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NON-CONVICTION BASED CONFISCATION IN THE EU LEGAL FRAMEWORK

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1. Introduction.

For many decades, the international community has had a general agreement on the necessity of a workable system for the confiscation of criminal proceeds as an indispensable tool to implement the policy idea that "crime should not pay". As it has been recently noted, "it is difficult to find a single country, or scholar, stating that it is not worth removing criminal money from the economy".[1] The attention paid by supranational organisations to the fight against dirty money is well demonstrated by the number of legislative initiatives adopted in the field of asset recovery, in the framework of the United Nation,[2] of the Council of Europe[3] and of the European Union.[4]

On the other hand, it is only recently that supranational institutions and law enforcement authorities seem to have reached consensus also on a more specific orientation: the traditional form of confiscation (*standard confiscation* or *basic confiscation*), whereby the forfeiture of dirty property follows a criminal conviction that identifies both the author of the offence and the money and goods resulting therefrom, is not adequate, or at least is not enough to effectively recover the proceeds of crime.[5]

[1] K. LIGETI, M. SIMONATO, "Asset Recovery in the EU: Towards a Comprehensive Enforcement Model beyond Confiscation? An Introduction", in K. LIGETI, M. SIMONATO (eds.), *Chasing Criminal Money*, Oxford and Portland: Hart, 2017, 3.

[2] Since the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988.

[3] Since the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990. For an overview on the international legal framework on asset recovery, see R. IVORY, "Asset Recovery in Four Dimensions: Returning Wealth to Victim Countries as a Challenge for Global Governance", in K. LIGETI, M. SIMONATO (eds.), *Chasing Criminal Money*, op. cit., 178; for the historical perspective, see M. FERNANDEZ-BERTIER, "The History of Confiscation Laws: From the Book of Exodus to the War on White-Collar Crime", *ivi*, p. 53 ff.

[4] For a full list of the instruments adopted by the EU in the field of confiscation see D. NITU, "Extended and third party confiscation in the EU", in this book, par. 2.2

[5] J. P. RUI, "Non-conviction based confiscation in the European Union – an assessment of Art. 5 of the proposal for a directive of the European parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union", *ERA Forum*, 2012, 352 with further bibliographical references.

In other words, a general perception has progressively emerged that success in the recovery of criminal proceeds largely depends on the possibility of confiscating money and goods regardless of the outcome of a criminal proceeding, which is always time-consuming and uncertain. This sometimes because the defendant/owner of the property is not available for a criminal trial, e.g. in the event of flight from prosecution, illness, or death, or sometimes because of problems in finding evidence, which makes it very difficult, if not impossible, to demonstrate the link between the defendant and the crime, or between the crime and the dirty property.[6]

As a consequence, there has been growing support for the introduction of new forms of confiscation, different from traditional confiscation as described above, and based on a less rigid link between confiscated proceeds and criminal offences. Indeed, this may be necessary because the confiscated assets are not the proceeds of the crime the defendant has been convicted of (extended confiscation), or because those assets belong to a third person (third-party confiscation) or because they are linked to an offence that has not led to a conviction as a result of a criminal trial (non-conviction-based confiscation).

While another chapter of this book deals with extended and third-party confiscation,[7] this paper is focused on non-conviction-based confiscation (from now on NCBC), which can be labelled "strictly speaking" confiscation without previous conviction. Indeed, we can only agree with the idea expressed by some authors that extended confiscation and, even more so, third-party confiscation can be considered to some extent as confiscation without previous conviction[8]: in the first case because (at least part of) the confiscated assets derive from conduct that has not led to a conviction; in the second case because the individual whose assets are confiscated was not the defendant in the criminal proceeding whereby the confiscation order was issued.

However, while both the abovementioned forms of confiscation always presuppose a criminal proceeding that led to a conviction (though for a crime different from the one that generated the confiscated proceeds, or against a person different from the owner of the confiscated property), only the "strictly-speaking" NCBC can operate regardless from *any* previous conviction,[9] and sometimes even from a criminal proceeding.

In other words, while with extended confiscation and third-party confiscation the link between the asset and the crime is *loosened*, with NCBC that link is, more radically, *broken*: this is the reason why NCBC appears to be such a delicate issue from the standpoint of individual rights, with special reference to the presumption of innocence and the right to property. Actually, it has always been clear that the possibility to confiscate property without a prior criminal conviction would raise questions of consistency with the principles enshrined in many national constitutions and also, to a certain extent, in the international instruments protecting fundamental rights.

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[6] In this respect, see N. SELVAGGI, "On instrument adopted in the area of freezing and confiscation. A critical view of the current EU legal framework", in *Diritto penale contemporaneo*, 31 July 2015, 1.

[7] D. NITU, "Extended and third party confiscation in the EU", op. cit.

[8] M. PANZAVOLTA, "Confiscation and the Concept of Punishment: Can There Be a Confiscation Without a Conviction?", in K. LIGETI, M. SIMONATO (eds.), *Chasing Criminal Money*, op. cit., 25.

[9] As underlined by J. P. RUI, U. SIEBER, "Non-Conviction-Based Confiscation in Europe. Bringing the picture together", in P. RUI, U. SIEBER (Eds.), *Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction*, Duncker & Humboldt: Berlin, 2015, 245.

Therefore, any legislative initiative having the aim of introducing a supranational model of non-conviction-based confiscation has always tried to strike a proper balance between two essential needs: the *efficiency in recovering criminal assets* on the one hand, and the *respect of fundamental rights and principles* on the other.[10]

In addition, attempts to find a suitable and workable compromise between these two requirements have had to be considered in light of the considerable differences between national laws as regards the admissibility and limits of NCBC and the procedures for its enforcement. Currently some EU countries do not allow asset confiscation without a criminal conviction. On the contrary, other EU countries do provide for NCBC, but with very different approaches, concerning the nature of the confiscation itself (preventive measure, criminal punishment, administrative sanction, civil forfeiture), the substantive requirements, the procedural machinery (criminal, administrative or civil proceeding), the related standards and burdens of proof, the individual applicable guarantees.[11] As it is well known, the picture may vary from the *civil asset forfeiture* as conceived in Ireland and UK, which consist of an *action in rem* directed against the property and conducted before a civil court, to the Italian so-called "preventive confiscation" that, though adopted by a criminal court, is not yet grounded on criminal conviction.[12]

While another chapter of this book focuses on the interactions between NCBC and fundamental rights,[13] the aim of this chapter is to provide a general overview of the provisions concerning this form of confiscation in the international law (*i.e.* outside the EU legal system), instruments (par. 2); to focus on the (absence of) provisions concerning NCBC in the third-pillar instrument on seizure and confiscation of illicit assets (par. 3); to offer an in-depth analysis of the different and variable approaches to NCBC that emerged during the decision-making process that led to the adoption of Directive 42/2014/EU and to highlight the shortcomings of the "minimal" version of NCBC adopted therein (par. 4); to outline the further developments of the NCBC regime in the EU legal framework (par. 5).

2. Non-conviction-based confiscation in international law.

The difficulties in finding the right balance between the *efficiency in recovering criminal assets*, on the one hand, and the *respect of fundamental rights and principles*, on

[10] In this respect, see T. S. GREENBERG, L. SAMUEL, W. GRANT, L. GRAY, *Stolen Asset Recovery* Washington DC: Star, The World Bank, 2009, 19 ff.

[11] As a result of a comprehensive comparative law analysis, J. P. RUI, U. SIEBER, "Non-Conviction-Based Confiscation in Europe. Bringing the picture together", op. cit., identify four main different approaches to NCBC in Europe (common law, the Italian, the German Scandinavian and the EU approaches); moreover, several other jurisdictions in Europe are reported as having developed NCBC rules (namely Bulgaria, Liechtenstein and Slovenia; see J. P. RUI, "Introduction", *ivi*, 6). For an in-depth analysis of NCBC national regimes in Belgium, France, Germany, Italy and Romania, see chapters…in this book.

[12] More in detail, the "*confisca di prevenzione*" not only can be ordered without a previous conviction, but also does not depend on the initiation of criminal proceedings against the owner at all since it is based on a suspicion that the individual belongs to a criminal organisation: see M. PANZAVOLTA, R. FLOR, "A Necessary Evil? The Italian 'Non-Criminal System' of Asset Forfeiture", in J.P. RUI and U. SIEBER (Eds.), *Non Conviction-Based Confiscation in Europe*, op. cit., 111 ff.; S. BOLIS, E. A. A. DEI CAS, F. DIAMANTI, "National Report: Italy", in this book, par. 1.

[13] M. SIMONATO, M. FERNANDEZ-BERTIER, "Non-conviction based confiscation and fundamental rights: the quest for a consistent European approach", in this book; on the topic, see also J. BOUCHT, "Civil Asset Forfeiture and the Presumption of Innocence under Article 6(2) ECHR", *New Journal of European Criminal Law*, 2014, 5(2), 221 ff.; J. P. RUI, U. SIEBER, "Non-Conviction-Based Confiscation in Europe. Bringing the picture together", op. cit., 356 ff.; M. SIMONATO, "Confiscation and fundamental rights across criminal and non-criminal domains", *Era Forum*, 2017, 18(3), 365 ff.

the other, was already clear under the first legislative initiatives taken outside the EU legal framework.

One of the first attempt to loosen the link between the confiscation order and the final criminal conviction can be found in a sectorial instrument, namely the UN Convention against Corruption of 31 October 2003 (UNCAC), whose Art. 54 is labelled "Mechanisms for recovery of property through international cooperation in confiscation". More in detail, Art. 54 lett. *c* of this Convention invited the Contracting States to

> *consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.*

It is worth noting that such wording ("shall *consider* taking") does not imply a binding obligation upon the Signing Parties, but a mere soft-law provision[14]: this illustrates well enough the complexity and sensitivity of the issue of non-conviction-based confiscation at a supranational level.

More recently, NCBC has been included by the Financial Action Task Force[15] (FATF) in the recommendations concerning the "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation", adopted in February 2012 and recently updated in November 2017.

Recommendation no. 4 – concerning the legislative measure to be adopted in order to enable the competent authorities to freeze and confiscate property (proceeds and instrumentalities) related to the offences of money laundering and the financing of terrorism – stipulates that

"Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law".

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[14] While, on the contrary, the wording of lett. *a* and *b* of Art. 54 ("Each State Party… shall *take* such measures…", emphasis added) – concerning namely the execution in a State party of confiscation orders issued by another State party and the confiscation of property of foreign origin in particular cases – establishes an obligation upon Signatory Parties.

Furthermore, Art.31, par. 8 of the UNCAC Convention also refers to the possibility of a reversal of the burden of proof: "States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings". The same possibility had been already envisaged, for the first time, by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1998 (Art. 5, par. 7) and, later, by the United Nations Convention against Transnational Organized Crime of 2000 (Art. 12, par. 8); on the contrary, the two latter instruments did not provide for specific rules on NCBC.

[15] The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 with the objective to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a "policy-making body" that works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. On the remarkable impact of FATF Recommendations, notwithstanding their status of "soft-law" rules, see R. BORLINI, F. MONTANARO, "The evolution of the EU law against criminal finance: the "hardening" of FATF standards within the EU, » in *Georgetown Journal of International Law*, vol. 48, 2017, 1011 ff.

In turn, recommendation no. 38 (concerning mutual legal assistance in freezing and confiscation procedures) envisages that the national authority

"should include being able to respond to requests made on the basis of non-conviction-based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law".

Although the instruments adopted by the Financial Action Task Force are merely *soft law* instruments, the wording of Recommendations 4 and 38 explicitly make their provisions on NCBC subject to the consistency with the standards of domestic law.

As regards the Council of Europe legal framework, it is worth noting that there are no *mandatory* provisions on non-conviction-based confiscation. More in detail, neither the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990[16] nor the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005[17] stipulate specific rules on NCBC. On the contrary, significantly enough both the Conventions include among the "grounds for refusal" of inter-state cooperation in the enforcement of confiscation orders the fact that "the request does not relate to a previous conviction".[18] Once again, a reference to NCBC can only be found in a *soft-law* provision: more in detail, in the Resolution 2218(2018),[19] the Parliamentary Assembly of the Council of Europe

"*strongly supports non-conviction-based confiscation or similar measures as the most realistic way for States to tackle the enormous and inexorably growing financial power of organised crime, in order to defend democracy and the rule of law*" (point 6).

Accordingly, "t*he Assembly…invites all member States of the Council of Europe and other States having a special status with the Council of Europe to…provide for non-conviction-based confiscation in their national laws…*" (points 9-9.1).

3. ***Non-conviction-based confiscation in the Area of Freedom, Security and Justice before the Treaty of Lisbon ("Third-pillar" instruments).***

As outlined by Simonato,[20] from the beginning the European Union's intervention in the area of confiscation has taken a three-fold approach: harmonisation of national legislations concerning the conditions for and the object of confiscation orders[21]; mutual

[16] Signed in Strasbourg on 8 November 1990.

[17] Signed in Warsaw on 16 May 2005.

[18] Respectively, Art. 18(4) lett. *d* of the Strasbourg Convention of 1990 and Art. 28(4) lett. *d* of the Warsaw Convention of 2005.

[19] Resolution on "Fighting organised crime by facilitating the confiscation of illegal assets", adopted on 26 April 2018 (available at http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=24761&lang=EN).

[20] M. SIMONATO, "Directive 20147427EU and non-conviction based confiscation. A step forward on asset recovery?", in *New Journal of European Criminal Law*, 2015, 216-217.

[21] The third-pillar instruments adopted in this field are – in chronological order – Joint Action 1998/699/JHA of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime; Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds

recognition of judicial decisions on freezing and confiscation[22]; horizontal cooperation between national authorities involved in asset recovery procedures.[23]

For the purposes of this chapter, attention will be focused on the first approach, with particular reference to the development of EU legislation concerning the harmonisation of national law regarding confiscation without conviction.

In this respect, the already mentioned remarkable differences existing at a national level on the admissibility and limits of NCBC not only prevented the adoption of binding provisions in international law conventions, but also at an EU level, at least under third-pillar legislation. In short, while the third-pillar instruments laid down somehow detailed rules on other forms of confiscation different from the traditional form (i.e. value confiscation, extended confiscation, third-party confiscation), no reference was made to the *strictly speaking* non-conviction-based confiscation.

This applies, for instance, to Joint Action 1998/699/JHA and to Framework Decision 2001/500/JHA, which for the first time required Member States to enable valued-based confiscation.[24]

However, the most significant example of how challenging it was for EU legislators to promote a common model of NCBC is provided by Framework Decision 2005/212, which had the ambitious objective of ensuring "that all Member States have effective rules governing the confiscation of the proceeds of crime" (Recital 10).

In view of this general objective, the Framework Decision laid down a very detailed discipline aimed at for the first time harmonising national legislation on extended confiscation of the assets of persons convicted for specific categories of crimes (Art. 3)[25];

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of crime, which partially replaced Joint Action 1998/699/JHA; Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.

Joint Action 1998/699/JHA has been replaced by Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, adopted on the basis of Art. 82.1 and 83 TFEU, which also partially replaced Framework Decision 2001/500/JHA and Framework Decision 2005/212/JHA, for the Member States bound by the Directive itself (Art. 14).

[22] The third-pillar instruments adopted in this field are – in chronological order – Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

Following the entry into force of the Lisbon Treaty, Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, adopted on the basis of Art. 82.1 TFUE, has partially replaced the provisions of Council Framework Decision 2003/577/JHA, as regards the freezing of evidence for Member States bound by that Directive. Eventually, the provisions of Framework Decision 2003/577/JHA as regards freezing of property and Framework Decision 2006/783/JHA were replaced by Regulation 2018/1805/EU of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, adopted on the basis of Art. 82.1 TFEU, between Member States bound by the Regulation itself. Therefore, the provisions of Framework Decision 2003/577/JHA as regards freezing of property, as well as the provisions of Framework Decision 2006/783/JHA, should continue to apply between the Member States that are not bound by the Regulation, and between any Member State that is not bound by the Regulation and any Member State that is bound by the Regulation (Recital 52 of the latter).

[23] See Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime.

[24] See, respectively, Art. 1, par. 2 of the Joint Action and Art. 3 of the Framework Decision.

[25] See J. BOUCHT, *The limits of asset confiscation. On the legitimacy of extended appropriation of criminal proceeds*, Oxford-Portland: Hart, 2017, 30; D. NITU, "Extended and third party confiscation in the EU", op. cit., par. 2.2.

and it also envisaged the possibility of third-party confiscation (Art. 3, par. 3). By contrast, no reference at all was made to confiscation without conviction.[26]

Following the deadline for the transposition of Framework Decision 2005/212, the Commission found that the level of harmonisation of national legislation attained was not satisfactory, due both to insufficient implementation and to persisting inconsistencies in the provisions adopted at a national level.[27]

Furthermore, such inconsistencies had the effect of hindering mutual recognition, as "it is difficult for requested countries to execute foreign confiscation orders if such orders are based on schemes that are completely at odds with their own national approach".[28]

The aforesaid critical remarks were mainly conceived with reference to the issue of *extended confiscation*, where (at least) an embryonic attempt of harmonisation had actually occurred. The same remarks should then apply, *a fortiori*, to non-conviction-based confiscation, which, as stated before, was simply not mentioned under third-pillar Framework Decisions.[29]

4. *The "changing fortunes" of non-conviction-based confiscation in the procedure for the adoption of Directive 2014/42/EU.*

[26] True that Art. 3.4 gives the Member States discretion "to use procedures other than criminal procedures to deprive the perpetrator of the property in question"; however, the reference to "*the perpetrator*" – in the Italian version "*l'autore del reato*" (the author of the offence) – leaves little room for a procedure not requiring a finding of guilt (see A. M. MAUGERI, "La proposta di direttiva UE in materia di congelamento e confisca dei proventi del reato: prime riflessioni", *Diritto penale contemporaneo, Rivista trimestrale*, 2, 2012, 181).

[27] As outlined by Nitu (op. cit., par. 2.3.1) "The major hindering behind Framework Decision 2005/212/JHA was the alternative options for extended confiscation provided by Article 3". As a matter of fact, "given the variety of measures taken by the Member States, designed in accordance with their legal systems and characterised by differing legal concepts that do not always overlap, it is often difficult to determine which one (at least) of these provisions [*i.e.* of Art. 3] each Member State has complied with unless they have spelled it out" (Report from the Commission pursuant to Article 6 of the Council Framework Decision of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property (2005/212/JHA), of 17.12.2007, COM(2007) 805 final).

[28] K. LIGETI, M. SIMONATO, "Asset Recovery in the EU: Towards a Comprehensive Enforcement Model beyond Confiscation? An Introduction", op. cit., 5; accordingly, J. BOUCHT, *The limits of asset confiscation. On the legitimacy of extended appropriation of criminal proceeds*, op. cit., 36. In this respect it is worth noting that Framework Decision 783/2006/JHA – while establishing the principle of mutual recognition of confiscation orders adopted in the circumstances set out in the previous Framework Decision 2005/212/JHA – included as *optional* ground for refusal the fact that "the confiscation order falls outside the scope of the option adopted by the executing State within the meaning of Article 3(2) of Framework Decision 2005/212/JHA". All this considered, should the options adopted by Member States under the latter provision differ one from the other, this ground of refusal could always apply. According to the Report from the Commission to the European Parliament and the Council based on Article 22 of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (COM (2010) 428 final of 23.8.2010), the majority of the Member States have actually transposed this ground of refusal into their national legislation, making it *obligatory*.

[29] For a case-law analysis illustrating the obstacles in the transnational enforcement of NCBC orders stemming both from the lack of EU instruments imposing on Member States the duty to enforce such orders, and from the insufficient harmonisation of national laws on NCBC, see F. ALAGNA, 'Non-conviction based confiscation: why the EU directive is a missed opportunity', *Eur. Journal of Crim. and Policy Research*, 2015, 21(4), 453 f.

Despite the emphasis placed on the importance of confiscation as an essential tool in the fight against organised crime[30] and the stated objective of ensuring "that all Member States have effective rules governing the confiscation of proceeds from crime",[31] on the day after the entry into force of the Treaty of Lisbon national legislations on confiscation were still significantly inconsistent, with negative effects on the efficiency of inter-state cooperation. More specifically, third-pillar instruments on confiscation did not address the issue of NCBC at all.

While the European Council Stockholm Program of 2009[32] rather generically proclaimed that "the confiscation of assets of criminals should be made more efficient and cooperation between Asset Recovery Offices made stronger", other EU soft-law instruments explicitly patronised the adoption of common rules concerning NCBC.

To start with, the Council of the European Union in 2010 invited the Commission and the Member States to consider "ways to acknowledge non-conviction-based confiscation systems in those Member States which do not have such systems in place, and in particular to examine, within the framework of mutual recognition, ways to enforce non-conviction-based confiscation orders in those Member States".[33]

In turn, the European Parliament in 2011 was even more explicit, calling the "Commission to submit…a framework proposal for a directive on the procedure for the seizure and confiscation of the proceeds of crime" that should also include "rules on the effective use of instruments such as extended *and non-conviction-based confiscation*".[34]

The implications of an EU obligation for the Member States to introduce NCBC into their national legal systems and/or to recognise non-conviction-based confiscation orders is well demonstrated by the challenging legislative procedure that led to the current text of Art. 4 of Directive 2014/42/EU. This text takes up – with some modifications in a restrictive sense – what was formulated in the original Commission proposal, from which the analysis shall therefore start.

4.1. *The limited cases for non-conviction-based confiscation in the original Commission proposal*.

In response to calls from the Council of the European Union and the European Parliament, in 2012 the Commission finally presented a proposal for a Directive on the freezing and confiscation of proceeds of crime in the EU.[35]

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[30] "The main motive for organised crime is financial gain. In order to be effective, therefore, any attempt to prevent and combat such crime must focus on tracing, freezing, seizing and confiscating the proceeds from crime" (Framework Decision 2006/783/JHA, Recital 7).

[31] See Framework Decision 2005/212/JHA, Recital (10).

[32] The Stockholm Program – An open and secure Europe serving and protecting citizens (2010/C 115/01).

[33] Council Conclusions of 28 May 2010 on Confiscation and Asset Recovery (7769/3/2010).

[34] European Parliament Resolution of 25 October 2011 on organised crime in the European Union (2010/2309(INI)), par. 8 (emphasis added).

[35] Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, of 12.3.2012, COM(2012) 85 final. For a commentary see A. M. MAUGERI, "La proposta di direttiva UE in materia di congelamento e confisca dei proventi del reato: prime riflessioni", op. cit., 180 ff.; J. P. RUI, "Non-conviction based confiscation in the European Union—an assessment of Art. 5 of the proposal for a directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union", op. cit.; J. BOUTCH, Extended Confiscation and the Proposed Directive on Freezing and Confiscation of Criminal Proceeds in the EU: On Striking a Balance between Efficiency, Fairness and Legal Certainty, *Eur. Journal of Crime, Criminal Law and Criminal Justice*, 2013, n. 1, 127 ff.

Recital no. 12 of the Directive proposal, after stating that the "issuance of confiscation orders generally requires a criminal conviction", provided that in "some cases, even where a criminal conviction cannot be achieved, it should still be possible to confiscate assets in order to disrupt criminal activities and ensure that profits resulting from criminal activities are not reinvested into the licit economy".

Accordingly, Article 5 of the proposal, entitled "Non-conviction based confiscation", provided as follows:

> *"Each Member State shall take the necessary measures to enable it to confiscate proceeds and instrumentalities without a criminal conviction, following proceedings which could, if the suspected or accused person had been able to stand trial, have led to a criminal conviction, where:*
> *(a) the death or permanent illness of the suspected or accused person prevents any further prosecution; or*
> *(b) the illness or flight from prosecution or sentencing of the suspected or accused person prevents effective prosecution within a reasonable time, and poses the serious risk that it could be barred by statutory limitations".*

The choice to limit NCBC to the cases of *death, (permanent) illness* and *flight from prosecution* of the suspected or accused person clearly mirrored Article 54 of UN Convention against Corruption,[36] as the explanatory memorandum underlined. At the same time, the option not to introduce a *general* model of NCBC was explained with the need "to meet the requirement of proportionality".[37]

Though the proposed model concerned confiscation "in relation to a criminal offence", it allowed "Member States to choose whether confiscation should be imposed by criminal and/or civil/administrative courts".[38]

However, as has been underlined,[39] the proposal did not provided for a real *actio in rem* for the recovery of assets of suspect origin *independent* of the criminal proceedings *in personam*, as happens with civil forfeiture and with preventive confiscation in Italy.[40] Rather, such proposal envisaged an "autonomous" procedure capable of recovering illicit profits only in a very limited set of situations where it is not possible to proceed *in personam*, excluding, instead, the more frequent case where the suspect cannot be identified.

Furthermore, and most importantly, in the proposed NCBC model orders could only be adopted when the judge considers that if the suspect or accused had been able to stand trial the procedure could have led to a criminal conviction. In sum, and quite

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The restraint in dealing with the issue of NCBC was already clear in the explanatory memorandum of the proposal, where, introducing the "minimum rules for Member States with respect to freezing and confiscation of criminal assets through direct confiscation, value confiscation, extended confiscation [third party confiscation and] non-conviction based confiscation" only with respect to the latter was it necessary to specify that only "limited circumstances" were considered (par. 1.1)

[36] See, *supra*, par. 2.

[37] Explanatory Memorandum to Article 5.

[38] *Ibidem.* In this respect, it is worth recalling that Article 8 of the proposal provided that in the cases under Art. 5, "the person whose property is affected by the decision to confiscate shall be represented by a lawyer throughout the proceedings in order to pursue the rights of the defence of the person relating to the establishment of the criminal offence and to the determination of the proceeds and instrumentalities".

[39] A. M. MAUGERI, "La proposta di direttiva UE in materia di congelamento e confisca dei proventi del reato: prime riflessioni", op. cit., 193 ff.

[40] See, *supra*, note 12.

paradoxically, the proposal implied that "the establishment of an offence is necessary for a non-conviction based confiscation", which is "something entirely different to what is commonly known as non-conviction based confiscation".[41] All this considered, we cannot but agree with the feeling that such system could have "a very limited effectiveness…given its substantial link to a criminal trial".[42]

Given that the contents of the proposed Article 5 have been incorporated with few modifications into the final version of Directive 2014/42EU Art. 4(2), further comments will be made with regard to the provision in force.[43]

4.2. *The innovative model of European non-conviction-based confiscation proposed by the LIBE Committee of the European Parliament.*

During the legislative process that led to the adoption of Directive 2014/42/EU, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament tabled radical amendments to the original Commission proposal.[44] The objective of the LIBE Committee was made quite clear in amendment 8 to Recital 12 of the Commission proposal, which stipulated that "Provision should be made to enable non-conviction based confiscation in all Member States".

More in detail, according to amendment 33 of the LIBE Committee Report, the limited cases of NCBC envisaged in the original Commission proposal would be disciplined – under Article 5 in a new par. 2[45] – only as *additional cases* to the general model of European NCBC set forth under Article 5, par. 1, which stipulated that:

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[41] J. P. RUI, "Non-conviction based confiscation in the European Union—an assessment of Art. 5 of the proposal", op. cit., p. 354.

[42] F. ALAGNA, 'Non-conviction based confiscation: why the EU directive is a missed opportunity', op. cit., 457, where the Author also notes that "the very limitation of such approach is that it deprives NCB confiscation of its true added value, which consists right in the opportunity to enforce confiscation where the evidentiary frame suffices for assuming the illicit origin of the goods confiscated but not for proving the accused guilty".

[43] See par. 4.3 below.

[44] Report of the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union, 20 May 2013, A7–0178/2013. For a commentary see A. M. MAUGERI, "L'actio in rem assurge a modello di 'confisca europea' nel rispetto delle garanzie Cedu? – Emendamenti della Commissione Libe alla proposta di direttiva in materia di congelamento e confisca dei proventi del reato", Diritto penale contemporaneo – Rivista trimestrale, 2013, 3, 252 ff.; F. MAZZACUVA, "La posizione della Commissione LIBE del Parlamento europeo alla proposta di direttiva relativa al congelamento e alla confisca dei proventi di reato", *Diritto penale contemporaneo*, 16 July 2013; C. GRANDI, "Il ruolo del Parlamento europeo nell'approvazione delle direttive di armonizzazione penale", *Rivista italiana di diritto e procedura penale*, 2015, 709 ff.

[45] In particular, the new Article 5 par. 2 proposed by the LIBE Committee slightly amended the original text, providing that: "Each Member State shall also take the necessary measures to enable judicial authorities to confiscate proceeds and instrumentalities without a criminal conviction, following proceedings which could, if the suspected or accused person had been able to stand trial, have led to a criminal conviction, where:

a) the death, illness or permanent illness of the suspected or accused person, where the illness or permanent illness results in the person being unfit to stand trial, prevents any further prosecution; or

b) the illness or flight from prosecution or sentencing of the suspected or accused person prevents effective prosecution within a reasonable time and poses the serious risk that it could be barred by statutory limitations".

Therefore, under lett. *a* – not only death or permanent illness, but – also non-permanent illness could legitimise NCBC, provided the health conditions "*results in the person being unfit to stand trial*"; such modification was welcomed by the literature, noting that the mandatory "permanent" nature of the illness

"each Member State shall take the necessary measures to enable judicial authorities to confiscate, as a criminal sanction, proceeds and instrumentalities without a criminal conviction where a court is convinced on the basis of specific circumstances and all the available evidence that those assets derive from activities of a criminal nature, while fully respecting the provisions of Article 6 of the ECHR and the European Charter of Fundamental Rights. Such confiscation is to be considered of criminal nature according, amongst others, to the following criteria: (i) the legal classification of the offence under national law, (ii) the nature of the offence and (iii) the degree of severity of the penalty that the person concerned risks incurring and shall also be in line with national constitutional law".

As it has been underlined, unlike the original Commission proposal, the LIBE Committee Report intended NCBC in its *true* and *traditional* pattern, allowing confiscation "on an eased burden of proof, where there is no conviction, if the illicit origin of the assets concerned is demonstrated".[46] In other words, the LIBE Commission proposed to adopt the *actio in rem* against tainted property as the general model of European NCBC,[47] by imposing on the Member States the confiscation of criminal proceeds in absence of a conviction, and without limiting such obligation to a set of cases where the *actio in personam* is precluded or to the cases where a criminal proceeding has been initiated against an identified defendant.[48]

At the same time, with the aim of striking a balance between efficiency and the respect of fundamental rights, the LIBE Committee added two remarkable elements.

First, the proposed model of European NCBC only concerned the proceeds and instrumentalities *of a crime*: according to Recital 12b the Directive "only covers such forms of non-conviction based confiscation which are considered to be of a criminal nature". According to the justification to amendment 27 "the measure has to be in relation to a criminal offence". Consequently, Art. 5 specifies that NCBC confiscation should be ordered only "*where a court is convinced on the basis of specific circumstances and all the available evidence that those assets derive from activities of a criminal nature*". Therefore, while breaking the link between confiscation and the conviction of the

could cause evidentiary problems (A. M. MAUGERI, "L'actio in rem assurge a modello di 'confisca europea' nel rispetto delle garanzie Cedu?, op. cit., 274).

[46] F. ALAGNA, 'Non-conviction based confiscation: why the EU directive is a missed opportunity', op. cit., 458.

[47] A.M. MAUGERI, "L'actio in rem assurge a modello di 'confisca europea', op. cit., 273. What is more, while Recital 1, as reworded by amendment 1, seemed to make 'the mutual recognition of measures taken in a different field from that of criminal law or otherwise adopted in the absence of a criminal conviction in the circumstances defined in Article 5' functional to the fight 'against economic crime, organised crime and terrorism', the text of Art. 5 did not actually limit the obligation to introduce NCBC to the areas of economic and organised crime only.

[48] In this respect, amendment no. 5 proposed a new Recital 7*b*, which provided that "Member States are free to adopt confiscation procedures which are linked to a criminal case before any court, whether criminal, civil or administrative". On the similarities between the LIBE Committee proposed model of European NCBC and the Italian model of preventive anti-mafia confiscation, see A.M. MAUGERI, "L'actio in rem assurge a modello di 'confisca europea', op. cit., 272 ; F. MAZZACUVA, *La posizione della Commissione LIBE del Parlamento europeo*, op. cit.

offender, the proposal shifted the focus on the link between the property and the crime, by imposing a substantial evidentiary standard.[49]

Second, and in parallel, in the LIBE Committee proposal NCBC is justified in light of its explicit classification as a "criminal sanction", the imposition of which should be subject to the guarantees envisaged in Article 6 ECHR and in the European Charter of Fundamental Rights, expressly referred to in Article 5(1) and in Recital 18 of the amended proposal.[50] In this respect, the LIBE Committee recalled that European Court of Human Rights had never considered the fact that individuals may be subjected to NCBC to be a violation of fundamental rights (new Recital 18*a*).

The choice of explicitly qualifying as "criminal" the confiscation – with or without prior conviction – making it subject to the safeguards of the ECHR and the CFREU was generally welcomed in the literature,[51] although some criticism arose with respect to the overall coherence of the proposed amendments.[52]

However, the text of the LIBE Committee was dropped by the Parliament in its position in first reading,[53] the text of which – a practical recovery of the original Commission proposal, as far as NCBC is concerned – was finally adopted on 3 April 2014.

4.3. *The "minimal" version of non-conviction-based confiscation under Article 4(2) of Directive 2014/42/EU. Critical remarks.*

While the aforementioned UN Convention on Corruption of 2003 and FATF Recommendations of 2012 only provided for *soft-law* provisions on NCBC,[54] Art. 4(2)

[49] For an in-depth analysis of the evidentiary standard required by the wording of Article 5, see A. M. MAUGERI, "L'actio in rem assurge a modello di 'confisca europea', op. cit., 280 ff.

[50] Justification to amendment 33 points out that "The 'criminal nature' of such a confiscation is a condition for any harmonisation under Article 83(1) TFEU".

[51] See A. M. MAUGERI, "L'actio in rem assurge a modello di 'confisca europea', op. cit., 274 f., where the Author also underlines that the strengthening of the guarantees was in line with the Opinion of the European Union Agency for Fundamental Rights (FRA) Opinion on the Confiscation of proceeds of crime (Vienna, 4 December 2012), which outlined that "the Procedural safeguards, as they have been developed in the relevant case law of the ECtHR, could be more prominent in the proposal, in order to enforce the compatibility with relevant fundamental rights standards of the non-conviction based confiscation mechanism. Such detailed safeguards would aim at providing a reasonable opportunity for a person concerned to put facts of the case to the responsible authorities".

[52] More in detail, part of the doctrine pointed out that the explicit qualification of confiscation as a criminal sanction would raise questions of consistency with procedural safeguards. As it was noted, when the Court of Strasbourg declared the compatibility of NCBC with the Convention, it came to this conclusion after *excluding* the criminal nature of the measure under scrutiny (*i.e.* preventive measures provided for in the Italian anti-mafia legislation), therefore on the grounds of Art. 6, par. 1, i.e. the civil limb of the right to a fair trial, and not of Art. 6, par. 2, i.e. the criminal limb. On the contrary, once the criminal nature of confiscation is recognised, its application should consequently meet the (higher) standards entrenched in Art. 6, par. *2*, including the presumption of innocence: the question, then, is whether the application of a "criminal" measure would be compatible with the presumption of innocence also "in absence of sufficient evidence to obtain a conviction" (F. MAZZACUVA, *La posizione della Commissione LIBE*, op. cit.).

[53] Position of the European Parliament adopted at first reading on 25 February 2014 with a view to the adoption of Directive 2014/.../EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (EP-PE_TC1-COD(2012)0036). According to J. P. RUI, U. SIEBER, "Non-Conviction-Based Confiscation in Europe. Bringing the picture together", op. cit., 277, "the present NCBC provision of the Directive is the result of an intrasparent debate that took place over a relatively short period of time and led to a compromise".

[54] See, *supra*, par. 2.

of Directive 2014/42/EU[55] introduced the first binding provision requiring EU Member States to provide for confiscation without previous convictions not limited to a specific category of crime.[56]

While Art. 4, par. 1 of the Directive requires Member States to enable conviction-based confiscation,[57] Art. 4, par. 2 provides that

"where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial".[58]

Before analysing this provision, it is worth noting that Art. 5 of the original Commission proposal of 2012 – explicitly entitled "non-conviction based confiscation" – was dropped during negotiation. While it is true that its text has been substantially transposed into Art. 4, par. 2 of the current Directive, the fact remains that EU legislators proved to be reluctant to use the wording "confiscation without conviction", a further evidence of how controversial the issue remains.[59]

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[55] Directive 2014/42/EU of 3 April 2014 *on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.* For a commentary see F. ALAGNA, 'Non-conviction based confiscation: why the EU directive is a missed opportunity', op. cit., 455 ss.; G. ARCIFA, "The new EU Directive on confiscation: a good (even if still prudent) starting point for the post-Lisbon Eu strategy on tracking and confiscating illicit money", Università di Catania - Online Working Paper n. 64/2014, available at http://www.cde.unict.it/quadernieuropei/giuridiche/64_2014.pdf; M. FAZEKAS, E. NANOPOULOS, "The Effectiveness of eu Law: Insights from the EU Legal Framework on Asset Confiscation", *Eur. Journal of Crime, Criminal Law and Criminal Justice*, 2016, 39 ff.; M. FERNANDEZ-BERTIER, The confiscation and recovery of criminal property: a European Union state of the art, *Era Forum*, 2016, 333 ff.; J. BOUCHT, *The limits of asset confiscation*, op. cit., 35 ff.; A. M. MAUGERI, "La direttiva 2014/42/UE relativa alla confisca degli strumenti e dei proventi da reato nell'Unione europea tra garanzie ed efficienza: un 'work in progress'", *Diritto penale contemporaneo, Rivista trimestrale*, 1, 2015, 300 ff.; J. P. RUI, U. SIEBER, "Non-Conviction-Based Confiscation in Europe. Bringing the picture together", op. cit., 276 ff.; M. SIMONATO, "Directive 20147427EU and non-conviction based confiscation. A step forward on asset recovery?", op. cit.

[56] As noted by M. SIMONATO, *ivi*, 222.

[57] "Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia".

[58] By virtue of the reference to Art. 4, par. 1, the scope of application of NCBC mirrors that of "traditional" confiscation under par. 1 itself, which in turn corresponds with the general scope of application of the Directive under Art. 3 : the latter provision mentions an extensive list of offences harmonised under third-pillar Framework Decisions, Directives adopted on the basis of Art. 83 TFEU, as well as instruments to be adopted which "provide specifically that this Directive applies to the criminal offences harmonised therein". Therefore, the scope of application of the NCBC is wider than that of extended confiscation as disciplined under Art. 5, par. 2 of the Directive, which provides for a list of crimes slightly narrower than that under Art. 3 (on the issue see D. NITU, "Extended and third party confiscation in the EU", op. cit., par. 2.3.1).

[59] As observed by M. PANZAVOLTA, "Confiscation and the Concept of Punishment", op. cit., 26.

All this considered, it is no surprise that the Directive achieved only a minimum harmonisation, as it requires NCBC in very few cases and under restrictive circumstances, namely:

i. When criminal proceedings – for a crime listed in Art. 3 which can give rise to economic benefit – have been initiated *against a person*.

ii. But the conviction cannot be achieved due to illness or the absconding of the suspect or accused.

iii. Provided the proceedings "could have led to a criminal conviction if the suspected or accused person had been able to stand trial".

Three observations can be made.

First, likewise the Commission proposal, Article 4, par. 2 of Directive 2014/42/EU clearly requires criminal proceedings *in personam*, therefore it does not include cases where the offender is unknown and it only concerns crime-related proceeds. Accordingly, this provision is far from introducing a *real*, *traditional* form of NCBC, which generally follow proceedings *in rem*.[60] Since the provision in force mirrors the original Commission proposal, the already quoted idea remains valid that this model is "something entirely different from what is commonly known as" NCBC.[61]

Second, the set of cases where NCBC shall be allowed appears to be extremely narrow, even more limited than that envisaged in the original Commission proposal, which mentioned a third hypothesis – the case of death of the defendant – then dropped during negotiation.[62] In sum, the Directive calls the Member States to allow NCBC only when the conviction is not possible due to illness or absconding of the suspected or accused person.

In order to assess the effective impact of such provision on national legislations it is worth recalling the text of Recital 15, which explicitly acknowledged that "in such cases of illness and absconding, the existence of proceedings in absentia in Member States would be sufficient to comply with this obligation".

In other words, the Member States that provide for trials *in absentia* already fulfilled the condition of Art. 4(2), which therefore has had no impact at all in their national

[60] M. FERNANDEZ-BERTIER, "The confiscation and recovery of criminal property: a European Union state of the art", 336; see also F. ALAGNA, 'Non-conviction based confiscation: why the EU directive is a missed opportunity', op. cit., 457, where the Author labels the EU model a "semi-non-conviction based confiscation"; M. SIMONATO, "Directive 20147427EU and non-conviction based confiscation", op. cit., 222, defines Art. 4 par. 2 of the Directive a "hybrid provision".

[61] J. P. RUI, "Non-conviction based confiscation in the European Union—an assessment of Art. 5 of the proposal", as quoted, *supra*, nt. 42.

[62] For critical remarks on this choice see A. M. MAUGERI, "La direttiva 2014/42/UE relativa alla confisca degli strumenti e dei proventi da reato", op. cit., 324. The Author also maintains that the list should have included more cases that preclude the conviction, but not always hinder the continuation of the criminal proceedings: for example, the lack of criminal capacity ("*imputabilità*") that not always depend on illness (e.g. minor age) or the case of amnesty. The Author also mention the case of *prescription*: to this respect, it is worth recalling that in a recent judgement (*G.I.E.M. s.r.l. v. Italy*, *Hotel promotion Bureau s.r.l. and Rita Sarda s.r.l. v. Italy*, *Falgest s.r.l. and Gironda v. Italy*, Applications no. 1828/06, 34163/07, and 19029/11, 28 June 2018) the ECtHR, deviating from its precedent case-law (*Varvara v. Italy*, App. no. 17475/09, 29 October 2013), has established that Article 7 ECHR does not necessarily require a 'formal' conviction for the application of a substantially-criminal sanction; on the contrary a 'substantial' declaration of liability – as the one made by the Italian courts before the statute of limitation put an end to the criminal proceedings *a quo* – may be 'capable of satisfying the prerequisite for the imposition of a sanction compatible with Article 7 of the Convention' (on the issue see M. SIMONATO, M. FERNANDEZ-BERTIER, "Non-conviction based confiscation and fundamental rights", in this book, par. 4).

legislations.[63] In this respect, it must also be pointed out that proceedings *in absentia* allow the possibility to *convict* a defendant who has not appeared in court: in those States, therefore, the "courts can easily render a *conviction* that also contains…a confiscation decision".[64] Thus, the confiscation order adopted following a trial *in absentia* is a *conviction-based* one, which has nothing to do, once again, with NCBC.[65]

As for the Member States that do not know at all *in absentia* trials yet,[66] they could comply with Art. 4(2) by laying down *in absentia confiscation proceedings*, without the establishment of *in absentia criminal proceedings* that can lead to a conviction being necessary.[67]

Third, the condition under Art. 4, par. 2 that the proceedings "could have led to a criminal conviction" entails "a full proof of a crime committed by the said person"[68]: although a "*real*" conviction is not necessary, the full proof of a "*potential*" conviction is still required. Therefore, the evidentiary standard that must be satisfied in order to prove the *potential* conviction does not seem to be lower than what is necessary for a *real* conviction: a further element to conclude that "Art. 4, No. 2 has nothing to do with a typical NCBC decision".[69]

For all these reasons, the system introduced by Art. 4, par. 2 of Directive 2014/42 has been considered almost unanimously "disappointing in the eyes of the supporters of NCBC".[70] Of course, more far-reaching models of NCBC are not in contrast with the directive, which lays down only minimum rules. However, the objective of promoting an extensive harmonisation of national laws on confiscation without previous conviction, capable of facilitating the mutual recognition of NCBC orders across Europe, was certainly missed.

5. **The initiatives for improving the existing EU legal framework.**

[63] M. SIMONATO, "Directive 20147427EU and non-conviction based confiscation", op. cit., 223.

[64] J.P. RUI, U. SIEBER, "Non-conviction based confiscation in Europe", op. cit., 281.

[65] M. FERNANDEZ-BERTIER, "The confiscation and recovery of criminal property: a European Union state of the art", op. cit., 336.

[66] Actually, a clear minority: see S. QUATTROCOLO, S. RUGGERI (eds.), *Personal Participation in Criminal Proceedings. A Comparative Study of Participatory Safeguards and in absentia Trials in Europe*, Heidelberg: Springer, 2019 and *ivi* S. QUATTROCOLO, *Participatory Rights in Comparative Criminal Justice. Similarities and Divergences Within the Framework of the European Law*, 449 ff.

Furthermore, it must be considered that Directive 2016/43 of the European parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, set forth, *inter alia*, the condition under which Member States shall allow a trial – and the potential following conviction – *in absentia*. More in detail, Art. 8, par. 2, on the right to be present at the trial, stipulates that "Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that: (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of nonappearance; or (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State". The deadline for the transposition of the Directive expired on 1 April 2018 and the Commission report on its implementation in the Member States is awaited by 1 April 2021.

[67] J.P. RUI, U. SIEBER, "Non-conviction based confiscation in Europe", op. cit., 281.

[68] *Ivi*., 278.

[69] M. FERNANDEZ-BERTIER, "The confiscation and recovery of criminal property", op. cit., 336.

[70] *Ivi*, 335; see also F. ALAGNA, 'Non-conviction based confiscation: why the EU directive is a missed opportunity', op. cit., 458 f.; A. MAUGERI, "La direttiva 2014/42/UE relative alla confisca degli strumenti e dei proventi da reato", op. cit., 327.

The shortcomings of the newly introduced NCBC legal framework prompted the European Parliament and the Council to adopt new initiatives. With a joint statement issued simultaneously with the adoption of the Directive, the EU co-legislators called on the Commission "to analyse, at the earliest possible opportunity and taking into account the differences between the legal traditions and the systems of the Member States, the feasibility and possible benefits of introducing further common rules on the confiscation of property deriving from activities of a criminal nature, also in the absence of a conviction of a specific person or persons for these activities".[71]

In response to this call, in its European Agenda on Security of 28 April 2015[72] the Commission announced that in 2016 "a feasibility study on common rules on non-conviction based confiscation of property derived from criminal activities" would be issued.

However, in spite of good intentions, it has become quite clear that the persisting differences between national approaches to NCBC are playing a dual and conflicting role. On the one hand, they are the target to hit through the proposed harmonisation measures. On the other hand, they are the hurdle that always prevents the adoption of the harmonisation measures themselves. A hurdle that remains extremely high, at least for two reasons: first, "various Member States have highlighted the existing incompatibility" of NCBC "with their legal tradition",[73] sometimes rooted in national Constitutions. Second, some authors also cast doubts on the existence of a suitable EU competence to enact a far-reaching model of European NCBC, since Art. 83, par. 1 and 2 TFEU would not provide for a proper legal basis.[74] If that were the case, and being aware of the difficulties experienced in the adoption of Art. 4 of the Directive, the only viable choice would be the adoption of *soft-law instruments* encouraging "Member States to introduce legislation on NCBC models…along the lines of the common law model and the Italian preventive model".[75]

All these difficulties and uncertainties[76] have probably led EU legislator to abandon the path of harmonisation and to embark (again) on that of mutual recognition.

In the already mentioned joint statement,[77] the European Parliament and the Council also called on "the Commission to present a legislative proposal on mutual recognition of freezing and confiscation orders at the earliest possible opportunity". In

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[71] Council of the European Union, Interinstitutional File: 2012/0036 (COD), no. 7329/1/14, 31.3.2014.

[72] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The European agenda on security, 28.4.2015, COM(2015) 185 final.

[73] M. FERNANDEZ-BERTIER, "The confiscation and recovery of criminal property", op. cit., 338 f. In this respect, the scenario depicted in the document from the British Parliament, House of Commons, European Security Committee (quoted by J.P. RUI, U. SIEBER, "Non-conviction based confiscation in Europe", op. cit., 281) is extremely interesting, revealing that during negotiations "Member States have sought to change Art. 5 [of the Commission original Directive proposal] so that they can comply with it without having to create new-conviction-based confiscation powers. Negotiations have reshaped the Article so that Member States can implement it by using *in absentia* prosecutions to achieve conviction" (document available at https://publications.parliament.uk/pa/cm201213/cmselect/cmeuleg/86-xxii/86xxii13.htm).

[74] In this sense see J.P. RUI, U. SIEBER, "Non-conviction based confiscation in Europe", op. cit., 284 ff. See also M. SIMONATO, "Directive 20147427EU and non-conviction based confiscation", op. cit., 221.

[75] J.P. RUI, U. SIEBER, "Non-conviction based confiscation in Europe", op. cit., 290.

[76] Even more so if we consider that the EctHR approach on the consistency of NCBC with the Convention is not fully predictable yet (see M. SIMONATO, M. FERNANDEZ-BERTIER, "Non-conviction based confiscation and fundamental rights", in this book).

[77] See, *supra*, note 71

parallel, in the aforesaid Agenda,[78] the Commission stated that "Mutual recognition of freezing and confiscation orders should be improved".

Accordingly, in 2016 the Commission adopted a proposal[79] that eventually led to the adoption of Regulation 2018/1805/EU, on the mutual recognition of freezing orders and confiscation orders.[80]

While another chapter of this book deals with the topic of mutual recognition,[81] the analysis here should focus on the provisions on NCBC. In this respect, the *Explanatory Memorandum* of the proposal established that the scope of the regulation would be extended compared to Directive 2014/42/EU, as it

"will also cover orders for non-conviction based confiscation issued within the framework of criminal proceedings*: the cases of death of a person, immunity, prescription, cases where the perpetrator of an offence cannot be identified, or other cases where a criminal court can confiscate an asset without conviction when the court has decided that such asset is the proceeds of crime. This requires the court to establish that an advantage was derived from a criminal offence. In order to be included in the scope of the Regulation, these types of confiscation orders must be issued* within the framework of criminal proceedings" (emphasis added).

However, during the meetings of the Working Party on Cooperation in Criminal Matters (COPEN), the Italian delegation pointed out that the notion of "criminal proceedings" as used in the proposed Regulation would probably not include, or at least not entirely, its system of confiscation, ruling out "preventive-confiscation".[82] For that reason, "Italy suggested using the concept of Article 82(1) TFEU and referring to proceedings in criminal matters. This would allow including its system of preventive confiscation".[83]

While some delegations supported the modification requested by Italy, others expressed doubts, also questioning whether in the Italian system "the procedural rights of the persons concerned would be adequately respected".[84]

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[78] See, *supra*, note 72.

[79] Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, of 21.12.2016, COM(2016) 819 final; see A. M. MAUGERI, "Prime osservazioni sulla nuova proposta di regolamento del parlamento europeo e del consiglio relativa al riconoscimento reciproco dei provvedimenti di congelamento e confisca", *Diritto penale contemporaneo – Rivista trimestrale*, 2017, 2, 235 ff.

[80] Regulation 2018/1805/EU of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders ; see A. M. MAUGERI, "Il Regolamento (UE) 2018/1805 per il reciproco riconoscimento dei provvedimenti di congelamento e di confisca: una pietra angolare per la cooperazione e l'efficienza", *Diritto penale contemporaneo*, 16 gennaio 2019.

[81] See V. WEYER, "Mutual recognition of confiscation orders and national differences", in this book.

[82] *Ibidem* ; A. M. MAUGERI, "Il Regolamento (UE) 2018/1805 per il reciproco riconoscimento, op. cit., 11 ff.

[83] Council of the European Union, Interinstitutional File 2016/0412 (COD), no. 12685/17, 2.10.2017.

[84] "Some other Member States expressed doubts about the advisability of accepting this modification. They observed that the Italian system of preventive confiscation seems to be of a hybrid nature criminal/administrative, and they wondered whether this system would be covered by the legal basis of Art. 82(1) TFEU. These Member States also inquired whether in the Italian system there is a link between confiscation order and a criminal offence, or whether the procedural rights of the persons concerned would be adequately respected" (*ibidem*, 4).

Since the decision on the extension of the scope of the regulation to include the systems of preventive confiscation, such as the Italian system, was considered to be of a political nature, the question was referred to the Council. In a subsequent press release, a Council agreement was announced on extending the proposal so as to include "a wider scope of types of confiscation such as non-conviction based confiscation, including certain systems of preventive confiscation, provided that there is a link to a criminal offence".[85]

As a consequence, Recital 13 of Regulation 2018/1805/EU now stipulates that the latter

"*should apply to all freezing orders and to all confiscation orders issued* within the framework of proceedings in criminal matters…. *The term therefore covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence, not only orders covered by Directive 2014/42/EU. It also covers other types of order issued without a final conviction.* While such orders might not exist in the legal system of a Member State, the Member State concerned should be able to recognise and execute such an order issued by another Member State" (emphasis added).

Accordingly, Art. 1, par. 1 establishes that

"*This Regulation lays down the rules under which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State* within the framework of proceedings in criminal matters" (emphasis added).[86]

In sum, the analysis of the preparatory work and the final text of the Regulation clearly indicates that the duty to recognise and enforce the confiscation orders issued by the courts of other EU Member States "in the same way as for a domestic confiscation" order, established by Art. 14, par. 1, shall also apply to NCBC orders adopted *beyond* the cases under Art. 4, par. 2 of Directive 2014/42/EU; *including* the cases of death, immunity, limitation, or where the perpetrator of an offence cannot be identified; *including* "preventive confiscation" orders, as long as they are issued within the *framework of proceedings in criminal matters*.

However, on the one hand, as it has been pointed out, it is not clear enough yet what is to be understood by "confiscation order issued within the framework of proceedings in criminal matters".[87] On the other hand, and most importantly, the path of mutual recognition *without* sufficient harmonisation is far from unhindered. This is all the more true if, as it was pointed out, doubts had already arisen during the preparatory work on the compatibility of certain forms of confiscation without a prior conviction, such as the Italian form, with fundamental rights; these doubts once again reflect the

[85] Council Press Release no. 758/17, of 08.12.2017, "Freezing and confiscation: Council agrees general approach on the mutual recognition of freezing and confiscation orders".

[86] While Art. 1, par. 1 of the proposal used the wording "within the framework of criminal proceedings".

[87] V. WEYER, "Mutual recognition of confiscation orders and national differences", op. cit., par. III.2.

differences between national legislation on confiscation, often linked to constitutional principles.[88]

For all these reasons, one can only agree with the fear that "there are reasons to believe that obstacles to the enforcement of such an order may be found in most Member States' legislations".[89] After all, these are not new problems at all: "mutual recognition can only work, if at all, if the laws of the different Member States are broadly similar. In consequence, even with mutual recognition, a significant degree of harmonisation may be required".[90]

[88] In this respect it is particularly worth noting that following protests raised by Germany and the European Parliament on the extension of the proposed regulation to include forms of preventive confiscation (see V. WEYER, "Mutual recognition of confiscation orders and national differences", op. cit., par. III.1), a specific grounds for refusal of the recognition and execution of confiscation orders has been added, covering the case where "in exceptional situations there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the confiscation order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence" (Art. 19, lett. *h*).

[89] V. WEYER, "Mutual recognition of confiscation orders and national differences", op. cit., par. III.2.

[90] J. SPENCER, "The principle of Mutual Recognition", in KOSTORIS (ed.), *Handbook of European Criminal Procedure*, Springer International Publishing, 2018, 290; accordingly S. MANACORDA, "Diritto penale europeo", *Enciclopedia Treccani on-line*, 2014. On the close interconnections between harmonisation and cooperation see, *amplius*, A. BERNARDI "Opportunité de l'harmonisation", in M. DELMAS-MARTY, G. GIUDICELLI-DELAGE, E. LAMBERT-ABDELGAWAD (eds.), *L'harmonisationdes sanctions pénales en Europe*, Paris: Société de législation comparée, 2003, 451 ff. ; G. GIUDICELLI-DELAGE, S. MANACORDA (eds.), *L'intégration pénale indirecte. Interactions entre droit pénal et coopération judiciaire au sein de l'Union européenne*, Paris: Société de législation comparée, 2005.