiveness by swiftly addressing and neutralizing the financial aspects of criminal enterprises.

However, pre-trial confiscation orders may clash with the presumption of innocence until proven guilty, a fundamental human rights principle.² It goes against the concept that individuals should not face punishment before being convicted through due process. This implies that the right to a fair trial includes the right to defend oneself against charges, and pre-trial confiscation might impede a defendant's ability to mount a robust defense by limiting their access to resources. The inherent risk of wrongful confiscation is ever-present, as assets seized before a trial may lead to unjust consequences if the charges are ultimately dismissed, affecting innocent individuals. The solution, therefore, lies in finding a delicate balance between effective law enforcement and safeguarding human rights.

Justice Minister Jonathan Attard has unveiled legislative amendments in **Bill 76**, 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**. According to government's view, the changes introduce a standardized

¹ Schunke Malin Thunberg 'Extended Confiscation in Criminal Law: National, European and International Perspectives' (Intersentia, 2017)

² King Colin, Hendry Jennifer 'Critiquing Civil Recovery' (Oxford University Press, August 2023)

procedure for seizure, freezing, and confiscation orders, with the goal of addressing imbalances between the pursuit of justice and the rights of the accused. Notable amendments include reducing the validity period of seizure orders, providing appeal rights for freezing orders, and establishing criteria for confiscation. The new law applies to cases post-amendment, with transition modalities determined by the Court.³ However, 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.⁴

In a recent Parliamentary debate, Government MPs defended the changes during the debate, countering critics' concerns about an "inquisition" and emphasizing the potential impact on suspects' families. They also justified excluding drug trafficking suspects from specific provisions. In response, Aquilina argued for extending the same exception to corruption cases, emphasizing the societal harm caused by both types of offenses.⁵

The most evidently contentious modification is the proposed change to **Article 36** of the **Proceeds of Crime Act**, marking a pivotal alteration in the legislative framework. The current **Article 36** outlines specific provisions, and the proposed revision holds considerable significance within the wider context of the legislative amendments.

At present, the text of **Article 36** is as follows:

'36.(1) Where a person is charged with a relevant offence, the Court shall at the request of the prosecution make an Order(hereinafter referred to as

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

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https://www.maltatoday.com.mt/news/national/126525/opposition_mps_question_governments_motivation_in_fasttracking_amendments_to_freezing_orders_framework

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https://www.maltatoday.com.mt/news/national/126525/opposition_mps_question_governments_motivation_in_fasttracking_amendments_to_freezing_orders_framework

a "Seizing and Freezing Order"):

(a) attaching in the hands of third parties in general all moneys and other movable property due to or pertaining or belonging to the accused; and
(b) prohibiting the accused from transferring, pledging, hypothecating or otherwise changing or disposing of any immovable or movable property owned or otherwise held by him:

Provided that the Court shall on the application of the accused served on the prosecution and the Director determine what moneys may be paid to or received by the accused during the subsistence of such order, specifying the source, manner and other modalities of payment, including salary, wages, pension and social security benefits payable to the accused, to allow him and his family a decent living in the amount, where the means permit six hundred euro (€600) every fifteen (15) days. In no event, however, may such payments be made from funds which there is reasonable cause to believe were taken unlawfully from victims of crime who would stand to recover such property if the accused is convicted.

(2) A Seizure and Freezing Order shall be immediately served upon the Director and shall:

(a) become operative and binding on all third parties immediately when it is made and the Director shall cause a notice thereof to be published without delay in the Gazette and also cause a copy thereof to be registered in the Public Registry, the Land Registry and any other registry established by law for the registration of property of any kind. A copy of such order shall also be served on any person who the prosecution or the Director may indicate; and

(b) remain in force until the final determination of the proceedings and in the case of a conviction until the sentence has been executed.

(3) For the purposes of paragraph (b) of sub-article (2), a sentence shall be deemed to be executed when the procedures set out in Part V for the purposes of establishing how much the person convicted has benefited from the proceeds of crime, and for the recovery of such proceeds have been terminated.

(4) The Court may, on the application of any interested party, when circumstances so warrant, vary such order, and the provisions of the foregoing sub-article shall apply to such order as varied.

(5) Every such order shall contain the name and surname of the accused, his profession, trade or other status, father's name, mother's name and maiden surname, place of birth and place of residence and a legally valid identification number, if any.

(6) Where any money is or becomes due to the accused from any person while such order is in force, such money shall, unless otherwise directed in the order, be deposited in a bank to the credit of the accused. Upon the deposit as aforesaid, the order shall apply with regard to the deposit so made.

(7) Where such order ceases to be in force as provided in sub-article (2)(b), the Director shall cause a notice to that effect to be registered in the Public Registry and in the other registries referred to in sub-article (2)(a) and sub-article (3), and publish a notice to that effect in the Gazette. A copy of such notice shall also be served on any person who had been served with a copy of the Seizing and Freezing Order in accordance with sub-article (2)(a).

(8) Where the Court does not proceed forthwith to make an order as required under sub-article (1), the Court shall forthwith make a temporary Seizure and Freezing Order having the same effect as an order made under the preceding provisions of this article. The Temporary Seizing and Freezing Order made under this sub-article shall remain in force until such time as the Court makes the order required by that sub-article or until the Criminal Court shall have determined an application in accordance with sub-article (9) or until the said Criminal Court has not revoked it in accordance with sub-article (10): Provided that a Temporary Seizing and Freezing Order shall not remain in force beyond the time when a Seizing and Freezing Order would in accordance with sub-article (2)(b) cease to be in force.

(9) Where for any reason whatsoever the Court denies a request made by the prosecution for an order under sub-article (1), the Attorney General may within three (3) working days from the date of the Court's decision apply to the Criminal Court to make the required order and the provisions of this article shall apply *mutatis mutandis* to the order made by the Court under this sub-article as if it were an order made by the Criminal Court under sub-article (1).

(10) The person charged may, within three (3) working days from the making of the order under sub-article (8), apply to the Criminal Court for the revocation of the Temporary Seizing and Freezing Order.

(11) The provisions of sub-articles (7) to (13) of article 35 shall *mutatis mutandis* apply in the case of a Seizing and Freezing Order made under this article'.

On the other hand, the Bill suggests substituting **Article 36** with the following:

'36. (1) Where a person is charged with a relevant offence, the Court shall, at the request of the prosecution, issue an Order, hereinafter referred to as a "Seizing and Freezing Order", attaching any property in the hands of third parties for which there is reasonable cause to believe that the property is subject to confiscation, and restraining and prohibiting the accused from transferring, pledging, hypothecating, or otherwise changing or disposing of any such property.

(2) In the case that property which is subject to confiscation referred to in sub-article (1) cannot be attached or restrained because it cannot be located, has been mixed with other property, has been transferred to a

third party, is located outside Malta, or cannot for any other reason be attached or restrained, the Court shall, subject to the limitations in sub-article (3), include in the Seizing and Freezing Order a provision attaching and restraining property of equivalent value.

(3)(a) The request for a Seizing and Freezing Order shall be made by the prosecution either by means of an application indicating the assets or sum of money subject to confiscation in the case of a conviction, or in the document whereby the charges are made.

(b) The right of the person charged to contest a Seizing and Freezing Order shall be as provided in paragraph (ii) of sub-article (8).

(c) A third party who establishes that a Seizing and Freezing Order is causing him immediate and irreparable harm may request the Court to vary the Order to mitigate such harm to the extent that it is practicable to do so without adjudicating the issues that the third party would be entitled to raise at the appropriate time in accordance with article 39.

(d) The prosecution may request the Court, at any time during the proceedings, to amend the Seizing and Freezing Order as provided in paragraph (a), to add or remove property which is subject to such Order.

(4) (a) If the charge against the person charged or the request made by the prosecution in terms of subarticle (3)(a) lists the assets that shall be subject to confiscation in the case of a conviction, or if it alleges a specific sum of money as the property subject to confiscation, the Seizing and Freezing Order shall be limited to such specific assets or to property having a value not greater than that sum of money.

(b) (i) If the charge against the person charged provides in general terms that property of the person charged shall be subject to confiscation, but does not limit the property subject to confiscation to specific assets or to a specific sum of money, the Court shall issue a Seizing and Freezing Order sufficient to preserve such property as may be required to satisfy a confiscation order, up to and including all assets of the accused, but in any case the Court shall require the prosecution to establish within ninety (90) days that there is a reasonable basis to believe that the property shall be subject to confiscation:

Provided that the time limit for the prosecution to establish the property that shall be subject to the Seizing and Freezing Order may be extended by the Court for another ninety (90) days if the Court is satisfied that such extension is justified;

(ii) If the prosecution within the time limits provided in paragraph (i), limits the property subject to the Seizing and Freezing Order to specific assets or a specific sum of money, the Court shall if it deems it appropriate, amend the Seizing and Freezing Order and the provisions of paragraph (ii) of sub-article 8 shall apply;

(iii) if the prosecution does not within the time limits provided in paragraph (i) limit the property subject to the Seizing and Freezing Order to specific assets or to a specific sum of money, the Seizing and Freezing Order shall cease to have effect upon the lapse of the said time limits and the provisions of paragraph (b) of subarticle (5b) of article 35 shall apply mutatis

mutandis in respect of the accused.

(5) (a) The Court may vary a Seizing and Freezing Order upon an application of the person charged or accused. The said application shall be served upon the prosecution and upon the Director. Upon such application the Court shall determine what monies may be paid to or received by the person charged or accused during the validity of such Order, to allow him and his family a decent living in a yearly amount not exceeding the amount established by the Minister by order in the Gazette and any other amount which the Court considers justified to meet necessary expenses.

(b) On the application of the person charged or accused served upon the prosecution and the Director, the Court shall also determine what monies may be paid to or received by the person charged or accused during the validity of such Order to allow him to carry on any trade, business, profession or occupation.

(c) In the case that during the proceedings a request is made for the variation of the Order in terms of paragraph (a) or (b) which relates to expenses which are recurrent, the Order allowing the payment of such recurrent expenses shall be considered as covering such expenses whenever they arise without the need to file an application every time such expenses arise.

(6) Any decision taken by the Court in accordance with this article shall constitute a provisional measure and shall not prejudice the merits of the case.

(7) A Seizing and Freezing Order shall be immediately served upon the Director and shall:

(a) become operative and binding on all third parties immediately when it is issued and the Director shall cause a notice thereof to be published without delay in the Gazette and also cause a copy thereof to be registered in the Public Registry, the Land Registry and any other registry established by law for the registration of property of any kind. A copy of such Order shall also be served on any person who the prosecution or the Director may indicate; and

(b) remain in force until the final determination of the proceedings and in the case of a conviction until the sentence has been executed.

(8) (i) Where the Court of Magistrates does not issue an Order in accordance with sub-article (1) when requested by the prosecution, the Court shall instead issue a temporary freezing order having the same effect. The Attorney General may, within seven (7) working days from the date of the Court's decision, file an application before the Criminal Court to make the required order. The temporary freezing order shall remain in force until the Criminal Court determines the application.

(ii) When an order in accordance with sub-article (1) is issued by the Court of Magistrates, the person charged may within seven (7) working days from the date of the Court's decision, file an application before the Criminal Court requesting the total or partial revocation of the order, provided that the order shall remain in force until a decision is given by the Criminal Court.

The Criminal Court shall grant the prosecution and the Director seven (7) working days to reply to the request of the person charged. The decision of the Criminal Court on the application shall be delivered within seven (7) working days from the filing of the replies or from when the time limit for their filing lapsed.

(9) (a) On the application of the Bureau, the Civil Court (Asset Recovery Section) shall order the sale during the proceedings and without awaiting a final judgment of any property which has been seized or frozen in terms of this article if that Court finds that:

(i) the property is perishable or at risk of deterioration, decay, damage or depreciation in value;

(ii) the expense of keeping the property is excessive or disproportionate to its fair market value when one also takes into consideration the time likely to determine whether the property shall be subject to forfeiture or to a confiscation order;

(iii) the property is subject to a loan or other right over property or to taxes on which the owner is in default of his obligations; or

(iv) there is any other valid reason for the sale:

Provided that the Court may in its discretion, deny a request to order the sale if it finds that the property possesses such unique characteristics that its sale would constitute an irreplaceable loss to the property owner should the property ultimately be found not to be subject to confiscation.

(b) The proceeds of any sale pursuant to this subarticle shall be held in an account maintained by the Bureau and shall serve as a substitute res in any ensuing criminal or non-conviction based confiscation proceeding.

(c) The Court shall decide on the request of the Bureau in accordance with this sub-article within thirty (30) days from the date when the request is made. The decree shall be subject to a right of appeal by the aggrieved party on points of law and such appeal shall be filed in the Court of Appeal within seven (7) working days from the date of the decree. The party against whom the appeal is filed may file a reply within seven (7) working days from the service of the appeal. The Court of Appeal shall decide the appeal within thirty (30) days from the conclusion of the written pleadings.

(10) The provisions of sub-articles (7) to (13) of article 35 shall *mutatis mutandis* apply in the case of a Seizing and Freezing Order issued in accordance with this article and to any order to which the provisions of this article apply.

(11) Where a Seizing and Freezing Order, as issued or as varied, is limited to specific property, the other property of the defendant shall not be considered as being subject to such Order.'

There are clear distinctions between the above two provisions. In the current scenario, the initiation of the order occurs when an individual is charged with a relevant offense, prompting the prosecution to request a Seizing and Freezing

Order from the court. This order involves attaching all monies and movable property linked to the accused, while also prohibiting them from transferring, pledging, hypothecating, or altering any owned or held immovable or movable property. The order takes effect immediately upon issuance and persists until the final resolution of the proceedings or, in the event of a conviction, until the sentence is carried out. The only available option to the accused is to apply to the court for a determination of permissible payments during the order's existence, with the court specifying the source, manner, and other details to ensure a decent living for the accused and their family.

With the proposed amendments, it remains evident that the order is still issued if the charge against the person broadly states that their property is subject to confiscation. However, key differences emerge in the prosecutor's obligations. The prosecution is now required to establish, within 90 days, a reasonable basis to believe that the property will be subject to confiscation. The court has the discretion to extend this time limit by an additional 90 days if it deems such an extension justified. If the prosecution successfully limits the property subject to the order within the specified time frame, the court can amend the order accordingly. On the other hand, if the prosecution fails to narrow down the property within the stipulated time limits, the order loses its effect, and specific provisions come into play.

Critics of the proposed changes contend that the burden of proving that the property slated for confiscation is linked to criminal activities should rest on the accused. Yet, this presents a potential quandary: if the accused assumes this responsibility, it could be construed as an implicit admission of guilt. To clarify, acknowledging that a specific portion of the property has no ties to criminal activity might be perceived as the accused confessing to their involvement in the alleged offenses related to the remaining assets.

This debate underscores the balance between ensuring due process and

protecting the rights of the accused on one hand, and providing the prosecution with the necessary tools to address potential criminal activities on the other. A legal system founded on the rule of law consistently grapples with the challenge of striking a fair and just balance in such matters. Meanwhile, the notion that the prosecution must demonstrate a reasonable basis to believe that a crime has occurred and define its parameters is a principle that should not be casually dismissed.

Consequently, it is imperative that a fundamental requirement be met: a reasonable proportionality must always exist between the means employed and the intended objective. This guiding principle has been underscored in numerous human rights judgments on a European level. For instance, consider the case of **Paulet vs United Kingdom** on May 13, 2014, where the European Court found a violation of Article 1 of the First Protocol to the Convention in relation to a confiscation order.⁶ The violation was based on the following reasons:

'i) It is not in dispute that the confiscation order in the present case amounted to an interference with the applicant's right to peaceful enjoyment of his possessions as protected by the first sentence of Article 1 of Protocol No.1. Moreover, it is clear from Philips v. the United Kingdom, no 41087/98, 51, ECHR 2001 - VII, that confiscation orders fall within the scope of the second para-graph of Article 1 of Protocol No. 1, which inter alia, allows the Contracting States to control the use of property to secure the payment of penalties. However, this provision must be construed in the light of the general principle set out in the first sentence of the first paragraph and there must, therefore, exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, among many examples, Allan Jacobsson v. Sweden (no.1), judgment of 25 October 1989, Series A no. 163, p.17, 55).'

ii) An interference with Article 1 of Protocol No.1 will be disproportionate where the property-owner concerned has had to bear "an individual and excessive burden", such that "the fair balance which should be struck between the protection of the right of property and the requirements of the general interest" is upset (see Sporrang and Loonroth v. Sweden, cited above, 73). The striking of a fair balance depends on many factors (AGOSI V. the United Kingdom, 24 October 1986, 54, Series A no. 108). Although the second paragraph of Article 1 of Protocol No. 1 contains no explicit procedural requirements, the Court must consider whether the

⁶ *Paulet v United Kingdom* App no 6219/2008 (ECtHR, 13th May 2014)

proceedings as a whole afforded the applicant a reasonable opportunity for putting his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake (AGOSI, cited above, and Jokela vs. Finland, no. 28856/ 95, 55, ECHR 2002-IV)'.⁷

More recently, in the European Court of Human Rights' decision on November 7, 2019, in the case of **Apostolovi vs Bulgaria**⁷, it was highlighted that in this case, it had to be determined whether a freezing order issued during criminal proceedings constituted a violation of Article 1 of the First Protocol to the European Convention. The Court found that in this case, there was a violation of Article 1 of the First Protocol to the Convention since:

'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 same reasoning was reaffirmed in the case of **Filkin vs Portugal**, which was adjudicated on March 3, 2020.⁸ The European Court of Human Rights underscored that, given the applicant's absence of procedural safeguards to adequately contest the measure and taking into account its protracted application, the Court determined that the applicant had borne an extraordinary and severe burden. As per the European Court, this upset the equitable balance that should be maintained between the legitimate general interest pursued by the authorities and the applicant's right to undisturbed enjoyment of their property. The Court explicitly articulated these sentiments as follows:

'Since the applicant did not benefit from the procedural guarantees that would enable him to effectively challenge the measure in question and having regard to its long period of application, the Court concluded that the applicant had been subjected to a 'special and outrageous charge', which overturned the fair balance that must be struck between the legitimate general interest pursued by the authorities and the applicant's right to the peaceful enjoyment of his property.'

⁷ *Apostolovi v Bulgaria* App no 62644/2009 (ECtHR, 7th November 2019)

⁸ *Filkin v Portugal* App no 69729/2012 (ECtHR, 3rd March 2020)

The opposition is correct in insisting that it is crucial for Malta to decisively address financial crime through effective methods.

However, it is indisputable, as underscored by the Strasbourg Courts, that this should not compromise fundamental human rights.

Legislation should prioritize guiding principles such as legitimacy, appropriateness, and necessity—or succinctly put, proportionality.



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