

Third-party owner of a property liable to confiscation: Without informing, you shall not seize

As early as 2016, the then Minister of Justice, Christiane Taubira, stressed the importance of criminal seizures in the legal arsenal.

The current interest in this process can be explained by the fact that it allows for a patrimonial penalty that deprives the perpetrator of the proceeds of his/her offense and, consequentially, of a title considered to be more fraudulent than legitimate.

However, the confiscation sometimes does not only affect the perpetrator of the offense but also a third-party owner of the seized property who has not committed any offenses.

“At a time when the share of dirty money in global wealth is reaching record levels and is placing economic systems themselves in a situation where they are confronted with huge contradictions, the imperative mission of Justice is to take up the challenge of the fight against offences resulting in the acquisition of property, which brings in a fortune to criminal organizations every day and impoverishes States, depriving them of the opportunity to provide the best possible level of public services to their citizens. It is up to public authorities to give the judiciary the means to carry out this mission. Seizures and confiscations, the legal regime of which has substantially evolved in recent years, are a major tool for this public interest work”^[1].

Back in 2016, Christiane Taubira, then Minister of Justice, already stressed the importance of criminal seizures in the legal arsenal. Confiscation effectively appears to be a “trendy”^[2] process as it allows for a patrimonial penalty that deprives the perpetrator of the proceeds of his/her offense and, consequentially, of a title considered to be more fraudulent than legitimate.

However, the confiscation sometimes does not only affect the perpetrator of the offense but also a third-party owner of the seized property who has not committed any offenses.

For quite a long time, there was no legal provision allowing for this unfortunate third-party owner to present his/her observations to the court that was considering the seizure of the property.

In two decisions dated September 23, 2021 and November 24, 2021, the French Constitutional Council has underlined this problematic situation and strengthened the right of bona fide third parties when imposing additional penalties providing for the confiscation of property^[3].

In doing so, the French Constitutional Council invalidated a major part of Article 131-21 of the French Criminal Code, effective from December 31, 2021.

On December 22, 2021, Law No. 2021-1729 of December 22, 2021, amended Article 131-21 of the French Criminal Code.

This Article, as amended, now provides in its final paragraph that:

“When the confiscation penalty relates to property to which a third party other than the convicted person has title, it cannot be ordered if this third party whose title is known or who has claimed his/her status as owner during the proceedings has not been given the opportunity to present his/her observations on the confiscation measure contemplated by the trial court for the purpose, in particular, of asserting the right he claims and his good faith.”^[4]

As such, this Article specifies that the confiscation penalty cannot be implemented when a third party with title to the property subject-matter of the confiscation is known and has not been given the opportunity to present his/her observation on said penalty envisaged by the court.

In order to specify the terms and conditions according to which the third-party owner must be informed of the contemplated confiscation penalty, the legislator published a Decree on December 23, 2021^[5].

This Decree created two Articles that specify how the third party is to be informed: Article D. 45-2 bis (applicable before the *Cour d’assises*, i.e., French Criminal Court having jurisdiction to judge people accused of felonies) and Article D.45-2-1 bis (applicable before the *Tribunal correctionnel*, i.e., French Criminal Court having jurisdiction to judge people accused of misdemeanors) of the French Code of Criminal Procedure.

Therefore, in this situation, the third-party owner (because there must be a title) who is known either because the investigations have revealed that he/she is an owner, or because he/she has claimed this status as owner, must be informed at least 10 days (extended to 1 month for *Cour d’assises*) before the date of the hearing during which a confiscation penalty may be ordered.

Specifically, the notice must inform the third party that the property he/she owns may be confiscated and that

he/she may present his/her observations himself/herself or through his/her attorney.

The notice must also inform the third party that he/she may present his/her observations at the hearing or in *"a written document delivered to the clerk of the court and recorded by the clerk either before the hearing or during the hearing, or addressed to the clerk of the court by registered letter, return receipt requested, at least 24 hours before the hearing date."*^[6]

Finally, the notice must specify the purpose of the observations to be made by the third-party owner who must *"assert the right he/she claims and his/her good faith"*^[7] by producing *"if necessary (...) any proof of title."*^[8]

This notice may be given by any means.

It must be noted that the last paragraph of Articles D. 45-2 bis and D. 45-2-1 bis specifies that the third-party owner does not have to be notified if he is summoned as a witness before the court hearing the case. In this situation, the President will remind him/her at the hearing that he/she *"may present his/her observations on the confiscation penalty that is likely to be ordered"*.^[9]

The introduction of this notice obligation, although being a real progress for third-party owners, seems to us problematic for several reasons:

- First, regarding the lack of prior information given to the third-party owner summoned as a witness. Indeed, how could a third party who was perhaps not aware that his/her property was liable to confiscation usefully defend himself/herself if he/she is informed thereof only during the hearing.
- Second, regarding the status of the third-party owner who can benefit from the information. The third party is to be informed by a notice if he/she is "known" or if he/she *"has claimed his/her status as owner during the proceedings"*. This raises questions, in particular as to the means that the third party must use to *"claim"* his/her status as a third-party owner. The text does not indicate how this claim is to be made.

Finally, a circular dated December 22, 2021 raises concerns as to the actual effectiveness of these new provisions with regard to third-party owners of a property liable to confiscation insofar as it specifies that *"Subject to the case-law of the Cour de Cassation (French Supreme Court), it seems that non-compliance with these new provisions should not entail the nullity of the ordered confiscation, insofar as the person concerned will always be able to request the restitution of the property on the basis of Article 710 of the [French] Code of Criminal Procedure"*^[10].

Did the French Directorate for Criminal Matters and Pardons intend, with this circular, to remove the binding nature of this new paragraph of Article 131-21 of the French Criminal Code? It would be important, with regard to the principle of legal certainty, that the legislator adopt a position on the effects of non-compliance with these provisions.

- [1] *Guide des saisies et confiscations*, French Directorate for Criminal Matters and Pardons 2016
- [2] *La difficile saisie pénale d'un immeuble*, Guillaume Beaussonie, RDI 2021. 284
- [3] French Constitutional Council, September 23, 2021, application for a priority preliminary ruling on the issue of constitutionality No. 2021-932; French Constitutional Council, November 24, 2021, application for a priority preliminary ruling on the issue of constitutionality No. 2021-949/950
- [4] Article 131-21 of the French Criminal Code: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000028312062 (in French only)
- [5] Decree No. 2021-1794 of December 23, 2021 amending the French Code of Criminal Procedure and relating *inter alia* to the confiscation penalty
- [6] Article D. 45-2 bis of the French Code of Criminal Procedure
- [7] *ibid*
- [8] *ibid*
- [9] *ibid*
- [10] Circular relating to the provisions of Law No. 2021-1729 of December 22, 2021 on confidence in the judiciary, drawing the consequences of rulings of the French Constitutional Council on applications for a priority preliminary ruling on the issue of constitutionality (JUSD2138990 C)

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