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SUBSTANTIVE ASPECTS OF CONFISCATION. A COMPARATIVE ANALYSIS

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I. Introduction

Having seen the struggles that are currently arising in the application of confiscation mechanisms within the EU, the present part of the book is enshrined so as to provide a comparative / horizontal analysis of the current situation in Belgium, France, Germany, Italy, the Netherlands and Romania, as part of a project designed so as to provide a starting point in ensuring a healthy harmonization process.

In the following lines, the current status quo in the aforementioned Member States will be presented, following the structure of the national reports.

In trying to provide insight in the way in which confiscation is regulated through the European Union, one must start logically with the types of confiscation mechanisms present in the Member States, and only afterwards provide comparison with the "comparable institutions" in each Member State.

The first section will be dedicated to criminal confiscation, then extended confiscation, afterwards non conviction-based confiscation and finally, third-party confiscation.

II. Criminal confiscation

When comparing criminal confiscation, the following analysis will be based on the definition of criminal confiscation provided by the current in force EU legislation, respectively Directive 2014/42/EU.

In the words of the Directive, *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[1]. Criminal confiscation will be regarded as a measure provided for by criminal law that can be ordered in a criminal procedure, following a final conviction. For the purpose of the following comparison, a final conviction means either the classical decision having the same name, or any other similar solution that renders that the defendant has committed an offense, respectively a crime provided by criminal law, with intent or negligence, unjustifiable and committed with guilt.

1. Function & common framework

Starting with the institution *per se*, criminal confiscation is regarded as a traditional institution throughout Europe, being regulated in all the analyzed Member States. Its function, as it was from the beginning, consist of depriving the convicted person of any and all patrimonial gain that he or she had obtained through the commission of the offense. The focus is thus put on the patrimonial aspect of criminality, the *ration d'etre* of the institution being to regulate the wrongdoings done, from a patrimonial standpoint. As common features, confiscation is provided for both the instrumentalities of crime, as well as for the object and the proceeds, it is ordered by a judge, and it consists of transferring the ownerships of the assets envisaged from the convicted person to the state.

As another common feature, the legal regime of criminal confiscation, be it a general institution or a special one, depends on the asset that is to be confiscated. Even though not all systems have the same delineations, the most common approach differs the regime depending on the type of asset that is to be confiscated. As such, the type of assets would be those that are (1) the object of the offense, (2) the instrumentalities of the offense and (3) the items, products and benefits resulting from the offense.

For simplicity, on the basis of comparison, we have elected to separate the analysis between the (1) instrumentalities of the offense and (2) the proceeds of crime, the latter including the items, products and benefits resulting from the offense.

2. Particularities – country-based

Regarding the regulated institutions *per se*, criminal confiscation appears in the Member States either under different names, or, in some cases, in more than one form. In Belgium, criminal confiscation is regulated dually, in the general part of the Criminal Code – "criminal confiscation" and in the special part, having specific regimes depending on the offenses for which confiscation is ordered. In France, confiscation is regulated in a similar measure as in Belgium, having a general and a special regime, depending, identically as in the previous case, of the offense committed. In Germany, confiscation is regulated as in the previous cases in the general part of the Criminal Code. The Netherlands has a rather different system in place, regulating three institutions that essentially make it possible to confiscate assets within a criminal procedure. The three institutions are withdrawal from circulation, forfeiture and the confiscation order, all being regulated in the general part of the Criminal Code. In Italy, confiscation is regulated in a rather *suis generis* manner, several institutions being created for the purpose of confiscating illegally used or obtained assets. In Italy criminal confiscation is regulated dually, in the general part of the Criminal Code (articles 240 e 240-bis Italian penal Code) and in the special part, having specific regimes depending on the offenses for which

[1] Directive 2014/42/EU, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042

confiscation is ordered. In Romania, confiscation is regulated in the general part of the Criminal Code, being a traditional institution and having a history of more than 100 years. Confiscation is "special" in the Romanian legal framework, being regulated solely in the general part.

3. Legal nature

In France, confiscation is primarily a penalty provided by criminal law. It can be imposed as an additional, alternative or principal penalty. Normally it is used as an additional penalty, but it can be used as a primary penalty either as a substitute to imprisonment, or as a substitute to another additional penalty.

In Belgium, confiscation is an accessory penalty provided by criminal law, that may or must accompany the main penalty imposed on the perpetrator of a crime, misdemeanor or contravention.

In Germany, confiscation is not a criminal penalty, but classified as a criminal measure. However, in order to be applied, confiscation requires a criminal conviction, even though the measure *per se* has a restitutive aim.

In the Netherlands, all the institutions described above have a criminal nature and they are essentially sanctions of criminal law.

In Italy, confiscations are formally qualified as administrative security measures, but in reality they can take on a substantially afflictive legal nature (criminal) in certain circumstances (e.g. value confiscation) or maintain a dimension of security measures to prevent the commission of new crimes (confiscation without conviction of the dangerous good).

In Romania, confiscation is regulated only as a security measure and not a punishment. However, in order to confiscate, the defendant must commit an offense provided by criminal law and the act must be unjustifiable.

4. Common approach

As a general rule, confiscation is applicable to all offenses for which a conviction is reached in all Member States. Assets-wise, with the exceptions provided, confiscation can be rendered against all movable or immovable property, whatever its nature, divided or undivided, of which the convicted person is the owner of or, (in most cases) where he or she has free disposal, subject to the rights of the owner in good faith.

5. Requirements concerning confiscation of instrumentalities

5.1 Common views

As per the instrumentalities on the offense, the main common feature of all the legal systems analyzed is that confiscation can be ordered against instruments which served or were intended toward committing the offense. They are material objects the use of which has permitted or facilitated the carrying out of the offense.

5.2 Particularities – country-based

In France, below the threshold of one-year imprisonment, confiscation is ordered only insofar as a special provision provides for it, whether it is a misdemeanor or a petty offence and whether the offence is provided for in the Criminal Code or another criminal legal instrument or a regulatory body. If the punishment provided by law is higher than one year, confiscation is also applicable.

In Belgium, confiscation is provided in the event of a conviction for a crime or offense, but in the event of a contravention, confiscation is provided only in cases where the law specifically mentions it.

In Germany, confiscation is applicable in the case of instrumentalities regardless of the offense, respectively for crimes, felonies and misdemeanors.

In the Netherlands, the institution that is strictly designed so as to confiscate the instrumentalities of crime is forfeiture. It is optional, and the judge may order it only after a conviction and it can be addressed with regard to all offenses of a criminal nature. However, withdrawal from circulation can also be used, but it is more so designed so as to deprive the offender of assets whose possession is illegal.

In Italy, confiscation of instrumentalities is envisaged for traditional confiscation as well as for the other models of direct confiscation, the rationale being the same.

In Romania, confiscation of instrumentalities is regulated expressively, for all assets, used or intended to be used for the commission of the offense.

5.3 Limitations – exempted assets or offenses

In France, the only offenses that are exempted are the ones regarding press institutions and corelated to press offenses, confiscation being possible for all other offenses. In Belgium, as in Germany, there are no offenses or assets exempted, constituting the instrumentality of the offense, subject to confiscation. However, the German legal system allows the Courts to negate confiscation if the value of the assets in question is minor – the applicable threshold varies between 50, 150 and 500 euros. In the Netherlands, there are essentially no limitations asset wise or offenses-wise concerning the disposition of a forfeiture order. In Italy, in general, there are no assets exempted. In Romania, confiscation is possible for all offenses, the only limitation, as in the French system, being the offenses regarding press institutions and corelated to press offenses.

5.4 Proportionality test

In France, proportionality is required as a rule when deciding on confiscating totally or partially the assets, as well as when confiscation is rendered alongside a conviction for a minor offense.

As for proportionality concerning instrumentalities, in Belgium it is regarded that a proportionality test must be rendered since confiscating the instrumentalities of the offense must not have the effect of subjecting the convicted person to an unreasonably harsh penalty. The obligation is expressively provided in Belgium criminal law.

Since in Germany, the confiscation of the instrumentalities of the crime requires personal guilt and has a more punitive nature than the confiscation of proceeds, a proportionality test is required and the element of reference, as in the case of the main penalty, is the personal guilt of the offender.

In the Netherlands, a proportionality test is compulsory in the case of forfeiture. As such, the judge must take into account the financial capacity of the defendant.

In Italy, a proportionality test is not required. However, debates are still ongoing on the need to introduce a proportionality test.

In Romania, a proportionality test is compulsory in the case of confiscation of instrumentalities. As such, the judge must determine whether the value of the asset that is to be confiscated is disproportionate when compared to the potential results of the offenses and the contribution of the asset. However, if the assets were produced, modified or adapted so as to commit the criminal offense, no proportionality test is required.

5.5 Confiscation through equivalent

Confiscation through equivalent is possible in French, Belgium, and Romanian criminal law concerning the instrumentalities. However, it is worth noting that the Belgian legal system used to deny this possibility, it being regulated only by Law no. 18 of March 2018, amending the criminal provisions concerning confiscation. In Germany, confiscation through equivalent is possible, the Court having to estimate the value of the assets used in the commission of the offense. Interestingly enough, the German legal system enforces value-based confiscation as a fine, and not as in the French legal system, as a modality of the execution the measure. In the Netherlands, If the object to be subjected to the forfeiture has not been seized, the judge will calculate its value. The defendant is then obliged to either hand over the object, or pay the calculated value thereof to the State. In Italy, the confiscation through equivalent model is not envisaged as a general rule. However, confiscation through equivalent is regulated in some cases, but it does not apply to all the confiscation mechanisms – it is possible only insofar as the special mechanism of confiscation provides for the express possibility.

5.6 Mandatory vs. optional confiscation

In France as well as in Germany, confiscation concerning the instrumentalities of the offense is optional, while in Belgium, confiscation of instrumentalities is compulsory, with the notable limitation of confiscation for a contravention, where the law must expressively provide the possibility to confiscate.

In the Netherlands, as opposed to the previous examples, confiscation by means of forfeiture is always optional. Therefore, the judge can decide not to confiscate by means of the lack of gravity of the offence, the character of the offender, the circumstances of the case and so on.

In Italy, the traditional form of confiscation is optional with regard to instrumentalities. However, for some of the several special mechanisms envisaged for contraband, card fraud and so on, confiscation is mandatory.

In Romania, confiscation of instrumentalities is mandatory in all cases when a judge considers that the assets subject to confiscation were an instrument used or destined to be used in the commission of the offense.

6. Requirements concerning the object of the offense and the proceeds of crime

6.1 Common views

Confiscation of the object of crime as well as the proceeds of crime has been a goal of all confiscation mechanisms present in every Member States. The common features of all the systems include the possibility to confiscate the assets in nature or by equivalent. Moreover, even if the systems are organized in a rather different manner, the rationale behind all the institutions is to deprive the offender of the goods that resulted from the commission of the offense as well as any patrimonial benefits. While the manner in which this is achieved and the length differs from Member State to Member State, two approaches can be identifies: an asset-based approach and a generalist approach.

6.2 Particularities – country-based

In France, confiscation of the object of the offense and the proceeds of crime is regulated similarly as in the case of the instruments of offense, in the sense provided above. However, confiscation of the object and the proceeds of crimes follows a assets-based approach. In this sense, in French law, the assets that are the object of the offense are considered all assets that represent the result obtained or sought by the offender. The proceeds of the offense are considered all assets created or acquired by the commission of the offense. In this sense, proceeds can be direct or indirect and the proof that the funds have been obtained from an illegal activity is sufficient to justify their confiscation. However, concerning indirect proceeds, these constitute all forms of enrichment likely to be linked to the commission of the facts.

In Belgium, similar to France, criminal confiscation of the object of the offense and the proceeds of crime is regulated on an assets-based approach. The first category consists of the assets that are the object of the offense. In the Belgian legal system these assets represent the *corpus delicti* and they must be the property of the offender. However, the condition of ownership is not linked to the legal status of the assets, the trial judge being in charge of a *de facto* analysis. The second category represents the proceeds of crime. Proceeds are defined in this context as solely things that have been produced by the offense – created or resulted by the offenses. The third category is represented by the profits derived from or generated by the offense. This category is further divided into 3 subcategories, respectively: (1) patrimonial benefits derived directly from the offense – any direct or indirect property or value that the offender obtained by committing the offense, (2) properties and values substituted for the patrimonial benefit – replacement assets and (3) income from invested benefits – all types of profits that result from the replacement assets. Finally, the last category concerns the patrimony of a criminal organization. Even though in other systems it is considered to be a different type of confiscation, not criminal in nature, in the Belgian legal system it is qualified as criminal confiscation, and it is based on a non-rebuttable presumption of unlawful origin of all the assets of the criminal organization. As it can be seen, the criminal confiscation scheme in Belgium is rather extensive, the mechanisms having a rather long reach.

In Germany, the confiscation of the proceeds of crime is a criminal measure with a restitutive nature, confirmed by the German Supreme Court, as opposed to the confiscation of the object and the instruments of crime, which has a more punitive character, requiring a criminal conviction. In the case of the confiscation of the proceeds

of crime, confiscation can be imposed even if the perpetrator committed solely an unlawful act without being able to prove personal guilt. In this sense, confiscation of the proceeds includes any object of economic value that has been obtained by the perpetrator through or for the commission of the offense. Moreover, the confiscation order will be extended to benefits directly and indirectly derived from the object as well as to surrogates / replacement assets. As a particular feature of the system regulated in Germany, since the institution has a restitutive aim, a two-step approach is provided in order to determine the extent of confiscation. As a first step, the Court must determine the object that has been directly or indirectly obtained through or by the commission of the crime and afterwards, to analyze whether any expenses were incurred by the defendant for that specific object, so as to decide on the value. The main idea is to confiscate only the exact enrichment that occurred by the commission of the offense. As a final note, as it seems normal, the law expressively provides that no expenses will be deduced if they were used for the purpose of preparing or committing the crime.

In the Netherlands, both the institution of forfeiture and withdrawal from circulation can target the proceeds of crime, but the primary institution regulated so as to target only these proceeds is the confiscation order. While the former can be characterized as object-based confiscation – targeting mainly the *instrumenta and corpore delicti*, the confiscation order can be characterized as a value-based confiscation mechanism. As such, somewhat different to the other countries presented above – with the exception of Germany, in the Netherlands the target is to take away the financial advantage that the defendant has obtained as a result of the criminal activity from a restorative standpoint – only taking into account the patrimonial advantages concretely obtained. In that sense, at first, the judge must see what the financial advantage was from the standpoint of a specific asset, then determine the value thereof and finally, the defendant has a choice to pay the amount and keep the object. Moreover, even if the asset does not exist anymore in the patrimony of the defendant, confiscation can still be rendered – rather singular feature. Futhermore, as in the cases presented above, the confiscation order can target not only direct assets, but also subsequent profit that defendant obtained using the initial profit. In all cases, prior to confiscation, a conviction must be rendered.

In the General Part of the Italian Penal Code, confiscation generally follows conviction, with the exception of things the use of which is in itself a crime. In the General Part of the Italian Penal Code, the confiscation following the conviction refers to constitute the product, the profit or the price of the offense. Direct confiscation needs a direct link that must be proven between the offense and the crime committed, respectively confiscation is ordered only insofar as the assets are a direct consequence of the offense

In Romania, criminal confiscation is regulated in a peculiar manner, when compared to the other Member States, confiscation being exclusively a security measure, ordered in the context of criminal conviction. However, in order to confiscate the object and proceeds of the offense, the offense committed must be at least provided by criminal law and unjustifiable. As such, in a nutshell, criminal confiscation can be ordered even if no personal guilt is proven with regard to the offender. In what concerns the institution *per se*, confiscation in Romania has an object-based approach. The categories provided are (1) assets produced by the commission of a criminal offense, (2) assets used immediately after the commission of the offense in order to escape or to ensure the retention of proceeds, (3) assets given to bring about the commission of the offense or to reward the perpetrator and (4) assets acquired by perpetrating the offence. While the meaning of each of the categories is further explained in the national report, what should

be highlighted is that the Romanian legal framework permits the confiscation of the direct assets – consequences of the commission of the offense, as well as assets obtained from the exploitation or use of assets subject to confiscation.

6.3 Limitations – exempted assets or offenses

The legal regime in France is identical in this regard as it is regulated for instrumentalities, the only exempted assets being press offences, all other assets being suitable for confiscation. In Belgium, as in Germany, no limitations exist having as a criterion the assets subject to the measure or the offenses that are committed. In the Netherlands, almost all offenses can give rise to confiscation, with the exception of custom and fiscal offenses that have specific special regime. Assets wise, the only limitation concerns the situation when the value that has to be confiscated is executed from a responsible third party – in this specific case, the limitation is provided by the "protected earnings level". In Italy, even though no specific limitations exist, when compared to the other Member States, the prime limitation would be that the Italian system provides only for direct confiscation of assets that are the direct consequence of the offense for which a conviction is rendered (with the exception of confiscation for the equivalent provided for in the special legislation). In this regard, assets that have been destroyed, hidden or disposed cannot be confiscated. In Romania, as opposed to the situation of instrumentalities, there are no limitations asset-wise or offense-wise in the case of confiscation.

6.4 Proportionality test

In what concerns the object and proceeds of crime, in France and in the Netherlands, it has been established that when the assets subject to confiscation are in entirety the proceeds of the offense, a proportionality test is not required. Belgium criminal law provides that a proportionality test is required only in the case of the profits obtained from the commission of the offense, in the case of a confiscation through equivalent. However, for the rest of the cases, a proportionality test is not required. In Germany, a proportionality test can be ensured with regard to the assets that are to be confiscated – it can either be interpreted as a proportionality measure or a limitation. As such, the Court may decide not to confiscate if: (1) the proceeds in question are deemed to be of minor value – as in the case of the instruments of the offense; (2) confiscation is deemed insignificant in addition to the anticipated penalty of measure of reform and prevention; or (3) the proceedings concerning confiscation are disproportionate or making a decision on the legal consequences of the offense is unreasonably difficult. In Italy, no proportionality test is required. As a rule, in Romania, confiscation is not subject to a proportionality test. However, in the case of assets used so as to escape or to keep the proceeds obtained, if these were qualified as proceeds and not instruments, a proportionality test is required in order to decide on total or partial confiscation. An exception for the exception is further provided, stating that if the above-mentioned assets were modified, produced or adapted in order to commit the offense, the proportionality test is no longer required.

6.5 Confiscation through equivalent

In France, confiscation through equivalent is possible, the rule being confiscation in kind. However, in this instance, value-based confiscation is simply an execution modality and thus, the judge actually has a real choice between confiscating the asset or the value of set asset – the option attests a greater flexibility of the penalty of confiscation.

In Belgium, confiscation through equivalent is available or not depending on the type of assets that is to be confiscated. It is generally not available for confiscating the object of the offense and the proceeds of crime, with the exemption of assets in the context of money laundering. However, concerning the profits derived from the commission of the offense, confiscation through equivalent is always possible.

In Germany, value-based confiscation is possible for the proceeds of crime. As an interesting note, value-based confiscation applies in German law even if the confiscated object falls short of the value of what was originally obtained, and the value will be enforced as a fine. Interestingly enough, as seen above, confiscation works similarly to unjust enrichment – the civil institution, but it's enforcement in the case of value-based confiscation is done as a penalty.

Since in the Netherlands the institutions is *per se* based on the value of the assets, the rule is inverted, respectively confiscation through equivalent can is the rule and not the exception.

Value based confiscation in Italy is not regulated in what concerns the proceeds of crime as a rule. As such, whenever it is not possible to apply direct confiscation, one must search for the specific type of offense that was committed if a regulation exists that permits value-based confiscation. Italy continues to extend the confiscation for equivalent (even if only in a fragmentary manner) in relation to certain specific cases, without responding to precise choices of criminal policy; our legislator continues not to provide in general for the confiscation for equivalent as a form of execution of the confiscation.

In Romania, value-based confiscation is possible for all categories of assets that could be qualified as proceeds. However, value-based confiscation is not an execution modality or a choice for the trial judge or the defendant, the principle being subsidiarity. As such, only insofar as confiscation in kind is not possible – for whatever reason, value-based confiscation will be applied.

6.6 Mandatory vs. optional confiscation

In the Netherlands, confiscation is always optional. On the same note, in France, confiscation as a penalty is optional, with the sole expectation of assets whose possession is illegal, when confiscation is mandatory. As opposed to this situation, in Germany and Romania, confiscation in the case of proceeds is mandatory.

In Belgium, confiscation is mandatory or optional depending on the assets that are to be confiscated. As such, for the object of the offense – *corpus delicti* and the proceeds of crime, confiscation is mandatory in the case of the commission of a crime or misdemeanors and it is optional in the case of contraventions. When discussing about the profits of crime, confiscation is, as a rule, optional, with the exception of assets received in the context of an offense against the state. Confiscation is mandatory concerning the last category, respectively when confiscation targets the patrimony of a criminal organization.

In Italy, the mandatory or optional character of confiscation depends on the type of offense that triggers the criminal procedure. In the case of contraband, counterfeiting of currency and credit card fraud, confiscation is mandatory in what concerns the profits, products and in some cases, the price of the offense. In Italy confiscation is mandatory in relation to the price of the offence and the property the use of which constitutes an offence in itself. In the other cases (profit and product) the mandatory or optional character of confiscation depends on the type of offense.

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7. Assets whose possession is illegal

In all Member States, confiscation of assets whose possession is illegal is regulated. In this sense, this is not equivalent to a conviction-based confiscation even though the ordering of the confiscation is done in the same criminal trial. In France, Italy, Romania, Germany and Belgium, confiscation is regulated in this area as a safety measure / preventive measure and it is being used in order to put out of circulation dangerous objects or products (weapons, narcotics, child pornography images and so on). In the Netherlands, the typical institution – though not the only one, is the one of withdrawal from circulation. As such, imposition is possible even if a criminal conviction is not reached, but for reasons that regard the dangerous or illegal nature of the asset and not as a specific criminal confiscation mechanism.

III. Extended confiscation

1. Common views

Extended confiscation has become a requirement imposed by EU law by means of Directive 2014/42/EU. Therefore, all Member States of the EU have implemented or otherwise analyzed their own legal system in order to abide by art. 5 of the Directive.

Extended confiscation is regulated in all the analyzed Member States and the purpose of the institution is to enhance, on the one hand, the power of the state to confiscate assets that are not directly obtained through or by the commission of a certain offense and, on the other hand, to be able to confiscate other assets, that for different reasons, cannot be confiscated through criminal confiscation or any other regulated confiscation mechanism.

Concerning the refining of the institutions, in France, extended confiscation was lastly modified by a Law adopted on the 5th of March 2007, while in Belgium, the final version of the institutions was regulated by a Law of 18 March 2018. In Germany, extended confiscation was regulated since 1992, but the final revision of the institution after Directive 2014/42/EU enlarged the scope of application, abandoning the list approach. In the Netherlands, the institution is one with tradition, being regulated since 1993 and without any modifications concerning the new confiscation directive. In Italy, extended confiscation was firstly regulated in in 1992 and the last reform, implementing Directive 2014/42/EU took place in 2018, without substantially changing the legal regime. Finally, in Romania, the institution was firstly devised in 2012 and it was further refined during the years by both legislative reform and Decisions by the Constitutional Court.

2. Legal nature

Concerning the legal nature of the institution, in all Member States, extended confiscation has the same legal nature as criminal confiscation, even though, some conditions differ from the traditional institution. In France, extended confiscation can be an additional, alternative or principal penalty, while in Belgium it is regulated as an accessory penalty. In the Netherlands, extended confiscation is regulated in the same article as criminal confiscation, while in Germany it has the same restitute aim as criminal confiscation, being a measure of criminal law. Finally, in Romania, extended confiscation is still a security (preventive) measure, while in Italy, the juridical nature that the jurisprudence assigns to the extended confiscation is of "atypical security measure" with dissuasive function on the importance that it affects the dangerousness of the goods which, left in the free availability of the subjects condemned for serious crimes, could propitiate the commission of further crimes.

3. Requirements

3.1 The Court Order

In France, so as to order extended confiscation, a conviction must be rendered for the commission of a crime, regardless of which type of confiscation is ordered – (1) extended confiscation based on the presumption of illicit origin, or (2) extended confiscation of the entirety of the patrimony. In Belgium, so as to confiscate extensively, the situation is similar as in France, in the sense that a conviction must be rendered, while the main difference would be that extended confiscation is regulated as a form of confiscating *any additional patrimonial benefits* that stemmed from the conviction of the offense. In Germany, in opposition with the former, so as to order extended confiscation, a criminal conviction is not required *per se*. However, the Court cannot confiscate unless it can identify that an unlawful act has been committed – personal guilt is not required. The Dutch legal regime for extended confiscation is similar to the one concerning criminal confiscation, in the sense that it can be ordered for all the types of offenses for which criminal confiscation can be ordered. However, in the Netherlands there are two variants of extended confiscation – one in which there are sufficient indication that other offences determined patrimonial benefits and another in which it is plausible that other offences determined the patrimonial benefits. In Italy, conviction and plea bargaining are prerequisites for the application of extended confiscation, but it is ordered with a subsequent measure that completes the conviction. The possibility is expressively provided by law. Finally, in Romania, the sole court order that can justify extended confiscation is a conviction. The institution cannot be applied for plea-bargaining and neither as in the case of special confiscation – when an unlawful and unjustifiable act has been committed – without proving the *mens rea*.

3.2 Triggering offenses

Concerning the type of offenses that can give rise to extended confiscation, the situation is different in France depending on the type of confiscation that is rendered – (1) extended confiscation based on the presumption of illicit origin, or (2) extended confiscation of the entirety of the patrimony. Concerning the former, extended

confiscation can be ordered for any felony or misdemeanor punishable by at least 5 years of imprisonment. With regard to the latter, a list of offenses is provided, the list encompassing only the most serious offenses punishable by French criminal law.

In Belgium, extended confiscation is provided only for offenses contained on a specific list, within three categories of offenses that are linked or not to a criminal organization. As such, the first category contains a number of very serious offenses that sanction serious violations of International Human Rights, terrorist offenses, counterfeiting of the euro, corruption & so on, for which, a conviction is sufficient to trigger the mechanism of extended confiscation without having to be convicted for participating in a criminal organization. The second category regards strictly offenses related to various forms of participating in a criminal organization and the third category is composed of serious acts of tax evasion for which, again, there is no need to be in the framework of a criminal organization. In the same sense, *the additional patrimonial benefits* must stem from facts / offenses that are not identical, but which are regulated under the same headings as those described above and for which a conviction has been rendered.

As shown above, in Germany, as opposed to the former two Member States, extended confiscation can be triggered by any offense regulated by criminal law.

In the Netherlands, on the one hand, for the version of extended confiscation in which it is required to have sufficient indications that other offenses determined patrimonial benefits, the triggering offence can be either one for which criminal confiscation can be ordered. On the other hand, for the version of extended confiscation in which it is required to plausibly assume that other offenses determined patrimonial benefits, the only offenses that can determine the ordering of the measure are those sanctionable with a fine of the fifth category, according to Dutch law. In any case, the solution must be a conviction.

In Italy, similar to the Belgian system, the triggering offenses that can give rise to extended confiscation are contained in a list, described as severe offenses. The list suffered several changes in time, the most important being in 2016 and 2018, by widening the scope of application.

Finally, in Romania, the triggering offenses are based on three criteria: the list approach – everlastingly increasing; the fact that the offense must be sanctionable with at least 4 years imprisonment; and that the offense give rise to financial benefits. Interestingly enough, all three criteria are cumulative and thus the first and second one seem to be redundant.

3.3 Applicable test – disproportionality, control & time frame

In the French system, extended confiscation is based regardless of the form on the use of presumptions. According to the legal texts, in the case of a felony of misdemeanor punishable by at least 5 years imprisonment and having yielded a direct or indirect profit, confiscation shall also include movable or immovable property, whatever its nature, divided or undivided, belonging to the convicted person, or subject, to the rights of the owner in good faith, of which he has free disposal, where neither the convicted person nor the owner, given the possibility to explain himself on the property whose confiscation is being considered, have failed to justify its source. As it can be seen, the applicable test in the French legal system is that of disproportionality between the legally obtained assets

and any other assets that the convicted person has in his or her patrimony or for which he or she has free disposal.

As particularities concerning the first model, the French system provides for a 2-prong mechanism – at first the person must be convicted for an offence punishable by at least 5 years that has yielded a direct or indirect profit and secondly, after this step, confiscation can be ordered concerning property that goes well beyond that that was obtained from the triggering offense. An important limitation regards the specific assets that can be confiscated. As such, extended confiscation can target only assets that cannot be justified by the offender and that are obtained / in the patrimony of the offender at the date of the commission of the triggering offense, even if the ones obtained beforehand cannot be justified.

Concerning the confiscation of the patrimony, the link between the triggering offense and the assets that are to be confiscated is legally ignored. Confiscation can be rendered regardless of any connection, an absolute presumption of illicit origin being in place. As such, it is simply sufficient that the defendant commit an offense that is expressively provided in the list and be convicted for it. Moreover, the limitation concerning the time of acquisition does not apply to the extended confiscation of the patrimony.

In Belgium, as opposed to the French model, where the system is built on presumptions, extended confiscation in Belgium is envisaged in a manner more linked to the triggering offense. As such, there is firstly a need that the profits be made from similar offenses as for which the conviction was rendered, and moreover, the prosecution needs to prove that the assets are linked to set activity and they were either in the possession or in the patrimony of the offender.

With regard to the limitations, it is important to note that it can target only assets acquired in the previous 5 years prior to the formulation of the accusation for the triggering offense and the judge must make a proportionality test, in order not to subject the defendant to an unreasonably harsh penalty.

In Germany, the applicable test is mixed. The Courts must weigh the circumstances of the case and in particular the results of the criminal investigation with regard to the triggering offense, as well as the financial situation of the offender and only afterwards a decision can be rendered with regard to extended confiscation. In essence, the disproportion between the value of the assets that are subject to extended confiscation and the lawful income of the offender is an important criterion, but not the only one. On the same note, it is important to state that even though no link is legally required between the triggering offense and the assets that are subject to confiscation – since extended confiscation is based on subsidiarity, the Federal Court of Justice and the Constitutional Court deemed it necessary to find a link with a criminal activity in order for the institution to be in conformity with constitutional guarantees.

In the Dutch system, the situation is again unique, but in the same time common to the situation presented above. The institution of extended confiscation uses as a main criterion the disproportion between the value of the assets that the offender has legally obtained versus the assets that are subject to extended confiscation. In this sense, in Dutch law at least, this option allows the judge to perform an abstract calculation of proceeds on the criterion shown above, no causal link being required with the triggering offense – similarity, identity or otherwise.

In Italy, the test is the common one applicable for extended confiscation, respectively that of disproportion between the persons declared income and the value of

his / her assets, assets that are available for the person. For the concept of availability, the criterion is the same as the one used for preventive confiscation in Italy; the person is considered to have the availability even though the owner is another person, if the true owner can dispose of the asset as he / she wishes, the third person being simple an intermediary.

In Romania, the applicable test, as in the rest of the Member States is the one that regard the massive gap between the legally obtained assets – for which justification can be rendered and the rest of assets that cannot be justified. Interestingly enough, extended confiscation in Romania, as opposed to Italy and France for example, cannot target assets whose possession the defendant does not have or has control – availability. However, the legal provision that regulates extended confiscation especially state that the judge must take into account – value wise, the assets that were transferred to third parties. As such, the possession and availability are irrelevant for assets-based confiscation, but can become relevant for value based confiscation. As limits, the application of the institution can go as far as 5 years – as in the Belgian case and the analysis cannot go before 2012, when the institution was created.

3.4 Standard of proof

The standard of proof in France concerning extended confiscation based on the presumption of illicit origin, as stated by the name, is based on a system of presumptions. As such, the legal provisions provide for a reversal of the burden of proof, a legal relative presumption being in place. In this sense, it is a substantive requirement that the defendant has the chance to prove the legality of the assets in order to reverse this presumption. Moreover, there is no requirement to prove that the assets that are confiscated by means of extended confiscation are the direct or indirect proceeds of the offense. In the same sense, it has become adamant that there is no need for the prosecution to prove that the assets subject to extended confiscation were acquired by illicit means. As a final note, concerning the confiscation of patrimony, there is no standard of proof requirement for the assets that are to be confiscated, the simple conviction for an offense provided in the list giving rise to an absolute presumption of illicit origins of all the assets that exist in the patrimony of the offender or over which control exists.

The Belgian legal regime does not make the use of presumptions at the core of extended confiscation. The standard of proof is that of serious and concrete evidence that the additional patrimonial proceeds have derived from an offense. In the same sense, the prosecution is burdened with having to prove that the patrimonial benefits resulted from a crime “not proven” similar to the one for which a conviction was rendered and at the same time, the defendant must be given the possibility to attest the contrary. As such, half of the work must be done by the prosecutions and the complementary mechanism would be that the defendant cannot plausibly attest to the contrary.

In Germany, the standard of proof is that of intimate conviction. So as to order extended confiscation, the German Courts must be intimately convinced that the object of the measure stems from another crime that has been committed by the owner of the assets. However, it is not required that the Courts determine the precise illegal conduct through which the perpetrator obtained the assets subject to extended confiscation.

In the Netherlands, the standard of proof is dual: sufficient indications on the one hand and plausibility, on the other. Regardless of the standard imposed, which is dependent on gravity of the offense committed, two particularities stand out. The first one

is that the judge that convicts for the triggering offense does not need any additional indications in what concerns the criminally obtained profits, with the exception of the plausible nature or sufficient indications that they could have stemmed from criminal activity. The second one is that for the triggering offense, the judge does not even have to choose one offense that led to financial gain, being possible to confiscate by means of extended confiscation assets even though the triggering offense was one that did not give raise to financial gain.

In the Italian legal system, the situation is similar as the one used in the other Member States - it relies on presumptions in order to confiscate on the basis of extended confiscation. By committing the triggering offense, a relative presumption is activated that afterwards imposes on the defendant to prove that his or her assets were legally obtained. If the defendant cannot prove the legal origin of the assets, extended confiscation will be ordered.

The Romanian legal framework provides as a common standard for criminal law - the standard of beyond all reasonable doubt. However, in the case of extended confiscation, both doctrine and the Constitutional Court of Romania – by decision 650/2018 decided that the common standard cannot be applied and thus the standard is the one of "balance of probabilities", based on the intimate conviction of the judge. Moreover, the Romanian Constitution provides for a constitutional presumption of licit origin of goods. As such, the prosecution, similar to the Belgian case, must strive to prove that the assets that are the subject of extended confiscation arose from criminal activities similar to those that gave rise to the conviction for the triggering offense. Furthermore, since it is almost impossible to prove this aspect while investing another offense, the general practice is that the prosecution service must try to rebut the constitutional presumption of the licit origin of assets by identifying an impressive gap between what could have been possible to earn and what exists in the patrimony.

3.5 Mandatory vs. optional confiscation

In France. The Netherlands and Belgium extended confiscation is optional, while in Romania, Italy and Germany, extended confiscation is mandatory for the assets that can be identified as having the specific traits provided by each national law.

IV. Non conviction-based confiscation in the case of illness & absconding

In all the Member States represented in the present project, confiscation of assets when the defendant is ill (and this condition precludes him or her to stand trial) and when he or she is absconding is possible, with the exception of Romania.

In Romania, in the case of illness, the criminal trial is suspended and therefore the judge cannot find that the defendant committed an unjustified unlawful act and order confiscation. For France, Belgium, the Netherlands and Italy, the illness of the defendant is not a barrier for prosecution and confiscation can be ordered in the context of a *trial in absentia*. However, in all these states, confiscation should be considered criminal and not non-conviction based. As an exception, in Germany, confiscation can be rendered in the case of illness, but not as in the former, as criminal confiscation, but as non-conviction-based confiscation – independent confiscation. There is a specific institution in place that was created for situations when, for various reasons, a conviction cannot be reached.

In a rather similar manner, in the case of absconding, in all Member States confiscation is possible. In France, Belgium, the Netherlands, Romania and Italy, confiscation is ordered in the context of a *trial in absentia* and therefore is conviction based. For the same rationale, Germany is the sole country where this solution of confiscation can be ordered when a non-conviction verdict is reached.

V. Non conviction-based confiscation in the case of the death of the defendant, immunity, prescription and other cases

The situation concerning the possibility to order non-conviction-based confiscation in the aforementioned cases is fragmented among Member States, some having specific institutions in place, while other trying to use other mechanisms and provide for criminal confiscation.

In France, the additional penalty of confiscation cannot be ordered without a conviction. As such, the only mechanism provided in French law that allow for confiscation without a conviction is an institution regulated since 2016, respectively the refusal to return the instrumentalities or proceeds of crime. The procedure is part of the criminal investigation, it is not technically a confiscation, but the effects are the same as in the case of confiscation – transfer of ownership from the defendant to the state. As limitations, the institution cannot be applied without the prior seizure of the assets and without seizure, neither *de facto* or *de iure* confiscation is possible.

In Belgium, in the case of death and prescription, confiscation can be imposed solely as a security measure, when the assets in question constitute a danger or their possession is illegal.

In Germany, the system regulated for non-conviction-based confiscation is the most complex out of all the analyzed system. It permits confiscation on two main grounds: either as independent confiscation (the same institution is used for illness & absconding) or as confiscation in the case of proceeds of unknow origin. Independent confiscation can be ordered in all cases in which prosecution cannot be continued for either legal reasons or factual reason. Moreover, confiscation in the form of independent confiscation follows the legal regime of confiscation or extended confiscation, condition wise. In this sense, for extended confiscation, an exception is provided in the case of the statute of limitations, the legislation providing for a term of 30 years. As confiscating the proceeds of unknown origin, the same rationale applies, the measure following the collarbone of the general regime, with the mentioning that it is available to be ordered only for specific offense provided in a list – mainly linked to terrorism and organized crime activity.

In the Dutch legal system only the sanction of withdrawal from circulation can be applied as non-conviction based confiscated – the same rationale exists as in Belgium, since the measure is designed so as to extract from circulation dangerous objects. Forfeiture and the confiscation order cannot be applied since they both require a criminal conviction and for withdrawal, the most important limitation is that it cannot target money.

In Italy, non-conviction-based confiscation represents an important element of the legal order, one of the most prominent institutions being the confiscation *ante delictum*, also known as the confiscation of prevention, designed to combat serious criminal phenomena such as the "mafia". In a nutshell, the institution is based on a series of subjective and objective conditions in order to deprive mafia members of assets illegally obtained. In general, the first step in the analysis is to qualify the potential owners as

dangerous – suspected of participating in Mafia associations or associations devoted to the commission of serious crime or who live off the commission of crimes. Afterwards, the next step is to prove the social dangerousness of the person. Then, the next step is to identify the assets of which the person has availability upon (act as *dominus*) and finally to investigate and obtain sufficient indications that the assets in question upon which he or she acts as *dominus* outweigh the value of the declared income or occupation. The culmination of this effort is the application of confiscation in a separate procedure, without any conviction of requirement to prove the objective elements of any offense.

In Romania, the reasons for a non-conviction solution can be several. The principal idea is that confiscation can be ordered insofar as it is not incompatible with the reason provided for closing the case. In the case of reaching the status of limitations, there are no obstacles in ordering confiscation on any of the regulated basis. The reason is that reaching the statute of limitations for any criminal offense has the effect of removing criminal liability. Therefore, removing criminal liability has no effect on the two conditions that need to be meet so as to order a security measure since the main goal of security measures is to prevent further commission of offences and remove a state of hazard. On the opposite side, if the act was committed in legitimate defense, the act is still one provide by law, but it is not unjustified anymore – an essential condition to order confiscation – as a security measure.

VI. Third party confiscation

In France, third party confiscation is provided and possible for both the proceeds of crime and the object of the offense. The explanation rests within the legal formulation of the text in the general part of the Criminal Code that mentions that confiscation can be ordered for assets "which either belong to the offender, or subject to the right of *de bona fide* third parties, are at his or her free disposal". Therefore, the legal formulation that permits third-party confiscation relates to the concept of free disposal. A legal definition of the concept does not exist, and the jurisprudence concluded that free disposal essentially means that the person who has it is the true owner of the assets. Alongside the condition of free disposal, in the French legal system, in order to confiscate from a third party this person must be of *mala fide.* In this context, in order to be of *mala fide*, the prosecution must prove that the legal owner of the asset left the free disposal of the asset in full awareness of the relation of the asset with the crime. However, the French jurisprudence have interpreted the concept in the sense that *mala fide* can be deduced from the fact that the owner could not be unaware of the fraudulent use or of the association with a criminal offense.

In the Belgian legal system, the application of confiscation to third parties is regulated depending on the type of confiscation that is ordered. As such, confiscation as a safety measure can be applied to third parties, as well as confiscation that targets the proceeds of crime and the profits generated by the offense. Furthermore, extended confiscation based on the presumption of illicit origin and extended confiscation of the patrimony of a criminal organization can target assets of third parties. The commonality between all the schemes of confiscation is that third party confiscation can be ordered only insofar as the rights of *de bona fide* third parties are respected, when it is the case. In opposition, third party confiscation is not possible when the asset in question constitutes the object of the offense or the instrument of the offense.

In Germany, third party confiscation is possible both in the case of confiscation and extended confiscation, the mechanism being one that just extends the scope of application of the institution. Concerning the conditions, confiscation may target assets of third parties if they were acquired by representation or transfer. In the former case, the perpetrator acted for the third party, while in the second one, the third party acquired the assets free of charge. As subjective elements, it is required that the third party either knew or at least should have known that the assets originated from criminal activity.

In the Netherlands, the application of third-party confiscation is dependent on the type of measure that is envisaged. In the case of the confiscation order, since it requires a criminal conviction so as to be ordered, third party confiscation cannot be imposed. This is only *strictu sensu* true. The confiscation order (art. 36e CC) can only be imposed on someone that is convicted of a criminal offence. But by means of seizure and subsequent selling assets under a *male fide* third party (someone who knew or could reasonably suspect that the assets were transferred to him/her with the aim of frustrating the execution of a confiscation order), confiscation under a third party is possible. So in the strict sence it is not third party confiscation (the confiscation order is itself not imposed on the 3rd party), but substantially it is possible (assets that officially belong to him are taken by the State). Hence, maybe the last sentence could be amended as to also include the confiscation order. However, in the case of forfeiture and withdrawal from circulation, third party confiscation is possible, under the same subjective conditions as in Germany, respectively that the third party knew or should have known that the assets in question stemmed from criminal activity.

In Romania, third party confiscation is not regulated not accepted. The reason for this is that confiscation in all its form is a security measure and security measures can be enforced only against a person that committed an unjustifiable act provided by criminal law. Or, as third parties, they would have suffered a sanction of criminal nature without coming anything of a criminal nature. The situation changes if the person described as a third party acted in bad faith as an accomplice, instigator or aider & abettor, cases in which confiscation could be imposed based on their own role in the commission of the offence.

The situation is similar in Italy, where, steaming from reasons of legality, third party confiscation is not accepted for criminal confiscation, either seen a security measure or a measure of criminal law. However, third party confiscation is provided in Italy as an exception is the case of extended confiscation, where the legislation provides that the measure can affect the assets owned by the offender, *even through* a third party. Jurisprudentially, as well, third party confiscation is accepted in the Italian legal order based on the concept of availability of assets. By availability, the jurisprudence considered the situation of substantial ownership, even in the absence of formal ownership, such that the offender acts *uti dominus* in relation to the asset in question. As a final note, the Italian literature and jurisprudence struggled whether in the many cases of non-conviction-based confiscation, third party confiscation should be allowed. The general view is that especially in these cases – confisca urbanistica, administrative confiscation & so on, third parties should be protected and therefore third-party confiscation should not be accepted, insofar as no *mens rea* can be identified, either as intent or negligence.

VII. Conclusions

As it can be shown in the present part of the book, even though confiscation in all of its forms is regulated in all Member States part of the project, the institutions differ in some respects in a fundamental and incompatible manner.

Having said this, harmonization, as the final goal of EU legislation, is very hard to be achieved in this area. The reason is not the unwillingness of the Member States to harmonize effectively, but more so the constitutional and legal context of each Member State that defines the way in which institution function and are regulated.

However, common ground does exist and mostly as an effect of the aforementioned EU legislation, most – granted not all, confiscation mechanism can be used in conjunction and can be applied effectively in the context of mutual recognition. As it was presented, most countries have the same background for criminal confiscation in all of its forms and variants and non-conviction-based confiscation, even though not regulated identically, has common and compatible features.