IMPROVING CONFISCATION PROCEDURES IN THE EUROPEAN UNION

Edited by

ALESSANDRO BERNARDI

Coordinated by

FRANCESCO ROSSI

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in Confiscation Procedures»
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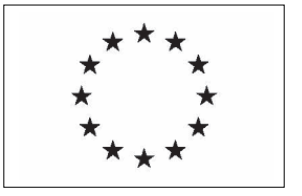

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JOVENE EDITORE
Via Mezzocannone 109 - 80134 NAPOLI
Tel. (+39) 081 552 10 19 - Fax (+39) 081 552 06 87
web site: www.jovene.it e-mail: info@jovene.it

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ALESSANDRO BERNARDI

PRESENTATION

SUMMARY: 1. Introductory remarks. – 2. The evolution of confiscation in Europe as an essential tool for combating organised crime. – 3. The analogies between financial penalties and confiscation with a view to combating illegal activities for profit. – 4. The inherent limits of pecuniary penalties and the extreme ductility of confiscation. – 5. The functions of combating illegal activities currently entrusted to confiscation. – 6. The main models of confiscation envisaged at European level to enhance the multi-functionality and effectiveness of this instrument. – 7. The synallagmatic relationship between the effectiveness of confiscation and its conflict with constitutional principles and the ECHR. – 8. The problems posed by the heterogeneity and "aggressiveness" of the models of confiscation in judicial cooperation between EU Countries. – 9. Sources of international and European law on confiscation. – 10. The current limits of EU confiscation legislation. – 11. The research "Improving cooperation between EU Member States in confiscation procedures" and the investigation method. – 12. The work plan.

1. *Introductory remarks*

A brief historical-comparative investigation into the institution of confiscation[1] – to which all forms of definitive expropriation in favour of the State of property, gains or proceeds unlawfully obtained are to be attributed – reveals an incontrovertible fact. Given the aptitude of confiscation to effectively punish the perpetrator of an illegal activity and to enrich the coffers of the State, it has always been present, or in any case, for a very long time in almost all national systems: "to the point of being able to affirm, with acceptable approximation, that the ablative measure of the offender's property constitutes a tenacious constant of the punitive phenomenon"[2].

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[1] In this respect, see, *ex multis*, M. FERNANDEZ-BERTIER, *The History of Confiscation Laws: From the Book of Exodus to the War on White-Collar-Crime*, in K. LIGETI, M. SIMONATO (ed.), *Chasing Criminal Money. Challenges and Perspectives On Asset Recovery in the EU*, Oxford, 2016; L. LORENZETTI, M. BARBOT, L. MOCARELLI (ed.), *Property rights and their violations - La propriété violée - Expropriations and confiscations, 16th - 20th Centuries - Expropriations et confiscations, XVIe - XXe siècles*, Berna-NewYork, 2012.

[2] See, although with exclusive reference to the Italian system, A. ALESSANDRI, *Confisca in diritto penale*, in *Dig. disc. pen.*, vol. III, Torino, 1989, 42.

In its most rigorous configuration, designed to deprive those responsible for serious crimes of all their assets, general confiscation has for many centuries represented (together with the loss of citizenship) the instrument *par excellence* of expression of the death/social exclusion of the criminal, thus constituting the natural corollary of capital punishment and exile. Over the centuries and with the progressive softening of the sanctioning arsenal, forms of confiscation have been favoured, almost everywhere, which have in common only the fact that they affect the assets of the offender in various ways and to varying degrees. However, confiscation tended to apply first of all to assets closely connected with the crime, in particular to the things used to carry it out, things which constituted the proceeds and things that were intrinsically prohibited.

In fact, an examination of the individual national legal systems reveals over time examples of confiscation distinguished by further peculiarities related in different ways to the type of offence committed, the type of perpetrator, and the type of preventive-punitive function privileged. However, it is precisely the extraordinary diversity of the existing models of confiscation that makes it impossible to provide an overall summary of the evolution of the institution on a comparative level.

Nevertheless, at least three aspects of this evolution are worthy of consideration.

The first aspect is that, considering the extreme flexibility of this institution and its extraordinary potential in the fight against crime and deviance oriented towards economic profit, in recent decades many legal systems have witnessed an increasingly widespread use of confiscation. The same has happened in relation to freezing, meaning the removal of the property from its owner or possessor in the course of the proceedings and the creation in relation to the property in question of a non-availability restriction pending, at the end of the proceedings, the property being confiscated or returned[3]. Therefore, freezing and confiscation have

[3] According to Article 1(l) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 'Freezing' or 'seizure' means temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or a competent authority'. However, it should be noted that sometimes the terms 'freezing' and 'seizure' are not used as synonyms. In these cases, the first of these terms is used to refer to situations in which the property remains in the hands of the owner or third parties, but these persons are prohibited to dispose freely of the property. The second term, instead, is used in relation to situations in which the property is taken away from the abovementioned persons and kept in police custody. On this distinction, see, for example, Open-ended Intergovernmental Working Group on Asset Recovery, *Study prepared by the Secretariat on effective management and disposal of seized and confiscated assets*, Vienna, 23 August 2017, 15 ff, where it is

become the main means of combating the illegal economy in many jurisdictions.

The second aspect is that in the last fifty years the well-known phenomenon of the coexistence, already within each legal system, of a plurality of models of confiscation, although very different in terms of qualification, discipline, function, object and degree of cogency, has been further accentuated almost everywhere. On the one hand, as will be seen below, this multiplication and differentiation of confiscation models is designed to best counteract the most diverse situations of illegality. On the other hand, however, the multiplication itself undoubtedly makes judicial cooperation mechanisms more difficult. This is a major drawback, given that the current processes of globalisation and European integration require closer relations between national systems, particularly with a view to combating illegality. This fight is particularly difficult in cases of organised crime capable of operating according to rational "market" logic, which affects both the conduct generating illicit proceeds and the final destiny of the proceeds. In fact, both can be oriented in light of criteria of convenience closely related to the concepts of forum shopping and treaty shopping. In our case, the first of these two concepts alludes to the tendency to choose the countries where the offence is committed on the ground of the different level of risk-penalty incurred by the perpetrators (natural or legal persons). The second concept alludes instead to the choice of more permissive (if not conniving) countries in which to place and even "transform" the illicit gains, exploiting the historical gaps in the field of judicial and administrative assistance between States.

The third aspect – closely linked to the second – is that, almost as if to make up for the evident 'advantageousness' and the particular anti-criminal effectiveness of confiscation, connected with its multi-functionality, the institution in question presents a myriad of theoretical and practical problems, which are actually very difficult to resolve. Suffice it to say here that, of all the punitive measures, confiscation is certainly the one that risks conflict with the greatest number of fundamental principles and rights: from the principle of legality to the property rights, from the principle of personality to the principle of guilt, from the principle of proportionality of punishment[4] to the principle of presumption of inno-

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stated that 'Many countries start out with seizure as the default interim measure, imposing freezing orders only if seizure is impossible or impractical' (p. 16).

[4] See, lastly, Italian Constitutional Court, judgement of 10 May 2019, n. 112. In this ruling, the Court declared the constitutional illegitimacy of Art. 187-*sexies* of Legislative Decree No. 58 of 1998 where it provided for the compulsory confiscation, direct or for equivalent, not only of the profit of the illicit act, but also of the relative product.

cence. This conflict between the institution in question and various fundamental principles/rights is particularly clear in Countries which have accepted the most "aggressive" models of confiscation, inasmuch as they are unconnected with a particular crime, constructed in a markedly preventive key and applied on the basis of mere suspicions, with reversal of the burden of proof[5]. However, this is fairly widespread at European level: a major scientific study commissioned by the EU Commission states that "there is a potential conflict between confiscation procedures and fundamental rights in all jurisdictions"[6].

2. *The evolution of confiscation in Europe as an essential tool for combating organised crime*

In recent decades, the fortunes of confiscation have gone hand in hand with the emergence of increasingly sophisticated forms of organised crime, including transnational crime, focused on the purpose of profit or in any case that requires substantial economic resources to achieve its goals. The cause of this combination can be seen in the modern tendency of states to react to offences using measures tailored to the specific profiles of these offences and the characteristics of their perpetrators. It is now well known that confiscation has the potential to frustrate the illegal economic benefits and to take away from the perpetrators of these offences the resources needed to commit further offences. Therefore, in relation to crimes aimed at making a profit or requiring substantial resources, confiscation proves to be a measure capable of almost perfectly supplementing the prison sentence both from the repressive and the preventive point of view, because of its capacity to "pay" the perpetrator of the offence and, more generally, to discourage the commission of the latter. The multi-functionality of confiscation has induced doctrine to suggest using it also as the only main punishment[7], at least for certain crimes of modest gravity, in the conviction that it can constitute, also alone, an adequate response from both a general and special pre-

[5] In relation to the Italian legal system, the extended confiscation referred to in Article 12 *sexies* of Law 356/92 and the confiscation referred to in Article 270-*septies* of the Criminal Code and introduced by Article 4, paragraph 1, *letter c)* of Law 153 of 28 July 2016 are emblematic.

[6] Matrix Insight Ltd, *Assessing the effectiveness of EU Member States' practices in the identification, tracing, freezing and confiscation of criminal assets: Final Report*, in F. Gunev, M. Redhead, B. Irving (ed.), Bruxelles, 2009, 13.

[7] See A.M. Maugeri, *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*, Milano, 2001, in particular 659 ff. and 707 ff.

vention perspective. But even for the most serious forms of organised crime, the anti-criminal values of confiscation – accompanied by other sanctioning measures – remain intact. In fact, taking economic resources from the association and its members means first of all undermining the strength of the association itself, preventing it from investing the same resources in the commission of other crimes (often, but not always, focused on the purpose of profit). The example of organised crime of a terrorist nature, which often draws its resources from lucrative illegal activities, is emblematic in this respect.

3. *The analogies between financial penalties and confiscation with a view to combating illegal activities for profit*

As we know, there is another measure which – alone or in conjunction with the custodial sentence depending on the type of offence – is specifically designed to eliminate the economic advantage inherent in the commission of offences for profit, thereby rewarding the perpetrators, discouraging them from committing further offences, and depriving them of their power. This alludes to the pecuniary sanction, sometimes in fact considered as something conceptually similar to confiscation[8] or as a prodromal measure to confiscation, since the latter is often intended to be a measure of conversion of the pecuniary sanction in the event of non-payment thereof. The pecuniary sanction effectively also constitutes the punitive consideration *par excellence* of an illicit gain and, furthermore, by taking resources away from the groups engaged in illicit activities, at the same time, it deprives them of power.

Moreover, like confiscation, the punitive pecuniary sanction has evolved over time, in particular colonising not only criminal law but also

[8] In fact, the pecuniary penalty and the confiscation sometimes tend to converge, as in the case in which the confiscation concerns a specific patrimonial value. In this case, pursuant to Article 13(4) of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, concluded in Strasbourg on 8 November 1990, "the Parties may agree that the requested Party may enforce the confiscation in the form of a requirement to pay a sum of money corresponding to the value of the property". This process of convergence between these two legal instruments often entails a real confusion, as it is in the case provided for in Article *735a* of the Italian Code of Criminal Procedure. This article, by implementing the aforementioned conventional rule, concerns the hypothesis of "Confiscation consisting in the imposition of the payment of a sum of money". According to this rule, in fact, "In the case of enforcement of a foreign decision on confiscation consisting in the imposition of payment of a sum of money corresponding to the value of the price, product or profit of an offence, the provisions on the enforcement of financial penalties shall apply, except for the provision concerning the compliance with the maximum limit of the sentence provided for in Article 735, paragraph 2".

administrative law and even civil law[9]. In addition, the traditional fixed or statutory pecuniary sanction has been accompanied almost everywhere by other models of pecuniary sanction. One example is the fine for daily rates, which is perfectly adapted to the economic capacity of the perpetrator, thus complying better with the principle of proportion of the penalty, in which the economic status of the perpetrator plays a decisive role. But what is perhaps more important is the proportional pecuniary sanction, whose entity is not related so much to the abstract gravity of the crime, but rather to the concrete "quantity" of the illicit act. This particular model of financial penalty pursues the aim of discouraging the commission of offences for profit by virtue of a mechanism consisting of contrasting the profit resulting from the offence with the disadvantage resulting from the financial penalty. To that end, the latter shall be calculated on the ground of proportional criteria designed to make the actual offence committed counterproductive.

It is clear that confiscation has many points in common with proportional pecuniary punishment. Both are, in fact, not only based on their remunerative nature, but also perform multiple functions of general and special prevention, all of which contribute to making the crime economically disadvantageous.

4. *The inherent limits of pecuniary penalties and the extreme ductility of confiscation*

The multiplication of models of pecuniary penalties and, above all, the affirmation of the proportional pecuniary penalty as an instrument of the fight against the illegality of profit has not, however, taken away the importance of confiscation. Moreover, especially in some European countries with a significant black economy and unsatisfactory mechanisms for converting the unexecuted[10] pecuniary penalty, the latter is currently experiencing a profound crisis which is leading to confiscation being preferable, considered to be the only economic measure capable of successfully combating organised crime[11].

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[9] One may think, for example, of the French *astreintes*, the *punitive (or exemplary) damages* proper to the *common law* systems, the civil pecuniary sanctions of a punitive nature introduced in Italy since the 2000s, etc.

[10] This is the case, for example, in Italy.

[11] In Italy, the ineffectiveness of the pecuniary penalty suggests that the public authorities focus their economic sanctions response on confiscation. In fact, the percentage of financial penalties forfeited is around 3% of the financial penalties imposed and this is caused by the inadequate knowledge of the economic resources of individuals, the modest harshness

Moreover, confiscation is much more ductile than pecuniary sanctions. In fact, in its various articulations, it still constitutes a punitive measure, and therefore necessarily presupposes a conviction[12]. Moreover, the pecuniary penalty is respectful of the principle of personality, as it is applicable only to the perpetrator of the offence[13]. Finally, and above all, the financial penalty is always bound by the principle of proportionality, since it is commensurate with the seriousness of the act, and with the economic capacity of its perpetrator. Vice versa – thanks to its hybrid nature, which sometimes allows it to take on the guise of criminal sanction, administrative sanction, civil sanction, security measure, prevention measure, compensatory measure and restoration measure – confiscation lends itself to being applied in a more capillary way than a pecuniary penalty. In particular, some models of confiscation (such as extended confiscation)[14] may invest assets of the perpetrator which are quantitatively disconnected from the offence for which they are being prosecuted, but which are likely to be linked to other illegal activities of the perpetrator of the offence in question. Extended confiscation can therefore be released from any principle of proportionality related to the criminal offence in question, since its only limit is the gap between what is likely to be legal and what is likely to be illegal[15]. Furthermore, confiscation can affect property owned by third parties, when one can believe that their real owner is the perpetrator of the fact in court and that per-

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of the sanctions applied in place of the unexecuted financial penalties and, more generally, by the inefficiency of the collection mechanisms,. The financial penalty is therefore far from being an effective tool in the fight against profit-making crime and it even risks providing an incentive for it.

[12] It is true, however, that in many legal systems, sums of money or property may be seized in the course of the proceedings if there is reason to believe that, over time, the guarantees for the payment of the financial penalty may be withdrawn or dispersed.

[13] In fact, there are few cases, usually of modest entity, in which the pecuniary sanction applies to a subject other than the perpetrator. These include administrative fines applicable in many countries for road traffic offences. These penalties fall on the owner of the vehicle in case of failure to identify the driver.

[14] See, *below*, paragraph 6.

[15] This does not, of course, refer to the cases of direct confiscation, in respect of which the ECtHR requires, pursuant to Article 1 of the Protocol to the ECHR concerning the right to property, that the amount of the confiscated property is not disproportionate in relation to the gravity of the criminal offence committed (see Judgment of 24 October 1986, *Agosi v. the United Kingdom*, Judgment of 5 May 1995, *Air Canada v. the United Kingdom*). It rather refers to extended confiscation cases, where the level of confiscation does not depend on the seriousness of the offence, which is a precondition for the application of the confiscation in question even in those EU Member States where a proportionality test is provided for. With regard to the different configurations assumed by this test in the legal systems of the 6 countries considered here, see D. Moroşan, F. Streteanu, D. Nițu, *Substantive aspects of confiscation*, in *this volume*.

son is unable to prove the lawful origin of the property in question. Finally, the combination of freezing and confiscation allows the authority, at any stage of the proceedings, to remove the item from the person subject to proceedings (while the pecuniary penalty is not often preceded by the freezing of the assets necessary to guarantee its effectiveness)[16].

Ultimately, in its various articulations, confiscation certainly proves to be an institution with multiple facets and multiple resources, to use therefore in the most diverse situations and, as already mentioned and as will be shown below, for the most diverse purposes.

5. *The functions of combating illegal activities currently entrusted to confiscation*

The opinion that confiscation is an institution capable of effectively pursuing the most diverse functions of the sanction is now widely shared.

In this regard, the remunerative function, related to the role of "retaliation" inherent in responding to illegal activities of profit with the removal of assets directly or indirectly resulting from the commission of an infringement has already been discussed.

Confiscation, however, also lends itself to performing, at least in principle, the three fundamental functions of general prevention. The first and most traditional is the function of "general negative prevention"[17]. That is to say, the function of intimidation towards the associates connected with the possibility of confiscating goods and property in a measure also disproportionate to the illicit act (at least in relation to certain models of confiscation, such as, in particular, extended confiscation and prevention confiscation[18]). The second is the function of "general positive prevention"[19] as confiscation expresses the social disapproval of the assets connected with the crime committed or in any case related in various ways, even if only presumptively, to illegal conduct, thus contributing to educating the community to respect the laws. The third is

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[16] As previously stated (see nt. 12), also the pecuniary penalty may sometimes be preceded by the freezing of the assets in order to guarantee its effectiveness; but these are exceptional (or, at least, infrequent) cases, whereas, it is the rule that the confiscation of assets is preceded by their freezing.

[17] See F. Tulkens, M. van de Kerchove, Y. Cartuyvels, C. Guillain, *Introduction au droit pénal*, Waterloo, 2014, 609 ff.

[18] See, *below*, paragraph 6.

[19] See, among others, F. Palazzo, *Corso di diritto penale. Parte generale*, Sixth Edition, Torino, 2016, 18; M. Baurmann, *Vorüberlegungen zu einer empirischen Theorie der positiven Generalprävention*, in *Goltdammer's Archiv für Strafrecht*, 1994, 368 ff.

the (often criticised) function of general integrating prevention[20], given that confiscation is considered by the community, at least in the majority of cases, a just response to crimes committed for profit and even, more generally, to any form of unjustified and probably illicit enrichment.

As for the functions of special prevention, confiscation, involves at least the partial neutralisation of the perpetrator[21], who is deprived of objects that could favour the commission of illicit acts, or, in any case, of assets and economic resources which could be used for criminal purposes or, in any case, are not permitted by the law. Moreover, confiscation also fully fulfils the function of intimidation in practice[22], since personally experiencing its effects can help with understanding the contraindications related to the offenses committed, since the latter prove to be unproductive in terms of benefits. Even the social rehabilitation function of the perpetrator does not[23] seem to be excluded from confiscation. In this regard, it has been observed that, in cases where confiscation is accompanied by imprisonment, the re-educative effects should derive especially (at least *theoretically*) from the latter penalty. Instead, in cases in which confiscation constitutes the only sanctioning response – as is hoped for by the doctrine[24], at least in relation to certain unlawful situations of minor gravity – it has the advantage of taking the perpetrator away from measures, such as detention, that most of the time (on a *practical* level) are rich in desocialising[25] effects. However, above all, part of

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[20] That is to say, "social integration". In this perspective, the penalty fulfils the task of ensuring the trust of citizens in the law: see F. PALAZZO, *Corso di diritto penale. Parte generale*, cit., 18 ff.; G. JAKOBS, *Sttatlische Strafe: Bedeutung und Zweck*, Paderborn, 2004, 26 ff. and 31 ff. J.C. MÜLLER TUCKFELD, *Integrationsprävention. Studien zu einer Theorie der gesellschaftlichen Funktion des Strafrechts*, Franckfurt am Main, 1998.

[21] On the function of neutralisation of the penalty, see for instance F. TULKENS, M. VAN DE KERCHOVE, Y. CARTUYVELS, C. GUILLAIN, *Introduction to Criminal Law*, cit. For a criticism, see H.-J. KERNER, *Is neutralisation an acceptable objective?*, in A. TSITSOURA (ed.), *The objectives of criminal sanctions. In homage to Lucien Slachmuylder*, dir. da, Brussels, 1989, 102 ff.

[22] Such an intimidation in practice relates to the concrete experience, on the part of the offender, of the suffering inherent in the applied punishment: see G. DE VERO, *Corso di diritto penale*, I, Torino, 2012, 31 ff.

[23] See among others M. ANCEL, *La défense sociale nouvelle*, in *Revue internationale de droit comparé*, 1954, 842 ff.; K. LUDERSSEN, *Resozialisierung und Menschenwürde*, in K. LUDERSSEN (ed.), *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse?*, vol. IV, Baden Baden, 1998, 109; P. RAYNOR, G. ROBINSON, *Why help offenders? Arguments for rehabilitation as a penal strategy*, in *European journal of probation*, 2009, 3 ff.; D. GARLAND, *Punishment and welfare - A History of Penal Strategies*, Gower, 1985.

[24] See, for all, A.M. MAUGERI, *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*, Milano, 2001, in particular 659 ff. and 707 ff.

[25] Cfr. THIELE, *Vermögenstrafe und Gewinnabschöpfung. Ein Spagat zwischen verfassungsrechtund effectiver Kriminalpolitik*, Gottingen, 1999, 105 ff.

the doctrine strongly emphasizes the direct re-socialising effect of confiscation, at least if it is conceived in a peaceful perspective of reintegration. From this point of view, confiscation actually results in the offender having to return the unlawfully obtained assets to the victim, or to pay the part of the profits deriving from unlawful behaviour to the State[26].

The above considerations make it almost superfluous to remember that confiscation is also suited to achieving the task of repairing the damage. This reparation takes place mainly through compensation to the victim, but also through the recovery by the State of resources, on the one hand, related to illegal activities and, on the other hand, profitably intended for preventing illegal activities. For example, confiscation takes on in the broad sense "civilistic" functions with a reparatory-compensation type role when it applies to assets resulting from smuggling activities, that is, on sums corresponding to evaded tax. In the latter cases, confiscation aims to satisfy the interests of the Treasury.

Furthermore, confiscation can have a restorative function of the *status quo ante* (as in the case of the confiscation of buildings destined for demolition, as the result of building without planning permission that cannot be remedied).

Finally, precisely because of its severity, confiscation lends itself to limiting the use of prison sentences and personal interdictions richer in desocialising profiles.

Of course, as happens in relation to any type of sanction in the broad sense, even confiscation, if misused, may not be able to adequately perform one or more of its various functions, even to the point of being contraindicated from a functionalistic perspective. For example, the function of general positive prevention and even the function of general integrating prevention can be frustrated by forms of confiscation so draconian as to delegitimise the legal system, inducing the community not to recognise itself in the punitive measures provided for by it. *A fortiori*, an unjust confiscation based on presumptions that do not conform to reality[27], can induce feelings of rebellion against the law in the person affected, thus promoting their possible path towards illegality. In short, confiscation, precisely because of its possible disruptive effects, is an institution that must be handled with some caution, so as to make the most of its unquestionable potential without making the related risks emerge.

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[26] See L. Eusebi, *Può nascere dalla crisi della pena una politica criminale? Appunti contro il neoconservatorismo penale*, in *Dei delitti e delle pene*, 1994, 94 ff.

[27] In fact, a miscarriage of justice in matters of confiscation is not unlikely, since confiscation can take place on the basis of a civil standard of proof "most likely than not" rather than on the criminal standard "beyond all reasonable doubt".

6. *The main models of confiscation envisaged at European level to enhance the multi-functionality and effectiveness of this instrument*

The extreme multi-functionality of confiscation that we have described here is related not to a single model of confiscation, but rather to the multiform set of its models. Moreover, in European Countries, confiscation has now taken on such heterogeneous configurations as to induce us to affirm that "more than confiscation, by now, we must speak (…) of 'confiscations' in the plural (…) which have in common the mere fact of consisting in an act of compulsory removal of assets from the holder"[28].

In this regard, the main models of confiscation should first be mentioned in general terms. A distinction is therefore made between *direct confiscation* (affecting property relevant to the offence committed); *confiscation of value or equivalent* (concerning property available to the offender for a value corresponding to the proceeds of the offence); *extended confiscation* (concerning property whose lawful origin the offender cannot justify and which appears disproportionate in relation to their economic conditions); *confiscation from third parties* (carried out, under certain conditions, against subjects other than the perpetrator); *confiscation without conviction* (applied to a person subject to criminal proceedings but, although found guilty, not convicted as untraceable, or dead, or perpetrator of a time-barred offence); *prevention confiscation*[29] (affecting property of suspected illegal origin available to an allegedly socially dangerous subject).

Moreover, confiscation can take on different forms, depending on whether it is considered a main penalty, or an accessory or complementary penalty, a security measure, a simple effect of the criminal conviction, a preventive measure, an administrative sanction, a civil sanction, a restitution or restoration measure. However, there is no lack of further specific qualifications in individual legal systems, of which it is difficult to provide a complete list.

The models of confiscation can also be distinguished from each other on the basis of the bodies responsible for the adoption of confiscation (and, where appropriate, its freezing): judicial bodies, sometimes civil, criminal (judging but also investigating), "special"[30]; and then ad-

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[28] E. Nicosia, *La confisca, le confische. Funzioni politico-criminali, natura giuridica e problemi ricostruttivo-applicativi*, Torino, 2012, 2.

[29] In some respects similar to the *actio in rem* of Anglo-Saxon matrix.

[30] As in the case of military courts, or tax commissions when they proceed in order to protect the interests of the tax authorities.

ministrative bodies of various kinds (for example, the customs agency), including the so-called independent administrative authorities.

Finally, it should be remembered that confiscation can also have – as mentioned above – different degrees of coerciveness, having, depending on the case, a mandatory or optional nature.

Although confiscation models are sometimes distinguished in light of further and different criteria, they essentially seem to be the most salient differential traits to be found in the multiform universe of confiscation. As has already been mentioned, this universe, which is gradually and even convulsively expanding, is destined to pose difficult problems both at national[31] level and, *a fortiori*, at transnational level, *i.e.* in the context of cooperation between States.

7. *The synallagmatic relationship between the effectiveness of confiscation and its conflict with constitutional principles and the ECHR*

The variegated set of models of confiscation existing in Europe – of which the main ones have been indicated above – allows, as mentioned above, a very heavy impact to be inflicted on the assets of the perpetrator, of the suspected perpetrator or of third parties not considered to be in good faith. In fact, all types of property (money and other movable property, credits, registered movable property, real estate, companies and corporations, shares and quotas) can be attracted by this institution; to the point that, in some cases, extended confiscation ends up in fact translating into something very similar to the general confiscation mentioned at the beginning. Moreover, this latter model of confiscation has been reintroduced, in recent times, in some European countries[32].

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[31] See, for example, M. Romano, *Confisca, responsabilità degli enti, reati tributari*, in *Riv. it. dir. proc. pen.*, 2015, 1674 ff.

[32] For example, in France, where it is currently provided for certain categories of offences expressly mentioned by law. See J.-F. Thony, É. Camous, *Gel, saisie et confiscation des avoirs criminels: les nouveaux outils de la loi française*, in *Revue internationale de droit pénal*, 2013, n. 1-2, 205 ff. In Italy, the general confiscation of assets imposes an administrative sanction against associations, organizations or groups, in two cases: when there is a final conviction for the constitution of a secret association, pursuant to art. 3 of Law 25 January 1982, n. 17 (in this case, the confiscation is ordered by decree of the President of the Council of Ministers); when there is a final sentence stating that the aforesaid associations have favoured a crime with terrorist purposes, pursuant to Art. 3, para 36, Law 15 July 2009, No. 94 (in this case, the confiscation is ordered by decree of the Minister of the Interior). See A.M. Maugeri, *Dalla riforma delle misure di prevenzione patrimoniali alla confisca generale dei beni contro il terrorismo*, in O. Mazza, F. Viganò (ed.), *Il "pacchetto sicurezza" 2009*, Torino, 2009, 425 ff.

Certainly, the possibility for the State to discover, on the basis of different individual presuppositions (conviction, quasi-conviction, general dangerousness), assets of every type whose illegal origin can only be suspected, makes confiscation a particularly effective instrument. This effectiveness is even greater considering that it also allows the seizure of property belonging to third parties, provided that such property is deemed to be available to the recipient of the confiscation order.

It is true, however, as has already been mentioned[33], that the more models of confiscation are designed to guarantee maximum functionality with a view to combating illegality, the greater the risk that these models will end up in conflict with the guaranteeing principles enshrined in the Constitution, the ECHR and the EU. In particular, it is clear that if the most "aggressive" models of confiscation were to take on the nature of punitive sanctions, these models should be considered to be contrary to the principles of personality[34], presumption of innocence[35], guilt[36], proportionality[37]. In this regard, however, the "formalist" tendency of certain national legislations is evident, aimed at denying the punitive nature of confiscation in order to be able to shape this institution in a very casual way; just as the fairly generalised laxity with which confiscation is examined in certain States in light of the constitutional principles is also clear.

As for the case law of the European Court of Human Rights (ECtHR) on confiscation[38], while being affected by the specific features of individual cases, it is also significantly affected by the changing profiles of this institution. The convergence of these two factors means that case law does not give a sufficiently consistent picture as to the legitimacy or otherwise of certain hypotheses of confiscation in light of the ECHR principles. Thus, in some cases the Court has found the application of confiscation to be contrary to the principle of the presumption of inno-

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[33] See *above*, sub-paragraph 1.

[34] See R. Dies, *Confisca e principi costituzionali*, in *Libro dell'anno del Diritto 2012*, *www.treccani.it*; G. Della Volpe, *La (ritenuta) legittimità costituzionale della confisca per equivalente nei reati tributari*, in *Giurisprudenza penale web*, 2018, 10.

[35] See C.K. Graber, *Geldwäscherei*, Bern 1990, 97 ff.

[36] See A.M. Maugeri, *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*, Milano, 2001, 755, who considers the relative confiscation "an unacceptable penalty of suspicion" to the extent that the crimes or behaviours have not been judicially ascertained and, in particular, the culpability of the perpetrator in relation to such facts has not been proved.

[37] See, among others, H. Gramckow, *Einziehung bei Drogendeliktenin den USA*, Koln, 1994, 241 ff.

[38] On which see M. Simonato, M. Fernandez-Bertier, *Confiscation and fundamental rights: the quest for a consistent European approach*, in *this volume*.

cence laid down in Article 6.2. ECHR[39], or even to the same principle of criminal law as in Article 7 ECHR[40]. Moreover, the frequent tendency to exclude confiscation from the overall fair trial guarantees provided for in Article 6 ECHR has led part of the doctrine to state that the Strasbourg courts demonstrate a "considerable deference towards how states construct and use asset confiscation as a means of crime control"[41]. Indeed, when States do not confer a punitive nature on confiscation, the ECtHR tends to confirm the national point of view, attributing to confiscation the nature of a non-punitive, prevention measure. In these cases, confiscation does not relate to "criminal matters" and is therefore protected only by the property right (Article 1 of the First Protocol to the ECHR), which is also characterised by uncertain boundaries. In particular, the requirement of the necessity/proportion of confiscation required to evaluate the legitimacy of the interferences in the peaceful enjoyment of one's own assets is interpreted in a less stringent way, inasmuch as the individual States are attributed with a very wide "margin of appreciation"[42]. In this way, they are allowed to apply particularly penetrating models of confiscation, especially in the presence of forms of organised crime. The latter are difficult to contrast with measures fully respecting the traditional apparatus of guarantees peculiar to sanctions "in criminal matters".

8. *The problems posed by the heterogeneity and "aggressiveness" of the models of confiscation in judicial cooperation between EU Countries*

At national level, the growing variety of models of confiscation, often co-existing within the same internal system to facilitate obtaining assets belonging to a large sample of subjects as much as possible, undoubtedly strengthens the effectiveness of confiscation in the fight against illegality. In terms of judicial cooperation between States, however, this variety actually risks (with only an apparent paradox) producing the opposite effect. In fact, the more the individual States equip

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[39] See, for example, judgement of 25 September 2008, *Paraponiaris v. Greece*; sent. 1 March 2007, *Geerings v. Netherlands.*

[40] See, for example, judgement of 20 January 2009, *Sud Fondi Srl v. Italy*.

[41] J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, Oxford-Portland, 2017, 23.

[42] See F. Palazzo, *Per un ripensamento radicale del sistema di prevenzione ante delictum*, in *Criminalia*, 2017, 141 f. The author however refers to a judgment of the ECtHR (Grand Chamber, June 28, 2018, *G.I.E.M. and others v. Italy*) that considered confiscation to be a "criminal matter" and stated the disproportion of this measure on the basis of its mandatory nature, which would prevent it from adapting to the actual gravity of the fact.

themselves to launch new types of confiscation in order to respond to the challenges of widespread and globalised illegality, the greater the risk of the mechanisms of trans-national confiscation getting stuck, thus compromising the very effectiveness of the confiscation.

In a nutshell, the obstacles to judicial cooperation on confiscation arise mainly from the mutual heterogeneity of the relevant models used in the issuing and executing States. This heterogeneity is often related to the different development from one State to another of the constitutional principles/rights relevant in the criminal field and, more generally, in the field of sanctions.

In fact, it may happen that the executing State does not possess the model of confiscation (for example, general confiscation, or prevention confiscation) in relation to which its cooperation is requested. It may also happen that the same model is considered a sanction in one State, a security measure in a second State and a prevention measure in a third State. It may also happen that the same model of confiscation (for example, extended confiscation) is supported by very different levels of evidence from one State to another, regardless of how it is qualified. The examples could go on[43].

However, given the well-known interference between the (conceptually distinct) mechanisms of harmonisation and mutual recognition, a lack of inter-state harmonisation of confiscation and freezing models may constitute an obstacle to mutual recognition. This obstacle is even greater considering that the most modern and "aggressive" models of confiscation are often at the limits of constitutional legitimacy already within the very countries in which they were conceived. In relation to these models, the level of constitutional tolerance of EU countries called upon to cooperate in confiscation activities may also be lower than that of the issuing State.

9. *Sources of international and European law on confiscation*

This overall state of affairs explains the proliferation, since the 1960s, of a whole series of instruments of international and European law designed to encourage States to use certain models of confiscation that have become established over time, to harmonise national rules on confiscation and to facilitate cooperation on the subject between the national judicial and administrative bodies of the various States.

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[43] See, in particular, V. WEIER, *Mutual Recognition of Confiscation Orders and National Differences*, in *this volume.*

In this respect, a number of international *soft law* instruments have been launched with a wealth of recommendations and guidelines. The common denominator of these instruments is to facilitate the fight against transnational organised crime through the use of confiscation mechanisms able to effectively target illicit proceeds and their substitutes. In addition, and above all, conventions have been adopted by the United Nations and, at European level, by the Council of Europe; as well as numerous and varied sources of EU *hard law* legislation.

In particular, as far as the United Nations is concerned, the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* of 1988 should be remembered, in which the complex subject of cooperation in matters of direct confiscation and confiscation by equivalent is dealt with. The issue was then taken up by the *United Nations Convention against Transnational Organized Crime* of 2000, which also addressed the issue of the return of property to the requesting state, in order to compensate the victims of the crime or meet the claims of the rightful owners.

As for the instruments of the Council of Europe, the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* of 1990 should be noted. It addresses the issue of refusal to cooperate, specifying the cases in which such refusal is lawful, first of all the case in which "the requested measure would be contrary to the fundamental principles of the legal system of the requested Party" (Article 18(*a*)).

Finally, particular attention should be paid here to the Union's binding regulatory sources opened by the Joint Action 98/699/JHA[44] on judicial cooperation. This is a legislative text which aims essentially to ensure that requests from other Member States for the freezing and confiscation of instruments and the proceeds of crime are given the same attention as similar measures taken in national procedures. This Joint Action was followed by: Framework Decision 2001/500/JHA[45], which, with a view to inter-state harmonisation, enshrined in Article 2(1)(*a*) and (*b*) of Directive 2001/500/JHA, provides for the establishment of a common framework for the implementation of Community law. The Framework Decision 2003/577/JHA[46] of judicial cooperation, which extended to the

[44] Joint Action 98/699/JHA of 3 December 1998 *on money laundering, the identification, tracing, freezing, seizing andconfiscation of instrumentalities and the proceeds from crime.*

[45] Framework Decision 2001/500/JHA of the Council of 26 June 2001, *on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.*

[46] Framework Decision 2003/577/JHA of the Council of 22 July 2003, *on the execution in the European Union of orders freezing property or evidence.*

freezing and confiscation (except for the reasons for refusal or postponement specified therein) the principle of mutual recognition which, in 1999, the European Council had elevated to the cornerstone of European[47] judicial cooperation; Framework Decision 2005/212/JHA[48] on harmonisation, which obliges Member States to introduce extended confiscation into their legal systems for a precise list of offences; Framework Decision 2006/783/JHA[49], which regulates the principle of mutual recognition in relation to direct confiscation orders, both equivalent and extensive (while allowing, in a wide range of cases, the requested State to refuse to execute many of these orders).

With the end of the pillar system of the European Union following the Lisbon Treaty of 2007-2009, EU legislation has changed its appearance. However, as suggested by important EU documents containing guidelines for the development of a genuine European criminal policy[50], they have continued to be interested in freezing and confiscation in order to combat transnational crime. With this in mind, Directive of harmonisation 2014/42/EU[51] and Regulation (EU) 2018/1805[52] on judicial cooperation were adopted.

The Directive in question 'aims to amend and expand the provisions of Framework Decisions 2001/500/JHA and 2005/212/JHA'[53]. To this end, it contains minimum harmonisation rules aimed at ensuring that Member States provide for the applicability of freezing and direct confiscation for a wide range of offences, in equivalent and extensive terms. In addition to these models of confiscation, the Directive complements

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[47] Cfr. *Tampere European Council 15 e 16 October 1999 - Presidency Conclusions*, par. 33, in *http://www.europarl.europa.eu/summits/tam_it.htm.*

[48] Framework Decision 2005/212/JHA of the Council of 24 February 2005, *on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.*

[49] Framework Decision 2006/783/JHA of the Council of 6 October 2006, *on the application of the principle of mutual recognition to confiscation orders.*

[50] See, in particular, European Commission, Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, Brussells, 20 September 2011, COM(2011) 573 def., 9; see also Commissione of the European Communities, Communication From the Commission to the European Parliament and the Council - Proceeds of organised crime. Ensuring that "crime does not pay", Brussells, 20 November 2008, COM(2008) 766 def.

[51] Directive 2014/42/EU of the European Parliament and the Council of 3 April 2014, *on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.*

[52] Regulation (EU) 2018/1805 of the European Parliament and the Council of 14 November 2018, *on the mutual recognition of freezing orders and confiscation orders.*

[53] Thus, verbatim, recital 9 of the Directive.

direct and equivalent confiscation against third parties not in good faith; and also (only in relation to specific and circumscribed hypotheses) confiscation without conviction, obliging Member States to ensure proper management of frozen/confiscated assets and to collect and maintain comprehensive statistical data on these assets and related measures.

Finally, the aforementioned Regulation (which replaces Framework Decisions 2003/577 and 2006/783, and which will apply from 19 December 2020) deals with measures relating to all freezing and confiscation cases provided for in the context of criminal proceedings[54]. In relation to these hypotheses, for thirty-two figures of crime, mutual recognition is freed from the constraint of double criminality. This will lead to the strengthening of judicial cooperation in this area, with a view to clarifying the procedures for transmitting, transposing and implementing the measures relating to the above-mentioned instruments. Member States can now only avoid such cooperation in light of the grounds for refusal and postponement of enforcement which are exhaustively laid down in the Regulation[55]. Among these reasons, the one relating to the existence, in exceptional situations, of "substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the freezing 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"[56] stands out.

It is known that in the area of judicial cooperation in criminal matters, the European Union has so far used the Regulations in an extraordinary way. The fact that one of the two Regulations adopted so far on this subject[57] specifically concerns freezing and confiscation therefore highlights the importance attached to these institutions in the fight against crime within the "Area of freedom, security and justice". This importance is also confirmed by the reading of other EU regulatory sources. These sources are intended, for example, to improve the efficiency of the Member States' authorities responsible for tracing confisca-

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[54] And therefore also to the hypothesis of extended confiscation, third party confiscation and non-conviction based confiscation.

[55] Articles 8 and 19.

[56] Art. 8, point (f). Among the fundamental rights at risk of infringement, this rule underlines "in particular the right to an effective remedy, the right to a fair trial or the right of defence".

[57] As known, the other is Regulation (EU) 2017/1939 of the Council, of 12 October 2017, *implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')*.

ble assets[58]; or to require Member States to adopt "the necessary measures to enable the freezing and confiscation of instrumentalities and proceeds [also] from the criminal offences" which harm the financial interests of the Union.

10. *The current limits of EU confiscation legislation*

The legislative texts introduced by the European Union on freezing and confiscation create, in principle, stricter constraints on judicial cooperation on the part of the Member States than those found at international level[59], not least because the former are based on the principle of mutual recognition.

Nevertheless, for a number of reasons, the results obtained so far by these texts cannot be considered fully satisfactory. In this respect, it should first be recalled that most of the texts in question were adopted under the third pillar of the European Union, which produced EU sources in criminal matters from 1992 to 2009. These texts are therefore mainly intergovernmental in nature, so that – at least until the end of the five-year transitional regime provided for by the Treaty of Lisbon – they were binding on the Member States only at a theoretical level and not also at a practical level. In fact, their failure or inadequate transposition could only be established in certain cases and in any event could not be sanctioned by the Court of Justice, thus constituting an obligation of a more political than legal nature[60]. This situation did not, therefore, encourage the Member States to comply fully and promptly with the texts

[58] See Council Decision 2007/845/JHA of the Council 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.*

[59] On this point, see M.L. CESONI, *La construction supranationale de la lutte contre le blanchiment*, in M.L. CESONI (ed.), *La lutte contre le blanchiment en droit belge, suisse, français, italien et international*, Bruxelles, 2013, 21 ff.

[60] More specifically, as for Joint Actions and Framework Decisions in relation to infringement proceedings against Member States that failed to comply with their obligations to implement EU law, the jurisdiction of the Court of Justice existed only if the dispute arose between two Member States (and not between the Commission and a Member State). It follows that, in the event of failure to implement, as well as in the event of delay or incorrect implementation of a Framework Decision, the Commission did not have the legal instruments to induce the defaulting State to recognise the binding nature of the Framework Decision, as enshrined in Article 34(2)(*b*) of the Treaty. EU. Moreover, even in case of infringement procedure between two Member States, no sanctions were applicable to the defaulting State, unlike what was provided for in Article 228.2 of the Tr. EC in relation to first pillar instruments.

in question. In fact, the Commission's reports on the state of transposition of these Framework Decisions[61] did not fail to complain that many Member States had not transposed these instruments by the scheduled date, or at least had not fully complied with them. Indeed, to date there are EU countries that have not implemented all these instruments.

A further limit found in the third pillar legislative acts referred to above was the lack of harmonisation of the models of confiscation provided for therein. In fact, in the Joint Action 98/699/JHA and in the Framework Decision 2001/500/JHA (which replaced that Joint Action), the obligation on the Member States to provide in their national legislation for ordinary and value confiscation was enshrined by a mere reference to Article 2 of the aforementioned *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*[62]. In essence, therefore, very little was added to what was laid down in the Convention in question[63].

As regards the inter-state approximation obligations laid down in Framework Decision 2005/212/JHA, informal meetings of experts organised by the Commission and contacts with the authorities of the Member States showed that these obligations were at least partly frustrated by the lack of clarity of certain rules contained in this Framework Decision[64]. In addition, the harmonising effect of the obligation to intro-

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[61] Report on Framework Decision 2005/212/JHA, COM(2007)805; Report on Framework Decision 2003/577/JHA, COM(2008)885; Report on Framework Decision 2006/783/JHA, COM(2010)428; Report on Decision 2007/845/JHA, COM(2011)176; Communication From the Commission to the European Parliament and the Council - *Proceeds of organised crime. Ensuring that "crime does not pay"*, COM(2008)766.

[62] See, *above*, *sub* nt. 9.

[63] In must be reminded that art. 1 of the abovementioned Framework Decision 2001/500/JHA established: "In order to enhance action against organised crime, Member States shall take the necessary steps not to make or uphold reservations in respect of the following articles of the 1990 Convention: (*a*) Article 2, in so far as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year. However, Member States may uphold reservations on Article 2 of the 1990 Convention in respect of the confiscation of the proceeds from tax offences for the sole purpose of their being able to confiscate such proceeds, both nationally and through international cooperation, under national, Community and international tax-debt recovery legislation; (*b*) Article 6, in so far as serious offences are concerned. Such offences shall in any event include offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, offences punishable by deprivation of liberty or a detention order for a minimum of more than six months".

[64] See COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission to the European Parliament and the Council - Proceeds of organised crime. Ensure that "crime does not pay"*, cit., 5.

duce extended[65] confiscation for certain offences[66] was largely frustrated for two different reasons. Firstly, because the Framework Decision identified three different models of this type of confiscation. Secondly, because the same Framework Decision allowed Member States both to choose which of these models to adopt and to introduce additional models of extended confiscation if they were even more efficient. These concessions, while perhaps improving the efficiency of national confiscation, undoubtedly jeopardised the establishment at European level of uniform rules on extended confiscation, which would probably have made it easier to combat organised crime.

In turn, the overall inadequacy of the inter-state approximation constraints of the abovementioned confiscation models had ended up compromising cooperation between EU countries in this area, as regulated by the abovementioned Framework Decisions 2003/577/JHA and 2006/783/JHA. Moreover, this last Framework Decision neglects any special models of confiscation different from the extended one and, as already mentioned, allows very wide-reaching grounds for refusal. Although, indeed, this extent is at least partly justified by the halo of mistrust regarding the ability of the most aggressive forms of confiscation to respect the fundamental rights of the accused and, *a fortiori*, of the suspect and of third parties.

The overall framework outlined so far, which in some respects fell short of the expectations set out in the above-mentioned instruments, has not been significantly improved, even as a result of the late entry into force of[67] the Second Protocol to the PFI Convention[68]. In the fight against fraud, money laundering is proving to have a strong focus on confiscation[69]. The same applies following the entry into force of Framework Decision 2008/978/JHA[70], which aims to regulate the steps follow-

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[65] According to Article 3 of the Framework Decision: "total or partial confiscation of assets held by a convicted person".

[66] Namely for certain offences committed in the context of a criminal organisation as defined in Joint Action 98/733/JHA (see, *amplius*, Art. 3*a* of the Framework Decision); and for certain offences covered by the Framework Decision 2002/474/JHA on combating terrorism (see, *amplius*, Art. 3*b*).

[67] May 19, 2009.

[68] Second Protocol, of 19 June 1997, of the *Convention on the protection of the European Communities' financial interests*, adopted under art. K.3 on the Treaty of the European Union.

[69] See Article 5 of the Second Protocol.

[70] Framework Decision 2008/978/JHA of the Council of 18 December 2008, *on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters*.

ing the attachment orders adopted pursuant to Framework Decision 2003/577/JHA.

No one questions the undoubted potential in the fight against illegal profit linked to the multiple models of confiscation introduced on a European scale and the related cooperation mechanisms provided for by EU sources. However, the above helps to explain why the freezing and confiscation of assets of illegal origin located abroad encounters obvious difficulties, which undoubtedly go beyond the (already considerable) ones related to the domestic enforcement of measures in this area. These difficulties are indirectly testified, moreover, by the small amount of general statistical data that can be found on a global scale, which in some way clashes with the current general tendency to resort to confiscation in the most diverse illegal contexts[71]. Suffice it to say that, in view of the minimal amount of proceeds from the illegal economy at EU level of around EUR 110 billion per year[72], less than 2% of these proceeds are frozen and less than 1% are definitively confiscated[73]. These data are, as mentioned, very general. Moreover, they are variously conditioned by a plurality of heterogeneous factors, ranging from the so-called "black figure" to the attitude of concealment of the assets to be confiscated.

The fact remains that the figures given here, however incomplete and somewhat misleading they may be, show the very high rate of ineffectiveness of freezing and confiscation. This rate increases greatly in cases where the assets in question have been allocated abroad, perhaps following a tortuous path that makes them temporarily pass through countries other than that of their final destination, hindering their traceability[74]. But this ineffectiveness might even get worse because of the

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[71] See, V. MANES. *L'ultimo imperativo della politica criminale*: "nullum crimen sine confiscatione", in *Riv. it. dir. proc. pen.*, 2015, n. 3, 1259 ff.

[72] See *From illegal markets to legitimate businesses: the portfolio of organised crime in Europe - Final report of Project OCP Organised Crime Portfolio*, in *www.transcrime.it/ocportfolio/materials/*, 2015, 9 ff. and 48. Moreover, this statistic does not take into account the proceeds of other important illegal acts such as usury, extortion, gambling or tax evasion and it is thus the result of approximation. In addition, further approximation derives from the absence of an accurate catalogue of confiscation orders pronounced.

[73] Statistics published by Europol (*Does Crime still pay? Criminal Asset in the EU*, in *www.europol.europa.eu*, 2016, 4 ff.) quantify the proceeds of crime seized at around 1.8% and the proceeds definitively confiscated at around 0.9%. Also in this case, as stated in the previous nt., the data is extremely approximate. In fact, it derives from the elaboration of national information relating to national surveys, which are processed on the ground of criteria that differ from one Member State to another. For example, reports from some Member States did not include confiscation orders issued in the context of non-criminal proceedings.

[74] One may think of the case in which the assets leave the country where they had been illegally obtained to transit through a State where they are recycled; then, they are reused in

possibility for the requested State not to follow up the orders of seizure and confiscation adopted by another EU Country.

11. *The research "*Improving cooperation between EU Member States in confiscation procedures*" and the investigation method*

The research the results of which are presented here was conceived at a particularly turbulent time in the process of "Europeanising" freezing and confiscation. The deadline for the transposition of Directive 2014/42/EU[75] of harmonisation was near and there was already talk of the proposal for what was to become of Regulation (EU)2018/1805[76]. In the meantime, the assessments, and possible suggestions, that the European Commission was to provide regarding the rules on freezing and confiscation in force in the various Member States[77] were due to be published. In the meantime, although in a general context characterised by insufficiency of available data, awareness of the difficult problems posed by the most modern and invasive models of confiscation, especially in the context of judicial cooperation, has progressively increased. These problems, if not solved, risk undermining the undisputed potential of freezing and confiscation in the fight against organised crime.

During the implementation of the research project, it appeared that these problems derived from a plurality of factors, among which, it is worth noting: the differences that can be found from one State to another in relation to the models of freezing and confiscation provided for;

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another country and finally allocated in another State. The use of sophisticated expedients, aimed at separating the physical transfer of the asset from the related financial movements, make these steps further complicated.

[75] Originally fixed on the 4 October 2015, the deadline has later been postponed to the 4 October 2016 by the Corrigendum to Directive 2014/42/EU of the European Parliament and the Council, of 3 April 2014, *on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union*.

[76] The aforementioned proposal was submitted on 21 December 2016. On this proposal, see A.M. MAUGERI, *Prime osservazioni sulla nuova "proposta di regolamento del parlamento europeo e del consiglio relativo al riconoscimento reciproco dei provvedimenti di congelamento e di confisca"*, in *Dir. pen. cont. - Riv. trim.*, 2017, n. 2, 231 ff. The above-mentioned proposal was amended in December 2017. Compared to the original version, the measures subject to mutual recognition are no longer those issued in a criminal proceeding, but those taken in a "proceeding concerning criminal matters". As for the other aspects, Regulation (EU) 2018/1805 has remained substantially unchanged from the initial proposal.

[77] Under Article 13 of the 2014 Directive, these assessments and proposals were to be set out in a report to be submitted to the European Parliament and the Council by 4 October 2018. However, this deadline has not been met and the report has not yet been submitted.

the deficiencies of the national bodies entrusted with the identification and recovery of assets resulting from illegality, the management of the frozen assets and the finalisation of the confiscated assets; the dubious constitutional[78] and conventional[79] legitimacy of certain national mechanisms of freezing and confiscation.

These problems were the starting point for the identification of the fundamental areas of investigation of our research project. In this regard, all aspects of freezing and confiscation relevant from a comparative and supranational perspective were examined. However, more attention was paid to those where there is greater room for improvement and where a greater effort of research and reflection is therefore required. Particular attention has been paid to the areas of judicial cooperation in the field of confiscation and the management of frozen and confiscated assets. With regard to the first area, the aim was to verify the situation in the various Member States of the European Union on the eve of the entry into force of Regulation 2018/1805, so as to identify, if possible, the national specificities that could hinder the achievement of the objectives that the latter sets. As for the second area, it seemed from the outset to be the one most overlooked by European Union regulatory sources and, at the same time, the one which may be difficult to implement[80]. With regard to the latter, a process of horizontal harmonisation, also pursued through the exchange of good practices between the various member States, is therefore more appropriate than ever.

The six national units that took part in the project[81] concentrated on problems of a more strictly legal nature, as already mentioned, made par-

[78] See, limited to Italy, Corte cost., judgments 2010, n. 196; 2018, n. 223; 2019, n. 24; 2019, n. 26; 2019, n. 112, cit.

[79] In particular, before the research project was presented, in the *Varvara* and *Sud Fondi* cases the ECtHR had found that certain forms of confiscation permitted in Italy were unlawful and had set limits on the application of this legal instrument, which could not be ignored in the light of judicial cooperation.

[80] At the UN level, this is also the viewpoint taken by the Open-ended Intergovernmental Working Group on Asset Recovery, *Study prepared by the Secretariat on effective management and disposal of seized and confiscated assets*, cit. In this study it is pointed out that, in the context of the *United Nations Convention against Corruption*, particular problems arise from the implementation of Article 31 concerning the "Freezing, seizure and confiscation" of the proceeds of the crimes established by the aforementioned Convention, of property equivalent to them and of property used in the context of these crimes. In this study, it is also stressed that, with respect to these problems, the most important is that relating to the management and disposal of frozen, seized or confiscated assets (p. 4).

[81] University of Ferrara, Coordinator (Italy); Université Saint-Louis - Brussels ASBL (Belgium); ARPE - Association de Recherches Pénales Européennes (France); Rheinische Friedrich-Wilhelms - Universitat Bonn (Germany); Universiteit Utrecht (Netherland); Universitatea Babes Bolyai - Cluji Napoca (Romania).

ticularly difficult by a variegated, changing and rather cumbersome regulatory and jurisprudential framework, which is therefore difficult to master.

An attempt was made to obtain an overview as faithful and up-to-date as possible of the freezing and confiscation mechanisms provided for by each of the legal systems of the six EU countries involved in the research, in order to assess their compatibility with the relevant EU sources, with the ECHR rights as developed by the ECHR Court, as well as with the parallel mechanisms and rights of the other countries in question.

The research focused on a comparative survey carried out on a vertical and horizontal plane. As far as the vertical plane is concerned, the research was directed towards verifying compliance with supranational sources in the matter of freezing and confiscation by the national systems on the subject. As far as the horizontal plane is concerned, the aim was to identify the moments of convergence and divergence within the partner States in relation to these institutions. The ultimate aim of this comprehensive comparative survey was to facilitate the elimination of the most problematic aspects of national laws and practices, at the same time highlighting the best solutions adopted so far and suggesting, where appropriate, reforms and interventions to facilitate judicial cooperation in this difficult field.

12. *The work plan*

With a view to rationalising the work, it was decided to split the research into three phases. The first phase was essentially aimed at analysing the main issues raised from a European perspective by confiscation in its various forms. The second phase was aimed at examining in detail the different profiles assumed by freezing and confiscation in partner countries. The third phase was aimed at examining the points of convergence and divergence found in the laws of these countries in relation to the aforementioned profiles of the institutions in question.

More specifically, four works were developed in the first phase of the research.

The first is an examination of the ECtHR case law on confiscation. It intends to underline recent developments in this jurisprudence as well as its possible further developments, especially as regards the recognition or otherwise of the criminal nature of the different models of confiscation[82].

[82] M. Simonato, M. Fernandez-Bertier, *Confiscation and fundamental rights: the quest for a consistent European approach*, in *this volume.*

The second is an investigation into non-conviction-based confiscation in the different configurations attributed thereto and the associated risks of violation of the presumption of innocence and property rights[83].

The third focuses on extended and third-party confiscation, paying particular attention to the need to design both models in such a way as to respect fundamental rights[84].

The fourth examines the differences between the confiscation systems of the Member States, as well as the characteristics and limits of the mutual recognition mechanisms provided for in EU[85] sources.

The second phase of the research was dedicated to the drafting of national reports, which set out in detail how freezing and confiscation are regulated in the six EU countries involved in this research. These national reports were to be structured in such a way as to facilitate the comparison of the relevant freezing and confiscation regimes. To this end, taking into account the great differences existing in the matter between the above-mentioned Countries, it was decided to draw up a questionnaire divided into four sections, concerning respectively: the substantial aspects of the different models of confiscation, the procedural aspects of freezing and confiscation, the mechanisms of the mutual recognition of freezing and confiscation orders, the mechanisms of management and disposal of frozen and confiscated assets. Each section was in turn divided into paragraphs and subparagraphs. The latter each contained one or more questions designed to allow an orderly review of all relevant issues.

Each national report shall be drawn up in such a way as to provide timely answers to the questions raised in the questionnaire. In turn, the answers provided by each national research group contribute to the creation of an essential database in order to be able to focus on emerging problems in judicial cooperation.

Finally, in the third phase of the research, six studies were drawn up to make a horizontal comparison between the legal systems of the partner countries.

The first provides an overview of the models of confiscation in the Member States, distinguishing between direct confiscation, extended confiscation, non-conviction-based confiscation and third-party confisca-

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[83] C. Grandi, *Non-conviction based confiscation in the EU legal framework* in *this volume.*

[84] D. Nitu, *Extended and third party confiscation in the EU*, in *this volume.*

[85] V. Weyer, *Mutual recognition of confiscation orders and national differences*, in *this volume.*

tion, specifying the specific features of each of them within the individual national systems considered[86].

The second compares the procedural regulations of freezing in the partner Countries, underlining both the progressive convergence and the persistent divergences between the national systems[87].

The third examines the national procedural disciplines of confiscation. This examination underlines the great differences that exist in this regard between the six countries considered, not significantly softened by the launch of the relevant European standards of harmonisation[88].

The fourth examines how the partner countries have implemented the mutual recognition provisions of the Framework Decisions 2003/577/JHA and 2006/783/JHA. It also sets out the innovations resulting from Regulation (EU) 2018/1805, which will be in force from December 2020[89].

The fifth analyses both the national regulations implementing Directive 2014/42/EU on the management and disposal of frozen assets, and the regulations dictated in this regard by Regulation (EU) 2018/1805[90].

The sixth investigates the evolution of national rules on the destination and administration of confiscated assets, with particular attention to those – not adequately harmonised on a European scale – relating to the destination and administration of assets allocated abroad[91].

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[86] D. Moroşan, F. Streteanu, D. Niţu, *Horizontal conclusions*, in *this volume.*

[87] O. Cahn, J. Tricot, *Procedural Aspects of Freezing in Europe*, in *this volume.*

[88] W.S. de Zanger, *Procedural aspects of confiscation*, in *this volume.*

[89] V. Weier, *Horizontal Analysis on Mutual Recognition*, in *this volume.*

[90] T. Slingeneyer, *Horizontal report management freezing*, in *this volume.*

[91] S. Bolis, *The destination and administration of confiscated assets: a fragmented picture*, in *this volume.*

Section I

THE EUROPEAN FRAMEWORK

MICHELE SIMONATO - MICHAËL FERNANDEZ-BERTIER

CONFISCATION AND FUNDAMENTAL RIGHTS: THE QUEST FOR A CONSISTENT EUROPEAN APPROACH

SUMMARY: 1. Introduction. – 2. The development of modern confiscation models for the sake of efficiency. – 3. Common EU concepts of confiscation (and its limits). – 4. The key question: confiscation as a criminal sanction? – 5. Confiscation as something else than a criminal sanction. – 6. Conclusions.

1. *Introduction*

In the past decades, various countries have introduced new forms of confiscation. Many have done so to comply with obligations under international and EU law, which are increasingly urging the development of strategies and tools aimed at depriving criminals of their illicit gain. The benefits of fighting 'dirty money' have been widely emphasized and nowadays confiscation is becoming one of the main objectives when dealing with organised crime and other serious offences – including but not limited to drug trafficking, corruption and money laundering[1].

Confiscation is part of the larger asset recovery strategy, which is constituted of distinct yet correlated phases including the financial investigation, detection and tracing of illicit property; the provisional freezing or seizure of (presumed) criminal property and their management; the permanent confiscation (or forfeiture) of the assets; and the recovery and re-use of the confiscated property.

The rationale for (modern) confiscation rests on several premises: criminals are motivated by profits and we should hit them where it hurts; significant proceeds may derive from crime and are therefore available

[1] G. STESSENS, *Money Laundering. A New International Enforcement Model* (Cambridge University Press, 2000); J. VERVAELE, 'Economic Crimes and Money Laundering: A New Paradigm for the Criminal Justice System?', in B. UNGER and D. VAN DER LINDE (eds.), *Research Handbook on Money Laundering* (Edward Elgar, 2013) 379; V. MANES, 'L'ultimo imperativo della politica criminale: *nullum crimen sine confiscatione*' (2015) *Riv. it. dir. proc. pen.*, 1259; M. FERNANDEZ-BERTIER, 'The Confiscation and Recovery of Criminal Property: a European Union State of the Art' (2016) 17 *ERA Forum* 323.

for recovery; criminals should be prevented from using their resources to finance or commit crime; and traditional forms of law enforcement are not effective especially within the scope of acquisitive crime.

With this in mind, several functions of confiscation can be highlighted, which are often overlapping: retribution, for most legal systems have established confiscation as a form of criminal penalty; deterrence (general and specific) to further reduce or at least control crime; remediation through restoring the *status quo ante* by disgorging illicit property; and restitution to compensate victims.

Initially, the confiscation of criminal property was implemented globally through the traditional proceedings of 'criminal confiscation' (*standard confiscation*), which allow for the deprivation of the illicit gains of an offender after their criminal conviction for a specific (set of) crime(s). This 'conviction-based' form of confiscation is ordered by a court of law, as part of the offender's sentence, against the property that is proven to be connected to the offences they were found guilty for. Yet, standard confiscation rapidly proved to be insufficient, not to say inefficient. Beyond the quintessential question of the prosecutorial culture towards the confiscation of criminal property, the true limits of the traditional concept of (conviction-based) confiscation come from factors such as the difficulty to first secure the criminal conviction of an offender, the necessity to prove the nexus between the property subject to confiscation and the offence they were convicted for, and the evident budgetary and time constraints that relate to investigating and prosecuting criminal cases – all hindering the success of state authorities in depriving criminals from their ill-gotten gains.

Against that background, estimates have shown that crime does indeed pay, and quite well so: overall, the black economy (i.e. the illicit gains made by criminals) would amount to around 3.6% of the gross world product, and less than 1% of the money laundered globally – probably around 0.2% – would be effectively seized[2]. From an EU perspective, it is estimated that illicit markets would generate EUR 110 billion annually, i.e. 0.9% of the gross European product[3]. Only 2.2% of unlawful proceeds would be seized and only 1.1% would be effectively confiscated in the EU[4].

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[2] United Nations Office against Drugs and Crime, *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes*, Research report, Vienna (October 2011) 5 and 7.

[3] E.U. Savona, M. Riccardi, *From illegal markets to legitimate businesses: the portfolio of organised crime in Europe*, Trento, Transcrime (2015).

[4] Europol, *Does crime still pay? Criminal Asset Recovery in the EU. Survey of statistical information 2010-2014* (2016) 4.

2. *The development of modern confiscation models for the sake of efficiency*

Over the time, and facing the aforementioned constraints and setbacks, European legislators have developed new forms of confiscation – supposedly more effective/efficient[5]. Two specific trends can be highlighted in this respect, which consist in the expansion of the scope and reach of post-conviction powers of confiscation (through the use of presumptions) coupled with an increased interest for the development of non-conviction-based models of confiscation. Yet, even more far-reaching models of asset recovery devices seem to have already emerged for the sake of efficiency.

Compared with a traditional concept of confiscation, whereby the deprivation of property (i.e. the instrumentalities[6] and proceeds[7] of crime) follows a conviction for a specific crime, the new forms of confiscation provide for a loosened link between offences and confiscated proceeds. Assets may be confiscated even if they are not property of the crime for which the offender has been convicted (*extended confiscation*), if they belong to persons other than the offender (*third party confiscation*), or if they are the proceeds of an offence for which there has been no conviction at trial (*non-conviction based confiscation*).

Extended confiscation has been one of the fastest developing new forms of deprivation with a view to alleviating the recovery of illicit property. It is generally understood as the deprivation of the 'unjustified property' of an offender. The term 'extended' relates to property other than directly connected to the crime the person was convicted for, property that goes beyond the direct proceeds of crime. Extended confiscation ordinarily follows the prior criminal conviction of a defendant for specific crimes, i.e. being a post-conviction form of confiscation. It generally relies on (rebuttable) presumptions of unlawful origin of the defendant's property, which may derive from a disproportion between their lawful income and their actual economic resources. It is then the task of the property owner to rebut the statutory assertions to avoid confiscation. The mechanism thus entails a reversal, or at least a sharing, of the

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[5] For a history of confiscation, see M. FERNANDEZ-BERTIER, 'The history of confiscation laws: from the Book of Exodus to the war on white-collar crime', in K. LIGETI, M. SIMONATO (eds.), *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 53-75.

[6] Ie the property used or intended to be used in any manner for the commission of a criminal offence

[7] Ie any economic advantage derived directly or indirectly from an offence.

burden of proof between the prosecution and the individual[8]. Extended confiscation is a quite practical concept for enforcement purposes when it comes to prosecuting serious and organised crime offences – which rarely consist in a 'one shot' activity. Being able to rely on the presumption that the property of a convicted person derives from related (yet unproven) offences alleviates the associated investigatory and burden of proof hurdles. As often pointed out by the supporters of extended confiscation, it is easier for a convicted offender to prove the licit origin of their property than for the prosecution to prove their unlawful character. Conversely, it is also easier for the prosecution to successfully claim confiscation through 'watering down some of the traditional criminal procedural safeguards'[9]. Extended confiscation does facilitate the task of law enforcement authorities in proving the illicit character of the assets through less rigorous judicial procedures than the standard conviction-based confiscation approach. Extended confiscation is now an established feature of EU confiscation law and of all Member states' domestic confiscation regime (see below 3).

Non-conviction-based confiscation allows for the deprivation of tainted assets irrespective of any prior criminal conviction (i.e. of the property owner/holder). Hence, the targeting of the assets may operate at a very early stage of the investigations. This form of confiscation of criminal property allows the authorities to quiet title to criminal property. The main justifications for modern forms of non-conviction-based confiscation rely on the preventive and remedial functions of confiscation: to prevent property from being used for the commission of further unlawful activities (as the instrumentalities of crime), and/or to restore the *status quo ante* on basis of the unjust enrichment theory and the idea that the offender has no right whatsoever to ill-gotten gains (ie the proceeds of crime). One of the main interests for non-conviction-based confiscation, from a law enforcement perspective, is the absence of requirement of a prior conviction before initiating confiscation proceedings: the property is (somewhat) dissociated from its owner and confiscation is not conditional upon prior liability of any offender. Confiscation can therefore be ordered within the course of less rigorous judicial procedures

[8] J. Boucht, '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. J. Crime Crim. Law Crim. Justice 21, 127-162 (2013), 129; G. Turone, *Legal frameworks and investigative tools for combating organized transnational crime in the Italian experience*, in UNAFEI 134th International Training Course Visiting Experts' papers, No. 48-64 (2007).

[9] J. Boucht, 'Extended confiscation and the proposed directive', 129.

than criminal proceedings since the prosecuting authorities only bear the burden of demonstrating that the property is related to an unlawful activity. Furthermore, the onus of proof that must be met by law enforcement authorities rests on a lower standard[10] than usually sought in criminal matters as the proceedings are (most often) conducted outside of the criminal justice system[11]. Non-conviction-based confiscation therefore proves useful either where prosecutors have not identified the owner of the tainted property or where they are not able to build a case that would resist the 'beyond a reasonable doubt' criminal standard of proof. Although the majority of EU Member states have not established the possibility to confiscate criminal property regardless of any conviction, non-conviction-based confiscation is expected to keep on spreading to further jurisdictions in the future due to the avowed limited of criminal (including extended) confiscation.

In parallel to the expansion of extended confiscation and non-conviction-based confiscation, further-reaching confiscation models have recently surfaced. This includes but is not limited to 'unexplained wealth orders', a form of non-conviction-based confiscation orders that further relies on the use of presumptions that the targeted property had been acquired unlawfully. In essence, unexplained wealth orders combine the benefits of both extended confiscation and non-conviction-based confiscation at once. From a procedural point of view, once law enforcement authorities have suspicions as to the legitimacy of transactions conducted by a person or of assets they possess, recovery proceedings may be initiated. It is then to the latter to justify the source of their wealth, absent which the relevant court may issue a confiscation order. Unexplained wealth orders prove therefore useful where enforcement authorities have moderate evidence as to the existence of a specific unlawful activity[12]. Unexplained wealth orders are not (yet) a widespread feature of confiscation models across the EU but have started to emerge in some jurisdictions[13].

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[10] They rest on a medium (civil) standard of proof - i.e. the traditional balance of probabilities.

[11] Although in practice there is often a link between the preventive [non-conviction-based confiscation] measures and criminal proceedings […]'. M. Panzavolta, R. Flor, 'A necessary Evil? The Italian "non-criminal system" of asset forfeiture', in J.P. Rui, U. Sieber (eds.), *Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (Duncker & Humblot, 2015) 118, 123.

[12] I.e. where the requirements for traditional non-conviction-based confiscation (and incidentally criminal confiscation) might not be met.

[13] Such as in the UK through the Criminal Finances Act 2017. The UK UWO concept however mostly consists in an investigative tool that precedes non-conviction-based confisca-

In all these cases, the fact that a previous fully-fledged assessment of the criminal conduct, and of the link with the assets, is not a decisive factor to apply a confiscation measure raises several questions as regards the general objectives of criminal justice systems and the balance between effectiveness or efficiency and human rights: the recent legislative developments have proven that legislators are moving away from the most traditional concepts of confiscation to adopt (allegedly) more efficient ways to permanently deprive criminals from their criminal property. Within this context, one can observe a 'slippery slope' that consists in departing from standard conviction-based concepts towards the creation and increasing use of presumption-based and/or non-conviction-based models, and even to non-judicial powers of confiscation, for the sake of efficiency yet at the expense of procedural rights[14]. The search for efficiency through the development of increasingly incisive and aggressive confiscation models leads inevitably to potential conflicts with human rights. Correlatively, it draws a path towards a decrease in fundamental protections of the persons who see their property taken away.

Quite logically, the European Court of Human Rights (ECtHR) has been called on to exercise its scrutiny on various (modern) forms of confiscation, including but not limited to standard criminal confiscation, extended confiscation and non-conviction-based confiscation – as well as unexplained wealth orders. Human rights law, however, has not yet provided a firm answer to all questions arising about the compatibility of new forms of confiscation with fundamental rights. In particular, the ECtHR has a casuistic approach that makes it difficult to identify a solid framework to assess the legitimacy of confiscation regimes[15]. As observed by judge Pinto de Albequerque in his (partly concurring and partly dissenting) opinion in the *Varvara* case:

> 'Under the *nomen juris* of confiscation, the States have introduced *ante delictum* criminal prevention measures, criminal sanctions (accessory or even principal criminal penalties), security measures in the broad sense, administrative measures adopted within or outside criminal proceedings,

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tion: if the targeted person fails to (reasonably) justify the source of their property, the presumption will be made that the property is 'recoverable' under subsequent non-conviction-based proceedings (without any further need to demonstrate the criminal origin of the property). Home Office, *Circular 003/2018: unexplained wealth orders*, 1 February 2018.

[14] See M. Fernandez-Bertier, 'Targeting criminal proceeds: a call for equilibrium between efficiency and respect of human rights', in A. Hoc, S. Wattier, G. Willems (eds.), *Human rights as a basis for reevaluating and reconstructing the law*, (Bruylant, 2016) 185-198.

[15] J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017).

and civil measures *in rem*. Confronted with this enormous range of responses available to the State, the Court has not yet developed any consistent case-law based on principled reasoning'[16].

The compelling questions concerning human rights, however, cannot be neglected, and the ECtHR – as well as the Court of Justice of the European Union (CJEU) – will be likely called again in the future to identify certain limits to confiscation measures that every State must respect[17]. This article, without having the ambition of being exhaustive, aims to clarify some features of the recent ECtHR case law.

3. *Common EU concepts of confiscation (and its limits)*

It is difficult to provide a full picture of the ECtHR case law with regard to all specific forms of confiscation. This is due to the fact that in this field, more than in other areas of criminal law, great differences exist among national regimes, and some countries have introduced peculiar forms that are hardly comparable with homologue foreign concepts (e.g., the anti-mafia preventive confiscation in Italy)[18].

It is worth mentioning, however, that in the last years, the EU has contributed to the development of a common narrative in this field. The objectives of the EU are not necessarily different from those pursued by other international organisations, such as the United Nations or the Council of Europe. The EU, however, due to the type of binding instruments that it can adopt, has the potential to take a step further compared to a traditional international setting; for this reason, it has adopted several legal instruments, in some cases re-stating the obligations provided by international treaties, in other cases going beyond them[19].

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[16] ECtHR, *Varvara v. Italy*, App. no. 17475/09, 29 October 2013.

[17] More recently, in *Gogitidze*, the ECtHR has tried to put forward a more comprehensive vision concerning non-conviction-based confiscation regimes (including unexplained wealth orders), but still many issues remain without a clear answer.

[18] Panzavolta M., 'Confiscation and the Concept of Punishment: Can There be a Confiscation Without a Conviction?' in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 25; Nicosia E., *La confisca, le confische* (Giappichelli, 2012).

[19] M.J. Borgers, 'Confiscation of the Proceeds of Crime: The European Union Framework', in C. King and C. Walker (eds.), *Dirty Assets. Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate, 2014) 27; M. Fernandez-Bertier, 'The Confiscation and Recovery of Criminal Property: a European Union State of the Art' (2016) 17 *ERA Forum* 323; K. Ligeti, M. Simonato, 'Asset Recovery in the EU: Towards a Comprehensive Enforcement Model beyond Confiscation? An Introduction', in K. Ligeti and M. Simonato

For example, the EU has been trying to make the already existing cooperation mechanisms swifter and more effective in practice (e.g., the Council Decision 2007/84/JHA concerning the cooperation between Asset Recovery Offices)[20]. Furthermore, it has adopted instruments applying the principle of mutual recognition to freezing and confiscation orders (the recent Regulation (EU) 2018/1805[21] – which replaces Framework Decision 2003/577/JHA[22] and Framework Decision 2006/783/JHA and strengthens the existing regime in this regard[23]).

The most relevant EU efforts – at least for the purposes of this contribution – have been made as regards the harmonisation of national concepts of confiscation. In particular, Directive 2014/42/EU aims to put forward a common definition of extended confiscation[24], third party confiscation[25], and what some confusingly refer to as non-conviction based confiscation or even as 'criminal non-conviction-based-confiscation'[26] (as being ordered within the scope of criminal proceedings)[27]. Directive

(eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 1.

[20] 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 [2007] OJ L332/103. The objective is to ensure close co-operation and direct communication between national authorities involved in the tracing of illicit proceeds and other property that may become liable to confiscation (see Recital 3). For this purpose, each ARO established in one Member State is able to send a specific and detailed request for information to its counterpart in another Member State. The rules for this co-operation are those set forth in Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L386/89.

[21] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation [2018] OJ L 303/1.

[22] Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence [2003] OJ L196/45.

[23] Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [2006] OJ L328/59.

[24] See Art. 5 of Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39.

[25] Art. 6 of Directive 2014/42/EU.

[26] Commission staff working document, impact assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, 21 December 2016, SWD/2016/0468 final - 2016/0412 (COD).

[27] Art. 4(2) of Directive 2014/42/EU. This article however creates a 'hybrid' device which is no way akin to the traditional concept of non-conviction-based confiscation as intertwining criminal and non-criminal proceedings: it is only when the conviction route is impossible that the court may open the way to a non-conviction based order, what some have

2014/42/EU should have been transposed into national law by October 2016, which most Member states appear to have now done with more or less delay[28].

The complexity (if not impossibility) to reconcile a common and clear-cut typology and terminology of confiscation models even at EU level must however be highlighted. As argued by some authors[29], not only the non-conviction based confiscation but also extended and third-party confiscation can be considered to some extent as confiscations without previous conviction: in the extended confiscation, some of the confiscated assets derive from crimes for which there has not been any conviction, and the third parties owning the confiscated assets are, by definition, not involved in the criminal proceedings leading to the conviction. Yet, it must be reminded that non-conviction-based confiscation in its most essential meaning does not require any prior conviction to trigger confiscation. By contrast, extended confiscation and third party confiscation (as defined by the EU legislation) are indeed 'post-conviction' models of confiscation since securing the conviction of an offender is a pre-requisite for confiscation. In short, in spite of the efforts of the EU to harmonise the substantive concepts of confiscation across Member states, one may expect that the path to reconciling all their domestic variations will be a long one and will keep on generating much discussion and practical hurdles.

Further, in some cases due to treaty limitations (e.g., as regards the impossibility to propose a more far-reaching model of non-criminal confiscation) and in others to the difficulties to reach a common approach within the Council, the provisions of Directive 2014/42/EU do not cover every aspect of confiscation measures. Hence a broad margin of discre-

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qualified as a 'semi-non-conviction based confiscation'. Alagna F.: 'Non-conviction based confiscation: why the EU directive is a missed opportunity'. Eur. J. Crim. Policy Res. 21(4), 447-461 (2015). For more developments on Art. 4(2), see among others M. Simonato, Directive 2014/42/EU and non-conviction based confiscation: a step forward on asset recovery? New J. Eur. Crim. Law 6(2), 213-228 (2015); M. Fernandez-Bertier, 'The Confiscation and Recovery of Criminal Property: a European Union State of the Art' (2016) 17 ERA Forum 32; J.P. Rui, U. Sieber, *Non-conviction-based confiscation in Europe. Bringing the picture together*, in J.P. Rui, U. Sieber (eds.), *Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction*, Duncker & Humblot, Berlin (2015).

[28] Although no official evaluation of its implementation has been completed so far. See *https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32014L0042*.

[29] M. Panzavolta, 'Confiscation and the Concept of Punishment: Can There be a Confiscation Without a Conviction?' in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 25.

tion is left to national legislators. For example, as regards extended confiscation, the Directive does not clarify to what extent a shift or reversal of the burden of proof is allowed, what underlying offences can be taken into consideration to determine the scope of confiscated property, or what criteria can be used to prove the link of certain assets with previous criminal conduct[30]. As regards 'criminal non-conviction-based confiscation', the EU provisions aim just at minimum harmonisation, since they suggest employing confiscation without conviction in very limited cases (i.e., if conviction-based/post-conviction confiscation is not possible due to illness or the absconding of the suspect) and it can be considered as a real obligation only for those countries that do not provide for *in absentia* proceedings[31]. Most importantly, it does not deal with confiscation measures issued outside the context of a criminal procedure (i.e. the purest form of non-conviction-based confiscation). However, being a minimum harmonisation Directive, this does not preclude Member States to provide for them[32]: in the end of 2016, the European Commission already estimated that around (*i*) 12 Member states had aligned (or were aligning) their confiscation regimes along the lines of Directive 2014/42/EU (including extended confiscation and criminal non-conviction-based confiscation in the cases of illness or absconding only), (*ii*) 8 Member states had gone beyond the requirements of the Directive to include other forms of criminal non-conviction based confiscation (in case of death of the offender or in the absence of conviction more generally) and (*iii*) 7 Member states had implemented (or were implementing) a true (i.e. administrative or civil) form of non-conviction-based confiscation[33]. We understand that such figures have further evolved in the past couple of years to the benefit of non-conviction-based concepts of confiscation.

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[30] See J. Boucht, 'Extended Confiscation: Criminal Assets or Criminal Owners?' in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 117; M. Simonato, 'Extended Confiscation of Criminal Assets: Limits and Pitfalls of Minimum Harmonisation in the EU' (2016) 41 *European Law Review* 727.

[31] See Recital 15 of Directive 2014/42/EU.

[32] As it occurs, for example, in Italy, Ireland, Romania, the Slovak Republic, Slovenia, Bulgaria and the UK. J.P. Rui, U. Sieber, 'NCBC in Europe: Bringing the Picture Together', in J.P. Rui, U. Sieber (eds.), *Non-Conviction-Based Confiscation in Europe* (Duncker & Humblot, 2015) 263.

[33] Commission staff working document, impact assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, 21 December 2016, SWD/2016/0468 final - 2016/0412 (COD).

It is worth mentioning that Directive 201/42/EU also introduces a minimum level of procedural safeguards that must be implemented at national level: these basically consist in the obligation to communicate the order with its underlying reasons as well as the possibility of a judicial review[34]. Nevertheless, no clear limits are incorporated in the substantive regulation of these new confiscation measures. The EU legal framework does not even explicitly preclude, for example, the confiscation of all assets of the convicted person[35]. For this reason, the ECtHR case law plays an important role in the identification of the limits to such afflictive measures, and in the future a similar role could be played by the CJEU, which may be called to clarify the scope and content of the Charter of Fundamental Rights of the European Union (CFREU) in this context. For the past four decades, the ECtHR has tried to find a fair balance between the interests of the States and those of the confiscation subjects with respect to both conviction-based and non-conviction-based confiscation. The lessons of the ECtHR are therefore a valuable asset for the continuing development of confiscation as a leading (anti-profit) criminal policy measure to fight crime given its direct impact and applicability on national orders. That said, the case law developed by the ECtHR ought not to be considered as sacrosanct as only constituting minimum standards that Member states have to abide with. Further, the Court is manifestly not immune to inconsistent interpretations and disputable judgments which have sparked criticism.

4. *The key question: confiscation as a criminal sanction?*

The identification of the fundamental rights that have to be protected, and to what extent, depends on a preliminary crucial question concerning the nature of a confiscation measure: is it a criminal sanction, or can it be considered as a different type of measure, different from a penalty? Obviously, only in the first case the full set of principles and safeguards applicable to criminal law cases must apply. For example, Article 6(2) and Article 6(3) ECHR would be engaged, and some features of civil proceedings – such as the standard of proof based on the balance

[34] Art. 8 of Directive 2014/42/EU.

[35] Some limits can be found in Recitals 17 and 18. See 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"' (2015) *Dir. pen. cont. - Riv. trim.*, 300. It must be noted that confiscation of estate (i.e. of all assets of a person) is a possibility in France contrary to most countries.

of probabilities instead of the beyond any reasonable doubt principle – could be considered in contrast with due (criminal) process standards. Similarly, the principle of legality enshrined in Article 7 ECHR would be triggered, thereby imposing a non-retroactive legal basis. Even the *ne bis in idem* principle (Article 4 Protocol 7 ECHR) could be at stake, for example, if proceedings targeting assets were linked to a crime for which a final decision has already been issued.

The question about the nature of confiscation arises because national law often does not label a confiscation measure as a penalty, but rather as a security measure, a preventive measure, or as a remedial measure – all not aiming at the punishment of the culprit, but at the neutralisation of crime profit and at the removal of illegal proceeds from the licit economy. It is well-known, however, that the ECtHR adopts an autonomous concept of criminal matter, independent from national labels. Since the *Engel* judgment[36], the ECtHR has developed some criteria to assess whether a certain measure is substantially punitive, regardless of its formal classification at the national level: these criteria include the nature of the offence, and the degree of severity of the sanction.

Already at this point, however, when looking at the way in which these criteria have been applied to confiscation measures, it is quite difficult to decipher the rationale behind the ECtHR case law[37]. In some cases, measures that were defined as non-criminal by national law were treated as a penalty by the ECtHR. In other similar cases, the national classification has been upheld by the judges in Strasbourg.

An example of the first case, where the national label was re-qualified, concerns a confiscation measure for the illegal construction of buildings labelled as administrative in Italy ('confiscation of land'). It was applied despite the eventual acquittal of the defendant, on the basis of the consideration that the *actus reus* was anyway ascertained during the criminal proceedings. Italian courts, indeed, concluded that the building had been illegally built; however, since the local authority had granted

[36] *Engel and Others v. the Netherlands*, nos 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, 23 November 1976, §§ 80-85. The aim Engel test is to prevent national legislators from circumventing the application of fundamental guarantees that attach to criminal proceedings through different (and cosmetic) labeling. In brief, characterizing a measure as 'criminal' under the *Engel* test makes the guarantees protected by article 6, article 7 and article 4 of Protocol 7 ECHR all applicable. The *Engel* text requires the ECtHR to analyse (*i*) the domestic classification of the measure, (*ii*) the nature of the offence and (*iii*) the degree of severity of the penalty.

[37] R. Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (Cambridge University Press, 2014) 150.

the authorisation, they found that the accused was not guilty of negligence and had not had any unlawful intent: the law governing the authorisation system was not clear enough and the defendant's mistake was unavoidable. On the basis of these facts, in *Sud Fondi* the ECtHR condemned Italy for a violation of Article 7 ECHR, since the legal basis for the offence did not satisfy the criteria of clarity, accessibility and foreseeability. Consequently, it was impossible to foresee that a penalty could be inflicted[38].

Some years later, another case concerning the same kind of 'administrative' confiscation was brought before the ECtHR: in this case, the criminal proceedings had been discontinued on the grounds that the prosecution had become time-barred after the applicant had been convicted in the first degree[39]; nonetheless, a confiscation measure was applied. In *Varvara*, the ECtHR considered that measure as a penalty, and punishing a defendant whose trial has not resulted in a conviction as incompatible with Article 7 ECHR:

> 'a system which punished persons for an offence committed by another would be inconceivable. Nor can one conceive of a system whereby a penalty may be imposed on a person who has been proved innocent or, in any case, in respect of whom no criminal liability has been established by a finding of guilt'[40].

Such a judgment concerning an administrative confiscation, issued after an acquittal due to time-barred prosecution, has sparked a judicial 'dialogue' – as a matter of fact rather conflictual – with the Italian Constitutional Court, who held that Italian courts are obliged to implement only those ECtHR judgments that reflect a 'consolidated case law'. According to the Italian Court, this is not the case for *Varvara*, which is just the result of the casuistic approach followed by the judges in Strasbourg[41].

Recently, the Grand Chamber of the ECtHR 'replied' to the Italian Court through an important judgment on some cases concerning the same confiscation measure applied after the criminal proceedings was time barred[42]. Such a judgment, however, is far from clarifying all the de-

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[38] ECtHR, *Sud Fondi Srl v. Italy*, App. No. 75909/01, 20 January 2009.

[39] Contrary to the *Sud Fondi* case, therefore, the acquittal was not a decision on the merits.

[40] ECtHR, *Varvara v. Italy*, App. no. 17475/09, 29 October 2013, § 66-67.

[41] Italian Constitutional Court, 26 March 2015, no. 49.

[42] ECtHR, *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.

bated aspects outlined in this paper and from giving more consistency to the ECtHR case law in this field. At a first look, indeed, this new judgment seems to deviate from the previous *Varvara* judgment – and to lower the standards of Article 7 ECHR – in order not to create further conflicts with the Italian Court. According to the Court, indeed, Article 7 does not necessarily require a 'formal' conviction (i.e., a conviction 'decided by criminal courts within the meaning of domestic law') for the application of a substantially-criminal sanction. A 'substantial' declaration of liability – as the one made by the Italian courts before the lapse of time that put an end to the criminal proceedings – may be 'capable of satisfying the prerequisite for the imposition of a sanction compatible with Article 7 of the Convention'[43], according to the ECtHR.

It is worth observing that this conclusion was certainly – and to some extent understandably – determined by the need to respect the discretion of the States in choosing what to consider as criminal or administrative[44]. As said, the application of the *Engel* criteria does not oblige the States to transfer administrative cases to criminal courts, but just to ensure the respect of certain criminal-law safeguards also in administrative punitive proceedings. However, the judgment leaves the impression that such a watered-down interpretation of Article 7 ECHR was mainly reached on the basis of two arguments that have been strongly criticised in the separate opinions[45], namely on those concerning the need to avoid impunity and the complexity of crimes that, combined with short time limitation periods, would cause such an impunity[46].

Furthermore, the same separate opinions point out the incoherent results of this judgment. If such a confiscation measure does not represent a violation of Article 7 in respect to one applicant, on the other hand it does violate the right to be presumed innocent until proven guilty according to law, protected by Article 6(2) ECHR. According to the ECtHR, a problem arises 'where a court which terminates proceedings because they are statute-barred simultaneously quashes acquittals handed down by the lower courts and, in addition, rules on the guilt of the person concerned'[47]. And this is what happens in the Italian case, since the substantial demonstration of liability (sufficient to ensure compliance

[43] ECtHR, *G.I.E.M. s.r.l. v. Italy*, § 258.

[44] *Ibidem*, § 253.

[45] *Ibidem*. See in particular those of Judge Pinto de Albuquerque (p. 81) and Judges Sajó, Karakas, Pinto de Albuquerque, Keller, Vehabovic, Kuris and Grozev (p. 154).

[46] *Ibidem*, § 260.

[47] *Ibidem*, § 316.

with Article 7) is seen as a declaration of guilt incompatible with the presumption of innocence. For this reason, the Court seems to have accommodated the views of the Italian constitutional court as regards Article 7, but on the other hand does not 'save' such a peculiar non-conviction-based form of confiscation, and raises the higher barrier of Article 6(2).

Besides the Italian 'confiscation of land', the ECtHR has addressed on various occasions the national labelling and has analysed the impact of confiscation measures related to serious and/or organised crime on this essential safeguard.

In *Paraponiaris*, a pecuniary measure was applied to the applicant after he had been acquitted because of a time-barred prosecution, since the national courts held that the offence was 'objectively' ascertained despite the eventual acquittal. In this case, the ECtHR found a violation of Article 6(2) ECHR since the application of a sanction after an acquittal, because the offence had actually been committed, is comparable to a determination of guilt without a due process[48].

In *Welch*, for example, dealing with the retrospective application of an *extended* form of confiscation related to drug trafficking, which was considered by the British legislator as a preventive measure aimed at removing the value of the proceeds from possible future use in the drugs trade, the ECtHR held that in reality that confiscation amounted to a penalty within the meaning of Article 7 ECHR, and that therefore it could not have retroactive application. To reach such a conclusion the ECtHR observed, on the one hand, that the purpose of the measure is not conclusive, since the 'aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment'[49]; on the other hand, that not even the severity of the measure is decisive, since 'many non-penal measures of a preventive nature may have a substantial impact on the person concerned'[50]. The Court, therefore, found indications of a regime of punishment in other factors, such as the existence of statutory presumptions that reverse the burden of proof, the fact that the order was not limited to actual enrichment or profit but to all proceeds of crime, the discretion left to the judge, and the fact that a confiscation order could be converted into a prison sentence.

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[48] ECtHR, *Paraponiaris v. Greece*, App. no. 42132/06, 25 September 2008. See M. PANZARASA, 'Confisca senza condanna? Uno studio *de lege lata* e *de iure condendo* sui presupporti processuali dell'applicazione della confisca' [2010] *Riv. it. dir. e proc. pen.*, 1672, 1691.

[49] ECtHR, *Welch v. The United Kingdom*, App. no. 17440/90, 9 February 1995, § 31.

[50] I.e. a conviction-based confiscation of assets deriving from other criminal conduct, for which there has been no conviction.

In the famous case *Phillips*, which also concerns an English regime of extended confiscation[51], the ECtHR was asked to establish whether the applicant was subject to new charges (as regards the assets deriving from un-proven criminal conduct) and, if not, whether the presumption of innocence produced an effect, notwithstanding the absence of new charges[52]. The main argument leading the Court to find Article 6(2) ECHR non applicable to those facts is that the purpose of the reference to other criminal conduct 'was not the conviction or acquittal of the applicant for any other drug-related offence' but 'to enable the national court to assess the amount at which the confiscation order should properly be fixed'. In other words, the Court considered the reference to other offences only as a criterion to determine the extent of the confiscation, operating in the sentencing phase (for the judged offences) but not representing a new charge for the other non-judged offences allegedly committed by the convicted person. As to the other prong of the question – whether the presumption of innocence applies even if no new charges are brought – the ECtHR noted that Article 6(2) ECHR 'can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning', without further elaborating on the nature and degree of those specific accusations deriving from the confiscation procedure. Furthermore, the ECtHR held that the reversal of the burden of proof – provided in the UK in order to ascertain the link between assets and other offences – did not violate the notion of a fair hearing under Article 6(1) ECHR. According to the ECtHR, the applicant benefited from adequate safeguards: among them, a public hearing where he could adduce documentary and oral evidence, and the effective possibility to rebut the presumption of the criminal origin of the assets targeted by the extended confiscation.

By contrast, a violation of the presumption of innocence was found in *Geerings*, where the Court condemned the Netherlands because an extended confiscation order, issued after a conviction, covered assets deriving from crimes for which the applicant had been previously acquitted. This, according to the ECtHR, amounted to a determination of guilt without the applicant having been found guilty according to law[53].

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[51] *Ibidem*, § 32.

[52] ECtHR, *Phillips v. The United Kingdom*, App. no. 41087/98, 5 July 2001. See also ECtHR, *Van Offeren v. The Netherlands* (dec.), App. no. 19581/04, 5 July 2005; and ECtHR, *Walsh v. The United Kingdom*, App. no. 43384/05, 21 November 2006.

[53] ECtHR, *Geerings v. The Netherlands*, App. no. 30810/03, 1 March 2007.

In *Butler*, a case brought against the United Kingdom concerning its regime of *non-conviction-based confiscation* (civil asset forfeiture) related to drug trafficking – which, according to the applicant, is criminal in nature and should, therefore, attract the safeguards of the criminal process – the Court declared the application inadmissible *ratione materiae*. The main reason is that those kind of confiscation orders do not involve the determination of any criminal charge, more or less like the reference to other criminal conduct in extended confiscation assessed in *Phillips*. This makes it incomparable with a criminal sanction, since the non-conviction-based confiscation regime applied in the case under scrutiny 'was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs'[54].

On repeated occasions[55], the Italian (non-conviction-based) anti-mafia preventive confiscation regime has also been considered as a non-criminal measure. Since several decades, Italy has introduced a peculiar system of rather burdensome 'preventive measures', both personal (i.e. limiting the liberty of persons) and patrimonial (i.e., touching upon their property). They are devised to tackle organised crime more effectively than criminal proceeding, since they can be applied to persons who are not convicted, but only suspected of being connected to a mafia organisation (or, since more recently, involved in other serious offences). As regards the patrimonial side, the nature of that peculiar confiscation has been long debated in Italian case law, which tend to emphasise its preventive non-criminal facet, and literature, which is generally much more critical against the non-criminal label and the consequent lowering of safeguards[56]. The ECtHR has never found this kind of preventive confiscation to be criminal in nature and to attract the safeguards typical of criminal proceedings[57]. The only aspect that determined a condemnation of Italy for a violation of the civil limb of Article 6 ECHR has been the lack of the possibility to request a public hearing to decide for their application[58]. This led some authors to observe that the ECtHR

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[54] ECtHR, *Butler v. United Kingdom* (dec.), App. no. 41661/98, 27 June 2002.

[55] Starting with ECtHR, *M v. Italy* (dec.), App. no 12386/86, 15 April 1991.

[56] 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. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (Duncker & Humblot, 2015) 111.

[57] ECtHR, *Arcuri and others v. Italy* (dec.), App. no. 52024/99, 5 July 2001; ECtHR, *Licata v. Italy* (dec.), App. no. 32221/02, 27 May 2004; ECtHR, *Riela and others* (dec.), App. no. 52439/99, 4 September 2001.

[58] ECtHR, *Bocellari and Rizza v. Italy*, App. no. 399/02, 13 November 2007; ECtHR, *Bongiorno and others v. Italy*, App. no. 4514/07, 5 January 2010.

has been 'tolerant'[59] and has 'shown a readiness to display considerable deference towards how states construct and use asset confiscation as a means of crime control'[60].

Recently, the Georgian non-conviction-based confiscation and unexplained wealth orders system has been repeatedly challenged before the Court. Such a system allows enforcement authorities to recover assets wrongfully or inexplicably accumulated by public officials accused of certain offences, without obtaining their conviction and through relying on the use of presumptions. In these cases, however, the ECtHR has underlined that the non-conviction-based confiscation of property as a result of civil proceedings, which results from unexplained wealth orders and does not involve the determination of a criminal charge, is not of a punitive but of a preventive and/or compensatory nature, and therefore does not entail the application of Article 6(2) and 6(3) ECHR[61]. Interestingly, the ECtHR first conducted an analysis as to whether the 'more extensive'[62] or the 'most limited'[63] aspect of Article 6(2) ECHR was concerned – should the Court conclude to the applicability of the provision. It found that the more extensive aspect was of no relevance since the non-conviction-based proceedings did not take place after criminal prosecution of the confiscation subject but preceded it. It then denied the applicability of the more limited aspect of Article 6(2) since civil *in rem* confiscation proceedings 'do not stem from a criminal conviction or sentencing proceedings and thus do not qualify as a penalty' and cannot amount to the determination of a criminal charge.

Overall, and as already said, a point of criticism often raised toward the case law of the ECtHR concerns its incoherence, and therefore the unpredictability of its outcome in a specific case. This might be due, for

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[59] M. Panzavolta, 'Confiscation and the Concept of Punishment: Can There be a Confiscation Without a Conviction?', in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 25.

[60] J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017) 23.

[61] See, among others, ECtHR, *Gogitidze and others v. Georgia*, App. no. 36862/05, 12 May 2015; ECtHR (dec.), *Giorgi Devadze v. Georgia*, App. no. 21727/05, 3 November 2016.

[62] 'The role of which is to prevent the principle of presumption of innocence from being undermined after the relevant criminal proceedings have ended with an outcome other than conviction (such as acquittal, discontinuation of the criminal proceedings as being statute-barred, the death of an accused, and so on'. *Gogitidze and others v. Georgia*, § 125.

[63] 'The role of which is to protect an accused person's right to be presumed innocent exclusively within the framework of the pending criminal trial itself'. *Gogitidze and others v. Georgia*, § 126.

example, to the fact that the ECtHR often seems to ground its conclusions on the assessment of the purpose of the measure, excluding the nature of penalty whenever there is not a clear punitive aim.

5. *Confiscation as something else than a criminal sanction*

If the answer to the question concerning the nature of a confiscation measure, even after applying the *Engel* criteria, is that confiscation is not a penalty, but a different kind of measure, it does not follow – of course – that fundamental rights do not apply at all, but just that different rights, or different aspects of those rights, are at stake. Consequently, certain safeguards can be diluted, but do not disappear. A legal basis is still necessary, even if the legality principle is less stringent, the defence rights are those that fall within the civil limb of Article 6 (instead of the full set of guarantees provided for criminal proceedings), the standard of proof can be based on the balance of probabilities instead of the beyond any reasonable doubt, the use of presumption (thereby the reversal of the burden of proof) can be more extensive, etc.[64]

How much weaker the protection of fundamental rights outside the realm of criminal law can be, however, is not self-evident. European and national case law, as well as scholarly literature, are still struggling to identify what safeguards ought to apply to non-criminal (or quasi-criminal, being in any case a component of the public response to crime) confiscation proceedings. Rather that within the scope of Article 6 and 7, the answer is sought in the realm of the right to property. Article 1, Protocol 1, ECHR provides, indeed, that no one can be deprived of his possessions 'except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. The ECtHR has clarified that this means that the Convention requires a legal basis for any interference with the 'peaceful enjoyment' of one's possessions (lawfulness), and that such an interference, based on public interests, is proportionate to the legitimate aim pursued (proportionality)[65].

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[64] M. Panzavolta, 'Confiscation and the Concept of Punishment: Can There be a Confiscation Without a Conviction?', in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 25, 34.

[65] More precisely, the Court held that 'where a confiscation measure has been imposed independently of the existence of a criminal conviction but rather as a result of separate "civil" (…) judicial proceedings aimed at the recovery of assets deemed to have been acquired unlawfully, such a measure, even if it involves the irrevocable forfeiture of possessions,

As regards the lawfulness, the ECtHR clarified that, in order to ensure adequate protection against arbitrary action on the part of the authorities, it exercises a scrutiny on the 'quality of the law', in the sense that the requirement of lawfulness means also compatibility with the rule of law. Domestic rules, therefore, must be sufficiently precise and foreseeable, and the law must provide legal protection against arbitrariness. Recently, for example, the ECtHR condemned Bulgaria in a case concerning an unexplained wealth order (i.e. non-conviction-based confiscation issued against unexplained – therefore allegedly 'unlawful' – income). One of the reasons for the violation of Article 1, Protocol 1, ECHR was identified in the fact that no time limits were provided for the possibility for the State to require evidence about personal revenues and expenditure, therefore, in principle, prosecution authorities would be free to 'open, suspend, close and open again proceedings at will at any time'[66].

In this regard, it is worth mentioning that there is the possibility that the ECtHR approach to the Italian preventive confiscation (see above 4) might change if the Court decides to go down the road recently taken by the Grand Chamber in *De Tommaso*[67]. That case concerned the application of *praeter delictum* personal 'preventive measures', namely a sort of special police supervision accompanied by several obligations (such as not changing place of residence, or leading a 'honest and law-abiding life'). In that case, the ECtHR held that such measures violated Article 2 Protocol 4 ECHR, which provides that any measure restricting the liberty of movement must be adopted in accordance with domestic law, pursue one of the legitimate aims referred to in the third paragraph of that Article, and strike a fair balance between the public interest and the individual's rights. The Court recalled that the legal basis to adopt such measures must be accessible to the persons concerned and foreseeable to its effects: this means that the law, in order to protect individuals against arbitrary interferences by the public authorities, must be formulated 'with sufficient precision to enable citizens to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'[68]. This is not the case with such measures, according to the ECtHR, since Italian law does not clearly identify the 'fac-

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constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1' (ECtHR, *Gogitidze and others v. Georgia*, App. No. 36862/05, 12 May 2015, § 94).

[66] ECtHR, *Dimitrovi v. Bulgaria*, App. no. 12655/09, 3 March 2015, § 46.

[67] ECtHR (GC), *De Tommaso v. Italy*, App. no. 43395/09, 23 February 2017.

[68] ECtHR (GC), *De Tommaso v. Italy*, App. no. 43395/09, 23 February 2017, § 107.

tual evidence' or the specific types of behaviour that can be taken into consideration to assess the dangerousness of the individual, which may give rise to the preventive (personal) measure; in other words, the vagueness of the law regulating the conditions to apply such measures, as well as their content, does not provide sufficient protection against arbitrary interferences with the freedom of movement.

Although this case concerns personal measures, there might be consequences on the future case law concerning the preventive non-conviction-based confiscation, since the two legal regimes, and the requirements to apply the respective measures, are quite similar[69]. As said above, the ECtHR did not consider the Italian personal preventive measures as criminal in nature: only the civil aspects of Article 6 ECHR were considered applicable, and no violation was found in that respect. Hence despite the various arguments used by scholars and dissenting judges[70], there are no real reasons to expect that this is likely to happen soon with regard to patrimonial preventive measures. Nevertheless, applying to patrimonial measures the reasoning followed by the ECtHR in *De Tommaso* (as regards the personal measures) may lead to a more severe scrutiny of the 'quality of law' needed to adopt measures restricting the right to property[71].

As regards the proportionality, it is worth mentioning that this concept is not explicitly mentioned in the ECHR, but has acquired an important role due to the development of the ECtHR case law especially as regards the 'qualified rights', i.e. those non-absolute rights that can be subject to legitimate limitations, such as the right to private life, the right to manifest one's religion or belief, the right to freedom of expression, and indeed the right to property. The proportionality test is conducted when there is an interference with a fundamental right, and aims to assess whether such an interference pursues a legitimate objective, whether the measure is suitable to reach that objective, whether it is necessary (i.e., if no other less intrusive means were available) and whether it is proportionate to the final objective (proportionality *stricto sensu*)[72]. This

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[69] F. Viganò, 'La Corte di Strasburgo assesta un duro colpo alla disciplina italiana delle misure di prevenzione personali', in *www.penalecontemporaneo.it*, 3 March 2017.

[70] In his partly dissenting opinion in *De Tommaso*, judge Pinto de Albuquerque explains why he considers these preventive measures criminal in nature in light of the *Engel* criteria.

[71] Judge Pinto de Albuquerque (§ 60) concluded that 'the Italian legislature evidently has to draw all the logical conclusions from the present judgment with regard to the recent Legislative Decree no. 159/2011, and the sooner the better.

[72] See R. Alexy, 'Constitutional Rights and Proportionality' (2014) *Revus* [online] 22.

implies, in other words, an assessment of the relation between means and ends, which requires a fair balance between the competing interests protected by the human right and those of the community as a whole[73].

In some cases, the ECtHR has affirmed that an interference with the right to property violates the principle of proportionality – compromising the fair balance between individual right and general interest – when an excessive burden is imposed on the property-owner. In *Paulet*, the applicant complained that the confiscation orders (following a conviction for obtaining employment using a false passport) had been disproportionate as it amounted to the confiscation of his entire savings over nearly four years of genuine work, without any distinction being made between his case and those involving more serious criminal offences such as drug trafficking or organised crime. The Court specified that, '[a]lthough the second paragraph of Article 1 of Protocol No. 1 contains no explicit procedural requirements, the Court must consider whether the proceedings as a whole afforded the applicant a reasonable opportunity for putting his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake'[74]. This was not the case in the domestic proceedings, according to the ECtHR: the UK courts simply considered that the confiscation order had been issues in the public interests, but they did not go further to conduct the other aspects of the proportionality test, meaning they did not balance the interference in the public interest with the right to peaceful enjoyment of an individual's possessions as recognised by the ECHR. The scope of their review, in other words, had been too narrow to satisfy the requirement of seeking a fair balance between opposite interests.

In *Microintelect*, a case dealing with Bulgarian confiscation in administrative punitive proceedings concerning the selling of alcohol without the required authorisation, the ECtHR stressed that, when finding the balance between property rights and general interests, the States have a wide margin of appreciation when passing laws for the purpose of securing the payment of taxes, since decisions in this area 'commonly involve the consideration of political, economic and social question which the Convention leaves within the competence of the Contracting States'[75]. In that case, however, Bulgaria was condemned for a violation of Article

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[73] See, as regards Art. 8 ECHR, *Von Hannover v. Germany*, App. no. 59320/00, 24 June 2004, § 57.

[74] ECtHR, *Paulet v. The United Kingdom*, App. no. 6219/08, 13 May 2014, § 65.

[75] ECtHR, *Microintelect Odd v. Bulgaria*, App. no. 34129/03, 4 March 2014, § 42. See also ECtHR, *Aboufadda v. France*, App. no. 28457/10, 4 November 2014, § 22.

1, Protocol 1, ECHR because the applicant – a 'third party' whose property was affected – could not intervene in the proceedings against the alleged offender. In addition, since there was no legal basis for a judicial review of the decision, the Court did not find that national law provided adequate safeguards against unjustified interferences with property rights.

Even the assessment of the proportionality of the interference with the right to property may, therefore, be influenced by the level of procedural safeguards granted to the applicant. In *Webb*, for example, the Court observed that the applicant had an adversarial procedure before the national authorities who decided on the (non-criminal) confiscation, and that proceedings applying the civil standard of proof do not entail that the measure is disproportionate. In that case, a potential violation of Article 6(1) ECHR (civil limb) was rather identifiable in the lack of reasoning for the decision; however, the application was declared inadmissible because of the non-exhaustion of all domestic remedies[76].

This emerged even more clearly in the above-mentioned *Gogitidze*, which concerns unexplained wealth orders related to corruption offences, where the ECtHR recognised the legitimacy, in the anti-corruption field, of 'internationally acclaimed standards' concerning *in rem* confiscation measures that entail, *inter alia*, the possibility of lowering the standard of proof and to tackle assets belonging to third parties ('family members and other closer relatives who were presumed to possess and manage the ill-gotten property informally on behalf of the suspected offenders, or who otherwise lacked the necessary *bona fide* status'). Assessing, and confirming, the proportionality of the national measures, the ECtHR stressed that States have a wide margin of appreciation with regard to what constitutes the appropriate means of applying measures to control the use of property[77]. Most decisively, the Court acknowledged that the applicants were afforded 'a reasonable opportunity of putting their arguments before the domestic courts', both in writing and at an oral hearing; that the proceedings were conducted in an adversarial manner; and that the domestic courts duly examined the prosecutor's claim in the light of numerous supporting documents available in the case file[78].

All in all, there are not many cases in which the Court found the interference with property rights disproportionate as such. This is not surprising, since there are no clear cut criteria to determine what amounts

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[76] ECtHR, *Webb v. The United Kingdom* (dec.), App. no. 56054/00.

[77] ECtHR, *Gogitidze and others v. Georgia*, App. No. 36862/05, 12 May 2015, § 108.

[78] ECtHR, *Gogitidze and others v. Georgia*, App. No. 36862/05, 12 May 2015, § 109-113.

to a disproportionate interference with the right to property. Proportionality, as developed by the ECtHR, is a rather 'procedural' concept, which serves as an analytical framework that may lead to different results according to the specific weight of the various factors taken into consideration in the different contexts, particularly those related to the procedure that led to the adoption of the confiscation order[79]. Such a reliance on proportionality in human rights adjudication has been subject to criticism because of the lack of clear guidance to the judge as to how to determine when a concrete measure does not represent a fair balance, or when the adopted means could be proportionate to the legitimate objective[80]. As regards measures against the right to property, the ECtHR has shown a tendency to apply a less stringent proportionality test compared with the one conducted as regards other fundamental rights[81]. in particular when such measures are part of an enforcement strategy against serious crime like drug trafficking, organised crime, and – more recently – corruption. Also for this reason, one may conclude that the protection offered by the ECHR as regards the right to property is lower than that provided by the full set of provisions of Article 6 and 7 ECHR. The question concerning the true nature of confiscation measures, therefore, maintains its relevance.

6. *Conclusions*

Confiscation has been increasingly acquiring a prominent place in the design of criminal policies in the field of serious and/or organised crime and terrorism, but also more in general in the field of economic and financial crime. The interest of national legislators and practitioners in fostering the effectiveness of measures against criminal property has certainly risen in the last years. The risks of such a trend are to be assessed by taking into consideration the various fundamental rights endangered by these measures. At the national level, domestic courts are struggling to find a balance between effectiveness (if not efficiency) of

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[79] J. Mc Bride, 'Proportionality and the European Convention on Human Rights', in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart, 1999) 23; T. Harbo, *The Function of Proportionality Analysis in European Law* (Brill Nijhoff, 2015) 63; Boucht [6] 168; A. Marletta, *Il principio di proporzionalità della disciplina del mandato d'arresto europeo* (Cedam, forthcoming).

[80] F.J. Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press, 2017) 2-7.

[81] J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017) 174.

crime control mechanisms and protection of human rights. In the European context, both the ECHR and the CFREU contain provisions that imply certain limits to confiscation measures, and a minimum level of safeguards for convicted persons, defendants, or simple property owners. So far, the ECtHR has dealt with a number of cases involving examples of extended, non-conviction based (including unexplained wealth orders), and third party confiscation, i.e. the most recent and afflictive forms of confiscation. In the future, the CJEU may also be asked to clarify the content and scope of the rights provided by the CFREU.

Over the past four decades, the developments of the ECtHR on the compliance of confiscation orders with fundamental rights have been quite extensive. In most instances, applicants have argued that the confiscation order they had faced violated their right to be presumed innocent (under Article 6(2) ECHR), the right to a fair trial (under Article 6(1)) and/or their right to property (Article 1 Protocol 1). Without any attempt to draw comprehensive conclusions from the ECtHR's case law, it is interesting to highlight a few high level lessons learned from the Court in this area[82]:

Article 6(2), which protects the presumption of innocence, shall only apply in very limited instances: (extended) criminal confiscation should not trigger Article 6(2) for it does not amount to a criminal charge but rather constitutes part of the sentencing process… except when the scope of confiscated property includes property linked to a crime for which defendant was actually acquitted. Similarly, non-conviction-based confiscation (including unexplained wealth orders) should not trigger the right to be presumed innocent since it does not amount to a criminal charge and therefore does not qualify as a penalty[83].

Article 6(1) and the right to a fair hearing shall always apply – under either its civil or its criminal limb: reasonable (and rebuttable) statutory assumptions should generally be held to comply with Article 6(1) in both (extended) conviction-based and non-conviction-based proceed-

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[82] Summary of M. FERNANDEZ-BERTIER, 'Fundamental rights in confiscation proceedings: An ECtHR state-of-the-art', presentation made at the *Confiscation of criminal assets in the European Union* conference, Utrecht University, 23 November 2017, available at *www.improvingconfiscation.eu*.

[83] See among others ECtHR, *M. v. Italy* (dec.), App. no. 12386/86, 15 April 1991; *Raimondo v. Italy*, App. no. 12954/87, 22 February 1994; *Phillips v. the United Kingdom*, App. no. 41087/98, 5 July 2001; *Butler v. the United Kingdom* (dec.), App. no. 41661/98, 27 June 2002; *Van Offeren v. the Netherlands* (dec.), App. no. 19581/04, 5 July 2005; *Walsh v. the United Kingdom* (dec.), App. no. 43384/05, 21 November 2006; *Geerings v. the Netherlands*, App. no. 30810/03, 1 June 2007; *Gogitidze and others v. Georgia*, App. no. 36862/05, 12 May 2015; ECtHR (dec.).

ings. The ECtHR has also been attentive to the reasonable length of confiscation proceedings and to the need that confiscation subjects be at least granted the opportunity to ask for a public hearing to challenge the confiscation order[84].

Article 1 Protocol 1 shall always be triggered by a confiscation order. However, only a limited number of ECtHR judgments have concluded to a violation of the right to property: where confiscation is considered to be lawful, it is the analysis of the proportionality of the interference that bears the more weight, i.e. whether the procedure for confiscation was arbitrary and whether the domestic courts acted without arbitrariness. What matters is the respect of a 'fair balance', i.e. making sure that the interference was proportionate and that the applicant did not have to bear an excessive individual burden, and in particular that the applicant had a reasonable opportunity to put its case before relevant authorities[85].

Overall, safeguards and limits differ depending on whether confiscation measures are criminal in nature or not. The criminal limb of Article 6 ECHR, as well as Article 7 ECHR, apply to confiscation measures whose nature is that of a penalty, whatever the national label is. The assessment of the nature carried out by the ECtHR is, therefore, crucial to determine the violation of those conventional rights. However, the application of the long-established Engel criteria to guide such an assessment – national qualification, nature of the offence, and severity of the sanction – do not always lead to predictable and consistent outcomes. The assessment seems to strongly depend on the purpose of the sanction – preventive and/or compensatory rather than punitive – but this is a debatable approach, since penalties too may combine punitive with preventive purposes[86].

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[84] See among others ECtHR, *Autorino v. Italy* (dec.), App. no. 39704/98, 21 May 1998; *Phillips v. the United Kingdom*, App. no. 41087/98, 5 July 2001; *Webb v. United Kingdom*, App. no. 56054/00, 10 February 2004; *Grayson and Barnham v. United Kingdom*, App. nos. 19955/05 and 15085/06, 23 September 2008; *Minhas v. the United Kingdom* (dec), App. no. 7618/07, 10 November 2009; *Pozzi v. Italy*, App. no. 55743/08, 26 July 2011; *Gogitidze and others v. Georgia*, App. no. 36862/05, 12 May 2015.

[85] See among others ECtHR, *Butler v. the United Kingdom* (dec.), App. no. 41661/98, 27 June 2002; *Vasilyev and Kovtun v. Russia*, App. no. 13703/04, 13 December 2011; *Zakova v. the Czech Republic*, App. no. 2000/09, 3 October 2013; *Gogitidze and others v. Georgia*, App. no. 36862/05, 12 May 2015.

[86] F. Mazzacuva, 'The Problematic Nature of Asset Recovery Measures: Recent Developments of the Italian Preventive Confiscation', in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 101. See also the partly dissenting opinion of judge Pinto de Albuquerque in *De Tommaso*, § 37.

In the future, therefore, the Court may strive to refine the common European understanding of criminal charge and criminal sanction, further clarifying the distinction between punitive, preventive and reparative purposes, as well as to clarify the scope of Article 6, Article 7 and Article 1 Protocol 1 ECHR in relation to the different confiscation measures. As several authors suggest, to make the outcome of its case law more predictable and unfluctuating, the ECtHR might also endeavour to find a more 'principled reasoning' to distinguish the various forms of confiscation, based for example on the forfeitable object or the procedure followed to adopt the measure[87]. However, the recent judgments – in particular the *G.I.E.M. S.R.L.* issued in June 2018 – appear as a missed opportunity, and further contribute to making some features of the fundamental rights at stake unclear. For example, it often happens that the procedural guarantees (Article 6 ECHR) are taken into consideration to assess the substantive aspects of Article 7 ECHR[88].

In *Varvara*, Judge Pinto de Albuquerque indicated that the ECtHR has tended to afford weaker guarantees to more severe and more intrusive confiscation orders, whereas it grants stronger protections to less serious deprivation measures. The Strasbourg judge decried that the ECtHR casuistic approach has resulted in a 'contradictory and incoherent' case law which even surpasses the contradictions between cases dealing with measures of substantially same nature. Given the multiplicity of established confiscation powers – i.e. preventive measures (*ante delictum*), criminal penalties, security measures or administrative orders – the ECtHR has yet failed in developing a 'coherent jurisprudence based on a policy rationale'[89]. About six years after J. Pinto de Albuquerque's opinion in *Varvara*, the tension between efficient confiscation measures and the protection of fundamental freedoms remains imbalanced – to the disadvantage of human protections.

Considering the proliferation of national laws extending confiscation powers, the need of a more coherent and comprehensive assessment of the various types of measures – as well as clearer indication of the limits of law enforcement powers deriving from fundamental rights – remains a high priority.

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[87] M. Panzavolta, 'Confiscation and the Concept of Punishment: Can There be a Confiscation Without a Conviction?' in K. Ligeti and M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing, 2017) 25.

[88] See the dissenting opinion of Judges Sajo, Karakas, Pinto de Albuquerque, Keller, Vehabovic, Kuris and Grozev in *G.I.E.M. S.R.L. and others v. Italy*, § 21-24.

[89] J. Pinto de Albuquerque's partly dissenting and partly concurring opinion in ECtHR, *Varvara v. Italy*, App. no. 17475/09, 29 October 2013, 28-30.

CIRO GRANDI

NON-CONVICTION-BASED CONFISCATION IN THE EU LEGAL FRAMEWORK

SUMMARY: 1. Introduction. – 2. Non-conviction-based confiscation in international law: an overview. – 3. Non-conviction-based confiscation in the Area of Freedom Security and Justice before the Treaty of Lisbon ("Third-pillar" instruments). – 4. The "changing fortunes" of non-conviction-based confiscation in the procedure for the adoption of Directive 2014/42/EU. – 4.1. The limited cases for non-conviction-based confiscation in the original Commission proposal. – 4.2. The innovative model of European non-conviction-based confiscation proposed by the LIBE Committee of the European Parliament. – 4.3. The "minimal" version of non-conviction-based confiscation under Article 4(2) of Directive 2014/42/EU. Critical remarks. – 5. The initiatives for improving the existing EU legal framework.

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]

[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

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].

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"

History of Confiscation Laws: From the Book of Exodus to the War on White-Collar Crime", *ivi*, 53 ff.

[4] For a full list of the instruments adopted by the EU in the field of confiscation see D. Nițu, "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.

[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. Nițu, "Extended and third party confiscation in the EU", op. cit.

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.

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

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[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.

[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.

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

[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, Section II 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, "Italy", in this book, par. 1.

[13] M. Simonato, M. Fernandez-Bertier, "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.

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 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 "Interna-

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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,

tional 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*".

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

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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.

[16] Signed in Strasbourg on 8 November 1990.

[17] Signed in Warsaw on 16 May 2005.

Conventions include among the "grounds for refusal" of inter-state co-operation 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,

> "*the 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 recognition of judicial

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[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.

[20] M. Simonato, "Directive 2014/42/EU 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 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).

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 value-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 en-

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[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.

suring "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]; 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].

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

[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", *Dir. pen. cont. - Riv. trim.*, 2, 2012, 181).

[27] As outlined by Niţu (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. Bouchт, *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" (Art. 8.3). All this considered, should the options adopted by Member States under the latter provision differ one from the other, this ground of refusal

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*

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 acknowl-

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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.

[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).

edge 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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[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.

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).

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 pro-

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[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.

posal 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 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

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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., 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", *Dir. pen. cont. - Riv. trim.*, 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", *Dir. pen. cont.*, 16 July 2013; C. Grandi, "Il ruolo del Parlamento europeo nell'approvazione delle direttive di armonizzazione penale", *Riv. it. dir. proc. pen.*, 2015, 709 ff.

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:

> "*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

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[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 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.

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 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 pro-

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[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.

[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.

posal[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* provi-

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[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

sions on NCBC[54], Art. 4(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].

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.

[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' ", *Dir. pen. cont. - Riv. trim.*, 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 2014/42/EU 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". There-

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].

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

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fore, 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. Niţu, "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.

[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 2014/42/EU 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. 41.

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 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 confis-*

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[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, "Confiscation and fundamental rights", op. cit., in this book, par. 4).

[63] M. Simonato, "Directive 2014/42/EU 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*

cation 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*

The shortcomings of the newly introduced NCBC legal framework prompted the European Parliament and the Council to adopt new initia-

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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.

tives. 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,

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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 2014/42/EU and non-conviction based confiscation", op. cit., 221.

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 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*

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[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, "Confiscation and fundamental rights", op. cit., in this book).

[77] See, *supra*, note 71.

[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", *Dir. pen. cont. - Riv. trim.*, 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", *Dir. pen. cont.*, 16 gennaio 2019.

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

> *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].

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 the-*

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[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).

[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".

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

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[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.

[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 evi-

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].

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dence, 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. *b*).

[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*, Cham: 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.

DANIEL NIŢU

EXTENDED AND THIRD PARTY CONFISCATION IN THE EU

SUMMARY: 1. Introduction. Outline of the study. – 2. Extended confiscation. Towards a new and integrative legal framework. – 2.1. Preliminary aspects. Terminology. From ordinary confiscation to extended confiscation. – 2.2. Legal framework – from the Joint Action of 3 December 1998 to Directive 2014/42/EU. – 2.3. Directive 2014/42/EU - the new standard for extended confiscation. – 2.3.1. A unique set of minimum rules for extended confiscation. – 2.3.2. The triggering offence - a broader approach. – 2.3.3. More accurate definitions. – 3. Third party confiscation. – 3.1. Preliminary aspects. – 3.2. Confiscation from a third party – Article 6 of Directive 2014/42/EU. – 3.3. The minimum standard required by Article 6. – 4. Conclusions. The German and the Romanian case studies. – 4.1. The German model and the Romanian proposal of July 2018. – 4.2. The impact of the new provisions. The future role of Court of Justice of the European Union.

1. *Introduction. Outline of the study*

During the last 20 years, building on the Tampere[1] and Stockholm Programmes[2], at the EU level, focus has been oriented towards reinforcing the fight against serious organized and transnational crime[3] and, in particular, the identification, seizure and confiscation of the proceeds

[1] See, Presidency Conclusions - Tampere European Council, 15 and 16 October 1999 (available at *https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm*).

[2] See the Council of the European Union, The Stockholm Programme - An open and secure Europe serving and protecting the citizens, Brussels, 2 December 2009 (available at *https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_stockholm_programme_-_an_open_and_secure_europe_en_1.pdf*).

[3] For a definition of transnational crimes, see S. GLESS, J.A.E. VERVAELE, "Editorial. Law Should Govern: Aspiring General Principles for Transnational Criminal Justice", *Utrecht Law Review*, (9) 4, 2013, 1-10. Gless and Vervaele define transnational crimes as offences that affect multiple jurisdictions, but are not core crimes in public international law, where as transnational criminal law would be the sum of existing laws applicable to transnational crimes.

and instrumentalities of criminal actions[4]. As Johan Boucht points out, "confiscation has been high on the agenda of the EU for at least two decades, which has resulted in a fairly comprehensive confiscation regime, comprising both substantial and procedural provisions"[5].

There is no doubt that as a result of the interest at EU level, a vast and complex legal framework devoted, generally speaking, to confiscation arose. Still, there is no consensus about the clarity and coherence of the outcome – partially demonstrated by the new efforts made, the last and definitely not least being Directive 2014/42/EU. Trying to sum up all the European instruments comprising this new legal framework, some authors make distinctions between substantial (material) provisions and procedural provisions[6] while others recognize, on the one side, common rules on the seizure and confiscation of proceeds and instrumentalities and on the other side, rules on the principle of mutual recognition of confiscation orders[7].

We opt for a more precise distinction, proposed by Simonato[8]: after establishing the fact that the EU so far has focused mainly on confiscation matters, rather than on other phases of the asset recovery process, he identifies three main areas of EU intervention: *harmonization of con-*

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[4] S. Montaldo, "Directive 2014/42/EU and social reuse of confiscated assets in the EU: advancing a culture of legality", *New Journal of European Criminal Law*, (6) 2, 2015, 197. For a similar approach, from the perspective of fighting corruption, which includes "asset recovery", see R.D. Ivory, "The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases", *Utrecht Law Review*, (9) 4, 2013, 149.

[5] See, J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, Oxford and Portland, Oregon: Hart Publishing, 2017, 30. As it seems, the author links the start of the period of interest at the EU level not to the 1999 Tampere Program, but to the Joint Action of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime.

[6] See, M.J. Borgers, "Confiscation of the Proceeds of Crime: The European Union Framework", in C. King, C. Walker (eds.), *Dirty Assets, Emerging Issues in the Regulation of Criminal Law and Terrorist Assets*, Ashgate, 2014, quoted by J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 30.

[7] S. Montaldo, *Directive 2014/42/EU and social reuse of confiscated assets in the EU: advancing a culture of legality*, op. cit., 197. Montaldo quotes F. Gascon Inchausti, "Mutual recognition and transnational confiscation orders", in S. Ruggeri (ed.), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*, Heidelberg: Springer, 2013, 253, who, as well, use the distinction minimum standards (on confiscation) and mechanism for recognition and execution of seizure and confiscation orders.

[8] See M. Simonato, "Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?", *New Journal of European Criminal Law*, (6) 2, 2015, 216-217.

fiscation regimes[9], *mutual recognition between judicial decisions on freezing and confiscation*[10] and *horizontal cooperation between national authorities involved in the recovery of assets*[11].

Starting from this latter distinction, but having in mind the previous ones, we must underline that our analysis will be dedicated strictly to

[9] The European instruments dealing with these aspects are – in a 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 (available online at *https://eur-lex.europa.eu/legal-content/FRF/TXT/?uri=celex:31998F0699*); Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds of crime (available online at *https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:32001F0500*); Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (available online at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32005F0212*) and last, but not least, 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 (*available online at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042*).

[10] The relevant instruments are as follows: Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (available online *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003F0577*); Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (available online at *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006F0783*); Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (available online at *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32014L0041*), which partially replace the provisions of Council Framework Decision 2003/577/JHA for the Member States bound by this Directive. As well, we must mention the Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders – the last draft version, from 18 June 2018 sends a strong message that the Council, following a provisional agreement with the European Parliament, agreed on the new rules. See, for more details, *Crime will no longer pay: Council agrees new rules on mutual recognition of freezing and confiscation orders*, Press Release, 20 June 2018, available online at *http://www.consilium.europa.eu/en/press/press-releases/2018/06/20/crime-will-no-longer-pay-eu-agree-new-rules-on-mutual-recognition-of-freezing-and-confiscation-orders/*.

[11] 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 (available online at *https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:32007D0845*) and Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (available online at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006F0960*). As Simonato points out, this latter instrument sets the rules for the cooperation - M. SIMONATO, *Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?*, op. cit., 217.

substantial (material) law aspects and, in particular, it will focus on confiscation issues, as regulated by EU normative instruments. Eventually, narrowing even more the object of the research, our analysis will follow a twofold approach – on the one side, extended confiscation and on the other side, third party confiscation, both in the version shaped by Directive 2014/42. Of course, reference to other types of confiscation and to procedural aspects is somehow inevitable, but these aspects will be touched upon only in order to fully understand the new EU approach regarding extended and third party confiscation.

2. *Extended confiscation. Towards a new and integrative legal framework*

2.1. *Preliminary aspects. Terminology. From ordinary confiscation to extended confiscation*

Confiscation per se, often called now the *regular criminal confiscation*[12] or *basic confiscation*[13] is a well-known institution of Criminal law, which is in general, conceived as "the final deprivation of the property representing the result of a crime for which the offender has been convicted"[14]. Irrespective of its legal nature (safety measure, remedy etc.), criminal confiscation is, as a general rule, mandatory and consecutive to

[12] See, J. BOUCHT, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 27. Previously (16 et seq.); the author dedicated an entire section to terminological aspects, having in mind that the term "confiscation' is used occasionally as a denominator for all kinds of confiscation".

[13] See, 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, Brussels, 17.12.2007, COM (2007) 805 final, 4 (available online at *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52007DC0805*).

[14] See also, M. SIMONATO, *Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?*, op. cit., 217. The author underlines that among the legislation and doctrine from Member States there are still discrepancies, as "different nuances and terminology" can be found, giving the example of the UK and quoting D.J. DICKINSON, "Towards more effective asset recovery in Member States - the UK Example", *ERA Forum*, 10, 2009, 436 on the a special meaning of the term "confiscation". For a similar approach, see D.J. FRIED, "Rationalizing Criminal Forfeiture, *Journal of Criminal Law and Criminology*, 79, 1988, 328-436, quoted by J. BOUCHT, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 27, on the use of the notion of "forfeiture" with the sense of confiscation.

[15] Exceptions when regular confiscation will be ordered even in cases of acquittal can be provided – for example, in the Romanian Criminal law (Article 112 of the Criminal Code), regular confiscation will be enforced once all its conditions are fulfilled, irrespective of the

a final judgment, where usually the offender is convicted[15]. Without a doubt, this regular criminal confiscation is by far the one that offers the most safeguards for the person affected by the measure (e.g., the offence is proven, as well as a causal link between the assets sought to be confiscated and the criminal activity, all within the criminal trial). Still, there are numerous elements that can hinder confiscation in these cases: although the offence is proved, there is insufficient evidence that the property or goods originate from the commission of the offence, or the aforementioned goods are not in the possession of the defendant etc. All these difficulties are multiplied in cases of large-scale offences (tax fraud, corruption, drug or human trafficking etc.), especially when committed transnationally and within a criminal organization[16].

Therefore, the EU was aware that traditional confiscation has proven its limits and it was insufficient[17] – a new instrument was needed – *extended confiscation*. In a pragmatic manner, Johan Boucht "defines" it as a way of partially overcoming the difficulties met by the ordinary / basic confiscation and making it easier for the state to claim confiscation. The same author considers extended confiscation to be an "instrument relaxing the otherwise strict standards for the rules on evidence in criminal proceedings relating to confiscation"[18].

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judgment rendered (conviction, acquittal for certain grounds, closure of the criminal case etc.) – for details in the Romanian law, see V. Paşca, *Măsurile de siguranţă. Sancţiuni penale*, Bucharest: Lumina Lex Publishing House, 1998; C. Sima, *Măsurile de siguranţă în dreptul penal contemporan*, Bucharest: Beck Publishing House, 1999; D. Hoffman, *Confiscarea specială în dreptul penal. Teorie şi practică judiciară*, Bucharest: Hamangiu Publishing House, 2008. A similar case is in Sweden, where confiscation will be "effected even though the offender cannot be punished because of his lacking mental capacity (which, according to section 20 of the Penal Code, includes minimum age) or *mens rea*" – for more details, see *Criminal Confiscation in Norway and Sweden*, in J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 40 et seq.

[16] See also, J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 27.

[17] See, M. Simonato, *Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?*, op. cit., 219, with the reservation that the author makes reference to ordinary confiscation as "conviction based confiscation" and he analyses its limits in comparison not so much with extended confiscation, but with non-conviction based confiscation.

[18] J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 27-28. The author offers a very interesting reasoning for extended confiscation schemes, by drawing a comparison with the criminalization of money laundering, as in both cases "the moral imperative that no one should benefit from his crime" read in conjunction with the difficulties in probation lead eventually to public policy support for such mechanisms.

2.2. *Legal framework - from the Joint Action of 3 December 1998 to Directive 2014/42/EU*

It was previously mentioned that over the last 20 years, confiscation was one of the priorities of the EU, being seen as an effective mean of combating transnational organized crime, a plague affecting all Member States.

The first EU instrument adopted in the field and generally recognized as being the prime attempt to regulate confiscation regimes was the Joint Action 1998/699/JHA of 3 December 1998, adopted by the Council on the basis of Article K.3 of the Treaty on the European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime[19]. Focusing on substantial provisions, Article 1(2) was the most important, as it provided that "each Member State shall ensure that its legislation and procedures on the confiscation of the proceeds from crime shall also allow for the confiscation of property, the value of which corresponds to such proceeds, both in purely domestic proceedings and in proceedings instituted at the request of another Member State, including requests for the enforcement of foreign confiscation orders".

The Joint Action is relevant from at least two perspectives: first, it required Member States to regulate and enable value-based confiscation (and not merely confiscation of an asset in its present form, e.g., an identified asset of the offender). Secondly, it represented a punctual approach regarding the harmonization of confiscation regimes across Member States. The interest at the European level regarding the latter was observed in the following year, at the Tampere meeting and in the 2001 Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds of crime, which regulated again the need for value-based confiscation provisions at the national level of Member States.

Four years later, Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities

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[19] Joint Actions were used under the Maastricht Treaty; the Treaty of Amsterdam (1997) abolished Joint Actions and introduced Framework Decisions and Decisions – see for details, A. KLIP, *European Criminal Law. An Integrative Approach*, Cambridge-Antwerp-Portland: Intersentia, 2012, 54. A joint action was legally binding. Member States were allowed to take national action, but on the condition that the Member States refrained from taking any course of action that would impede with an adopted joint action. As well, the Member States were to notify the Council in advance on any action taken that might touch upon a joint action.

and Property was adopted – the most comprehensive approach towards harmonization at the European level. From the Preamble of the Framework Decision, the premises were set. First, it was stated that the existing instruments failed to achieve their goals, as there are Member States which were unable to confiscate the proceeds from all offences punishable by deprivation of liberty for more than one year. Second, the aim of the instrument was to ensure that all Member States have efficient and effective rules governing confiscation of proceeds from crime, *inter alia*, in relation to the onus of proof concerning the source of assets held by a person convicted of an offence related to organized crime[20]. Summing up, Article 2 of the Framework Decision, entitled "confiscation", regulated the so-called criminal / ordinary / general / conviction-based confiscation, reiterating and enlarging the provisions of Article 1 (1) of the Joint Action of 3 December 1998 and Article 3 of Framework Decision 2001/500/JHA, requiring Member States to enable confiscation (in whole or in part, in specie or in value) of instrumentalities and proceeds. Article 3, of utmost importance for our analysis, regulated, for the first time, extended confiscation ("version 2005").

The 2005 version of extended confiscation proposed a complex mechanism, which represented a minimum standard (clause) and did not prevent Member States to adopt more severe provisions[21]. Confiscation was permitted if at least one of the conditions of the two alternative scenarios were met:

Scenario (1): *Conviction for an offence committed within the framework of a criminal organisation*

In this case, several sub-conditions needed to be fulfilled. First, the offence must have been committed within the framework of a criminal organisation, as defined in Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the EU. Second, the aforementioned offence must have been covered by one of the Council Framework Decisions provided by Article 3 (1) letter (*a*), the so-called "Euro offences". This offence was known as the "trigger offence", being the one that set the whole mechanism in motion.

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[20] See, point (10) from the Preamble.

[21] See, *Extended Confiscation in the 2005 Framework Decision*, in J. BOUCHT, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 33 et seq.

Scenario (2): *Conviction for an offence covered by Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism*

In this case, no connection with a criminal organisation was needed.

For both scenarios, subsequent sub-conditions needed to be fulfilled: first, in all cases, the offence must have been of a nature that can generate financial gain. Second, if the offence was not money laundering, it must have been punishable with imprisonment of at least 5 to 10 years, or, be the case that the offence in question is money laundering, be punishable with imprisonment of at least 4 years.

Article 3 (2) of the Framework Decision provided three different methods for Member States to implement the new institution in their national legal framework. The methods were alternative and optional, but for each Member State it was compulsory to enable confiscation under at least one of the methods prescribed. In fact, as Johan Boucht noticed, all three methods envisaged by the European legislator "rested upon an assumption that individuals convicted of the relevant offences liable to give rise to economic benefit (…), could be suspected of having committed similar offences in the past"[22].

Method (1): The court is fully convinced that the property in question has been derived from criminal activities of the convicted person during a period prior to conviction for the offence, which is deemed reasonable by the court in the circumstances of the particular case;

Method (2): The court is fully convinced that the property in question has been derived from similar criminal activities of the convicted person during a period prior to conviction for the offence, which is deemed reasonable by the court in the circumstances of the particular case;

Method (3): It is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court is fully convinced that the property in question has been derived from the criminal activity of that convicted person.

A few comments must be made:

Firstly, the prior two methods are almost identical, the sole distinction being that the latter adds a cumulative element, namely, the similar-

[22] J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 34.

ity between the offences for which the defendant is convicted and the previous criminal activity from which the property in question derived. Both suffer from the same standard of proof requirement – for the court to even consider extended confiscation. Since the court must be "fully convinced" that the property was derived from (similar) prior criminal activities, one must but notice that this is fairly close to the regular standard of proof in criminal cases in order to convict the defendant. In this case, why not make use of the general / ordinary / conviction-based confiscation?

Secondly, with regard to the third method, it is not exactly clear who establishes that the value of the property is disproportionate to the lawful income of the convicted person. The first answer would be the national court, but we must observe that letter (*c*) makes explicit reference to the court only when reaching the conclusion that the property derives from criminal activities. *Per a contrario* – and having in mind the wording of letters (*a*) - (*b*) – it is possible for another actor to establish the disproportion. It is not clear who this person or institution might or could be – e.g., could it be the local tax administration, since it implies only a mathematical comparison between licit income and the value of properties? Did the European legislator want to leave this aspect at the latitude of each Member State? Apparently, the omission went unnoticed by the doctrine and, most probably, the reasons lie in the fact that in order for extended confiscation to be ordered, it is necessary for the court to be – once again – *fully convinced* that the property in question is derived from criminal activities. As such, annotating this provision, it was stated that although the standard of proof seems similar to the first two methods, the case is "somewhat" different: the standard is based on the relationship between the defendant's lawful income and the added value of his assets. Therefore, the model comes close to a "reversed burden of proof" in certain situations[23]. We are not sure this was the will of the European legislator, but we have to admit that it is the most convenient interpretation. On the one hand, it is definitely in favour of the defendant to have the court be the one which must establish the disproportion. On the other hand, only such an interpretation could elude the regular standard of proof which could normally permit the indictment of the offender for

[23] See, J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 34-35. In fact, this was exactly the solution embraced by the Romanian legislature, when transposing the provisions of the Framework Decision in national law, by Law no 63 of 2012 (published in the Official Gazette no 258 of 19 April 2012) – for more details, see F. Streteanu, "Consideraţii privind confiscarea extinsă", *Caiete de Drept Penal*, 2, 2012, 23 et seq.

the previous criminal activity and, thus, allowing the court to juggle only with the conviction based ordinary confiscation.

All the above-mentioned comments and "inquires" were noticed in the years following the Framework Decision, in the process of its implementation. In a 2007 report regarding the status of the implementation[24], the Commission showed that most Member States are slow in putting in place mechanisms to allow widespread confiscation. The reasons were considered to be an apparent lack of clarity of the provisions, which "lead to piecemeal transposition". Moreover, the Framework Decisions' alternative criteria for extended confiscation might have *de facto* restricted the scope for mutual recognition, as national authorities will execute confiscation orders issued by other Member States only if these are based on the same ground(s) for confiscation applicable in the receiving Member States[25].

In 2008, the Commission had to acknowledge that although Framework Decision 2005/212/JHA aimed at ensuring that Member States will introduce effective rules on confiscation, including rules on the burden of proof with regard to the source of the assets concerned[26], the outcome was not a success. The Commission underlined in 2008 that the existing legal texts were only partially transposed, due to the fact that some provisions of the Framework Decision were not clear enough. The result was that transposition into national legislation was "patchy". As a conclusion, ten strategic priorities were proposed, all highlighting that confiscation is "one of most effective ways to fight organized crime". Among other action points aiming at ensuring that the EU continues to uphold the highest standards in this area, the Commission proposed: recasting the existing EU legal framework by improving its clarity and coherence, as well as further extending the existing legal concepts and introducing new provisions. The road was thus paved for the new Directive - 2014/42/EU.

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[24] 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, Brussels, 17.12.2007, COM(2007) 805 final (available online at *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52007DC0805*).

[25] See, J. Bouchт, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 36; M. Simonato, "Extended confiscation of criminal assets: limits and pitfalls of minimum harmonisation in the EU", *European Law Review*, 2016, 729 et seq.

[26] See, Communication from the Commission to the European Parliament and the Council, *Proceeds of organised crime. Ensuring that "crime does not pay"*, Brussels, 20.11.2008, COM(2008) 766 final (available online at *https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0766:FIN:EN:PDF*).

2.3. *Directive 2014/42/EU - the new standard for extended confiscation*

Following its findings from 2008 and onwards, the Commission started working on a proposal aimed at remedying the inconsistencies sprung from Framework Decision 2005/212/JHA, but also from accompanying legislation[27]. According to the Explanatory Memorandum, the Commission started from the ten strategic priorities for future work and highlighted shortcomings in the EU legal framework (lack of implementation, lack of clarity of some provisions, lack of coherence between existing provisions) identified in its Communication on the proceeds of crime adopted in 2008. In that context, the Commission proposed a "(…) Directive laying down minimum rules for Member States with respect to freezing and confiscation of criminal assets through direct confiscation, value confiscation, extended confiscation, non-conviction based confiscation (in limited circumstances), and third party confiscation. It was stated that the adoption of minimum rules will further harmonize the Member States' freezing and confiscation regimes, and thus facilitate mutual trust and effective cross-border cooperation"[28].

The Commission underlined the consistency of the new proposal with other policies integrated in the general aim of providing better safeguards for taxpayers' money at EU level against fraud and corruption.

The Commission's proposal tried to encompass all types of confiscation regimes[29], but after serious arguments within the Council and the Parliament – especially concerning the safeguard of the presumption of

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[27] 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, Brussels, 12.3.2012, COM(2012) 85 final (available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0085&from=EN*).

[28] See, Explanatory Memorandum, General Context, 4.

[29] See, for a justification, the Commission Staff Working Paper, *Accompanying document to 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*

Impact Assessment, Brussels, 12.3.2012, SWD (2012) 31 final (available online at: *https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/news/pdf/1_en_impact_assesment_part1_v4_en.pdf*). The Commission imagined four types of asset confiscation; type 1 assets are those amenable to ordinary confiscation proceedings (ordinary confiscation); type 2 assets are those not so amenable due to barriers to prosecution (barriers to prosecution); type 3 assets are those not so amenable due to insufficient evidence (insufficient evidence); type 4 assets are those not so amenable for both of these reasons (third party confiscation was seen distinct). As an operational objective, the Proposal wanted to harmonize all these types at the Member States' level in order to allow for easier mutual recognition. As well, the Commission wanted to extend the criminalization, which involved defining non-traditional crimes, which in turn meant that more assets were available for confiscation.

innocence[30], the Directive was considerably revised compared to the initial wording[31].

Having all these in mind, we will focus only on the final version of the Directive, as it was adopted on April 3, 2014 by the EU Council and the Parliament. From the outset, we mention that we embrace Simonato's conclusion regarding the limits of the Directive – "due both to inner limits of the legal basis provided by Treaties and to policy consideration"[32]. As he pointed out, (at least) three aspects must be taken into account: *first*, the Directive aims only at the harmonization of national laws; second, the existing instruments which share the same harmonization objectives will remain in force if not covered by the Directive[33]; and

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[30] See, for more details, G. ARCIFA, "The new EU Directive on Confiscation: a good (even if still prudent) starting point for the post-Lisbon EU Strategy on trafficking and confiscating illicit money", *Università di Catania, Online Working Paper*, 64, 2014, (available online at: *http://www.cde.unict.it/sites/default/files/Quaderno%20europeo_64_2014.pdf*).

[31] See also, J. BOUCHT, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 38, in the context of analysing Article 5 from the Directive.

[32] M. SIMONATO, "Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?", op. cit., 220. The author considers that the reason why the Directive does not address mutual recognition lies, probably, in the fact that failure of mutual recognition is ascribed to insufficient harmonization. As a supplementary argument, we send to the Commission's notes that the alternative models (the 3 methods we presented in the previous section) for extended confiscation were the main reason for piecemeal transposition in the domestic laws of Member States, causing a rupture in mutual recognition, as each state recognized confiscation orders similar to the ones from its own legislation – see, Communication from the Commission to the European Parliament and the Council, *Proceeds of organised crime. Ensuring that "crime does not pay"*, op. cit., 4.

[33] See also, details, G. Arcifa, "The new EU Directive on Confiscation: a good (even if still prudent) starting point for the post-Lisbon EU Strategy on trafficking and confiscating illicit money", op. cit. The directive covers all the offences mentioned in Article 83 TFEU (the so called "Euro offences" according to Simonato –) and Article 14 explicitly provides that Joint Action 98/699/JHA, point (a) of Article 1 and Articles 3 and 4 of Framework Decision 2001/500/JHA, and the first four indents of Article 1 and Article 3 of Framework Decision 2005/212/JHA, are replaced by the Directive for the Member States bound by this Directive. Therefore, Article 2, 4 and 4 of the Framework Decision 2005/212/JHA will remain in force for criminal activities which fall outside the scope of the Directive [the first scenario will be of offence punishable by deprivation of liberty for more than one year, as provided by Article 2(3) from the Framework Decision]. See also on this M. SIMONATO, "Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?", op. cit., 220. Arcifa questions such a technique, which permits a former third pillar act to "survive", as she considers it a threat to the "principle of legal clarity in a domain (judicial cooperation in criminal matters) which may affect fundamental rights". The future will show if such a "technique" will lead to practical problems, but from the perspective of our analysis this will probably not be the case – the main problem will be with Article 2 from Framework Decision 2005/212/JHA (although, indeed Article 4 and 5 will "survive" as well), which regulate ordinary confiscation, not extended confiscation.

third, the instruments mainly deal with material law – "substantive concept(s) of confiscation and the related procedural safeguards"[34].

Trying to synthesize the novelties of the Directive, as compared with Framework Decision 2005/212/JHA, we must mention the following:

2.3.1. *A unique set of minimum rules for extended confiscation*

The major hindering behind Framework Decision 2005/212/JHA was the alternative options for extended confiscation provided by Article 3, which led to a restriction in the functioning of mutual recognition of confiscation orders. Although the Framework Decision established alternative minimum rules for extended confiscation in order to make the implementation process smoother and also provide the possibility for Member States to freely apply the desired "methods", the outcome was unsuccessful. As already noted by the Commission in its official reports, Member States usually relied on one model and consequently executed confiscation orders issued by another Member only if the basis was the same.

In contrast, the Directive provides for a unique mechanism, being relatively close to the one proposed by Article 3 (2) letter *c*) from Framework Decision 2005/212/JHA (the disproportion between the value of property and the lawful income). According to Article 5 of the Directive, *Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct*.

In order for extended confiscation to be ordered, a set of sub-conditions need to be fulfilled.

a) *First*, the offender must be convicted for one of the specific crimes provided by Article 5(2) of the Directive, which defines the notion of 'criminal offence' as including at least the following:

– active and passive corruption, both in the private and public sector;

– offences relating to participation in a criminal organization, at least in cases where the offence has led to economic benefit;

[34] Aspects considered "the core" of EU attention - M. SIMONATO, "Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?", op. cit., 220.

– offences relating to child pornography;

– offences relating to illegal system interference and illegal data interference;

– any other criminal offence that is punishable, in accordance with the relevant instrument mentioned in Article 3 of the Directive or, in the event that the instrument in question does not contain a penalty threshold, in accordance with the relevant national law, by a custodial sentence of at least four years.

When analyzing this condition, Johan Boucht refers to a conviction for a "relevant triggering offence"[35], a good denomination, as it represents the first element, which – if fulfilled, puts in motion the mechanism for extended confiscation.

In this context, a few comments must be made regarding the triggering offence condition.

Article 5 (1) requests another element to be fulfilled, namely that the offence in question is liable to give rise, directly or indirectly, to economic gain. This represents a rephrasing of the sub-condition from Article 3 (1) final from the Framework Decision 2005/212/JHA, where it was provided that the triggering offence "(…) is of such nature that it can generate financial gain". Since no problems of interpretation were noticed when the Framework Decision was in force, most probably the condition will not give rise to any difficulties in practice. In fact, just looking over the offences provided by Article 5 (2) and Article 3 of the Directive, one can notice that a person will usually commit such a crime in order to try to obtain one form or another of economic benefit.

Furthermore, we underline the fact that the person must be *convicted*. Hence, a question arises. Must there a conviction judgment be pronounced, or it suffice to have a judgment where it is established that the offence was committed by the defendant? Strictly referring to the particular case of the Romanian Code of Criminal Procedure, starting with the year 2014, there are several solutions that reflect the commission of an offence by a certain person, but the finality is not a conviction – the waiver of penalty and the postponement of penalty judgments. In these cases, the court deems that the person indicted did commit the crime. Looking over the French version of Article 5 (1), we see that the *convic-*

[35] J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 38. The triggering offences are, as Simonato points out, the "Euro offences", mentioned in Article 83 (1) TFEU - see, M. Simonato, "Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?", op. cit., 220.

tion is now *reconnue coupable*, which would translate in found guilty. As such, attention must be given by Member States when transposing this condition into national legislation. In our opinion, the French version is more accurate and corresponds to the EU's will. Still, the current normative version of extended confiscation in the Romanian law refers only to the conviction judgment (*condamnare* in Romanian), so the measure cannot be imposed, even if all the other conditions are met, in cases of waiver or postponement of penalty[36].

b) *Second*, provided the defendant was convicted for a "Euro crime" (triggering offence), the analysis moves forward in checking if the property in question is derived from criminal conduct.

The sub-condition must be read in comparisons with Article 3 (2) letters *a*) to *c*) from Framework Decision 2005/212/JHA, in order to identify the novelty elements with ease. The standard of proof is lowered: from the initial "fully convinced" to the "satisfaction" of the court that the property in question derives from criminal conduct.

The court can reach such a conclusion by comparing the value of property and the lawful income of the convicted person; if a disproportion is found, there is a presumption that the property derives from criminal conduct. We underline that it is the court (and only the court) who establishes that the property derives from criminal activity [as opposed with the wording of Article 3 (2) *c*) from the Framework Decision where it was not clear who "establishes"].

Boucht briefly notes in a footnote "that the provision does not require that the onus of proof be shifted"[37], statement which must be analyzed in conjunction with his findings regarding the Norwegian scheme "which is based on a reversed burden of proof, so that confiscation may be ordered unless the defendant can prove, on a balance of probabilities, that the assets in question have been legitimately acquired"[38]. It is our opinion that, although not as detailed as the domestic (Norwegian) one, the EU mechanism proposed by the Directive will work similarly. At this stage, the court has concluded that: (1) the predicate or triggering of-

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[36] Most probably, the reason behind this lie in the fact that Framework Decision 2005/212/JHA was transposed into Romanian law in 2012, when the former Criminal Code and Criminal Procedure Codes were in force. At that time, in cases where the offender was found guilty, the court had no other solution than to convict him. See Law no 63 of 2012 for the amendment of the Criminal Code and of Law no 286 of 2009 regarding the Criminal Code, published into Official Gazette no 258 from 19 April 2012.

[37] See J. Boucht, "The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds", op. cit., 39, footnote 38.

[38] Idem, 44.

fence has been committed by the defendant; (2) the offence in question is able to give rise, directly or indirectly, to economic gain; (3) the value of assets in question is objectively disproportionate to the cumulative lawful income of the defendant[39]. Hence, all these already proven facts justify the court to draw a simple assumption: namely that the value property which does not have an equivalent in the incomes of the defendant derives from previous criminal conduct[40].

In fact, looking at the Preamble of the Directive, we think that this interpretation correspondents with the general aim of confiscation as proposed in this instrument, as the need for confiscation was affirmed "(…) where there is insufficient evidence for a criminal prosecution, if a court considers on the balance of probabilities that the property is of illicit origin"[41]. The balance of probabilities, mentioned both in the Preamble and by Boucht when focusing on the Norwegian model, are another denomination for simple assumptions; which, indeed, do not imply a reverse burden of proof, but allows the court to reach the conclusion (either inductive or deductive) that the property derives from criminal conduct on the basis of previous particular elements of the case (including the disproportion aspect).

2.3.2. *The triggering offence - a broader approach*

Although partially touched upon in the previous sections, the triggering (or predicate) offence which enables extended confiscation must be analyzed distinctively. Comparing the "target area" of Article 3 of the Framework Decision 2005/212/JHA and that of Article 5 of the Directive, it is clear that the scope of extended confiscation was considerably enlarged[42]. If the previous instrument was mainly based on the criminal

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[39] This will probably consist in a mathematic comparison between the general income of the offender and the value of property in question. We do not consider it to be a reverse burden of proof when the defendant bring proofs that there is no disproportion (e.g., he or she offers information about rentals initially ignored by the authorities which can add the total lawful income), as the case starts from the premise that there is a disproportion between these two. And, to be even more explicit, this conclusion (premise) has been *proved* by the authorities, by collecting info and data on the income of the offender and the value of his/hers properties.

[40] This is the case both in the Romanian system and in the Spanish one. For more details, see, F. STRETEANU, "Consideraţii privind confiscarea extinsă", op. cit., 16-17. Having in mind the fact the Romania implemented the provisions of Framework Decision 2005/212/JHA only in 2012, the (alternative) model selected was the one closest to the one regulated by the Draft Proposal of the Directive, which was already part of the public debate.

[41] Preamble, point (12).

[42] See also, E. CALVANESE, "Enforcement of Confiscation Orders", in R.E. KOSTORIS

organisation framework and on terrorism, the Directive refers to these offences as one of the categories mentioned by Article 5 (2) letter (*b*) – organised crime – or letter (*e*), read in conjunction with Article (3) (*e*), Council Framework Decision 2002/475/JHA on 13 June 2002 on combating terrorism.

In the context of the triggering offence (namely the one for which the person is convicted), another comment must be made. We already presented the unique mechanism envisaged by the Directive and showed that this partially represents an inspired rephrasing of Article 3 (2) letter (*a*) to (*c*) of Framework Decision 2005/212/JHA. Another aspect that helps enlarge the area in which extended confiscation can be ordered is that there is no need to identify a similarity between the triggering offence and the prior criminal activity from which the property in question derived. As such, the "similarity" principle enshrined in Article 3 (2) letter (*b*) from Framework Decision 2005/212/JHA was abandoned.

To conclude on this point, the scope of the Directive was significantly enlarged, both from the perspective of the predicate offence and from the one of the prior criminal activity of the defendant.

2.3.3. *More accurate definitions*

Another aspect which enhances the functioning of extended confiscation is the more precise definitions which will apply, according to Article 2 of the Directive.

The term "proceeds" from Article 2 (1) makes reference to "economic advantage derived directly or *indirectly* from a criminal offence". We underlined "indirectly" as this is a new element, comparing the text to the 2005 version[43]. Although apparently we are in the presence of a minor amendment, the new wording will permit an easier functioning of extended confiscation (e.g., in cases where the defendant did not commit – not even as an accomplice or instigator – the previous criminal activity from which the property in question derived *indirectly*[44]). Even more, the final thesis of Article 2 (1) provides that proceeds "may consist of any

(ed.), *Handbook of European Criminal Procedure*, Springer International Publishing, 2018, 439.

[43] See, Article 1 of the Framework Decision 2005/212/JHA, according to which "proceeds mean any economic advantage from criminal offences. It may consist of any form of property as defined in the following indent".

[44] For a similar conclusion, but drawn from the wording of Article 5 from the Directive, see J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 40; M. Simonato, "Extended confiscation of criminal assets: limits and pitfalls of minimum harmonisation in the EU", op. cit., 734.

form of property *and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits*". Once again, the latter (italic) part is new when compared to the similar text from the 2005 Framework decision and highlights the aim at EU level to allow confiscation at the subsequent levels, even after the initial assets (benefit) were transformed or reinvested, either by the defendant or by third parties. This is a step forward to allow both extended confiscation and – as we will see in the following section – third party confiscation, seen as a distinct and new institution.

With regard to the same paradigm of enabling the function of enlarged extended confiscation and of a brand new third party confiscation, Article 2 (4) defines confiscation as "(…) a final deprivation of property ordered by the court in relation to a criminal offence". When comparing the definition with the previous one, found in Framework Decision 2005/212/JHA[45], we note instantly that there is no more reference to the nature of confiscation, either as a penalty or another type of measure. As a direct effect, it will be easier for Member States to transpose in their national legislation the new form of extended confiscation and, especially third party confiscation. In this respect, it will be possible to regulate and define it according to the particularities of each national system, meaning that it will not necessarily be of a criminal nature (either seen as a penalty or another type of measure, e.g. safety measure in some systems). These particular aspects, although of significant importance in the case of extended confiscation, are of utmost importance when dealing with third party confiscation, this being the reason why we will focus more on it in the following section, when analyzing Article 6 of Directive 2014/42/EU – "confiscation from a third party".

3. *Third party confiscation*

3.1. *Preliminary aspects*

The connection between third parties and confiscation measures was simply mentioned in the Preamble of Council Framework Decision 2005/212/JHA. Accordingly, "pursuant to paragraph 50(*b*) of the Vienna Action Plan, within five years of the entry into force of the Treaty of Amsterdam, national provisions governing seizures and confiscation of the

[45] According to which "confiscation means a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property".

proceeds from crime must be improved and approximated where necessary, taking account of the rights of third parties *in bona fide*"[46].

A closer look at Article 3 (3) from the 2005 Framework Decision reveals that in the context of extended powers of confiscation, the idea to confiscate from other parties than the defendant was inserted. Without calling it third party confiscation, the possibility for Member States to adopt "(…) the necessary measures to enable confiscation, in accordance with the conditions set out in paragraphs 1 and 2, either wholly or in part, for property acquired by the closest relatives of the person concerned and property transferred to a legal person in respect of which the person concerned — acting either alone or in conjunction with his closest relatives — has a controlling influence. The same shall apply if the person concerned receives a significant part of the legal persons' income". Article 3 (4) made a step back, by stipulating that "Member States may use procedures other than criminal procedures to deprive the perpetrator of the property in question". First, this kind of confiscation seemed to still be linked to the defendant (so, it wasn't *in rem*, following the property, but still *in personam*, following the person of the perpetrator); second, it provided a very large legislative framework for Member States, which could include civil law, making it less a criminal law measure or penalty. *Nota bene!*, Article (1) defined confiscation as a penalty or measure ordered in relation to a criminal offence.

When presenting the reasons behind the lack of success of the 2005 Framework Decision, emphasis was put on the alternative model for extended confiscation. Still, the Commission already put forward yet another aspect that hinders confiscation in practice: third parties. It was revealed that the JHA Council Conclusions on confiscation and asset recovery adopted in June 2010[47] called "for a more coordinated approach between Member States to achieve a more effective and widespread confiscation of criminal assets". In particular, the Commission was called "(…) to consider strengthening the legal framework in order to achieve more effective regimes for third party confiscation and extended confiscation".

As a result, the Commissions' Communication "An Internal Security Strategy in Action" stated that the Commission will propose legislation to strengthen the EU legal framework on confiscation, in particular to allow for more third party confiscation and extended confiscation.

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[46] See Preamble, point (3).

[47] See, Council document 7769/3/10, quoted in Explanatory Memorandum, 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, Brussels, 3.

At that time, *third party confiscation* was considered to involve "(…) the confiscation of assets that have been transferred by an investigated or convicted person to a third party"[48]. The Commission argued the need for third party confiscation in detail, showing that "(…) criminals often transfer their assets to knowing third parties as soon as they come under investigation, in order to avoid confiscation[49].

The Commission noted that Member States' national provisions on third party confiscation are diverging, aspect which hampered the mutual recognition of freezing and confiscation orders on assets transferred to third parties. Still, "in order to meet the requirements of proportionality and protect the position of a third party acquiring property in good faith", the Proposal did not bring minimum harmonization provisions on third party confiscation in all cases. Instead, it merely required third party confiscation "(…) to be available for the proceeds of crime or other property of the defendant received for a price lower than market value and that a reasonable person in the position of the third party would suspect to be derived from criminal activities or to be transferred in order to circumvent the application of confiscation measures". The Proposal clarified that the "reasonable-person-test" must be based on concrete facts and circumstances to prevent arbitrary decisions. Moreover, third party confiscation should be possible only following an assessment, based on specific facts, that the confiscation of property of the convicted, suspected or accused person is unlikely to succeed, or in situations where unique objects must be restored to their rightful owner[50].

3.2. *Confiscation from a third party - Article 6 of Directive 2014/42/EU*

The original version of Article 6 from the Proposal was significantly amended in the course of negotiations; for reasons already mentioned when analyzing extended confiscation, we will focus only on the final version, as provided by Article 6 of the Directive. According to the provision in question, "Member States shall take the necessary measures to enable the confiscation of proceeds, or other property, the value of which

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[48] See, footnote 9 from the Explanatory Memorandum, 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, Brussels, 3.

[49] See 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, Brussels, 12.

[50] See, *Third party confiscation* in 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, Brussels, 11-12.

corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value".

The Preamble of the Directive gives few indications regarding the new institution. As a consequence of the generalized practice where defendants transfer properties to knowing third parties with a view so as to avoid confiscation, rules were necessary "(…) to allow for the confiscation of property transferred to or acquired by third parties"[51]. Examples were given: acquisition by a third party refers to situations where property has been acquired, directly or indirectly, for example through an intermediary, by the third party from a suspected or accused person, including when the criminal offence has been committed on their behalf or for their benefit, and when an accused person does not have property that can be confiscated. As well, a minim standard was set – confiscation should be possible *at least* in cases where third parties *knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation*, on the basis of concrete facts and circumstances, including that the transfer was carried out free of charge or in exchange for an amount significantly lower than the market value.

The Preamble also provides that third party confiscation should extend to both natural and legal persons, a logical approach, and that the rights of *bona fide* third parties should not be affected. Regarding the *bona fide* third parties, we mention that Article 6 (1) stipulates that third party confiscation should not prejudice their rights[52], while Article 8 provides an exhaustive list of safeguards[53].

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[51] See, Preamble, point (24).

[52] As Arcifa points out, it is worth mentioning that the Parliament has attempted to take legislative measures in order to prosecute persons who fictitiously attribute ownership and availability of property to third parties, but the amendment was rejected. See, G. Arcifa, "The new EU Directive on Confiscation: a good (even if still prudent) starting point for the post-Lisbon EU Strategy on trafficking and confiscating illicit money", op. cit.

[53] Our analysis will not focus on *bona fide* third parties, as in this case, the premise is that Article 6 (1) of the Directive will not apply. As well, the safeguards provided by Article 8 will not make the object of our analysis. For a comprehensive view of the application of fundamental principles in the case law of ECHR - see R.D. Ivory, "The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases", op. cit., 151-164; M. Simonato, "Confiscation and funda-

A very important aspect is stipulated briefly only in the Preamble, where point (25) affirms that: "Member States are free to define third party confiscation as subsidiary or alternative to direct confiscation, as appropriate in accordance with national law". The heterogeneous approaches at the national level regarding third party confiscation made it impossible for the EU legislator to propose a more precise tool. As such, as already recognized in the Explanatory Memorandum from the initial Proposal, the current state of play of third party confiscation is comprised of a minimum standard which aims at confiscating directly from third parties. The nature or characteristics of the measure is irrelevant when transposing the provision into national legislation, an aspect which allows Member States to adapt the institution in accordance with the domestic system. What is important is to have a tool which permits confiscation *in rem*, namely to follow the property in question.

3.3. *The minimum standard required by Article 6*

Although the Directive did not introduce minimum harmonization provisions on third party confiscation in all cases, explicitly to meet the requirements of proportionality and to protect the position of third parties acquiring property in good faith, a minimum standard can be drawn from the "crippled" version of Article 6[54].

When trying to imagine exactly how this institution is supposed to function, we will make use of the notion used in the Explanatory Memorandum of the Proposal, namely the *reasonable-person-test*. When the conditions of this test are applicable, the third party confiscation will be ordered. As such, the cumulative conditions of third party confiscation can be identified through a *per a contrario* interpretation of the aforementioned test.

Referring only to the provisions of Article 6, we consider that the court will verify the following "steps", in a chorological order:

(1) ordinary or extended confiscation conditions are met, as regards the defendant;

(2) the property in question was transferred by the defendant to a third party or was acquired by a third party;

(3) the third party knew or ought to have known that the purpose of the transfer of property was to avoid confiscation.

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mental rights across criminal and non-criminal domains", *ERA Forum*, 2017, 365-379; A. Balsamo, "The content of fundamental rights" in R.E. Kostoris (ed.), *Handbook of European Criminal Procedure*, op. cit., 166.

[54] Crippled as in comparison with the corresponding Article 6 from the Proposal.

In cases in which all these requirements are met, third party confiscation will operate, directly from the third party. If the first two "steps" are relatively easy to verify, the third one is – without a doubt – the most difficult and in it lays the "core" of third party confiscation. This last step is actually the reversed *reasonable-person-test* and it will enable confiscation provided that the concrete facts and circumstances of the case demonstrate to the court that the (third) party acted in ill-faith. Such ill-faith consists of knowledge or even gross ignorance (as Article 6 regulates even the case where the person "ought to have known") that the transfer of property was intended to avoid confiscation (either ordinary or extended) from the defendant. Article 6 (1) mentions some elements that can help the court in establishing ill-faith, namely acquisition free of charge or for an amount significantly lower than the market value. In these cases, a reasonable person would suspect the property in question to be derived from criminal conduct or to be transferred in order to circumvent the application of confiscation measures and therefore would abstain from the acquisition or receiving of the property in question[55].

As it becomes apparent, the "reasonable-person-test" must be based on concrete facts and circumstances to prevent arbitrary decisions. After its completion, if the court considers that the third party did not act "reasonable", all the conditions for the application of Article 6 are fulfilled[56].

4. *Conclusions. The German and the Romanian case studies*

The complexity of both extended confiscation and third party confiscation has created a number of problems at national level, in the transposition phase. The problems encountered by Member States led to delays in the transposition schedule, from October 2015 to 2016. The postponement did not help and on 24 November 2016, the Commission started the infringement procedure according to Article 258 TFEU against the majority of the Member States. The procedure is still ongoing

[55] The initial version of Article 6 from the Proposal contained several built-in limitations of third party confiscation. The measure was designed to be available only following an assessment, based on specific facts, that the confiscation of property of the convicted, suspected or accused person is unlikely to succeed, or in situations where unique objects must be restored to their rightful owner. The Directive does not provide for any restrictions other than the prejudice of *bona fide* third parties, according to Article 6 (2).

[56] Arcifa considers that the person who receives a property under such conditions "has a reasonable suspicion concerning the illicit origin of the same property" – see G. Arcifa, "The new EU Directive on Confiscation: a good (even if still prudent) starting point for the post-Lisbon EU Strategy on trafficking and confiscating illicit money", op. cit.

regarding several states, which failed to transpose the Directive, even at this time[57].

The case studies refer to Germany and Romania since these two reflect "opposing" realities regarding the fulfilment of transposition obligations. Although both states were part of the states that on 24 November 2016 were questioned by the Commission, requesting further information, now Germany transposed the Directive, while Romania is in the middle of an ongoing infringement procedure as it did not succeed in transposing the entirety of instrument[58].

4.1. *The German model and the July 2018 Romanian proposal*

At this time, Germany seems to be the only Member State which fulfilled all its obligations regarding the transposition of Directive 2014/42/EU, or at least it is the only one which communicated all the relevant information. According to the European Judicial Networks' website[59], Germany has fully implemented the Directive in its domestic law in July 2017, by amending the Criminal Codes and regulating the (new) extended confiscation and the possibility of third party confiscation[60].

On the other side, we have the Romanian "model". Although communication was made to the Commission, arguing that the Directive was transposed, in fact, there was a merely partial transposition of Articles 10 and 11 from the Directive.

Until recently, various forms of draft proposals circulated, but all referred only to extended confiscation, leaving third party confiscation completely behind. The main reason for such an approach was the erroneous belief of Romanian law makers, partially backed up by a wrong

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[57] For up to date information see, *Browse infringements of EU Home Affairs law* (available online at: *https://ec.europa.eu/home-affairs/what-is-new/eu-law-and-monitoring/infringements_en?country=All&field_infringement_policy_tid=All&field_infringement_number_title=*).

[58] See Infringement number 20160813, last checked on April 4, 2019 (available online at: *http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&decision_date_from=&decision_date_to=&title=&submit=Search&r_dossier=20160813*).

[59] See *https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=126*.

[60] See *Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung*, Bundesgesetzblatt Teil 1 (BGB 1), Nummer 22, 21.4.2017 (available online at: *ttps://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5b@attr_id=%27bgbl117s0872.pdf%27%5d#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl117s0872.pdf%27%5D__1509524157099*). For the reasons presented in the Foreword, we will not focus on these provisions, as the German National Report will contain a section dedicated to an in-depth analysis of these substantial law aspects.

case law application, that third party confiscation is somewhere included in either ordinary or extended confiscation. As an argument, it was invoked that both ordinary and extended confiscation mention that the court can consider the value of property transferred to third parties. What apparently is being ignored is that both types of confiscation are regulated by the Romanian Criminal Code as safety measures, which can be ordered only against the defendant (the person who committed an act regulated by Criminal Law and who, subsequently is blameworthy)[61]. Even more, in cases of extended confiscation, the defendant must be convicted by the court (so, the court must additional establish his or her guilt)[62].

Albeit such erroneous interpretations, one must admit that at the given moment, the Romanian legislation does not permit third party confiscation. In order to enable it, the legislator must understand that a coherent approach is needed, depending on the nature of the desired third party confiscation in the new legislation.

If the option is to regulate it as a safety measure, besides introducing a new type of confiscation, the first amendment should target the nature of the safety measures, providing a new broader definition, in order to include third parties, not just offenders (as it is now, according to Article 107 of the Criminal Code).

If, following the suggestions from the Preamble of the Directive, third party confiscation will be regulated as subsidiary or alternative to confiscation, a new category of measures will probably need to be provided in the Criminal legislation[63]; among which, third party confiscation is the first.

At the current time, the Romanian Parliament just adopted a new draft proposal, amending *inter alia*, the Criminal Code[64]. It is the most

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[61] See also, M. Armaşu, "The Extended Seizure, Comparative Analysis between the Current Regulation and Changed Imposed by Directive 2014/42/EU, of the European Convention on Human Rights Perspective", *Revista Forumul Judecătorilor*, 2014, 184 et seq. The author underlines not only the nature of confiscation as a safety measures, but its character as a penalty, accordingly to the jurisprudence of the ECHR.

[62] Such an approach was met in the case law of the Bucharest Court of Appeal in two major criminal cases involving important politicians. In both cases, the court ordered ordinary confiscation from third parties (although these weren't even parties in the trial), probably applying the maxim "the end justifies the means". For a critique, see D. Niţu, "Confiscarea extinsă. Confiscarea specială. Confiscarea de la terţi", *Caiete de Drept Penal*, 4, 2017, 56-61.

[63] For an example of how third party confiscation is regulated in candidate states for EU accession, see B. Misoski, "The impact of the EU Directive 2014/42/EU on freezing and confiscation of instrumentalities and procedees of crime to the Macedonian criminal justice system", *EU and Comparative Law Issues and Challenges Series*, 2, 2018, 364.

[64] See Draft Proposal PL-x nr. 406/2018 amending the Criminal Code and the law on corruption (available online at: *http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=17241*).

complex attempt until now in order to transpose Articles 5 and 6 of the Directive, but yet again, the proposal is plain wrong from the outset, concerning both types of confiscation:

– first, there is no amendment to the nature or definition of safety measures and no new category of measures are introduced – as such, apparently, third party confiscation seems to be lost during the drafting process;

– second, extended confiscation – although partially amended in order to correspond to the wording of Article 5, is actually hampered from the beginning, as the standard of proof required for the court regarding the commission of previous criminal activities by the offender (other than that for which he or she stands trial) is the "fully convinced one"[65]; as well, the proposal adds to the Directive and requests that the offence for which the conviction is pronounced and the prior criminal activities to be of the same nature[66];

– finally, third party confiscation – without a denomination – seems to be now regulated by the last two paragraphs of Article 112[1]. In fact, once again, the Romanian legislator proves to have an erroneous understanding on the fundamentals behind third party confiscation. By inserting provisions from Article 6 of the Directive within the national extended confiscation framework, again, extended confiscation will be able to target only the convicted person[67].

In September 2018, the Constitutional Court issued its decision and considered that some of the aforementioned amendments do not comply with the wording of the Romanian Constitution[68]. Regarding extended confiscation, the Court criticized the new standard of proof required and

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The proposal was challenged to the Constitutional Court for several issues by the Romanian High Court of Cassation and Justice, the President and a number of 110 members of the Parliament from parties pertaining to the opposition.

[65] In fact, this was one of the arguments of the High Court of Cassation and Justice when challenging to the Constitutional Court the draft proposal. It was correctly underlined that under these auspices, the offender can be convicted for the previous criminal activity and, as a consequence, ordinary confiscation can be imposed (available online at: *http://www.cdep.ro/proiecte/2018/400/00/6/sesiziccj406.pdf*).

[66] This was one of the arguments invoked by the opposition when challenging the draft proposal at the Constitutional Court (available online at: *http://www.cdep.ro/proiecte/2018/400/00/6/sesizpnlusrpmp406.pdf*).

[67] Actually, this was one of the arguments invoked by the Romanian president when challenging the draft proposal at the Constitutional Court (available online at: *http://www.cdep.ro/proiecte/2018/400/00/6/neconPR406.pdf*).

[68] See Decision no. 650 from 25 October 2018, published in the Official Gazette no. 97 from 7 February 2019.

it underlined that the Romanian legislator makes confusion between criminal confiscation and extended one; further, it added that such an approach hampers the application of Directive 2014/42/EU[69]. From the perspective of third party confiscation, the Constitutional Court considered that the new introduced paragraphs of Article 112[1] regulate "distinct normative hypothesises", other than extended confiscation[70]. So, the Court was not troubled that the general normative framework on safety measures was not amended, by providing a new definition or by introducing a new category of measures.

Following the publication of Decision no. 650, the draft proposal needs to be amended once again, in order to fully comply with the conclusions and the reasoning of the Court.

4.2. *The impact of the new provisions. The future role of the Court of Justice of the European Union*

As a final conclusion, we opt for turning the focus of the discussion in another direction. If, until now, the analysis checked the EU legislations' evolution and issues of transposition, the premise is now on the interpretation of the aforementioned legislation on extended and third party confiscation, as transposed in the national legislation of Member States. For this, the Court of Justice of the European Union will have to embark on a pivotal mission and there are already signs that Directive 2014/42/EU will be on the spotlight, just as one time, the EAW and then the *ne bis in idem* principle were.

As a final aspect, regarding the future (and vital) role of the Court, we send to the request for a preliminary ruling recently referred by a Bulgarian court[71]. The questions raised refer to numerous provisions from the Directive, but for our analysis, it presents particular interest ques-

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[69] See paragraphs 401-406 from the decision.

[70] See paragraph 413 from the decision. The Court found no irregularity in the fact that the case of third parties are dealt by both paragraph 3 of Article 112[1] and paragraph 9. In its opinion, paragraph 3 covers extended confiscation, and the reference to third party is made only in order to settle the exact amount needed to be confiscated from the convicted person. In that regard, the amendment brought to paragraph 3, namely that the third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, was also considered unconstitutional as at stake is not the confiscation from third parties (see paragraphs 410-412).

[71] See Request for a preliminary ruling from the Sofiyski gradski sad (Bulgaria), 3 April 2018, case C-234/18 (available online at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CN0234&from=EN*).

tions no. 4 and no. 5 on extended and third party confiscation. The Bulgarian court asked whether:

– Article 5(1) of 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 is to be interpreted as meaning that a right to property may be withdrawn, as having been directly or indirectly obtained by way of a criminal offence, on the sole ground of the discrepancy between the value of a person's assets and his lawful earnings, in the case where there is no final criminal judgment finding that the person concerned committed the criminal offence in question?

– The provision contained in Article 6(1) of 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 are to be interpreted as meaning that it provides for confiscation from third parties as an additional or alternative means of direct confiscation or as an additional means of extended confiscation?

VERA WEYER

MUTUAL RECOGNITION OF CONFISCATION ORDERS AND NATIONAL DIFFERENCES

SUMMARY: Introduction. – I. The Main Differences between the Member States' Confiscation Systems. – II. The Drawbacks of the Framework Decision 2006/783/JHA. – 1. Limited Scope – 2. Extensive Grounds for Refusal. – 3. Slow and Inconsistent Transposition. – III. Regulation (EU) 2018/1805 as Remedy? – 1. The New Approach. – 2. Critical Appraisal. – IV. Conclusion.

Introduction

By applying the principle of mutual recognition to confiscation orders, Framework Decision 2006/783/JHA[1] aims at facilitating as well as enhancing cross-border confiscation. Evaluation yet shows that – especially in comparison to other mutual recognition instruments, such as the European Arrest Warrant[2] – only very few confiscation requests are based on this act[3]. EU reports indicate that this lack of application is partly due to the considerable differences between the Member States' confiscation systems: as a matter of fact, they have not only been responsible for the rather limited scope of the Framework Decision but also for the Member States' apparently great reluctance to apply this instrument[4].

This essay will try to shed light on the question why mutual recognition regarding confiscation faces so many difficulties or – to be more precise – why the Member States' different confiscation laws constitute a

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[1] Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, 59).

[2] Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, 1).

[3] Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders SWD(2016)468, 16, 27 ff. As a matter of fact, there are hardly any statistics available.

[4] Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders SWD(2016)468.

barrier to transnational confiscation that cannot be easily removed by EU law. In a first step, the main differences between the Member States' confiscation regimes will be briefly depicted (I.). Second, the shortcomings of the Framework Decision will be explained (II.). And finally, it will be demonstrated why Regulation (EU) 2018/1805[5] – that will replace the Framework Decision as from December 2020 (Art. 39 (1) Regulation (EU) 2018/1805) – is not likely to bring a significant improvement (III.).

I. *The Main Differences between the Member States' Confiscation Systems*

Confiscation systems are "notorious" for differing substantially, both in substantive and procedural elements. Most crucial of all: In some Member States, for instance France[6] and Belgium[7], the confiscation of criminal proceeds is defined as a criminal punishment whereas in others, such as Germany[8], it is considered as a precautionary or preventive measure[9].

Furthermore, whereas in some Member States, confiscation is generally only possible if the owner of the proceeds has been convicted of a criminal offense (so-called criminal or ordinary confiscation), a growing number of Member States also allow for non-conviction based confiscation[10].

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[5] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders (OJ L 303, 28.11.2018, 1). The Regulation will also replace Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, 45).

[6] So-called *peine complémentaire.* For more information see E. Camous, "Art. 131-21 et 131-21-1", in: JurisClasseur Pénal Code, para. 14 ff.

[7] So-called *peine accessoire*. For more information see F. Lugentz, D. Vandermeersch, *Saisie et confiscation en matière pénale*, Bruxelles: bruylant, 2015, para. 5 ff..

[8] So-called (criminal) measure *sui generis* (*Maßnahme eigener Art*, Section 11 Nr. 8 of the German Criminal Code) that bears resemblance to the civil law concept of unjustified enrichment (*ungerechtfertigte Bereicherung*). For more information see A. Eser - F. Schuster, "Vorbemerkungen § 73", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 12 ff.

[9] See for an overview of the Member States' confiscation laws Comparative Law Study of the Implementation of Mutual Recognition of Orders to Freeze and Confiscate Criminal Assets in the European Union, 30 ff.

[10] See for an overview of the non-confiscation schemes that exist in the EU Comparative Law Study of the Implementation of Mutual Recognition of Orders to Freeze and Confiscate Criminal Assets in the European Union, 240 ff. See also *European Commission*, Analysis of non-conviction based confiscation measures in the European Union SWD(2019) 1050 final.

Even between those Member States that provide for such an option, the relevant schemes vary significantly: In some legal systems, non-conviction based confiscation takes place within the context of criminal proceedings and is limited to circumstances in which the offender has died or has absconded. In others, it might also cover cases in which a conviction cannot be obtained due to evidential issues. Several Member States, such as the United Kingdom[11], Ireland[12] or Italy[13], even pursue non-conviction based confiscation as separate proceedings that can occur independently from the any related criminal proceedings (often called civil confiscation)[14].

The different confiscation mechanisms also entail different standards of proof: In criminal confiscation proceedings, the illicit origin of the proceeds generally has to be established "beyond reasonable doubt", which means, the court has to be intimately convinced that the proceeds have been derived from the associated crime. In non-conviction based confiscation procedures, competent authority may often decide "on the balance of probabilities" whether the proceeds stem from criminal activities.

Great variety also exists with regard to so-called extended confiscation (regimes enabling the confiscation of assets not originating from the crime subject to the ongoing criminal investigation. Some jurisdictions require the court to be at least satisfied that the assets in question result from similar or even any other criminal conduct whereas in others, the burden of proof is even reversed, for example by means of statutory presumptions.

II. *The Drawbacks of the Framework Decision 2006/783/JHA*

The concept of mutual recognition is supposed to make international cooperation both simpler and more efficient: in particular, contrary to traditional mutual legal assistance instruments[15], giving wide dis-

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[11] So-called Civil recovery, see Chapter V of the Proceeds of Crime Act (POCA) from 2002.

[12] Proceeds of Crime Acts 1996 - 2016.

[13] So-called *misure di prevenzione*. For more information see M. Panzavolta, R. Flor, "A Necessary Evil? The Italian 'Non-Criminal System' of Asset Forfeiture", in: J.P. Rui, U. Sieber, *Non-conviction-based confiscation in Europe - Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction*, Freiburg i. Br.: Nomos, 2015, 111 ff.

[14] Similar schemes exist in Bulgaria, Slovenia and Slovakia, see *Eurojust*, Report on non-conviction-based confiscation (General Case 751/NMSK - 2012), 2013.

[15] See, for example, – in the context of confiscation – Art. 5 (4) (*c*) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: "The

cretion in that respect, Member States are in general obliged to grant requests by another Member State. In principal, this is also the case with Framework Decision 2006/783/JHA: According to Art. 7 (1), Member States "shall without further formality recognise a confiscation order … and shall forthwith take all the necessary measures for its execution, unless the competent authorities decide to invoke one of the grounds for non-recognition or non-execution provided for in Article 8". However, Framework Decision 2006/783/JHA faces several technical as well operational issues that might seriously undermine its effectiveness: First, it suffers from a rather limited scope that does not include any civil confiscation scheme. Second, the grounds for refusal laid down in Art. 8 of the Framework Decision allow Member States to only recognise confiscation orders that comply with their own internal law. Finally, the transposition has been very slow and – to make things even worse – often inconsistent.

1. *Limited Scope*

According to Art. 2 lit. *c* of the Framework Decision, the term "confiscation order" denotes "a final penalty or measure imposed by a court following proceedings in relation to a criminal offence, resulting in the definitive deprivation of property". Art. 2 lit. *d* complements this definition by stating that the term "property" also refers to assets that are liable to extended confiscation forms[16]. Non-conviction based confiscation, however, is not mentioned at all by the Framework Decision. Admittedly, merely speaking of "proceedings *in relation to* a criminal offense", the definition laid down in Art. 2 lit. *c* does not stipulate that a conviction must have been recorded. Furthermore, its wording is almost identical to the definitions used by the European Council Conventions on confiscation[17] which, according to the Explanatory Reports, apply to

decisions and actions shall be taken by the requested Party, in accordance with and subject to provisions of its domestic law".

[16] The Framework Decision distinguishes between two types of extended confiscation orders, ie orders resulting 'from the application in the issuing State of any of the extended powers of confiscation specified in Article 3(1) and (2) of Framework Decision 2005/212/JHA' - Art. 2 (*d*) (*iii*) and orders that have been issued 'under any other provisions relating to extended powers of confiscation' – Art- 2 (*d*) (*iv*). See below for more details.

[17] Art. 1 lit. *d* of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990 and of the Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005 define "confiscation" as "penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property".

"criminal activities or acts connected therewith, such as acts related to civil *in rem* actions"[18].

Nevertheless, the fact that the Framework Decision only refers to the concept of extended confiscation strongly indicates that the scope does not include any other special confiscation scheme. Moreover, according to Art. 1 (1), the confiscation order has to be imposed by a court "competent in criminal matters" which, in any case, leaves out civil confiscation.

2. *Extensive Grounds for Refusal*

Apart from the limited scope, the Framework Decision leaves extensive grounds for refusal: In general, the enforcement of a confiscation order can only be refused on the grounds – exhaustively – listed in Art. 8 of the Framework Decision (Art. 7 (1): "shall … recognise …, unless the competent authorities decide to invoke one of the grounds … provided for in Art. 8"). Most of the grounds for refusal enumerated in Article 8 are common in the field of mutual legal assistance in criminal matters, such as the *ne bis in idem* principle (Art. 8 (2) (*a*)) or the double criminality requirement (Art. 8 (2) (*b*)). Yet, there is also Art. 8 (2) (*g*) stipulating that an extended confiscation order does not have to be executed if it is not based on one of the three options foreseen by Art. 3 (2) of Framework Decision 2005/212/JHA[19] (so-called "confiscation under any other provisions relating to extended powers of confiscation" (Art. 2 (*d*) (*iv*)) as opposed to "confiscation resulting from the application in the issuing State of any of the extended powers of confiscation specified in Art. 3 (1) and (2) of Framework Decision 2005/212/JHA" (Art. 2 (*d*) (*iii*)).

Art. 3 of Framework Decision 2005/212/JHA (described by the European Commission as the "real added value of the Framework Decision"[20]) required Member States to allow for extended confiscation.

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[18] Explanatory Report to the Convention on Laundering, Search Seizure and Confiscation of the Proceeds from Crime, 7.

[19] Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property. Art. 3 has now been replaced by Art. 5 of the Directive 2014/42/EU 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 (OJ L 127, 29.4.2014, 39), see Art. 14 (1) Directive 2014/42/EU.

[20] 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 (COM(2007) 805 final), 4.

However, because no consensus had been reached in the Council[21], it did not establish a single minimum standard but provided for a set of three options that ranged from a fairly high down to a rather low standard of proof: Member States could choose ("or alternatively") between schemes that covered at least either property obtained during a period prior to the conviction (Art. 3 (2) (*a*) of Framework Decision 2005/212/JHA), property derived from similar criminal activities (Art. 3 (2) (*b*) of Framework Decision 2005/212/JHA) or property disproportionate to the lawful income of the convicted person (Art. 3 (2) (*c*) of Framework Decision 2005/212/JHA)[22].

Art. 7 (5) of the Framework Decision even permits Member States to automatically refuse the execution of these types of confiscation orders ("[e]ach Member State may state in a declaration … that its competent authorities will not recognise and execute confiscation orders under circumstances where confiscation of the property was ordered under the extended powers of confiscation referred to in Article 2 (*d*) (*iv*)"). As a matter of fact, almost all Member States have submitted such a notification[23].

In addition, even if the confiscation order complies with one of the three options of Framework Decision 2005/212/JHA, the executing Member State has to enforce it only "to the extent provided for in similar domestic cases under national law", Art. 8 (3) of the Framework Decision. In other words, if the option applied by the issuing Member State differs from the one implemented by the executing Member State, the latter is free to deny the execution of the request.

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[21] M. KILCHLING, "§ 16 Geldwäsche" in U. SIEBER, H. SATZGER, B. HEINTSCHEL-HEINEGG, Europäisches Strafrecht, München: C.H. Beck, 2014, para. 19.

[22] Art. 3 (2) of Framework Decision 2005/212/JHA read as follows: "Each Member State shall take the necessary measures to enable confiscation under this Article at least:

(*a*) where a national court based on specific facts is fully convinced that the property in question has been derived from criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,

(*b*) where a national court based on specific facts is fully convinced that the property in question has been derived from similar criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,

(*c*) where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person."

[23] Council document 13344/16.

3. *Slow and Inconsistent Transposition*

The effectiveness of the Framework Decision is further hampered by its slow transposition into national law: Almost all Member States exceeded the transposition deadline – often by years[24]. Even now (as for March 2019), the implementation is still pending in Ireland and Luxembourg.

Furthermore, the implementation report issued by the European Commission in 2012 revealed that several Member States had included additional grounds for refusal in their national legislations[25]. For example, Austria would not recognise confiscation orders that violated the the fundamental rights and legal principles enshrined in Art. 6 of the TEU, i.e. the European *ordre public*, while the Czech Republic and Latvia would not enforce confiscation orders that contravened fundamental principles of their constitutions, i.e. the national *ordre public*[26].

III. *Regulation (EU) 2018/1805 as Remedy?*

To overcome these deficiencies, the EU has adopted a new mutual recognition instrument – Regulation (EU) 2018/1805 – that is supposed to amend the framework as follows:

1. *The New Approach*

First, according to Art. 1 (1), the Regulation will apply to all kinds of confiscation orders as long as they are issued "within the framework of proceedings in criminal matters" (as opposed to "framework of proceedings in civil or administrative matters", Art. (1) (4)). In particular, the scope will not be restricted to the types provided for by Directive 2014/42/EU on the confiscation of proceeds[27], but will also cover "crim-

[24] See Status of Implementation, available under *https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=34* (last accessed on 31rd March 2019).

[25] 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).

[26] Implementation report (Fn. 25), 10. See also Horizontal Conclusion on Mutual Recognition.

[27] Those are: extended confiscation (Art. 5 Directive 2014/42/EU), a very basic version of non-conviction based confiscation (Art. 4 (2) Directive 2014/42/EU) and third party confiscation (Art. 6 Directive 2014/42/EU).

inal" non-conviction based confiscation orders (referred to as "confiscation without a final conviction", see recital 13 and Art. 2 (3) of the Regulation).

Second, Member States shall no longer be able to deny the execution of a confiscation order simply due to its type[28]. The original proposal had also omitted an *ordre public* ground for refusal. However, protests by Germany[29] and the European Parliament[30] resulted in the introduction of Art. 19 (1) (h): now, Member States "may decide not recognise and to execute a confiscation order … 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"[31].

Last but not least, to avoid the transposition problems that the Framework Decision had faced, the EU legislator has opted for the instrument of the regulation (Art. 288 TFEU). Hence, the rules will be directly applicable[32].

2. *Critical Appraisal*

Nevertheless, it has to be doubted whether the Regulation will be an improvement. First, it is not at all obvious what types of confiscation orders exactly are covered by its scope. What kind of criteria have to be fulfilled to qualify a confiscation order as "issued within the framework of proceedings in criminal matters", meant to be an "autonomous concept" (recital 13)? What elements distinguish "criminal matters" from "civil matters"? Does the characterisation depend on the nature of the proceedings, the issuing authority or on the purpose of the relevant scheme? As a matter of fact, this issue already came up in the Council

[28] Cf. Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders (COM(2016) 819 final), 13.

[29] Germany had even threatened to reject the proposal, see Council document 15104 ADD 1/17, 2: "Although Germany, like the other Member States, sees the need to improve cross-border cooperation in the area of asset recovery, in light of the above Germany is not in a position to agree to the general approach contained in the current text of the Regulation".

[30] Council document 5482/18.

[31] Art. 19 (1) (h) of the Regulation has been drafted in the style of the recent CJEU case law in Arranyosi & Căldăraru, eucrim 2018, 202.

[32] Proposal for a Regulation (Fn. 28), 7.

when deciding on its general approach. The proposal by the EU Commission was meant to apply to orders "issued within the framework of criminal proceedings". After Italy had pointed out that such a wording would probably rule out its *misure di prevenzione* being not of criminal but of a "hybrid nature", the Council (as well as the European Parliament) finally agreed upon the current term "within the framework of proceedings in criminal matters" to ensure a broader understanding and to align with the terminology of Art. 82 ff. TFEU[33].

Furthermore, as mentioned above, the Regulation will not only apply to the confiscation types prescribed by Directive 2014/42/EU, but to every sort of confiscation order – provided it has been issued "within the framework of proceedings in criminal matters". Consequently, Member States might be obliged to recognise and to execute confiscation orders that are not consistent with their internal laws, probably even contravene constitutional principles. A study carried out in preparation of the Directive 2014/42/EU reported that especially non-conviction based confiscation is subject to concerns about complying with fundamental rights and/or principles[34]. There are reasons to believe that obstacles to the enforcement of such an order may be found in most Member States' legislations.

Art. 19 (1) (h) of the Regulation has slightly eased the situation. However, apart from the fact that this clause is misconfigured (why is the refusal of a confiscation order that violates fundamental rights only optional?), it so far has only the very "patchy" case law of the ECtHR to rely on[35].

IV. *Conclusion*

In general, the concept of mutual recognition offers many advantages. However, mutual recognition also depends to a great deal on mutual trust and thereby on shared concepts. With regard to confiscation however, the Member States' national regimes still differ widely and – most important of all – profoundly. The harmonisation measures adopted by the European Union, such as the Directive 2014/42/EU, might have led or will lead to a certain degree of approximation. Never-

[33] Council document 12685/17.

[34] Comparative Law Study of the Implementation of Mutual Recognition of Orders to Freeze and Confiscate Criminal Assets in the European Union, 266 f.

[35] For example, the ECtHR has not decided yet on a confiscation system that considers confiscation to be a penalty.

theless, it has to be kept in mind that they only lay down minimum standards, allowing Member States, even encouraging them, to go beyond the obligations[36]. In particular, they cannot change the legal nature of a Member State's confiscation regime.

Although a new instrument on the mutual recognition of confiscation orders is to be welcomed, the Regulation does not offer an adequate response to the problems mentioned above, but raises a number of legal issues instead. Taking into account the current state of play, it is a far too ambitious project. Instead of adopting a harmonisation measure "in disguise", Member States should be given time to "warm up" to the new confiscation concepts and – in particular – to better get to know the different systems.

[36] See, for example, Recital 22 of Directive 2014/42/EU.

Section II

THE NATIONAL FRAMEWORK

YVES CARTUYVELS – CHRISTINE GUILLAIN – THIBAUT SLINGENEYER

BELGIUM[1]

Summary: 1. Substantial aspects of confiscation. – 1.1. Confiscation in criminal matters. – 1.1.1. Criminal confiscation. – 1.1.2. Extended confiscation. – 1.1.3. Non-conviction based confiscation. – 1.1.4. Other types of confiscation. – 1.2. Third-Party Confiscation. – 2. Procedural aspects. – 2.1. Freezing. – 2.1.1. Procedures for the freezing of assets. – 2.1.2. Competent authorities for the request of a freezing order. – 2.1.3. Competent authorities to impose a freezing order. – 2.1.4. Conditions for the imposition of a freezing order. – 2.1.5. Time limits for the issuing of a freezing order. – 2.1.6. Duration of the freezing order. – 2.1.7. Rights and legal remedies of the person addressed by a freezing order. – 2.1.8. Legal remedies against unlawful freezing orders. – 2.2. Freezing of third-parties' assets. – 2.3. Confiscation. – 2.3.1. Procedures for the confiscation of assets. – 2.3.2. Competent authorities for the request of a confiscation order. – 2.3.3. Competent authorities to impose a confiscation order. – 2.3.4. Standard of proof for the imposition of a confiscation order. – 2.3.5. Time limits for the issuing of a confiscation order. – 2.3.6. Rights and legal remedies of the person addressed by a confiscation order. – 2.4. Third-party confiscation. – 3. Mutual recognition aspects. – 3.1. Freezing. – 3.1.1. National legal framework for the mutual recognition of freezing orders. – 3.1.2. Competent authorities for the execution of freezing orders from another EU member State. – 3.1.3. Grounds for non-recognition and non-execution. – 3.1.4. Grounds for postponement. – 3.1.5. Time limits for the execution of freezing orders from another EU Member State. – 3.1.6. Rights and legal remedies of the person addressed by a freezing order from another EU Member State. – 3.2. Freezing of third-parties' assets. – 3.3. Confiscation. – 3.3.1. National legal framework for the mutual recognition of confiscation orders. – 3.3.2. Competent authorities for the execution of confiscation orders from another EU Member State. – 3.3.3. Grounds for non-recognition and non-execution. – 3.3.4. Grounds for non-recognition and non-execution. – 3.3.5. Time limits for the execution of confiscation orders from another EU Member State. – 3.3.6. Rights and legal remedies of the person addressed by a confiscation order from another EU member State. – 3.4. Third-party confiscation. – 4. Management and disposal aspects. – 4.1. Freezing. – 4.1.1. Competent authorities for the management of frozen assets. – 4.1.2. Power of the competent authorities on the frozen assets. – 4.1.3. Costs for the manage-

ment or disposal of the frozen assets. – 4.1.4. Legal remedies against wrongful management of frozen assets. – 4.1.5. National practices on the management of frozen assets in a different EU Member State. – 4.1.6. National practices on the management of frozen assets in execution of a freezing order from a different EU Member State. – 4.2. Freezing of third-parties' assets. – 4.3. Confiscation. – 4.3.1. Competent authorities for the disposal of confiscated assets. – 4.3.2. Modalities of disposal of confiscated assets. – 4.3.3. Other possible destinations of confiscated assets. – 4.3.4. National practices on the disposal of confiscated assets in a different EU Member State. – 4.3.5. National practices on the management of confiscated assets in execution of a confiscation order from a different EU Member State. – 4.4. Third-Party Confiscation. – Conclusion. – 5. Final conclusions.

1. *Substantial aspects of confiscation*

In Belgian law, confiscation can be of two different kinds. On the one hand, confiscation is an accessory penalty in addition to a main penalty (criminal confiscation). On the other hand, confiscation of property may be pronounced as a *safety measure*: it is then intended to put out of circulation dangerous products or objects (weapons, narcotics, child pornography images…) and is then independent of a criminal conviction.

This chapter is mainly devoted to criminal confiscation. The general regime of this confiscation is provided for in Articles 42 to 43-*quater* of the Penal Code (hereinafter P.C.). These articles set out general principles which, for each type of item that is liable to be confiscated – the object of the offense, the instruments of the offense, items, products and benefits resulting from the offense – specify as follows: 1°) the conditions of the confiscation; 2°) if the latter is obligatory or optional; 3°) if it is direct or can take place by equivalent; 4°) whether it presupposes that the item is the property of the convict or not (third-party confiscation); 5°) and in which cases extended confiscation is an option.

The current legal regime of criminal confiscation is the result of a recent amendment of the legislation (2018): the legislator was led to take into account *a*) the decision n° 12/2017 of the Belgian Constitutional Court (hereinafter C.C.), annulling the former Article 43, § 1 of the P.C., and *b*) the Directive 2014/42/EU. This general regime is besides made more complex by the existence of specific rules for certain criminal offenses. Finally, it should be mentioned that a Preliminary Draft of Book I

[1] Par. 1 written by Dr. Yves Cartuyvels; par. 2 written by Dr. Christine Guillain; par. 3 and 4 written by Dr. Thibaut Slingeneyer.

of the P.C.[2], currently under discussion in Belgium, provides for the reform of the system of criminal confiscation for the sake of consistency and simplification. As they have not yet entered into effect, we are not dealing here with these new rules envisaged by the draft reform of the P.C.

1.1. *Confiscation in criminal matters*

1.1.1. *Criminal confiscation*

a) Criminal confiscation is provided for in Articles 42 to 43-*quater* of the P.C. It consists in confiscating a property belonging, as a rule, to the convicted person and transferring said property to the State. It can also consist, when the transfer of this property is not possible, in imposing on the convict the payment of a sum of money equivalent to the value of the property which should have been confiscated ("confiscation by equivalent").

Pronounced by the trial judge[3], confiscation is an accessory penalty that may or must accompany a main penalty imposed on the perpetrator of a crime, misdemeanor or contravention[4]. If pronounced, this sentence cannot be suspended[5]. Confiscation is always *special*, dealing with property related to the offense[6]. It may relate to the assets of a natural person or a legal person. If the confiscated item or its equivalent is attributed or returned to the civil party to the trial (P.C., art. 43-*bis*, § 3), the confiscation also constitutes a measure of civil compensation[7].

b) The general system of criminal confiscation is organized in Belgian criminal law according to the assets liable to be confiscated:

1°) The first asset, envisaged in Article 43, § 1. of the P.C., is constituted by the things "constituting the object of the offense". This is the

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[2] Commission de réforme du droit pénal (Criminal Law Reform Commission; J. Rozie, D. Vandermeersch et al.), *Proposition d'avant-projet de livre 1er du Code pénal*, Bruxelles: La Charte, 2016.

[3] Exceptionally, the investigating court may or must pronounce the confiscation when it acts as a court of law (for example in the event of suspension of the pronouncement of the sentence, or measure of internment).

[4] Exceptionally, confiscation can be pronounced in the absence of a principal sentence (non-conviction-based confiscation). See, point 1.1.3.).

[5] Law of 29 June 1964, art. 8, § 1, 1st subpara.

[6] The Belgian Constitution (art. 17) forbids general confiscation.

[7] M. Fernandez-Bertier, «Les peines patrimoniales prévues par le projet de livre Ier du Code pénal: l'amende, la confiscation et la peine pécuniaire en fonction du profit de l'infraction», in Ch. Guillain, D. Scalia (eds.), *La réforme du Livre 1er du Code pénal belge*, Bruxelles: Larcier, 169-209.

"*corpus delicti*", namely the material object of the offense (for example, illegal drugs or weapons)[8]. Confiscation is *compulsory* in the event of a conviction for a crime or offense (P.C., art. 43, § 1), but will be pronounced in the event of a contravention only in cases where the law provides for it (P.C., art. 43, § 2)[9]. In principle, the confiscated item must be the *property of the convicted person*[10], thus excluding *third-party confiscation*. This condition of ownership is a de facto judgment of the trial judge, which is not held by documents attesting the ownership of a third-party[11]. If the convicted person is only the co-owner of the item, the confiscation has the effect of creating an undivided co-ownership between the State and the other co-owners[12]. Moreover, with the exception of money laundering, the object of the offense *cannot be confiscated by equivalent*[13].

2°) The second object, also envisaged in Article 43, § 1 of the P.C., is constituted by the *instruments* of the offense. This refers to items "which served or were intended toward committing the offense". These are material objects the use of which has permitted or facilitated the carrying out of the offense, such as, for example, weapons, a car, a counterfeit key[14] or funds destined for the financing of a terrorist activity[15]. The existence of this condition falls within the sovereign domain of the trial judge's discretion[16]. Confiscation is also required in the case of a punishable attempted offense (crime or misdemeanor), whether the items were used to prepare the offense or instruments used after the offense, and which were used to commit it[17]. Moreover, it does not matter whether the instruments were actually used to commit the offense or the attempted offense: it is sufficient for the author to having mobilized them for that purpose[18]. Except

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[8] F. Lugentz, D. Vandermeersch, *Saisie et confiscation en matière pénale*, Bruxelles: Bruylant, 2015, 21.

[9] Some authors consider that the confiscation of the object of the offense is also compulsory in the event of contravenalization of a crime (D. Bernard, C. Guillain, B. Dejemeppe, «La confiscation pénale: une peine finalement pas si accessoire», in C. Guillain, P. Jadoul, J.F. Germain (eds.), *Questions spéciales en droit pénal*, Bruxelles: Larcier, 2011, 13).

[10] This condition is assessed at the time when the offense is committed (Cass., 25 November 2008, *Pas.*, 2008, n° 664).

[11] B. Dejemeppe, «La confiscation - L'état du droit en 2004», in *Saisie et confiscation des profits du crime*, Anvers: Maklu, 2004, 110.

[12] *Ibidem*.

[13] Cass., 4 April 2006, *Pas.*, 2006, n° 200.

[14] M.-A. Beernaert, H. Bosly, D. Vandermeersch, *Droit de la procédure pénale*, Bruxelles: Larcier, 2014, 458.

[15] Bruxelles, 27 June 2013, unpublished, quoted in F. Lugentz, D. Vandermeersch, *op. cit.*, 23.

[16] Cass., 5 June 1944, *Pas.*, 1944, 371.

[17] D. Bernard, C. Guillain, B. Dejemeppe, *op. cit.*, 16-17.

where otherwise provided by law[19], confiscation here also presupposes that the instrument *is the property of the convicted person*, a condition which is assessed at the time of the offense. This implies that *third-party confiscation* is here excluded. If the author of the offense is only co-owner of the confiscated instruments, the confiscation has the effect of creating a joint possession between the State and the other co-owners. In addition, the confiscation of an immovable property used to commit the offense is not authorized, except in cases where the law expressly provides for it[20]. Finally, it should be noted that, barring exceptions[21], *confiscation by equivalent* of the instrument of the offense was until recently not possible. The Law of 18 March 2018 amending various provisions of criminal law, criminal procedure and judicial law, amended Article 43-*bis*, § 2 of the P.C. in this respect. It has introduced confiscation by equivalent of the *instruments* of the offense, which puts the Belgian criminal law in conformity with the Directive 2014/42/EU[22].

Confiscation, whether direct or by equivalent, is here *compulsory* under the same regime as that in effect for the confiscation of the object of the offense. In the case of a conviction for a crime or misdemeanor, the compulsory nature of the confiscation presupposes, however, that the confiscation *does not have the effect of subjecting the convicted person to an unreasonably harsh penalty* (P.C., art. 43, § 1). This reduction in the compulsory nature of confiscation is the result of recent developments. In 2006, the Belgian Court of Cassation ruled that the purely compulsory nature of the confiscation was not contrary to Article 1 of the Additional Protocol to the ECHR when it involved acts used to commit a crime or a misdemeanor[23]. However, in its judgment n° 12/2017 of 9 February 2017, the Belgian Constitutional Court ruled that Article 43, § 1 of the P.C. violated Articles 10 and 11 of the Constitution, when read in conjunction with Article 1 of the First Additional Protocol to the European Convention on Human Rights, "in that it obliges the judge to pronounce the confiscation of the item which served to commit a crime or an offense when

[18] *Ibidem*, 15.

[19] See, point 1.2.

[20] This is the case in matters of pimping and matters relating to slumlords.

[21] Cass. 4 April 2006, *Pas.*, 2006, n° 200. An exception to this principle is provided, for those procuring and keeping a house of debauchery, slumlords, and human smuggling.

[22] Article 4.1 of the Directive provides that "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".

[23] Cass., 3 May 2006, *Pas.*, 2006, n° 254.

the sentence constitutes such a burden on the financial situation of the person to whom it is imposed as a violation of the right of ownership" (B.14). The Court considers here that the special confiscation of the instrument of the offense may, in certain cases, "put such burden on the financial situation of the person to whom it is imposed that it constitutes a measure disproportionate to the legitimate aim pursued, resulting in a violation of the right of property guaranteed by this provision of international law" (B.12). The absence of the judge's power of moderation, linked to the compulsory nature of confiscation, is therefore a source of unconstitutionality (Doc., Ch., 2017-2018, n° 2753/1, 59-60). The Belgian legislator therefore amended Article 43, § 1 of the P.C. by the Law of 18 March 2018 but also of recital 18 of Directive 2014/42/EU[24]. The new Article 43, § 1 of the P.C., maintains the compulsory nature of the confiscation of the instrument of the offense except "when it has the effect of subjecting the convicted person to an unreasonably harsh penalty". This mitigation of the compulsory nature of confiscation concerns only the instruments of the offense and not the object or proceeds of the offense.

3°) The third object consists of the *proceeds* of the offense (not to be confused with the profits derived from the offense - see below). Article 42, § 2 of the P.C. specifies that confiscation may relate to "things that have been produced by the offense". This refers to things that are created by or result from the offense, such as a counterfeit painting, counterfeit banknotes, narcotics from illegal cultivation or manufacture, etc. Here again, confiscation is *compulsory* in case of crime or misdemeanor but will be pronounced for the contraventions *only in the cases determined by the law*. On the other hand, this confiscation does not suppose that the product is the property of the convict, which makes it possible to deduce that *third-party confiscation* is here possible. This makes important the distinction, sometimes difficult to make in practice[25], between the object of the offense (for which *third-party confiscation* is not provided) and the proceeds of an offense (for which *third-party confiscation* is possible, since the product will be confiscated even if it is not or no longer the property of the convicted person). In fact, one and the same item (e.g. narcotics) may be both the object and the proceeds of the

[24] Recital 18 of Directive 2014/42/EU provides that "Member States may provide that, in exceptional circumstances, confiscation should not be ordered, insofar as it would, in accordance with national law, represent undue hardship for the affected person (…) ". However, the Directive states that "Member States should make a very restricted use of this possibility" and that it should be allowed only "in cases where it would put the person concerned in a situation in which it would be very difficult for him to survive".

[25] P.E. Trousse, "Les principes généraux du droit pénal positif belge", *Les Novelles, Droit Pénal*, t. 1, Bruxelles: Larcier, 1967, 183, n° 890.

offense (in which case, the most severe regime will apply). Finally, it should be noted that, with some exceptions, *confiscation by equivalent* of the proceeds of the offense is not allowed.

4°) The fourth item is constituted by the *profits* derived from or generated by the offense. Article 42, § 3 of the P.C. provides for the confiscation of "patrimonial benefits derived directly from the offense", of "substituted properties and values" and of "income from these invested benefits". These three assumptions are aimed at confiscating profits from a criminal offense. *Patrimonial benefits derived directly from the offense* are defined in Article 42, § 3 of the P.C. as "any property or value that the offender obtained by committing the offense"[26], whether said benefit results from the offense directly or indirectly[27]. This patrimonial benefit may take any of the following shapes: movable or immovable properties, tangible or intangible assets. The only requirement is that the pecuniary benefits result from the offense (Doc., Ch., 1989-1990, n° 987/1, 3), which is left to the sovereign appreciation of the trial judge[28], subject to review by the Court of Cassation[29]. It may be the salary of a hit-man, the amount of money resulting from the sale of drugs, profit from fraud, vehicles, buildings, works of art, etc.[30]. By *properties and values substituted for the patrimonial benefits*, Article 42, § 3 of the P.C. refers to "replacement assets" which are substitutes for the primary economic benefits. This may include, for example, goods purchased with stolen money, shares or bonds purchased with money derived from the offense, etc. As for *incomes from invested benefits*, it is all types of profits that result from both primary and replacement assets[31]. This may include bank interest generated by money of illicit origin, rents from a building purchased with profits from drug trafficking, etc.

In this area, confiscation is, with one exception[32], *optional* and must be the subject of a *written requisition by the public prosecutor* (P.C., art. 43-*bis*, § 1). It is possible for profits derived from crimes, misdemeanors and contraventions; it applies to intentional and unintentional offenses; it

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[26] C. Meunier, «*Du neuf dans les pouvoirs de saisie pénale du juge d'instruction et dans les possibilités de confiscation spéciale*», *J.L.M.B.*, 1997, 1452.

[27] The concept "directly" here does not include a limitation of confiscation to benefits obtained without any intermediate step of the offense. (F. Lugentz, D. Vandermeersch, *op. cit.*, 26).

[28] Cass., 10 January 2012, *Pas.*, 2012, n° 18.

[29] Cass., 27 September 2006, *Pas.*, 2006, 1858.

[30] B. Bilquin, A. Braem, «Blanchiment», in *Droit pénal et procédure pénale*, Bruxelles: Kluwer, 2003, suppl. 6, 32.

[31] Cass., 18 October 2011, *Pas.*, 2011, n° 555.

[32] Article 135-*bis*, § 2 of the P.C. provides for the compulsory confiscation of items received in the context of an offense against the safety of the State.

covers both ordinary criminal offenses (drug trafficking and trafficking in human beings, terrorism, etc.) as well as certain offenses of a financial nature (economic and social offenses, serious and organized tax evasion, fraud to the financial interests of the EU, financial scams…)[33]. The gross amount of profits is retained here, but since confiscation is optional, the judge may limit himself to the net amount of the benefits[34]. In case of multiple perpetrators, the profit drawn by each of the authors of the offense is not the necessary measure of confiscation: confiscation (possibly by equivalent) can relate to all the patrimonial advantages derived from the offense, independently of the personal benefit that the perpetrator has derived from it[35]. These profits derived from the offense must not be the property of the convicted person and they may never have entered the patrimony of the latter. *Third-party confiscation* is therefore provided here. However, in this case, the third-party concerned will be able to assert their rights under the "lawful possession" which they enjoy of the confiscated item (P.C., art. 43-*bis*, § 4)[36]. If the convict is co-owner of the item, confiscation will again create a joint possession between the State and the third-party owner(s). In case of multiple owners, the economic benefits resulting from the participation of the co-perpetrator or accomplice of the offense will be considered as "patrimonial benefits derived directly from the offense" and may therefore be subject to confiscation, even if these benefits are not or not anymore the property of the co-author or the accomplice (and are thus passed in the patrimony of a third-party)[37]. In addition, the amount of the confiscation cannot exceed the amount of the patrimonial benefit derived from the offense (nor of the value of the property and value substituted for the property benefits if the purchaser of the property is of bad faith)[38]. In addition, Article 43-*bis*, § 7 of the P.C. authorizes the judge to provide an amount or a value lower than this maximum amount, in order not to subject the convicted person to an "*unreasonably harsh penalty*", which the here optional character of confiscation implicitly implies. Finally, these broader patrimonial benefits or "profits" derived from the offense may be *confiscated by equivalent* when they can not be found in the offender's estate. In this case, the judge will proceed with their monetary evaluation and the con-

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[33] F. Lugentz, D. Vandermeersch, *op. cit.*, 27.

[34] *Ibidem*, 29-30.

[35] Cass., 9 May 2007, *Pas.*, 2007, n° 239.

[36] Cass., 29 May 2001, *Pas.*, 2001, n° 316.

[37] Cass., 12 November 2013, *Pas.*, 2013, n° 597.

[38] Cass., 9 May 2007, *Pas.*, 2007, n° 239. In the case of multiple authors and/or accomplices, the judge may allocate this maximum amount among the various participants in the offense.

fiscation will be based on a sum of money equivalent to these patrimonial benefits (P.C., art. 43-*bis*, § 2).

Confiscation by equivalent of these patrimonial benefits can only relate to a sum of money and not on specific items of property[39]. However, the receiver may proceed to the forced execution of this confiscation on movable and immovable property which are part of the patrimony of the convicted person (Mortgage Law, art. 7 and 8). Confiscation by equivalent is here always *optional* and here again, the judge can reduce the amount of the confiscation in order to spare the convict an "unreasonably harsh sentence" (P.C., art. 43-*bis*, § 7).

5°) The fifth object liable to confiscation is constituted by the *additional patrimonial benefits* removed from the offense (P.C., art. 43-*quater* §§ 1 and 2). This extended confiscation will be discussed in the point 1.1.2.

6°) A sixth object susceptible of being confiscated is the *patrimony of a criminal organization*. Article 43-*quater*, § 4 of the P.C. provides for the confiscation, compulsory and subject to the rights of bona fide third-party[40], of the assets of a criminal organization. This confiscation is based on the non-rebuttable presumption of the unlawful origin of the assets of the criminal organization. Because of the "vagueness" which surrounds both the notion of criminal organization and the identification of its patrimony, this provision is seldom applied by judges[41].

7°) It should also be noted that in the case of a *concurrence of offenses*, the penalties of confiscation are always cumulative and that the rules provided for in Articles 64 and 65 of the P.C. allowing a more favorable punitive regime to the offender are not applicable[42].

1.1.2. *Extended confiscation*

As pointed out above (point 1.1.1) Article 43-*quater* of the P.C. provides for the principle of extended confiscation. As was recalled by the Court of Cassation[43], this provision allows the judge to consider the confiscation of these additional patrimonial benefits or their equivalent found in the estate or in the possession of the convict, when there is serious and concrete evidence that these profits are derived from a offense.

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[39] Cass., 3 June 2009, *Pas.*, 2009, n° 370.

[40] See M.L. Cesoni, «L'organisation criminelle», in *Les infractions*, vol. 5, *Les infractions contre l'ordre public*, Bruxelles: Larcier, 2013, 614.

[41] F. Lugentz, D. Vandermeersch, *op. cit.*, 39.

[42] *Ibidem*, 64.

[43] Cass., 15 October 2014, *Pas.*, 2014, 2244.

In its first version, Article 43-*quater*, § 2 of the P.C. authorized the confiscation of the additional patrimonial benefits linked to "identical facts" to the offenses envisaged in Article 43-*quater*, § 1 of the P.C. and for which the author had not been previously sentenced, provided that the presence of these benefits in the patrimony of the convict could only be explained by the criminal activity for which they had been wholly or partly found guilty[44]. To make criminal extended confiscation in line with the requirements of Directive 2014/42/EU[45], the Belgian legislator amended Article 43-*quater*, §§ 2 and 3 of the P.C. Under the Law of 18 March 2018, the new Article 43-*quater*, § 2 of the P.C. reproduces the whole of the previous mechanism which was largely in line with the Directive. However, it provides that extended confiscation will no longer relate to profits related to "identical facts" to the offenses provided for in § 1, but to profits related to "offenses likely to give rise, directly or indirectly, to economic advantages, provided that they appear under the same heading, provided for in § 1, as the offense which is the subject of the sentence". This amendment widens the scope of the offenses liable to generate extended confiscation, even if this field remains limited to the list of offenses exhaustively listed in Article 43-*quater*, § 1 of the P.C.

The *list of offenses* liable to lead to confiscation of additional patrimonial benefits has been amended in 2018. Still provided for in Article 43-*quater*, § 1 of the P.C., this list is organized around three categories of offenses. The *first category* includes certain serious violations of International Human Rights Law as well as all terrorist offenses where they are likely to generate patrimonial benefits[46]; the counterfeiting of the euro and some facts of public and private corruption; debauchery and prostitution of minors, trafficking in human beings and human smuggling, child pornography; concealment and money laundering, traffic of certain psychotropic substances or the administration of hormones to animals. For these offenses, considered particularly serious, the conviction alone authorizes the use of confiscation, without there being necessary to demonstrate that these offenses were committed within the framework of a criminal organization (Doc. Ch., 2001-2002, n° 1601/1, 38). A *second category* of offenses includes various forms of participation in a criminal organization (P.C., art. 324-*ter*) and various offenses that can lead to con-

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[44] M.A. Beernaert, H. Bosly, D. Vandermeersch, *op. cit.*, 467.

[45] Article 5 of the Directive refers to "the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit".

[46] The list of terrorist offenses has been extended to comply with Directive 2014/42/EU.

fiscation only if committed as part of a criminal organization[47]. Finally, a *third category* concerns serious acts of tax evasion, organized or not, whether committed within the framework of a criminal organization or not (Doc. Ch., 2001-2002, n° 1601/1, 39).

From the outset, this rule posed a problem: providing for a sentence related to facts for which the author was not found guilty, it appeared hardly compatible with the right to a fair trial and the presumption of innocence. In 2002, however, the Belgian legislator was encouraged in this direction by the Philips judgment against the United Kingdom (5 July 2002), in which the ECHR admitted the compatibility of such a rule with the Convention[48]. Extended confiscation has, however, been accompanied by two types of conditions, regarding the confiscation of additional benefits. Firstly, the confiscated property benefits must have been acquired during a "relevant period of time"[49]. This relevant period begins five years before the person being charged and runs until the date of the conviction (Article 43-*quater* § 2 of the P.C.). On the other hand, it is necessary for the Public Prosecutor's Office to establish the existence of serious and concrete indicators that these pecuniary benefits derived from facts identical (or similar)[50] to the offense (cf. the list of offenses) and that the convicted person (or a third-party) cannot plausibly attest to the contrary (P.C., art. 43-*quater*, §§ 2 and 3).

Confiscation may be *direct* or pronounced *by equivalent*, but in both cases, it is always *optional* (P.C., art. 43-*quater*, § 1). It must have been the subject of a *requisition by the public prosecutor* (P.C., art. 43-*quater*, § 1). It should be noted, however, that the new Article 43-*quater*, § 1 of the P.C. does not require, contrary to the provisions of the Directive, that the confiscated property be the property of the accused. It is enough, as was already the case before, that these items be or having been "in the possession" of the accused. A form of *third-party confiscation* is therefore indeed envisaged. Belgian criminal legislation is here more stringent than the Directive, in that it "opens" the scope of extended confiscation to additional property benefits that would be the property of third-parties.

Finally, Article 43-*quater*, § 3 of the P.C. grants the judges a power of moderation: they may decide to disregard part of the relevant period or part of the income, property or values they determine in order to not subject the convict to an unreasonably harsh sentence.

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[47] This would include, for instance, theft with violence or threats, murder to facilitate theft, theft and extortion or trafficking in nuclear material, etc.

[48] European Court of Human Rights, 5 July 2002, *Philips v. UK*.

[49] This relevant period covers a period beginning five years before the accused is charged, and runs until the date of the sentencing.

[50] F. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 38.

1.1.3. Non-conviction based confiscation

Non-conviction based confiscation can intervene in different cases.

a) In the case of a *mental disorder* of the offender, resulting in the absence of a criminal conviction and the pronouncement of a measure of internment, special confiscation is pronounced (Law of 5 May 2014 on internment of persons, art. 16). The general regime of confiscation applies in this case.

b) If the offender is a *minor*, except in exceptional cases, he is referred to the juvenile court and is not criminally convicted. In this case, the juvenile court may nevertheless decide on the confiscation of property, when the act qualified as offense is declared as established (Law of 8 April 1965 on the protection of youth, art. 61).

c) In the event of the *accused absconding* before trial, he/she may be convicted by default and thus sentenced to the penalty of confiscation according to the rules mentioned in point 1.1.1.

d) In the event of *death* of the defendant before its conviction, the prosecution is extinguished. Therefore, there will be no sentence, but confiscation as a security measure may possibly be pronounced. De facto, the seized items may not be returned if the heirs cannot assert a legitimate claim on them (for example, stolen or defrauded items or money obtained by the sale of narcotics)[51].

e) In the case of a *penal transaction* the public prosecutor shall invite the offender liable to confiscation to abandon the property or assets frozen or, if they are not frozen, to surrender them to a place defined by the prosecutor (Code of Criminal Procedure, hereinafter C.C.P., art. 216-*bis*, § 1, § 6). In such a case of criminal settlement, the article does not specify that these assets must be part of the patrimony of the alleged offender. *Third-party confiscation* is thus an option here. In the case of *penal mediation*, the public prosecutor invites the offender liable to confiscation to abandon the objects already frozen belonging to him or, if they are not frozen, to hand them over to a place determined by the prosecutor (C.C.P., art. 216-*bis*, § 3). *Third-party confiscation* is not considered here. In both cases, confiscation is not a sentence in the true sense of the term, as long as it is not pronounced by a judge. It is rather "a voluntary renunciation of the right of ownership"[52].

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[51] F. Kuty, *Principes généraux du droit pénal belge*, T. IV: *La peine*, Bruxelles: Larcier, 2017, 1080-1083.

[52] F. Lugentz, D. Vandermeersch, *op. cit.*, 16.

f) In the case of *suspension of the sentence*, confiscation may or must be ordered against the suspect or the accused in accordance with the law applicable to the facts (Law of 29 June 1964 with regard to suspension, suspended sentence and probation, art. 6, § 2). As a result, the suspension of the pronouncement of the sentence has no effect on the confiscation[53]. It must be added here that the sentence of confiscation cannot be suspended (Law of 11 February 2014, art. 52).

g) If the judge confines himself to *pronouncing a conviction without main penalty*, special confiscation is nevertheless pronounced in accordance with the law applicable to the facts (Preliminary Title of the Code of Criminal Procedure, art. 21-*ter*, § 2, in fine). This rule continues to apply if the judge takes such a decision on the ground that the reasonable delay to try has been exceeded[54].

h) In the event of *prescription*, the confiscation as a security measure may possibly be pronounced.

1.1.4. *Other types of confiscation*

a) Belgian criminal law also provides for *specific criminal confiscation regimes* for certain types of particular offenses. The special rules here are either derogatory to common law, or maintain the application of common law but broaden the conditions for the application of confiscation. These special rules exist in respect of stolen goods and laundering, trafficking in human beings and human smuggling, pimping, narcotics, customs and excise, haulage and transport services, hunting, weapons and copyright and intellectual property rights. It suffices here to consider the specific regimes for dealing with stolen goods and money laundering, on the one hand, and drug trafficking on the other, insofar as they play an important role in matters of confiscation.

In order to determine the confiscation regime applicable to *concealment and money laundering*, it is necessary to combine the rules of ordinary law (P.C., art. 42 to 43-*quater*) and the rules specific to the offense of money laundering (P.C., art. 505, §§ 6 and 7)[55]. By building on the or-

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[53] D. Libotte, H. Van Bavel, «Het wel en wee van het witwasmisdrijf», *Tijdschrift voor Strafrecht*, 2007, 369-373.

[54] F. Lugentz, D. Vandermeersch, *op. cit.*, 66. The authors consider that, in this case, it should be admitted that "the judge shall confiscate to a level lower than that which he would have ordered in the absence of such an overrun".

[55] For a detailed analysis, see D. Vandermeersch, «Confiscations spéciales en matière de blanchiment», in M. Van Molle (eds.), *Blanchiment de capitaux et professions juridiques*, Limal: Anthemis, 2014, 31-58.

dinary law system, three types of confiscation can be envisaged. The first concerns the confiscation of the *object of laundering*. Article 505, §§ 5 to 7 of the P.C. provides for the direct confiscation of patrimonial benefits derived directly from the primary offense of money laundering (e.g. drug trafficking), and of substituted properties and values or incomes from invested benefits. These goods, which constitute the "object" of money laundering according to Article 42, § 1 of the P.C., will therefore be confiscated on the basis of this article (and not Article 43-*bis* of the P.C.). Confiscation is here in principle *compulsory*[56]. It does not presume that the property is (still) the property of the convicted person (P.C., art. 505, §§ 5 to 7) and thus authorizes *third-party confiscation*. In this case, third-parties – those who have not been convicted of the primary offense or of money laundering – will be able to assert their rights over the items by virtue of their "lawful possession", which remains to the sovereign appreciation of the trial judge[57]. The amount of the special confiscation may not exceed the amount of the object of the laundering[58]. *Confiscation by equivalent* of the object of money laundering is also provided, when the goods that constitute this object cannot be found in the patrimony of the convict (or elsewhere). This confiscation can only relate to a sum of money[59]. It is compulsory[60] but subordinate to the principle of subsidiarity: if the object of money laundering is part of the patrimony of the convicted person, only direct confiscation will be pronounced and the same applies if this object is found elsewhere[61]. In accordance with ordinary law (P.C., art. 42, § 1), the confiscation *of instruments intended for or used to commit the offense of money laundering* is compulsory when those instruments are found in the property of the convicted person. Ownership of property by the convict is here a condition of confiscation, and *third-party confiscation* is therefore excluded. This includes movable things (for example, a car), but not immovable properties or items that are the subject of the money laundering or the patrimonial benefits derived from that offense[62]. Pursuant to the Article 42, 3° of the P.C., *the patrimonial benefits, substituted properties and values, and income from*

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[56] Subject to the temperaments provided for in Article 505, §§ 6 and 7, *in fine* of the P.C.

[57] Cass., 4 March 2014, *Pas.* 2014, n° 170. The judge appreciates, in particular with the help of the elements of the file, the good faith of the third-party.

[58] Cass., 14 April 2010, *Pas.*, 2010, n° 80.

[59] Cass., 3 June 2009, *Pas.*, 2009, n° 370.

[60] Subject to the temperaments provided for in Article 505, §§ 6 and 7 of the P.C.

[61] F. Van Volsem, «Witwassen: de sancties», *Tijdschrift voor Strafrecht*, 2011, 413.

[62] *Ibidem*, 402.

invested benefits may be confiscated if they result directly from the offense of money laundering (e.g., a commission charged by the "launderer"). Confiscation is always *optional*, must be required by the public prosecutor, and is not subject to the ownership condition. It is the judge who decides whether a patrimonial benefit is derived, and to what extent, from the offense of money laundering[63]. According to the Court of Cassation, if the original laundered assets are the subject of money laundering, then the assets resulting from the transaction constitute economic advantages resulting from the offense of money laundering and will therefore be confiscated as such[64]. Finally, *confiscation of additional patrimonial benefits* (or of substitute properties or values, or income from invested benefits) is allowed in the case of money laundering. This confiscation is direct but can also take place *by equivalent* when the property has disappeared from the property of the convicted person. It is always *optional* and requires a requisition from the public prosecutor. Its amount may be weighted by the judge who wants to avoid an overly severe sentence (P.C., art. 43-*quater*, § 3, last subpara).

With regard to drug trafficking, Article 4, § 6 of the Law of 24 February 1921 with regard to drug trafficking provides for *optional third-party confiscation* of vehicles, devices, instruments or things that constituted the object or the instrument of the offense[65]. Third-party confiscation is therefore possible, even when the item belongs to a bona fide third-party. The Constitutional Court ruled that Article 4, § 6 violated Articles 10 and 11 of the Constitution in that it did not provide for the return of confiscated items to these persons or their summons, so that they were unable to express themselves regarding the confiscation[66].

b) We find also in Belgian law confiscation *as a safety measure*. This confiscation is intended to remove from circulation objects or substances considered dangerous or harmful to public health or safety[67]. These may be weapons, explosives, narcotics, or child pornography, for instance[68]. Confiscation may be pronounced here independently of any criminal charge or conviction.

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[63] Cass., 17 December 2013, *Pas.*, 2013, n° 690.

[64] Cass. 9 September 2014, *Pas.*, 2014, 1793.

[65] The offenses concerned are provided for in Articles 2, 2°, 2-*bis* and 3 of the Law of 24 February 1921.

[66] C. C., 3 April 2014, n° 65/2014.

[67] D. Bernard, C. Guillain, B. Dejemeppe, *op. cit.*, 40.

[68] B. Dejemeppe, "La confiscation", *in Saisie et confiscation des profits du crime*, Anvers, Maklu, 2004, 101.

1.2. *Third-Party Confiscation*

Belgian criminal law does not provide for a set of specific penal provisions relating to third-party confiscation. The existence and regime of third-party confiscation can be deduced from the implicit place left for it in Articles 42 to 43-*quater* of the P.C., or in other specific provisions relating to confiscation for certain offenses. This explains why, for each case of criminal confiscation envisaged in point 1.1, we specified when the regime of third-party confiscation was envisaged. In a pedagogical concern, we summarize here the elements outlined above, adding certain rules for specific offenses.

a) As a rule, third-party confiscation is not envisaged for the *object* of the offense (P.C., art. 42, § 1).

However, in the case of money laundering, third-party confiscation is compulsory, but third-parties may assert their rights over the item by virtue of their "lawful possession". In terms of drug trafficking, confiscation is optional, even when the thing belongs to a third-party. Bona fide third-parties may however assert their rights over the matter[69].

In the matter of slumlords, third-party confiscation is also mandatory, without prejudice to the rights of third-parties on the property concerned. It can also take place by equivalent (P.C., art. 433-*terdecies*, §§ 2 and 3).

b) As a rule, third-party confiscation is not envisaged for the *instrument* of the offense (P.C., art. 42, 1°). However, in matters of drug trafficking, optional confiscation is provided, even when the thing belongs to a bona fide third-party. Such confiscation is possible here by equivalent, but only for the convict. Similarly, with regard to pimping and keeping a brothel, Article 382-*ter* of the P.C. provides for compulsory confiscation of the instrument of the offense even if it does not belong to the convicted person, without prejudice to the rights of third-parties on the concerned goods. Confiscation can here take place by equivalent. In the area of trafficking in human beings, third-party confiscation is compulsory, without prejudice to the rights of third-parties on the property concerned. It can take place by equivalent. (P.C., art. 433-*novies*, § 6). In matters of slumlords, third-party confiscation is also mandatory, without prejudice to the rights of third-parties on the property concerned. It can also take place by equivalent (P.C., art. 433-*terdecies*, §§ 2 and 3). Finally, in the area of human smuggling, third-party confiscation of the instrument of the offense is also mandatory, without prejudice to the rights of

[69] C. C., 3 April 2014, n° 65/2014.

third-parties on the property concerned. It can also take place by equivalent (Law of 15 December 1980 on access to the territory, residence, settling and removal of foreigners, art. 77-*sexies*).

c) With regard to *proceeds* derived from the offense, third confiscation is provided for, since Article 42, § 2 of the P.C. does not condition the confiscation of a property requirement for the convicted person. It has a mandatory character and can be pronounced by equivalent.

d) With respect to *profits* derived from the offense, the same reasoning applies. Reading the Article 42, § 3 P.C. makes it possible to deduce that third-party confiscation exists and that it has an optional character (except in case of an offense against the security of the State, where it is compulsory (P.C., art. 135-*bis*, § 2)).

e) With regard to *additional patrimonial benefits in a broad sense* derived from the offense, third-party confiscation is provided for, since Article 43-*quater*, § 1 of the P.C. does not require that the confiscated things be the property of the convicted person and that one is satisfied with them being or having been in "their possession". The same principle applies to the extended confiscation of these additional patrimonial benefits, on the basis of the same provision.

f) Third-party confiscation is also possible in the event of a *penal transaction*. It is optional (C.C.P., art. 216-*bis*, § 1, subpara 6).

Kinds of confiscation	Legal basis	Compulsory	Third-party confiscation	By equivalent
Safety measure	*No general legal basis*	*Yes*	*Yes*	*No*
Object of the offense	P.C., art. 42, 1°, 43 and 43-*ter*	Yes	No	No
Instruments of the offense	P.C., art. 42, 1°, 43, 43-*bis* and 43-*ter*	Yes	No	Yes
Proceeds of the offense	P.C., art. 42, 2°, 43 and 43-*ter*	Yes	Yes	No
Profits generated by the offense	P.C., art. 42, 3°, 43-*bis* and 43-*ter*	No	Yes (but protection of bona fides third-party)	Yes
Extended confiscation	P.C., art. 43-*quater*, § 1 to 3	No	Yes (but protection of bona fides third-party)	Yes
Patrimony of a criminal organization	P.C., art. 43-*quater*, § 4	Yes	Yes (but protection of bona fides third-party)	Yes
Money laundering	P.C., art. 505	Yes	Yes (but protection of bona fides third-party)	Yes
Drug trafficking	Law of 24 February 1921, art. 4, § 6	Yes	Yes (but protection of bona fides third-party)	Yes

2. *Procedural aspects*

Confiscation should not be confused with freezing of assets, which is often, for reasons of efficiency, an indispensable prerequisite for confiscation[70]. Therefore, we will first discuss the rules on freezing and then treat those related to confiscation.

2.1. *Freezing*

2.1.1. *Procedures for the freezing of assets*

The rules on criminal freezing are found in articles 35 to 40-*bis* of the C.C.P., as far as the preliminary investigation is concerned; in Article 89, with respect to investigation; in Articles 46-*quinquies* and 89-*ter* for discreet visual inspection; in Articles 524-*bis* and 524-*ter*, in the context of the special inquiry into economic benefits, and in Articles 464/1 to 464/41, in the framework of the criminal execution investigation.

The procedures for the lifting of freezing are governed, during the preliminary investigation, by Articles 28-*sexies* and 28-*octies* of the C.C.P. and, during the investigation, by Articles 61-*quater* and *sexies* of the C.C.P.

Specific provisions on freezing are also provided for in special criminal law or in particular criminal law (see below point 2.1.4.).

2.1.2. *Competent authorities for the request of a freezing order*

In Belgium, the pre-trial investigation is composed of two phases: the preliminary investigation phase ('information') and the investigation phase ('instruction').

The preliminary investigation is the set of acts intended to search for offenses, their authors and their evidence. It aims at gathering the elements useful for the exercise of the public action. It is conducted under the direction and authority of the public prosecutor (C.C.P., art. 28-*bis*, §§ 1 to 3).

The pre-trial investigation can also be entrusted, by the public prosecutor or the victim, to the investigating judge. To ensure its independence and its impartiality, investigating judge never search for offenses, but only authors and aims at gathering the evidences useful for the demonstration of the truth (C.C.P., art. 55).

Freezing is an act that falls under both the preliminary investigation

[70] However, confiscation is not legally subject to prior freezing, so that courts can confiscate things that have not been frozen.

phase and the investigation phase. It can therefore be ordered by both the public prosecutor and the investigating judge.

Preliminary investigation acts cannot normally include any act of coercion or infringe individual rights and freedoms. Nevertheless, Article 28-*bis*, § 3 of the C.C.P. states that "these preliminary investigation acts may, however, include the freezing of the assets mentioned in Articles 35 and 35-*ter*".

In the context of preliminary investigation, freezing can be operated by the public prosecutor both in flagrant state (C.C.P., art. 35) and outside flagrance (C.C.P., art. 28-*bis*, § 3), in the context of a reactive or proactive investigation (C.C.P., art. 28-*bis*, § 3). It may also be ordered as part of a special inquiry into economic benefits or as part of the criminal execution investigation.

According to Article 89 of the C.C.P.[71], provisions relating to freezing in the context of preliminary investigation are applicable to the investigation phase. As a result, the powers of the public prosecutor and the investigating judge in matters of freezing are common.

2.1.3. *Competent authorities to impose a freezing order*

In theory, freezing can be executed by both the public prosecutor and the investigating judge. The public prosecutor has the status of judicial police officer (C.C.P., art. 9), while the investigating judge may perform all acts that fall within the jurisdiction of the judicial police (C.C.P., art. 56, § 1).

In practice, the execution of freezing will be delegated to the police. The latter have the task, in the exercise of their judicial police duties, of "seeking, freezing and making available to the competent authority the objects the freezing of which is prescribed" (Law of 5 August 1992 on the police function, art. 15, 3°). On this occasion, they must "transmit to the competent authorities the report of their mission as well as the information collected on this occasion" (Law of 5 August 1992, art. 15, 4°). The judicial police officers have the right to confiscate the documents they discover, without having to wait for instructions from the public prosecutor or the investigating judge[72] and without being required to be judicial po-

[71] C.C.P., art. 89: "The provisions of Articles 35, 35-*bis*, 35-*ter*, 36, 37, 38, 39 and 39-*bis* concerning the freezing of objects whose search may be made by the public prosecutor, in the case of *flagrante delicto*, are common to the judge of the 'instruction'. In addition, the investigating judge may perform all acts that fall within the competence of the judicial police, the information and the investigation" (C.C.P., art. 56, § 1).

[72] Antwerp, 19 March 2003, *Rechtskundig Weekblad*, 2003-2004, 1696, quoted in M.-A. Beernaert, H. Bosly, D. Vandermeersch, *Droit de la procédure pénale*, Bruges: La Charte, 2017, 487.

lice officers. However, only an agent who is a judicial police officer is authorized to draw up the minutes of freezing (C.C.P., art. 37, § 1).

It has been held that "judicial police officers who carry out a search with warrant or a regular search must confiscate all items that appear to be referred to in Article 42 of the PC and all that can be used for the ascertainment of truth (C.C.P., art. 35)"[73].

According to Article 40-*bis* of the C.C.P., "the public prosecutor may, in the interests of preliminary investigation, authorize the police to postpone the freezing … of all items referred to Article 35". This technique consists in "not immediately confiscating the object of the offense or the property directly related to the offense or not directly arresting certain alleged offenders, in order to identify the (other) perpetrators of the offense"[74].

Finally, it should be noted that, in the context of penal transaction and penal mediation, the public prosecutor must invite the perpetrator of the offense "giving rise or that may give rise to confiscation to relinquish, within a period he fixes, the property or the patrimonial benefits confiscated or, if they are not confiscated, to put them back to a place designated by the judge" (C.C.P., art. 216-*bis*, § 1 and 216-*ter*, § 4).

2.1.4. *Conditions for the imposition of a freezing order*

Substantially, according to Article 35, § 1 of the C.C.P., "the public prosecutor will freeze anything that appears to be one of the items referred to in Articles 42 and 43-*quater* of the P.C. and all that can be used to ascertain the truth".

a) *The freezing of items that can be used to ascertain the truth*. Freezing can, on the one hand, relate to the things that are intended to contribute to ascertaining the truth (C.C.P., art. 35). This is what is commonly referred to as exhibits, but also all exculpatory material[75]. It can be the murder weapon, the stained clothing of a murder victim, the seized drug, mail addressed to or received by a suspect, the bookkeeping of a company[76].

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[73] Cass., 19 February 2002, *Pas.*, 2002, n° 498.

[74] M.-A. Beernaert, N. Colette-Basecq, C. Guillain, L. Kennes, P. Mandoux, M. Preumont, D. Vandermeersch, *Introduction à la procédure pénale*, Bruges: La Charte, 2017, 153.

[75] See, in relation to this, Article 37, § 1 of the C.C.P.: "If there are suspicious papers or effects in the suspect's home which may be used for conviction or for discharge, the general attorney shall freeze said effects or papers".

[76] Fr. Lugentz, D. Vandermeersch, *op. cit.*, 104.

b) *The freezing of things that are liable to be confiscated*. Freezing may, on the other hand, relate to items that may be confiscated under Article 42 of the P.C. (see point 1.1.1.).

Among these items, are the patrimonial benefits derived directly from an offense. According to the Court of Cassation, "all that appears to constitute a patrimonial benefit derived from an offense as provided for in the aforementioned Article 35, refers not only to the economic benefits derived directly from an offense but also to all that derives from it indirectly, and therefore also the property and the values that were substituted for them or the income from these benefits invested as provided for in Article 42, 3° of the P.C.". The Court therefore considers that the public prosecutor and the investigating judge can freeze them without "establishing that the assets and values which have been substituted for the patrimonial benefits and the income from the invested benefits, correspond to the conditions set out in Article 42, 3° of the P.C., (…) It is enough that there be indications of the latter"[77]. The amount of the freezing may not exceed the amount of the alleged pecuniary benefit derived from the offense[78]. Freezing may also relate to claims (C.C.P., art. 37, § 2).

c) *Freezing of a building*. Article 35-*bis* of the C.C.P. authorizes freezing of real estate as a precaution, provided that the building appears to constitute a property benefit derived from an offense or a property that it has come to replace[79]. Freezing is therefore not possible under Article 35 of the C.C.P.[80], either when the building is the object of the offense or if it has served it or was intended to do so[81]. However, this does not apply in the case of stowage of stolen goods and money laundering: in these cases, the property benefit derived from an offense is, under Article 505, §§ 5 and 7 of the P.C., the object of the offense, which must be confiscated and thus frozen, even if the property does not belong to the convicted person: "the circumstance whereby the owner of the property is not the author or the co-perpetrator of the offense from which the initial pecuniary benefit is derived, or that the investigating judge who orders the freezing is not responsible for the investigation of this basic offense, constitutes no obstacle to said freezing"[82]. Derogations are also possible in special criminal law.

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[77] Cass., 15 February 2000, *Pas.*, 2000, n° 124.

[78] Cass., 9 May 2007, *Pas.*, 2007, n° 239.

[79] Cass., 15 February 2000, *Pas.*, 2000, n° 124.

[80] M.-A. Beernaert, H. Bosly, D. Vandermeersch, *op. cit.*, 491 and 515.

[81] Cass, 27 May 2009, *Revue de droit pén*al *et de criminologie*, 2012, 889 with contrary conclusions of general attorney D. Vandermeersch.

[82] Cass., 4 March 2008, *Pas.*, 2008, n° 152.

d) *Freezing by equivalent*. Assuming that "there is serious and concrete evidence that the suspect has obtained a pecuniary benefit as defined in Articles 42, 3° or 43-*quater*, § 2 of the P.C., and that the items which materialize this patrimonial benefit cannot or can no longer be found as such in the patrimony of the suspect who is in Belgium or have been mixed with lawful things", the public prosecutor and the investigating judge may freeze "other things which are in the patrimony of the suspect, equal to the supposed amount of said patrimonial benefit" (C.C.P., 35-*ter*, § 1). Freezing by equivalent only relates to the things referred to in Articles 42, 3° or 43-*quater*, § 2 of the P.C. and not to the things referred to in Article 42, 1° of the P.C.[83], so that it does operate "only with respect to the pecuniary benefits and not with respect to the object of the offense, its product or its instruments"[84].

However, since the Law of 5 February 2016, freezing by equivalent is applicable to the object of concealment or money laundering and, since the Law of 18 March 2018, also to the instruments which served or which were intended to commit the offense with. The purpose of the latter amendment is to bring the freezing regime in line with that of confiscation by equivalent, which relates both to the object of concealment or laundering and to its instruments (C.C.P., art. 35-*ter*, § 1): "the transposition of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of the instruments and proceeds of crime in the European Union requires the provision, in the P.C., of confiscation by equivalent of the instruments of the offense. It is therefore necessary, in order to ensure the effectiveness of its execution, also for the C.C.P., to provide for freezing by equivalent of the instruments of the offense" (Doc., Ch., 2017-2018, n° 54-2753/1, 9). In order, not to subject the person to an unreasonably harsh penalty, the public prosecutor or the investigating judge may reduce the monetary assessment, in accordance with Article 43-*bis* of the P.C.

Unlike confiscation by equivalent, which can only concern a sum of money and not specific property, freezing by equivalent can relate to movable property, real estate and receivables, but in no case exempt property (C.C.P., art. 35-*ter*, § 2). "These are, in particular, goods indispensable to the household or profession, the exempt amount of income, and property belonging to public institutions"[85].

Freezing by equivalent is subject to the principles of proportionality and subsidiarity: "on the one hand, the value of the goods frozen may

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[83] Cass. 4 April 2006, *Nullen Crimen*, 2006, 3, 208.

[84] Cass. 4 April 2008, *Pas.*, 2008, n° 204.

[85] Fr. LUGENTZ and D. VANDERMEERSCH, *op. cit.*, 118 and 119.

not exceed that of the alleged proceeds of the offense which may be taken into account for confiscation; on the other hand, like confiscation by equivalent, freezing by equivalent is subsidiary and can only be ordered if, in the assets of the suspect in Belgium, the patrimonial benefits derived directly from the offense or their substitute can no longer be found as such"[86].

e) *Freezing of additional* patrimonial *benefits*. The direct or equivalent freezing of the additional economic benefits referred to in Article 43-*quater* of the C.C.P., is possible on the basis of Articles 35 and 35-*ter* of the C.C.P. (see point 1.1.2.).

f) *Freezing of the assets of a criminal organization*. The same applies to the assets of a criminal organization that can be confiscated under Article 43-*quater*, § 4 of the P.C., so that it can also be seized on the basis of Articles 35 and 35-*ter* of the C.C.P. (see point 1.1.1.).

g) *The freezing of things under special criminal law*. Special criminal law may provide for specific measures in matters of freezing[87].

Thus, Articles 382-*ter* (corruption of youth, debauchery and pimping), 433-*novies* and *quaterdecies* (trafficking in human beings and abuse of vulnerability) of the P.C., as well as Article 77-*sexies* of the Law of 15 December 1980 (smuggling), provide for the possibility for the public prosecutor and the investigating judge to freeze movable property, buildings, rooms or any other space forming the object of the offense, served to it or were intended to commit it.

According to Article 4, § 6 of the Law of 24 February 1921 on drugs, it is possible to confiscate – and therefore to freeze – vehicles, tools, instruments or items that have served or were intended to commit offenses provided for by the law on drugs or which have been subject to it, even if they are not the property of the convict.

Other measures are considered as freezing without being of a judicial nature. This is the case with the freezing by administrative measure provided for in Article 30 of the Law of 5 August 1992 on the police function. This article allows police officers to withdraw from the free disposal of the owner, possessor or keeper, objects and animals that endanger the life and physical integrity of persons and the safety of property, in places accessible to the public, for the needs of the public peace and as

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[86] M.-A. Beernaert, N. Colette-Basecq, C. Guillain, L. Kennes, P. Mandoux, M. Preumont, D. Vandermeersch, *op. cit.*, 149.

[87] For a detailed account, see Fr. Lugentz, D. Vandermeersch, *op. cit.*, 112 to 118.

long as the necessities of the maintaining the public peace require it. Another example is the Royal Decree of 28 December 2006 on specific restrictive measures against certain persons and entities in the fight against the financing of terrorism. This Royal Decree authorizes the freezing of the funds and economic resources of persons or entities who commit, attempt to facilitate or participate in acts of terrorism. This Royal Decree partially implements UN Resolution 1373 (2001) and complements the European legal arsenal with regard to the freezing of assets of terrorists[88].

h) *The special inquiry into the pecuniary benefits* may be ordered, upon request of the public prosecutor, by the courts and tribunals in the event of the convicted person, with a view to determine the pecuniary benefits that might be taken into account for a confiscation sentence (C.C.P., art. 524-*bis* and 524-*ter*). This investigation is only possible if the public prosecutor demonstrates, on the basis of sound and concrete evidence, that the convict has derived pecuniary benefit from the offense for which he or she was convicted, or from other offenses likely to give rise, directly or indirectly, to a financial benefit, insofar as they appear in Article 43-*quater*, § 1, of the P.C. Acts performed as part of the special investigation into economic benefits may include the freezing of items referred to in Articles 35 and 35-*ter* of the C.C.P. This type of freezing can therefore affect movable and immovable property alike.

i) Freezing is also possible in the context of a criminal execution investigation (see below point 4.3.1.).

On the level of form. The defendant must be invited to explain himself about the frozen items when presented to him. A report must be drawn up by the public prosecutor or, most often, by a judicial police officer who lists the things frozen. As far as it is possible, items are individualized in the minutes (C.C.P., art. 37, § 1). "If this individualization of frozen items turns out to be impossible in practice, because of their large quantity, the wording can be limited to a more general enumeration"[89]. The minutes are signed by the person subject to the freezing, who may receive a copy free of charge (C.C.P., art. 35 and 37.). "The individual subject to the freezing is not required to sign the minutes, but by signing, they confirm that the enumeration recorded in the minutes corresponds to what has been frozen"[90].

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[88] The Royal Decree of 28 December 2006 has been confirmed by Article 115 of the Law of 25 April 2007 on various provisions (IV).

[89] Fr. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 131.

[90] *Ibidem*.

In the event of freezing of receivables (in particular on a bank account), it must be made by written notification to the debtor in the forms provided for by law. From the date of receipt of the notification of the minutes of the freezing, the debtor can no longer alienate the sums or things that are the subject of the freezing (C.C.P., art. 37, §§ 2 and 4).

If it is a question of proceeding to the provisional freezing of immovable property, the public prosecutor or the investigating judge must make a prosecutor's request, and the freezing must be done by bailiff's writ, notified to the owner. On pain of nullity, the bailiff's writ must contain a copy of the indictment and certain mentions (C.C.P., art. 35-*bis*).

If the freezing is carried out by equivalent, the public prosecutor or the investigating judge must mention, in their decision, the estimate of the amount of the alleged pecuniary benefit of the offense – which is not easy for the magistrate[91]. They must also indicate the serious and concrete indicators justifying the freezing. In the case of third-party freezing, the magistrates must indicate "serious and concrete indicators which show that the suspect wishes to exempt the property from the execution of a possible special confiscation, as well as the preliminary investigation whereby it appears or may be deduced that the third-party has knowledge of this". All these elements must appear in the minutes of freezing (C.C.P., art. 35-*ter*, §§ 1 and 4).

2.1.5. *Time limits for the issuing of a freezing order*

There is no time limit to carry out freezing ordered by the judicial authorities.

2.1.6. *Duration of the freezing order*

Freezing is not limited in time, subject to the prescription of public action. However, the conservatory freezing of real estate is only valid for five years from the date of its transcription.

2.1.7. *Rights and legal remedies of the person addressed by a freezing order*

As the Court of Cassation pointed out, "the consequences for the injured party notwithstanding, a freezing constitutes a precautionary measure which does not have the character of a penalty". It follows that the guarantees attached to Articles 6 and 7 of the European Convention on Human Rights must not apply to them. Thus, the right of every ac-

[91] *Ibidem*, 148: "It is not always easy to determine with precision the amount of the proceeds of the offense at this stage of the proceedings, the magistrate being often forced to make a simple estimate".

cused person to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them "shall not apply to measures concerning assets undertaken in the course of preliminary investigation or investigation"[92]. In the same vein, the Liege Court of Appeal found that "the decision to freeze property as a precautionary measure pursuant to Article 28-*sexies* of the C.C.P. does not in any way infringe the presumption of innocence of the person recognized as owner of said property. Such a decision can only take place under certain precise and specific conditions imposed by law and, in particular, after taking into account the principle of proportionality"[93].

As we saw in point 2.1.4., freezing is subject to certain formalities. Thus, the person subject to freezing receives a free copy of the report of freezing, which contains the inventory of the items frozen and which is given to them immediately or which is sent to them within forty-eight hours (C.C.P., art. 37, § 3). The Court of Cassation considers that "the freezing provided for in Articles 35 and 35-*ter* of the C.C.P, the formalities of which are specified in Article 37 of the C.C.P., is in conformity with Article 1 [of Additional Protocol n° 1 of the European Convention on Human Rights]. These provisions also satisfy the principle of legality and the rule of law". The Court nevertheless specifies that "the respect of the procedural safeguards provided for by the law at the time of the freezing is neither prescribed on penalty of nullity, nor substantial"[94].

In addition, the freezing carried out at a person's holding a professional secret must be surrounded by a number of guarantees in order to comply with Article 8 of the European Convention on Human Rights[95].

The public prosecutor or the investigating judge may at any time of the procedure lift the freezing operated on a property, if they consider "that the frozen assets do not fall under the application of the Article 42 of the P.C. or that their freezing is no longer necessary to ascertain the truth"[96]. Nothing prevents these authorities, then, from returning the property belonging to the victim[97].

Any person aggrieved by an act of investigation relative to their property may, by reasoned request, ask the lifting of freezing respectively to the public prosecutor or the investigating judge. The procedure, so-called "référé pénal", must be introduced by reasoned request, the ap-

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[92] Cass. 22 June 2005, *Pas.*, 2005, n° 365.
[93] Liège, 2 September 2014, *Revue de Droit pénal de l'entreprise*, 2014, 323.
[94] Cass., 17 October 2006, *Pas.*, 2006, n° 403.
[95] For more precisions, see Fr. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 119 to 123.
[96] *Ibidem*, 173.
[97] *Ibidem*, 100.

plicant having to had elected residence in Belgium. The public prosecutor or the investigating judge must decide on this request for the lifting of the measure at the latest within fifteen days of the inscription of the request in the register. They may reject the application in the following cases: when they consider that the necessities of the investigation require it; when the lifting of the act compromises the safeguarding of the rights of the parties or third-parties; when the lifting of the act poses a threat to persons or property; and in cases where the law provides for the restitution to a third-party or the confiscation of said property. The magistrate may order a partial or total lifting of the measure. They may also impose conditions (C.C.P., art. 28-*sexies* and 61-*quater*).

Challenging the freezing order can be done at all stages of the criminal proceeding (preliminary investigation, investigation and judgment) by the person whose property is affected. In case of judgment, the tribunal or the court will rule on the petition.

Moreover, pursuant to Articles 21-*bis* and 61-*ter* of the C.C.P., as amended by the Law of 18 March 2018 amending various provisions of criminal law, criminal proceeding and judicial law, the "directly interested party" may request the public prosecutor or the investigating judge to consult the preliminary investigation or investigation file related to a crime or offense[98] and to obtain a copy thereof. The persons have the faculty to seize the chamber of indictments in the event of refusal of the public prosecutor or the investigating judge.

The refusal of lifting the freezing or the absence of response of the public prosecutor or investigating judge may be appealed before the indictment chamber in fifteen days of the communication or notification of the decision. The indictments division must rule within 15 days after hearing the general attorney, the applicant and his counsel (C.C.P., art. 28-*sexies*, § 4 and 61-*quater*, § 5). On the occasion of this appeal, the applicant may raise the irregularity of the freezing. Similarly, the indictments division may dismiss evidence gathered as a result of an unlawful freezing, either because the irregularity is prescribed on pain of nullity, or because it considers, pursuant to Article 32 of the P.T.C.C.P., that this irregularity taints the reliability of the evidence or that the use of the evidence is contrary to fair trial. The Court of Cassation, however, considers that the damage suffered by the applicant, "the absence of any notification of the measures of freezing carried out does not in itself consti-

[98] For offenses falling within the jurisdiction of the police court, this possibility applies only in respect of the offenses referred to in Article 138, 6-*bis* and 6-*ter*, and offenses for which the prescription is three years in application of Article 68 of the Law of 16 March 1968 relating to the traffic police (C.C.P., art. 21-*bis*, § 2).

tute a violation of the rights of the defense," to the extent that this absence can be amended[99]. During the examination of the request, the indictments chamber does not have to "definitively and irremediably replace the trial court which will rule on the substance of all aspects of the case, including the confiscation of the vehicle"[100]. The applicant cannot introduce a new application for the same purpose before the expiry of a period of three months from the last decision on the same subject (C.C.P., art. 28-*sexies*, § 7 and 61-*quater*, § 8). The judgment of the indictments chamber cannot be the object of an immediate appeal as he's not being considered definitive[101].

2.1.8. Legal remedies against unlawful freezing orders

In addition to the criminal appeal, the person whose assets are frozen can always challenge the liability of the Belgian State and claim damages (see point 4.1.4.).

2.2. *Freezing of third-parties' assets*

Under Article 42 of the P.C., confiscation – and thus freezing on the basis of Article 35 of the C.C.P. – may relate to items that have been produced by the offense (P.C., art. 42, 2°), as well as on the property benefits derived directly from the offense, the property and securities substituted for them and the income from these invested benefits (P.C., art. 42, 3°), even if they belong to third-parties.

As we have seen, the economic benefits derived directly from concealment or money laundering offense, as well as the assets and securities that were substituted for them and the income from these invested benefits, represent, under Article 35-*ter*, § 1 of the C.C.P., the object of the offense, so that they must be confiscated and therefore frozen, even if the property does not belong to the convict.

The Law of 1 February 2014 extends freezing by equivalent to third-parties of bad faith, on two conditions: it is first necessary that there exist "serious and concrete indicators that the suspect transferred the goods to a third-party or financially allowed them to acquire it for the express purpose of preventing or complicating severely the execution of any special confiscation involving a sum of money"; second, that the third-party knows or ought reasonably to know "that the property was transferred to them directly or indirectly by the suspect, or that they

[99] Cass., 17 October 2006, *Pas.*, 2006, n° 403.
[100] Ghent, 27 September 2005, *Tijdschrift voor Strafrecht*, 2006, 99.
[101] Cass. 20 April 2010, *Tijdschrift voor Strafrecht*, 2010, 6, 335 and note J. VAN GAEVER.

could have acquired it with the financial assistance of the suspect in order to avoid the execution of the possible special confiscation of a sum of money" (C.C.P., art. 35-*ter*, § 4). Some do, however, question the effectiveness of extended freezing by equivalent at the expense of the third-party, "to the extent that the legislator did not foresee what would happen to the property frozen at the time of the judgment"[102].

Third-parties, who claim to have rights over the items frozen and liable to be confiscated, must be allowed to appear before the court in order to defend themselves and possibly to recover their belongings (P.C., art. 43-*bis*, § 4; Preliminary Title of the Code of Criminal Procedure, art. 5-*ter*). The third-party concerned may also introduce criminal proceedings which are open to "any person aggrieved by an act of preliminary investigation or investigation relating to their property". The concept of "any person" must be understood to mean any third-party who is aggrieved in their property, without it being required that they be a party to the trial process (civil party or accused). The third-party must nevertheless have an interest in undertaking action and having been harmed by the measure of freezing[103].

The Court of Cassation considers that "neither a criminal freezing practiced on immovable property, nor its confiscation can, in principle, affect the rights of creditors whose mortgage has been registered in the Mortgage Office before the date of the transcription of the input. These creditors may therefore, notwithstanding the criminal freezing, exercise their enforcement rights over the immovable property"[104].

Finally, we have seen that any "directly interested person" can ask the public prosecutor or the investigating judge to consult the preliminary investigation or investigation file and obtain a copy thereof. Is considered a "person directly interested" any of the following: the accused, the person in respect of whom the prosecution is engaged within the frame of the investigation, the suspect, the liable civil party, the civil party, the person who made a declaration of aggrieved person, as well as those who are subrogated in their rights or the persons who represent them as ad hoc agent, curator, temporary administrator, guardian or guardian ad hoc. Persons who are not considered as "directly interested" may nevertheless request permission to consult the file or obtain a copy thereof. In this case, the decision is taken by the public prosecutor, even during the investigation phase (C.C.P., art. 21-*bis*, § 1).

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[102] Fr. Lugentz, D. Vandermeersch, *op. cit.*, 110.

[103] Brussels, 24 June 1999, quoted by M.-A. Beernaert, H. Bosly, D. Vandermeersch, *op. cit.*, 486.

[104] Cass., 5 September 2014, *Nullen Crimen*, 2014, 6, 506.

2.3. *Confiscation*

2.3.1. *Procedures for the confiscation of assets*

In Belgian criminal law, the general system of confiscation is envisaged in Articles 42 to 43-*quater* of the P.C. Specific provisions are provided for in special criminal law. The penalty of criminal confiscation is included in Article 7 of the P.C., which enumerates penalties for natural persons and Article 7-*bis* for legal persons.

2.3.2. *Competent authorities for the request of a confiscation order*

Only the public prosecutor can ask the judge to confiscate property. The civil party may, however, request that the confiscated property be returned, or even attributed, to them. Similarly, any person who can claim a right over the confiscated thing can assert this right (P.C., art. 43-*bis*)[105].

The requisition of the public prosecutor prior to the confiscation, however, is mandatory only in the cases expressly provided by law and when the confiscation is optional: "The law does not provide for the obligation for the public prosecutor to make written requisitions when confiscation is compulsory, since, in this case, the judge has no discretion in the matter"[106]. This is the case with the confiscation of "economic benefits derived directly from the offense, the property and values that have been substituted for them and the income from these invested benefits" referred to in Article 42, 3°[107], "additional economic benefits". Referred to in Article 43-*quater* and the confiscation of unmovable assets under Article 43-*bis* of the P.C. In these last two hypotheses, in order to be pronounced, the confiscation must have necessarily been required, in writing[108], by the public prosecutor.

2.3.3. *Competent authorities to impose a confiscation order*

Special confiscation, sanctioning an offense, is a sentence to be pronounced by a court of law. It may also be pronounced by the investigating courts when they decide as courts of judgment on a suspension of the pronouncement of the sentence (Law of 29 June 1964 on suspension,

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105 "In the absence of requisition of the public prosecutor, the plaintiff cannot substitute for the public prosecutor to solicit a particular inquiry on the patrimonial advantages", Fr. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 71.

106 *Ibidem*, 61.

107 The rule also applies to freezing by equivalent of patrimonial advantages.

108 Even though Article 43-*quater* of the C.C.P. does not expressly provide for it, D. BERNARD, B. DEJEMEPPE, C. GUILLAIN, *op. cit.*, 28.

suspended sentence and probation, art. 6, § 2) or internment (Law of 5 May 2014 on internment, art. 16).

2.3.4. *Standard of proof for the imposition of a confiscation order*

As an *accessory penalty*, confiscation may only be ordered in the case of guilt and conviction of the accused to a principal sentence. It is sometimes compulsory, sometimes optional. In the context of the hypotheses referred to in Article 42, 1° and 2° of the P.C. (purpose and instruments of the offense), confiscation is compulsory for crimes and misdemeanors. The judge who finds that the legal conditions are met must pronounce the penalty of confiscation and "must not and cannot subject the imposition of this penalty to balancing the interests of the property in relation to the necessities of public utility"[109]. We have nevertheless seen that the confiscation provided for in Article 43-*quater* of the P.C., concerning extended confiscation of additional benefits, raises a question since it allows the judge to confiscate property in the possession of the convict, property that is not directly related to the sanctioned offense (see above, point 1.2.)[110].

As a safety measure, confiscation may be ordered in the absence of a principal sentence. This is the case, for example, as we have just seen, in a suspension of the pronouncement of the sentence or in matters of internment, but also in the event of acquittal, extinction of the public action, simple conviction on the ground of having extended a reasonable delay (Preliminary Title of the Code of Criminal Procedure,, art. 21-*ter*, 2°)[111] and concurrence of offenses (P.C., art. 65, 2°). Lastly, if the juvenile court is not authorized to pronounce sentences, it can decide the confiscation of the property, when the fact qualified as offense is declared established (Law of 8 April 1965 on the protection of the youth, art. 61). It is justified by the need to avoid the circulation of substances or objects that are dangerous or harmful to health and public safety[112]. Such objects may thus be weapons, explosives, narcotics, toxic products, child pornography material… (see, point 1.1.3.)[113].

Since the Law of 11 February 2014, the judge can no longer suspend the execution of the sentence of confiscation (Law of 29 June 1964, art. 8, § 1). In order to compensate for this deletion, the law now allows the judge to reduce the amount of the patrimonial benefits or monetary

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[109] Cass., 3 May 2006, *Pas.*, 2006, n° 254.
[110] D. Bernard, B. Dejemeppe, C. Guillain, *op. cit.*, 29.
[111] Cass., 12 February 2008, *Pas.*, n° 105; Cass., 1st April 2008, *Pas.*, n° 199.
[112] P.E. Trousse, *op. cit.*, n° 842.
[113] B. Dejemeppe, *op. cit.*, 101.

valuation in order not to subject the convict to an unreasonably harsh penalty.

2.3.5. *Time limits for the issuing of a confiscation order*

There is no time limit for confiscation, subject to compliance with the reasonable delay (European Convention on Human Rights, art. 6).

2.3.6. *Rights and legal remedies of the person addressed by a confiscation order*

Confiscation as a penalty must respect several fundamental rules relating to the rights of individuals. It must respect the principle of legality, be pronounced individually and be motivated. It cannot be retroactive and is subject to prescription. It cannot prejudice the rights of the victim. Furthermore, a confiscation order can be appealed.

a) *The penalty is a sanction established by law*. In accordance with the principle of legality in criminal matters enshrined in Articles 12 and 14 of the Constitution, confiscation as a penalty must be established by law. From this arises the obligation of the judge to respect the legal terms and to order the sentence of confiscation only if they find that the legal conditions are met[114]. Thus, a decision is vitiated by illegality if it is not found that the objects are the property of the convict, when such a condition is required[115].

The judicial decision must clearly identify the convicted persons[116]. It must also clearly identify the confiscated items. On several occasions, the Court of Cassation has considered that the sentence of confiscation is illegal when the confiscated item was insufficiently identified[117]. In the context of confiscation by equivalent on the basis of Article 43-*bis*, § 2 of the P.C., confiscation can relate to a sum of money equivalent to the benefits that have vanished. In this case, the Court of Cassation admits an assessment *ex aequo et bono*, in the absence of precise elements of assessment[118].

Under Article 64 of the P.C., sentences of confiscation imposed for several offenses are always cumulated[119].

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[114] Cass., 27 March 1990, *Pas.*, 1990, 879; Cass., 1 April 2008, *Pas.*, n° 199.

[115] Cass., 11 September 1990, *Pas.*, 1991, 36.

[116] Cass., 14 January 2004, *Pas.*, n° 20.

[117] Cass., 15 January 1990, *Pas.*, 1990, 580; Cass., 24 June 1998, *Pas.*, 1998, 798.

[118] Cass., 14 December 1994, *Recueil Cassation*, 1995, 98 to 100 and note by P. Van Caenegem.

[119] Cass., 27 January 2009, *Pas.*, 2009, n° 66.

b) *The sentence must be motivated.* To the extent that the sentence can only be imposed if the legal conditions are met, the judge must justify his decision on the confiscation and must therefore motivate it[120].

The motivation of the reasons for the choice of sentence is imposed by Article 195, § 2 of the C.C.P. That reasoning applies, however, only to the accessory penalty of confiscation, where that sanction is optional. The obligation to motivate is imposed on the judge only insofar as he has the choice of a sentence which he's not obliged to impose[121]. When he applies Articles 42, 1° and 2° of the P.C., it must not indicate the reasons for the choice of sentence from the point of view of its necessity or usefulness, nor the reasons for its degree, nor meet the elements relating to the social situation of the convict[122].

c) *The punishment is individual.* Every sentence must be pronounced individually and separately, for each convicted person. A sentence cannot be pronounced collectively or severally for several convicts in the same case[123]. Exceptions may, however, be provided for by the legislator as in Article 505, § 6 and 7 of the P.C. which stipulate that the things referred to in § 1, 2° to 4° of said article, including the equivalent sums of money, are confiscated in respect of each of the perpetrators, co-perpetrators or accomplices of the offense.

d) *A sentence cannot be retroactive.* As with any other sentence, amendments to the rules on confiscation cannot be retroactive if they are unfavorable to the defendant (P.C., art. 2, § 2). However, in order to determine the lesser sentence, main penalty is taken into account before additional penalty[124].

e) *The sentence is subject to prescription.* Confiscation is subject to prescription in accordance with Article 94 of the P.C., within the time limits set for the offenses for which it is pronounced. However, in the case of blocked or frozen amounts of money in a bank account, it is considered that since the amount is already frozen at the time when it is confiscated, no enforcement action is necessary to attribute these sums of money to the State, so that this confiscation is not subject to prescrip-

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120 Cass., 27 March 1990, *Pas.*, 1990, 879; Cass., 1st April 2008, *Pas.*, 2008, n° 199.

121 Cass., 1 March 2000, *Pas.*, 2000, 498.

122 Voy. S. Van Overbeke, «De motivering van de verbeurdverklaring van vermogensvoordelen», obs. under Cass., 21 mai 2002, *Rechtskundig Weekblad*, 2002-2003, 343.

123 Cass., 27 May 2009, *Revue de droit pénal et de criminologie*, 2010, 1, 71; Cass., 20 January 2015, *Pas.*, 2015, 150.

124 Cass. 22 December 2009, *Pas.*, 2009, n° 775.

tion. In this hypothesis, conviction and execution merge and the State becomes the owner of the property as soon as the confiscation is pronounced[125].

f) The rights of the victim. The sentence of confiscation cannot prejudicially affect the rights of the victim of the offense. Under Article 43-*bis*, § 3 of the P.C., the judge must order the restitution of the confiscated items belonging to the victim[126]. In this case, the confiscation takes on a reparatory dimension[127]. The same article states that the confiscated items will be attributed to the victim "when the judge has pronounced confiscation on the grounds that they constitute property or values substituted by the convict to items belonging to the civil party or because they constitute the equivalent of such items".

Article 44 of the P.C. stipulates that "the sentence imposed by law shall always be pronounced without prejudice to restitution and damages which may be due to the parties". Nothing therefore prevents the judge from ordering the defendant to confiscate the pecuniary privileges while ordering him to pay to the civil party damages equivalent to these pecuniary benefits, without this entailing the violation of property law or the imposition of an unreasonably harsh penalty[128].

The request of the victim is not subject to any particular form[129]. However, if the court realizes that the rights of the defense may be jeopardized by the sentence of confiscation that it is considering, it is necessary to order the reopening of the proceedings in order to allow the public prosecutor to take position and the parties to explain themselves in the matte[130].

g) The remedies. Sentences of confiscation may be challenged by ordinary (appeal and opposition) and extraordinary (cassation) remedies.

The appeal judge is seized within the limits of the notice of appeal. He can therefore in principle, on the sole appeal of the accused, pronounce a confiscation that the first judge would have wrongly failed to

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125 Cass., 9 May 2007, *Pas.*, 2007, n° 239.

126 Cass., 9 May 2007, *Pas.*, 2007, n° 239.

127 Cass. 23 March 1982, *Pas.*, 1982, 865. There is restitution within the meaning of Article 44 of the P.C. only if it repairs the harm caused by the crime or offense, restitution being a restorative measure of civil character (J. CONSTANT, *Manuel de droit pénal*, Liege, 1956, 727, n° 665).

128 Cass., 10 juin 2014, *Nullum Crimen*, 2014, 503 and note by L. HUYBRECHT.

129 See A. VANDEPLAS, "Teruggave", *Strafrecht en Strafvordering*, 1998, n° 37.

130 C. CALIMAN, «La loi du 19 décembre 2002 portant extension des possibilités de saisie et de confiscation en matière pénale», *Custodes*, 2003, 70.

pronounce[131]. If confiscation has not been imposed in the first instance and in case of appeal by the prosecutor, the appeal court may pronounce it only if it is unanimous[132]; the same unanimity is required on appeal for the decision ordering a confiscation having the character of a safety measure while declaring the public action prescribed[133]. However, this case-law must be qualified according to the main sentence: the Court of Cassation considers that unanimity is not required if the main sentence of imprisonment is reduced on appeal, the accessory penalty of confiscation not aggravating the sentence pronounced against the accused[134].

When the public prosecutor must make requisitions prior to confiscation, he is not obliged to reiterate his requisition on appeal[135]. In addition, the requisition may be filed for the first time on appeal[136]. The requisitions of the public prosecutor to carry out a particular investigation on the patrimonial benefits can however never be introduced for the first time on appeal (C.C.P., art. 524-*bis*, §§ 1 to 3).

Confiscation is correlated to facts beyond the control of the Court of Cassation[137]. As a rule, the trial judge holds that a thing is the object of the offense, has served or was intended to commit the offense or has been produced by the offense (proceeds of an offense). In the case of confiscation, the Court of Cassation thus holds that "the trial judge determines supremely, within the limits of the law, the penalties which they consider to be related to the seriousness of the offenses declared established and to the accused's individual culpability"[138].

2.4. *Third-party confiscation*

By virtue of the principle of the individual nature of penalties, confiscation can in principle affect only the offender who has been convicted.

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[131] Liège, 20 October 1938, *Pas.*, 1939, 78.

[132] Cass., 10 October 1972, *Pas.*, 1973, 150; Cass., 19 November 1998, *Pas.*, 1999, 1144.

[133] Cass., 23 December 1986, *Pas.*, 1987, 518.

[134] Cass., May 13, 1980, *Pas.*, 1980, 1137; Cass., 9 July 2002, *Pas.*, 2002, n° 396. According to the Court of Cassation, the relative gravity of two sentences is measured not only in relation to their duration or rate, but also according to their nature, their character, species or purpose (Cass., 8 January 2003, *Revue de droit pénal et de criminologie*, 2003, 534, note A. JACOBS).

[135] Cass., 17 June 2003, *Pas.*, 2003, n° 357.

[136] Cass., 27 May 2008, *Pas.*, n° 319; Cass., 16 December 2008, *Pas.*, n° 735.

[137] See Cass., 22 October 2003, *Pas.*, 2003, n° 516, with conclusions by general attorney J. SPREUTELS.

[138] Cass. 16 September 2009, *Pas.*, 2009, 1923.

As we have seen (see above point 1.2.), there are, however, many exceptions to the principle. In case of third-party confiscation, the punishment does not have a personal, but real character, attached to the property.

Article 43-*bis* of the P.C. provides that any third-party claiming to have rights over the confiscated property "may assert that right within a given time period and in a manner determined by the King". The third-party owner of an object liable to confiscation must therefore be allowed to appear in the proceedings in order to defend themselves against that measure, which would affect them indirectly[139].

The third-party may, for example, argue that a condition necessary for confiscation is lacking, that there are cases of force majeure[140] or invincible error[141]. Becoming party to the case by the sentence that affect them, the third-party may appeal in cassation on points of law[142]. The same applies if the object belonging to a third-party was confiscated by a judgment, without intervention of the third-party at the hearing. On the other hand, as soon as the conviction entailing the confiscation has become *res judicata*, the third-party can only assert their rights over a confiscated patrimonial benefit attributed to the civil party (in accordance with Article 43-*bis*, § 3 of the P.C.) by filing an application before the civil court[143].

As we have seen, the object of the offense of concealment and money laundering as well as the pecuniary benefits derived from these offenses must be confiscated, even if "the property does not belong to the convict, however, without being prejudicial to the rights of third-parties over property that may be subject to confiscation" (P.C., art. 505, §§ 5 to 7). In this case, it is accepted that "third-parties, namely persons who have not been convicted of the offense of money laundering or the underlying offense, can assert their rights in these matters under their lawful possession", which is left to the sovereign discretion of the judge[144]. The third-party cannot therefore merely invoke their right of ownership over the property, but must also demonstrate their good faith in order to claim recovery of the property[145].

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[139] Cass., 31 July 1995, *J.L.M.B.*, 1996, 578, observations O. KLEES, P. MONVILLE; Cass., 15 December 2012, *Droit pénal de l'entreprise*, 2013, 1, 51.

[140] Cass., 22 September 1947, *Pas.*, 1948, 368.

[141] Cass., 23 January 1950, *Pas.*, 1950, 348.

[142] Cass., 15 December 2012, *Droit pénal de l'entreprise*, 2013, 1, 51.

[143] Cass., 22 September 1998, *Pas.*, 1998, 971; Cass., 15 December 2012, *Droit pénal de l'entreprise*, 2013, 1, 51.

[144] Cass., 4 March 2014, *Pas.*, 2014, n° 170.

[145] Regarding the exercise of third-party rights, see Fr. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 92 to 95.

3. *Mutual recognition aspects*

3.1. *Freezing*

3.1.1. *National legal framework for the mutual recognition of freezing orders*

The question of freezing of evidence across Member States of the European Union is governed by the Law of 22 May 2017 on the European Investigation Order in criminal matters (Law of 22 May 2017, art. 3 and 40).

The question of freezing for confiscation across Member States of the European Union is regulated by the Law of 5 August 2006 on the application of the principle of mutual recognition of judicial decisions in criminal matters across Member States of the European Union. This law therefore transposes Framework Decision 2003/577/JAI. However, existing conventions on mutual assistance relating to freezing remain applicable (circular COL 4/2014, 8)[146].

These questions relating to freezing, when they concern non-EU member States, are regulated by the Law of 20 May 1997 on international co-operation with regard to carrying out freezing and confiscations.

3.1.2. *Competent authorities for the execution of freezing orders from another EU member State*

The judicial authority of the issuing State shall address its request (in Dutch, French, German or English) to the public prosecutor of the place where the property concerned, or the majority thereof, is located (Law of 5 August 2006, art. 12 and 3, §§ 3 and 4). If the certificate is sent to a public prosecutor who is not territorially competent, the latter shall transmit the certificate to the territorially competent public prosecutor (Law of 5 August 2006, art. §§ 3 and 4). If there is any doubt as to territorial jurisdiction, the law has unfortunately not provided for a mechanism that would solve the problem[147].

The public prosecutor must immediately seize the investigating judge (Law of 5 August 2006, art. 12, § 1/1). The latter's decision will re-

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[146] M.-A. Beernaert, H.-D. Bosly, D. Vandermeersch, *Droit de la procédure pénale*, Bruges: La Charte, 2017, 1944.

[147] G.-F. Raneri, «La circulation des décisions de saisie de biens ou d'éléments de preuve dans l'Union européenne. Présentation de la loi belge du 5 août 2006», *Revue de la Faculté de droit de l'Université de Liège*, 1, 2007, 60.

late "only to the conditions of form and substance of the recognition, but in no case on the grounds which underlie the foreign decision of freezing or its opportunity" (Law of 5 August 2006, art. 4, § 4)[148].

3.1.3. *Grounds for non-recognition and non-execution*

In principle, the execution of the decision by the competent judicial authority of the issuing State is mandatory and the substantive reasons for that decision cannot be challenged before a Belgian court (Law of 5 August 2006, art. 4, §§ 1 and 4).

Assumptions of refusal of execution exist however (Law of 5 August 2006, art. 2, 6, 7, 11 and 14):

a) *Requirement that the request arise from a decision taken by a competent judicial authority and in the context of criminal proceedings*: this assumption of compulsory refusal is provided for in Article 2, § 1 of the Law of 5 August 2006.

b) *Requirement of double criminality*: this assumption of compulsory refusal is provided for in Article 6, § 1 of the Law of 5 August 2006. The enforcement of the decision of freezing will be refused if the facts on which the freezing order is based do not constitute an offense under Belgian law. This double criminality requirement is assessed in relation to the facts and not to the qualification given by the law of the issuing State (circular COL 4/2014, 9). This requirement is not retained for the list of offenses envisaged in Article 6, § 2 of the Law of 5 August 2006 when they are punishable in the issuing State by a prison sentence of at least three years. This exception is rather "a presumption of double criminality [than] an abandonment of its requirement"[149]. Only the checking of conformity between the statement of facts (included in the certificate) and the generic acceptance of the behavior referred to in the list must be carried out. The Belgian legislator has stipulated that for facts of abortion and euthanasia, the double criminality control is maintained (Law of 5 August 2006, art. 6, § 4). This assumption of refusal does not apply either in matter of taxes, duty, customs and exchange (Law of 5 August 2006, art. 6, § 3).

c) *Existence of immunity*: this assumption of compulsory refusal is provided for in Article 7, § 1, 1° of the Law of 5 August 2006. Immunity

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[148] F. Lugentz, D. Vandermeersch, *Saisie et confiscation en matière pénale*, Bruxelles: Bruylant, 2015, 240.

[149] G.-F. Raneri, *op. cit.*, 64.

must be assessed *in concreto*, so if it can be waived, the request is not necessarily refused (circular COL 4/2014, 11).

d) *Principle "ne bis in idem"*: this hypothesis of compulsory refusal is provided for in Article 7, § 1, 2° of the Law of 5 August 2006. The execution will be refused if the decision of freezing is based on "facts for which a final decision has already been reached in Belgium or in another Member State of the European Union"[150]. A case-law decision interpreted this principle narrowly, by stating that a decision to dismiss the case, which was therefore not of a definitive nature, did not allow the claim of issuing State to be opposed[151]. This restrictive case law does not appear to be in line with the CJEU case law[152].

e) *Infringement of fundamental rights (recognized by Article 6 of the Treaty on the European Union):* this assumption of compulsory refusal is provided for in Article 7, § 1, 3° of the Law of 5 August 2006. This ground for refusal is not stated literally in the Framework Decision 2003/577/JHA. It must be interpreted restrictively because there is a "presumption of respect for human rights in favor of the issuing State"[153].

f) *Absence of sufficient information (in the certificate):* this optional refusal hypothesis is provided for in Article 7, § 2 of the Law of 5 August 2006. In this case, a time-limit is given to the issuing State to compensate for this insufficiency and it is only if the information is not given within this period that the request is refused.

g) *Requirement that Belgian law provide for a sentence of confiscation:* this assumption of compulsory refusal is provided for in Article 11 of the Law of 5 August 2006. If the Belgian law does not provide for confiscation for facts related to the request, this application for freezing with a view to subsequent confiscation is refused (e.g. if the facts are a contravention under Belgian law and the penalty of confiscation is not provided for such a contravention). This hypothesis of refusal is not possible for the list of offenses provided for in article 6, § 2 of the Law of 5 August 2006.

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150 *Ibidem*, 66.

151 Brussels (Acc.), 27 March 2014, unpublished, cited by F. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 229.

152 CJUE, 5 June 2014, ECLI: EU:C:2014/1057.

153 A. WEYEMBERGH, V. SANTAMARIA, «La reconnaissance mutuelle en matière pénale en Belgique», in G. VERNIMMEN-VAN TIGGELEN, L. SURANA, A. WEYEMBERGH (eds.), *L'avenir de la reconnaissance mutuelle en matière pénale dans l'Union européenne*, Bruxelles: Bruylant, 2009, 75.

h) *Practical impossibility*: this hypothesis refers to situations where the property has disappeared, has been destroyed, or cannot be found in the location indicated (Law of 5 August 2006, art. 14, § 3).

While Framework Decision 2003/577/JHA provides that refusal cases are always optional, the Law of 5 August 2006 provides for mandatory refusal causes.

3.1.4. *Grounds for postponement*

The assumptions for postponement of freezing are provided for in Article 13 of the Law of 5 August 2006:

– when it might damage an ongoing criminal investigation;

– when the property concerned has already been subjected to a conservatory freezing order in criminal proceedings.

The circular COL 4/2014 (p.4) refers to the situation where a translation of the decision is deemed necessary (in case of serious doubts about the reliability of the certificate).

3.1.5. *Time limits for the execution of freezing orders from another EU Member State*

The investigating judge, who must be immediately seized by the public prosecutor who has received the request from the issuing State, takes the decision if possible within 24 hours and at the latest within 5 days of his referral (Law of 5 August 2006, art. 12, § 1/1). Failure to comply with this deadline cannot be sanctioned (order period).

The decision of the investigating judge is immediately communicated to the public prosecutor who is responsible for executing the freezing (Law of 5 August 2006, art. 14). It will finally be "promptly communicated by the public prosecutor to the competent authority of the issuing State" (Law of 5 August 2006, art. 14).

3.1.6. *Rights and legal remedies of the person addressed by a freezing order from another EU Member State*

The grounds for the freezing can only be challenged in a court of the issuing State (Law of 5 August 2006, art. 15, § 2).

The decision of the investigating judge is taken in a unilateral procedure (circular COL 4/2014, 14) and is not subject to appeal (Law of 5 August 2006, art. 12, § 4).

Any "person aggrieved" by the freezing may request the investigating judge to lift it, pursuant to Article 61-*quater* of the C.C.P. (Law of 5 August 2006, art. 15, § 1). The Law of 5 August 2006 refers to the sys-

tem set up in domestic law, the "référé pénal" (see above point 2.1.7.). The public prosecutor informs the competent authority of the issuing State of such a request so that this authority can put forward its arguments (Law of 5 August 2006, art. 15, § 1).

This request for lifting has a suspensive effect on the execution of the request for confiscation but not on the freezing itself (Law of 5 August 2006, art. 15, § 1).

3.2. *Freezing of third-parties' assets*

If a thing is not likely to be confiscated and therefore not liable to be frozen (C. i.cr., art. 35 and P.C., art. 42) due to the fact that Belgian law requires that the thing belong to the accused or the condemned (see above point 1.1.), recognition of the freezing that relates to a third-party's property is refused on the basis of Article 11 of the Law of 5 August 2006. However this assumption of refusal does not apply to the list of offenses provided for in Article 6, § 2 of the Law of 5 August 2006. Thus, as regards this list of offenses, the "items forming the object of the offense and (…) those that have served to or are intended to commit it" (P.C., art. 42, 1°) may not be seized under Belgian law if they belong to a third-party, but there would be no possibility to refuse recognition of the foreign ruling. The practical dimension of this distinction does not seem significant to us.

The request to lift the freezing (see point 2.1.7.) is accessible to "any person aggrieved" by the freezing. This concept of "aggrieved person" includes the accused, the civil party and third-parties[154]. Third-parties may therefore request the lifting of the freezing but they must have a direct interest in taking action.

The request for the lifting (for example by the accused) may be refused if it jeopardizes the right of a third-party.

3.3. *Confiscation*

3.3.1. *National legal framework for the mutual recognition of confiscation orders*

In principle, the question of confiscation between Member States of the European Union is governed by the Law of 5 August 2006 on the ap-

[154] Brussels (Acc.), 24 June 1999, cited by M.-A. Beernaert, H.-D. Bosly, D. Vandermeersch, *op. cit.*, 523.

plication of the principle of mutual recognition of judicial decisions in criminal matters across Member States of the European Union. It therefore transposes Framework Decision 2006/783/JHA. However, the existing conventions on mutual assistance relating to confiscation remain applicable (circular COL 4/2014, 8)[155].

These questions relating to confiscations, when they concern non-EU States, are regulated by the Law of 20 May 1997 on international cooperation with regard to the execution of freezing and confiscations.

3.3.2. *Competent authorities for the execution of confiscation orders from another EU Member State*

The judicial authority of the issuing State shall address its request (in Dutch, French, German or English) to the public prosecutor of the place where the property concerned, or the majority thereof, is located (Law of 5 August 2006, art. 30 and 3, §§ 3 and 4). If the certificate is sent to a public prosecutor who is not territorially competent, the latter shall transmit the certificate to the territorially competent public prosecutor (Law of 5 August 2006, art. 3, § 4).

The public prosecutor must then seize the criminal court where the property, or majority thereof, is located (Law of 5 August 2006, art. 30). The concept of "majority" of goods must be interpreted according to the number of goods and/or the value thereof (circular COL 4/2014, 24, Doc., Ch., 2010-2011, n° 1703/1, 21).

If the public prosecutor intends to request the non-execution of the confiscation order, they must first consult the competent authorities of the issuing State (Law of 5 August 2006, art. 30, § 4).

The decision of the criminal court will deal with the formal and substantive conditions of the recognition and not with the reasons or the opportunity of the foreign decision (Law of 5 August 2006, art. 4, § 4).

3.3.3. *Grounds for non-recognition and non-execution*

In principle, enforcement of the decision from the issuing State is mandatory and the substantive reasons for that decision cannot be challenged in a Belgian court (Law of 5 August 2006, art. 12, § 1 and 4).

Assumptions of refusal of execution exist however (Law of 5 August 2006, art. 2, 6, 7, 7/1, 29 and 32):

a) *Requirement that the request arise from a decision taken by a competent judicial authority and in the context of criminal proceedings*: this as-

[155] M.-A. Beernaert, H.-D. Bosly, D. Vandermeersch, *op. cit.*, 1944.

sumption of compulsory refusal is provided for in Article 2, § 1 of the Law of 5 August 2006.

b) *Requirement of double criminality*: this assumption of compulsory refusal is provided for in Article 6, § 1 of the Law of 5 August 2006. This requirement of double criminality is assessed in relation to the facts and not however they are described under the law of the issuing State (circular COL 4/2014, 9). It is not retained for the list of offenses envisaged in Article 6, § 2 of the Law of 5 August 2006 when said offenses are punished in the issuing State by a custodial sentence of which the maximum is at least three years. The Belgian legislator has stipulated that for facts of abortion and euthanasia, double criminality control is maintained (Law of 5 August 2006, art. 6, § 4). This assumption of refusal does not apply either in matters of taxes, duty, customs and exchange (Law of 5 August 2006, art. 6, § 3).

c) *Existence of immunity*: this hypothesis of compulsory refusal is provided for in Article 7, § 1, 1° of the Law of 5 August 2006. The immunity must be assessed *in concreto*, so if it can be waived, the request is not necessarily refused (circular COL 4/2014, 11).

d) *Principle "ne bis in idem"*: this hypothesis of compulsory refusal is provided for in Article 7, § 1, 2° of the Law of 5 August 2006.

e) *Infringement of fundamental rights*: this assumption of compulsory refusal is provided for in Article 7, § 1, 3° of the Law of 5 August 2006.

f) *Absence of sufficient information (in the certificate)*: this optional refusal hypothesis is provided for in Article 7, § 2 of the Law of 5 August 2006. In this case, a time-limit is given to the issuing State to remedy this insufficiency and it is only if the information is not provided within this period that the request is refused.

g) *Prescription of the sentence of confiscation* (the execution of a confiscation order is barred by statutory time limitations in Belgium): this assumption of optional refusal is provided for in Article 7/1 of the Law of 5 August 2006 when the facts fall within the scope of the jurisdiction of the Belgian courts. This assumption of refusal concerns only confiscations by equivalent and confiscations of an amount of money which has not been previously frozen (circular COL 4/2014, 13)[156].

h) *Acts committed in Belgium (or outside the territory of the issuing State) and Belgian law does not permit legal proceedings to be taken in re-*

[156] Cass., 11 January 1990, *Pas.*, 1990, 561.

spect of such offenses where they are committed outside the Belgian territory (territoriality clause): this optional refusal hypothesis is provided for in Article 7/1 of the Law of 5 August 2006. It does not apply to cases of money laundering.

i) *The person did not appear in person at the trial*: this hypothesis of optional refusal is provided for in Article 7/1 of the Law of 5 August 2006. This assumption does not apply if certain guarantees are met (the convict was informed in due time that such a confiscation order may be handed down if they do not appear at the trial); he was indeed defended by his counsellor at the trial; and he did not challenge the decision.)

j) *Impossibility related to the respect of the rights of any interested party* (including bona fide third-parties): this assumption of optional refusal is provided for in Article 29 of the Law of 5 August 2006.

k) *Extended confiscation not provided for by Belgian law*: this assumption of optional refusal is provided for in Article 29 of the Law of 5 August 2006. The foreign decision will be executed within the limits authorized by Belgian law; i.e. within the limits set by Article 43-*quater* of the C.C.P.

l) *Practical impossibility*: this hypothesis refers to situations where the property has disappeared, been destroyed, or cannot be found (Law of 5 August 2006, art. 32, § 3).

3.3.4. *Grounds for non-recognition and non-execution*

The postponement assumptions are provided for in Article 31 of the Law of 5 August 2006:

– whether the total value of the confiscation may exceed the amount specified in the confiscation order because of the simultaneous execution of the confiscation order in more than one Member State;

– whether the execution may undermine an ongoing criminal investigation;

– whether the property is already the subject of confiscation proceedings;

– in the case of an action brought by a third-party.

The circular COL 4/2014 (p. 4) refers to the situation where a translation of the decision is deemed necessary (in case of serious doubts about the reliability of the certificate).

This postponement decision can be taken by both the criminal court and the public prosecutor. In the case of a postponement, the public

prosecutor can seize the property in order to avoid it being no longer available for possible future confiscation (Law of 5 August 2006, art. 31).

3.3.5. *Time limits for the execution of confiscation orders from another EU Member State*

The Law of 5 August 2006 does not specify the time within which the public prosecutor must seize the criminal court, but circular COL 4/2014 (p. 24) specifies that the public prosecutor must freeze it "at once".

There is no time limit for the decision of the criminal court. Once the decision is taken, it is communicated "at once" to the public prosecutor (circular COL 4/2014, 26). Finally, it will be "promptly communicated by the public prosecutor to the competent authority of the issuing State" (Law of 5 August 2006, art. 35).

3.3.6. *Rights and legal remedies of the person addressed by a confiscation order from another EU member State*

The grounds for confiscation cannot be challenged in a Belgian court (Law of 5 August 2006, art. 4, § 4).

The criminal court rules in an adversarial manner after hearing the public prosecutor, the convict and any interested third-party. Its decision is motivated. It is subject to lead to an appeal before the court of appeal. The latter's decision may be the subject of an appeal in cassation. The issuing State is informed of the possible appeal (Law of 5 August 2006, art. 30).

If the amount of the confiscation is to be converted, the exchange rate applicable at the time of the confiscation order has been pronounced in the issuing State (Law of 5 August 2006, art. 30, § 5). The correctional court takes into account amounts previously confiscated in other states (Law of 5 August 2006, art. 33).

In domestic law, the criminal court may reduce the amount of confiscation, "so as not to subject the convicted person to an unreasonably harsh penalty" (P.C., art. 43-*bis*, § 7)[157]. This faculty is not conceivable in the context of recognition of a foreign decision.

3.4. *Third-party confiscation*

If an item is not likely to be confiscated (P.C., art. 42) because Belgian law requires that the item belong to the convict (see point 1.1.) and

[157] F. Lugentz, D. Vandermeersch, *op. cit.*, 282.

that this property requirement is not provided for in the legislation of the issuing State, recognition of the foreign confiscation order cannot be refused. Thus, the "items forming the subject of the offense and (…) those that have served it or were intended to commit it" (P.C., art. 42, 1°) may not be confiscated under Belgian law if they belong to a third-party, but there would be no possibility to not recognize the foreign decision. The practical stake of this distinction does not seem significant to us.

Any interested third-party who is entitled to a rightful possession may defend his or her rights against the object of the confiscation before the competent court. They will be informed of the hearing before the competent court (Law of 5 August 2006, art. 30). If this third-party has not intervened, they may appeal and appeal in cassation[158].

Conclusion

No figures are available to quantify the extent of denial of recognition and enforcement of foreign decisions. The same is true of the grounds for refusal. In matters of confiscation, the reason for refusal relating to prescription appears to be the most frequently used[159]. The Article 5, § 1 of the Law of 5 August 2006 provided that "any judicial decision transmitted or received by a Belgian authority under this Law shall be transmitted to the Department of Justice". Research has shown that the judicial authorities did not effect this transmission[160]. This requirement was considered to be administratively burdensome and was therefore removed by the Law of 26 November 2011. It could have been useful for centralizing the case law in this area and drawing statistics thereof. The judicial authorities must always inform the Department of Justice when they refuse to execute a decision of freezing and confiscation but this requirement would not be followed in practice.

No figures are available to quantify the assumptions of postponement of the execution of the decision. However, these deferral assumptions would not be uncommon and would be primarily related to the risk of hampering an ongoing investigation.

The speed in handling the recognition of decisions seems variable from one judicial district to another. If the judicial district (Brussels, primarily) has at its disposition, because of its volume of cases, specialized

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158 Cass., 5 December 2012, *Pas.*, 2012, 2422.

159 The different findings presented in this report on current practices were derived from meetings with field actors.

160 A. Weyembergh, V. Santamaria, *op. cit.*, 61.

magistrates, the speed is increased. Pre-existing personal relationships with foreign colleagues also seem to play a role.

Be it as it may, it seems that the Law of 5 August 2006 is only very rarely applied. Weyembergh and Santamaria[161] and Lesuisse[162] explain this as follows: the law is little known to the magistrates; the magistrates who know it have a lack of will to apply it; other conventions (within the Council of Europe) exist; finally, the system put in place by this law is not simpler (on the contrary!) than the one provided for by the Law of 20 May 1997 on international cooperation. It would seem that the investigating judges use the Law of 20 May 1997 more often than the public prosecutor (they are more independent in their working relationships and are less constrained by a superior authority to adopt new models provided in the circulars of the College of Public Prosecutors). In general, we can question the opportunity to fragment legal instruments (e.g. an instrument for freezing only…) whereas the "criminal trial is a unit whose various elements (…) constitute a whole"[163].

4. *Management and disposal aspects*

4.1. *Freezing*

4.1.1. *Competent authorities for the management of frozen assets*

In the context of preliminary investigation, decisions relating to the management of frozen property are taken by the public prosecutor, on his own initiative or at the request of the Central Organ for freezing and confiscation (cf. Central Office for Seizure and Confiscation, hereinafter COSC, C.C.P., art. 28-*octies*). In the context of an investigation, these decisions are made by the investigating judge (C.C.P., art. 61-*sexies*). Even if the legislator does not provide that an application may be made by a litigant, there is nothing preventing that any interested person make a gracious claim to the competent magistrate[164].

The public prosecutor and the investigating judge notify the COSC "without delay" of their decisions of freezing as well as their decisions concerning the management of frozen property (Law of 4 February 2018,

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[161] *Ibidem*, 62.

[162] S. Lesuisse, «Reconnaissance mutuelle des décisions de saisies et de confiscations en matière pénale», in P. Fréteur, P. Tilliet (eds.), *Saisies et confiscations. Questions d'actualité*, Bruxelles: Larcier, 2011, 131.

[163] A. Weyembergh, V. Santamaria, *op. cit.*, 62 and 77.

[164] F. Lugentz, D. Vandermeersch, *op. cit.*, 162.

art. 19 and 10, § 2). In practice these notifications of freezing decisions are usually carried out by the police[165]. Circular COL 9/2018 provides for an e-mail notification within five working days of the freezing or final decision on the management of frozen property (p. 10 and 21, annex 2 of circular COL 9/2018, 1). This obligation to notify the COSC exists only when the freezing relates to the property assets that come under the jurisdiction of the COSC: buildings, motor vehicles, ships, aircrafts, securities, amounts of money, accounts with financial institutions, virtual currencies, live animals, real rights and claims and any other movable property that exceeds the threshold of 2,500 euros (Law of 4 February 2018, art. 18, Royal Decree of 17 May 2018, art. 2). The authority considers the patrimonial advantages by freezing, by frozen property or by lots of similar property (Royal Decree of 17 May 2018, art. 2).

The execution of these decisions involves various actors including the Registrar of the Tribunal, who is responsible for the preservation of frozen property kept in the Registry (Royal Decree n° 260 of 24 March 24 1936, art. 1) and the COSC (Law of 4 February 2018). The COSC[166] is a component of the Public Prosecutor's Office, which carries out its tasks under the authority of the Minister of Justice (Law of 4 February 2018, art. 4 and 6). It represents the "Asset Management Office" within the meaning of art. 10 of Directive 2014/42/EU (Law of 4 February 2018, art. 5 and 31).

4.1.2. *Power of the competent authorities on the frozen assets*

Frozen assets may be subject to a series of decisions, which are listed below.

a) *Conservation and management.* The Law of 4 February 2018 refers to three types of "management": constant-value management, compulsory management and optional management (art. 3). The COSC must manage frozen property entrusted to it "with due diligence" and "in accordance with the principles of prudent and passive management" (Law of 4 February 2018, art. 8). Thus, the OCSC is not allowed to speculate on the market of investments at risk. It will pay the proceeds of the managed securities (e.g. coupons, dividends) without re-use (Doc., Ch.,

[165] *Ibidem*, 158.

[166] The COSC is currently composed of about thirty people. There are, of course, public prosecutors (4) but also seconded officials from the Department of Finance (4), liaison officers from the Federal Police (2) and administrative staff.

2017-2018, n° 2732/1, 12). Management fees are considered legal costs (Law of 4 February 2018, art. 8).

Mandatory management concerns frozen cash, the credit balances of frozen accounts, the sums of money which have been substituted for the frozen goods (following a disposal or a restitution in exchange for payments, see below), and the frozen virtual values (Law of 4 February 2018, art. 3 and 15). The public prosecutor or the investigating judge must transfer to the COSC the frozen cash and the credit balances of the frozen accounts within three months of the freezing (Law of 4 February 2018, art. 15). This systematic transfer to the COSC makes it possible, among other things, to transfer money more quickly to the Department of Finance in case of confiscation (Doc., Ch., 2017-2018, n° 2732/1, 18). Foreign currencies that may be managed by the COSC are the US Dollar, Australian Dollar, Canadian Dollar, British Pound, Japanese Yen, Swiss Franc, Swedish Krona, Norwegian Krone, Danish Krone, and the South African Rand (Law of 4 February 2018, art. 8, Royal Decree of 17 May 2018, art. 1). Other currencies are, in principle, deposited with the registry (circular COL 9/2018, 15).

Optional management is the management of securities and assets that require specialized management. This is the case for some virtual values (e.g. bitcoins), live animals, diamonds, works of art, securities, gold bars, and so on. (Doc., Ch., 2017-2018, n° 2732/1, 9 and 19). If the public prosecutor or the investigating judge assigns to the COSC any patrimonial asset that falls under such discretionary management, the COSC may refuse. The case will then be decided (arbitration procedure) by the Attorney General in charge of economic, financial and fiscal crime (Law of 4 February 2018, art. 16). If the COSC accepts the mission (or if it is forced by the Attorney General to accept it), the property will be deposited in its safes. If this option is not possible due to the nature of the property, the COSC may call upon an intermediary or an agent whose intervention it deems necessary (Law of 4 February 2018, art. 16). The COSC may even enter into "framework agreements" with third-parties for the management of certain properties (e.g., an agreement with a museum for the management of works of art; Doc., Ch., 2017-2018, n° 2732/1, 19). Regarding the management of dematerialized securities, the current good practice is to not necessarily transfer these securities to an account opened with the COSC but to continue to have them be managed by the financial institution from which these securities are frozen. The garnishee continues to be informed by their financial institution and to be liable for management fees, which reduces the legal costs (Doc., Ch., 2017-2018, n° 2732/1, 10; circular COL 9/2018, 18). Bearer securi-

ties that are not available in electronic form are deposited in the registry or in the safes of the COSC (circular COL 9/2018, 19).

Constant value management consists either in the sale or disposal of the property (see below), or in the restitution in exchange for payments (see below) or in the conservation in kind of frozen property with or without bond. In the latter case, the public prosecutor or the investigating judge entrusts the management of the property to the registry, to a third-party or to the garnishee (Law of 4 February 2018, art. 14). This magistrate sets independently the bond which must be paid by the frozen party or a third-party. The management of the bond is entrusted to the COSC. It seems that this guarantee measure is not applied in practice (circular COL 9/2018, 7). Conservation in kind will be preferred if the frozen property constitutes evidence (restitution or sale does not seem relevant in this case, see below) or if there is a possibility for the person to challenge the ongoing freezing order (postponement of the decision is preferable). But the legislator wishes that "the usual method of treatment of frozen property becomes sale and restitution in exchange for payments", and not the conservation in kind, and this to limit the legal costs and the deterioration of the frozen item (Doc., Ch., 2006-2007, n° 2761, 8 and 14)[167].

b) *Restitution in exchange for payments.* The public prosecutor and the investigating judge may decide to return the property to the garnishee in exchange for a payment of a sum of money (C.C.P., art. 28-*octies* and 61-*sexies*). The freezing will then relate to the sum of money resulting from the restitution (subrogation). These magistrates sovereignly determine the amount of this sum of money. However, in order to make an objective assessment of the property's value, the magistrate can ask the COSC or the police to make an estimate of the property (circular COL 9/2018, 7). This possibility of restitution is not often used because some magistrates fear that the restitution of the property will enable the accused to perpetrate a similar offense or to launder money from illicit activities[168]. The circular COL 9/2018, however, makes restitution a priority measure (even with regard to sale or disposal, 7). For example, it recommends that the police immediately ask the garnishee if they are willing to pay a sum of money to recover the frozen property (p. 7). If, within 20 calendar days, the garnishee has not paid the amount provided

[167] A. Fokan, «La gestion à valeur constante des avoirs saisis: principes et aspects pratiques», in P. Fréteur, P. Tilliet (eds.), *Saisies et confiscations. Questions d'actualité*, Bruxelles: Larcier, 2011, 17 and 22.

[168] *Ibidem*, 24.

on the account of the COSC, the alternative measure will automatically be sale or disposal. These precisions are given by circular COL 9/2018 (p. 8) alone.

When the frozen property is a motor vehicle, a boat or a plane, the magistrates have the obligation to rule on the fate of this property (by choosing between restitution or sale or disposal) within three months following freezing (Law of 4 February 2018, art. 10). This rule is justified by the rapid decrease in value of these goods and the high costs of conservation in kind.

c) Sale or disposal. The public prosecutor and the investigating judge may authorize the COSC to sell or dispose of the frozen property. The freezing will then relate to the sum of money resulting from the sale or disposal (subrogation). This sum of money will be managed by the COSC. Sale of frozen assets is enjoying increasing popularity in Belgium[169]. Practice shows that the execution of confiscation is facilitated in case of prior sale of the frozen property[170].

Only replaceable assets of easily determinable value whose conservation in nature may result in depreciation, damage or costs that are disproportionate to their value may be alienated (C.C.P., art. 28-*octies* and 61-*sexies*). Thus, some "oldtimers" cars, or works of art cannot be sold because they are not replaceable (Doc., Ch., 2017-2018, n° 2732/1, 15; circular COL 9/2018, 7). Property may be sold even if its owner cannot be identified[171]. Except in the case of investigation, parliamentary proceedings (Doc., Ch., 2017-2018, n° 2732/1, 14) and the circular COL 9/2018 (p. 6) specify that the public prosecutor is liable to make constant value management decisions (and thus take a disposal/sale decision) until the final decision of the criminal judge. Such competence in the judgment phase does not appear explicitly in the Law of 4 February 2018 or in the C.C.P.[172]. Jurisprudence prior to the Law of 4 February 2018 specifies that the public prosecutor cannot proceed to disposal/sale during the judgment phase[173]. It has been held that if the owner of the frozen property has made a request to terminate the freezing (C.C.P., art 61-*quater*), the sale of the property is premature (Doc., Ch., 2017-2018, n° 2732/1, 16)[174]. If the frozen property is an exhibit, the sale may not be timely.

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[169] *Ibidem*, 25.

[170] *Ibidem*, 22.

[171] Cass., 17 October 2007, *Pas.*, 2007, 1815.

[172] A field actor confirms this competence of the public prosecutor during the judgment phase, but points out that it is rarely encountered in practice.

[173] Ghent (acc.), 11 August 2015, *T. Strafr.*, 2016, 253.

[174] Brussels (acc.), 29 June 2004, *T. Strafr.*, 2004, 303.

For movable property, the COSC has the sale carried out by the Department of Finance. When the frozen property is a motor vehicle, a boat or an airplane, the decision (restitution or sale) must be taken within three months of the freezing. In practice, more than 90% of frozen assets to be disposed of by the COSC are vehicles[175]. The COSC may request the police services to transfer the vehicle to the place of sale (Law of 4 February 2018, art. 12).

For real estate, the COSC entrusts the sales mandate to a notary (Law of 4 February 2018, art. 11 and 13). The Belgian State is deemed to be the seller (Law of 4 February 2018, art. 13). The notary pays the mortgagees and transfers the balance to the COSC (circular COL 9/2018, 11). However, buildings should be less frequently and less quickly disposed of than movable properties because the risk of depreciation is lower and the legal obstacles are more numerous (circular COL 9/2018, 8).

Except in special circumstances, a public auction is organised (the Finshop of the Department of Finance organize public sales online). The costs of the sale are borne by the buyer. For example, over-the-counter selling is preferable in the case of a time-sensitive requirement (e.g. perishable goods), in the case of market niches (e.g. aircraft, circus animals), in the event of a risk of disturbance to the public order at the time of the public sale, or in the event of risk that the goods sold in public sale may return towards the criminal environment (Doc., Ch., 2017-2018, n° 2732/1, 17).

d) *Making property available to the Federal Police.* When the public prosecutor or the investigating judge has made the decision to dispose of the frozen property, this decision may be suspended if the COSC decides to make the property available to the police (Law 4 February 2018, art. 17). This decision is optional and the COSC will not provide for it if it may interfere with the prosecution's or defense's evidence (Doc., Ch., 2017-2018, n° 2732/1, 20). The director of the COSC determines the duration of the availability, which in practice generally is between one and two year-long.

Such availability is possible (principle of proportionality) only if the property concerns acts committed within the framework of a criminal organization or in the context of the facts referred to in the list of Article 90-*ter*, §§ 2 to 4 from the C.C.P. Such provision is possible even if the owner of the property cannot be identified (Law of 4 February 2018, art. 17). The frozen property must be useful (principle of purpose) to the fight

[175] A. Fokan, *op. cit.*, 16.

against or the prevention of acts committed within the framework of a criminal organization, or in the context of facts referred to in the list of Articles 90-*ter*, § 2 to 4 of the C.C.P. It is also necessary (subsidiarity principle) that the police not already have similar assets in sufficient numbers.

At first glance, these limitations may seem convoluted and counterproductive (e.g., why can the police use a frozen car solely for the purpose of combating certain offenses?). But in fact, the legislator did not want this availability to be used as an argument to justify a reduction of the public endowments of the police. Assets frozen are not usable on a "daily" basis, but only for specific "operations".

The police must use these goods wisely. The availability can in theory concern all the frozen assets but in practice it concerns mostly vehicles and, to a lesser extent, computer tools. The money frozen cannot be used by the police for operational purposes (as part of an infiltration for example, circular COL 9/2018, 20).

e) *Destruction*. The public prosecutor may decide on the destruction of frozen property liable to be confiscated (C.C.P., art 28-*novies*). When he wishes to make such a decision during the investigation, the prior authorization of the investigating judge is required. The public prosecutor can request the assistance of the COSC as part of this destruction (Law of 4 February 2018, art. 27). If the administering of the evidence so requires, the taking of samples, or a photographic or video recording of the property will take place before the destruction.

Such destruction is motivated by reasons of cost (the conservation of the property has a disproportionate cost compared to the value of the property) or for security reasons (the property constitutes a serious danger to the security or public health, the re-use of assets would violate public order, good morals or legal provision).

f) *Use by the police or a scientific institution for didactic or scientific reasons (property liable to destruction).* With respect to property that may be destroyed and is not likely to be re-circulated, the public prosecutor may decide to make it available to the police or a scientific institution, free of charge, for didactical or scientific reasons or for the study of relevant criminal phenomena (C.C.P., art 28-*novies*). It may also make the property available to the police when it is useful for the purposes of combating offenses referred to in Article 90-*ter* §§ 2 to 4 of the C.C.P. The preparatory work of the law illustrates this point with illegal narcotics (Doc., Ch., 2017-2018, n° 2732/1, 42). An actor in the field mentions another case: (illegal) blockers of electronic devices ("jammers") which are of great interest to the police to carry out certain operations. When the

public prosecutor wishes to make such a decision during the investigation, the authorization of the investigating judge is required.

g) Restitution (linked to the end of the freezing). The frozen property kept in the registry is returned by the Registrar of the Tribunal. In the case of frozen property managed by the COSC, the enforceable decision providing for restitution must be executed by the COSC within two months (Law of 4 February 2018, art. 23). No penalty is provided for exceeding this deadline (circular COL 9/2018, 24).

If the case is closed without further action, the public prosecutor specifies to the COSC, within the month of the decision to close the investigation, the destination of the frozen property[176]. If the director of the COSC finds the decision to close the investigation without the public prosecutor specifying the destination of the frozen property, he decides himself of this destination, after written notice to the public prosecutor (Law of 4 February 2018, art. 19). This is a situation that will often result in restitution. The director of the COSC also decides on the destination of the frozen property when the court has not pronounced, in the judgment, the destination of the frozen property (here again restitution is possible, Law of 4 February 2018, art. 19).

Prior to restitution, the COSC informs the institutions responsible for the recovery of tax or social security debts in Belgium and the other Member States of the European Union (Law of 4 February 2018, art. 32, Royal Decree of 12 July 2009, art. 1). The COSC may also directly apply the sums to be returned to the payment of these debts (Law of 4 February 2018, art. 32). An actor in the field fears that the new legal deadline of two months imposed on the COSC to carry out the restitution is too short to effectively implement the legal compensation of the debts of the garnishee.

4.1.3. *Costs for the management or disposal of the frozen assets*

Costs related to the management of seized property are legal costs that are taxed by the COSC (Law of 4 February 2018, art. 8, Program Law (II) of 27 December 2006, art. 2).

In the event of the freezing being lifted, the frozen sums returned shall be increased by interest (Law of 4 February 2018, art. 9, Royal Decree n° 150 of 18 March 1935, art. 18 and 19). The interest rate is the one chosen by the financial institution designated by the COSC to manage the sums of money (Doc., Ch., 2017-2018, n° 2732/1, 14).

[176] The Law of 4 February 2018 only envisages sums of money, but circular COL 9/2018 wisely extends the scope of the decision of the director of the COSC to all the assets frozen (p. 22).

4.1.4. *Legal remedies against wrongful management of frozen assets*

In the face of a decision concerning the management of the frozen property taken by the public prosecutor or the investigating judge, it is possible on the one hand to challenge them and on the other hand to seek compensation for the damage suffered.

Decisions relating to constant value management (disposal and sale, restitution in exchange for payments, conservation in kind) are notified to the dependents in whose hands the freezing was made, to persons who according to the data of the file were manifested as injured by the act[177] and, in case of freezing of immovable assets, to the mortgage creditors (C.C.P., art. 28-*octies* and 61-*sexies*). These persons may appeal to the indictments chamber within fifteen days of notification. This period is extended by fifteen days if the person resides outside the Kingdom. The procedure is the same as for a "référé penal" (see point 2.1.7.). There is no appeal in cassation possible. The petitioner may not address or file a petition for the same purpose before the expiry of a period of three months from the last decision on the same subject (C.C.P., art. 28-*sexies* and 61-*quater*).

Decisions of the COSC to make available the frozen property to the police are notified to the magistrate who authorized the sale of the property (Law of 4 February 2018, art. 17). It is not intended that this decision of the COSC be notified to other persons, however as this decision can only concern the property for which a sale was authorized, a series of persons (see above) have been notified of this sale decision. The drafting of Article 17 of the Law of 4 February 2018 is problematic because it could be interpreted as giving to the garnishee two recourses: a first against the decision of sale and a second against the decision of making the frozen asset available to the police. One actor in the field states that the intention of the legislator is to provide only one remedy (against the sale decision).

Decisions relative to destruction are notified by the public prosecutor within eight days to the dependents from whom freezing was practiced and persons who appear entitled to assert rights over the property to be destroyed (C.C.P., art. 28-*novies*). These persons may appeal to the indictments chamber within fifteen days of notification. This period is extended by fifteen days if the person resides outside the Kingdom. The procedure is the same as for a "référé penal" (see point 2.1.7.). There is no appeal in cassation possible.

[177] Are concerned here third-parties who have made a "référé penal", the third-parties who have challenged the freezing in accordance with Royal Decree n° 260 of 24 March 1936, and third-parties who have sent a letter to the competent magistrate (circular 9/2018, 9).

The decision of the public prosecutor to allow the police or a scientific institution to use for educational purposes the property to be destroyed (C.C.P., art. 28-*novies*, § 9) cannot be as such challenged by those to whom the destruction decision was notified. Besides, this decision of the public prosecutor of provision to the police is not notified to these people.

These differences in the remedies available depending on the type of decision taken in the context of the management of frozen property are not justified by the legislator (were they intended by the latter?).

In addition to these different remedies to oppose the decisions made in the management of seized property, there is the possibility to claim compensation for damages related to these decisions.

In Belgium, since the cases *Anca* I and II, it is clearly recognized that the State is liable for the mistakes made by judges in the performance of their duties[178]. It is not the personal responsibility of the magistrate that will be considered but the responsibility of the Belgian State directly (on the basis of art. 1382 and 1383 of the Civil Code).

In the constant value management of frozen property, the magistrate is guided by the desire to avoid a loss of value of the property frozen. The magistrate has an obligation of means and not an obligation of result (Doc., Ch., 2017-2018, n° 2732/1, 14)[179]. The Law of 4 February 2018 explicitly provides that conservation in kind (one of the possible decisions in the context of constant-value management) is done "according to the means available" (art. 3). It can nevertheless be considered that the Law of 4 February 2018 provides for an obligation of result when it requires the public prosecutor or the investigating judge to choose, in the case of motor vehicles, boats and aircrafts, within three months of the freezing between the sale and restitution in exchange for payments (art. 10). The absence of a decision within the prescribed period could constitute a fault (without having to pass through the criterion of the diligent and careful magistrate placed under the same conditions)[180].

In the event of compulsory or optional management by the COSC, the responsibility of the State could be engaged if the seized assets are not managed "wisely and reasonably" and according to a "careful and passive management" (Law of 4 February 2018, art. 8).

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178 Cass., 19 December 1991, *Pas.*, 1992, 316; Cass., 8 December 1994, *Pas.*, 1994, 1063.

179 H. Lurkin, «La responsabilité du pouvoir judiciaire en matière de gestion de biens saisis: obligation de moyen ou de résultat?», *Revue de la Faculté de droit de l'Université de Liège*, 2, 2013, 286.

180 If the magistrate does not make their decision within this period, a reminder email is sent by the COSC (circular COL 9/2018, 13).

If the frozen property has been made available to the police and must be returned to its rightful owner, it will be necessary to compensate the potential loss (linked to the use) by compensation (Law of 4 February 2018, art. 17, § 7). Proof of this loss is facilitated by the obligation to make a description of the condition and an estimate of the value of the property before and after use (Law of 4 February 2018, art. 17, § 4).

If the property destroyed could have been put back into circulation on a regular basis, and if the file ends with a dismissal, an acquittal or a non-suit, then the rightful owner of the destroyed property can claim damages. The amount of the indemnity corresponds to the value of the property destroyed at the moment of the destruction (C.C.P., art. 28-*novies*, § 8).

4.1.5. *National practices on the management of frozen assets in a different EU Member State*

If the property to be frozen is abroad, the public prosecutor, the investigating judge or the competent criminal court shall transmit a certified copy of the freezing decision as well as the certificate to the competent authority of the executing State (Law of 5 August 2006, art. 3 and 18 and Annex 1). The assistance of the COSC may be requested by these competent authorities (Law of 4 February 2018, art. 7 and 26). The competent authority may request the transfer of the property only if the freezing is provided for the purpose of establishing evidence. Where freezing is provided for the purposes of confiscation, the frozen asset must be maintained in the executing State.

The certificate listed in Annex 1 of the Law of 5 August 2006 does not provide that the Belgian authority may ask the enforcement authority for the various measures available under Belgian law (sale, restitution in exchange for payments…). Quite logically, frozen property will be managed as permitted by the law of the executing State. An actor in the field considers it crucial that a maximum of national legislation allows the sale of frozen goods.

In the event of the lifting of the freezing, the executing authority is informed (Law of 5 August 2006, art. 18).

4.1.6. *National practices on the management of frozen assets in execution of a freezing order from a different EU Member State*

The management (at constant value) of frozen property is provided by the COSC (circular COL 4/2014, 9). The COSC is the "centralized office" within the meaning of art. 10 of Directive 2014/42/EU of 3 April

2014, and is therefore responsible for facilitating the application of the Law of 5 August 2006 on the application of the principle mutual recognition (Law of 4 February 2018, art. 5 and 7).

Article 15, § 3 of the Law of 5 August 2006 refers to the system set up in domestic law by Article 61-*sexies* of C. i. cr. specifying that the investigating judge can therefore authorize the COSC to alienate the frozen property or to return it for a sum of money.

The Law of 5 August 2006 has not been modified to take into account the third option now provided by Article 61-*sexies* of the C.C.P., namely conservation in kind. This is all the more surprising since the commentary on the articles of the draft law that led to the Law of 4 February 2018 specifies that the "proposed regulation is inspired by the constant value management of property frozen on the basis of a freezing certificate [provided by] Article 15, § 3 of the Law of 5 August 2006" (Doc., Ch., 2017-2018, n° 2732/1, 15). Prior to his decision, the investigating judge must consult the competent authority of the issuing State. The public prosecutor informs the issuing State of the decision taken by the investigating judge (Law of 5 August 2006, art. 15, §§ 3 and 4).

Other measures provided by Belgian law (destruction, provision to the police…) are not explicitly provided for by the Law of 5 August 2006. Nevertheless, it would seem logical that the Belgian law be applicable to the management of these frozen assets since it is the law of the country of execution (*lex fori*).

The freezing decision is maintained until the lifting of the measure following a "référé pénal" or until the lifting of the decision of the judicial authority of the issuing State or until the final decision on confiscation (Law of 5 August 2006, art. 16)[181].

4.2. *Freezing of third-parties' assets*

If property belonging to a third-party can be frozen, the management of this property will be *a priori* similar to what has just been described.

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[181] The Law of February 4, 2018 (art. 10) provides that the management with constant value is possible for assets frozen in Belgium on the basis of the Law of May 20, 1997, but does not explicitly provide for assets frozen on the basis of the Law of 5 August 2006. There is no doubt, however, that the legislator did not want to override the Law of 5 August 2006. Thus, circular COL 9/2018 states that "this regulation is inspired by the European freeze certificate and is also valid for the constant value management of property seized in this context "(14). The models provided for in Annex 5 of the circular COL 9/2018 remove the differences between the procedures provided for in Article 15 of the Law of 5 August 2006 and Article 10 of the Law of 4 February 2018 (generalizing the procedure provided by the Law of 4 February 2018). Thus, both in the framework of international cooperation and in the

As an "aggrieved person", the third-party may request the lifting of the freezing ("référé pénal") (C.C.P., art. 61-*quater*).

When a lifting decision is taken, it is important to know to whom the frozen property must be returned. In principle, the restitution is made to the person in whose hands the freezing has been made, unless otherwise decided by the judge (Royal Decree n° 260 of 24 March 1936, art. 2). The competent magistrate (public prosecutor, investigating judge, trial court) must determine to whom the frozen item must be returned (Royal Decree n° 260 of 24 March 1936, art. 2). When the judge does not rule on the fate of a frozen item, the decision in this respect is a measure of execution of judgments and decisions that the public prosecutor has the power and the duty to order for the subsequent restitution of the property[182].

If a third-party (or a creditor of the garnishee) claims to hold a right to the frozen item and the magistrate has ordered the restitution to another person, that third-party (or the creditor of the garnishee) may object to the restitution before the civil judge (Royal Decree n° 260 of 24 March 1936, art. 3 to 5). The third-party must then seize the judge before the expiry of the time limit set by the public prosecutor, which is of at least fifteen days. The decision on restitution will not be enforced until the decision of the civil judge is enforceable[183]. Royal Decree n° 260 of 24 March 1936 only concerns frozen items which have been deposited in the registry. For frozen items that have not been deposited in the registry, legal doctrine suggests that a similar procedure for protecting the rights of third-parties be followed[184]. The parliamentary proceedings of the Law of 4 February 2018 specify that the COSC must wait for the decision of the civil judge in the dispute between the garnishee and the third-party or the creditor before restituting the item (Doc., Ch., 2017- 2018, n° 2732/1, 30). The Law of 4 February 2018 is less explicit on this last point.

4-3. *Confiscation*

4.3.1. *Competent authorities for the disposal of confiscated assets*

The registrar of the court who pronounced the confiscation shall transmit an extract of this judgment which has become res judicata to the

framework of the "European freeze", it is planned to suspend the execution of the decision on constant management for a period of three months to allow the requesting State to communicate these remarks (which is not provided for by the Law of 5 August 2006).

[182] Cass., 6 October 2010, *Pas.*, 2010, 2496, with conclusions by attorney general D. VANDERMEERSCH.

[183] Cass., 13 June 2001, *Pas.*, 2001, 1120.

[184] F. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 193.

receiver of the Department of Finance within three days (Royal Decree of 28 December 1950, art. 121). The registrar must also inform the COSC, but this legal obligation has not entered into force (Royal Decree of 28 December 1950, art. 121).

Article 19 of the Law of 4 February 2018 does not explicitly provide that confiscation orders must be notified to the COSC. This lack of clarity may be a substantial problem. Thus, while the parliamentary proceedings specify that the public prosecutor must notify the COSC without delay of the confiscation orders (Doc., Ch., 2017-2018, n° 2732/1, 23), annex 2 of circular COL 9/2018 considers that it is the registry of the court's role to make this notification by e-mail within five working days of the conviction having become res judicata.

Prosecutions for the recovery of confiscated property are carried out by the Department of Finance on behalf of the Public Prosecutor and according to the indications of the COSC[185] (C.C.P., art. 197-*bis*). The public prosecutor considers the property benefits by judgment or order, by confiscated items or by lots of similar property (Royal Decree of 17 May 2018, art. 2).

To assess the feasibility of an effective execution of confiscation, the COSC may conduct a solvency investigation of the sentenced person (Law of 4 February 2018, art. 21). This survey seeks to collect information allowing the Department of Finance to ensure the effective execution of a confiscation order. It therefore seeks to "identify any type of property of which the convicted person is the owner but which have not been frozen [or identified] during the criminal investigation"[186]. When a financial institution or a company registered with the Crossroads Bank for Enterprises refuses to communicate information relating to the solvency of the convicted person (list of bank accounts, bank safes, banking transactions, identification of the holders and agents of the person sentenced) it risks a criminal fine (Law of 4 February 2018, art. 21 and 22). As part of this solvency investigation, the COSC may decide on a temporary freeze (a sort of a posteriori freezing for a maximum of five working days) of the property of the person concerned (Law of 4 February 2018, art. 22)[187].

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[185] The COSC is the Asset Recovery Office for the purposes of Decision 2007/845/JHA. It is a member of the European Union's Asset Recovery Office Platform (ARO) and the CARIN network (Camden Asset Recovery Interagency Network; Doc., Ch., 2017-2018, n° 2732/1, 34). It plays a key role in finding the assets of a convicted person abroad.

[186] P. Tilliet, «Nouveautés en matière d'exécution des confiscations prononcées par le juge pénal », in P. Fréteur, P. Tilliet (eds.), *Saisies et confiscations. Questions d'actualité*, Bruxelles: Larcier, 2011, 53.

[187] *Ibidem*, 54.

The public prosecutor may also perform or instruct the COSC to carry out a criminal execution investigation in order to search, identify and seize the assets on which confiscation may be executed (C.C.P., art. 464/1; Law of 4 February 2018, art. 24). Such an investigation is only possible if the convicted person has been convicted of an offense punishable by a minimum term of imprisonment of one year and the amount owed (we cumulate the amount of confiscation, criminal fines and court costs) is of at least 10,000 euros (Royal Decree of 25 April 2014, art. 1). The means of investigation are more extensive than in the case of solvency investigation. Interrogations, searches, searches in a computer system, deep searches, observations, use of indicators, wiretapping, etc., are authorized in this case. A measure of deprivation of freedom is however not allowed (C.C.P., art. 464/5). The frozen items in the framework of a criminal execution investigation can be returned in exchange for payments fixed by the magistrate in charge of this investigation (C.C.P., art. 464/35). They can also be alienated (C.C.P., art. 464/37). The person aggrieved by a freezing can request the public prosecutor to lift this act of execution. Since a final judgment has already been pronounced, the appeal against the decision of the public prosecutor will be brought before the judge of the enforcement of sentences (C.C.P., art. 464/36).

4.3.2. *Modalities of disposal of confiscated assets*

In the case of a prior freezing, the Department of Finance official proceeds to the execution of frozen items in accordance with the instructions of the public prosecutor or the COSC (C.C.P., art. 197-*bis*). When the decision of confiscation order is cast as res judicata, the earlier frozen item becomes the property of the State.

In the absence of a prior freezing, the Department of Finance official invites the convicted person "to voluntarily make themselves available within one month"[188]. Without prior freezing, a claim on the confiscated item is created, with the State as its beneficiary[189].

4.3.3. *Other possible destinations of confiscated assets*

The judgment pronouncing a confiscation assigns, in principle, the property of confiscated items to the State[190]. But in certain cases, the

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[188] *Ibidem*, 52. There is no legal basis for this delay. It comes from practice and seems to be of sufficient duration.

[189] A. Masset, «Confiscation en matière pénale», in *Postal Mémorialis*, C 302/17.

[190] Cass., 4 April 2008, *Pas.*, 2008, 814.

confiscated items are returned or attributed to the civil party (P.C., art. 43-*bis*, § 3 and art. 44).

When confiscated items belong to the civil party, they are returned to them (P.C., art. 43-*bis*). The confiscation then has "the character of a civil compensation of the damage resulting from the offense"[191]. For those items to be returned to the civil party, they must be owned by the latter, whether they were found in kind in the patrimony of the condemned and were confiscated[192]. The civil party is preferred over the creditors (non-mortgage) of the convicted person[193].

These confiscated items are attributed to the civil party if these goods constitute property or values substituted by the condemned to things belonging to the civil party or a sum of money which is equivalent to them (P.C., art. 43-*bis*). On the other hand, confiscated items that do not belong to the civil party cannot be attributed to them[194]. Confiscation is a prerequisite for the assignment of property to the civil party[195].

The circular COL 9/2018 specifies that Article 32 of the Law of 4 February 2018 is applicable here and that public debts can therefore be compensated before restitution or attribution (p. 25).

If restitution or attribution of confiscated property does not allow for full compensation, the victim may request compensatory compensation on the basis of Article 1382 of the Civil Code.

For the situation of third-parties who did not bring civil action, see below point 4.4.

4.3.4. *National practices on the disposal of confiscated assets in a different EU Member State*

If the confiscated items are abroad, the public prosecutor transmits a certified copy of the confiscation order and the translated certificate to the competent authority of the State (Law of 5 August 2006, art. 3 and 39 and Annex 3). The Minister of Justice and the COSC receive a copy of these documents (C.C.P., art. 197-*bis*, § 3). The public prosecutor may request the COSC to assist them or to undertake these steps themselves with the executing State (C.C.P., art. 197-*bis*, § 3; Law of 4 February

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[191] F. Kuty, «Les droits de l'État, de la victime de l'infraction et des tiers sur les avantages patrimoniaux confisqués sur la base de l'Article 43-*bis* du Code pénal», in F. Deruyck, M. Rozie (eds.), *Liber Amicorum Alain De Nauw. Het strafrecht bedreven*, Brugge: Die Keure, 2011, 531; Cass., 9 May 2007, *Pas.*, 2007, 882.

[192] *Ibidem*, 531 and 532.

[193] Civ. Brussels, 29 November 2004, *J.L.M.B.*, 2005, 835.

[194] Cass., 18 April 2006, *Pas.*, 2006, 857.

[195] Cass., 9 May 2007, *Pas.*, 2007, 883.

2018, art. 7 and 26). Article 39 of the Law of 5 August 2006 determines to which state(s) the certificate must be transmitted (criteria of the place of income, the registered seat of the legal person, the place where the property is found…).

The transmission of a confiscation order to a executing State does not restrict the right of the Belgian's authorities to execute the confiscation themselves (Law of 5 August 2006, art. 39, § 5). The executing State must be informed by the public prosecutor of this execution (Law of 5 August 2006, art. 40).

4.3.5. *National practices on the management of confiscated assets in execution of a confiscation order from a different EU Member State*

The destination of the confiscated items is determined by the public prosecutor (and not by the criminal court) according to the rules set out in Article 38 of the Law of 5 August 2006:

– sums of less than EUR 10,000 are paid to the (Belgian) State Treasury;

– sums of money equal to or greater than EUR 10,000 are divided equally between the (Belgian) State Treasury and the issuing State;

– for goods that are not an amount of money, the public prosecutor decides to transfer them to the issuing State (circular COL 4/2014, 30) indicates that this situation is exceptional) or to sell them, the proceeds of the sale being distributed as indicated above. If neither of these two hypotheses is possible, the property will be disposed of in accordance with Belgian law (e.g. destruction of drugs or weapons).

Cultural objects belonging to the Belgian cultural heritage may not be sold or returned.

Such rules relating to the destination of confiscated items are highly problematic in that they do not take into account the interests of victims and bona fide third-parties[196]. The fate of the Belgian victim in domestic law is more favorable (P.C., art. 43-*bis*, par 3). Fortunately, it is envisaged that the Minister of Justice may derogate to these rules with the agreement of the issuing State (Law of 5 August 2006, art. 38, § 3). In addition, international agreements (e.g. C.B.I.F.T., art. 25.2) may provide for other distribution keys that are more favorable to the issuing State, to victims and to bona fide third-parties[197].

The execution of confiscation is terminated if the issuing State withdrew its application (Law of 5 August 2006, art. 36) and in case of

[196] F. Lugentz, D. Vandermeersch, *op. cit.*, 280.
[197] *Ibidem*, 264.

amnesty or pardon granted by Belgium (Law of 5 August 2006, art. 37). These last hypotheses are surprising since it is a foreign conviction.

4.4. *Third-Party Confiscation*

In some cases (see point 1.1.), property may be confiscated even if the convicted person is not the owner. We have seen that confiscation implies in principle a transfer of ownership to the State or to the civil party. However, it is stipulated that the sentence of confiscation cannot prejudice the rights of third-parties over confiscated items (P.C., art. 43-*bis*, par 4)[198]. This absence of prejudices for third-parties is related to the principle of the individual nature of penalties, which also applies to ancillary penalties[199]. The rights of bona fide third-parties must be privileged in relation to the rights of the State[200].

Third-parties may claim their rights either during the judgment phase, since they will be informed of the setting of the hearing before the criminal court (Preliminary Title of the Code of Criminal Procedure, art. 5-*ter*), or after the judgment (Royal Decree of 9 August 1991).

If one is still in the judgment phase, the third-party by virtue of their lawful possession is informed of the case setting by the prosecution services and may indicate their intention to intervene (Preliminary Title of the Code of Criminal Procedure, art. 5-*ter*; Judicial Code, art. 812). To speak of "lawful possession" within the meaning of Article 5-*ter*, it is necessary that this third-party has not committed any offense and that they have no knowledge of the unlawful origin of the property[201]. A non bona fide third-party will not prevent the pronouncement of confiscation in favor of the State.

If a judgment providing for confiscation in accordance with Article 43-*bis* of the P.C. has already been pronounced, it cannot be executed before the expiry of a period of ninety days from the day when the sentence will become res judicata (Royal Decree of 9 August 1991, art. 1). Once the decision has become final, the Registrar of the Tribunal shall, within thirty days, notify third-parties who claim to have a claim against an item and who have opposed the return of the item in accordance with

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198 F. Discepoli, «Réflexions en matière de saisies et de confiscations à la suite de l'arrêt de la Cour constitutionnelle du 3 avril 2014», *Pli juridique*, 32, 2015, 20.

199 C.C., 3 April 2004, n° 65/2014; D. Bernard, C. Guillain, B. Dejemeppe, «La confiscation pénale: une peine finalement pas si accessoire», in C. Guillain, P. Jadoul, J.-F. Germain (eds.), *Questions spéciales en droit pénal*, Bruxelles: Larcier, 2011, 5.

200 F. Kuty, *op. cit.*, 558.

201 Cass., 12 December 1921, *Pas.*, 1922, 98.

Article 3 of Royal Decree n° 260 of 24 March 1936 and all other persons indicated to it by the Public Prosecutor as being entitled to claim rights in confiscated property. Third-parties must then apply to the civil court within ninety days from the day on which the judgment becomes res judicata (Royal Decree of 9 August 1991, art. 3). The decision on confiscation will not be enforced until the decision of the civil judge[202] has become res judicata (Royal Decree of 9 August 1991, art. 4). This protection of third-parties provided for in Article 43-*bis* of the P.C. does not apply to confiscation related to money laundering (P.C., art. 505)[203].

It is not enough for the third-party to show that they have a real right to the item, but also to distinguish between the non-bona fide and bona fide third-party[204]. If the third-party knew or ought to know the origin of the property, they cannot claim the restitution of the property. They could even be prosecuted for money laundering or receiving. The good faith of the third-party "is attested if the third-party can trust the regularity of the nature and origin of the goods"[205]. The bona fide third-party believes that "the person whose property they hold is the latter's owner. (…) This belief must be reasonable and seriously founded"[206]. The legal doctrine stipulates that it is very rare for a third-party to succeed in successfully claiming its rights over an item that is liable to confiscation[207]. Some authors believe that a distinction should be made between a bona fide third-party who "upon acquiring property benefit, provided or offered compensation (…) and those who received the property free of charge or without genuine compensation"[208]. In the first case, the third-party must remain in possession of the pecuniary benefit and the confiscation (per equivalent) will relate to the property and securities which have been substituted for them (P.C., art. 42, 3°). In the second case, the bona fide third-party can no longer ignore the criminal origin of the property and "any transaction that (they) would perform (…) would be considered money laundering"[209]. They therefore become bad faith third-party, and cannot claim possession of the item.

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[202] Cass. 22 September 1998, *Pas.*, 1998, 971.

[203] O. Klees, «La bonne foi du légitime propriétaire d'une chose confisquée par le juge pénal», in F. Deruyck, M. Rozie (eds.), *Liber Amicorum Alain De Nauw. Het strafrecht bedreven*, Brugge: Die Keure, 2011, 501.

[204] Cass., 4 March 2014, *Pas.*, 2014, 580; F. Lugentz, D. Vandermeersch, *op. cit.*, 93.

[205] Cass, 4 March 2014, *Pas.*, 2014, 582.

[206] O. Klees, *op. cit.*, 517.

[207] *Ibidem*, 503.

[208] F. Lugentz, D. Vandermeersch, *op. cit.*, 95.

[209] *Ibidem*, 95.

There may be a conflict of interest between the victim and the bona fide third-party. The victim, deprived of possession of the property of which they are the owner, is protected by Articles 43-*bis*, § 3 and art. 44 of the P.C., while the bona fide third-party who acquired possession is protected by Article 43-*bis*, al. 4 of the P.C. The legitimate possession of the bona fide third-party takes precedence over the right of the victim dispossessed by the offense[210]. The victim will obviously be able to demand compensation for the damage caused to the perpetrator of the offense on the basis of Article 1382 of the Civil Code. However, in the event of loss or theft, the victim may claim the movable property stolen or lost for a duration of three years (C. civ, art. 2279, § 2). In this case, the victim will have to reimburse the bona fide third-party owner the price that this movable property cost them (C. civ., art. 2280). The victim will then be able to claim compensation from the offender, on the basis of Article 1382 of the Civil Code, for the price that they had to pay in order to recover their possession[211].

Finally, the criminal execution investigation may concern the property of the convicted person but also that of non bona fide third-parties. Non bona fide third-parties are defined as third-parties who conspire knowingly and voluntarily with the convicted person in order to exempt the latter's assets from the execution of the enforceable sentences (C.C.P., art 464/1). The magistrate in charge of the criminal execution investigation can freeze the goods of a third-party if there are serious and concrete indications that the convict transferred the goods to the third-party (even before the sentence is passed res judicata), in order to avoid the recovery of confiscation, and that the third-party knew or ought to have known that the property had been assigned to them in order to avoid confiscation (C.C.P., art. 464 /30).

Conclusion

The Court of Audit considers that "the execution of confiscation is entrusted to numerous, highly decentralized actors who report to independent hierarchical authorities". This creates a certain "confusion of roles" and the inability of the COSC to "fully exercise its coordination role"[212]. The Court of Audit also notes shortcomings at different points

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[210] Cass., 11 January 2005, *Pas.*, 2005, 58.

[211] Cass., 31 October 2003, *Pas.*, 2003, 1744; F. Kuty, *op. cit.*, 560.

[212] Cour des comptes, *L'exécution des peines patrimoniales. Les amendes pénales et les confiscations spéciales*, Bruxelles: 2007, 47 and 51.

in the process: the registries do not transmit the decisions perfectly to the (competent) actors of the Department of Finance, the COSC does not receive all the decisions carrying out confiscations; the actors responsible for the Department of Finance are not always able to execute the confiscations because the judgments do not always make it possible to clearly identify the confiscated items; no actor is able to verify whether a confiscation has been executed[213].

These difficulties are reflected in a lack of quantitative data: "There is no reliable and complete information on the total number of sentences of confiscation of patrimonial assets pronounced for the benefit of the State, nor on the confiscated items entered into possession of the State"[214]. These difficulties are translated into a certain number of risks: "that confiscated items do not enter the State's heritage late or late; that confiscated items be diverted"[215].

Ten years after this audit, some things have not improved (there are still no reliable statistics available) but the current situation is however better overall. The new Law of 4 February 2018 is certainly more suitable than the previous legislation, and there has been progress in the implementation of a new computerized database of statistics[216].

5. *Final conclusions*

Several elements can be highlighted to conclude this national report.

In regards to substantive aspects, Belgian legislation on freezing and confiscation is very complex, in particular due to the many recent legal changes in Belgium. These legal changes have been imposed by European obligations and the case law of the Belgian Constitutional Court. The classification established by the Belgian law about confiscation (article 43 of the Penal Code) and freezing (art. 35 of the Code of Criminal Procedure) mobilizes concepts ("object of the offence", "instruments of the offence", "proceeds of the offence", "profits derived from or generated by the offence") which do not cover those traditionally used by in-

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213 *Ibidem*, 54.

214 *Ibidem*, 5 and 59.

215 *Ibidem*, 70.

216 This database is built to also collect goods frozen in Belgium by foreign authorities, as well as goods confiscated in Belgium by foreign judges (Doc., Ch., 2017-2018, n° 2732/1, 21).

217 It is important to be very careful in the terminology used because the notion of "proceeds of a criminal offence" used in international and European texts corresponds to the notion of "profits derived from or generated by the offence" in Belgian law (and not to the notion of "proceeds of a criminal offence": F. Lugentz, D. Vandermeersch, *op. cit.*, 211).

ternational provisions, and by European law ("proceeds of a criminal offence", "instrumentalities of a criminal offence"; Directive 2014/42/EU and Regulation (EU) 2018/1805)[217]. Some confiscations are mandatory and others are optional (freezing is always optional) and no convincing logic can be easily found. The question of third-party freezing or confiscation is neither explicitly nor systematically regulated by the legislator, which creates legal uncertainty. Extended freezing or confiscation exists but is rarely applied. The non-based confiscation, in the restricted sense of Directive 2014/42/EU (art. 4, § 2), is provided for Belgian law. An ambitious reform of the Penal Code is in progress in Belgium[218]. If this project is successful, the criminal confiscation will be mandatory (but with guaranties against an unreasonably harsh penalty) and the "extended" confiscation will be abolished (with a potential problem of compliance with European legislation)[219].

In regards to procedural aspects, Belgian law provides a number of guarantees for persons involved in the freezing or confiscation. So, the law allows the suspect and any person aggrieved by a freezing to ask the lifting of freezing. This procedure, so-called "référé penal", is very helpful for the protection of the rights of third parties. Confiscation, sanctioning an offense, may only be ordered, by a court of law, in the case of guilt and conviction of the accused to a principal sentence. As a penalty, confiscation must respect several fundamental rules relating to the rights of individuals. It must respect the principle of legality, be pronounced individually and be motivated. It cannot be retroactive and is subject to prescription. It cannot prejudice the rights of the victim. Furthermore, a confiscation order can be appealed.

In regards to mutual recognition aspects, the question of freezing for confiscation and the question of confiscation between Member States of the European Union are governed by the Law of 5 August 2006. This Law is rarely applied and is considered too complicated by practitioners. In addition, this law provides for numerous and sometimes mandatory assumptions of refusal of execution of the freezing or confiscation decisions. The implementation of Framework Decision 2003/577/JHA and Framework Decision 2006/783/JHA are thus subject to criticism.

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218 Commission de réforme du droit pénal, *op. cit*.

219 The authors of the draft new Belgian Penal Code no longer retain extended confiscation for three reasons: it does not respect the principle of the presumption of innocence; this mechanism is very complicated and rarely applied in practice and its disappearance is compensated by the creation of a new penalty: the pecuniary penalty fixed according to the expected or obtained profit from the offence (J. Rozie et D. Vandermeersch, *op. cit.*, 139).

In regards to management and disposal aspects, Belgium has, as provided for the Directive 2014/42/EU, an Asset Management Office. Indeed, the COSC must play this role of centralizing management. However, this centralization is not easy as the number of different actors involved in this stage of management is so large (the public prosecutor, the Ministry of Finance, the police, the Registrar of the Tribunal, the notary, the private administrator). To avoid a deterioration of the seized property and disproportionate conservation costs, Belgian law gives priority to sales, generally public auctions. A website under the responsibility of the Ministry of Finance centralizes these sales. Even if the re-uses of the assets are not very frequent, Belgian law allows them to take place relatively early in the procedure. Indeed, these re-uses may concern frozen assets (it is therefore not necessary to wait for a confiscation order). On the other hand, these re-uses are "institutional" re-uses, and not "social" re-uses, because the main beneficiary is the police. In the face of a decision concerning the management of the frozen property, it is generally possible on the one hand to challenge them and on the other hand to seek compensation for the damage suffered (the latter possibility is rare in practice and the chances of success are low). The execution of the confiscation decisions is complicated in practice by communication problems between the multitude of actors involved. However, in the legislation there are tools to ensure the feasibility of enforcing confiscation: the solvency investigation (Law of 4 February 2018, art. 21) and the criminal execution investigation (Code of Criminal Procedure, art. 464/1; Law of 4 February 2018, art. 24).

GENEVIÈVE GIUDICELLI-DELAGE - OLIVIER CAHN - JULIETTE TRICOT
AND
IRYNA GREBENYUK - NICOLAS JEANNE - MARIE NICOLAS

FRANCE[1]

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0. *Introduction*

0.1. *Developments in the normative framework and state of transposition of EU instruments*

The legal regime for confiscation is laid down in article 131-21 of the Criminal Code[2]. A single[3] text whose deep[4] modernization has been achieved through international instruments, particularly European ones. *Act No. 2004-204 of 9 March 2004 adapting the justice system to changes in crime*[5] is the first to have shown the way. Other texts followed: *Act No. 2007-297 of 5 March 2007 on the prevention of delinquency*[6] and, above all, *Act No. 2010-768 of 9 July 2010 on facilitating seizure and confiscation in criminal matters*[7], which, by creating the new category of special seizures, gives the confiscation measure a new place and scope within French criminal policy and procedure[8]. This text recasts the rules applicable to seizures, creates an Agency for the Management and Recovery of Seized and Confiscated Assets (hereinafter AGRASC)[9], and strengthens criminal cooperation mechanisms for the seizure and confiscation of assets[10]. Then comes *Act No. 2012-409 of 27 March 2012 on the execution*

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[1] Part 0 written by Olivier Cahn and Juliette Tricot, Part 1 by Iryna Grebenyuk, Part 2 by Olivier Cahn and Marie Nicolas, Part 3 by Juliette Tricot, Part 4 by Nicolas Jeanne.

[2] Hereinafter CC.

[3] Subject, of course, to the texts on procedure, cooperation and management of confiscated assets to be presented in Parts 2, 3 and 4.

[4] To measure it, it is sufficient to compare the versions of the text since the entry into force of the new Criminal Code in 1994 with the version in force today (unchanged since 2013): see for the 1994 version: *https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=B202B7EFECC1F1FF48E6C049645C7871.tplgfr33s_1?idArticle=LEGIARTI000006417274&cidTexte=LEGITEXT000006070719&categorieLien=id&dateTexte=20030612*; for the current version, *infra*, part. 1.

[5] *Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité.*

[6] *Loi n° 2007-297 du 5 mars 2007 relative à la prévention de la délinquance.*

[7] *Loi n° 2010-768, 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale.*

[8] *Infra*, Part 2.

[9] *Infra*, Part 4.

[10] *Infra*, Part 3.

of sentences[11], which (in particular) separates value confiscation from the absence of prior seizure or the impossibility of representing the confiscated asset and thus gives it a general scope, and *Act No. 2013-1117 of 6 December 2013 on the fight against tax fraud and serious economic and financial crime*[12], which (in particular) specifies in turn the conditions for value confiscation and the missions of the AGRASC. Most recently, *Act No. 2016-731 of 3 June 2016 on strengthening the fight against organized crime, terrorism and their financing and improving the efficiency and guarantees of criminal procedure*[13] further supplemented and amended the overall system.

These reforms have broadened the scope of the confiscation penalty and, above all, have considerably facilitated its imposition, especially since, as mentioned above, the amendments made to the legal regime on confiscation have been supplemented by a thorough reform of the rules governing criminal seizures[14].

The developments very briefly presented at the moment[15] have been largely (if not exclusively) driven by the European Union. This is why the chronology, pace and purpose of successive reforms reflect the sinuous path of European freezing and confiscation law, its successive limits and inconsistencies. Thus, the effects of the choice, initially, to favour mutual recognition to the detriment of harmonisation[16], linked to the context of the first half of the 2000s, which was very favourable to mutual recognition because of the success of the EAW and rather hostile to harmonisation, were manifest in French law, to such an extent that the French Senate was able to highlight before the adoption of the great 2010 law, the discrepancy – without justification – between the cooperation system applicable in France (more permissive) and the "internal" system (much more limited). But it also explains why the transposition of European texts operates sometimes *ex post* (following and in view of the European instrument) but sometimes *ex ante* (in advance).

Therefore, without going into unnecessary detail (some texts transposing both *ex post* and *ex ante*), it is possible to present in this way the

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[11] *Loi n° 2012-409 du 27 mars 2012 de programmation relative à l'exécution des peines.*

[12] *Loi n° 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière.*

[13] *Loi n° 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement et améliorant l'efficacité et les garanties de la procédure pénale.*

[14] *Infra*, part 2.

[15] Described in more detail below.

[16] In this sense, J. Lelieur, "Le dispositif juridique de l'Union européenne pour la captation des avoirs criminels", *AJ Pénal*, 2015, 232.

state and process of transposition of the European instruments constituting the Union's policy on confiscation (and freezing).

For example, the *Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence* was transposed by *Law 2005-750 of 4 July 2005 on various provisions for adapting to Community law in the field of justice*[17] by means of Articles 695-9-1 to 695-9-30 of the CCP[18].

Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property was transposed by *Act No. 2007-297 of 5 March 2007 on the prevention of crime* through a substantial revision of article 131-21 CC.

Council Framework Decision No 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders was transposed by *Law 2010-768 on facilitating seizure and confiscation in criminal matters* through Articles 713 to 713-141 CCP[19].

The *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* has been implemented through the creation of the Criminal Assets Identification Platform, PIAC, which is responsible for the identification of sources of illicit enrichment and the very nature of such wealth, and the AGRASC, which is entrusted with the operational management of seized property (by the judicial authority).

Finally, *Directive 2014/42* was partially transposed by *Act No. 2016-731 of 3 June 2016 on strengthening the fight against organized crime, terrorism and their financing and improving the efficiency and guarantees of criminal proceedings* (Art. 84) and *Decree No. 2016-1455 of 28 October 2016 on strengthening guarantees of criminal procedure and the enforcement of sentences in the field of terrorism*.

0.2. *General features of the French "model"*

To outline the general features of the "model" adopted by the French legislator, it is necessary to distinguish the nature of the confiscation measure, on the one hand, and its types or forms, on the other[20].

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[17] *Loi 2005-750 du 4 juillet 2005 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la justice.*

[18] *Infra*, part 3.

[19] *Infra*, part 2.

[20] For a very clear and exhaustive presentation of the French legal regime on confiscation and seizures (excluding international and cooperation aspects), see Lionel Ascensi's recent and highly valuable book: *Droit et pratique des saisies et confiscations pénales*, Dalloz, 2019.

With regard to the nature (in the sense of disciplinary affiliation), it is the choice of a unitary model that prevails, since confiscation measures are all (whatever their type/form) of a criminal nature (*stricto sensu*) and are therefore governed by the Criminal Code and the Code of Criminal Procedure.

However, one major exception should be mentioned that concerns customs confiscation[21]. The confiscation measure has its own, not strictly criminal, nature in this context. This is a sanction as in criminal law (which, as in criminal law, may be preceded by other measures[22] to secure its future enforcement). But it is said to be of a fiscal or mixed nature, insofar as this sanction has both a repressive (punitive) and compensatory character.

On the other hand, the typology of confiscation measures is particularly diversified. It does not exactly match the tripartite classification of the Directive and the draft Regulation (criminal confiscation, extended confiscation and confiscation without prior conviction) and is based on considerations relating to the nomenclature of criminal sanctions as well as the scope (or purpose) of confiscation.

Thus, with regard to the nomenclature of criminal sanctions, confiscation is primarily a penalty. However, it may present itself as a security measure (*mesure de sûreté*) in a number of cases[23].

Thereafter, it may be imposed as an additional, alternative or principal penalty. In principle, it is an additional penalty. It may be enforced as a primary penalty either as a substitute to imprisonment[4] or as a substitute to another additional penalty[25].

Finally, two classifications, used in doctrine, make it possible to ap-

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[21] As provided for in the Customs Code for the sanction of criminal customs offences.

[22] E.g. the consignment and seizure measures provided for by the Customs Code and implemented in accordance with it by customs officers.

[23] Of which only mention will be made. This report, whose main aim is to compare French law with current and future EU law, focuses on confiscation as a penalty. See Art. 131-21, par. 7 CC.

[24] In the following cases: "confiscation of one or more vehicles belonging to the convicted person; confiscation of one or more weapons belonging to the convicted person or which are freely available to him; confiscation of the thing which was used in or was intended for the commission of the offence, or of the thing which is the product of it, except for a press misdemeanour" (article 131-6 4°, 7°, 10° CC).

[25] "Where a misdemeanor is punishable by one or more of the additional penalties enumerated under article 131-10 [such as prohibition, confiscation, incapacity or withdrawal of a right, an obligation to seek treatment or a duty to act, the impounding or confiscation of a thing, the confiscation of an animal, the compulsory closure of an establishment, the posting a public notice of the decision or the dissemination the decision in the press, or its communication to the public by any means of electronic communication], the court may decide to impose as a main sentence one or more of the additional penalties" (article 131-11 CC).

proach the central question of the link between the offence and the object of confiscation.

Indeed, French law traditionally distinguishes between general confiscation, successively "maintained, abolished or restored"[26] and special confiscations.

The first, "an eclipse institution [which] disappears during periods of calm and is reborn in times of turmoil"[27], consists of the State's control over the condemned person's property (all his/her assets)[28].

The second ones concern a specific asset[29].

But, in particular because of the recent developments mentioned above, which have transformed the conception and uses of confiscation, a second typology tends to emerge, distinguishing seizure *in personam* from seizure *in rem*[30]. Thus, according to this classification, a distinction should be made between real confiscations, i.e. confiscations directly related to the commission of an offence, on the one hand, and personal confiscations which, without such a link, are only related to the convicted person, on the other hand.

This distinction would explain why the latter not only require the characterization of the official or hidden right of ownership of the convicted person but are also governed by the principle of personality (and proportionality) of penalties, while the former would be autonomous measures, "distinct from the notion of personal punishment"[31] without falling into the category of security measures.

These general and contextual considerations being recalled, it is appropriate to present the French law on confiscation, in its substantial dimension first (1), then the French law of confiscation and freezing in its procedural dimension (2) before examining the French system for the mutual recognition of freezing and confiscation orders (3), and finally the management of seized and confiscated property (4).

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[26] A. Beziz-Ayache, "Confiscation", *Rép. Dalloz* (2017), n° 5.

[7] J. Pradel, *Droit pénal général*, Cujas, 2014, cited by A. Beziz-Ayache, "Confiscation", *Répertoire Dalloz*, 2017, n° 5.

[28] Art. 131-21, par. 6 CC: "*Lorsque la loi qui réprime le crime ou le délit le prévoit, la confiscation peut aussi porter sur tout ou partie des biens appartenant au condamné ou, sous réserve des droits du propriétaire de bonne foi, dont il a la libre disposition, quelle qu'en soit la nature, meubles ou immeubles, divis ou indivis*" ("Where the law punishing the felony or misdemeanour so provides, confiscation may also cover all or part of the property belonging to the convicted person or, subject to the rights of the owner in good faith, of which he has free disposal, whatever its nature, movable or immovable, divided or undivided").

[29] Art 131-21 (par. 2, 3, 4, 5, 8) CC, *infra*.

[30] See for instance, G. Cotelle, "Consécration implicite de la procédure de confiscation sans condamnation préalable", *AJ Pénal*, 2016, 463.

[31] *Ibid.*

1. *Aspects on substantive criminal law on confiscation*

1.1. *Criminal confiscation*

Definition. Confiscation is a penalty provided for in the Criminal Code, which applies to property whose ownership will be permanently transferred[32] to the State. Its purpose is to punish the commission of a criminal offence committed by a natural or legal person[33]. It can only be pronounced by a court decision against a person convicted of the alleged offences.

It is because it is subject to the assessment of a judge whose status guarantees his or her independence and impartiality that the sentence has been declared in accordance with the Constitution[34].

Article 131-21, in particular paragraphs 3 and 4, therefore envisages confiscation within the meaning of the Directive and the Regulation by distinguishing between several types of confiscation according to the penalty incurred and the link between the property and the offence (*infra*).

This general framework is superimposed on specific frameworks that it can, depending on the case, supplement or "compensate".

> Indeed, special legal regimes and this general framework on confiscations coexist under French law, which may lead to some kind of fragmentation. But the general regime does often supplant a specific confiscation (in order to punish effectively).
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> More than that, the judge is allowed to mention several legal bases of confiscation in his rulings[35].
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> Special legal regimes[36] are for instance provided as regards theft (confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it, with the exception of articles subject to restitution, Art. 311-14, 4° CC); felonies and misdemeanors against the nation, the State and public peace (Art. , 3°, 431-7 3°, 431-11, 3°, 431-21 CC; procuring (Art. 225-22, 3°, 224-24, 1° CC); corruption (Art 433-23 CC); counterfeiting or forging of coins or banknotes (Art. 442-13 CC); forgery of securities issued by public authorities (Art. 443-6 CC).

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[32] If necessary, with a view to its destruction, which constitutes a means of enforcing the penalty of confiscation.

[33] See Art. 131-39, 8° CC.

[34] Cons. const., 26th Nov. 2010, no. 2010-66 QPC: Official Journal, 27th Nov. 2010, 21117.

[35] Cass. Crim., 22nd Feb. 2017, n° 16-83.257.

[36] Art. 131-21 par. 4 CC, on general confiscation mentions the confiscation if provided by a special law or regulation.

Conditions relating to persons. The penalty is applicable to natural and legal persons.

As for the former, adults – including protected adults – are liable, as are minors aged 13 to 18. Confiscation is also part of the educational sanctions that may be imposed on minors between the ages of 10 and 13[37].

As for legal persons, they also incur this penalty, the pronouncement of which follows the same regime (that of articles 131-21) as that applicable to natural persons, subject to the hypothesis of general confiscation (*infra*, extended confiscation): this penalty is only possible in matters of crimes against humanity (Art. 213-3 CC), certain offences of procuring (Art. 225-25 CC) or terrorist acts (Art. 422-6 CC).

Conditions relating to the penalty incurred. Most penal texts provide for the possible imposition of the penalty of confiscation, which may thus be imposed on a particular property according to the punitive interest it entails. Beyond this casuistic nature of the texts, there is a general framework which is that of Article 131-21 of the Criminal Code.

This provision applies to all offences, except press offences[38]. It is sufficient to incur a prison sentence of more than one year, which makes it possible to fill the many gaps in the special texts.

Below the one-year imprisonment threshold, confiscation is only incurred if there is a law providing for it, whether it is a misdemeanour or a petty offence and whether the offence is provided for in the Criminal Code or another code or penal legal or regulatory body.

Conditions relating to the link between the property and the offence. Article 131-21 of the Criminal Code provides that property may be confiscated because it is related to the offence it punishes. It deprives the offender of what allowed him/her to act or the profits he/she was able to make from his/her action.

> But there are also some cases in which the link in question is presumed.
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> Finally, there are some of the most serious qualifications for which it is not necessary to establish a real or presumed link between the property and the offence. The mere fact of being found guilty is sufficient to autho-

[37] In this case, "any object detained or belonging to the minor that was used to commit the offence or that was the proceeds thereof" may be confiscated, *see* Ordinance No. 45-174 of 2 February 1945 on juvenile delinquents, art. 15-1, 1.

[38] See below.

rize the imposition of this sanction, the penalty being applicable to any property of the convicted person, regardless of its lawfulness, unlawfulness or presumed lawfulness. The latter two cases will be considered as part of the extended confiscation (*infra*, 1.2).

The link with the offence is conceived more or less closely, based on the following typology, ranging from the closest to the most distended links.

The first category covered by article 131-21, paragraph 2, of the Criminal Code is property used to commit the offence (this category does not require special clarification) and property intended to commit the offence (category that allows confiscation to be applied to an attempt); it corresponds to the category of instruments of the offence.

Then, in paragraph 3 of the same article, the legislator refers to property that is on the one hand the subject-matter of the offence and on the other hand, the proceeds of the offence. These two categories require further clarification.

As for the subject matter of the offence, the legislator does not provide for any definition. The doctrine considers that it covers the result obtained or sought by the offender[39].

As far as the proceeds are concerned, it makes it possible to cover all the assets acquired or created by the commission of the facts[40]. The judge may order the total confiscation of the property without having to explain its proportionality. Anything that is the proceeds of the offence is subject to confiscation. These proceeds can be direct or indirect. In the first case, all the assets obtained, whatever their nature, are concerned. Proof that the funds have been obtained from an illegal activity is sufficient to justify their confiscation without the need to make an accurate statement of the sums involved if the person concerned does not provide proof of the share corresponding to other sources of income. However, a demonstration is required[41]. The connection between the offence and what the offender has gained from it must be established[42]. In the second case (indirect proceeds) "all forms of enrichment likely to be linked to

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[39] E. Camous, "Confiscation", *Jurisclasseur Pénal Code* (Art. 131-21 et 131-21-1, Fasc. 20), 2017, n° 28.

[40] A. Mihman, "La confiscation des profits illicites", *Gazette du Palais*, 11-13 May 2014, n° 133.

[41] See recently the reminder of this requirement: Cass. Crim., 14th Nov. 2017, n° 15-81.346; 23 Jan. 2018, n° 16-87.712.

[42] Par. 3 in fine: "Si le produit de l'infraction a été mêlé à des fonds d'origine licite pour l'acquisition d'un ou plusieurs biens, la confiscation peut ne porter sur ces biens qu'à concurrence de la valeur estimée de ce produit".

the commission of the facts"[43] are concerned, which makes this category the most sensitive.

The conditions for the execution of the confiscation (confiscation in kind and value confiscation). The law provides for two types of confiscation. The confiscation may concern the property itself or its value.

It should be borne in mind that confiscation in kind or in value is not a condition of sentencing. It is only an execution modality. Thus understood, the judge may decide to apply the penalty to the property that is directly subject to confiscation.

But the judge may just as easily impose the penalty of value confiscation, in other words in proportion to the value of these assets. The decision shall indicate that the penalty of confiscation is imposed for a specified amount.

One of the first consequences is that it is not possible to combine these two penalties. Judges cannot decide to confiscate property in kind and its value. They are required to make a choice between one or the other sanction[44].

Confiscation in kind is a matter of principle. The penalty is intended to relate to something that happens to be related to the offence committed or to the person who committed it, as a perpetrator, co-perpetrator or an accomplice.

Value confiscation is provided for in article 131-21, paragraph 9. In this case, the penalty shall be an amount the quantum of which is determined by the conviction decision.

However, this amount is not taken at random. It must correspond to the value of the property that could have been confiscated in kind. Value confiscation is therefore based on an alternative mechanism.

But even more elaborately, the law allows this value to be attributed to a property belonging to the convicted person that could not have been confiscated as such, but because this property has an identical value to the proceeds of the offence[45], for example, it may be confiscated even though it was acquired before the commission of the facts.

This option attests to the great flexibility of the confiscation penalty and must be put into perspective with the new provisions of article 706-

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[43] E. Camous, n° 32.

[44] Cass. *Crim*., 21st March 1996, *Bulletin criminel* 1996, n° 127; M. Véron, *Droit penal*, 1996, comm. 214.

[45] E. Camous, "La confiscation en valeur. Une peine en devenir", *Droit pénal*, 2017, n°7-8, dossier 5.

141-1 of the Code of Criminal Procedure which allow, before conviction, the value of property to be seized.

The conditions under which value confiscation may be imposed were substantially amended by Act No. 2012-409 of 27 March 2012. The old provision required the fulfilment of two alternative conditions: the property had not previously been seized or could not be represented.

These requirements no longer condition the imposition of value confiscation.

The trial court now has a real choice. It is possible for the court to order confiscation in kind, in other words to apply it to confiscable property, whether or not it has previously been seized, or in value, in other words, to a sum or other thing of which the convicted person is the owner or of which he has free disposal.

The only condition is that it is not possible to combine the two penalties on the same asset.

On the other hand, the same decision may very well include confiscations in kind and in value as long as they concern separate assets[46].

The flexibility offered to the judge makes it possible to compensate for the disappearance of the confiscable object or to seize an object unrelated to the offence but which can be confiscated because it has the same (monetary) value as the amount of money that can be confiscated.

Value confiscation is the result of compensation. This is the amount established between the value of the property whose confiscation is not or cannot be ordered and the amount indicated in the conviction decision. Consequently, the trial court may not order a value confiscation of an amount greater than that which was susceptible to in kind confiscation. Nor can it confiscate as compensation another property whose value is also higher than what was confiscable.

The conditions for the execution of the confiscation [bis] (total or partial confiscation). When it is pronounced, confiscation shall in principle cover the entire property.

The confiscation order may only affect the legal nature of the property and not its material integrity. Therefore, the penalty may be imposed on the undivided share of a property, provided that the situation of undivided ownership already exists[47].

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[46] Cass. crim., 22nd March 2017, n° 16-83.576.

[47] The totality of undivided share of a property may be seized and confiscated, despite the good faith of other co-owners (Cass. Crim., 3rd Nov. 2016, n° 15-85.751). On the question of breach of the right to the property of the third parties / co-owners, see E. CAMOUS, "Saisie et confiscation de biens faisant l'objet d'une propriété collective", *Droit pénal*, 2019, n° 4.

This is not the case for intangible property such as amounts recorded in an account. In such a case, a court may order partial confiscation of the funds.

The same applies to value confiscation because the sanction then concerns a fungible thing such as a sum of money. It can therefore be partially confiscated without altering its legal integrity.

The conditions for the execution of the confiscation [ter] (grounds). The penalty of confiscation must be reasoned, whether it is imposed for a felony, a misdemeanour or a petty offence[48].

In a recent decision, the Court of Cassation recalled that "with respect to misdemeanours, the judge who imposes a sentence must give reasons for his decision in the light of the circumstances of the offence, the personality and personal situation of the offender".[9]

It adds, summarizing recent case law, that "except where the confiscation, whether in kind or in value, concerns property which, in its entirety, constitutes the proceeds of the offence, the judge, in ordering such a measure, must assess the proportionate nature of the infringement of the person's right of ownership when such a guarantee is invoked or proceed to this *ex officio* when it concerns the confiscation of all or part of the property".

Thus, when the confiscation concerns property which in its entirety constitutes the proceeds of an offence, the penalty does not have to be assessed on the basis of proportionality[50].

The court therefore introduced a differentiated application of the principle of proportionality according to the lawfulness of the property that proceeds from the offence justifying the confiscation or seizure. In this sense, if the property subject to the measure is totally unlawful (by nature or because of its origin), "the principle of proportionality cannot apply"[51]. If the confiscated property is only partly of fraudulent origin, then the confiscatory measure must be examined in the light of the principle of proportionality[52].

Mandatory and optional confiscation. Most often optional, the confiscation measure may in certain circumstances be mandatory. In this

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[48] See, for example, Cass. crim., 21st March 2018, n° 16-87.296, E. Bonis, *Droit pénal*, 2017. Comm. 96, 50-51; Cass. crim., 27th June 2018, 16-87.009.

[49] See general individualization requirements: art. 132-1 par. 3 CC.

[50] Cass. crim., 3rd May 2018, n° 17-82.098.

[51] Cass. crim., 7th Dec., 2016, n° 16-80.879.

[52] Cass. crim., 4th May, 2017, n° 16-87.330.

case, the judge is required to order it. Between these two extremes there are situations in which, although necessarily provided for in the texts, the law authorises the judge to disregard it, provided that he or she gives a reason for doing so. This is a non-confiscation.

As a penalty, confiscation is a simple option that falls within the sovereign power of judges with regard to the circumstances of the offence and the personality of the offender (Art. 132-24 CC). This was reiterated by the Criminal Division of the Court of Cassation in a judgment of 27 May 2015. The Court of Appeal was not required to order the confiscation of the defendant's vehicle, even if it was automatically incurred for crimes and offences punishable by a prison sentence of more than one year. Indeed, the confiscation of property used to commit the offence is, unless otherwise provided for in article 131-21 of the Criminal Code, only a mere faculty[53].

In some cases, the court is required to order confiscation without having to question the identity of the owner or holder, whether or not the latter is convicted. This is the case for objects classified as dangerous or harmful by law or regulation or when their detention is unlawful (Art. 131-21, para. 7 CC). In this case, confiscation is not only the sanction imposed on a person found guilty of the facts of which he or she is accused. It is also a security measure which concerns the property itself, the nature of which prohibits any restitution. This explains why, like any security measure, it is not subject to the principle of the necessity of penalties[54]. However, it must be "proportional"; but the proportionality is not to be assessed with regard to the seriousness of a convicted person's past misconduct but in respect with "the prevention of breaches of public policy necessary to safeguard rights and principles of constitutional value"[55]; besides, it is then assessed *a priori*, with regard to the legal provision and not the judge's decision.

Categories of offences for which the different types of confiscation can be improved. Subject to press offences[56], the penalty of confiscation is incurred for all crimes and offences punishable by at least one year's imprisonment. For other offences, confiscation may be incurred if the criminal provision so provides. This is how, in particular, many petty offences are punishable by such a penalty. Thus, the list of offences covered can-

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[53] Cass. crim., 27th May 2015, n° 14-84.086.

[54] See Cons. const., 2nd March 2004, No. 2004-492 DC, recital 74; C. LAZERGES, *Revue de science criminelle et de droit pénal comparé*, 2004, 725.

[55] Cons. const., 21st Feb. 2008, No. 2008-562 DC, recital no. 13.

[56] Art. 131-21, para. 1 CC.

not be reproduced here (especially since the offences are within and outside the Criminal Code).

With regard to the issue of confiscation of the assets of third parties, article 131-21 makes the existence of a title deed and free disposal one of the conditions without which the penalty of confiscation cannot be imposed, subject to dangerous or harmful objects or objects whose detention is unlawful.

With regard to the concept of free disposal, which extends the scope of confiscation, it has become equal to the condition of ownership as the reforms have progressed. However, the notion is neither defined by the law nor by the criminal judge. The case law seems to retain an autonomous definition, "disconnected from the founding principles of civil law and company law"[57], which brings the notion closer to the prevailing interpretation in the field of money laundering[58].

The moment from which the person is the owner or has free disposal of the thing constitutes a sensitive point. This depends on the type of confiscation implemented, given the nature of the links between the offence and the property concerned.

The property that was used to commit the offence, that was intended to commit it or that was the object of the offence is naturally those that have a direct but also contemporary link with the facts. These are those that the convicted person possessed or had free access to at the time of the perpetration of the offence, regardless of the date on which these objects entered into his patrimony. However, once they have been removed from this patrimony, they may no longer be confiscated, subject to the demonstrated bad faith of the new owner.

The direct or indirect proceeds of the offence have a natural connection with the facts alleged. It is therefore necessary to establish a contemporary relationship between the offence and what it has allowed the author, the co-author or accomplice to benefit. It is therefore possible to look to the future by focusing on the property that was the result of the offence or that was acquired as a result of the offence. On the other hand, it is not possible to confiscate property whose purchase, possession or free disposal predates it. They cannot, by nature, be the direct or indirect result of an offence that necessarily occurred later.

The confiscation of property freely available to the convicted person is only possible subject to the rights of the owner in good faith. This rule

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[57] Ch. Cutajar, "Saisie pénale et «libre disposition»: nouvelle illustration de l'autonomie du droit pénal des affaires", *La Semaine juridique, Edition Générale*, 2013, 804.

[58] A. Létocard, "La revitalisation du traitement judiciaire du blanchiment. - À propos de l'article 324-1-1 du Code pénal", *La Semaine juridique, Edition Générale*, 2015, 899.

was incorporated into article 131-21, paragraph 3, of the Criminal Code by Act No. 2007-297 of 5 March 2007[59].

Good faith is thus inseparably linked to free disposal. It all comes from the fact that the one who freely disposes of the thing is not necessarily its owner. In such a case, this can lead to depriving a person of his or her property even though he or she has not been convicted. Such a consequence can be admitted when the owner is in bad faith. Thus, it is a matter of reaching those who, without committing the predicate offence, knowingly left property belonging to them at the offender's free disposal. On the other hand, those who ignore everything cannot have to suffer such a sanction.

Good faith is presumed. It is therefore for the prosecution to show that the owner of the thing left at the free disposal of the convicted person is acting in bad faith. The proof of this demonstration is free.

The assessment of the owner's good faith is left to the sovereign discretion of the courts. Bad faith may refer to the owner's knowledge of the use that was made of the property, in other words, that it was used to commit the offence. But it can go beyond that and result from circumstances that suggest that he could not have ignored it.

As for the victim, it is barely and inappropriately covered by article 131-21, which states that confiscation includes "all property that is the object or direct or indirect proceeds of the offence, with the exception of property that is likely to be returned to the victim".

However, the victim is necessarily a *bona fide* third party who, as such, benefits from the protection afforded by this status.

Thus, the principle is that property belonging to a victim cannot be confiscated. His/her ownership is legitimate and cannot be contested. To order the confiscation would deprive him/her of what belongs to him/her without this being justified by the commission of a criminal offence and therefore linked to a sanction. This rule applies even when the property in question is the thing that was used to commit the offence.

Confiscable objects. Article 131-21 of the Criminal Code sets out the scope of the objects that may be confiscated. In addition to objects qualified as harmful and dangerous, "all movable or immovable property, whatever its nature, divided or undivided (…), of which the convicted person is the owner or, subject to the rights of the owner in good faith, of which he has free disposal" are thus covered.

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[59] Transposition of *Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property*.

With regard to movable property, the law does not lay down any obligation as to how it should be designated. This is left to the free discretion of the court.

With regard to immovable property, confiscation can only fully produce its effects on the day on which the transfer of ownership is registered with the mortgage registry. It is therefore important that the decision respects the formalism imposed by the matter; this difficulty will most often be overcome by the fact that the property will have been the subject of a protective seizure. As the act of seizure has been previously registered, it is sufficient that the decision refers to it for enforcement to be carried out.

The possible confiscation of movable and immovable property makes it possible to include intangible property, in particular bank accounts, securities, shares or financial instruments as well as intangible property that constitute business assets.

Intangible rights, such as receivables and those arising from life insurance contracts, are also subject to confiscation.

Finally, the penalty of confiscation may relate to the state of undivided ownership of movable or immovable property (Art. 131-21, para. 2 CC) as well as intangible rights (Art. 131-21, para. 8 CC); it may not then extend to the share of co-owners who have not been convicted.

1.2. *Extended confiscation*

Types of extended confiscation. Extended confiscation has two forms in French criminal law.

It covers, on the one hand, the failure to justify the lawful origin of the property, provided for in paragraph 5 of article 131-21 of the Criminal Code, and on the other hand, the so-called general confiscation (confiscation of patrimony), provided for in paragraph 6 of the same article. The drafting of these two texts is the result of the aforementioned law of 5 March 2007.

In the first case, the link between the property and the offence is legally presumed[60].

The text states that: "In the case of a felony or misdemeanour punishable by at least five 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

[60] A. Mihman, "La confiscation des profits illicites", *Gazette du Palais*, n° 133, 2014, 1.

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".

Thus, as indicated at the end of the paragraph, confiscation does not therefore depend on the evidence that attests to the fact that it is the direct or indirect proceeds of the offence. It refers to the impossibility for the convicted person to prove their origin, in other words that they were legally acquired with funds of lawful origin[61]. The main consequence is that the burden of proof does not rest on the prosecution but on the person prosecuted.

In the second case, the link between the property and the offence is legally ignored: it is irrelevant. Thus, paragraph 6 provides that: "where the law punishing the felony or misdemeanour so provides, confiscation may also cover all or part of the property belonging to the convicted person or, subject to the rights of the owner in good faith, of which he has free disposal, whatever the nature, movable or immovable, divided or undivided".

This penalty is provided for the most serious offences restrictively listed by law (*infra*).

Conditions. With regard to the presumption of fraudulent origin of property, it presupposes the commission of a felony or misdemeanour punishable by 5 years' imprisonment.

The felony or misdemeanour punishable by 5 years' imprisonment must have yielded a direct or indirect profit. This condition is not locked in any other condition. Thus, the profit in question is assessed as such without the law requiring it to be reconciled with the property liable to confiscation. In other words, there is no need to establish that they were acquired with illicit assets.

Insofar as confiscation may be ordered if the accused does not justify its origin without the prosecution being obliged to bring it into line with the offence committed, the measure may relate to property the value of which goes well beyond the profits that the person has made from the offence.

Article 131-21 paragraph 5 requires that the person has been given an opportunity to explain himself. It is not only a procedural requirement but also a substantive one, which obliges the investigation services, first and foremost the investigating judge, to hear the person on his or her assets.

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[61] Note that the inability to justify his incomes, in some conditions, is a criminal offence (art. 321-6 CC).

As for the general confiscation, the most singular feature of this category of (extended) confiscation is the fact that it is incurred as such, without it being necessary to establish a direct, indirect or even presumed link with the offence. It may concern any object, whatever its nature or value, even if it is established that it was not used to commit the facts, that it is not the product of it and that its origin is perfectly justified. It is sufficient that the person concerned be convicted of one of the offences listed restrictively by law.

Mandatory or optional confiscation. The penalty of general confiscation is optional, it may therefore be decided not to impose such confiscation, which is within the sovereign discretion of the judges of the merits[62].

The same applies to confiscation based on the lack of any justification of origin of the property.

Categories of offences for which confiscation can be imposed. Confiscation based on the presumption of fraudulent origin of property concerns all felonies and misdemeanours for which the penalty is more than five years' imprisonment. General confiscation (confiscation of patrimony) is provided for the most serious offences restrictively listed by law. This is the case with regard to crimes against humanity (Arts. 213-1, 4° and 213-3, 2° CC), terrorism (Art. 422-6 CC), trafficking in human beings, procuring and related offences (Art. 225-25 CC), corruption of minors, simple and organized gang corruption, dissemination of simple and organized gang child pornography images (Art. 227-33 CC), offences relating to counterfeiting (Art. 442-16 CC), laundering of funds derived from a crime or offence (Art. 324-7, 12° CC), criminal conspiracy to prepare an offence punishable by 10 years' imprisonment (Art. 450-5 CC), failure to justify resources (Art. 321-10-1 CC).

The Act of 9 July 2010 redefined the framework of article 222-49 of the Criminal Code, which already provided for the possible confiscation of the assets of those who commit certain offences under drug legislation. The offences of transporting, holding, offering, transferring, acquiring or using illegal drugs have been added, so that almost all the offences provided for in this area are now covered (Art. 222-49, para. 2, referring to the provisions of article 222-37).

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[62] Par. 5 of the Art. 131-21 CC provides "confiscation affects as well…". It may seem so far that this confiscation is mandatory, as long as other paragraphs provide "may affect" or "may be imposed" when it is facultative. Yet, when the confiscation is mandatory indeed, the law states expressly "confiscation is compulsory" (para. 6 of the same text). Pursuant to the general requirement, it must be reasoned in the court's decision (see above; *Adde* Cass. crim., 8th March 2017, n° 15-87422).

Confiscable objects. As mentioned above, the provisions of article 131-21, paragraph 5, of the Criminal Code have a very specific scope with regard to the conditions imposed. Indeed, the text qualifies as confiscable everything for which the person cannot prove its origin, movable or immovable property of any kind, divided or undivided.

This confiscation is based on a double trigger mechanism. First of all, the person must be convicted of an offence punishable by 5 years' imprisonment that has yielded a direct or indirect profit. It is only under this condition that goods whose origin cannot be proven are then confiscable. This presumption mechanism suggests that non-justified assets are the result of the direct or indirect benefit provided by the offence. As a result, confiscation can only relate to what the convicted person has acquired or had free disposal of form the date on which the offence was committed. It does not seem possible to deprive him of previously acquired property, even if he is unable to justify it.

As regard confiscation of patrimony, it covers all property owned by the person or freely available to him or her, whatever it may be and whatever the date of acquisition. This is an essential point in that it may happen that the property for which confiscation is ordered has entered the property of the convicted person before the commission of the alleged offences. The fact that it was legally acquired before the date of prevention cannot have any impact on the sentencing, which remains justified[63]. Similarly, it may be decided not to order such confiscation; a decision which is within the sovereign discretion of the judges of the merits.

1.3. *Non-conviction based confiscation*

In case of illness or absconding of the suspected person. There is no specific type of confiscation in such hypotheses in French legal provisions. Nevertheless, illness and absconding of the suspected person are not the barriers to prosecution *per se*, for the French legal system admits trials *in absentia*[64].

More than that, Article 493-1 CCP introduced by the *Loi n° 2016-731 renforçant la lutte contre le crime organize, le terrorisme et leur financement, et ameliorant l'efficacité et les garanties de la procedure pénale*[65], aims to refrain the convicted person for seeking for the restitution of his former property to be restituted: "In the absence of an application

[63] Cass. crim., 8th July. 2015, n° 14-86.938.

[64] See pt. 15 of the Directive 42/2014/EU: "in such cases of illness and absconding, the existence of proceedings in absentia in Member States would be sufficient to comply with this obligation".

[65] Transposition of *Directive 2014/42.*

to set aside, the confiscated assets become the State property after the expiration of penalty limitation period".

In case cases of death of a person, immunity, prescription, cases where the perpetrator of an offence cannot be identified and other cases when a criminal court has decided that asset is the proceeds of crime. When the additional penalty of confiscation cannot be, or has not been, imposed, the property cannot be confiscated. Yet, a new legal tool, called "refusal to return the instrumentalities or the proceeds of crime" introduced by the abovementioned Law n° 2016-731, permits the recovery of illegally acquired properties[66]. It establishes a procedure for the transfer of ownership of assets related to the offence to the State, regardless of the admission of guilt and the imposition of the sentence. This procedure is part of the criminal investigation applicable to the person being prosecuted: that is Art. 41-4, 99, 373 and 481 of the Code of Criminal Procedure. From the technical point of view, it is not a confiscation, but a *refusal to return seized property, be it the instrumentalities or the proceeds of crime*, leading to its transfer to the State. However, the measure has the same effects as the ones produced by a confiscation. At the same time, it is not based on conviction. Therefore, it is a *de facto* confiscation *in rem*[67]. But it is not generalized.

When the confiscation is not legally possible (the public action is barred due to death of a person, for example) or has not been imposed by the court, it is possible to refuse to return the seized property if it is a "direct or indirect proceed from crime". That means that the refusal to return the assets is only possible in case of seizure. In other cases, neither *de facto* nor *de jure* confiscation can be imposed[68].

1.4. *Third-Party Confiscation*[69]

Article 131-21, par. 2, 5, 6 and 9 CC allows third-party confiscation. Theses paragraphs mention assets "which either belong to the sentenced

[66] Previously, the judicial practice did already recognize a similar mechanism in rather a creative way: Cass. crim., 25th Nov. 2015, n° 14-84985; Cass. crim., 2nd Dec. 1991, and n° 90-84.994.

[67] See G. COTELLE, "Consécration implicite de la procédure de confiscation sans condamnation préalable", *AJ Pénal*, 2016, 463.

[68] Authors therefore recommend the introduction of the non-conviction based confiscation under French law: C. LATIMIER, *Le recouvrement des avoirs illicites de la corruption internationale. Évolutions récentes en droit français et recommandations à la lumière de la Convention des Nations Unies contre la corruption*, PhD thesis, Université Côte d'Azur, 2017, § 820 sq.

[69] Subject to the following remarks and in the absence of specific details, the conditions set out above are applicable.

person or, subject to rights of the *bona fide* owner, are at his free disposal".

For offences punished by a prison sentence superior to 1 year (excluding press offences), confiscation may concern "all movable and immovable assets of any nature, divided or undivided, which were used or were intended for the commission of the offence" (Art. 131-21 par. 2 CC)[70].

The same goes in case of a felony or misdemeanor punished by at least a five-years' imprisonment which has provided a direct or indirect profit "when either the sentenced person nor the owner, after have been given the opportunity to explain themselves, is not able to justify the origin" (Art. 131-21, par. 5).

More than that, Art. 131-21, paragraph 6 allows for third-party confiscation in case of felony or misdemeanor if the law so provides.

Like any criminal confiscation, third-party confiscation may be executed in value (Art. 131-21, par. 9). In any case, the rights of the bona fide owner are preserved[71].

Finally, Art. 131-21, par. 3, foresees confiscation of all goods that are the objects or the direct and indirect proceeds of the offence. This provision sets aside the case of property liable to be returned to the victim. But it does not mention the *bona fide* owner. Accordingly, the Court of Cassation does not limit the scope of this type of confiscation to the assets of the sentenced person. In other words, a third-party confiscation is possible for objects and proceeds of the offence. The ownership of these assets is irrelevant[72].

In addition, according to Art 131-21, par. 7, confiscation is mandatory for objects classified as dangerous or harmful by law or regulation, or whose detention is unlawful, whether or not such property is the property of the convicted person[73].

Conditions for the imposition of confiscation[74]. The assets which can be confiscated may be the property of the convicted person as well as the

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[70] "La confiscation porte sur tous les biens meubles ou immeubles, quelle qu'en soit la nature, divis ou indivis, ayant servi à commettre l'infraction ou qui étaient destinés à la commettre, et dont le condamné est propriétaire ou, sous réserve des droits du propriétaire de bonne foi, dont il a la libre disposition".

[71] "La confiscation peut être ordonnée en valeur. La confiscation en valeur peut être exécutée sur tous biens, quelle qu'en soit la nature, appartenant au condamné ou, sous réserve des droits du propriétaire de bonne foi, dont il a la libre disposition".

[72] Cass. crim., 4th Sept. 2012, n° 11-87143.

[73] See for instance, Art. 222-24 (human trafficking) or art. 222-49 CC (drug trafficking).

[74] As far as Art. 131-21 is applicable, the conditions for the imposition of confiscation are the same as those described above.

third-party property. In this latter case, the asset shall be at "free disposal" of the sentenced person, in other words the convicted person is the true owner of the asset. As the legal definition of the concept of "free disposal" is not provided, the matter is subject to judicial interpretation[75].

Because it constitutes an infringement of the right to property[76], the third-party confiscation is possible only if the third party is *mala fide*. There is a presumption of good faith and the prosecution has to prove that the owner left the free disposal of the asset in full awareness of the relation to the criminal offences. Yet, the jurisprudence is often deducing the *mala fide* from the fact that the owner could not be unaware of the fraudulent use or of the association with a criminal offence[77].

Mandatory or optional imposition. The imposition of third-party confiscation is potional. But it is mandatory for drug crimes: "In the cases set out under articles 222-34 to 222-40, it is mandatory for the court to order the confiscation of installations, equipment and of any asset used directly or indirectly for the commission of the offence, as well as all the products coming from the said installations, equipment or assets, *whoever may own them and wherever they may be*, provided their owner could not have been ignorant of their fraudulent origin". (art. 222-49 CC).

Confiscation is mandatory for the articles defined as dangerous or noxious by statute or by regulations (Article 131-21, par. 7 CC).

2. *Aspects of procedural criminal law*

2.1. *Freezing*

2.1.1. *Preliminary remarks*

Terminology. In French criminal law and criminal procedure, the term "freezing" (*gel*) is used only for international cooperation, and more particularly for cooperation between the Member States of the European Union. The term has thus been taken from international and European instruments.

The Code of Criminal Procedure uses this term only in *Title X on international judicial assistance*, concerning the "issue and execution of

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[75] See the discussion on problematic aspects of actual judicial definition which may exclude the trust and the propositions to extend the definition to the "beneficial owner": C. Latimier, *cit.*, §§ 738-759.

[76] E. Camous, "Le droit de propriété et la peine de confiscation", *Droit pénal*, 2019, n° 3, Study 5, 25-26.

[77] Cass. crim., 9th Dec. 2014, n° 13-85150.

freezing orders" in the context of the provisions on "mutual assistance between France and the other Member States of the European Union" (*infra* Part 3).

Apart from criminal law and criminal procedure *stricto sensu*, the legislator uses the term freezing to refer to administrative preventive measures which should not be confused with measures forming part of criminal procedure and having a criminal purpose. These preventive measures all fall under the Monetary and Financial Code; they concern so-called terrorist assets (Art. L562-2 MFC and following) and freezing measures imposed by the UN Security Council or the EU Council (Art. L562-3 and following).

Thus, the terminology can be misleading, and it is important to distinguish between the repressive, strictly criminal side of freezing, which is of primary interest here, and the administrative side of a preventive nature, which will only be mentioned without giving rise to in-depth analyses.

To regulate freezing measures within the meaning of the Directive and the draft Regulation, subject to the above-mentioned special case of measures relating to mutual recognition, the French legislator uses the term and legal category of "seizures" (*saisies*): either through the general power of seizure or by means of special seizures.

These terminological remarks are not only of conceptual importance. They also have a practical significance, as illustrated by certain cases brought before the Criminal Division of the Court of Cassation. This was the case with regard to the provisions on freezing orders issued by an EU member State which are to be distinguished from those of articles 706-141 et seq. of the Code of Criminal Procedure relating to special seizures (aimed at securing future confiscation). Indeed, the decision to execute the freezing order issued by the judicial authority of a Member State of the European Union is not a seizure order within the meaning of the Code of Criminal Procedure. The investigating judge does not decide on the advisability of seizing property with a view to its confiscation, but on the advisability of enforcing a foreign decision: the investigating judge does not rule on the merits; he decides on enforcement. The specificity of the legal nature of the decision to execute the freezing orders therefore entails the specificity of the legal regime of that decision.

However, as pointed out by an author[78], some provisions are confusing. The third paragraph of Article 695-9-1 of the Code of Criminal Pro-

[78] L. Ascensi, "Conditions de l'appel contre l'exécution de la décision de gel de bien prise par les autorités étrangères - Cour de cassation, crim. 13 février 2013", *AJ pénal*, 2013, 357.

cedure thus provides that "the freezing of property (…) shall be subject to the same rules and shall have the same legal effects as a seizure"; Article 695-9-15 of the Code of Criminal Procedure provides that "orders freezing property ordered for the purpose of subsequent confiscation shall be executed, at the Treasury's expense, in accordance with the procedures laid down in this Code".

The Criminal Chamber has had the opportunity to recall the specificity of the legal regime for the execution of freezing orders. In the present case, the investigating judge of Perigueux, by ordering the "seizure" of the credit balance of the bank account, and the bank, by appealing to the registry of the investigating judge, had wrongly placed themselves on the ground of criminal seizures, whereas the investigating judge's task was not to seize, but to execute the freezing order taken by the Dutch judicial authorities. Consequently, the conditions of the appeal were no longer those of article 706-148 of the Code of Criminal Procedure, which provides that the seizure order "shall be notified to the Public Prosecutor's Office, the owner of the seized property and, if known, to third parties having rights in that property, who may refer it to the investigating chamber by declaration to the court registry within ten days of the notification of the order", but those of Article 695-9-22, which provides that a non-suspensive appeal is available to the person holding the property which is the subject of the freezing order or to any other person claiming to have a right in that property, such appeal being lodged "by means of a request submitted to the registry of the investigating chamber of the territorially competent court of appeal within ten days of the date on which the decision in question is put into effect".

Normative context. Until 2010, the enforcement of confiscation remained limited in France, seizures being restricted to the preservation of evidence. Previous to the *Loi* n° 2010-768 of 9th July 2010[79], the provisions of the Code of Criminal Procedure did not consider seizure as a precautionary measure aimed to facilitate the confiscation of criminal assets but only as a procedural tool dedicated to the preservation of evidence and the neutralisation of dangerous or unlawful goods.

The current legal framework amends this restrictive conception to approximate the French criminal justice provisions to EU standards and requirements. Nonetheless, some commentators keep on arguing that

[79] E. Camous, "Les saisies en procédure pénale: un régime juridique modernisé, commentaire des dispositions pénales de droit interne de la loi n° 2010-768 du 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale", *Droit Pénal*, étude 1, 2011; Ch. Cutajar, "Commentaire des dispositions de droit interne de la loi du 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale", *Dalloz*, 35, 14th October 2010, 2305.

these mechanisms will only find their full efficiency after magistrates' investigation culture will have integrated this evolution and they have renounced their reluctance to "democratize the identification and seizure of criminal assets"[80]. They consider that "trial courts are not sufficiently aware yet of the impact of confiscation, which they still regard as an accessory measure rather than as a first strike weapon" and that "the complete success of the new arsenal will only be acquired when the judiciary will have fully integrated the penalty of confiscation as the central element of the fight against organized crime and renewed its approach of penal punishment in this field"[81].

Directive 2014/42/EU of the European Parliament and of the Council of 3rd April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union has been transposed into French Law by two pieces of legislation, bearing in mind, however, that, as indicated in the introduction, most of the transposition had in fact preceded the Directive and was the result of the transposition of previous European instruments.

> The first one is the *Loi n° 2016-731 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale*, of 3rd June 2016[82]. As regards (administrative) freezing, article 118 of this Law gives the government the power to intervene by way of *ordonnance*[83]. In particular, the 5th paragraph of Article 118 invites the Government to take, by way of *ordonnance*, the necessary legislative measures to reinforce the coherence and effectiveness of the national system of asset freezing with the purpose of fighting against the financing of terrorism or the implementation of asset freezing measures decided by the United Nations Security Council or the Council of the European Union[84].

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[80] J.-F. Thony and E. Camous, "Gel, saisie et confiscation des avoirs criminels: les nouveaux outils de la loi française", *RIDP*, 84, 2013/1, 284.

[81] *Idem.*

[82] *Loi* n° 2016-731 of 3rd June 2016, Strengthening the Fight against Organized Crime, Terrorism and their Financing, and Improving the Efficiency and Safeguards of Criminal Procedure; available at: *https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032627231&categorieLien=id*.

[83] As far as confiscation is concerned, art. 84 of the same Act provides for the same.

[84] Art. 118, *Loi* of 3rd June 2016 empowers the Government to: "5° Amend the rules contained in Chapters I and II of Title VI of Book V and Chapter IV of Title I of Book VII of Monetary and Financial Code, with a view, in particular, to extending the scope of assets that may be frozen and the definition of persons subject to the freezing and prohibition of the provision of funds, of extending the scope of trade information necessary for the preparation and implementation of the freezing measures and to specify the terms and conditions for the release of frozen assets".

The second is the Ordonnance n° 2016-1575 of 24th November 2016 reforming the system of asset freezing which was therefore passed[85]. It does not transpose – strictly speaking – Directive 2014/42; it strengthens the legal framework of the freezing of assets within the context of the fight against terrorism. It provides that all assets related to terrorist acts may be seized including assets used to carry out the offences as well as any assets resulting from the carrying out these offences

The *ordonnance* also establishes an administrative procedure, under the supervision of the administrative judge, to combat the financing of terrorist activities. The *décret* n° 2018-264 provides for implementation measures[86] and is complemented by the *décret* n° 2016-1455, of 28th October 2016 aimed to ensuring the efficacy of criminal procedure and on the enforcement of sentences for terrorism related sentences[87].

2.1.2. *Procedures for the freezing of assets*

The legal framework. The French legal system draws a distinction between the administrative or preventive procedure, which explicitly refers to "freezing", and the judicial procedure, which – except in matters of EU cooperation – is based on the seizure mechanism (and its wording)[88]. In this study, it is the judicial aspect that will be of primary concern. However, in order to provide an overview of the national instruments covered by the concept of freezing, some more summary elements concerning the administrative aspect will also be mentioned.

Criminal seizures. Within the framework of criminal proceedings, measures involving an effect equivalent to freezing orders can be taken by judicial police officers, under supervision of the territorially competent prosecutor, or investigating judges in the implementation of their investigation powers of search and seizure. In addition to this general (ordinary law) framework, there is a set of special rules for special seizures.

Indeed, until the entry into force of the law of 9 July 2010, most of the rules applicable to criminal seizures were contained in the texts that allowed the judicial authority to seize objects useful for the manifestation of the truth. The seizures were then used for a probative purpose.

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[85] P. Dufourq, "Lutte contre le terrorisme: précisions sur le dispositif de gel des avoirs", *Dalloz Actualité*, 8th December 2016.

[86] *https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=D2D0CE3BAD500824E62FD748A7745C8F.tplgfr37s_3?cidTexte=JORFTEXT000036794511&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000036794149*.

[87] *https://www.legifrance.gouv.fr/eli/decret/2016/10/28/JUSD1628593D/jo/texte*.

[88] As mentioned above, measures explicitly called "freezing" are dealt with in the Code of Criminal Procedure, as a tool of cooperation within the EU: see *infra*, 3.

As mentioned above, the law of 9 July 2010 has profoundly modified French law with the introduction of "special seizures", which have in common that they do not pursue any "evidentiary" objective. Their sole purpose is to guarantee the execution of confiscations that may be ordered by the criminal court: they therefore pursue a "patrimonial" objective[89].

Special and common law seizures are distinguished by their regime and scope. The use of a special seizure is warranted in three cases: first, when a "patrimonial seizure" (saisie de patrimoine) is contemplated (Art. 131-21, para. 5 and 6 CC); second, because of the nature of the property concerned (seizure of immovable property or intangible property or rights); and third, because of the effects of the seizure (seizure without possession). Apart from these hypotheses, it is the common law seizure regime that applies. That is to say, when the seizure, whatever the nature of the property, pursues a probative purpose, or when the seizure is carried out for the purpose of confiscating tangible movable property whose confiscation is provided for by a text other than paragraphs 5 and 6 of art 131-21 CC and whose owner is to be deprived of its possession. In practice, all property useful for establishing the truth, as well as tangible movable property which is the object, product or instrument of the offence and is confiscable as such, will be subject to seizure under ordinary law (C. Pen., arts. 131-21, paras. 2 and 3)[90].

The difference in the regime between ordinary and special seizures is criticised by the doctrine[91] when the ordinary law seizure is carried out for the purpose of confiscation (thus pursuing a patrimonial and non-evidentiary function). In this case, the guarantees of ordinary law appear weaker than in the case of special seizures, although grounds for such a difference appear to be missing.

Hence, the purpose of the special seizures procedure (stated in articles 706-141 to 706-158 and in article D. 15-5-1-1 CCP) is to guarantee that the additional penalty of confiscation of the property (as defined in Article 131-21 CC) will be enforced. It applies to seizures relating to all or part of the property of a person, real property, property or a

[89] However, the distinction between "evidentiary seizures" (*saisies probatoires*) and patrimonial seizures (*saisies patrimoinales*) does not exactly overlap with the dichotomy between special seizures and other seizures. Indeed, if the special seizures pursue an exclusively patrimonial objective, the other seizures do not only have an evidentiary function; they may also aim at a patrimonial purpose. In fact, a reading of art. 706-141 CCP suggests that special seizures should be conceived as a special category within the broader category of criminal seizures, in which ordinary law seizures should be distinguished. See L. ASCENSI, *cit*. 174.

[90] *Ibid.*, 175.

[91] *Ibid.*, 176.

right/claim over intangible property as well as seizures that do not result in the owner being dispossessed of the property[92].

In most cases, however, the confiscation is preceded by an act of seizure carried out either by a judicial police officer in the course of a police investigation or an investigating judge acting within a judicial inquiry. The *Cour de cassation* stated that the seizure can continue throughout the jurisdictional procedure and apply to all goods, assets and properties that are the direct or indirect proceeds of the suspected offense and which confiscation may, as such, be decided by the trial court under article 131-21 CC[93].

Therefore, a judicial police officer, acting according to the *in flagrante delicto* procedure, may proceed with the seizure of all papers, documents, computer data and other goods in possession of the individuals who "seem to have been involved" in the offense or "seems to detain elements, information or goods related to the offense"; the officer may furthermore carry out searches and seizures in any premises in which goods that may be confiscated according to the provisions of article 131-21 CC are likely to be found. When the search is carried out only to seek for and seize goods which confiscation is provided for by par. 5 and 6 of article 131-21 CC, the prior authorization of the territorially competent public prosecutor is requested[94]. In case of a preliminary police investigation, searches, house visits and seizures of exhibits may not be made without the written express consent of the person in whose residence the operation takes place. Nonetheless, if the needs of an inquiry into a felony or a misdemeanour punished by a prison sentence of five years or more justify this, or if the search for goods which confiscation is provided for by article 131-21 CC justifies it, the JLD may, at the request of the prosecutor, decide, in a written and reasoned decision, that searches, house visits or seizures will be carried out without the consent of the person in whose residence they take place (art. 76 CCP).

An investigating judge may search any premises in which he believes "useful findings" may be found (art. 92 CCP). Searches are made in all the places where items or electronic data may be found which could be useful for the discovery of the truth or assets which confiscation is allowed under article 131-21 CC (art. 94 CCP).

Besides, customs officers may carry out searches (*visites domiciliaires*) and seizures when investigating customs offenses. They must in-

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[92] Art. 706-41 CCP.

[93] Cass. crim., 18th September 2012, n° 12-80662, Bull. crim. n° 193.

[94] In flagrante delicto police investigation in felony cases: art. 56 CCP; in misdemeanour cases, when an imprisonment is incurred: art. 67 CCP.

form the public prosecutor, who may prevent them to do so, of searches of professional dwellings they intend to carry out (Art. 63-*ter Code des douanes*)[95]. Except when they act *in flagrante delicto*, house searches must be authorized by the territorially competent JLD and carried out under his/her supervision; in any case, customs officers must be accompanied by a judicial police officer (Art. 64 *code des douanes*). On the other hand, when in the course of their duty, customs officers record an infringement of customs regulations, they are allowed to seize all goods likely to be eventually confiscated (Art. 323 (2) *code des douanes*).

Finally, apart from procedural tools, French public authorities have also provided for specialized police units aimed to improve the efficiency of confiscation proceedings. Thus, an inter-ministerial *circulaire* of 22nd May 2002 establishes the «*groupes d'intervention régionaux*»[96] (GIR), which gather police and gendarmerie officers, tax police officers, customs officers and civil servants from public administrations, to carry out patrimonial investigations on organized crime groups. In 2005, the legislator has established the *Plateforme d'identification des avoirs criminels* (Proceeds of crime identification platform - PIAC), which is a specialized unit, owing national jurisdiction, within the Central office for the fight against serious financial crime (*Office central de la répression de la grande délinquance financière*[97] - OCRGDF). It is mainly entrusted with collecting evidence on financial assets of organized crime groups. Its added-value also lies in its international jurisdiction, the unit being the designated police contact point in transnational inquiries. Furthermore, Act of Parliament n° 2004-204 of 9th March 2004 has set up the Inter-regional specialized courts (*Juridictions interrégionales spécialisées*[98] - JIRS), which are in charge of the fight against complex organized crime activities and allowed to enforce specific derogatory procedural tools (art. 706-80 et seq. CCP).

Administrative/preventive freezing measures are dealt with in the *Code monétaire et financier* (Monetary and Financial Code, hereafter MFC)[99].

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[95] Customs code.

[96] Regional Intervention Group.

[97] Central Office for Combating Organised Financial Crime, OCDEFO.

[98] Specialized Interregional Courts.

[99] Book V. Services providers; Title VI. Obligations relating to the fight against money laundering, terrorist activities financing, prohibited lotteries, games and bets and tax evasion and fraud; Chapter II. Provisions relating to the freezing of assets and the prohibition of making funds available, which gathers articles L562-1 to L562-13, as amended by *ordonnance* n° 2016-1575.

In a recent decision, the Constitutional Council (*Conseil constitutionnel*, hereafter Cons. const.) found these provisions in conformity with the Constitution[100]. It states that "administrative police measure implemented against individuals or legal entities under the quarrelled provisions are aimed only to the preservation of law and order and the prevention of offenses", that "when referring to behaviours likely to define criminal offenses as a condition to allow the enforcement of these measure, the contested provisions do not bring in consequences on further criminal proceedings" and that "through vesting the minister of Economy with the power to order these administrative police measures, the contested provisions do not infringe on the exercise of judicial function"[101]. Furthermore, these provisions do not involve a "presumption of guilt"[102]. Eventually, taking into account: 1. that "freezing measures are aimed to prevent acts of terrorism or acts sanctioned and prohibited by a resolution of the UN Security council", and therefore "pursue the objective of preventing breaches of law and order, which is necessary for the safeguard of rights and principles of constitutional value", 2. that "assets and resources likely to be frozen" are precisely defined by the legislator, 3. that, when ordering a freezing measure, the minister must take into account the necessity for the person targeted to "provide for the costs of the family life and the conservation of his/her patrimony"; 4. that the length of the measure is limited to six months; that the measure should be withdrawn as soon as the required conditions are not satisfied anymore and can only be renewed provided the minister is satisfied that the conditions justifying this renewal are gathered and that the implementation of such a measure is subjected to a contradictory debate, 5. that the State is liable for damages suffered as a consequence of the implementation of unjustified freezing measures, "the legislator has provided for necessary measures and set up criteria adequated to the pursued purpose"; as a consequence, the infringement with property right is regarded as in conformity with the Constitution[103].

With regard to the freezing of funds and economic resources belonging to, owned, held by or controlled by natural or legal persons, or any other entity that commits, attempts to commit, facilitates or finances acts of terrorism, or incites or participates in them, the relevant provisions are stated in articles L. 562-2 *et seq*. and Articles R. 562-1 *et seq*. MFC[104].

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[100] Cons. const., 2nd March 2016, n° 2015-524 QPC, M. Abdel Manane M.K. [Gel administratif des avoirs], Official Journal, 4th March 2016, Text. n° 121.

[101] § 9.

[102] § 13.

[103] § 15 to 20.

[104] These provisions have been modified by *ordonnance* n° 2016-1575, 24th November 2018. *https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=689CB3CEB6EA2EF0C42AF3CCBE25BAC5.tplgfr23s_2?cidTexte=JORFTEXT000033471674&idArticle=LEGIARTI000033472599&dateTexte=20161126*.

The purpose of the order is to extend the scope of assets that may be frozen and the

Concerning freezing measures decided under the provisions of the United Nations Security Council or the Council of the European Union, Article L. 562-3 MFC applies.

2.1.3. *Competent authority for the request of a freezing order*

The prosecutor, the investigating judge or, subjected to their authorization, a judicial police officer, may request the assistance of any qualified person to perform the acts necessary for the seizure of the property and their preservation[105].

The judge owing local jurisdiction acts on request of the prosecutor. The law does not prescribe the form in which the authorization of the prosecutor must be given. A simple reference in the minutes will be sufficient, provided it evidences that the judge in charge of supervising the investigations has given his consent. The same approach applies to the content of the authorization.

In case of an *in flagrante delicto* or preliminary investigation, the authorization of the prosecutor is required in two situations. The first relates to crimes or offences punishable by five years' imprisonment having provided a direct or indirect profit. If the individual cannot account for the source/origin of the property, it can be confiscated[106]. The second relates to the hypotheses in which the law provides for the confiscation of general property and assets[107]. The court may order the confiscation of the property without the need to establish a correlation between the unlawful activities of the person and its enrichment. In other cases, the judicial police officer may seize all property liable to confiscation without having to obtain prior authorization, subject to the special regulations applicable to certain property.

When a judicial inquiry is started, the investigating judge must, in principle, be seized of a prior request of the prosecutor, but the *Cour de cassation* held that, in order to guarantee the confiscation of the property belonging to the individual under indictment is carried out, the investigating judge may, without prior request of the prosecutor, order the seizure of this property[108].

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definition of persons subject to the freezing and prohibition of the release of funds for the benefit of persons covered by a measure, freezing of assets, as well as to extend the scope of information exchange necessary for the preparation and implementation of freezing measures and finally to clarify the terms and conditions for the release of frozen assets.

[105] Art. 706-42 CCP.

[106] Art. 131-21, par. 5, CC.

[107] Art. 131-21, par. 6, CC.

[108] Cass. crim., 6th May 2015, n° 15-80.086.

As regards administrative freezing orders, the request of a freezing order emanate from on the one hand national public authorities and on the other hand from EU authorities and other international public bodies for the implementation of UNSC resolutions under Chapter VII of the Charter or EU acts under article 15 and 29 TEU and 75 TFEU.

As far as French public authorities are concerned, they are mainly intelligence services such as TRACFIN (French Financial Intelligence Unit) or counterterrorism services like the *Direction générale de la sécurité intérieure*[109], when they have collected sufficient elements to allow them to believe that an individual or a legal entity uses his/her/its assets to commit or attempt to commit acts of terrorism, or facilitate or take part in any way to (the preparation of) such acts (art. L562-1 MFC).

With regard to EU or International authorities, freezing orders requests will thus target individuals or legal entities suspected of having committed, being committing or being likely to commit acts sanctioned or prohibited by either the resolution or the EU act, or of aiding or abetting in anyway such acts (art. L562-2 MFC).

With regard to freezing of terrorist assets, the power to order a freezing measure is vested in the Minister of the Economy and the Minister of Interior. No request from any other authority is necessary prior to the implementation of the freezing measure[110]. The decisions of the Ministers are published in the Official Journal and are binding as of this publication.

With regard to freezing measures decided under the provisions of the United Nations Security Council or the Council of the European Union, they are also under the responsibility of the Minister of the Economy, which acts without prior request[111].

2.1.4. *Competent authorities to impose a freezing order*

Seizures amounting to freezing orders can be enforced by judicial police officers, under supervision of the territorially competent prosecutor, in the course of police investigations and by an investigating judge, throughout a judicial inquiry.

With respect to special seizures, when a judicial investigation is started, the investigating judge owes jurisdiction to order the seizure of property resulting from a crime[112]. In case of an *in flagrante delicto* or preliminary investigation, the seizure is ordered by the prosecutor, with the authorization of the judge of freedoms and custody (*juge des libertés*

[109] Internal Security General Directorate of the Judicial Police Central Directorate.
[110] Art. L562-2 MFC.
[111] Art. L562-3 MFC.
[112] Art. 706-42 CCP.

et de la détention, hereafter JLD). The 2010 *circulaire* provides that, in the context of the *in flagrante delicto* or preliminary investigation, the prosecutor shall request the JLD by motion to authorize the seizure. On ground of this authorization, the prosecutor implementing the criminal seizure authorized by the judge must then issue a criminal seizure decision, which constitutes the legal order enabling the seizure of the property, the JLD's jurisdiction being limited to the power to allow the seizure or not.

The Code of Criminal Procedure provides for separate seizure procedures depending on the type of property to be seized, whether it is real estate ("*saisie immobilière*")[113], intangible property ("*saisie de biens incorporels*")[114] or the seizure is made without loss of possession ("*saisies sans dépossession*")[115] or extends to the patrimony ("*saisies de patrimoine*")[116].

The authority owing jurisdiction varies according to the kind of confiscation requested.

As regards seizures of the patrimony[117], article 706-148 CCP provides for the competence of the JLD, on request of the prosecutor. In an investigation on an offense which is punished by a minimum of five years imprisonment, he/she may, by a reasoned decision, order the seizure of assets which confiscation is provided for by article 131-21 CC or when the origin of these goods cannot be established. An appeal against such an order can be launched before the investigating chamber of the Court of appeal, within ten days, by the owner of the asset or any third party who owns rights on the asset.

As regards seizures of immovable assets or of intangible rights or assets[118], throughout police investigations, the JLD, on request of the public prosecutor, may order the seizure of the asset which confiscation is provided for by article 131-21 CC. Once a judicial inquiry is started, the investigating judge is vested with the same power (art. 706-150 and 706-153 CCP). Judicial review of such an order may be claim in similar conditions as those previously stated.

In its decision of 24th October 2018, the *Cour de Cassation* provided important clarifications as to the apprehension of the accused's immovable assets, at the time of the preparatory phase. In this case, one of the

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113 Art. 706-150 to 706-152 CCP; *Loi* n° 2013-1117 of 6th December 2013.
114 Art. 706-153 to 706-157 CCP; *Loi* n° 2013-1117 of 6th December 2013.
115 Art. 706-158 CCP; *Loi* n° 2013-1117 of 6th December 2013.
116 Art. 706-148 to 706-149 CCP.
117 *Loi* n° 2012-409 of 27th March 2012.
118 *Loi* n° 2010-768 of 9th July 2010.

defendants prosecuted for VAT fraud, whose damage to the State is estimated at around ten million euros, challenged the seizure in value of a residential building of which he is undivided owner. According to the Court: "where several perpetrators or accomplices have participated in a set of facts, either to the whole or to a part of them, each of them incurs the confiscation of the proceeds of the only offense(s) with which he/she is charged, with or without the circumstance of an organized band, provided that the total value of confiscated property does not exceed that of the total proceeds of this offense"[119].

The same rules apply to seizures without dispossession (art. 706-158 CCP). Nonetheless, as far as intangible assets are concerned, a judicial police officer may be authorized by the public prosecutor or the investigating judge to seize sums of money kept on a bank account. The seizure must be confirmed by the JLD or by the investigating judge within ten days (art. 706-154 CCP).

In a decision of 16th October 2016[120], the Constitutional Council (*Conseil constitutionnel*) has found the provisions governing the special criminal seizures consistent with the Constitution. The Council stated that sufficient guarantees are provided, once the measures are ordered by a magistrate and can only refer to assets likely to be confiscated in case of a criminal conviction, once any person claiming rights on the asset may request the public prosecutor, the general prosecutor or the investigating judge to release the seizure, once appeals can be lodged before the investigating chamber of the Court of appeal against the orders allowing the seizure.

With regard to immovable property[121], during the *in flagrante delicto* investigation or preliminary inquiry, the JLD, on prosecutor request, may authorize, by reasoned order, the seizure of buildings whose confiscation is provided for in article 131-21 CC. This is to be done at the expense of Treasury[122]. The investigating judge may also, during the course of the judicial investigation, order the seizure under the same conditions[123].

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[119] Cass. crim., 24th October 2018, n° 18-80.834; *Dalloz*, 2018, 2093.

[120] Cons. const., 14th October 2016, n° 2016-583/584/585/586 QPC, Société Finestim SAS et autre [Saisie spéciale des biens ou droits mobiliers incorporels], *Official Journal*, 16th October 2016, Text. n° 48.

[121] Seizure of real property (*saisie immobilière*): Art. 706-150 to 706-152 CCP; *Loi* n° 2010-768 du 9 juillet 2010.

[122] These are properties derived from activities of a criminal nature (proceeds); art. 131-21, par. 3 CC, but also used to commit the crime (instrumentalities); art. 131-21, par. 2, CC.

[123] Art. 706-150 CCP.

> The *Cour de cassation* decided, in a decision of 24th October 2018, that the instrument of the offense, within the meaning of Article 131-21 par. 2 CCP, constitutes the property that allowed the commission of the offense, whether or not its use was determinative of his commission. The investigating chamber correctly justified its decision to seize the accused's home, since a video showing him practicing sexual acts on the person of the civil party, was recorded at his home, a discreet place out of public view, where he brought the victim and his mother, and where there are furniture and accessories used in recorded acts. More precisely, he used his apartment for the accomplishment of the offenses by inviting foreign victims to stay at his place. Therefore, the provision of this building constituted one of the means to attract economically vulnerable young women[124].

Article 706-152 CCP, enacted by the *Loi* of 3rd June 2016, which adapt French legislation to the provisions of Directive 2014/42, allows the early disposal of a building when the conservation costs are disproportionate to its value. The proceeds of the sale are then recorded and will, at the owner's request, be returned to him/her in the event of an acquittal, provided that the property was not the direct or indirect instrument or product of an offence.

As far as intangible property is concerned, in case of an *in flagrante delicto* or preliminary inquiry, the JLD, on request of the prosecutor, can authorize by a reasoned order the seizure, at the expense of the Treasury, of intangible property or rights confiscated under article 131-21 CC. The investigating judge may, in the course of his/her investigations, order the seizure under the same conditions[125].

As regards bank accounts, the Code of Criminal Procedure now provides a legal basis for their seizure, which previously resulted from practice and has been enshrined in case law in the form of an account blocking requisition. By way of derogation from article 706-153, a judicial police officer may be authorized, by any means, by the prosecutor or the investigating judge to enforce, at the expense of the Treasury, the seizure of a sum of money paid into an account opened with an institution that is legally authorized to keep deposit accounts[126]. On request of the prosecutor, the seizure must subsequently by upheld by the JLD within 10 days, starting from the date that it took place.

Practically, the police officer operating the seizure orders the credit institution to transfer the sums seized to the AGRASC[127]. If, within a pe-

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[124] Cass. crim., 24th October 2018, n° 18-82.370.
[125] Art. 706-53 CCP.
[126] Art. 706-54 CCP.
[127] Seized and Forfeited Assets Management Agency.

riod of ten days, the JLD or the investigating judge, by reasoned order, confirms the seizure, the sums will remain in the agency's account. However, if the magistrate decides to release, in whole or in part, the funds concerned, they will be returned by the agency upon receipt of the order.

Seizures without loss of possession[128] may be ordered when the seizure of a tangible personal property is considered inappropriate or physically impracticable. The JLD, on request of the prosecutor, may authorize, by a reasoned order, the seizure, of the property without taking possession, at the expense of the Treasury. The investigating judge may, in the course of the preliminary investigations, order the seizure under the same conditions[129]. The magistrate who orders the seizure shall designate the guardian who will have the obligation to ensure the maintenance and the conservation of the property at the expense of its owner or its holder. Apart from the acts necessary for the maintenance and preservation of the property, the guardian may use the property only to the extent that the judge's decision expressly provides for it.

Seizures of estate may be subject to confiscation pursuant to par. 5 and 6 of article 131-21 CC, *i.e.* seizure is permitted only under a reasoned order made by the freedom and custody judge on request of the local prosecutor, in an investigation on a felony or a misdemeanour punished by a minimum of five years imprisonment[130]. Seizures may then extent to all or part of the property of the suspected person and can only be implemented where the Law so provides for or where the origin of the property cannot be established.

The *circulaire* of 22nd December 2010 states that the seizure of Patrimony must be implemented only when no other legal ground for seizure is available: "Otherwise, the regime specifically applicable according to the nature of the property concerned should be preferred"[131].

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[128] "Saisie sans dépossession": Art. 706-158 CCP; *Loi* n° 2013-1117 of 6th December 2013.

[129] Art. 706-158 CCP.

[130] Art. 706-148 CCP refers to art. 131-21, par. 5 and 6, CC; *Loi* n° 2016-731 of 3rd June 2016. In a decision of 16th May 2018, the *Cour de cassation* decided, on the basis of Article 706-148 CCP, that the investigating chamber, before an appeal against an order of the JLD, on the request of the public prosecutor, seizure in value of goods, may, due to the devolutive effect of the appeal, and after adversarial debate, modify the legal basis of the seizure of these goods from that this measure was preceded by a request of the public prosecutor, unimportant the foundation referred to by it, and must, if it is a seizure of assets, order it itself. Cass. crim., 16th May 2018, n° 17-83.584, *Dalloz*, 2018, 1075.

[131] Circulaire, 22nd December 2010, présentation des dispositions de la loi n° 2010-768 du 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale, NOR:JUSD1033251C. *http://www.textes.justice.gouv.fr/art_pix/JUSD1033251C.pdf*.

The example provided in the *circulaire* is those of a building that was acquired through the proceeds of drug trafficking, which can be seized and confiscated under article 706-150 CCP as an indirect product of the offense and on ground of a seizure of Patrimony. It states that "in such a case, the seizure on the sole ground of article 706-150 CCP should be favoured". It is only "if there is not enough evidence to establish a direct or indirect link between the commission of the offense and the acquisition of the property concerned, or if the acquisition occurred previous to the period covered by the procedure, that the seizure on the basis of article 706-148 will remain the only effective solution".

> As far as freezing of terrorist assets are concerned, the Minister of Economy and the Minister of the Interior may decide, jointly, to freeze the funds and economic resources: *i*) belonging to, possessed, detained or controlled by natural person or legal entities, or any other entity who commit, attempt to commit, facilitate, finance or incite or participate in acts of terrorism; *ii*) belonging to, owned by, held or controlled by legal entities or any other entity which is itself owned or controlled by the persons mentioned in 1° or acting knowingly for the account or on the instructions of those persons[132].
>
> With respect to freezing measures decided under the provisions of the United Nations Security Council or the Council of the European Union, the Minister of Economy may order the freezing of funds and economic resources: *i*) belonging to, possessed, owned or controlled by natural or legal persons, or any other entity who commits, attempts to commit, facilitate or finance actions sanctioned or prohibited by resolutions adopted under Chapter VII of the United Nations Charter or the acts adopted pursuant to article 29 of the Treaty on European Union; *ii*) belonging to, owned, held or controlled by legal persons or any other entity which is themselves owned or controlled by the persons mentioned in 1° or acting knowingly for the account or on the instructions of those persons[133].

2.1.5. *Procedural Conditions*

As far as ordinary law seizures are concerned, provisions of the CCP presented above are enforceable[134].

As far as special seizures are concerned, first, it should be noted that the seizure can only relate to property that may be confiscated[135], that is

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[132] Art. L562-2 MFC.
[133] Art. L562-3 MFC.
[134] Art. 56, 76 and 99 CCP; see above (2.1.2.).
[135] Art. 131-21 CC.

property or rights whose confiscation can be ordered as additional punishment in case of a criminal conviction. Subsequently, the seizure must be ordered by a judge. Finally, the order made both by the JLD and the investigating judge, must be reasoned. The seizure decision itself is not subjected to any mandatory formalities. The *circulaire* of 2010 only recommends: *i*) that the explicit legal basis for the seizure and the order of the JLD that authorized it are mentioned; *ii*) that it contains a precise identification of the property to which the seizure relates and, where appropriate, the identification of any/all co-owners holding it, in order to ensure its enforceability and to allow enforcement; *iii*) to bring this decision to the notice of those concerned by any means by the public prosecutor, in order to ensure its effectiveness.

In addition, research undertaken for the sole purpose of apprehending a property with a view to confiscation must be conducted as part of an act of inquiry, in particular a formal search[136]. The magistrate or the judicial police officer is therefore bound to respect the procedural conditions of the search. He/she must in particular act in the presence of the owner of the property or in the presence of two witnesses[137]. During a preliminary inquiry, the seizure can only be carried out with the express consent of the person concerned. To override the absence of consent, the authorization of the JLD is needed.

As regards administrative/preventive freezing orders, formalism is rather limited[138]. Article L562-9 MFC adds that "orders made by the ministers (…) are published in the Official journal and become enforceable from the date of publication".

2.1.6. *Time limits for the issuing of a freezing order*

A time limit is only provided for regarding freezing orders requested by judicial authorities of another EU member State within the framework of mutual recognition mechanisms[139].

As regards siezures, no specific time limits are provided for in the CCP. As a result, the usual criteria of reasonableness and due diligence should apply. Besides, to our knowledge, there is for the moment no evidence of any particular difficulty.

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[136] Art. 56 CCP.
[137] Art. 57 CCP.
[138] See above, 2.1.4.
[139] *Infra*, C.

In particular, rules on special seizures do not impose a mandatory delay between the request of the requesting authority and the decision to seize.

However, as regards the delay between the order to seize and its implementation, the *circulaire* of 2010 recommends that the prosecutor "provides for a rapid implementation of seizure measures authorized by the JLD in order to avoid any delay between the notification of the judge's order and the decision to seize taken by the prosecutor on the basis of the order, which would be likely to jeopardize the enforcement effectiveness".

As far as freezing of terrorist Assets and freezing measures decided under the provisions of the United Nations Security Council or the Council of the European Union are concerned, since the Minister of Economy acts without prior request, there is no deadline imposed by the MFC.

2.1.7. *Duration of the freezing order*

The CCP does not provide for a maximum time limit for seizure. The measure can therefore be maintained until the decision is made to release the seizure or a finding of criminal liability is made.

As far as freezing of terrorist Assets and freezing measures decided under the provisions of the United Nations Security Council or the Council of the European Union are concerned, in principle, the property can be frozen for a maximum of 6 months[140]. This suggests that the freezing measure is only to be applied temporarily[141]. However, these measures are renewable on the sole decision of the Minister. The lack of a maximum delay was justified by the fact that "once expired, it would make frozen funds available to terrorists again". One of the objectives of the legislator was therefore to allow permanent measures[142]. Moreover, the expiry of a national freezing measure does not necessarily mean that the assets will be released. Indeed, the freezing could be resumed either by judicial measure or international measure.

2.1.8. *Rights and legal remedies of the person addressed by a freezing order*

The judicial review of all seizures amounting to a freezing order may be claimed according to the ordinary remedies provided for in the CCP. Besides, several guarantees have been enacted by Law.

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[140] Art. L562-2 and L562-3 MFC.

[141] The list of persons targeted by a national asset freeze measure is available online: *https://www.tresor.economie.gouv.fr/Ressources/4248_dispositif-national-de-gel-terroriste*.

[142] Ch. MAURO, "Lutte contre le terrorisme - Le gel d'avoirs n'est pas une sanction… mais un peu quand même", La Semaine Juridique, Edition Générale, 16th May 2016, 589.

With regard to the seizure of intangible property in particular, the Constitutional Council (*Conseil constitutionnel*) stated that this measure is subject to all the guarantees that the rights of defence and freedoms may require[143]. The Council also stated that the absence of a specified period of time imposed on the investigating chamber to decide on the appeal launched against the order authorizing or pronouncing the seizure cannot constitute an infringement on the right to an effective judicial remedy that could deprive the person of the constitutional protection of the right of ownership. The judge is only required to make a ruling within a reasonable amount of time.

Right to information. When the seizure of property that may be subject to subsequent confiscation has been made, the person concerned is informed either during the search or at a subsequent hearing, provided that informing the individual is not likely to compromise the course of the investigations. He/she is then notified, at least briefly, of the reasons for the seizure[144]. In the absence of information, no foreclosure delay can be set against the person regarding a possible request for return of the property seized.

Right of Appeal. An appeal against the seizure order may be launched before the investigating chamber of the Court of Appeal within ten days of its notification[145].

The appeal against the seizure order is not suspensory, so that it cannot be used to dissipate the seized property. The owner of the seized property and the third parties to the proceedings may be heard by the investigating chamber, but third parties cannot launch the procedure by themselves. Thus, the owner of a property seized as a product of the offence which is not the person prosecuted will not be able to appeal where he is not a party himself.

Acts with the effect of transforming, substantially altering the property or reducing its value must be authorized by the JLD, on request of the prosecutor who ordered the seizure. The person concerned and the prosecutor may, within a period of ten days from the notification of this decision, launch an appeal before the investigating chamber. The appeal is suspensory (i.e. the original decision continues to run). Thus, the re-

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[143] Cons. const., 14th October 2016, n° 2016-583/584/585/586 QPC, *http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-583/584/585/586-qpc/decision-n-2016-583-584-585-586-qpc-du-14-octobre-2016.148001.html*.

[144] Art. D. 15-5-1-1 CCP.

[145] Art. 706-150, par. 2, 706-53 par. 2 and 706-58, par. 2, CCP.

quest granted by the investigating judge will have no effect until the decision of the investigating chamber confirms it.

Control of the judicial authority. The seizure is ordered or controlled by a judicial authority. In the same way, the judicial authority is responsible for all the requests relating to the enforcement of the seizure[146].

Consent of the person concerned (only in respect of the preliminary inquiry). Like the other acts of the preliminary investigation, the special seizure of property confiscated under article 131-21 CC can only be carried out with the consent of the interested person. The JLD may decide, on request of the prosecutor, that the seizure will take place without the consent of the person concerned if it is necessary for the investigation into a felony or offence punishable with a sentence of imprisonment of five years or more. The decision of the magistrate must be provided in writing, and give reasons justifying the action taken.

Provisional nature of the measure (no ownership transfer). Special criminal seizures have exclusively temporary effects. They do not transfer ownership of the property to the State.

Until the seizure is lifted or the seized property is confiscated, the owner or, failing that, the holder of the property is responsible for its maintenance and conservation. He bears the burden of such expenses, except for expenses that may be borne by the State[147].

In the event of default or the unavailability of the owner or the holder of the property, the public prosecutor or the investigating judge may authorize the AGRASC to assume responsibility for the management and recovery of the seized and confiscated assets which advance sale is not envisaged. This is with a view to enabling the Agency to take all the legal and materials acts necessary for the conservation, the maintenance and the valuation of the property.

Any act that has the effect of transforming or substantially modifying the property or reducing its value is subject to the prior authorization of the JLD, upon the request of the prosecutor or the investigating judge.

The 2010 *circulaire* recommends "to inform this person or the person from whose hands the property is seized, if necessary, by a reminder contained in the body of the decision".

However, some guarantees are excluded. For example, adversarial argument is not permitted before the judge who authorized or ordered the seizure, nor is the decision to be suspended pending an appeal before

[146] Art. 706-144 CCP.
[147] Art. 706-143 CCP.

the investigating chamber. This is to prevent the owner or the person concerned from taking advantage and employing stalling tactics.

Right to restitution. During an investigation, the *investigating judge* is competent to decide on the restitution of the objects placed under judicial control[148]. He/she rules, by reasoned order, either on requisitions of the public prosecutor, or, after his/her opinion, *ex officio* or at the request of the accused, the civil party or any other person claiming to be entitled on the object. The decision must be taken within one month, otherwise the plaintiff may directly seize the president of the chamber of the investigation. The investigating judge may also, with the consent of the public prosecutor, decide of his own motion to return to the victim of the offense objects under judicial authority whose property is not disputed.

However, there is no restitution if it hinders the manifestation of the truth or the safeguarding of the rights of the parties, or, since the Law of 3rd June 2016, when the property seized is the instrument or the direct or indirect product of the offense or if it presents a danger to persons or property. Finally, it can be refused when the confiscation of the object is provided for by law.

> In a judgment of 28 February 2018, the Criminal Chamber recalled the immediate application of the new provisions resulting from the law of 3 June 2016; in this case, paragraph 4 of article 99 of the CPP. As a procedural law, it escapes the principle of non-retroactivity. In this case, which concerned the seizure of a luxury branded vehicle purchased with funds derived from misappropriation to the detriment of a company, the applicant claimed to be in good faith and to benefit from paragraph 3 of Article 99, according to which the investigating judge "may also, with the agreement of the public prosecutor, decide ex officio to return or have returned to the victim of the offence objects placed under judicial control whose ownership is not in dispute". The Criminal Division relies on the sovereign discretion of the trial judges, who considered, on the one hand, that the car was the direct or indirect product of the offences and, on the other hand, that the applicant, in view of the purchase conditions, could not fail to suspect certain irregularities[149].

In case of an *in flagrante delicto* or preliminary investigation, the right to restitution is subject to the existence of a prior request from the owner[150]. The responsibility to seek restitution therefore lies with him.

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148 Art. 99 CCP.

149 Cass. crim., 28th February 2018, n° 17-81.577; D. Miranda, "Bien mal acquis (et de mauvaise foi) ne profite jamais…", in *AJ Pénal*, 2018, 264.

150 Art. 41-5, par. 4, CCP.

The request is to be made within the six months following the final decision[151]. Once this period has elapsed, the State becomes the owner. The period is reduced to two months when the owner or the person to whom the restitution has been granted does not claim the object after formal notice addressed at his last known address[152].

According to the CCP, once a decision has been given to dismiss the case, acquit the defendant, or to convict the defendant but without applying the penalty of confiscation, the prosecutor informs, by acknowledgement letter, the owner of the property of the modalities of restitution of the product of the sale[153]. However, this information relates only to provisional seizures made in the context of a judicial inquiry and only applies to property disposed of during the proceedings. In other cases, the individuals concerned have no right to this information even if no decision of confiscation has been pronounced.

The prosecutor or the Court of Appeal general prosecutor are the only authorities empowered to rule on the restitution of the property that has been seized in the case of a decision where no action is taken or a decision of dismissal. This is also the case in the event of an acquittal or if, despite the conviction, the sentence of confiscation has not been pronounced.

Sometimes restitution is not allowed, which means there is no absolute right to restitution.

For example, an order for restitution need not be given where this is likely to create a danger to persons or property or where a particular provision provides for the destruction of property under judicial control[154]. Furthermore, the prosecutor may order the destruction of seized personal property whose preservation is no longer necessary for determining the decision in the case of objects classified by law as dangerous or harmful or the detention of which is unlawful[155]. Sometimes the confiscation is mandatory and therefore restitution is impossible. Thus, with regard to drug trafficking[156], shall be pronounced "the confiscation of facilities, equipment and any property that has been used, directly or indirectly for the commission of the offence, as well as any product from it to any person they belong and wherever they are found since their owner

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151 Art. 41-4, par. 3, CCP; *Loi* n° 2016-731 of 3rd June 2016.
152 Art. 41-4, par. 3, CCP.
153 Art. R. 15-41-3 CCP.
154 Art. 41-4, par. 2, CCP.
155 Art. 41-4, par. 3, CCP.
156 Art. 222-49 CC.

could not ignore the origin or the fraudulent use". Thus, for example, a vessel used to transport 3 kilos of cocaine will not be returned[157].

In the abovementioned decision, the Constitutional Council (*Conseil constitutionnel*) states that individuals targeted by administrative/preventive freezing orders "are not deprived of the possibility to bring their claim against the orders before an administrative court, including by way of an interlocutory procedure; it is for the court to assess, according to the elements contradictorily debated before it, the existence of motives justifying the temporary freezing of assets measure"[158]. According to article L521-1 of the *Code de justice administrative*[159], a petition for suspension allows judicial review and the suspension of the enforcement of an administrative decision, within 48 hours and up to one month, according to the level of urgency. It is a provisional measure, suspending the decision until the administrative court pronounces on the annulment appeal.

Furthermore, the minister of Economy (art. L562-3 MFC) or the minister of Interior and the minister of Economy (art. L562-2 MFC) may jointly authorize the partial removal of the order when they consider it "consistent with the safeguard of law and order" and with the decisions that motivated the order. Such an authorization may be granted by the minister(s) on their initiative, or on a demand from the individual or the legal entity who/which is targeted by the measure. Authorizations are granted if the claimer is able to demonstrate either, a necessity resulting from particular material needs relating to his/her private and family life or to the requirement of its activity, providing this activity is consistent with law and order, or motives relating to the preservation of his/her/its patrimony (art. L562-11 MFC).

Finally, when the freezing measure is removed, this information should be brought to the attention of the person concerned, as far as possible. And when a person is no longer subject to a national freezing measure, the "right to be forgotten" orders the administration to erase any information relating to this person.

2.1.9. *Legal remedies against unlawful freezing orders*

The law provides for the possibility for the owner who regains possession of his property to obtain compensation. This is not a general right however, as it relates only to "the loss of value that may have resulted from the use of the property"[160]. Compensation is therefore only

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[157] M. Véron, "Le refus de restitution d'un navire confisqué", *Droit Pénal*, 2010, comm. 68.

[158] Cons. const., 2nd March 2016, n° 2015-524 QPC, §.10.

[159] Administrative justice code.

[160] Art. 41-5, par. 3, CCP.

available in relation to the loss of value in respect of the property itself, and not the losses incurred from being deprived from use of the property.

If the property has been disposed of in the course of proceedings, then the amount received on the sale is returned. The law does not provide for the value of this sum to be re-assessed according to changing market values. It is therefore not possible for the owner to request a re-evaluation of the price based on the market value assumed at the time of restitution or loss resulting from the inability to make use of the property during the course of the procedure.

As far as administrative/preventing freezing orders are concerned, article L562-13 MFC reads "The state is liable for the damageable consequences of the enforcement, carried out in good faith" of freezing orders.

2.2. *Freezing of third-parties' assets*

Subject to special rules hereafter detailed, freezing procedures previously discussed can be implemented when the freezing of third-parties' assets is contemplated.

All judicial freezing measures are subjected to the ordinary judicial review procedure available in the CCP.

As regards administrative/preventive orders, article L562-10 MFC reads "measures implemented (…) are enforceable against this parties who/which may claim of a right on the assets or economic resources subjected to a freezing measure, even when the right grew out previous to the measures".

In return, the partial release of the measures may be requested by any third party who/which is able to claim he/she/it owes a right on the assets or economic resources targeted by the freezing order. The granting of the authorization is subjected to the same conditions (art. L562-11 MFC).

2.2.1. *Procedures for the freezing of third-parties' assets*

The legal framework. No legal provision makes explicit reference to the possibility of seizing property in the hands of a third party. From this point of view, Criminal law does not provide any counterpart to article L112-1, al. 1, of the *Code des procédures civiles d'exécution*[161], which reads "seizures may relate to all property belonging to the debtor even if

[161] Code of Civil Enforcement Procedures.

held by third parties"[162]. However, such a possibility is not entirely excluded in criminal procedure, since certain provisions refer to it[163].

Thus, article 131-21 CC sets out the cases in which the seizure may be carried out when the property is in the hands of a third party. The property in question belongs to the offender, but it is owned by someone else. Under this provision, the property may be apprehended whilst in the possession of this third-party holder without his being able to oppose it. The enforcement procedure is the same as that provided for interested parties[164].

Sometimes, the seizure is subjected to the existence of a property right of the convicted person[165]. In other cases, the confiscation of property of which the convicted person has "free disposal" is allowed. Finally, the seizure can be pronounced on property, regardless of any legal relationship with the prosecuted person, no matter who holds it. However, the rights of third parties in good faith are always preserved.

Cases in which a title-deed is required. As a consequence of the principle that penalties are personal, the seizure and confiscation of property under the provisions of al. 5 and 6 of Article 131-21 CC can only be carried out on property belonging to the convicted person[166]. These provisions respectively relate to the seizure of property of which the convicted person could not justify the origin and the general seizure of all or part of his assets and general property. The extent of this seizure explains that the legislator has subjected it to the existence of a property right of the convict on the property. The principle of proportionality requires that the property rights of third parties uninvolved in the criminal activity cannot be infringed. On the other hand, depending on the gravity of the offence committed, it may be justifiable to seize all assets or property where it cannot be demonstrated that these have been lawfully acquired. Article 131-21 CC does not establish a general principle that only property belonging to the convicted person may be seized. This requirement should not, therefore, be extended to assumptions that the law does not provide, in accordance with the principle of strict interpretation of the criminal law.

Cases in which the person must only have free disposal. Article 131-21, al. 2 CC allows the confiscation, and thus the seizure, of the property

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[162] *Ordonnance* n° 2011-1895 19th December 2011.

[163] E. Camous, "Fasc. 20: Des saisies pénales spéciales", in *Jurisclasseur*, 40.

[164] Art. 706-141 to 706-158 and Art. D. 15-5-1-1 CCP.

[165] Ch. Cutajar, "Le nouveau droit des saisies pénales", in *AJ Pénal* 2012, 124 and ff.

[166] Art. 8 and 9 of Declaration of the Rights of Man and of the Citizen; Cons. const, 16th June 1999, n° 99-411 DC.

used to commit the offence or which was intended to commit it when the convicted person has free disposal, "subject to rights of the owner in good faith". The freedom to dispose of the property is one of the most important elements of the right of ownership. It follows that the true owner is the one who has the right to free disposal of the property. To prove the right to freely dispose, it is necessary to demonstrate that the one who claims the property is only the apparent owner. Merely demonstrating that the individual who has been sentenced is using or enjoying the property will not be sufficient to authorize the seizure. It will be necessary to demonstrate that the third party claiming the property does not enjoy the essential prerogative of the right of ownership, namely the right to dispose of it. The requirement of good faith means that the person holding the property must have been unaware that the property which he/she acquired is related to the commission of an offence. Restitution to the owner in good faith requires that he diligently pursue its claim.

Circumstances where the right of ownership is irrelevant. In some cases, it does not matter whether the property is owned by the individual who has been convicted. This applies when confiscation is mandatory. Under Article 131-21, al. 3, CC, it is therefore possible to seize, the property that is the object or the direct or indirect product of the offence, except, of course, if it can be returned to the victim. Such property can be confiscated, no matter who holds it. In order to protect the interests of *bona fide* third parties, it is intended that, if the proceeds of the offence have been mixed with lawful funds to acquire one or more other properties, the seizure will only concern the estimated value of the proceeds of the offense. This is, moreover, the opinion of the Ministry of Justice in the 2010 *circulaire*, which states that, apart when it is so provided for by law, "seizure and confiscation do not require that the property seized or confiscated be the property of the accused or convicted person, if it constitutes the object, the instrument or the direct or indirect product of the offence". The public prosecutor, pursuant to Article 41-5 CCP, and the investigating judge, pursuant to Article 99-2 CCP, may return property belonging to victims prior to the judgment.

Specific provisions of the Criminal Code. In addition, some special provisions provide for the seizure of property, no matter who currently enjoys possession of the property. Thus, article 225-24, 1° CC allows the "Confiscation of the movable assets directly or indirectly used for the commission of the offence as well as of any products of the offence held by a person other than the person victim of human trafficking or practicing prostitution". Under this provision, the Criminal Chamber of the Court of Cassation approved the seizure of funds deposited on the ac-

counts of a legal person and belonging to a third party condemned for habitual tolerance of prostitution[167].

Specific provisions in the Code of Criminal Procedure[168]. Intangible property can be seized even when held by a third party according to the CCP. Thus, a sum of money paid into an account opened with an institution authorized by law to hold deposit accounts may be seized even when held by a third-party holder[169]. Similarly, the seizure may relate to a debt obligation for a sum of money. In this case, the third-party debtor must immediately record the amount due to the *Caisse des dépôts et consignations* or to the AGRASC[170].

Article 706-145 CCP forbids any disposal of assets seized within criminal proceedings and reads that "from the time it becomes enforceable and until its release or the confiscation of the seized asset, the criminal seizure suspends or forbids any civil enforcement proceedings on the asset subjected to the criminal seizure". Nonetheless, when the upholding of the seizure is not necessary anymore, a creditor owing an enforcement order may be authorized to start or carry on civil enforcement proceedings on the asset (art. 706-146 CCP).

The criminal seizure of an immovable asset is enforceable against third parties following the publication of the order and until the release of the seizure (art. 706-151 CCP); so is the seizure of a business (art. 706-157 CCP). The seizure of intangible assets must be notified to the issuing person or corporate entity (art. 706-156 CCP). The public prosecutor is in charge of the enrolments and notifications.

The seizure of a debt obligation resulting from a life insurance contract results in the "freezing" of the contract. It suspends any right of redemption, renunciation, pledge of the contract and prohibits any subsequent acceptance of the benefit of the contract pending the final judgment, prohibiting the insurer from granting an advance to the insured. The decision to seize is notified to the subscriber as well as to the insurer or to the organization with which the contract has been subscribed. The contract is frozen during the investigation and, if the confiscation is not ordered, the contract is restored to the insured. The seizure does not al-

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[167] Cass. crim., 8th April 2009, n° 08-86.386 - M. VÉRON, "La saisie des produits de la prostitution", *Droit Pénal*, 2009, comm 106.

[168] *Loi* n° 2010-768 of 9th July 2010.

[169] Art. 706-154 CCP. In its decision of 24th October 2018, the *Cour de Cassation* ruled under Article 706-154 CCP that: "the party who appeals against an order for the special seizure of money credited to a bank account is entitled, in the course of the appeal, to have the documents of the proceedings relating to the seizure which he/she is contesting made available" (n° 17-86.199).

[170] Art. 706-155 CCP.

low for the sums insured to be immediately apprehended, unless it can be established that the amount of premiums and contributions invested in the life insurance is the direct or indirect product of the offence. If this is the case, the seizure may then relate to the sums themselves and be carried out directly in the hands of the managing body of the insurance policy. The seizure of shares, securities, financial instruments and other intangible assets or rights is notified to the interested person and, where applicable, to the financial intermediary.

The freezing of "terrorists' assets" is carried out against the natural or legal persons who own, hold or control them. Assets held by a third-party holder can therefore still be frozen[171].

As regards freezing measures decided under the provisions of the United Nations Security Council or the Council of the European Union, there too, property held by a third party may be frozen under Article L. 562-3 MFC.

2.2.1. *Rights and legal remedies*

The Law distinguishes between a victim and a third party acting *bona fide*.

The victim has a right to the restitution of the property seized as a consequence of the property right he/she owns on the asset[172]. The only reservation is that the continuance of the seizure is no longer required for the investigation needs.

The third party acting in good faith is treated differently in criminal proceedings. He/she has not directly suffered injury as a result of the offence and he/she has not been involved in the offence itself but has rights over the property seized. The potential loss suffered by the third party does not arise from the offence itself, but from the procedure of the seizure.

The third party must have acted in good faith. This good faith is presumed when the third party is not aware of the criminal use that is

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[171] Art. L562-2 and ff. MFC, as amended by *ordonnance* n° 2016-1575 of 24th November 2016 *https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=689CB3CEB6EA2EF0C42AF3CCBE25BAC5.tplgfr23s_2?cidTexte=JORFTEXT000033471674&idArticle=LEGIARTI000033472599&dateTexte=20161126*.

The purpose of the order is to extend the scope of assets that may be frozen and the definition of persons subject to the freezing and prohibition of the release of funds for the benefit of persons covered by a measure, freezing of assets, as well as to extend the scope of information exchange necessary for the preparation and implementation of freezing measures and finally to clarify the terms and conditions for the release of frozen assets.

[172] E. Camous, "Fasc. 20: Des saisies pénales spéciales", *Jurisclasseur*, 186 and ff.

made of the property over which he/she claims to have rights. Therefore, he/she cannot assert his rights if it is established that he/she knew or could not have been unaware that the property was somehow associated with the commission of an offence.

The third party in good faith may require the property which he/she claims to own according to the rules applicable to ordinary law. He/she then has a right to restitution which is exercised according to the rules established in this area.

The third party in good faith naturally has a right to compensation whenever the property concerned is disposed of in anyway. The same applies if it has been transmitted to the AGRASC, in order for the Agency to carry out all the acts necessary for its conservation, maintenance or valuation[173].

Decisions that violate the rights of *bona fide* third parties fall within the scope of the seizure court proceedings regulated by the provisions specifically established for this purpose. It is therefore the magistrate who ordered or authorized the seizure who has jurisdiction[174].

Procedure. The law does not provide for any special provision by which a third party in good faith can assert his/her rights. No time limit has been established in this regard. He/she can therefore act as long as the seizure is continuing.

2.3. *Confiscation*

2.3.1. *Preliminary remarks*

By two recent decisions, the Constitutional Council (*Conseil constitutionnel*) has reviewed the conformity of confiscation provisions to the French Constitution. In a decision of November 26th 2010[175], it states that the penalty of confiscation does not, in itself, contravene the principle of necessity of penalties, even in case of a petty offense, provided the principle of proportionality is complied with[176]. It further states that article 131-21 CC, which provides for the automatic confiscation of the goods used to commit the offense or which are the direct or indirect pro-

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[173] Art. 706-143, par. 2, CCP; *Loi* n° 2010-768 of 9th July 2010.

[174] Art. 706-144, par. 1, CCP.

[175] Cons. const., 26th November 2010, n° 2010-66 QPC, M. Thibaut G. [Confiscation de véhicules], *Official Journal*, 27th November 2010, Text. n° 39.

[176] § 5.

ceeds of the offense in case of a felony or a misdemeanor punished by a minimum of one year imprisonment (par. 1), of the goods the convicted person proved unable to justify of their origin in cases of a crime or a misdemeanor having procured proceeds and punished of a minimum of five years imprisonment (par. 5), or of the goods legally regarded as dangerous or harmful when their detention is unlawful (par. 7) is consistent with the Constitution and that, as regards the seriousness of the offenses, the confiscations are not "obviously disproportionate"[177], Finally, the Council reckons that article 131-21 preserve the property right of third parties acting in good faith[178].

Besides, in a decision of May 18th 2018[179], the Council states that the overall confiscation of all assets belonging to individuals who have been found guilty of terrorist offenses (art. 422-6 of the Penal code) is not «obviously disproportionate», taking into account the seriousness of offenses of acts of terrorism, and therefore, is consistent with the principle of necessity and proportionality of punishments[180].

2.3.2. *Procedures for the confiscation of assets*

The legal framework. Confiscation proceedings are mainly regulated by article 131-21 CC which has been presented I detail above[181].

The enforcement of article 131-21 CC is also provided for by articles 706-141 *et seq.*, *Title XXIX. On special seizures* of the CCP. Article 706-141 reads "the present title is enforceable, in order to guarantee the implementation of the complementary penalty of confiscation as defined by the provisions of article 131-21 CC, to seizures carried out in accordance with the present code when they are carried out on all or on a part of a person's goods, on an immovable good, on a movable intangible right or a debt obligation and on to seizure that do not involve a dispossession of the good", whereas article 706-141-1 allows confiscation "in value". Chapter I provides for the "common provisions". According to article 706-143, until the release of the seizure or of the confiscation, the owner or the holder of the assets are responsible for their maintenance and conservation. In case of non-compliance, the public prosecutor or the investigating judge may transfer the asset to the AGRASC.

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177 § 6.

178 § 7.

179 Cons. const., 18th May 2018, n° 2018-706 QPC, M. Jean-Marc R. [Délit d'apologie d'actes de terrorisme], *Official Journal* n° 122, 30th May 2018, Text. n° 110.

180 §§.15 to 18.

181 See, 1.

2.3.3. *Competent authorities to request or impose a confiscation order*

As far as national authorities[182] are concerned, confiscation can only be requested by judicial authorities[183].

The confiscation of all assets subjected to seizure orders may be imposed by the trial court when it comes to a criminal conviction.

Furthermore, according to article 373-1 CCP, the *Cour d'assises* (Court of Assize, competent for felonies), when it orders the confiscation of an asset, may order both the immediate seizure of this asset in order to guarantee the enforcement of the confiscation and the transfer of the asset to the AGRASC for the purpose of its disposal. Appeals lodged against such an order are not suspensory. Article 484-1 CCP empowers the correctional tribunal (competent for misdemeanours) with the same prerogative.

2.3.4. *Standard of proof for the imposition of a confiscation order*

As regard the standard of proof, there is no specific provisions in the French CCP. It may therefore be inferred that the standard of proof is the ordinary one. Article 427 CCP reads: "Except where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his innermost conviction. The judge may only base his decision on evidence which was submitted in the course of the hearing and contradictorily discussed before him". Prosecutors mainly have to prove the adequacy of confiscation, i.e. subject to third parties and victim rights, confiscation is necessary and proportionate to effectively punish the offender.

2.3.5. *Time limits for the issuing of a confiscation order*

Disparate provisions deal with time limit issues. The general principle has been stated by the French *Conseil constitutionnel* in the abovementionned decision of October 14th 2016: "the court must rule in a reasonable time".

No evidence was found of existing complaints of unreasonable duration of this kind of proceedings in France.

2.3.6. *Rights and legal remedies of the person addressed by a confiscation order*

Rights and guarantees mainly lay in the right to lodge an appeal be-

[182] As regards foreign authorities, see *infra*, C.

[183] Cass. crim., 18th September 2012, n° 12-80.662; in *JCP Entreprise et Affaires*, 46, 15th November 2012, 1682.

fore the Court of appeal of any confiscation order made by a first-tier trial court. Confiscation orders are criminal sentences, subjected to the ordinary rules governing appeal proceedings.

Besides, according to article 41-4 of the CCP, "Where no court has been seized, or where the court involved has exhausted its jurisdiction without deciding on the return of property, the district prosecutor or prosecutor general are competent to decide, on their own motion or upon application, as to the restitution of property of which the ownership is not seriously disputed". Article 99 CCP reads "During the investigation, the investigating judge is competent to decide on the restitution of items placed under judicial authority. He/she decides by making a reasoned order either upon the district prosecutor's submissions or on his own motion, after hearing the prosecutor's opinion, or upon the application of the person under judicial examination, the civil party or any other person claiming a right over the item. He/she may also on its own motion decide, with the agreement of the district prosecutor, to return or to have returned the articles placed under judicial authority whose ownership is not disputed to the victim of the offence. (…) The investigating judge's order is served either on the applicant in the event of a dismissal of the application, or on the public prosecutor and on any other party concerned in the event of a restitution decision. It may be referred to the investigating chamber by an ordinary application filed with the court registry within the time limit and according to the conditions set out by the fourth paragraph of article 186. This time limit is suspensive". Furthermore, the president of the investigation chamber may order, on submissions of the general prosecutor of the Court of appeal or on request of one of the parties, by making a reasoned order on the total or partial release of seizures. Decisions of acquittal or which do not confirm the confiscation automatically give rise to the release of the seizures (art. 373-1 CCP). Likewise, the president of the correctional chamber of the Court of appeal may order, by issuing a reasoned order either upon the district prosecutor's submissions or upon the application of one of the parties, of the total or partial release of the seizures. Dismissals or decisions that do not confirm the confiscation automatically give rise to the release of the seizures (art. 484-1 CCP).

2.4. *Third-Party Confiscation*

Third-party confiscation is not ruled on by any specific provisions. Provisions discussed above (III) may be enforced. The burden of proving his/her property and/or *bona fide* lies on the third-party when he/she

claims against the enforcement of a confiscation which is contemplated by the trial court.

In a recent decision[184], the criminal chamber of the Court of cassation states – under the visa of article 1 of the additional protocol n° 1 ECHR, article 6, § 2, of EU directive 2014/42 and articles 131-21 CC and 481 and 482 CCP[185] – that 1) a judgement denying the restitution to a third-party is appealable without *res judicata* of the confiscation order made by the trial court being opposable to him/her and 2) if the restitution application should be examined in accordance with article 481 CCP when the seized or frozen assets have not been confiscated yet, such an application must be decided on according to the provisions of article 131-21 CC once the assets have been confiscated. Having regards to the "clear and unconditional" provisions of article 6 § 2 of the EU directive, which guarantee the rights of the *bona fide* owner, the Court states that, although it is established that the confiscated assets have been purchased with the proceeds of a criminal offense, nonetheless the *bona fide* third-party's rights should not be infringed, which involves the restitution of the confiscated assets.

3. *Mutual recognition aspects*

3-1. *Freezing*

3.1.1. *National legal framework for the mutual recognition of freezing orders*

Article 6 of Act No 2005-750 of 4 July 2005 inserted a *Section 5 in Chapter II of Title X*[186] *of Book IV*[187] *of the Code of Criminal Procedure*. This section contains the provisions transposing the Framework Decision of the Council of the European Union of 22 July 2003 on the execution in the European Union of orders freezing property or evidence[188].

In accordance with the EIO Directive, the provisions of Articles 695-9-1 and following have been partly rewritten by Article 3 of the Order of 1 December 2016 in order to cover only requests for freezing with a view to confiscation, and no longer apply, as was previously the case under the

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184 Cass. crim., 7th November 2018, n° 17-87424.

185 See also Cass. crim., 27th June 2018, n° 17-87424.

186 "International judicial cooperation".

187 "Some specific proceedings".

188 M. Massé, "L'évolution du droit en matière de gel et de confiscation", *Revue de Science Criminelle et de Dorit Pénal Comparé*, 2006, 403; A. Beziz-Ayache, "La nouvelle procédure de gel de biens ou d'éléments de preuve", *AJpénal*, 2005, 410.

Framework Decision of 22 July 2003, to requests for freezing of evidence. As a result, when an item is requested for freezing because it is likely to be used as evidence – even if it is property which may otherwise or subsequently be subject to confiscation – the EIO will be preferred (which will in particular make it possible to use only one form, that of the EIO, without having to send the evidence freezing order accompanied by the request for transfer and the freezing certificate). Requests for freezing provided for in articles 695-9-1 and following shall henceforth be made only in cases where the sole objective sought is confiscation.

Restating the letter of Article 2(*c*) of Decision 2003/577, Article 695-9-1 *defines* a freezing order as: "a decision taken by a judicial authority of a Member State of the European Union, called the issuing State, to prevent the destruction, transformation, removal, transfer or disposal of property liable to confiscation located in the territory of another Member State, called the executing State".

The same article provides that "The freezing order is subject to the same rules and has the *same legal effects as a seizure*" (Art. 695-9-1, *in fine* CCP).

The freezing order does not cover all the cases known to national law concerning precautionary measures applicable to the organized crime regime (Art. 706-103 CCP), since the latter text allows for the taking of protective measures irrespective of any link with the alleged facts, and is limited solely to a connection between the person under investigation and his property[189].

Furthermore, it should be noted that, while under French law confiscation may, for certain specified offences[190], be general (confiscation of patrimony) and concern property not directly related to the said offences, the freezing order referred to in Article 695-9-1 may concern only property which is the proceeds of an offence or corresponds in whole or in part to the value of such proceeds[191] or constitutes the instrument or object of the offence (Art. 695-9-2 CCP)[192].

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[189] O. BEAUVALLET, "Entraide judiciaire international: Dispositions propres à l'entraide entre la France et les autres Etats membres de l'Union européenne", *JurisClasseur Procédure Pénale, (Art. 695 à 695-9-53)*, Fasc. 20, n° 117.

[190] See *supra*, Part A. Art. 222-49, 225-25 and 324-7 12° CP.

[191] The concept of value has the same meaning as that referred to in particular in the fourth paragraph of Art. 131-21 CP, which provides that "Where the thing confiscated has not been seized or cannot be produced, confiscation in value is imposed. For the recovery of the sum representing the value of the thing confiscated, the provisions governing judicial enforcement of public debts apply".

[192] "A freezing order may be issued in respect of any property, movable or immovable, tangible or intangible, as well as any judicial act or document establishing a title or a right

3.1.2. *Competent authorities for the execution of freezing orders from another EU Member State*[193]

Entrusted initially (2005) to the JLD, the competence to rule on requests for freezing of property with a view to their subsequent confiscation is now entrusted to the investigating judge (Art. 695-9-10 CCP) territorially competent (Art. 695-9-11 CCP)[194] and, where appropriate, through the public prosecutor or the Prosecutor General.

The public prosecutor is competent to carry out the measures ordered by the investigating judge.

Before handing down a decision, the investigating judge, directly seized of a request for freezing, shall communicate it to the public prosecutor for his opinion (CCP, art. 695-9-12).

The public prosecutor who directly receives a request for freezing shall forward it for execution, with his opinion, to the investigating judge (CCP, art. 695-9-12, para. 2).

3.1.3. *Grounds for non-recognition and non-execution*

The grounds for refusal to execute a freezing order are either optional or mandatory.

Article 695-9-16 of the Code of Criminal Procedure provides that execution of the decision may (optional grounds) be refused if it is not accompanied by a certificate or if the certificate is incomplete or does not correspond to the freezing order. However, in this case, a period may

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over such property, which the judicial authority of the issuing State considers to be the product of an offence or corresponds, in whole or in part, to the value of this product, or constitutes the instrument or the object of an offence.

The provisions of this Section shall not apply to requests to prevent the destruction, transformation, removal, transfer or disposal of an object, document or data which may be used as evidence, even if it is the proceeds of an offence or constitutes the instrument or object of an offence, which requests shall be the subject of a European investigation order in accordance with the provisions of Section 1 of this Chapter".

[193] Where France is the issuing State, the public prosecutors, investigating judges, *JLD* and trial courts competent to order a seizure according to the provisions of the CPP owe jurisdiction to order the freezing of assets located in another member State and to issue the certificate (Art. 695-9-7 CCP).

[194] For the sake of simplification, there is a double extension of territorial competence. Thus, on the one hand, a competent judge on the basis of the location of only one of the property or evidence would be competent for the entire request addressed to him. And secondly, in the absence of a precise location, the territorial jurisdiction of the Paris investigating judge is extended to the entire national territory.

If the judicial authority to which the request for freezing has been transmitted does not have the competence to act on it, it shall transmit it without delay to the competent judicial authority and inform the judicial authority of the issuing State (Art. 695-9-11, ali. 3 CCP).

be granted to the judicial authority of the issuing State to provide the necessary elements.

The mandatory grounds for refusal are provided for in article 695-9-17 CCP. There are five of them: 1° when the execution of the freezing order would be likely to threaten public order or the fundamental interests of the nation[195]; 2° If an immunity bars the execution or if the asset cannot be seized according to French law (such as, for example, correspondence between the lawyer and the person under investigation or documents classified as "secret defence"); 3° (*ne bis in idem*) If it appears from the certificate that the freezing decision is based on offences for which the person who is the object of the said decision has already been conclusively judged by the French judicial authorities or by the judicial authorities of a State other than the issuing State, provided that, in the case of a conviction, the penalty has been carried out, is being carried out or can no longer be carried out under the law of the State of conviction; 4° (*discriminatory grounds*) If it is established that the freezing decision was taken with the purpose of prosecuting or convicting a person because of his gender, race, religion, ethnic origin, nationality, language, political opinions or sexual preferences or gender identity, or that the execution of the said decision could affect the situation of this person for one of these reasons; 5° (*double jeopardy*) If the freezing decision was taken with an aim of confiscating property and the facts supporting it do not constitute an offence allowing, according to French law, the seizure of that property.

Nevertheless, the ground for refusal set out in 5° is not applicable when the freezing decision concerns an offence which, according to the law of the issuing State, is comprised within one the of the categories of offences mentioned in article 694-32 (concerning the EIO) and is punished by an unsuspended custodial sentence of at least three years.

The execution of the freezing order may no longer be refused in respect of tax, duty, customs or changes on the ground that the relevant French legislation differs from that of the issuing State (*see* Art. 695-9-18 CCP).

To date, no court decision has ruled on these grounds for refusal.

3.1.4. *Grounds for postponement*

Enforcement may be deferred, pursuant to Art. 695-9-20 CCP, When it is likely to prejudice an ongoing criminal investigation (1°);

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[195] Note that this ground for refusal is based on a reference to another article of the CCP. Indeed, art. 695-9-17 CCP contains a reference to art. 695-9-14 of the same Code ("*Without prejudice to the application of article 694-4*, the execution of a freezing decision is refused in any of the following cases: […]").

when any of the property in question has already been the subject of a freezing or seizure measure in the context of criminal proceedings (2°); when the freezing order is taken with a view to the subsequent confiscation of property and the property is already the subject of a freezing or seizure order in the context of non-criminal proceedings in France (3°); where any of the property in question is a document or medium protected for national defence purposes, as long as the decision to declassify it has not been notified by the competent administrative authority to the investigating judge in charge of executing the freezing order (4°).

The investigating judge who decides to postpone the execution of the freezing order shall inform the judicial authority of the issuing State without delay by any means leaving a written record, specifying the reason for the postponement and, if possible, its foreseeable duration.

3.1.5. *Time limits for the execution of freezing orders from another EU Member State*

Unlike international rogatory letters issued for the purpose of seizure, which do not impose any time limit for execution, the procedure for freezing property provides for very short time limits both for deciding on the request and for ordering the protective measure requested.

Thus, the decision authorizing or refusing the freezing of the property must be taken "as soon as possible and, if possible, within 24 hours of receipt of the said decision"[196]; the execution of the freezing decision itself must take place "immediately".

Moreover, the investigating judge shall without delay inform the authority of the issuing State of the execution of the freezing order by any means leaving a written record.

Furthermore, the refusal to execute an order must be reasoned and notified "without delay to the issuing State judicial authority by any means leaving a written record". It is proceeded likewise when, for any reason, it proved impossible to enforce the order (art. 695-9-19 CPP).

To date, no court decision has ruled on these time limits[197].

3.1.6. *Rights and legal remedies of the person addressed by a freezing order from another EU Member State*

Under article 695-9-22 CCP, any person holding the property which is the subject of the freezing order or any other person claiming to have a

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[196] Art. 695-9-13 CCP.

[197] See however *infra*, case law on remedies against freezing orders.

right in the said property may, lodge an appeal by sending an application to the registry of the investigating Chamber of the court of appeal competent for the area in question within ten days from the execution date of the decision. The provisions of Article 173 CCP shall then apply[198].

The appeal is not suspensive and does not allow the substantive grounds for the freezing order to be challenged.

The investigating Chamber may, by a decision which is not subject to appeal, authorize the issuing State to intervene at the hearing through a person authorized by that State for that purpose or, where appropriate, directly through the means of telecommunications provided for in Article 706-71 CCP. Where the issuing State is authorized to intervene, it shall not become a party to the proceedings.

The person concerned by the freezing order may also obtain information from the registry of the investigating judge on the remedies available in the issuing State against the freezing order and mentioned in the certificate (695-9-24 CCP).

Informing the issuing State of the outcome of the appeal proceedings – The Prosecutor General shall inform the judicial authority of the issuing State of any appeal lodged and of the grounds raised, so that that authority may make its observations, where appropriate by means of the telecommunications facilities provided for in Article 706-71 CCP. It notifies it of the results of this action (695-9-25 CCP).

Finally, according to Art. 695-9-30 CCP, the total or partial release of the freezing order may be requested by *any interested person*. Where the investigating judge, ex officio or at the request of any interested person, intends to release the freezing order, he shall notify the judicial authority of the issuing State and enable it to submit its observations.

Remedies against a freezing order (case law) – At the request of the Spanish judicial authorities, an investigating judge ordered the freezing of a painting by Picasso, discovered during a visit by customs officers, on a ship belonging to a company. The latter, together with another who claims to own the work, and a third party, submitted an application for annulment of the decisions of the investigating judge ordering the freezing and release of the freezing of the property. In order to reject the application, the judgment first states that the Chamber is required to examine the situation of the applicants who claim to have a right in the painting. It then states that the two companies cannot claim to hold a right in the painting concerned and the third party does not justify the exercise of any right in the work in question. The investigating chamber

[198] See *infra*: Nature of the proceeding.

concludes thereof that there is therefore no need to examine the grounds of nullity put forward. This decision has been annulled by the *Cour de cassation* which found that the property in dispute was on the vessel belonging to one of the applicant companies and finds that the master of the vessel, who was employed by that company, was the holder[199].

Constitutionality of article 695-9-22 of the Code of Criminal Procedure – According to the *Cour de cassation*, there is no reason to refer to the Constitutional Council a priority preliminary ruling on the issue of constitutionality relating to article 695-9-22 of the Code of Criminal Procedure. On the one hand, it results from the combined application of articles 695-9-1, last paragraph, and [695-9-14][200] of the Code of Criminal Procedure, according to which the freezing of property is subject to the same rules as the seizure and must be executed in accordance with the rules of that Code, that the date of implementation of that decision, which determines the starting point of the 10-day period fixed by article 695-9-22 of the Code of Criminal Procedure, corresponds to the date on which the seizure decision is sent by registered letter by the investigating judge to the person concerned. On the other hand, this period shall be extended where an insurmountable obstacle has made it impossible for the latter to exercise its right of appeal in good time. Lastly, the lack of precision in the notification of the procedures for the exercise of remedies does not deprive the parties of the possibility of exercising an effective remedy before the investigating chamber and allows the exercise, also effective, of the rights of the defence, the rules laid down by article 695-9-22 of the Code of Criminal Procedure, which refers to article 173 of the Code of Criminal Procedure as to the form of the remedy, being accessible to the person concerned and/or his/her lawyer[201].

Compliance (of the appeal against the freezing order) with the Framework Decision – Pursuant to article 695-9-22 of the Code of Criminal Procedure, which refers to the provisions of article 173 of the same Code, the appeal against the freezing order must be lodged within 10 days of the date on which the investigating judge notified the persons concerned, in the form of a declaration made to the registry of the competent court. According to the Cour de cassation, these provisions, which guarantee the effectiveness of the appeal, are an "exact transposition" of Framework Decision 2003/577/JHA of 22 July 2003, which, although it requires, in application of the principle of equivalence, that the

[199] Cass. crim., 19 mai 2016, n° 15-86.375.
[200] Repealed by the Ordinance 2016-1636.
[201] Cass. crim., 11 juillet 2017, n° 16-87.169.

Member States, which enjoy a margin of appreciation, organise the appeal against the freezing order in accordance with the legislation in force, "does not, however, require it to contain precise information on the time limits and procedures of the said appeal"[202].

Nature of the proceeding – The proceeding in question takes the form of a request for annulment of documents since "the provisions of article 173 are then applicable" (CCP, art. 695-9-22). It is the only one applicable to the exclusion of national rules relating to special seizures.

> Following a freezing order by the public prosecutor of a foreign court, a French investigating judge, pursuant to the provisions relating to mutual assistance between France and the other Member States of the European Union, had ordered the seizure of the credit balance of an account opened in the name of persons in a bank. The latter's counsel, who considered himself a preferred creditor, appealed this decision. According to the Cour de cassation, the investigating chamber correctly declared this appeal inadmissible since it follows from the provisions of article 695-9-22 of the Code of Criminal Procedure, *which alone is applicable in this case*, that any person who claims to have a right over frozen property may, by sending an application to the registry of the investigating Chamber of the court of appeal with territorial jurisdiction, within ten days from the date of implementation of the decision in question, lodge an appeal against it, in the manner provided for by article 173 of the Code of Criminal Procedure[203].

3.2. *Freezing of third-parties' assets*

As stated above (3.1.6.), a person who holds the property which is the subject of the freezing order or any other person claiming to have a right in that property may, by application to the registry of the investigating chamber of the territorially competent court of appeal within ten days from the date of enforcement of the decision in question, bring an appeal against it. The provisions of Article 173 CCP are then applicable. The appeal is not suspensive and does not allow the substantive grounds for the freezing order to be challenged.

In addition, the investigating chamber may, by a decision which is not subject to any appeal, authorize the issuing State to intervene at the hearing through a person appointed by that State for that purpose or,

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[202] Cass. crim., 5 avril 2018, n° 16-87.169.

[203] Cass. crim., 13 février 2013, n° 12-82.999; A. Maron and M. Haas, "Recours emmêlés", *Droit pénal* 2013, comm. 64; See also Cass. crim., 13 février 2013, n° 12-83.000.

where appropriate, directly through the means of telecommunications provided for in Article 706-71 CCP. Where the issuing State is authorized to intervene, it shall not become a party to the proceedings.

3.3. *Confiscation*

The Act No. 2010-768 of 9 July 2010 on facilitating seizure and confiscation in criminal matters transposed Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

It has also recast the provisions applicable outside the European Union by codifying Laws No 90-1010 of 14 November 1990 and No 96-392 of 13 May 1996 and extending their scope to all international conventions containing mechanisms for the recognition of confiscation orders.

Finally, it established a legal framework for the cross-border enforcement of confiscations on the basis of the international principle of reciprocity where there is no international convention applicable[204].

3.3.1. *National legal framework for the mutual recognition of confiscation orders*

Act No. 2010-768 of 9 July 2010 on facilitating seizure and confiscation in criminal matters inserted a Chapter III in Title I of Book V of the Code of Criminal Procedure entitled: "Transmission and execution of confiscation orders pursuant to the EU Council Framework Decision of 6 October 2006". It includes Art. 713 to 713-35 of the CCP.

The express reference to the European Union's reference text should be underlined because this legal technique is far from systematic.

3.3.2. *Competent authorities for the execution of confiscation orders from another EU Member State*

The CCP gives French judicial authorities jurisdiction in criminal matters to enforce confiscations ordered by foreign judicial authorities. It has appointed the public prosecutor to receive requests for execution from the competent foreign authorities and the *tribunal correctionnel* (criminal court which is competent for misdemeanors) to rule on such requests.

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[204] Art. 713-36 to 713-41 CCP.

If the French judicial authority to which the confiscation order and the certificate have been addressed considers that it does not have territorial competence to act on them, it shall transmit them without delay to the competent judicial authority and inform the competent authority of the issuing State.

The public prosecutor territorially competent is that of the location of any of the confiscated property or, in the absence of a clearly determined geographical jurisdiction, the public prosecutor of Paris (Article 713-13 second paragraph, CCP).

The public prosecutor, with his opinion, refers the application for recognition and enforcement of the confiscation order to the criminal court (713-14 CCP).

After ensuring that the request is lawful, the criminal court shall decide without delay on the execution of the confiscation order (713-15 CCP).

It is for the public prosecutor to enforce that decision under the same conditions as confiscation ordered in national proceedings and to inform the competent authority in the issuing State of that recognition and execution of the confiscation order as soon as possible, by any means leaving a written record.

It follows from Articles 713 and 713-36 of the Code of Criminal Procedure that a request for execution on French territory of a confiscation order issued by a court of an EU Member State may be examined in accordance with the procedure laid down in Articles 713-12 to 713-35 of the Code of Criminal Procedure only if the State from which the request emanates has transposed into its domestic law the Framework Decision of the Council of the European Union of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders[205].

> In the absence of an international convention to the contrary, confiscation orders issued by foreign judicial authorities are governed by articles 713-37 to 713-40 of the Code of Criminal Procedure.
>
> The execution of the confiscation ordered by a foreign judicial authority is authorized by the criminal court, at the request of the public prosecutor (Art. 713-38 CCP).
>
> Enforcement is permitted provided that the foreign decision is final and enforceable under the law of the requesting State.
>
> The refusal to authorize the execution of the confiscation order issued by the foreign court shall automatically entail the release of the seizure. It is ordered for the reasons referred to in article 713-37 CCP. Auto-

[205] Cass. crim., 28 May 2015, n° 14-83.612.

matic release shall be ordered when the proceedings instituted abroad have ended or have not led to the confiscation of the seized property.

The execution on the territory of the Republic of a confiscation order issued by a foreign court entails the transfer to the French State of ownership of the confiscated property, unless otherwise agreed with the requesting State (Art. 713-40 CCP).

3.3.3. *Grounds for non-recognition and non-execution*

The mandatory grounds for refusing recognition and enforcement of a confiscation order are provided for in article 713-20 of the Code of Criminal Procedure[206] and do not call for any specific comments except for two grounds.

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[206] "Without prejudice to the application of Article 694-4, the execution of a confiscation order shall be refused in one of the following cases:

1° If the certificate is not produced, if it is drawn up incompletely or if it clearly does not correspond to the confiscation order;

2° If immunity prevents it or if the property, by its nature or status, cannot be confiscated under French law;

3° (*ne bis in idem*) if the confiscation order is based on offences for which the person against whom the order was issued has already been finally tried by the French judicial authorities or by those of a State other than the issuing State, provided, in the event of conviction, that the sentence has been executed, is being enforced or can no longer be enforced in accordance with the laws of the sentencing State;

4° (*discriminatory grounds*) If it is established that the confiscation order was issued for the purpose of prosecuting or convicting a person on the grounds of sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation or gender identity or that the execution of the confiscation order may prejudice that person's situation for any of these reasons;

5° (*dual criminality*) If the confiscation is based on facts which do not constitute offences allowing, under French law, such a measure to be ordered, except as regards the list of offences provided for by the EAW framework and set out in Art. 694-32 CCP (cf. Art. 713-20 CCP) and regardless of tax offences (Art. 713-21 CCP).

6° If the rights of a third party in good faith make it impossible, under French law, to enforce the confiscation order;

7° (*in absentia procedure*) If, according to the information given in the certificate, the person concerned did not appear in person at the trial at the end of which the confiscation was ordered, unless, according to these information, he is in one of the cases provided for in 1° to 3° of article 695-22-1;

8° (*time limitation period*) If the facts on which the decision is based fall within the jurisdiction of the French courts and the confiscation order is time-barred under French law.

However, the ground for refusal provided for in paragraph 5 shall not be invoked where the confiscation order concerns an offence which, under the law of the issuing State, falls within one of the categories of offences referred to in Article 694-32 and is punishable there by deprivation of liberty for a term of three years or more.

The execution of a confiscation order shall also be refused, where appropriate in part, if the confiscation order is based on the ground referred to in Article 713-1, paragraph 3 [i.e. *extended confiscation*]. In this case, the fifth paragraph of article 713-24 shall apply".

The first one is the specific ground for refusal of extended confiscation which allows, in certain cases, to refuse in whole or in part the recognition and enforcement of the confiscation order. Article 713-20 11th paragraph of the Code of Criminal Procedure provides: "The execution of a confiscation order shall also be refused, where appropriate in part, if the confiscation order is based on the ground referred to in article 713-1, paragraph 3. In this case, the fifth paragraph of Article 713-24 is applied". It concerns the cross-border enforcement of extended confiscations.

An extended confiscation ordered in another State of the European Union may, in most cases, be recognised and enforced. However, in some cases, it will be impossible to recognize and enforce this extended confiscation. In this respect, three situations must be distinguished:

First, if an extended confiscation ordered by the judicial authority of another EU Member State concerns acts falling within the seven categories referred to in Framework Decision 2005/212/JHA of 24 February 2005[207], the "general confiscation" ("*confiscation Générale*", that is confiscation of patrimony) provided for by the French legislation being broader than the three optional mechanisms provided for by this Framework Decision, the confiscation shall be recognised and enforced, irrespective of the option on the basis of which the law of the issuing State confiscated the property;

Second, if an extended confiscation ordered by the judicial authority of another EU Member State concerns acts not falling within the seven categories referred to in Framework Decision 2005/212/JHA of 24 February 2005 but for which French legislation authorises general confiscation (such as genocide, eugenics, reproductive cloning, etc.), the confiscation must be recognised and enforced;

Third, if an extended confiscation ordered by the judicial authority of another EU Member State concerns acts which do not fall within the seven categories referred to in Framework Decision 2005/212/JHA of 24 February 2005 or those for which French law authorises a general confiscation, the latter may not be recognised and enforced. It will either be refused in its entirety (713-20 11th paragraph), or possibly, recognized and executed "within the limits provided by French law for similar acts" (see last paragraph of Article 713-24 CCP)[208].

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[207] *i.e.* counterfeiting of the euro, facilitation of illegal residence or transit, trafficking in human beings, in the case of child sexual exploitation and child pornography, drug trafficking or money laundering involving organised crime or acts constituting an act of terrorism.

[208] Thus, when an "extended" foreign sentence has been pronounced for offences against a person's physical or psychological integrity (torture and acts of barbarism, violence,

The second ground that requires clarification relates to the limitation period under French law which is not, except in exceptional cases, a ground for refusal of enforcement

The fact that the sentence is time-barred under French law does not constitute a ground for refusing recognition and execution of confiscation.

However, where the facts on which the confiscation order is based fall within the jurisdiction of the French courts and the confiscation order is time-barred under French law, the confiscation order may not be recognised and enforced in French territory.

The *optional grounds for refusing recognition and enforcement of a confiscation order* are provided for in article 713-22 of the Code of Criminal Procedure[209].

The two grounds for refusal based on territoriality have always been maintained in the framework decisions on mutual recognition instruments and transposed into the Criminal Procedure Code to limit problems of conflict of legislations.

In order to give primacy to territorial application of criminal law in these conflicts of legislation, the two grounds based on the place of commission of the facts have been maintained.

Where it is not possible to proceed to the verification of the double criminality, three situations must be distinguished:

(1) The acts were committed in whole or in part in the executing State. In this case, pursuant to Article 713-22 of the Code of Criminal Procedure, *French legislation should prevail and the recognition and execution of the confiscation order should be refused*.

(2) The acts were committed exclusively in the issuing State. In this case, *the law of the issuing State should be given precedence and there are no grounds for refusing the execution of the confiscation order*.

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threats, rape, sexual assault, moral harassment, etc.) French law allows the confiscation of "one or more vehicles belonging to the convicted person" and "one or more weapons owned or freely available to the convicted person" (see art. 222-44 5° and 6° CP). An extended confiscation ordered in another State of the European Union must be refused with the exception of the confiscation of property of the type that could be confiscated in France (the vehicle belonging to the convicted person, the weapon at his free disposal, etc.).

[209] "The execution of a confiscation order may be refused in one of the following cases:

1° If the confiscation order is based on criminal proceedings relating to offences *committed in whole or in part on the territory of the Republic*;

2° If the confiscation order is based on criminal proceedings relating to offences which have been committed outside the territory of the issuing State and French law does not permit the prosecution of such acts when they *are committed outside the territory of the Republic*".

(3) The acts were committed outside the issuing State and the executing State. In this case, *it is for the court, pursuant to article 713-20 CCP, secondly, to assess whether these facts could be prosecuted under French law.*

Indirectly, this ground implies that the facts are incriminated under French law, since in any event, no prosecution would be possible in France for acts committed abroad if they are not incriminated under French law.

The two grounds for refusal referred to in Article 713-20 have not been transformed into a mandatory ground for refusal but left to the discretion of the court, since situations may arise in which the issue at stake does not involve questions of pre-eminence of jurisdiction but concerns the prosecution of acts committed in France which could be prosecuted by the French authorities.

3.3.4. *Grounds for postponement*

The criminal court may stay the proceedings when it considers it necessary to translate the decision or when the property is already the subject either of a seizure or freezing order or of a final confiscation order in another proceeding.

Where it stays the proceedings, the criminal court may order seizure measures in accordance with the procedures laid down in article 484-1 CCP.

In the event of a stay of proceedings, the public prosecutor shall inform the competent authority of the issuing State without delay by any means leaving a written record, stating the reasons and, if possible, the duration of the stay of proceedings (713-17 CCP).

As soon as the reason for the stay no longer exists, the criminal court shall decide on the execution of the confiscation order. The public prosecutor shall inform the competent authority of the issuing State by any means leaving a written record (713-18 CCP).

Once the authorization has been granted by the court, the public prosecutor – responsible for the enforcement of such decision – may postpone the enforcement where the confiscation order concerns a sum of money and the amount recovered is likely to exceed the amount specified in the confiscation order due to its execution in several States; or where the execution of the confiscation order may prejudice an ongoing criminal investigation or proceedings (Art. 713-31 CCP).

The public prosecutor who postpones the enforcement of the confiscation order shall inform the competent authority of the issuing State

without delay by any mean leaving a written record, stating the reasons for the postponement and, if possible, its foreseeable duration.

3.3.5. *Time limits for the execution of a confiscation order from another EU Member State*

Under article 713-15 CCP, the criminal court shall decide "*without delay*" on the execution of the confiscation order.

In case of postponement, the criminal court shall decide on the execution of the confiscation order "*as soon as* the reason for the stay no longer exists".

3.3.6. *Rights and legal remedies of the person addressed by a confiscation order from another EU Member State*

If it considers it useful, the criminal court shall hear, where appropriate by rogatory letters, the *convicted person and any person having rights in the property* which has been the subject of the confiscation order. These persons may be represented by a lawyer (Art. 713-16 CCP).

The sentenced person may appeal against the decision authorising the execution of the confiscation in France (713-29 CCP).

Any person who holds the property which is the subject of the confiscation order or any other person claiming to have a right in that property may, by sending an application to the registry of the territorially competent criminal appeals chamber, within ten days from the date of execution of the decision in question, lodge an appeal against the latter (Art. 713-29 CCP).

In the event of an appeal against the confiscation order, the public prosecutor shall inform the competent authority of the issuing State of the appeal lodged by any means leaving a written record.

The appeal is suspensive but does not allow the substantial grounds which led to the confiscation order to be challenged.

The court may, by a decision which is not subject to appeal, *authorise the issuing State to intervene* at the hearing through a person authorised by that State for that purpose or, where appropriate, directly through the means of telecommunications provided for in Article 706-71. Where the issuing State is authorised to intervene, it shall not become a party to the proceedings (Art. 713-29 CCP).

Where the person concerned is able to provide proof of confiscation, in whole or in part, in another State, the criminal court, after consultation with the competent authority of the issuing State, shall deduct in full from

the amount to be confiscated in France any fraction already recovered in that other State pursuant to the confiscation order (713-24 CCP).

3.4. *Third-Party Confiscation*

The only reference to third parties can be found in the aforementioned Art. 713-20 CCP, which sets out the mandatory grounds for refusal[210].

In its paragraph 6, this article provides that: "the execution of a confiscation order shall be refused (…) if the rights of a third party in good faith make it impossible, under French law, to execute the confiscation order".

4. *Management and disposal aspects*

Creation of AGRASC. As a result of the "paradigm shift" introduced by the *Loi* n° 2010-768 of 9th July 2010, which gives confiscation a greater place and a new role to seizure – no longer envisaged solely for evidentiary purposes but also for patrimonial purposes in order to secure future confiscations –, the Agency for the Management and Recovery of Seized and Confiscated Assets (AGRASC) was created[211]; this new actor of the criminal procedure constitutes the "institutional expression"[212] of the profound evolution of the substantive and procedural law on confiscation undertaken since 2010[213]. The AGRASC is legally defined as a public state body of an administrative nature. It is placed under the joint supervision of the Minister of Justice and the Minister in charge of the Budget[214].

The AGRASC was created following the difficulties encountered in practice in seizures and confiscations proceedings. Although the preser-

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[210] With respect to the enforcement of confiscation orders decided by a non-EU member State, *see* Art. 713-38 CCP.

[211] The organization and objectives of the agency are specified in two *circulaires* of the Ministry of Justice, respectively of 22nd December 2010, covering the entirety of the law of 9th July 2010 (*http://www.textes.justice.gouv.fr/art_pix/JUSD1033251C.pdf*) and of 3rd February 2010, specifically in relation to AGRASC (*http://www.textes.justice.gouv.fr/art_pix/JUSD1103707C.pdf*).

[212] L. Ascensi, *Droit et pratiques des saisies et confiscations pénales*, *Dalloz*, 2019, 7.

[213] E. Pelsez, "L'agence de gestion et de recouvrement des avoirs saisis et confisqués – AGRASC", *AJ Pénal*, 2012, 139; A. Fournier, "La nouvelle Agence de gestion et de recouvrement des avoirs saisis et confisqués (AGRASC). *À propos du décret du 1er février 2011*", *La Semaine juridique, édition notariale et immobilière*, 2011, 334; E. Camous, "fasc. 20: L'agence de gestion et de recouvrement des avoirs saisis et confisqués", *Jurisclasseur Procédure pénale*.

[214] Art. 706-159 CCP.

vation of value of seized assets is subjected to their adequate conservation, judges and clerks did not have specific means to prevent their depreciation in value. For this reason, the AGRASC, an *ad hoc* structure specializing in the management of seized and confiscated property, was created. It provides help and logistical support to the courts in the management of seized property by relieving them of the material and legal difficulties posed by the seizure of criminal assets. The AGRASC is the French Asset Recovery Office, established in accordance to the Decision 2007/845/JHA of 6th December 2007. The purpose of the scheme is to ensure the management of the property seized by the judicial authority.

4.1. *Freezing*

4.1.1. *Competent authorities for the management of frozen assets*

The main competent authority for the management of frozen orders is evidently the AGRASC.

The Agency[215] has specific powers to ensure the conservation and enhancement of assets handed over to it. Moreover, the Agency receives all sums that have been apprehended in cash or in bank accounts and also property for the purpose of disposal before judgment. It alone ensures the publication of foreclosures of real estate and business funds. To achieve its missions, it has its own investigative powers. The Agency also responds to requests for mutual assistance or international cooperation.

Its missions, carried out under judicial mandate and throughout the territory, are defined by article 706-160 of the Code of Criminal Procedure. It involves the management of all property, whatever its nature, seized, confiscated or subject to a precautionary measure during criminal

[215] AGRASC is managed by a board of directors, chaired by a magistrate of the judiciary appointed by *décret* (Art. 706-162 CCP) The board of directors is made up of six representatives of the State: the director of criminal affairs, the secretary general of the Ministry of Justice, the director general of public finances, the director general of the national police, the Director General of the National Gendarmerie, the Director General of Customs (Art. R.54-1, 12 CCP). Thus, there are multiple large organizations involved, which is aimed at improving information-sharing between the different actors. The board of directors also comprises four qualified individuals with expertise in the areas of contract law, corporate law, wealth management and public procurement. They are selected by the Minister of Justice, one of them suggested by the Minister in charge of the Budget. This is demonstrative of the broad field of action AGRASC. Its activities go well beyond simply applying the rules of criminal procedure. Finally, there are two staff representatives at the AGRASC. They are elected under the conditions set by the Minister of Justice (art. 54-1 CCP). The term of office of senior officials representing national institutions does not have a duration as such. However, the term of office for the president, the four qualified individuals and their staff representatives is three years, but this is renewable at the end of the term (Art. 54-1, par. 11, CCP).

proceedings, which is entrusted to it and which requires, for its conservation or recovery, acts of administration; the centralized management, through an account opened at the *Caisse des dépôts et consignations* (CDC), of all sums seized during criminal proceedings the alienation or destruction of property for which it has been entrusted with the management and which is ordered; the alienation of property ordered or authorised under the conditions provided for in Articles 41-5 and 99-2 of the Code of Criminal Procedure. The Agency may, under the same conditions, manage seized property, dispose of or destroy seized or confiscated property and distribute the proceeds of the sale in execution of any request for mutual assistance or cooperation from a foreign judicial authority. In the exercise of its powers, the Agency may obtain the assistance and any useful information from any natural or legal person, public or private, without professional secrecy being enforceable against it, subject to the provisions of Article 66-5 of Law No 71-1130 of 31 December 1971 reforming certain judicial and legal professions.

Agrasc's scope of intervention is not limited to the management of assets seized pursuant to the provisions introduced by the 2010 law (special seizures). Its powers are exercised over all seized and confiscated property (including common law seizures). Besides, the Agency performs an advisory function for magistrates. It carries out a mission to inform victims and public creditors about property that is returned by court decision[216].

However, the public prosecutor or the investigating judge play a significant role. In particular, they have a protective role: in the event of default or unavailability of the owner or holder of the property, and subject to the rights of *bona fide* third parties, the public prosecutor or the investigating judge may authorise the handing over to the Agency for the management and recovery of seized and confiscated assets whose advance sale is not envisaged so that this Agency may carry out, within the limits of the mandate entrusted to it, all the legal and material acts necessary for the conservation, maintenance and enhancement of the property[217]. Any act having as a consequence to transform, substantially modify or reduce the value of the property is subject to the prior authorization of the JLD, at the request of the public prosecutor who ordered or authorized its seizure, the investigating judge who ordered or authorized its seizure or the investigating judge in the event of the opening of judicial investigation after the seizure[218].

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[216] L. Ascensi, *Droit et pratiques des saisies et confiscations pénales*, *Dalloz*, 2019, 8.
[217] Art. 706-143, par. 2, CCP.
[218] Art. 706-143, par. 3, CCP.

4.1.2. *Powers of the competent authorities on the frozen assets*

The AGRASC has a general mandate for the management of the property entrusted to it[219]. In principle, it can decide on its own motion whether or not to carry out these acts without having to refer to the Courts. However, the law provides for exceptions[220].

There is no list of authorized acts of management. Therefore, any act of management can be carried out in order to preserve the property.

The AGRASC's mission is to value the seized assets (it is entrusted with the administration of seized properties likely to be confiscated). This objective can be differentiated from that of the daily management of a property, because it involves preventing the asset's value from depreciating. The AGRASC is therefore entitled to carry out any act that could increase the value of the property provided it is indeed a management act. The Agency does not have to obtain the consent of the owner or holder of the seized property. Only economic interests are taken into account. The texts do not set conditions for the valuation of the property, but it must only be acts of management (*actes d'administration*). For example, it may decide to sell the property such as a painting or precious object prior to the judgment, because their value is greater than the value they presented at the time of delivery.

The Agency is competent for "the alienation and the destruction of the property the management of which it is responsible, without prejudice of the allocation of these properties under the conditions of the articles L2222-9 of the *Code general de la propriété des personnes publiques*[221] and 707-1 of this Code"[222].

In addition, when movable property seized is no longer useful as evidence in the court proceedings or for the purposes of investigations into an offense and its return is impossible (identification of the owner of the property has not been possible or the property has not been claimed in time), the prosecutor (during an inquiry) or the investigating judge (during a criminal investigation) may authorize the delivery of these assets to the AGRASC for disposal[223].

Assets will also be turned over to the AGRASC for disposal if maintaining the seizure results in a decrease in the value of the property[224].

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219 Art. 706-160, par. 1, CCP.
220 *Infra*.
221 General Code of Property of Public Persons; hereafter: GCPPP.
222 Art. 706-160, par. 3, CCP.
223 Art. 41-5, par. 1 and 99-2, par. 1, CCP.
224 Art. 41-5, par. 2 and 99-2, par. 2, CCP.

In these cases, the Agency can therefore perform acts of disposition. It may sell or destroy the property entrusted to it subject to compliance with procedures established for this purpose. This possibility applies only to property entrusted to the Agency as part of its general management objective[225]. The role of AGRASC is to enforce preliminary decisions. The alienation or destruction must have been ordered. The Agency cannot decide it alone.

However, it may suspend that decision where the property is likely to be allocated free of charge to an investigation service or when it is a confiscation by value.

The Law provides that "movable property which, in the course of criminal proceedings, has been transferred to the State following a final judicial decision may be assigned, free of charge, under the conditions determined by interdepartmental Decree, to police services, gendarmerie units or services of the customs administration when these services or units carry out judicial police missions"[226]. Confiscated property can therefore be provided to investigative units. However, the courts are excluded: they cannot take advantage of the property they ordered to seize.

Assignment to services performing judicial police missions is only possible for movable property. Building are excluded. In addition, a final sentence of confiscation must have been given, *i.e.* the property must have been transferred to the State.

However, the AGRASC, which has been ordered to proceed with the disposal or destruction of the property over which it has custody, may refuse to enforce this measure. In this case, the property is assigned to the service concerned under the conditions provided for by interdepartmental *décret*[227].

The Court may order the return of property entrusted to the AGRASC. In this case, the Agency is required to enforce the decision without the owner having made the request. The decision of confiscation must be final[228].

If the property entrusted to the AGRASC is not confiscated and the decision is not that restitution should be made, the owner must make the request within 2 months (if the person was the subject of a formal notice), or within 6 months (in the absence of formal notice). The period runs from the date on which the last court seized has exhausted its juris-

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[225] There are other hypotheses in which objects are handed over to it: art. 41-5 and 99-2 CCP.

[226] Art. L2222-9 GCPPP, which refers to art. 706-160, 3° CCP.

[227] Art. L2222-9 GCPPP.

[228] Art. 478 to 484 CCP.

diction[229]. There is no particular form to respect: the notice must only be registered at the enforcement service or the AGRASC, which is responsible for enforcing prosecution decisions on behalf of the public prosecutor. Without this request within the time limit, the property becomes property of the State, unless third parties acting in good faith have a right to the property[230].

In principle, restitution is in kind. The AGRASC must return the property to the person named in the decision that provides for restitution or to the person who requests it. In the latter case, the agency must verify that the individual is the owner.

When the property itself has been entered in value – this is the case for funds seized from a bank account – the Agency returns the amount of the sum seized. If the property seized has been sold, it is the sum deposited that is returned. Only the price will be returned (without interest). No compensation can be claimed by the owner in case the asset is sold prior to the judgement at a price he/she regards as undervalued. Since the sale was made publicly and competitively on the market, there is an irrebuttable presumption of sale at the correct price.

Finally, since the Law of 3rd June 2016, Art. 706-160 states that: "the sums transferred to the Agency for the Management and Recovery of Assets Seized and Confiscated" in Criminal Proceedings "and whose origin cannot be determined shall be transferred to the State at the end of a period of four years after their receipt, at the closure of the annual accounts. In the event of a decision to return the property after the four-year period, the State shall reimburse the Agency for the sums due"[231].

4.1.3. *Costs for the Management or disposal of frozen assets*

The AGRASC is financed in two ways: firstly, through direct funding, secondly through self-financing.

The Agency's resources consist of grants, advances and other contributions from the State and its public institutions, the European Union, local authorities, their public institutions and any other public or private legal entity[232]. It is also funded by "the tax revenues determined by the law"[233]. Finally, it can receive donations and bequests (although this situation has yet to materialize)[234].

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[229] Art. 41-4, par. 3, CCP.

[230] Cass. crim., 19th February 2014: *JurisData* n° 2014-002535; E. Camous, "Ne pas réclamer c'est accepter… que la chose soit confisquée", in *JCP G* 2014, 265.

[231] Art. 706-160, par. 2, CCP.

[232] Art. 706-163, 1° CCP.

[233] Art. 706-163, 2° CCP.

[234] Art. 706-163, 6° CCP.

Finally, the AGRASC is financed from the profits of sums seized or acquired by the management of assets seized. These profits are paid into its account at the *Caisse des Depots et Consignations*[235]. It can only do this for a proportion which is capped under the same conditions as the confiscated sums. This is the main source of funding for the agency.

4.1.4. *Legal remedies against wrongful management of frozen assets*

The CCP does not provide for any direct recourse against the AGRASC for the mismanagement of property. Only the remedies mentioned above are available.

It should be noted that the *Cour de cassation* stated that the lodging of an appeal against an order refusing the return of seized property does not preclude the investigating judge from ordering its handing over to the AGRASC for the purposes of disposal[236].

4.1.5. *National practices on the management of frozen assets in a different EU Member State and in execution of a freezing order from a different EU Member State*

The Agency may, under the conditions set out above[237], manage the seized property, dispose of or destroy the seized (or confiscated) property and proceed to the distribution of the proceeds of the sale in execution of any request for mutual assistance or cooperation from a foreign judicial authority[238].

According to the circular of 3rd February 2011 on the presentation of the Agency for the Management and Recovery of Assets Seized and Confiscated (AGRASC) and its missions, the Agency will be seized by magistrates, ideally in dematerialized form, at the address *amo@agrasc.gouv.fr*, reserved for international missions[239].

The referral to the AGRASC is subject to a request for assistance from a foreign judicial authority in accordance with the provisions governing the matter[240]. Furthermore, the investigating judge owes sole ju-

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[235] Art. 706-163, 4° CCP.

[236] Cass. crim., 8th November 2017, n° 17-82.527; V. Morgante, "Refus de restitution de bien saisi et remise parallèle à l'AGRASC", in *Dalloz Actualité*, 28th November 2017.

[237] E. Camous, "fasc. 20: L'agence de gestion et de recouvrement des avoirs saisis et confisqués (AGRASC)", in *Jurisclasseur*, 194 and ff.

[238] Art. 706-160, par. 6 CCP.

[239] *http://www.textes.justice.gouv.fr/art_pix/JUSD1103707C.pdf*.

[240] Art. 695-9-1 CCP. In the absence of an international convention, art. 694-10 to 694-13 apply.

risdiction. The granting of the requested freezing decision leads to deal with the frozen assets "according to the rule" of the CCP.

The actions of the Agency are effective because it corresponds to a European model identified as Asset Management Office (AMO) or Asset Recovery Office (ARO) within the framework of the European Union. Moreover, it develops contacts and exchanges with its foreign counterparts, notably within the CARIN network (Camden Asset Recovery Inter-Agency Network) and the "ARO Platform" with the European Commission.

To date, we found no decision of the *Cour de cassation* on this point. Nevertheless, according to the annual report of the AGRASC, in 2014 more than € 205,000 has been paid to foreign States under the division of assets in the framework of international mutual assistance[241]. During the year 2014, thirty requests for International Mutual Assistance Mission were issued by 14 different countries, including 5 Member States of the European Union (representing 11 requests). In 2015, it was € 269,302. The 2017 activity report mentions 50 seizures (among 707) in 12 incoming mutual assistance cases (cases in which a foreign country orders the seizure of a property located in France and requests that its execution be carried out by the French magistrate)[242].

4.2. *Freezing of third parties' assets*

The Agency manages all the frozen property entrusted to it. Therefore, it can, under the conditions mentioned above (4.1.), manage the seized property in the hands of the third party holding the property[243].

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[241] Annual Report 2014, *http://www.justice.gouv.fr/publication/rapport_activite_agrasc_2014.pdf*.

[242] In 2017, no share of equity has been realized; Annual Report 2017 de l'AGRASC, 20. *https://www.economie.gouv.fr/files/files/PDF/2018/AGRASC_Rapport_2017.pdf*.

[243] Art. 706-143 CCP refers to the third-party holder to specify that in case of default on his part, the public prosecutor or the examining magistrate may authorize the delivery to the AGRASC of properties whose advance sale is not envisaged so that it realizes all the legal and material acts necessary for the conservation, the maintenance and the valorisation of this property.

Art. 706-143 CCP states that: "In the event of default or unavailability of the owner or holder of the property, and subject to the rights of third parties in good faith, the public prosecutor or the investigating judge may authorise the handing over to the Agency for the Management and Recovery of Seized and Confiscated Assets of the seized property whose sale in advance is not envisaged so that this agency may carry out, within the limits of the mandate entrusted to it, all the legal and material acts necessary for the conservation, maintenance and enhancement of this property".

On this point, there are neither any specific provisions in the CCP, nor any specificity[244].

It should be noted, however, that victims or civil parties (*parties civiles*)[245] may, when they receive a final decision awarding them damages and have not obtained compensation, may obtain payment from the AGRASC for this sum on the funds of frozen assets[246].

Such a request for payment must, under penalty of foreclosure, be sent by registered letter to the Agency within two months of the date on which the decision awarding damages became final[247]. Recourse to the AGRASC is only possible if the applicant's preliminary compensation claim is rejected by the *Commission d'indemnisation des victimes d'infraction* (Commission for the Compensation of Crime Victims)[248].

In addition, victims can be informed by the AGRASC about property returned by court order, to ensure the payment of their debt obligations[249].

Impact on ongoing civil enforcement proceedings relating to the seized property (Articles 706-145 and 706-146 of the Code of Criminal Procedure).

In order to guarantee the effectiveness of the criminal seizure, the law provides that it entails the suspension of civil enforcement proceedings in progress and prohibits the institution of any new civil enforcement proceedings concerning the same property. The purpose of this provision is to allow an immediate freezing of seized property in criminal proceedings, without interference from civil proceedings initiated elsewhere by the creditors of the owner or holder of the property, and to prevent the magistrate responsible for conducting the criminal investigation from being forced to manage a technical dispute before the enforcement judge in the margins of criminal proceedings, which would be a source of legal uncertainty.

Creditors who have instituted civil enforcement proceedings prior to the criminal seizure are automatically considered to hold a security interest ranking prior to the criminal seizure, so that no privilege is conferred on the criminal seizure in the event of the assets being sold. The

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[244] It's only specified for the seizure of the payment obligation that the debtor must immediately record the amount due to the Agency. However, for contingent or term loans, the funds are recorded when these claims become due; art. 706-155 CCP.

[245] E. Camous, "fasc. 20: L'agence de gestion et de recouvrement des avoirs saisis et confisqués (AGRASC)", in *Jurisclasseur*, 174 and ff.

[246] Art. 706-164 CCP.

[247] Art. 706-164, par. 2, CCP.

[248] Cass. 2ème civ., 20th October 2016, n° 15-22.789, *JurisData* n° 2016-021558.

[249] Art. 706-141 CCP.

procedural pre-eminence of criminal seizure over civil enforcement proceedings during the criminal proceedings therefore does not alter the order of creditors nor does it confer any privilege on the State. In the event that the amount of the civil claims prior to the criminal seizure is greater than the proceeds of the sale, no sum shall accrue to the State as a result.

By way of derogation from the principle of suspension or prohibition of civil enforcement proceedings as a result of the seizure of property, a creditor may, however, be authorised, under the conditions laid down in Article 706-144 CCP, to initiate or resume civil enforcement proceedings on the property, provided that he has an enforceable title recording a liquid and enforceable claim and that it is not necessary to maintain the seizure of the property in the form required. The authorization to initiate or resume civil proceedings on property that is the subject of a criminal seizure must be requested from the magistrate who authorized or ordered the seizure under the conditions provided for in article 706-144 CCP.

4.3. *Confiscation*

4.3.1. *Competent authorities for the disposal of confiscated assets*

In principle, the person responsible for maintaining the conservation of the seized or confiscated property is first and foremost the owner of the property or, failing that, the holder of the property. Article 706-143, paragraph 1, of the Code of Criminal Procedure thus provides that the owner or holder "shall bear the costs thereof, with the exception of the costs which may be borne by the State".

The AGRASC is responsible for the management of all property confiscated, whatever its nature, which is entrusted to it and which requires administrative acts for its conservation or recovery[250].

The departmental director of public security or the command of a gendarmerie group may be informed on a quarterly basis by the judicial police officers under his authority, under conditions preserving the secrecy of the investigation, of the list of property seized in criminal investigations exceeding a value fixed by decree and whose confiscation is provided for by law. He may ask the public prosecutor to refer the matter to the JLD or, if judicial information has been opened, to the investigating judge, so that the latter may authorize that those of such property which are no longer necessary to establish the truth and whose conservation would entail a financial charge for the State be handed over, subject

[250] Art. 706-160 CCP.

to the rights of third parties, to the AGRASC for the purpose of their disposal[251].

The State has a beneficiary role because the sums transferred to the Agency for the Management and Recovery of Seized and Confiscated Assets whose origin cannot be determined are transferred to it after a period of four months[252].

4.2.2. *Modalities of disposal of confiscated assets*

The further execution of confiscations in kind or in value, when they concern property designated in the confiscation order, shall consist, as the case may be, in its preservation as it stands in the movable or immovable property of the State, in its alienation for the purpose of paying the proceeds of sale to the general budget of the State, which is the consequence of the principle of the non-allocation of State revenues, or in its destruction, for example if the property is dangerous or unlawful, or if it is of such a nature that its transfer is not economically relevant to the State[253]. In practice, in the vast majority of cases confiscated property is liquidated[254].

Where enforcement is the responsibility of the public prosecutor, confiscation is carried out with the assistance of the administration in charge of matters belonging to the Directorate General of Public Finance. The property is handed over to this administration after a report has been drawn up by the registry office. If the administration does not intend to keep the property in the State's patrimony, it shall proceed with the sale by public auction of the property. Its proceeds are in principle paid into the general State budget. If, on the other hand, the confiscated property has no market value, or if it is dangerous or illegal, it is destroyed, with a destruction report being drawn up by the registry office in charge of the seals department.

The disposal of confiscated property entrusted to Agrasc, either at the stage of seizure or after the confiscation order, is subject to a special regime as to its modalities.

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[251] See Article 99 of Act No. 2011-267 of 14 March 2011 on guidance and programming for the performance of internal security; Décret n° 2012-594, April 27, 2012.

[252] Art. 706-160, par 2, CCP.

[253] L. Ascensi, *Droit et pratiques des saisies et confiscations pénales*, Dalloz, 2019, 155.

[254] However, according to Art. 131-21 CC, the confiscated property will vest in the State subject to the legally constituted real rights in favour of third parties. It follows from this that, at the stage of enforcement of the sentence, the body responsible for it must pay the third party rights holders whose base is the confiscated property. This will be the case for privileged creditors holding legal liens or security interests that are enforceable against the State.

Due to the specific nature of the assets entrusted to the agency, it is not required to dispose of them with the assistance of the administration in charge of the domains. The agency has concluded and implemented a series of partnerships enabling it to dispose of confiscated property under financially more favourable conditions than State sales.

With regard to movable property, Agrasc uses, on the basis of partnerships, the services of judicial auctioneers, sworn brokers of goods, or judicial officers in order to achieve the best possible liquidation of confiscated property[255].

The execution of confiscations sometimes follows specific procedures, either because the nature of the confiscated property imposes this specificity, or because the pure and simple implementation of the devolution of the confiscated property to the State is waived.

4.2.3. *Other possible destination of confiscated assets*

It is possible to identify two other types of disposal of confiscated assets: a compensatory one and a budgetary purpose.

Compensatory use. Article 706-164, paragraph 1, of the Code of Criminal Procedure provides that "any person who, having brought a civil action, has benefited from a final decision awarding him damages and interest for the damage he has suffered as a result of a criminal offence and costs pursuant to Articles 375 or 475-1 and who has not obtained compensation or reparation pursuant to Articles 706-3 or 706-14, or recovery assistance pursuant to Article 706-15-1, may obtain from the Agency for the Management and Recovery of Seized and Confiscated Assets that such sums be paid to it out of the funds or from the net asset value of its debtor whose confiscation has been decided by a final decision and of which the Agency is the depositary pursuant to Articles 706-160 or 707-1". Such application for payment shall, under penalty of foreclosure, be sent by registered letter to the Agency within two months of the date on which the decision referred to in the first paragraph of this Article has become final. In the event of multiple claimants and insufficient assets to fully compensate them, payment shall be made at the price of the journey and, in the case of claims received on the same date, at the euro market. The foregoing provisions shall not apply to the guarantee of State claims. The State shall be subrogated, to the extent of the sums paid, to the rights of the victim against the perpetrator of the offence in accordance with the priority of civil law sureties. The files likely to give

[255] CH. DUCHAINE, "De la nécessité d'un usage raisonné des saisies et confiscations. Punir le condamné ou punir l'État", *AJ pénal*, 2015, 242.

rise to such an action by the State are examined by the Agency for the Management and Recovery of Seized and Confiscated Assets and then communicated to the Minister in charge of Finance who ensures their recovery.

Budgetary purpose. One of the Agency for the Management and Recovery of Seized and Confiscated Assets' special features is the way it is financed. Indeed, in addition to the usual resources of public administrative establishments, Article 706-163 of the Code of Criminal Procedure provides for two original resources, the objective being to achieve self-financing of the establishment. These resources will be a part of the proceeds from the sale of confiscated property when the agency has intervened for their management or sale, subject to the allocation of this proceeds to the "Narcotics" competition fund; the proceeds from the investment of the sums seized or acquired by the management of the assets seized and paid into its account at the *Caisse des dépôts et consignations*. The sums seized will be transferred from the courts' accounts with *Caisse des Dépôts* to the Agency's account, the latter being the beneficiary of the interest paid by *Caisse des Dépôts* on these deposited sums.

The AGRASC may withdraw a portion of the proceeds from its activities. Thus, it uses some of the funds confiscated to self-finance. According to the Code, "A proportion capped according to I of article 46 of the law n° 2011-1977 of 28th December 2011 of finance for 2012 confiscated sums managed by the agency" is integrated into the financial resources of the Agency[256]. Funds that have been definitively transferred to the State following a court decision are taken into account. Seizures are excluded because they remain the property of the persons from whom they were apprehended.

The AGRASC may also include in its resources a portion of the proceeds from the sale of confiscated property[257]. The Agency simply needs to intervene in the management or sale of these goods. However, the AGRASC cannot include in its resources the proceeds of the sale of the property where the law provides for their full restitution to the person from whom they have been seized. This is the case where property seized before a judgment is rendered. The funds are then held by the AGRASC with the obligation to return them in case of non-prosecution, acquittal or if the person is convicted but the confiscation was not ordered. In any event, the Agency cannot finance itself with proceeds from the sale of property seized in connection with drug offenses.

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[256] Art. 706-163, 3° CCP.
[257] Art. 706-163, 3° CCP.

4.2.4. *National practices on disposal of confiscated assets abroad and in execution of a confiscation order from another EU Member State*[258]

Orders for the confiscation of property issued by French courts. In order to obtain the execution of a confiscation order abroad, the Public Prosecutor's Office shall send the competent authorities of the State where the property to be confiscated is located a copy of the order which has become final, accompanied within the European Union by a certificate and outside the European Union by an international letter rogatory. According to Article 713-10 CCP: "Where the confiscation order relates to a sum of money and the competent authority of the administering State has substituted the confiscation of property for it, consent to the transfer of that property shall be given by the Minister of Justice";

Orders for confiscation of property issued by foreign courts. Reciprocally, the competent foreign authorities shall send the public prosecutor territorially competent in lieu of the property to be confiscated a copy of a final decision of the foreign court ordering confiscation, accompanied within the European Union by a certificate translated into French (Article 713-13 CCP) and outside the European Union by an international letter rogatory.

The criminal court seised by request of the public prosecutor examines whether this decision is compatible with French law and, unless there are grounds for refusal provided for by law (or possibly by the international convention), recognises and orders the execution of the confiscation on the territory of the Republic, which transfers ownership of this property to the French State. The proceeds of such confiscation may be shared between the French State and the sentencing State.

Article 706-160, paragraph 3, merely specifies that the AGRASC "may, under the same conditions, manage seized property, dispose of or destroy seized or confiscated property and distribute the proceeds of the sale in execution of any request for mutual assistance or cooperation from a foreign judicial authority".

Requests for confiscation from an EU State. Article 713-23 of the code of criminal procedure specifies that "Where the confiscation order relates to a sum of money expressed in foreign currency, the criminal court shall convert the amount to be confiscated into euros at the exchange rate in force on the date on which the confiscation order was is-

[258] Circulaire, 22nd December 2010 *relative à la présentation des dispositions spécifiques de la loi n° 2010-768 du 9 juillet 2010 visant à permettre l'exécution transfrontalière des confiscations en matière pénale* (art. 694-10 to 694-13 and 713 to 713-41 CCP) NOR: JUSD1033289 C.

sued". Article 713-24 of the Code of criminal procedure states that, while the criminal court may neither apply measures that would replace the confiscation order nor modify the nature of the confiscated property or the amount that is the subject of the confiscation order, the situation is different in four cases. First, where the person concerned is able to provide proof of confiscation, in whole or in part, in another State: the criminal court, after consultation with the competent authority of the issuing State, shall deduct in full from the amount to be confiscated in France any part already recovered in that other State pursuant to the confiscation order. Second, where the competent authority of the issuing State so agrees, the criminal court may order payment of a sum of money corresponding to the value of the property in lieu of its confiscation. Thirdly, where the confiscation order relates to a sum of money which cannot be recovered, the criminal court may order the confiscation of any other available property up to the amount of that sum of money. Fourthly, where the confiscation order relates to property which could not be confiscated in France in relation to the acts committed, the criminal court orders that it be executed within the limits laid down by French law for similar acts.

In addition, article 713-32 CCP stipulates that property other than sums of money confiscated pursuant to the confiscation order may be sold in accordance with the provisions of the Code of State Property. The sums of money recovered and the proceeds from the sale of confiscated property shall vest in the French State where the amount recovered is less than € 10,000, and shall vest half in the French State and half in the issuing State in other cases. The costs of executing the confiscation order shall not be set off against the amount payable to the issuing State. However, where high or exceptional costs have had to be incurred, detailed information on these costs may be communicated to the issuing State in order to obtain their sharing. Confiscated property which is not sold shall vest in the French State unless otherwise agreed with the issuing State.

Requests for confiscation from a non-EU Member State or from an EU Member State not subject to mutual recognition. Article 713-38 CCP specifies that the authorisation for enforcement from the criminal court may not have the effect of infringing rights lawfully constituted for the benefit of third parties, pursuant to French law, in respect of property the confiscation of which has been ordered by the foreign decision. However, if this decision contains provisions relating to the rights of third parties, it is binding on French courts unless the third parties have

not been able to assert their rights before the foreign court under conditions similar to those laid down by French law.

Article 713-40 of the Code of Criminal Procedure provides that the execution on the territory of the Republic of a confiscation order issued by a foreign court entails the transfer to the French State of ownership of the confiscated property, unless otherwise agreed with the requesting State. The property thus confiscated may be sold in accordance with the provisions of the State state property. The costs of executing the confiscation order shall be charged against the total amounts recovered. The sums of money recovered and the proceeds from the sale of confiscated property, after deduction of enforcement costs, shall vest in the French State where the amount is less than € 10,000 and shall vest half in the French State and half in the requesting State in other cases. If the foreign order provides for confiscation in value, the order authorising its enforcement makes the French State creditor of the obligation to pay the corresponding sum of money. The amount recovered, net of all costs, shall be shared in accordance with the rules presented above.

4.4. *Third-Party Confiscation*

Impact of the commencement of collective proceedings (Article 706-147 of the Code of Criminal Procedure)

In the event of collective proceedings being initiated, the provisions of Article L. 632-1 of the Commercial Code provide for the nullity of certain acts committed during the so-called "suspect period", i.e. after the date of cessation of payments, when this was postponed by the court of procedure, and in particular concern precautionary measures. This text has on several occasions been at the origin of the annulment of civil protective measures taken in the context of criminal proceedings and was a source of legal uncertainty for the magistrates responsible for conducting investigations.

For this reason, the law expressly provides that this provision is not applicable to criminal seizures ordered under Title XXIX of the CCP, the legal certainty of which will not be called into question in the event that a subsequent judgment postpones the date of cessation of payments. However, this option does not confer any privilege on the State's claim in connection with the liquidation and recovery of assets.

This derogation applies only to criminal seizures. However, protective measures intended to guarantee the State's claim as a fine or that of the victims as damages remain subject to the aforementioned provisions of the Commercial Code.

MARTIN BÖSE - VERA WEYER

GERMANY

SUMMARY: 1. Substantial Aspects on Confiscation. – 1.1. Criminal confiscation. – 1.2. Extended confiscation. – 1.3. Non-conviction based confiscation in the framework of criminal proceedings. – 1.4. Non-conviction based confiscation in criminal matters. – 1.5 Third-Party Confiscation. – 2. Procedural Aspects. – 2.1. Freezing. – 2.1.1. Procedures for the freezing of assets. – 2.1.2. Conditions for the imposition of a freezing order. – 2.1.3. Duration of the freezing order. – 2.1.4. Rights and legal remedies of the person addressed by a freezing order. – 2.1.5. Legal remedies against unlawful freezing orders. – 2.2. Freezing of third-parties' assets. – 2.3. Confiscation. – 2.3.1. Procedures for the confiscation of assets. – 2.3.2. Standard of proof for the imposition of a confiscation order. – 2.3.3. Time limits for the issuing of a confiscation order. – 2.3.4. Rights and legal remedies of the person addressed by a confiscation order. – 2.4. Third-party confiscation. – 3. Mutual Recognition Aspects. – 3.1. Freezing. – 3.1.1. National legal framework for the mutual recognition of freezing orders. – 3.1.2. Competent authorities for the execution of freezing orders from another EU member State. – 3.1.3. Grounds for non-recognition and non-execution. – 3.1.4. Grounds for postponement– 3.1.5 Time limits for the execution of freezing orders from another EU Member State. – 3.1.6 Rights and legal remedies of the person addressed by a freezing order from another EU Member State. – 3.2. Freezing of third-parties' assets. – 3.3. Confiscation. – 3.3.1. National legal framework for the mutual recognition of confiscation orders. – 3.3.2. Competent authorities for the execution of confiscation orders from another EU Member State. – 3.3.3. Grounds for non-recognition and non-execution. – 3.3.4. Grounds for postponement. – 3.3.5. Time limits for the execution of confiscation orders from another EU Member State. – 3.4. Third-party confiscation. – 4. Management and disposal aspects. – 4.1. Freezing. – 4.1.1. Competent authorities for the management of frozen assets. – 4.1.2. Power of the competent authorities on the frozen assets. – 4.1.3. Costs for the management or disposal of the frozen assets. – 4.1.4. Legal remedies against wrongful management of frozen assets. – 4.1.5. National practices on the management of frozen assets in execution of a freezing order from a different EU Member State. – 4.2. Freezing of third-parties' assets. – 4.3. Confiscation. – 4.3.1. Competent authorities for the disposal of confiscated assets. – 4.3.2. Modalities of disposal of confiscated assets. – 4.3.3. National practices on the management of confiscated assets in execution of a freezing order from a different EU Member State. – 4.4. Third-Party Confiscation.

1. *Substantial Aspects on Confiscation*

In German criminal law, confiscation is not a criminal penalty (*Strafe*), but classified as criminal "measure" (*Maßnahme*, section 11 No. 8 German Criminal Code, *Strafgesetzbuch* – StGB) that aims at depriving the offender of his or her illegal profits and objects generated by or used in its commission or preparation (*producta vel instrumenta sceleris*). However, due to the complexity of the German confiscation regime and its unclear relationship to victim compensation claims, criminal courts were reluctant in the past to order confiscation because the measure was considered to be an error-prone and resource-intensive instrument. To overcome these deficiencies, the legislator initiated a reform of the German confiscation regime that entered into force on 1 July 2017[1]. In its essence, the reform pursued five objectives, namely (1) to streamline the relationship to victim compensation and to abolish the exclusion of confiscation by the mere existence of victim compensation claims, (2) to enable criminal courts to postpone confiscation to a later stage of criminal proceedings (i.e. after final conviction), (3) to widen the scope of extended confiscation, (4) to establish a legal basis for non-conviction based confiscation of assets of unknown origin and (5) to transpose Directive 2014/42/EU into German law[2]. By the reform, the confiscation regime has undergone profound changes so that it must be carefully examined whether and to what extent the well-established case-law applies to the revised provisions. As the practical implementation of the new legislation is in the initial phase, many issues still need to be resolved[3].

1.1. *Criminal confiscation (Art. 4 para. 1 Directive 2014/42/EU; see also Art. 2 No. 2 Regulation (EU) 2018/1805)*

Criminal confiscation as defined by Article 4 para. 1 of the Directive is provided for by section 73 StGB), so-called "confiscation of criminal proceeds" (*Einziehung von Taterträgen*), and section 74 para. 1 StGB, so-

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[1] Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung of 13 April 2017, BGBl. I 2017, 872.

[2] Explanatory Memorandum, BT Drs 18/9525 2-3.

[3] For general information on the amendments to the confiscation system see F. Bittmann, "Vom Annex zur Säule: Vermögensabschöpfung als 3. Spur des Strafrechts", *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 2016, 131 ff.; M. Köhler, C. Burkhard, "Die Reform der strafrechtlichen Vermögensabschöpfung – Teil 1/2", *Neue Zeitschrift für Strafrecht*, 2017, 497 ff.; M. Köhler, C. Burkhard, "Die Reform der strafrechtlichen Vermögensabschöpfung – Teil 2/2", *Neue Zeitschrift für Strafrecht*, 2017, 665 ff; G. Trüg, "Die Reform der strafrechtlichen Vermögensabschöpfung", *Neue Juristische Wochenschrift*, 2017, 1913 ff.

called "confiscation of objects generated by or used in the commission or preparation of a crime" (*Einziehung von Tatprodukten und Tatmitteln*). Classified as criminal "measure" (*Maßnahme*, section 11 No. 8 StGB), it constitutes a criminal law instrument and requires a criminal conviction – either by judgment or penal order (*Strafbefehl*, see section 432 StPO).

Nevertheless, the legislator considers section 73 StGB not to be of penal, but of restitutive nature, arguing that – similar to the civil law concept of "unjust enrichment" (*ungerechtfertigte Bereicherung*, section 812 ff. of the German Civil Code, *Bürgerliches Gesetzbuch* – BGB) – it aims at reallocating assets ("*quasi-kondiktionelle Ausgleichsmaßnahme"*) only[4]. As a consequence, it neither forms part of the sentencing process nor is it subject to the principle of non-retroactivity (see below 1.4.)[5]. Scholars however claim that the introduction of the "gross principle" (*Bruttoprinzip*, see below in this section) in 1992 has turned confiscation into a criminal sanction because it goes beyond restoring the *status quo ante*[6]*:* According to the *Bruttoprinzip*, the perpetrator's expenses to generate the proceeds are not deducted from the amount subject to confiscation. Thus, the perpetrator might not only be deprived of his or her ill-gotten gains, but also of assets he or she owns legally. The German Constitutional Court (*Bundesverfassungsgericht*) yet hold in 2004 that the *Bruttoprinzip* was in line with the restitutive purpose of confiscation because it corresponded to the law of unjust enrichment[7]. According to section 817 sent. 2 BGB, the recipient may not demand restitution of any performance rendered in fulfilment of an obligation that violates a statutory prohibition. A district court (*Landgericht Kaiserslautern*) ruled that the amended provision constituted a penalty in the sense of Art. 7 of the ECHR[8]. However, only recently, the German Supreme Court (*Bundesgerichtshof*) explicitly confirmed the restitutive character of confiscation under the new regime[9].

In contrast, the confiscation of objects generated by or used for the commission of a crime (section 74 para. 1 StGB) is considered a punitive

[4] BT Drs 18/9525 48.

[5] BGH *Neue Juristische Wochenschrift*, 1995, 2235 f.; 2002, 2257, 2258 (regarding the former regime).

[6] See W. Joecks, "§ 73", in *Münchener Kommentar zum Strafgesetzbuch*, München: C.H. Beck, para. 4 ff.

[7] BVerfGE 110, 1, 21 ff.

[8] LG Kaiserslautern, *Zeitschrift für Wirtschafts- und Steuerstrafrecht (wistra)*, 2018, 139; see also S. Beukelmann, "Keine Rückwirkung der Einziehung", *Neue Juristische Wochenschrift-Spezial*, 2018, 56.

[9] BGH *Neue Zeitschrift für Strafrecht-Rechtsprechungs-Report*, 2018, 241. See also M. Heger, "§ 73", in K. Kühl, M. Heger, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 1.

sanction that requires personal guilt of the offender[10]. As a consequence, the confiscation forms part of the sentencing process, and, together with the main penalty (imprisonment or a fine), must not be disproportionate to the guilt of the perpetrator[11]. However, if the guilt of the offender cannot be established, the court may order the confiscation of objects (*producta vel instrumenta sceleris*) that pose a danger to the general public or are supposed to be used for the commission of a crime (§ 74b para. 1 lit. *b* StGB). Insofar, the confiscation shall not punish the offender, but prevent the commission of a crime and protect the general public. Accordingly, it is a preventive measure (*Sicherungseinziehung*)[12].

The confiscation regime distinguishes the confiscation of proceeds of crimes (section 73 StGB) and the confiscation of *producta vel instrumenta sceleris* (sections 74, 74b StGB). In any case, confiscation may be ordered for any crime, both felonies (*Verbrechen*, section 12 para. 1 StGB) and misdemeanours (*Vergehen*, section 12 para. 2 StGB).

The confiscation of proceeds (section 73 StGB) requires the commission of a crime (i.e. unlawful conduct, irrespective of whether personal guilt can be established) and an object that has been obtained through or for the committed offence (see below in this section). However, to avoid "double-confiscation", confiscation is excluded to the extent claims of the victim have been satisfied, section 73e para. 1 StGB[13]. Furthermore, confiscation must not be ordered against a *bona fide* third-party who no longer disposes of the proceeds or its value, section 73e para. 2 StGB (see below 1.5.). If the proceeds no longer form part of the perpetrator's assets or of those of a *male fide* third party, the court is only held to *suspend* the enforcement of a confiscation order (section 459g para. 5 sent. 1 German Criminal Procedure Code, *Strafprozessordnung* – StPO). The proceedings can be resumed if new facts come to light – for instance, proceeds that are discovered only after the order has been issued (section 459g para. 5 sent. 1 StPO)[14].

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[10] A. Eser, F. Schuster, "§ 74", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 2, 17; M. Heger, "§ 74", in K. Kühl, M. Heger, *Strafgesetzbuch: Kommentar*, C.H. Beck, München 2018, para. 1, 3.

[11] BGH *Neue Zeitschrift für Strafrecht-Rechtsprechungs-Report*, 1993, 400; *Neue Zeitschrift für Strafrecht*, 2019, 82; A. Eser, F. Schuster, "§ 74", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, paras 28-29.

[12] A. Eser, F. Schuster, "§ 74b", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 2.

[13] BT Drs 18/9525, 68; BGH *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 2019, 119.

[14] BT Drs 18/9525 57, 69, 94. Section 459g para. 5 StPO replaces the so-called "hardship clause" laid down in former section 73c para. 1 StGB, which stated that confiscation should not be *ordered* to the extent it would constitute an undue hardship for the person af-

According to the wording ("… the court shall order …"), the confiscation of proceeds is mandatory[15]. Nevertheless, the court may refrain – with consent of the prosecution service – from confiscation under the conditions laid down in section 421 para. 1 StPO, i.e. if the proceeds in question are deemed to be of minor value (No. 1), if confiscation is deemed insignificant in addition to the anticipated penalty or measure of reform and prevention (No. 2), or if the proceedings insofar as they relate to confiscation are considered to be disproportionate or to make a decision on the other legal consequences of the offence unreasonably difficult (No. 3).

The confiscation of *instrumenta vel product a sceleris* may be ordered if the criminal liability of the offender (including personal guilt) has been established[16]. Furthermore, the offender must own or have a right to the object to be confiscated (section 74 para. 3 sent. 1 StGB). In contrast, the preventive confiscation (*Sicherungseinziehung*) does not require personal guilt nor is it limited to the property of the offender (section 74b para. 1 No. 1 and 2 StGB). Confiscation is optional ("… the court may order …"). In exercising its discretion, the court has to comply with the principle of proportionality (section 74f StGB). The (punitive) confiscation (section 74 StGB) must not be disproportionate to the guilt of the offender (section 74f para. 1 sent. 1 StGB), and a preventive confiscation (section 74b StGB) shall be deferred if its purpose can be attained by less intrusive means such as instructions to modify or dispose of the objects in a certain manner (section 74f para. 1 sent. 2 and 3 StGB).

The rules on confiscation may be applied to proceeds of crime (section 73 StGB) and to *producta vel instrumenta sceleris* (sections 74, 74b StGB).

As far as the confiscation of proceeds is concerned, the court shall confiscate any object of economic value that has been obtained by the perpetrator through or for the commission of a crime (section 73 para. 1 StGB). The confiscation order shall extend to benefits derived from these objects as well as to surrogates, i.e. objects acquired by way of sale of the originally obtained object, as a replacement for its destruction, damage to or forcible loss of it or on the basis of a surrogate right (section 73 para. 2 and 3 StGB).

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fected. It is not clear whether the enforcement proceedings can only be resumed by a court or also by the enforcement authority (prosecution service), see C. Coen, "§ 459g", in J.-P. Graf, *Beck'scher Online-Kommentar StPO*, München: C.H. Beck, 2018, para. 19 f., 31.

[15] M. Heger, "§ 73", in K. Kühl, M. Heger, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 9; BGH *Neue Zeitschrift für Strafrecht*, 2019, 221.

[16] A. Eser, F. Schuster, "§ 74", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 2, 4; M. Heger, "§ 74", in K. Kühl, M. Heger, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 3.

In contrast to the former confiscation regime, the new legal basis is not limited to objects directly obtained "from" the commission of a crime (the illegal gain, i.e. the difference between profit and costs)[17], but covers any objects that has been (directly or indirectly) obtained "through" the illegal act (see also Art. 2 No. 1 Directive 2014/42/EU)[18]. This "object-based" confiscation system further develops the "gross approach" (*Bruttoprinzip*) and, referring to the civil law concept of "unjust enrichment" (section 817 BGB), establishes a two-step approach for the determination of the object to be confiscated: (1) The court has to determine (1) the object that has been directly or indirectly obtained through (or for) the illegal act (the crime), and (2) whether and to what extent expenses incurred by the offender shall be deducted from object (respectively its value) subject to confiscation (section 73d para. 1 sent. 1 StGB)[19]. The court, however, shall not deduct any expenses for the purpose of preparing or committing the crime (section 73d para. 1 sent. 2 StGB; see also section 817 sent. 2 BGB), for instance the expenses for purchasing drugs or the payment of bribes[20]. In contrast, regular costs related to the provision of services (where the contract has been acquired by corruption) must be taken into account[21].

Where, due to the nature of what has been obtained or for other reasons, a confiscation is impossible (e.g. saving of expenditure), the court shall order the confiscation of the obtained object's monetary value of the obtained objects (section 73c StGB – *Einziehung des Wertes von Taterträgen*). The value-based confiscation also applies if the confiscated object falls short of the value of what was originally obtained (section 73c sent. 2 StGB). As far as surrogates are concerned, the court may confiscate the object (section 73 para. 3 StGB) or its value (section 73c sent. 1 StGB)[22]. In case of value-confiscation, the court orders the confiscation of a sum of money that will be effectively enforced like a fine (*Geld-*

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[17] BGH *Neue Zeitschrift für Strafrecht*, 2010, 339 (341 – insider dealing).

[18] BT Drs 18/9525 55.

[19] BT Drs 18/9525 55-56.

[20] BT Drs 18/9525 55, 68; A. Eser, F. Schuster, "§ 73d", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 5.

[21] BT Drs 18/9525 55, 68; A. Eser, F. Schuster, "§ 73d", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 5; see also OLG Celle, Beschluss v. 18.12.2018 – 3 Ws 222/18. Likewise, costs that have been made, for instance, for the preservation of the proceeds are to be deducted. For more information, see T. Rönnau, M. Begemeier, "Grund und Grenzen der Bruttoeinziehung: Zur Gestaltung der Bruttoabschöpfung anlässlich der Reform der strafrechtlichen Vermögensabschöpfung", *Goltdammer's Archiv*, 2017, 1 ff. See also OLG Celle, Beschluss v. 18.12.2018 – 3 Ws 222/18.

[22] A. Eser, F. Schuster, "§ 73c", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 6.

strafe), though a default prison term is not possible[23]. Since the reform of 2017, the prosecution service is even competent (but not obliged) to file for insolvency proceedings if the offense has given rise to claims of more than one victim and the person concerned is unable to satisfy all of them, section 111j para. 2 StPO[24].

In theory, there is no minimum threshold for confiscation. However, according to section 421 para. 1 No. 1 StPO, the court may – with consent of the prosecution service – refrain from confiscation if the assets in question are of minor value. The applicable threshold varies between 50 €[25], 150 €[26] and 500 €[27]).

The confiscation of *product a vel instrumenta sceleris* (sections 74, 74b StGB) applies to any object generated by the commission of a criminal offence (e.g. falsified documents or counterfeit money) or used (or intended for use) in its commission (e.g. vehicles used for smuggling)[28]. If the offender has consumed or disposed of the object or otherwise obstructed its confiscation, the court may order the confiscation of the object's value (section 74c para. 1 StGB); the value may be estimated (section 74c para. 3 StGB). Like the confiscation according to section 74 StGB, the confiscation of the object's value is a punitive measure and requires personal guilt (at least negligent obstruction of the confiscation order)[29].

1.2. *Extended confiscation (Art. 5 para. 1 Directive 42/2014/EU; see also Art. 2 No. Regulation (EU) 2018/1805)*

The German criminal justice system has provided for extended confiscation since 1992 (section 73d StGB – *Erweiterter Verfall*)[30]. The re-

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[23] Sections § 459g Abs. 2 StPO, der §§ 459, 459a sowie 459c Abs. 1 und 2 StPO.

[24] For more details see M. Huber, "§ 111j", in J.-P. Graf, *Beck'scher Online-Kommentar StPO*, München: C.H. Beck, 2018, paras 17 ff. See also R.E. Köllner, V. Cyrus, J. Mück, "Referentenentwurf des BMJV zur Reform der strafrechtlichen Vermögensabschöpfung – Insolvenzverwalter als 'Staatsanwalt Nummer 2'?", *Neue Zeitschrift für Insolvenz- und Sanierungsrecht*, 2016, 329, 333 ff.

[25] M. Köhler, C. Burkhard, "Die Reform der strafrechtlichen Vermögensabschöpfung – Teil 2/2", *Neue Zeitschrift für Strafrecht*, 2017, 665, 675.

[26] H. Putzke, H. Scheinfeld, "§ 421", in C. Knauer, *Münchener Kommentar zur Strafprozessordnung*, München: C.H. Beck, 2019, para. 19.

[27] Information provided by the public prosecutor's office in Bonn (*Staatsanwaltschaft beim Landgericht Bonn*). According to the Federal Office of Justice (Bundesamt für Justiz, Ms. Natalia Spitz), the threshold varies considerably from state to state and may even amount to 1000 €.

[28] A. Eser, F. Schuster, "§ 74", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 7, 12.

[29] A. Eser, F. Schuster, "§ 74c", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 2, 6.

[30] Art. 1 No. 7 Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer

cent reform changed the terminology and numbering (section 73a StGB – *Erweiterte Einziehung von Taterträgen*), but adhered to the legal concept of a non-punitive measure, thereby sharing function and purpose of confiscation of proceeds of crime (section 73 StGB, see above 1.1.)[31].

In its former version, the scope of the provision (section 73d StGB) has been limited to an exhaustive list of offences linked to organized crime[32]. Since Directive 2014/42/EU does not provide for such a limitation, but requires the Member States to extend the scope of their corresponding national provisions to (more or less) any harmonized offence (Art. 5 para. 2, Art. 3 Directive 2014/42/EU), the German legislator abandoned the list-based approach and extended the scope of extended confiscation to any criminal offence[33].

Like criminal confiscation, extended confiscation presupposes the commission of a criminal offence, i.e. an unlawful conduct; personal guilt is not required (see above 1.1.)[34]. In contrast to criminal confiscation, extended confiscation allows for the confiscation of objects that have not been obtained through the crime the perpetrator has been charged with, but through or for any other crime he/she has committed (section 73a para. 1 StGB). Even though a link to the criminal offence under investigation is no longer necessary, the new provision does not allow for the confiscation of objects whose criminal origin have not been established. Prior to the recent reform, it was sufficient that the circumstances justify the assumption that the objects were acquired as a result of unlawful acts, or for the purpose of committing them (section 73d StGB former version), but according to the Federal Court of Justice and the Constitutional Court the provision had to be interpreted in conformity with constitutional guarantees (presumption of innocence, fundamental right to property); therefore, extended confiscation may only

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Erscheinungsformen der Organisierten Kriminalität (OrgKG) of 15 July 1992, BGBl. I 1992, 1302.

[31] BT Drs 12/989 23 (on the former provision), „variation of ordinary confiscation"(„*eigenständige Erscheinungsform des Verfalls*"); BT Drs 18/9525 48, 66 (on the new version). See also M. Heger, "§ 73a", in K. Kühl, M. Heger, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 3.

[32] F. Saliger, "§ 73d", in U. Kindhäuser, U. Neumann, H.U. Paeffgen, *Nomos Kommentar zum Strafgesetzbuch: Kommentar*, Baden-Baden: Nomos, 2017, para. 6.

[33] BT Drs 18/9525 65. It has been criticized that this extension is not in line with fundamental rights and/or principles, in particular with the right to property (Art. 14 para. 1 sent. 2 GG) and the proportionality principle, see T. Rönnau, M. Begemeier, "Die neue erweiterte Einziehung gem. § 73a Abs. 1 StGB-E: mit Kanonen auch auf Spatzen?", *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 2016, 260, 262.

[34] A. Eser, F. Schuster, "§ 73a", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 6; see also BT Drs 18/9525 48, 66.

be ordered if the court is intimately convinced that the object to be confiscated stems from another crime that has been "committed by its owner[35]. On the other hand, the requirements for the standard of proof must not be overstretched; in particular, the court is not obliged to determine the illegal conduct through which the perpetrator has obtained the object to be confiscated[36]. In the light of this case-law, the legislator adapted the legal basis for extended confiscation to the aforementioned constitutional guarantees (section 73a para. 1 StGB)[37]. In its assessment, the court has to weigh the circumstances of the case, in particular the findings of the criminal investigation on the crime on which the confiscation order shall be based, the circumstances under which the object has been seized, and the economic and personal situation of the offender (section 437 StPO; see below 2.3.2.)[38]. In particular, the court may rely on the fact that the value of the relevant object is disproportionate to the lawful income of the offender (see also Art. 5 para. 1 Directive 2014/42/EU)[39].

Extended confiscation (section 73a StGB) is subsidiary to criminal confiscation (section 73 StGB) and, thus, may only be ordered if a link between the offence the perpetrator is charged with and the objects to be confiscated cannot be established[40]. If the offence the proceeds originate from is time-barred (section 78 StGB), confiscation can only be based on section 76a para. 2 StGB (see below 1.4.)[41]. Like criminal confiscation, extended confiscation is mandatory ("… the court shall order …")[42]. The exceptions under section 421 StPO apply accordingly (see above 1.1.)[43].

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[35] BVerfG *Neue Juristische Wochenschrift*, 2004, 2073, 2078, referring to BGH *Neue Juristische Wochenschrift* 1995, 470.

[36] BGH *Neue Juristische Wochenschrift*, 1995, 470.

[37] BT Drs 18/9525 65 f.

[38] BT Drs 18/9525 66, explicitly referring to section 437 StPO.

[39] A. Eser, F. Schuster, "§ 73a", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 11; M. Heger, "§ 73a", in K. Kühl, M. Heger, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 8.

[40] M. Heger, "§ 73a", in K. Kühl, M. Heger, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 11; BGH *Neue Zeitschrift für Strafrecht-Rechtsprechungs-Report* , 2018, 380.

[41] M. Heger, "§ 73a", in K. Kühl, M. Heger, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 11.

[42] A. Eser, F. Schuster, "§ 73a", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 12; M. Heger, "§ 73a", in K. Kühl, M. Heger, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 10.

[43] A. Eser, F. Schuster, "§ 73a", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 12.

1.3. *Non-conviction based confiscation in the framework of criminal proceedings: in case of illness or absconding of the suspected person (Art. 4 para. 2 Directive 42/2014/EU; see also Art. 2 No. 2 Regulation (EU) 2018/1805)*

In section 76a paras. 1 to 3 StGB, German law allows for non-conviction based confiscation if no person can be prosecuted or convicted of the offence linked to the object to be confiscated. The provision applies in particular to cases where the offender is unable to stand trial or absconding from justice[44] and, thereby, implements Art. 4 para. 2 Directive 2014/42/EU[45]. The provision mainly refers to the requirements of criminal confiscation (and extended confiscation)[46], but does not constitute a different type of confiscation; it simply enables the court to order confiscation without the requirement of a criminal conviction[47]. Therefore, it is called "independent confiscation" (*selbständige Einziehung*).

The court may issue an independent confiscation order if the offender cannot be prosecuted or convicted, but the elements of criminal offence and the other requirements for confiscation have been established (section 76a para. 1 StGB).

As independent confiscation is not an autonomous type of confiscation, it basically refers to the standard types of criminal confiscation so that the substantive requirements for each confiscation measure apply accordingly (see above 1.1.). As a consequence, independent confiscation is not *per se* mandatory or facultative, but this, again, depends upon the type of confiscation: Whereas confiscation of proceeds (section 73 para. 1 StGB; see section 76a para. 1 sent. 1 StGB) is mandatory, the confiscation of *product a vel instrumenta sceleris* (section 74, 74b StGB) is facultative (section 76a para. 1 sent. 2 StGB; see also above 1.1.)[48]. Nevertheless, independent confiscation orders are issued upon request of the prosecution service (section 435 para. 1 StPO) which is at the discretion of the latter[49].

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[44] A. Eser, F. Schuster, "§ 76a", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 6.

[45] BT Drs 18/9525 72.

[46] M. Heger, "§ 76a", in K. Kühl, M. Heger, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 1a.

[47] A. Eser, F. Schuster, "§ 76a", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 1.

[48] A. Eser, F. Schuster, "§ 76a", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 4.

[49] D. Temming, "§ 435", in J.-P. Graf, *Beck'scher Online-Kommentar StPO*, München: C.H. Beck, 2018, para. 7.

1.4. *Non-conviction based confiscation in criminal matters: the cases of death of a person, immunity, prescription, cases where the perpetrator of an offence cannot be identified and other cases when a criminal court has decided that asset is the proceeds of crime (Art. 2 No. 2 and recital (13) Regulation (EU) 2018/1805)*

The scope of independent confiscation (see above 1.3.) is not limited to cases where the offender is unable to stand trial or absconding from justice, but applies to any other cases where prosecution and conviction is impossible (section 76a paras 1 to 3 StGB). In addition, the recently introduced confiscation regime provides for a legal basis for non-conviction based confiscation orders in cases where the offender of an offence cannot be identified and, thus, nit be convicted, i.e. "non-conviction based confiscation of proceeds of unknown origin" (*verurteilungsunabhängige Einziehung von Vermögenswerten unklarer Herkunft*, section 76a para. 4 StGB).

Whereas independent confiscation orders (section 76a paras. 1 to 3 StGB) share the legal qualification of the corresponding standard type of confiscation measures (see above 1.3.), the legal materials remain silent on the exact legal nature of section 76a para. 4 StGB. The explanatory memorandum only states that the measure constitutes an individual type of confiscation that adheres to the Italian concept of *misure di prevenzione* or the English model of civil confiscation[50]. Indeed, the new instrument seems to serve mainly preventive functions because it is supposed to target cash of unknown origin that has been found at airports or during drug controls of vehicles[51]. In any case, it represents a "hybrid scheme" because many features, such as the standard of proof (see below) or the *ad rem* character are more common for public law or civil law than traditional criminal (procedural) law[52].

As has been mentioned above (see above 1.3.), the court may issue an independent confiscation order if the offender cannot be prosecuted

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[50] BT Drs 18/9525 73 ("*eigenständiges Einziehungsinstrument*").

[51] BT Drs 18/9525 48. Section 76a para. 4 StGB is harshly criticised by scholars, see for instance H. Schilling, Y. Hübner, " 'Non-conviction-based confiscation' – Ein Fremdkörper im neuen Recht der strafrechtlichen Vermögensschöpfung?", *Strafverteidiger*, 2018, 49 ff.; D. Temming, "§ 437", in J.-P. Graf, *Beck'scher Online-Kommentar StPO*, München: C.H. Beck, 2018, para. 3; A. Burghart, "§ 437", in H. Satzger, W. Schluckebier, *Strafprozessordnung: Kommentar*, Köln: Carl Heymanns Verlag, 2018, para. 6. In favor, F. Meyer, "Die selbstständige Einziehung nach § 76a StGB-E, oder: Don't bring a knife to a gunfight", *Strafverteidiger*, 2017, 343.

[52] See F. Meyer, "Abschöpfung von Vermögen unklarer Herkunft", in *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 2018, 246 ff.

or convicted (section 76a para. 1 StGB). In contrast to the former version, the scope of the provision applies to factual and legal obstacles to prosecution (e.g. the *ne bis in idem* principle)[53]. In other words, the elements of a criminal offence have been established, yet the offender cannot be convicted because, for instance, he or she is unknown, has died, has absconded, is permanently unable to stand trial[54]. The court, however, must not issue an independent confiscation order if the prosecution of the crime requires a request of the victim or an authorization of a public entity that has not been filed (section 76a para. 1 sent. 3 StGB) or if the (potential) addressee of the confiscation order is protected by immunity under international law (sections 18, 19 Courts Constitution Act – *Gerichtsverfassungsgesetz* – GVG)[55].

Furthermore, confiscation of proceeds of crime (section 73 StGB) and its value (section 73c StGB) may be ordered independently if the prosecution of the crime is time-barred (section 76a para. 2 StGB); the same applies to the preventive confiscation of *product a vel instrumenta sceleris* (section 74b StGB). This derogation from the general rules of statutory limitation on prosecution (section 78 para. 1 StGB) has not been part of the reform proposal of the government[56], but has been brought up by the Parliament's Committee on Legal Affairs (*Ausschuss für Recht und Verbraucherschutz*) which argued that the amendment reinforced the restitutive purpose of confiscation of proceeds (section 73 StGB, see above 1.1.). Besides, with regard to extended confiscation, the perpetrator should no longer be able to avoid confiscation by claiming that prosecution of the offence through which the assets had been obtained was time-barred[57]. Therefore, the legislator provided for an autonomous limitation period of 30 years that applies to extended confiscation irrespective of whether or not prosecution of the offence is time-barred (section 76b para. 1 StGB)[58]. According to Art. 316h EGStGB, the new provisions apply to offenses which have been committed before the law entered into force. Referring to the alleged penal nature of con-

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[53] BT Drs 18/9525 72. Prior to the reform, the scope of the provision was limited to factual obstacles.

[54] BT Drs 18/9525 72; A. Eser, F. Schuster, "§ 76a", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 6.

[55] A. Eser, F. Schuster, "§ 76a", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 9.

[56] BT Drs 18/9525 72 f.

[57] BT Drs 18/11640 82.

[58] The period of 30 years aligns with the longest period of prescription under civil law (sections 197, 852 BGB), M. Heger, "§ 76b", in K. Kühl, M. Heger, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 2.

fiscation, it has been argued that this were in breach with the principle of non-retroactivity[59]. The Federal Court of Justice rejected this argument and held that the confiscation of proceeds, due to its restitutive nature, did not fall within the material scope of the principle *nulla poena sine lege praevia* (Art. 103 para. 2 *Basic Law, Grundgesetz* – GG)[60]. Only recently, however, the Court held that Art. 316h para. 1 EGStGB might not be in line with the general principle of non-retroactivity, applying to all statutes (so-called *Verbot der echten Rückwirkung*, Art. 20 para. 3)[61]. This is why it has referred the matter to the German Constitutional Court for decision (so-called *konkrete Normenkontrolle*, Art. 100 para. 1 GG). Nevertheless, as far as confiscation qualifies as punitive sanction (section 74 StGB), the general rules on statutory limitation applies (section 78 para. 1 StGB)[62].

Finally, the court may issue an independent confiscation order if criminal proceedings against the suspect have been closed under the rules of discretionary prosecution (sections 153 ff. StPO) or if the court has ordered a discharge (section 76a para. 3 StGB).

As independent confiscation is not an autonomous type of confiscation, it basically refers to the standard types of confiscation measures and the corresponding substantive requirements (see above 1.3.). As a consequence, it depends upon the respective type of measure whether independent confiscation is mandatory or facultative (see above 1.3.). Nevertheless, it is at the discretion of the public prosecutor whether or not file a request for independent confiscation (section 435 para. 1 StPO; see above 1.3.).

In contrast to independent confiscation orders (section 76a paras 1 to 3 StGB), the non-conviction based confiscation of proceeds of unknown origin (section 76a para. 4 StGB) has a scope that is limited to an exhaustive list of offences linked to terrorism and organized crime (section 76a para. 4 sent. 3 StGB)[63]. In particular, the list covers money laundering (section 261 StGB), participation in criminal or terrorist organisations (sections 129 and 129a StGB) and preparation and financing of terrorist offences (sections 89a, 89c StGB), human trafficking (§§ 232 ff.

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[59] See, for instance, F. Hennecke, "Ein Ende der Verjährung: Zur Verfassungsmäßigkeit des 'Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung' ", *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 2018, 121 ff.

[60] BGH *Neue Zeitschrift für Strafrecht-Rechtsprechungs-Report* , 2018, 241.

[61] BGH, Beschluss v. 7.3.2019 – 3 StR 192/18.

[62] A. Eser, F. Schuster, "§ 76a", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 7.

[63] BT Drs 18/9525 73.

StGB), serious tax fraud and smuggling (section 370 para. 3 No. 5 and section 373 Fiscal Code, *Abgabenordnung* – AO), smuggling of migrants (section 96 para. 2 and 97 Residence Act, *Aufenthaltsgesetz* – AufenthG), trafficking in drugs (section 29 para. 1 No. 1, para. 3 Narcotics Act, *Betäubungsmittelgesetz* – BtMG) and weapons (sections 19 ff. Military Weapons Control Act, *Kriegswaffenkontrollgesetz* – KrWaffKontrG, sections 51, 52 Weapons Act, *Waffengesetz* – WaffG).

Basically, the confiscation is subject to two conditions (section 76a para. 4 sent. 1 StGB): (1) The proceeds (1) must have been seized in the framework of criminal proceedings related to one of the catalogue offences mentioned above and (2) originate from a criminal offence (which is not necessarily a catalogue offence)[64]. Like extended confiscation (section 73a StGB, see above 1.2.), the confiscation of assets of unknown origin my not be ordered unless the court is fully convinced that they are proceeds of a criminal activity[65]. In its conviction, the court may rely on the fact that the value of the proceeds is grossly disproportionate to the legal income of the defendant (section 437 sent. 1 StPO). In this case, it is upon the defendant to prove the legal origin of the assets[66]. Scholars have criticized that such a rule was tantamount to a reversal of the burden of proof and, therefore, in breach with the presumption of innocence[67]. According to the legal materials, proceedings *ad rem* have not to comply with the strict rules on evidence in criminal proceedings, but, due to the preventive nature of the confiscation order, may be modified in analogy to civil court proceedings[68]. In any case, section 437 StPO does not affect the free evaluation of evidence by the court (section 261 StPO)[69]. To that end, the court may take into consideration: the findings of the criminal investigation, the circumstances under which the proceeds haven been seized, and the economic and personal situation of the defendant (section 437 sent. 2 no. 1 to 3 StPO).

If the aforementioned conditions are fulfilled, the court ought confiscate the proceeds even if the person affected by the seizure cannot be

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[64] BT Drs 18/9525 73.

[65] BT Drs 18/9525 73.

[66] BT Drs 18/9525 92.

[67] R.E. Köllner, J. Mück, "Reform der strafrechtlichen Vermögensabschöpfung", *Neue Zeitschrift für Insolvenz- und Sanierungsrecht*, 2017, 593, 598; see also H. Schilling, Y. Hübner, " 'Non-conviction-based confiscation' – Ein Fremdkörper im neuen Recht der strafrechtlichen Vermögensschöpfung?", *Strafverteidiger*, 2018, 49, 51 ff.

[68] BT Drs 18/9525 92; see also F. Meyer, "Abschöpfung von Vermögen unklarer Herkunft", in *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 2018, 246, 249.

[69] BT Drs 18/9525 92; BT Drs 18/11640 89.

convicted. The court is not obliged to, but supposed to confiscate the proceeds in question ("confiscation as a rule, not as an exception"). It may only refrain from confiscation where – based on the circumstances of the case – such an order would be incompatible with the proportionality principle, and the case-law of the European Court of Human Rights[70]. According to the legal materials, the provision is subsidiary to sections 73-73c, 76a para. 1-3 StGB.

1.5. *Third-Party Confiscation (Art. 6 Directive 2014/42/EU)*

Third-party confiscation as defined by Art. 6 of the Directive is provided for in section 73b StGB (*Einziehung von Taterträgen bei anderen*)[71]. Section 73b StGB does not constitute a different type of confiscation, but simply extends the scope of application of sections 73, 73a StGB whose scope is limited to the confiscation of assets held by the offender (*Einziehung von Taterträgen bei Tätern und Teilnehmern*)[72].

According to German law, the court may confiscate assets of third-parties acquired by representation or by transfer: In the first case, the perpetrator has acted for a third party, i.e. a natural or legal person other than the perpetrator or the accomplice and the represented person has acquired the object to be confiscated thereby (section 73b para. 1 sent. 1 No. 1 StGB)[73]. The objects are subject to confiscation if the perpetrator committed the offence on behalf of the third party and the latter has benefitted directly, i.e. without any further transaction, from the criminal conduct[74]. In the second case, the third party acquired the assets free of charge (section 73b para. 1 sent. 1 no. 2 lit. *a* StGB; see also Art. 6 para. 1 Directive 2014/42/EU), the third party knew or at least should have known (negligence) that the relevant assets originate from a criminal offence (section 73b para. 1 sent. 1 No. 2 lit. *b* StGB; see also Art. 6 para. 1 Directive 2014/42/EU) or if the third party has acquired the assets by inheritance or legacy (section 73b para. 1 sent. 1 No. 3 StGB). In the latter case, it is not required that the third party has inherited the proceeds from the perpetrator[75]. However, section 73b para. 2 No. 2 and 3 StGB

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[70] BT Drs 18/9525 73.

[71] A corresponding legal basis exists for the confiscation of *producta vel instrumenta sceleris* (section 74a StGB).

[72] T. Rönnau, *Die Vermögensabschöpfung in der Praxis*, München: C.H. Beck, 2015.

[73] BT Drs 18/9525 66.

[74] M. Heger, "§ 73b", in K. Kühl, M. Heger, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 2.

[75] L. Fleckenstein, *Die strafrechtliche Abschöpfung von Taterträgen bei Drittbegünstigten*, Berlin: Duncker & Humblot, 2017, 235.

do not apply if the assets have been previously acquired by a *bona fide* third-party so that the *bona fide* third party holds a legitimate claim on the proceeds (section 73b para. 1 sent. 2 StGB; see also Art. 6 para. 2 Directive 2014/42/EU)[76].

Like the standard types of confiscation of criminal proceeds (sections 73, 73a StGB), third-party confiscation applies to any crime, and its imposition is mandatory (see above 1.1. and 1.2.). The court shall only refrain from confiscation to the extent the proceeds are no longer part of the third party's assets and the party neither knew nor ought to have known at that time that the relevant property had been derived from criminal activity, section 73e para. 2 StGB.

Liable to confiscation is every object the third-party has acquired by representation or transfer (§ 73b para. 1 StGB) and benefits and surrogates the third party has acquired by transaction or inheritance (§ 73b para. 2 StGB) or surrogates of the objects acquired by the third party (section 73b para. 3 StGB).

2. *Procedural Aspects*

2.1. *Freezing*

2.1.1. *Procedures for the freezing of assets*

Freezing orders are provisional measures aiming at securing the confiscation of objects; the legal and procedural framework forms part of the rules on criminal investigations (sections 111b ff. StPO). The provisions distinguish between the freezing (seizure) of criminal proceeds – *Beschlagnahme* (section 111b StPO) – and the freezing of assets in order to secure value-confiscation – *Vermögensarrest* (section 111e StPO). In principle, a freezing order requires authorization by a criminal court (section 111j para. 1 sent. 1 StPO). However, in urgent cases (*Gefahr im Verzug*), the freezing order may be issued by the prosecution service or, if moveable assets are at stake, even by its agents (*Ermittlungspersonen der Staatsanwaltschaft*, section 152 GVG), e.g. by police or customs officers (section 111j para. 1 sent. 2, 3 StPO). If the prosecution service has seized immoveable property, it yet ought to apply for court confirmation of the order within one week (section 111j para. 2 StPO). However, its failure to do so does not impair the validity of the order because the per-

[76] BT Drs 18/9525 67, referring to BGHSt 45, 235, 247; see also M. Heger, "§ 73b", in K. Kühl, M. Heger, *Strafgesetzbuch: Kommentar*, München: C.H. Beck 2018, para. 5.

son concerned has the right to apply for a court decision at any time (section 111j para. 2 sent. 3 StPO, see below 2.1.4.)[77].

2.1.2. *Conditions for the imposition of a freezing order*

The court (or, if permitted, the public prosecution service or its agents) may order the seizure or the freezing of assets if there are grounds to believe that they are subject to confiscation (section 111b para. 1 sent. 1 and section 111e para. 1 sent. 1 StPO). The court ought to issue a freezing order if there are cogent reasons to believe that they are liable to confiscation (section 111b para. 1 sent. 2, section 111e para. 1 sent. 2 StPO); thus, the freezing order should be the rule rather than the exception[78]. In any case, assets may only be seized if there is a need to secure them (so-called *Sicherungsbedürfnis*), i.e. if they are at risk of being concealed, moved or dissipated[79]. The law does not oblige the court to decide upon a request for a freezing order within a specified time.

2.1.3. *Duration of the freezing order*

The law does not specify the duration of the measure. However, a freezing order must be revoked as soon as the proceeds no longer need to be secured[80]. As a matter of fact, the former provision – ex-section 111b para. 3 StPO – stipulated a maximum period of six months which could be – depending on the degree of suspicion – prolonged for another twelve months[1]. According to the legal materials, the legislator decided to abolish this system because it had turned out to be too cumbersome to work with in practice[82].

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[77] M. Huber, "§ 111j", in J.-P. Graf, *Beck'scher Online-Kommentar StPO*, München: C.H. Beck 2018, para. 5.

[78] See BT Drs 18/9525 75.

[79] BT Drs 18/9525 49, 75; OLG Hamburg *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 2019, 106. See also A. Burghart, "§ 111b", in H. Satzger, W. Schluckebier, *Strafprozessordnung: Kommentar*, Köln: Carl Heymanns Verlag, 2018 para. 9.

[80] BT Drs 18/9525 49, 75; see also OLG Frankfurt *StrafRechtsReport*, 2018, 15.

[81] Former section 111b para. 3 StPO read as follows: "If there are no cogent grounds, the court may revoke the order … after a maximum period of six months. Where certain facts substantiate the suspicion of the offence and the time limit referred to in the first sentence is not sufficient given the particular difficulty or particular extent of the investigations or for another important reason, the court may, upon application by the public prosecution office, extend the measure provided the grounds referred to justify their continuation. Unless there are cogent grounds, the measure shall not be continued for longer than a period of twelve months" (The translation has been taken from *The German Code of Criminal Procedure*, *https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0771*. For a

2.1.4. *Rights and legal remedies of the person addressed by a freezing order*

If proceeds are seized by the prosecution service or its agents, the person concerned may apply for a court decision at any time, section 111j para. 2 sent. 3 StPO (*Herbeiführung einer gerichtlichen Entscheidung*)[83]. In this case, the court will review the legality of the freezing order and its conformity with the proportionality principle in particular (see above 1.4.)[84]. Even though the law does not provide for a duty to inform the addressee of the freezing order of his/her right to apply for a court decision, such a duty is derived from an analogy to the corresponding rule on seizure of potential evidence (section 98 para. 2 sent. 5 StPO)[85].

The decision of the court (the freezing order or the decision on the motion lodged by the applicant) may be challenged by a complaint (*Beschwerde*, sections 304 ff. StPO). The decision on the complaint may be appealed again if the assets that have been seized (frozen) on the grounds of section 111e StPO, i.e. to secure value-confiscation, are worth more than 20,000 EUR (section 310 para. 1 No. 3 StPO)[86].

2.1.5. *Legal remedies against unlawful freezing orders*

If the accused has suffered (economic) damages caused by a freezing order and is acquitted of the relevant offense or criminal proceedings are terminated for other reasons, he or she may claim compensation based on section 2 of the Act for the Reparation for Damages Sustained by Prosecution (*Strafverfolgungsentschädigungsgesetz* – StrEG), regardless of whether or not the order was valid[87]. Nevertheless, the claim is excluded if the court has confiscated the assets, section 5 para. 1 No. 4 StrEG, or if the accused caused the seizure by intentional or grossly neg-

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detailed explanation, see B. Schmitt, "§ 111b", in L. Meyer-Goßner, B. Schmitt, *Strafprozessordnung: Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen*, München: C.H. Beck, 2016, para. 8.

[82] BT Drs 18/9525 49, 75.

[83] Section 111j para. 2 sent. 3 StPO applies even if the freezing order has already been executed, see F. Bittmann, "§ 111e", in *Münchener Kommentar zur Strafprozessordnung*, München: C.H. Beck, 2014, para. 17.

[84] See, with regard to the proportionality principle, BVerfG *Neue Juristsiche Wochenschrift*, 2005, *3630*; BVerfG *Neue Zeitschrift für Strafrecht*, 2006, 639; OLG Frankfurt *StrafRechtsReport*, 2018, 15; OLG Köln, Beschluss v. 26.11.2018 – 2 Ws 685/18.

[85] F. Bittmann, "§ 111e", in *Münchener Kommentar zur Strafprozessordnung*, München: C.H. Beck, 2014, para. 10.

[86] G. Cirener, "§ 310", in J.-P. Graf, *Beck'scher Online-Kommentar StPO*, München: C.H. Beck, 2018, para. 1 ff.

[87] T. Rönnau, *Die Vermögensabschöpfung in der Praxis*, München: C.H. Beck, 2015, 242.

ligent conduct (section 5 para. 2 StrEG)[88]. Furthermore, he or she may file an action based upon the "state liability claim" (*Staatshaftungsanspruch*) under section 839 BGB in connection with Article 34 GG[89]. According to Article 34 GG, the state is liable for intentional and negligent violation of professional duties of civil servants who have caused individual harm or damages. The claim must be lodged with a civil court[90].

2.2. *Freezing of third-parties' assets*

As far as substantive criminal law allows for confiscation of third parties' assets (see above 1.5.), the procedural rules on freezing orders apply accordingly to third parties[91].

As far as compensation claims are concerned, the scope of the StrEG is limited to accused persons and, thus, does not apply to third parties[92]. However, a third party may claim compensation based on the "state liability claim" (see above 2.1.5.). Furthermore, *bona fide* third parties may claim compensation for the damage caused by preventive confiscation of *product a vel instrumenta sceleris* (section 74b paras 2 and 3 StGB).

2.3. *Confiscation*

2.3.1. *Procedures for the confiscation of assets*

Confiscation proceedings form part of criminal proceedings and, thus, are governed by criminal procedural law (sections 421 ff. StPO). In general, the court will decide upon confiscation in its final judgement (i.e. conviction based confiscation). The court may also impose confiscation by penal order (*Strafbefehl*, section 407 para. 2 sent. 1 No. 1 StPO). The court, however, may postpone the decision on confiscation where a

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[88] See K. Cornelius, "§ 5 StrEG", in J.-P. Graf, *Beck'scher Online-Kommentar StPO*, München: C.H. Beck, 2018, para. 1 ff. If the requirements are fulfilled, the damages caused by the seizure will be reimbursed by the *Bundesland* whose court decided at first instance, section 15 StrEG.

[89] *Cf.* K. Cornelius, "§ 1 StrEG", in J.-P. Graf, *Beck'scher Online-Kommentar StPO*, München: C.H. Beck, 2018, para. 10.

[90] For more background information see T. Rönnau, *Die Vermögensabschöpfung in der Praxis*, München: C.H. Beck, 2015, 248 ff.

[91] F. Bittmann, "§ 111b", in *Münchener Kommentar zur Strafprozessordnung*, München: C.H. Beck, 2014, para. 2.

[92] T. Rönnau, *Die Vermögensabschöpfung in der Praxis*, München: C.H. Beck, 2015, 244.

joint decision on sentencing and confiscation would considerably delay a conviction and the determination of the sentence (section 422 StPO). As a rule, the court should decide upon confiscation within six months after the conviction has become final (section 423 para. 2 StPO)[93]. In any case, the court orders confiscation *ex officio*, without a request (e.g. of the public prosecutor) being necessary.

In contrast, independent confiscation and confiscation of proceeds of unknown origin (section 76a StGB) require a request of the prosecution service or the private prosecutor (section 435 StPO, see above 1.3.); it is within the discretion of the public prosecutor to make such a request[94]. Non-conviction based confiscation orders will be imposed by a criminal court in accordance with criminal procedural law.

2.3.2. *Standard of proof for the imposition of a confiscation order*

Ordinary confiscation, section 73 StGB, is subject to a high standard of proof: it must be proven beyond reasonable doubt that the relevant proceeds have been derived from the offense the perpetrator has been charged with[95]. Extended confiscation, section 73a StGB, lowers the burden of proof in relation to the illicit origin of the proceeds: The court must be intimately convinced that the assets stem from criminal conduct, yet no link to a particular criminal conduct needs to be established. In this regard, extended confiscation (section 73a StGB, see above 1.2.) and non-conviction based confiscation of proceeds of unknown origin (section 76a para. 4 StGB) are subject to a specific standard of proof (section 437 StPO): The court must be fully convinced of the illicit origin, yet may base confiscation on a balance of probabilities test; in particular, the court may rely on the fact that the value of the property is grossly disproportionate to the legal income of the affected person (section 437 sent. 1 StPO). In any case, section 437 StPO does not affect the free evaluation of evidence by the court (section 261 StPO). To that end, the court may draw upon the findings of the criminal investigation (section 437 sent. 2 no. 1 StPO), the circumstances under which the proceeds haven been seized (section 437 sent. 2 no. 2 StPO), and the economic and personal situation of the defendant (sec-

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[93] D. Temming, "§ 423", in J.-P. Graf, *Beck'scher Online-Kommentar StPO*, München: C.H. Beck, 2018, para. 4.

[94] D. Temming, "§ 435", in J.-P. Graf, *Beck'scher Online-Kommentar StPO*, München: C.H. Beck, 2018, para. 7.

[95] See T. Rönnau, *Die Vermögensabschöpfung in der Praxis*, München: C.H. Beck, 2015, 193 ff. The reason must also be stated in the judicial decision.

tion 437 sent. 2 no. 3 StPO). According to the legal materials, the standard of proof shall be similar to the standard applied in civil court proceedings (see above)[96].

2.3.3. *Time limits for the issuing of a confiscation order*

As the confiscation order usually forms part of the final judgement, German law does not provide for a time limit for issuing the confiscation order. A time-limit is only foreseen where confiscation proceedings have been separated from the main proceedings on the verdict and the punishment: According to a general rule (which is not strictly binding), the court should decide upon confiscation within six months after the conviction has become final (section 423 para. 2 StPO).

In independent confiscation proceedings, the competent court is not obliged to take a decision upon a request for independent confiscation proceedings within a certain time-limit, either. In this case, the request of the prosecution service has the same function as the indictment, and, the fundamental right to a trial "within reasonable time" (Art. 6 para. 1 ECHR) notwithstanding, there is no specified time-limit for the court to open main proceedings and to render its judgement.

2.3.4. *Rights and legal remedies of the person addressed by a confiscation order*

As far as the confiscation order is (or shall be) addressed to the defendant, the procedural rights and guarantees of the accused person apply (e.g. the privilege against self-incrimination, the right to consult with defence counsel, the right to be heard and to examine witnesses etc.).

As part of the conviction (see above 1.1.), confiscation can only be challenged on appeal on grounds of fact and law (*Berufung*, sections 312 ff. StPO) and/or on appeal on grounds of law (*Revision*, sections 333 ff. StPO)[97]. If confiscation has been imposed by penal order (*Strafbefehl*, sections 407 ff. StPO), the defendant can file an objection (*Einspruch*, sections 410 ff. StPO).

In separated (sections 422, 423 StPO) and independent confiscation proceedings (sections 435, 436 StPO, i.e. non-conviction based confisca-

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[96] BT Drs 18/9525 92; for a critical view see H. Schilling, Y. Hübner, " 'Non-conviction-based confiscation' – Ein Fremdkörper im neuen Recht der strafrechtlichen Vermögensschöpfung?", *Strafverteidiger*, 2018, 49, 54 ff.

[97] M. Meißner, M. Schütrumpf, *Vermögensabschöpfung*: *Praxisleitfaden zum neuem Recht*, München: C.H. Beck, 2018, para. 203.

tion, sections 76a StGB), the decision of the court will be rendered without a public hearing (section 423 paras 2, section 436 para. 2, section 434 paras. 2 StPO) and may be challenged by immediate complaint (*sofortige Beschwerde*, sections 311 StPO). Upon request of the parties or *ex officio*, the court may hold a trial; in this case, confiscation will be imposed by judgment that may be challenged either on appeal on grounds of fact and law or on appeal on grounds of law (section 423 para. 3, sections 436 para. 2, 434 para. 3 StPO).

2.4. *Third-party confiscation*

In case of third-party confiscation, the court shall order the person concerned to participate in (confiscation) proceedings (*Einziehungsbeteiligung*) unless the third party declares in writing that he does raise any objections to the confiscation of the relevant assets (section 424 para. 1 and 2 StPO). The court may abstain from such order where participation of the third party is not feasible or if the third party is a foreign organisation pursuing action directed against the existence or security of the German state or against its constitutional principles and if it is to be assumed that the organisation, or one of its agents, made the object available to promote such action; in the latter case, the affected person shall be heard (section 425 para. 1 and 2 StPO). If, before the court has order the participation, indications arise that a third party might be affected by the confiscation order and, thus required to participate in proceedings, this person shall be heard if this appears feasible; the provisions on interrogation of the defendant shall apply accordingly (section 426 StPO).

The third party required to participate (*Einziehungsbeteiligter*) has the same rights, guarantees and remedies as the accused person (section 427 para. 1 sent. 1 StPO). In particular, the third party has the right to consult with counsel (section 428 StPO), must be served with the indictment and notified of the date and place where the trial will be held (section 429 para. 1 StPO). The third party has a right to participate in the trial, but the court may conduct the hearing in the absence of the third party (section 430 para. 1 StPO). The third party has the right to file applications to take evidence, but this right is limited as far as evidence is related to the accused person's guilt (section 430 para. 2 StPO). In appellate proceedings, the review of the confiscation order shall extend to the verdict only if the third party was not heard concerning the question of guilt earlier in the proceedings or if the verdict has been appealed by the convicted person (section 431 para. 1, 2 StPO). The underlying rationale of these provisions is that the scope of the third party's rights is

limited to the decision on whether or not the (specific) conditions for third-party confiscation requirements are met[98].

A third party that is not formally addressed by the confiscation order (*Nebenbetroffene*), may be required to participate in proceedings if there are grounds to believe that the confiscation order will affect his or her rights (section 438 para. 1 StPO); in this case, the aforementioned rules apply accordingly (section 438 para. 1 sent. 2, para. 3 StPO). Under certain conditions, the court may order that the participation does not extend to the establishment of the defendant's guilt (section 438 para. 2 StPO).

3. *Mutual Recognition Aspects*

3.1. *Freezing*

3.1.1. *National legal framework for the mutual recognition of freezing orders*

The mutual recognition of freezing orders of another EU Member State is regulated in sections 94 ff. of the Act on International Cooperation in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen* – IRG)[99]. These rules modify the general provisions on mutual legal assistance and requests of another state to execute seizure and freezing orders (sections 66, 67 IRG), and thereby implement Framework Decision 2003/577/JHA into German law.

3.1.2. *Competent authorities for the execution of freezing orders from another EU member State*

In principle, international cooperation in criminal matters falls within the competence of the federal government (section 74 para. 1 IRG), the government may, however, delegated its competence to the

[98] H. Putzke, H. Scheinfeld, "§ 431", in C. Knauer, *Münchener Kommentar zur Strafprozessordnung*, München: C.H. Beck, 2019, para. 4.

[99] The translations of the IRG have been inspired by M. Bohlander, W. Schomburg, in W. Schomburg, O. Lagodny, S. Gleß, T. Hackner, eds., *Internationale Rechtshilfe in Strafsachen*: *International cooperation in criminal matters*, München: C.H. Beck, 2012, Act on International Cooperation in Criminal Matters, 581 ff. Since 2012, the provisions on mutual recognition of freezing and confiscation orders have remained largely unchanged. The IRG is accompanied by the "guidelines for international assistance in criminal matters" (*Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten* – RiVaSt) which are however only legally binding for judicial authorities, i.e. have no external effects.

federal states (*Bundesländer*, section 74 para. 2 IRG)[100]. The competence to grant requests for mutual legal assistance and for the execution of freezing orders in particular has usually been further delegated to the public prosecution services at the district courts (*Staatsanwaltschaft beim Landgericht*)[101]. The seizure of assets, however, requires an authorization of the local court in whose district the assets are located (section 94 para. 1 and section 67 para. 3 IRG). In urgent cases, the prosecution service or its agents (see above 2.1.1.) may seize the objects without a court order (section 94 para. 1 and section 67 para. 4 IRG).

3.1.3. *Grounds for non-recognition and non-execution*

The public prosecution service shall refuse the recognition and execution of a freezing order if one of the following grounds applies (mandatory grounds for refusal):

– The convicted person has already been finally tried for the same offence on which the request is based by another state than the requesting state provided that the sanction has already been enforced or can no longer be enforced under the law of the convicting state (section 94 para. 2 No. 2 IRG; see also Art. 8 para. 1 lit. *a* Regulation (EU) 2018/1805). This refusal ground shall, however, not apply if the request serves the preparation of a confiscation order and the confiscation could have been ordered separately under section 76a StGB (see above 1.3. and 1.4.). As a matter of fact, the provision is subject to several flaws: Section 94 para. 2 No. 2 IRG is supposed to implement Art. 7 para. 1 lit. *c* of Framework Decision 2003/577/JHA enabling Member States to refuse a request if

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[100] See the corresponding agreement between the federal government and the government of the federal states of 28 April 2004, in H. Grützner, P.-G. Pötz, C. Kreß, Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen, Heidelberg: C.F. Müller, I 3.

[101] M. Böse, "§ 94 IRG", in H. Grützner, P.-G. Pötz, C. Kreß, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para. 3; see e.g. the circular on the competences in international cooperation in criminal matters in the state of Northrhine-Westphalia of 16 December 2016 (*Ausübung der Befugnisse im Rechtshilfeverkehr mit dem Ausland in strafrechtlichen Angelegenheiten, Berichtspflichten und die Zusammenarbeit im Europäischen Justiziellen Netz sowie mit transnationalen Verbindungsstellen - Gemeinsamer Runderlass des Justizministeriums - 9350 - III. 19 -, des Ministeriums für Inneres und Kommunales - 424 - 57.01.48 - und des Finanzministeriums - S 1320 - 5 - V B 5/ S 770 - 4 - V A 1 - vom 16. Dezember 2016 - JMBl. NRW S. 16* - GRdE-RHSt), No. 1.1.2.1. Due to the federal structure of the German state, the rules on the delegation of this competence may vary from state to state.

judicial assistance would infringe the *ne bis in idem* principle[102]. As section 94 para. 2 No. 2 IRG does not yet specify the conditions under which the principle applies, the legislator referred to Art. 54 CISA denoting that the provision is to be interpreted in line with the case-law of the Court of Justice[103]. On the other hand, the legislator has taken the view that independent confiscation (section 76a StGB) is not barred by a final judgement in which the court did not render a decision on confiscation (section 421 StPO)[104]. In contrast, the decision not to order confiscation shall be final and, thus, must not be overruled by an independent confiscation order[105]. Scholars have criticized this understanding, due to its negative effect on legal certainty[106]. These concerns support a rather restrictive interpretation of the exception from the *ne bis in idem* principle in cross-border cooperation (section 92 para. 2 sent. 1 No. 2 sent. 2 IRG) as it must be doubted whether it is in line with the transnational effect of the *ne bis in idem* principle (Art. 50 CFR, Art. 54 CISA)[107].

– The object to be seized or frozen is subject to a ban on seizure aiming at the protection of professional secrecies (section 94 para. 2 sent. 1 No. 1 IRG, referring to section 97 StPO; see also Art. 7 para. 1 lit. *b* Framework Decision 2003/577/JHA; Art. 8 para. 1 lit. *b* Regulation (EU) 2018/1805).

– The freezing certificate is incomplete and does not contain the required information (section 95 para. 1 IRG; see also Art. 7 para. 1 lit. *a*

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[102] BT Drs 16/6563 16.

[103] BT Drs 16/6563 16 f.; see also S. Trautmann, "§ 94 IRG", in W. Schomburg, O. Lagodny, S. Gleß, T. Hackner, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H. Beck, 2012, para. 9; L. Wörner, "§ 94 IRG", in K. Ambos, S. König, P. Rackow, *Rechtshilferecht in Strafsachen*, Baden-Baden: Nomos, 2015, para. 537.

[104] BT Drs 18/9525 57, 72.

[105] BT Drs 18/9525 72.

[106] A. Eser, F. Schuster, "§ 76a", in A. Schönke, H. Schröder, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para. 6.

[107] See M. Böse, "§ 94 IRG", in H. Grützner, P.-G. Pötz, C. Kreß, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para. 12 f; see also on this subject M. Böse, "Die transnationale Geltung des Grundsatzes ne bis in idem", in C. Momsen, T. Grützner, *Wirtschaftsstrafrecht: Handbuch für die Unternehmens- und Anwaltspraxis*, München: C.H. Beck 2013; T. Rönnau, " 'Doppelabschöpfung' im Strafverfahren – staatliches Unrecht? – Nachdenken über die Grenzen zulässiger Vermögensentziehung bei grenzüberschreitenden Sachverhalten", in W. Hassemer, *In dubio pro libertate: Festschrift für Klaus Volk zum 65. Geburtstag*, München: C.H. Beck, 2009, 583 ff.; M. Rübenstahl, H. Schilling, "Doppelter Verfall? – Zur Frage mehrfacher Vermögensabschöpfung bei Straftaten mit Auslandsbezug", *Höchstrichterliche Rechtsprechung im Strafrecht*, 2008, 492.

Framework Decision 2003/577/JHA; Art. 8 para. 1 lit. *c* Regulation (EU) 2018/1805): the name and address of the issuing judicial authority (No. 1), the description of the assets (No. 2) and the suspect (No. 3), the reasons for the freezing order (No. 4) and a description of offence and its legal assessment (No. 5 and 6). However, before the request is refused, the competent authority may set a deadline for submission, completion or correction (section 95 para. 2 IRG). Furthermore, it may not insist upon submission of a complete certificate if the relevant information can be gathered from the freezing order, section 95 para. 2 IRG[108].

– The offence on which the freezing order is based is not or – *mutatis mutandis* – would not constitute a crime or a regulator offence (*Ordnungswidrigkeit*) under German law (double criminality, section 66 para. 2 No. 1, section 67 para. 2 IRG and section 94 para. 1 IRG). However, double criminality shall not need to be established if the offence on which the request is based is under the law of the requesting State punishable by imprisonment of a maximum term of no less than three years and is a list offence (section 94 para. 1 No. 1 IRG and Art. 3 para. 2 Council Framework Decision 2003/577/JHA; see also Art. 7 para. 1 lit. *d* Framework Decision 2003/577/JHA; Art. 8 para. 1 lit. *e* and Art. 3 Regulation (EU) 2018/1805). Furthermore, the double criminality requirement shall not hinder the execution of the freezing order for the sole reason that German law does not provide for equivalent taxes or duties or does not contain similar tax, duties, customs or currency provisions as the law of the issuing Member State (section 94 para. 1 No. 2 IRG; see also Art. 8 para. 1 lit. *e* Regulation (EU) 2018/1805).

– The execution of the order would violate the European *ordre public* (section 73 sent. 2 IRG; see also Art. 8 para. 1 lit. *f* Regulation (EU) 2018/1805), for example, if the seizure would be incompatible with the proportionality principle[109].

So far, there is not much case-law on the refusal grounds mentioned above. In one case, the execution of a freezing was rejected because the double criminality requirement was not met[110]. In another case, the freez-

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[108] Nevertheless, the request may always be granted on the basis of other mutual legal assistance instruments, for instance the European Convention on Mutual Assistance in Criminal Matters, M. Böse, "§ 95 IRG", in H. Grützner, P.-G. Pötz, C. Kreß, Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen, Heidelberg: C.F. Müller, para. 4.

[109] M. Böse, "§ 94 IRG", in H. Grützner, P.-G. Pötz, C. Kreß, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para. 14.

[110] OLG Nürnberg *Strafverteidiger*, 2013, 104 f.

ing certificate was incomplete and did not allow for an assessment whether the conditions for recognition and execution of the order (the double criminality requirement in particular) were fulfilled[111]. There are no official statistics on the execution of freezing orders; in this regard, the roughly 100 cases per year reported by the police may serve as a baseline[112].

3.1.4. *Grounds for postponement*

The public prosecution service may postpone the execution of a freezing order as long as its execution might damage an ongoing criminal investigation (section 94 para. 3 No. 1 IRG; see also Art. 8 para. 1 lit. *a* Framework Decision 2003/577/JHA; Art. 10 para. 1 lit. *a* Regulation (EU) 2018/1805) or the property or evidence concerned have already been subjected to a freezing order in criminal proceedings conducted by domestic authorities or authorities of a third state (section 94 para. 3 No. 2 IRG; see also Art. 8 para. 1 lit. *b* and c Framework Decision 2003/577/JHA; Art. Art. 10 para. 1 lit. *b* and c Regulation (EU) 2018/1805). In the latter case, the request shall be executed as soon as the previous order has been lifted[113]. The decision is at the discretion of the competent authority[114].

3.1.5. *Time limits for the execution of freezing orders from another EU Member State*

German law does not specify a time limit for the execution of a freezing order. Nevertheless, the order shall be executed expeditiously[115], if possible, within 24 hours[116].

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111 OLG Dresden *Neue Zeitschrift für Strafrecht-Rechtsprechungs-Report*, 2011, 146 f.

112 According to the Federal Office of Justice (*Bundesamt für Justiz*, Ms. Natalia Spitz), number of cases decreased from 107 (2016) over 100 (2017) to 77 (2018); these cases, however, must be interpreted carefully because they do not include freezing orders not initiated by the police (eg the freezing of real estates).

113 BT Drs 16/6563 17.

114 M. Böse, "§ 94 IRG", in H. Grützner, P.-G. Pötz, C. Kreß, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para. 15.

115 BT Drs 16/6563 11.

116 M. Böse, "§ 96 IRG", in H. Grützner, P.-G. Pötz, C. Kreß, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para. 1; L. Wörner, "§ 96 IRG", in K. Ambos, S. König, P. Rackow, *Rechtshilferecht in Strafsachen*, Baden-Baden: Nomos, 2015, para. 549.

3.1.6. *Rights and legal remedies of the person addressed by a freezing order from another EU Member State*

As a rule, the execution of a freezing order requires court authorization (see above 1.-2.). The addressee has the right to challenge the court order and lodge a complaint (*Beschwerde* – section 77 IRG and sections 304 ff. StPO (see above 2.1.4.). If court authorization is not required, the person concerned may apply for a decision of the court (section 77 IRG and section 111j para. 2 sent. 3 StPO; see above 2.1.4.). In principle, the legal remedies correspond to the remedies against domestic freezing orders, but the court will not review whether the order is in line with the domestic law of the issuing Member State, in particular, whether the freezing order is based on reasonable suspicion[117]. Instead, the court will assess whether the public prosecutor may execute respectively must refuse the freezing order. The court's assessment is limited to the mandatory grounds for refusal (section 94 para. 1 and 2, section 95, section 73 sent. 2 IRG) because, according to the prevailing opinion, the individual is not entitled to invoke optional refusal grounds where only public interests are at stake (section 94 para. 3 IRG)[118]. If the appellate court (i.e. the district court – *Landgericht*) is of the view that the requirements for executing the freezing order are not fulfilled, it refers the case to the Higher Regional Court (*Oberlandesgericht* – section 61 para. 1 sent. 1 IRG)[119]. This provision shall ensure a uniform interpretation of the refusal grounds. In addition, the person concerned may directly file an application to the Higher Regional Court to rule on the transfer of seized objects and frozen assets to the issuing state (section 61 para. 1 sent. 2 IRG).

3.2. *Freezing of third-parties' assets*

The legal and procedural framework of cross-border execution of freezing orders applies irrespective of whether the freezing order is ad-

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[117] M. Böse, "§ 94 IRG", in H. Grützner, P.-G. Pötz, C. Kreß, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para. 3.

[118] See M. Böse, "§ 94 IRG", in H. Grützner, P.-G. Pötz, C. Kreß, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para. 3.

[119] OLG Dresden *Neue Zeitschrift für Strafrecht-Rechtsprechungs-Report*, 2011, 146 f.; M. Böse, "§ 94 IRG", in H. Grützner, P.-G. Pötz, C. Kreß, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para. 3.

dressed to defendants or third parties. Any person claiming that his/her rights were infringed by the confiscation order, has a right to challenge the decision to execute the freezing order (see above 2.1.4.; see also section 61 para. 1 sent. 2 IRG). Therefore, the foregoing explanations apply accordingly.

3.3. *Confiscation*

3.3.1. *National legal framework for the mutual recognition of confiscation orders*

The rules on the mutual recognition of confiscation orders are laid down in sections 88 ff. IRG that modify the general provisions on the enforcement of foreign sentences (sections 48 ff. IRG) and implement framework Decision 2006/783/JHA into German law.

3.3.2. *Competent authorities for the execution of confiscation orders from another EU Member State*

The competent authority is the public prosecution service in whose jurisdiction confiscation would take place (section 88d para. 1 sent. 1, sections 50, 51 IRG).

The procedure on the recognition and execution of a confiscation order is scheduled in two stages (section 88d IRG): First, the prosecution service will take a preliminary decision on whether the execution of the order is admissible (i.e. whether it complies with section 88a IRG and no mandatory grounds for refusal apply), and whether or not an optional ground for refusal (section 88c IRG, see below 3.3.3.) should be invoked. If the prosecution service intends to execute the confiscation order and not to invoke a ground for refusal, it will forward a reasoned decision to the court (section 88d para. 1 IRG). The court will then review the decision of the prosecution service and, if it finds that the execution is admissible and that the prosecution service has exercised its discretion on the optional refusal grounds correctly, will declare the foreign order enforceable (section 88d para. 3 sent. 1 IRG).

3.3.4. *Grounds for non-recognition and non-execution*

The public prosecution service shall refuse the recognition and execution of a freezing order if one of the following grounds applies (mandatory grounds for refusal)[120]:

[120] T. Hackner, "§ 88a IRG", in W. Schomburg, O. Lagodny, S. Gleß, T. Hackner, *In-*

– The convicted person has already been finally tried for the same offense on which the request is based on by another Member State than the requesting Member State, provided that the sanction has already been enforced, is currently being enforced or can no longer be enforced under the law of the convicting state (*ne bis in idem* – Art. 50 CFR, Art. 54 CISA), unless confiscation could have been ordered separately inder section 76a StGB (section 88a para. 2 No. 3 IRG; see also Art. 8 para. 2 lit. *a* Framework Decision 2006/783/JHA; Art. 19 para. 1 lit. *a* Regulation (EU) 2018/1805). This ground for refusal corresponds to section 94 para. 2 No. 2 IRG and from the same shortcomings (see above 3.1.3.)[121].

– The confiscation order has been issued in criminal proceedings in respect of criminal offences which have been committed on German territory (section 3 StGB) or on a German ship or aircraft (section 4 StGB) and is not punishable under German law (section 88a para. 2 No. 1 IRG; see also Art. 8 para. 2 lit. *f* Framework Decision 2006/783/JHA; Art. 19 para. 1 lit. *d* Regulation (EU) 2018/1805).

– The offence on which the confiscation order is based is not or – *mutatis mutandis* – would not constitute a crime under German law (double criminality, section 88a para. 1 No. 2 IRG). However, double criminality shall not need to be established if the offence on which the request is, based is under the law of the requesting State, punishable by imprisonment of a maximum term of no less than three years and is a list offence (section 88a para. 1 No. 2 lit. *a* IRG and Art. 6 para. 1 Framework Decision 2006/783/JHA; see also Art. 19 para. 1 lit. *f* and Art. 3 Regulation (EU) 2018/1805). Furthermore, the double criminality requirement shall not hinder the execution of the freezing order for the sole reason that German law does not provide for equivalent taxes or duties or does not contain similar tax, duties, customs or currency provisions as the law of the issuing Member State (section 88a para. 1 No. 2 lit. *b* IRG; Art. 8 para. 2 lit. *b* Framework Decision 2006/783/JHA; Art. 19 para. 1 lit. *f* Regulation (EU) 2018/1805).

– The confiscation order has been rendered in the absence of the person concerned (section 88a para. 2 No. 2 IRG; see also Art. 8 para. 2 lit. *e* Framework Decision 2006/783/JHA; Art. 19 para. 1 lit. *g* Regulation (EU) 2018/1805). This ground for refusal does not apply if the person was summoned in person and was thereby informed of the sched-

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ternationale Rechtshilfe in Strafsachen: International cooperation in criminal matters, München: C.H. Beck, 2012, para. 11.

[121] T. Hackner, "§ 88a IRG", in W. Schomburg, O. Lagodny, S. Gleß, T. Hackner, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H. Beck, 2012 para. 14.

uled date and place of trial and of the consequences of the failure to appear at the trial (section 88a para. 3 No. 1 IRG), the person was aware of the criminal investigation, but absconded from justice (section 88a para. 3 No. 2 IRG), the person had given a mandate to a lawyer to defend him/her at the trial and the person was actually defended by that lawyer (section 88a para. 3 No. 3 IRG), or the person waived his/her right to a retrial or did not apply for a retrial within the applicable time-limits (section 88a para. 4 IRG)[122].

– The execution of the order would violate the European *ordre public* (section 88 sent. 2 in conjunction with section 73 sent. 2 IRG; see also Art. 19 para. 1 lit. *h* Regulation (EU) 2018/1805)[123].

– The enforcement is statute-barred under German law unless confiscation could have been ordered separately under section 76a para. 2 StGB (section 88a para. 2 No. 4 IRG; see also Art. 8 para. 2 lit. *h* Framework Decision 2006/783/JHA)[124].

– The confiscation order could not have been issued under German law (section 88a para. 2 No. 2 IRG; see also Art. 8 para. 2 lit. *g* Framework Decision 2006/783/JHA). Germany has also – in accordance with Art 7 para. 5 of Framework Decision 2006/783/JHA – notified that its competent authorities will not recognize and execute confiscation orders under circumstances where confiscation of the property was ordered under the extended powers of confiscation referred to in Article 2 lit. *d* No. iv of the Framework Decision and an order of this type could not have been adopted under German law[125].

The prosecution service has discretion whether or not to grant the request in the following cases (optional refusal grounds)[126]:

– The certificate provided for in Article 4 of Framework Decision 2006/783/JHA is not produced, is incomplete, or manifestly does not correspond to the order (section 88c No. 1 IRG; see also Art. 8 para. 1 Framework Decision 2006/783/JHA; Art. 19 para. 1 lit. *c* Regulation

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[122] Section 88a para. 2 No. 2, paras 3, 4 IRG are supposed to implement Framework Decision 2009/299/JI.

[123] BT 16/12320 35. T. Hackner, "§ 88a IRG", in W. Schomburg, O. Lagodny, S. Gleß, T. Hackner, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H. Beck, 2012, para. 11.

[124] T. Hackner, "§ 88a IRG", in W. Schomburg, O. Lagodny, S. Gleß, T. Hackner, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: Beck, 2012, para. 15.

[125] Council document 17509/10.

[126] T. Hackner, "§ 88c IRG", in W. Schomburg, O. Lagodny, S. Gleß, T. Hackner, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H. Beck, 2012, para. 1.

(EU) 2018/1805). The issuing state must, however, at first be given an opportunity to correct or to complete the request (sections 88c No. 1, 88b para. 2 IRG)[127].

– The confiscation order has been issued in criminal proceedings in respect of a criminal offence which was committed on German territory or on a German ship or aircraft (section 88c No. 2 IRG). In contrast to the mandatory refusal ground (section 88a para. 2 No. 1 IRG), the optional refusal ground is not combined with the double criminality requirement (see also Art. 8 para. 2 lit. *f* Framework Decision 2006/783/JHA).

– The confiscation order has been issued in criminal proceedings in respect of a criminal offence which was neither committed on German territory nor committed on the territory of the requesting state, and German criminal law does not apply or the act is not an offense under German law (section 88c No. 3 IRG; see also Art. 8 para. 2 lit. *f* Framework Decision 2006/783/JHA).

– The assets are subject to a German confiscation order and for reasons of public interest the enforcement of the German order is to be given precedence (section 88c No. 4 IRG; see also Art. 11 Framework Decision 2006/783/JHA; Art. 21 para. 1 lit. *c* Regulation (EU) 2018/1805). As illustrated by the term "public", individual interests are not to be taken into account[128].

– A third state has ordered the confiscation of the same assets and requested for the enforcement of the order and for reasons of public interest the enforcement of the third state's order is to be given precedence (section 88c No. 5 IRG; see also Art. 11 Framework Decision 2006/783/JHA; Art. 26 Regulation (EU) 2018/1805). The third state does not have to be an EU-Member State[129].

So far, almost no cases have been published on the application of the aforementioned refusal grounds. In one case, the execution of a confiscation order was rejected because the order did not specify the offence so that the court could not assess whether the double criminality requirement was met[130].

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[127] T. Hackner, "§ 88c IRG", in W. Schomburg, O. Lagodny, S. Gleß, T. Hackner, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H. Beck, 2012, para. 2.

[128] T. Hackner, "§ 88c IRG", in W. Schomburg, O. Lagodny, S. Gleß, T. Hackner, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H. Beck, 2012, para. 5.

[129] T. Hackner, "§ 88c IRG", in W. Schomburg, O. Lagodny, S. Gleß, T. Hackner, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H. Beck, 2012, para. 7.

[130] OLG Hamm, Decision of 25 April 2013 – III-2 Ws 83/13 –, juris, para. 32 f.

3.3.4. *Grounds for postponement*

The prosecution service may postpone the execution of the confiscation order as long as there are grounds to believe that the confiscation order is simultaneously executed in another Member State (section 88d para. 2 No. 1 IRG; see also Art. 10 para. 1 lit. *a* Framework Decision 2006/783/JHA; Art. 21 para. 1 lit. *b* Regulation (EU) 2018/1805) or as long as it could jeopardise ongoing criminal or enforcement proceedings (section 88b para. 2 No. 2 IRG; see also Art. 10 para. 1 lit. *c* Framework Decision 2006/783/JHA; Art. 21 para. 1 lit. *a* Regulation (EU) 2018/1805).

3.3.5. *Time limits for the execution of confiscation orders from another EU Member State*

No time limits are specified for the duration of the postponement, nor does German law provide for a time-limit for the decision on the recognition and execution of the confiscation order. There are no official statistics on the duration of proceedings, and due to the delegation of competences to the judicial authorities of the states, the practical implementation may vary considerably. As far as the cooperation with non-Member States is concerned, MLA proceedings usually requires six months or more[131].

3.3.6. *Rights and legal remedies of the person addressed by a confiscation order from another EU member State*

Before the public prosecution service applies for a court decision on the execution of the confiscation order (see above 2.1.2.), the convicted person shall be heard (section 88d sent. 1 IRG). If the court decides that the confiscation order is recognized and enforced under German law, the convicted person has the right to challenge the decision by lodging an immediate complaint (*sofortige Beschwerde*, section 311 StPO) within one week after notification of the court decision (section 88d para. 3 sent. 1 and section 55 para. 2 IRG).

3.4. *Third-party confiscation*

The legal and procedural framework of cross-border execution of confiscation orders does not distinguish between confiscation and third-

[131] Information provided by the Federal Office of Justice (Bundesamt für Justiz, Ms. Natalia Spitz).

party confiscation, but but applies to both types of orders. As a consequence, the convicted person or any other person claiming that his/her rights were infringed by the confiscation order (third party), has a right to challenge the decision to execute the freezing order (see above 3.1.6.; see also section 88d sent. 1 f with regard to the right to be heard). Therefore, the foregoing explanations on the recognition of confiscation order (see above 3.) apply accordingly.

4. *Management and disposal aspects*

4.1. *Freezing*

4.1.1. *Competent authorities for the management of frozen assets*

In general, the prosecution service is responsible for the management of frozen assets, section 111m StPO. Nevertheless, it is entitled to assign this task to other authorities i.e. to its agents (section 152 GVG, see above 2.1.1.), the bailiff (*Gerichtsvollzieher*) or even to private institutions, for instance, if immoveable assets must be managed[132]. In general, the management is undertaken by the registrar (*Rechtspfleger*), Section 31 para. 1 No. 4 Registrar Act (*Rechtspflegergesetz* – RPflG).

4.1.2. *Power of the competent authorities on the frozen assets*

The freezing of assets has the effect of prohibition of disposal (*Veräußerungsverbot*, section 111d para. 1 sent. 2 StPO in conjunction with 136 BGB), which means that any disposal/transfer of the assets is void[133]. The prohibition of disposal does even apply if the person addressed by the freezing order becomes insolvent (section 111d para. 2 StPO). Nevertheless, the assets may be handed back to the person addressed by the order against immediate payment (section 111d para. 2 sent. 1 StPO) or even be retained by the person concerned, subject to revocation at any time, for further use in the interim until termination of proceedings (section 111d para. 2 sent. 3 StPO)[134]. Furthermore, if the

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[132] BT Drs 18/9525 83.

[133] Section 136 BGB reads as follows: "A prohibition of disposal which is issued by a court or by any other public authority within the limits of its competence is equivalent to a statutory prohibition of disposal of the kind described in section 135". Section 135 para. 1 BGB states that "[i]f the disposition of a thing violates a statutory prohibition against disposal intended solely for the protection of particular persons, the disposition is ineffective only in relation to these persons".

[134] Translation inspired by *The German Code of Criminal Procedure*, *https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0771*.

assets are subject to depletion or to a significant loss of value (this case especially relates to cars), or if their preservation, care or maintenance would result in disproportionately high costs or difficulties, the assets may be sold by public auction (the provisions of the Civil Procedure Code (*Zivilprozessordnung* – ZPO) on the sale at public auctions – sections 814 ff. ZPO – apply *mutatis mutandis*, section 111p para. 4 sent. 3 StPO), so-called "emergency sale" (*Notveräußerung*), section 111p para. 1 StPO. An emergency sale can only be ordered by the prosecution service or – in urgent cases – by its agents. Prior to the order, the person concerned ought to be heard and informed about time and place of the sale (section 111p para. 3 StPO), even though a failure to comply does not impair the validity of the order[135]. The person concerned may apply for a court decision which can be appealed by complaint (see above 2.1.4.). In this case, the court can suspend the sale (section 111p para. 5 StPO).

4.1.3. *Costs for the management or disposal of the frozen assets*

In general, the costs of asset management are borne by the state. However, if the person addressed by the order is (eventually) convicted, he or she will have to bear the costs insofar as they have been caused by the trial (see section 465 para. 1 StPO)[136]. As the management aims at maintaining the asset's value[137] rather than earning profits, the use of such earnings is not regulated by law.

4.1.4. *Legal remedies against wrongful management of frozen assets*

Apart from section 2 StrEG and/or the state liability claim (see above 2.1.5.), the person affected might claim damages for breach of duty (based on sections 280 ff. BGB applying *mutatis mutandis*) because the freezing of assets creates rights and duties between the state and the person affected – so-called *öffentlich-rechtliches Verwahrungsverhältnis* – that corresponds to a contract[138]. Similar to the state liability claim, dam-

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[135] F. Bittmann, "§ 111l", in *Münchener Kommentar zur Strafprozessordnung*, München: C.H. Beck, 2014, para. 3.

[136] The costs of asset management constitute "costs of the proceedings" in the sense of section 464a StPO, B. Schmitt, "§ 111b", in L. Meyer-Goßner, B. Schmitt, *Strafprozessordnung: Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen*, München: C.H. Beck, 2018 para. 16.

[137] M. Huber, "§ 111m", in J.-P. Graf, *Beck'scher Online-Kommentar StPO*, München: C.H. Beck, 2018, para. 2.

[138] S. Detterbeck, *Allgemeines Verwaltungsrecht*, München: C.H. Beck, 2018, para. 1272. The provisions on the „safekeeping contract" (*Verwahrungsvertrag*), sections 688 ff. BGB apply *mutatis in mutandis*.

ages will only be awarded if a civil servant has intentionally or negligently violated a professional duty towards the person concerned. The claim must be lodged with a civil court as well, see section 40 para. 2 sent. 1 of the Act on Administrative Court Proceedings (*Verwaltungsgerichtsordnung* – VwGO).

4.1.5. *National practices on the management of frozen assets in execution of a freezing order from a different EU Member State*

There is no information about practices on the management of assets located abroad, nor are there any specific rules on the management of assets in the framework of cross-border cooperation. In this regard, the rules on domestic criminal proceedings apply accordingly (section 77 para. 1 IRG and section 111m StPO). In addition, the reimbursement of costs from the issuing Member State may be waived (section 75 IRG).

4.2. *Freezing of third-parties' assets*

The rules on asset management and disposal apply irrespective whether the freezing order has been addressed to the defendant or a third party. As there are no peculiarities, the foregoing explanations apply accordingly.

4.3. *Confiscation*

4.3.1. *Competent authorities for the disposal of confiscated assets*

Confiscated assets will be disposed of by the prosecution service, sections 451 StPO, 63 ff. StVollstrO[139]. The assets will be sold, either by public auction (see above .) or privately, section 63 paras 1, 3 StVollstrO. However, assets (once) belonging to the victim of the offense must be returned to him or her pursuant to section 459h StPO. Potential victims must be informed (even by public announcement) as soon as possible after the order has become final, see section 459i StPO[140]. Having been informed of the confiscation, the victim will have a period of six months of

[139] In general, this task is undertaken by the registrar.

[140] Section 459h StPO distinguishes between three forms of victim's assets, i.e. assets that are still owned by the victim, assets whose ownership has been transferred to the state pursuant to section 75 para. 1 StGB and proceeds replacing the original assets. Apart from implementing the Directive, strengthening the position of the victim in confiscation proceedings has been one of the main motives for the profound amendment of the confiscation system, see BT Drs 18/9525 54. For more details on section 459i, see C. Coen, "§ 459i", in J.-P. Graf, *Beck'scher Online-Kommentar StPO*, München: C.H. Beck, 2018, para. 1 ff.

receipt to claim his or her property or the respective share of the proceeds, see sections 459j para. 1, 459k para. 1 StPO.

4.3.2. *Modalities of disposal of confiscated assets*

The proceeds generated by disposal of confiscated assets do not have to be used for a particular purpose: If assets are confiscated, their ownership passes to the federal state whose court ruled at first instance, sections 75 para. 1 sent. 1 StGB, 60 StVollstrO, thereby flowing into the general treasury, so-called *Justizfiskus*.

4.3.3. *National practices on the management of confiscated assets in execution of a freezing order from a different EU Member State*

As has been explained with regard to freezing orders (see above 4.1.5.), there is no information about practices on the management of assets located abroad, nor are there any specific rules on the management of assets in the framework of cross-border cooperation. The only exceptions are the provisions on disposal and asset sharing (sections 56b, 88f IRG) and costs (section 57a, 75 IRG; see above 4.1.3.).

The competent authority may enter into an ad hoc agreement with issuing Member State about the disposal, return or distribution of the assets resulting from the enforcement of the confiscation order for confiscation if reciprocity is assured (sections 56b para. 1, 88f IRG), without prejudice to the law on the protection of the German cultural heritage (section 56b para. 2 IRG). In the absence of such agreement, half of the revenue from the enforcement of the confiscation order request shall be assigned to the issuing Member States if – without deduction of costs and compensation – its value exceeds 10,000 EUR (section 88f IRG). The costs of enforcement shall be borne by the convicted person (section 57a IRG)[141].

4.4. *Third-Party Confiscation*

The rules on asset management and disposal apply irrespective whether the confiscation order has been addressed to the defendant or a third party. Therefore, the foregoing explanations apply accordingly (see above 3.), except for the provision on the costs of the execution (section 57a IRG).

[141] BT Drs 16/12320 28.

FRANCESCO DIAMANTI - ELEONORA ANNA ALEXANDRA DEI CAS - SAMUEL BOLIS

ITALY[1]

SUMMARY: 1. Aspects of substantive criminal law on confiscations. – 1.1. Criminal confiscation [and criminal confiscation covered by the Directive 42/2014/EU and by COM(2016) 819 final]. – 1.2. Extended confiscation. – 1.3. Other types of confiscation. – 1.4. Third party confiscation. – 2. Aspects of criminal procedural law. – 2.1. Introduction: seizures in the Italian penal system. – 2.1.1. Evidentiary seizure. – 2.1.2. Conservative seizure. – 2.1.3. Preventive seizure. – 2.1.4. Seizure "for prevention" envisaged by the "Anti-Mafia Code". – 2.1.5. The process for challenging seizures and the absence of a procedural remedy in the case of an injunction found to be unjustified. – 2.2. Procedural aspects of confiscations: judge competent to order mandatory or optional confiscation. – 2.2.1. Non-conviction-based confiscation. – 2.2.2. Rights and guarantees. – 2.2.3. Evidentiary standard required for confiscation. – 2.2.4. The remedies. – 2.3. Seizure and confiscation of assets belonging to third parties. – 2.3.1. The remedies available to third parties in case of seizure or confiscation. – 3. Mutual recognition aspects. – 3.1. The legal framework for the mutual recognition of seizure orders. – 3.1.1. The authorities responsible for proceeding with the enforcement of the seizure request. – 3.1.2. Reasons for not recognising or for postponing the enforcement of the freeze and seizure order. – 3.1.3. The challenge process and the protection of third parties. – 3.2. The legal framework for the mutual recognition of confiscation orders. – 3.2.1. The authorities responsible for proceeding with the enforcement of the confiscation request. – 3.2.2. Reasons for not recognising or for postponing the enforcement of the confiscation order. – 3.2.3. The challenge process and the protection of third parties. – 4. Management and disposal aspects. – 4.1. The custody and dynamic management of assets subject to preventive seizure. – 4.1.1. The Single Justice Fund. – 4.1.2. The actors of the administration. – 4.1.2.1. The judicial custodian. – 4.1.2.2. The National Agency for the management and administration of assets seized and confiscated during the seizure phase. – 4.1.2.3. The judicial administrator. – 4.2. Management and allocation of confiscated assets. – 4.2.1. The social allocation of confiscated assets. – 4.2.2. The National Agency for the management and administration of assets seized and confiscated during the confiscation phase. – 4.2.3. Criteria for the distribution of confiscated assets to beneficiaries. – 4.2.4. Special hypotheses regarding the assignment of confiscated assets to police forces. – 4.3. The protection of third parties. – 4.4. The management and administration of assets located abroad. – 4.5. Statistics.

1. *Aspects of substantive criminal law on confiscations*

1.1. *Criminal confiscation [and criminal confiscation covered by the Directive 42/2014/EU and by COM(2016) 819 final]*

The issue of the substantive profiles of confiscation has been quite clear, at least throughout the early twentieth century: a provision (Article 240 of the Italian Penal Code), and a legal framework. However, starting in the second half of the last century, a large number of legislative interventions transformed a linear regulation into a disorganised conglomerate with a high risk of regulatory overlap[2]. So much so, that the indica-

[1] Par. 1 written by Dr. Francesco Diamanti (University of Ferrara - University of Modena and Reggio Emilia); par. 2 written by Dr. Eleonora A.A. Dei Cas (University of Modena and Reggio Emilia); par. 3 and 4 written by Dr. Samuel Bolis (University of Ferrara).

[2] The most evident case – even if not the only one – is that of the direct or by equivalent confiscation of the assets constituting the profit or the product of the crime of computer fraud (Article 640-*ter* of the Italian Penal Code): this is currently regulated, if committed to the detriment of the State or another public body, by both art. 640-*quater* and art. 240 par. 2 no. 1-*bis*, as recently amended by Legislative Decree no. 202/2016, implementing Directive 42/2014/EU (for the first authoritative comment, see the italian leading expert in the field of confiscation 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", in *Dir. pen. cont. - Riv. trim.*, 1/2015, 300 et seq.). The Italian bibliography on confiscations is massive, for recent manuals see G. Fiandaca, E. Musco, *Diritto penale. Parte generale*, 8. ed., Turin: Zanichelli, 2019, 898 et seq, 932 et seq.; F. Palazzo, *Corso di diritto penale. Parte generale*, 6. ed., Turin: Giappichelli, 2018, 561 et seq., 632 et seq.; S. Canestrari, L. Cornacchia, G. De Simone, *Manuale di diritto penale*, 2. ed., Bologna: Il Mulino, 2017, 967 et seq. and 978 et seq.; D. Pulitanò, *Diritto penale*, 7. ed., Turin: Giappichelli, 2017, 508 et seq.; A. Manna, *Corso di diritto penale*, 4. ed., Padua: Giappichelli, 2017, 712 et seq.; G. Marinucci, E. Dolcini, G.L. Gatta, *Manuale di diritto penale. Parte generale*, 7. ed., Milan: Giuffrè, 2018, 808 et seq. (810 et seq., see also the *schema* on page 826); and for a safety measures general in-depth analysis, see A. Cadoppi, P. Veneziani, *Elementi di diritto penale. Parte generale*, 7. ed., Padua: Cedam, 2018, 599 et seq. On the issue of confiscations, in addition to the important works by G. Vassalli, "La confisca dei beni. Storia recente e profili dommatici", Padua: Cedam, 1951 and Alessandri A., "Confisca nel diritto penale", in *Digesto delle discipline penalistiche*, III, Turin, 1989, 39 et seq.; M. Romano, G. Grasso, T. Padovani, *Commentario sistematico del Codice penale*, III, Art. 150-240, Milan: Giuffrè, 2011, *sub* Art. 240, 604 et seq.; see also L. Baron, "Il ruolo della confisca nel contrasto alla c.d. criminalità dei profitto: uno sguardo d'insieme", in *Dir. pen. cont. - Riv. trim.*, 2018, 37 ss., which defines the confiscation in Italy «strutturalmente polimorfa, finalisticamente elastica e dogmaticamente ambigua» (the translation (not simple) could be the following: «structurally polymorphous, elastic in purpose and dogmatically ambiguous») see *Ibidem*, 45; M. Donini, "Per una concezione post-riparatoria della pena. Contro la pena come raddoppio del male", in *Riv. it. dir. proc. pen*., 2013, 1162 et seq. (spec. § 3 on the topic of confiscation by equivalent and victim protection); Various Authors, *Le sanzioni patrimoniali come moderno strumento di lotta contro il crimine: reciproco riconoscimento e prospettive di armonizzazione*, A.M. Maugeri (eds.), Milan: Giuffrè, 2008 and therein also the contribution by A.M. Maugeri, "I modelli di sanzione patrimoniale nel diritto comparato", in Various Authors (eds.), *Le sanzioni patrimoniali*, cit., 7 et seq.; Id., *Le moderne sanzioni patrimoniali tra funzionalità e garantismo*, Milan: Giuffrè, 2001; Id., "La riforma

tion of the issue in the singular, "confiscation", no longer serves any practical purpose within our system: it is necessary to use the plural form, *confiscations*[3]. For this reason, it seems more appropriate to follow the framework below.

We will first conduct a brief analysis of traditional confiscation pursuant to art. 240 of the Italian Penal Code. We will then highlight the problems that, over the course of the years, have led to the inclusion of the exorbitant number of confiscations now present within the Italian legal system.

The following discussion will consider the changes made by Italian Legislative Decree no. 202 of October 29, 2016, implementing Directive 2014/42/EU, which, incidentally, has persevered in this error by inserting additional specific scenarios relating to confiscation, and has therefore missed a great opportunity to streamline the overall framework. Before starting the summary of the Italian model, a very recent decision of the

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delle sanzioni patrimoniali: verso un'actio in rem?", in O. MAZZA, F. VIGANÒ (eds.), *Misure urgenti in materia di sicurezza pubblica*, Turin: Giappichelli, 2008, 135 et seq.; ID., "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", in *Dir. pen. cont. - Riv. trim.*, 1/2015, 300 et seq.; ID., "La confisca per equivalente. *ex* art. 322-*ter* - tra obblighi di interpretazione conforme ed esigenze di razionalizzazione", in *Riv. it. dir. proc. pen.*, 2011, 791 et seq.; VARIOUS AUTHORS, *Sequestro e confisca*, Turin: Giappichelli, 2017; F. MAZZACUVA, "Confisca per equivalente come sanzione penale: verso un nuovo statuto garantistico, nota a Cass. pen., sez. III, 24 settembre 2008, n. 39172", in *Cass. pen.*, 9, 2009, 3420 et seq.; C.E. PALIERO, F. MUCCIARELLI, "Le Sezioni Unite e il profitto confiscabile: forzature semantiche e distorsioni ermeneutiche. Ancora a proposito di Cass., sez. un. pen., 30 gennaio 2014 (dep. 5 marzo 2014), n. 10561, Pres. Santacroce, Rel. Davigo, Imp. Gubert" in *Dir. pen. cont. - Riv. trim.*, 4/2015; MANES V., "L'ultimo imperativo della politica criminale: 'nullum crimen sine confiscatione'", in *Riv. it. dir. proc. pen.*, 2015, 1259 et seq.; ID., "La confisca senza condanna al crocevia tra Roma e Strasburgo: il nodo della presunzione di innocenza", in *Dir. pen. cont.*, 13.4.2015; P. VENEZIANI, "La confisca obbligatoria nel settore penale tributario", in VARIOUS AUTHORS, *Studi in onore di Mario Ronco*, E.M. AMBROSETTI (ed.), Turin: Giappichelli, 2017, 665 et seq. For technical reconstruction of the main problems of confiscation, see F. MENDITTO, *Le confisca di prevenzione e penale. La tutela dei terzi*, Milan: Giuffrè, 2015; and the new «Confiscation Code» VARIOUS AUTHORS, *Codice delle confische*, T. EPIDENDIO, G. VARRASO (eds.), Milan: Giuffrè, 2018, *passim* (and 103 et seq. for the analysis of general profiles). For contributions in English, see also: R. FLOR, M. PANZAVOLTA, "A necessary Evil?, The Italian "non-Criminal System" of Asset Forfeiture", in RUI, SIEBER (eds.), *Non-Conviction-Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction*, Freiburg i. Br.: Duncker& Humbolt, 2015, 211 et seq.; and on the preventive confiscation in Italy, see F. MAZZACUVA, "The problematic nature of confiscation measures: recent developments of the Italian preventive confiscation", in LIGETI, SIMONATO (eds.), *Chasing criminal money in the EU: new tools and practices?*, Oxford-Portland: Hart, 2017, 101 et seq.

[3] See Italian Const. Court. n. 29/1961, n. 46/1964, and Sez. Un., n. 26654/2008, in CED 239926. On this topic see T. EPIDENDIO, *La confisca nel diritto penale e nel sistema delle responsabilita degli enti*, Padua: Cedam, 2011; E. NICOSIA, *La confisca. Le confische*, Turin: Giappichelli, 2012.

Italian Constitutional Court, by which the Court seems to have introduced the proportion test in confiscation, must be highlighted[4].

Most of the problems inherent to the issue of confiscation arise from the numerous and varied limitations that have always been found in the application of art. 240 of the Italian Penal Code, so-called "traditional confiscation".

The text of the aforementioned article states that:

"*In the case of conviction, the judge can order the confiscation of the items that served or were used to commit the crime, and the items that constituted the product or the profit thereof.*

Confiscation is always ordered:

1) for the items that constitute the price of the crime;

2) for the items whose manufacture, use, carrying, possession, or disposal constitutes a crime, even if no conviction has been issued.

The provisions of the first part and of point no. 1 of the preceding paragraph do not apply if the item belongs to a person unrelated to the crime. The provision of point no. 2 does not apply if the item belongs to a person unrelated to the crime, and if the manufacture, use, carrying, possession, or disposal of the same can be permitted by administrative authorisation".

This definition was extended by art. 2 of Italian Legislative Decree no. 202 of 29 October 2016, implementing Directive 2014/42/EU, with point no. 1-*bis*, which introduces a new scenario of mandatory, direct confiscation of the assets that constitute the profit or product of computer crimes, or confiscation by equivalent if the former is not possible[5].

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[4] Constitutional Court No. 122/2019, declared the constitutional illegitimary of Article 187-*sexies* of the Consolidated Law of Finance (already amended by the Italian Legislative Decree No. 107/2019). It was a case of insider dealing: a person had acquired shares in a listed campany of wich he was a shareholder and director, on the basis of the possession of privileged information relating to the imminent launch of a voluntary and total tokeaer bid for that company, provided by another company setup ad hoc and of which he was a shareholder. The purchase price of the shares was about 123,175 euro, the realizable value was 149,760 euro: this meant that the (illegal) profit was about 26,580 euro. For these facts, CONSOB (National Commission fo Companies and the Stock Exchange) had imposed a fine at 200,000 euro and the confiscation of real estate up to amount of 149,760 euro, equal to the value of the shares purchased through the conduct described above. In the view of the Italian Constitutional Court, such a solution is not in line with the principle of proportionability. Although some problems shill remain, this is a very important decision for the Italian legal system and, specifically, for the correct understanding of the proper functioning of confiscation.

[5] For example: articles 615-*ter* (*Unauthorised access to an IT system*), 615-*quater* (*Unlawful possession and dissemination of access codes for computerised or telematics systems*), 615-*quinquies* (*Dissemination of equipment, devices or computer programs aimed at damaging*

To summarise, therefore, art. 240 of the Italian Penal Code requires:

– in the case of conviction, the confiscation of the items that "… served or were used to commit the crime, and the items that constituted the product or the profit thereof". Items that are, essentially, either dangerous in and of themselves, or of illegal origin.

– the mandatory confiscation of the "price of the crime", the assets and the IT or telematics tools that have been used to commit numerous computer crimes, and "the items whose manufacture, use, carrying, possession, or disposal constitutes a crime, even if no conviction has been issued".

As stated in the beginning, over time this type of confiscation has proven to be rather unsuitable for dealing with the evolution of the types of crime that are unfortunately typical of the Italian state (especially Mafia type crimes).

Several problems had already arisen in the early 1980s, among them:

a. the institution, in both the optional and mandatory forms, presupposes a pertinent link between the asset and the case in point;

b. the power to issue a confiscation order, apart from an alleged crime, is subject to the issuance of a conviction;

c. the express provision of the inapplicability of the measure if the item belongs to a person unrelated to the crime complicates the removal of assets formally belonging to third parties unrelated to the crime through fictitious transfers and ownership, even if they subsequently remained fully available to the convicted person.

Such problems were enough for the Italian legislature to go beyond adding various types of confiscation, and to create a new "strategy" for combating crime using patrimonial measures, consisting in the provision of what have come to be known as confiscations "of prevention"[6] (or

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or interrupting computerised or telematics systems), 617-*bis* (*Installation of equipment designed to intercept, impede or interrupt telegraph or telephone communications*), 617-*ter* (*Falsification, alteration or suppression of communications content or telegraphic or telephone conversations*), 617-*quater* (*Unlawful interception, impediment or interruption of computerised or telematics communications*), 617-*quinquies* (*Installation of equipment designed to intercept, impede or interrupt computerised or telematics communications*).

[6] E. GALLO, "Misure di prevenzione", in *Enc. giur. Treccani*, XX, 1996, 1 et seq.; G. FIANDACA, "Misure di prevenzione (profili sostanziali)", in *Dig. disc. pen*., VIII, Turin, 1994, 108 et seq.; L. FILIPPI, "La confisca di prevenzione: un'anomalia tutta italiana", in *Dir. pen. e proc*., 3, 2005, 270 et seq.; F. MENDITTO, *Le misure di prevenzione personali e patrimoniali*, Milan: Giuffrè, 2001; in english, among other, see A. MANNA, "Measures of Prevention: dogmatic-Exegetic Aspects and Prospects of Reform", in *European Journal of Crime, Criminal Law and Criminal Justice*, 5/3, 1997, 248 et seq.; F. MAZZACUVA, "The problematic nature of confiscation measures", cit., 103 et seq.

ante delictum, Italian Law no. 646/1982, the so-called Rognoni-La Torre Law), which were mainly intended as a tool for combating the Mafia. To better understand the extent of the problem, it should be noted that in Italy, to date, the *National Agency for the administration and allocation of assets seized and confiscated from organised crime*[7] – recently (and partially) reformed by art. Decree No. 113/2018, the so-called "Decreto Salvini"[8] – is administering 18,270 properties (14,099 already allocated), and 3025 companies (927 already allocated). In 2017 (the latest available data), there were 2411 properties and 7 companies allocated[9].

Following a considerable series of legislative changes that cannot be fully summarised here, these are now embodied within the so-called "*Anti-Mafia Code*", Italian Legislative Decree no. 159 of 6 September 2011[10], which has recently been amended (also) by Italian Law 1 December 2018 no. 132[11].

The application requirements fall into two categories: "objective" and "subjective".

The first requirement (subjective) is that the person intended to be subjected to this measure must fall within the types of "dangerous subjects" outlined by the Italian legislature:

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[7] The "*National Agency for the administration and allocation of assets seized and confiscated from organised crime*" was established by Italian Decree-Law no. 4 of 4 February 2010, converted into law, with amendments, by Italian Law no. 50 of 31 March 2010, which has now been implemented by Italian Legislative Decree No. 159 of 6 September 2011 (the Anti-Mafia Code). The Agency is a body with legal personality under public law, vested with organisational and accounting autonomy, and is subject to the supervision of the Minister of the Interior. Its main office is located in Rome, and it has secondary offices in Reggio Calabria, Palermo, Milan and Naples.

[8] Decree No. 113 of 4 ottobre 2018, "Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata", in M. Vallone, "Riordino dell'agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata (artt. 37, 37-*bis* e 38 d.l. n. 113/2018, conv. con modd. da l. n. 132/2018 - artt. 110, co. 1, 112, 113-*bis*, d.lgs. 159/2011)", in Various Authors, *Il decreto Salvini. Immigrazione e sicurezza*, Francesca Curi (ed.), Pisa: Pacini, 2019, 347 et seq.

[9] See *http://www.benisequestraticonfiscati.it*.

[10] Massively amended by Italian Law no. 161 of 17.10.2017, O.G. 4.11.2017. For a general and current overview of the prevention measures, see *Delle pene senza delitto. Misure di prevenzione nel sistema contemporaneo: dal bisogno di controllo all'imputazione del sospetto* (Atti del Convegno di Milano, 18/19 novembre 2016), in *Riv. it. dir. proc. pen*., 2017, 399 et seq.

[11] See V. Maraldi, "Minimi ritocchi al d.lgs 159/2011 (c.d. Codice Antimafia). Art. 24 d.l. n. 113/2018, conv. con modd. da l. n. 132/2018 - artt. 10, 17, 19 e 67 d.lgs n. 159/2011", in Various Authors, *Il decreto Salvini*, cit., 295 et seq.

– *persons suspected of participating in Mafia associations or associations devoted to the commission of serious crimes* (so-called "qualified dangerousness");

– *people who live off the commission of crimes and the proceeds resulting from them (so-called "generic dangerousness").*

There is no need to ascertain crimes, but only clues indicating a "reasonable" probability that the subject belongs to these categories of people.

If the subject falls into one of these categories, then it is necessary to verify (and certify) his/her social dangerousness, which constitutes the second subjective requirement[12]. Here what is sought is the individual's predisposition for crime, as inferred from his/her personality. Mere suspicions, as well as anything that is not objectively demonstrable or verifiable, will not suffice for these purposes: it is necessary to have objectively identifiable conduct, and clear circumstances.

If the suspect falls into one of the aforementioned categories and his/her dangerousness is proven, then the asset intended to be seized and confiscated (the first objective requirement) must be directly or indirectly available to him/her. In order to "*have the asset available*", the main Italian jurisprudence deems it sufficient to prove the subject's ability to determine its allocation or use, or, in any case, that he/she is the actual *dominus*. For this objective type of investigation, the *iuris tantum* presumption hold true, almost as a general rule.

Example 1. The jurisprudence constantly makes reference to the principle by which third parties are bound to the dangerous subject by ties of kinship (spouse or children) or cohabitation: in these cases, there is a presumption of the property's indirect availability. If the children, spouses or cohabitants want to avoid confiscation, they have the burden of demonstrating the exclusive availability of the asset. If they are unable, the assets will be confiscated.

Example 2. If the suspect has fictitiously transferred or assigned assets to third parties in order to prevent their seizure and confiscation, the judge declares the relative act as ineffective. The following are assumed to be fictitious (Article 26 Legislative Decree no. 159 of 6 September 2011):

a. transfers and assignments, even for payment, carried out during the two years prior to the proposal of the preventive measure, involving

[12] The revocation of the confiscation is legitimate if there is no temporal correlation between the date of purchase of the assets and the manifestation of the social dangerousness of the subject, see Cass. pen., sez. II, no. 30974/2018.

a parent, child, spouse, or permanent cohabitant, as well as relatives within the sixth degree, and in-laws within the fourth degree;

b. transfers and assignments, either free of charge or fiduciary, carried out during the two years prior to the proposal of the prevention measure.

In Italy, it is naturally also the case that not all assets can be made subject to preventive confiscation, but only those in relation to which there are "*sufficient clues*" concerning their illegal origins (or re-use). Among these clues, that which is certainly most important is the disproportion between the value of the assets and the declared income or occupation. Just imagine a postman who owns a Ferrari, or a greengrocer who owns a forty-meter *yacht*.

It is also worth noting the new rule introduced in 2008, regarding the '*independence of personal (affecting the person) and material (affecting assets) prevention measures*', which delineates an entirely different situation from that of the past, when a patrimonial measure could only be requested along with a personal measure. However, in order to adopt the latter, the social dangerousness of the person in charge of the asset must still be a factor.

By rendering these measures independent, it is now possible to request only the patrimonial measure for those who are no longer considered a danger to society, but nevertheless were at a particular time in the past, when they accumulated considerable wealth. This reform has led to a significant increase in requests for preventive confiscations.

Another particular scenario is that in which the dangerous person still manages to disperse, misappropriate, conceal or devalue the assets in order to evade their seizure and confiscation, in which case it is possible to seize and confiscate other assets of legal origin (so-called "confiscation by equivalent"). The same thing happens when the assets are transferred to third parties in good faith prior to the enforcement of the seizure.

The preventive confiscation is then applied by a specialised magistrate with an extremely simple procedure that doesn't entirely overlap with penal procedure.

Finally, it should also be noted that preventive confiscation has overcome the scrutiny of the Italian Constitutional Court and the ECHR. However, the recent Grand Chamber session, with the ruling on *De Tommaso v. Italy* (ruling of 23 February 2017, no. 43395/09), held that the Italian law that regulates *personal* preventive measures is *lacking* in clarity and precision, thus resulting in excessive discretion in defining the category of generic dangerousness on the part of the judge. However, the ma-

jority of the national case-law has revealed that this criticism can, in fact, also be applied to the *patrimonial* prevention measures (and therefore also the confiscation) taken against subjects of generic dangerousness[13].

As a first approximation, one might say that the remaining critical points include:

a. the duration of the proceedings;

b. the administration and allocation of the assets (especially the companies) located throughout the country and, above all, abroad;

c. the protection of third parties involved in the confiscation.

The rise in the numerous scenarios of direct criminal confiscation, often also applicable by equivalent, is also the due to the numerous problems inherent to the traditional confiscation referred to under art. 240 of the Italian Penal Code[14].

Due to space limitations, we are only able to cite a few examples:

– that concerning contraband [under art. 116 of Italian Law no. 1424 of 1940 (now art. 301 of Italian Presidential Decree 43/1973, which is even applicable against third parties under certain scenarios[15])], whose provisions, in addition to making it mandatory to confiscate the product, the profit, and the *instrumenta sceleris*, extends the confiscation of the latter to third parties as well;

– those included as 416-*bis*, paragraph 7 of the Italian Penal Code, introduced in 1982. In Italy, this type of confiscation is bound to the individual cases indicated by the legislature in this law;

– art. 466-*bis* of the Italian Penal Code, which, in the event of a conviction or plea bargain for one of the crimes relating to the counterfeiting of currency referred to under articles 453 (*Counterfeiting of currency,*

[13] See now Constitutional Court No. 24/19, and *https://www.penalecontemporaneo.it/d/6526-due-pronunce-della-corte-costituzionale-in-tema-di-principio-di-legalita-e-misure-di-prevenzione-a*.

[14] As previously stated, with the provision of art. 240 of the Italian Penal Code alone, it was very difficult to combat certain forms of significant criminal phenomena. It was, and still remains, difficult to distinguish between the concepts of the *profit* and the *price* of crime, whose definitions separate optional confiscation from mandatory confiscation. Another very serious problem relating to art. 240 of the Italian Penal Code is the identification of the causal link between the *crime committed* and the *asset*, as this form of confiscation only arises, at least in Italy, if the assets are "*… a direct consequence of the crime*". This means, firstly, that it is not only impossible to proceed with this type of confiscation for assets that have been destroyed, hidden, or disposed of to good faith buyers, but also (and perhaps above all) that the confiscation of assets is precluded in cases in which the criminal activity overlaps with a legal activity that prevents a clear determination of the proceeds obtained unlawfully. The confiscation of profits obtained from criminal activities and reinvested in legitimate business activities, pursuant to art. 240 of the Italian Penal Code, is just as complex.

[15] On this point see Italian Const. Court, n. 229 of 1974 in *Dir. prat. trib.*, 1975, II, 59.

spending and introducing counterfeit currency into the State, in conspiracy with others), 454 (*Alteration of currency*), 455 (*Spending and introducing counterfeit currency into the State, not in conspiracy with others*), 460 (*Counterfeiting of watermarked paper in use for the production of public credit instruments or revenue stamps*) and 461 (*Fabrication or possession of watermarks or instruments used for making currency, revenue stamps or watermarked paper*), always requires "the confiscation of the items that served or were used to commit the crime and the items that are the product, the price or the profit thereof, unless they belong to a person unrelated to the crime, or, when this is not possible, the assets available to the condemned, for a value corresponding to the profit, the product or the price of the crime" [amendment introduced by art. 2 of Italian Legislative Decree no. 202 of 29 October 2016, implementing Directive 2014/42/EU];

– under art. 55, paragraph 9-*bis* of Italian Legislative Decree no. 231 of 21 November 2007, there is another scenario of mandatory direct or by equivalent confiscation of the items that served or were used to commit the crime of improper use of credit or payment cards envisaged by art. 55, paragraph 9, of the same Legislative Decree, as well as the profit or product of that crime, unless they belong to a person unrelated to the crime [introduced by art. 6 of Italian Legislative Decree no. 202 of 29 October 2016, implementing Directive 2014/42/EU][16].

Therefore, whenever it is not possible to apply direct confiscation, there is the possibility of *indirect confiscation by equivalent* (a.k.a. "*confiscation of value*")[17], which does not even require a pertinent relationship between the asset and the criminal offence; however, it does require evidence of the fact that the crime itself resulted in profits that are irrecoverable but can still be *quantified*[18].

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[16] Now included by the art. 4, d.lgs 1.3.2018, n. 21 concerning "Disposizioni di attuazione del principio di delega della riserva di codice nella materia penale a norma dell'articolo 1, comma 85, lettera q), della legge 23 giugno 2017, n. 103", in the italian Penal Code at the Art. 493-*ter* (*Indebito utilizzo e falsificazione di carte di credito e di pagamento*). On the "*riserva di Codice in materia penale*" principle (art. 3-*bis* of the italian Penal Code), above all, see M. Donini, "L'art. 3-*bis* c.p. in cerca del disegno che la riforma Orlando ha forse immaginato", in *Dir. pen. proc.*, 2018, 4, 429 ss.; T. Padovani, "Il testimone raccolto. L'ennesima riforma alle prese con i nodi persistenti del sistema penale", in *Arch. pen.*, 2018, 1s, 13 ss.; E.M. Ambrosetti, "Ad un anno dall'entrata in vigore della legge Orlando: una riforma ancora in corso", in *Arch. pen.*, 2018, 1s, 859 ss.

[17] For a recent reflection on this topic, see, among other, M. Donini, "Per una concezione post-riparatoria della pena", cit., § 3.

[18] *Ex plurimis*, Cass. pen., sez. III, 19 January 2016, no. 4097, in *Fisco*, 2016, 10, 973 (tax crimes, confiscation by equivalent of profit/price).

In the Italian legal system this type of confiscation is not generally envisaged[19], and is only applied in relation to a number of special and specific areas.

A number of examples are provided below:

Art. 322-*ter* of the Italian Penal Code (*corruption*); Art. 600-*septies* of the Italian Penal Code (ref. *crimes against individual freedom*); Art. 640-*quater* of the Italian Penal Code (*aggravated fraud and computer fraud*); Art. 644 of the Italian Penal Code (*usury*); Art. 2641 of the Italian Civil Code[20] (*criminal provisions relating to companies*); Art. 187 T.U. no. 58/1998 (*crimes relating to financial intermediation*); tax offences envisaged by Italian Legislative Decree no. 74/2000, with just one marginal exception pursuant to art. 10 (*the destruction/concealment of accounting records*)[21]; Art. 11 l. no. 146 of 2006[22] (*transnational crimes*); Art. 19, par. 2, of Italian Legislative Decree no. 231/2001 (*Criminal liability of legal entities*).

It should also be noted how preventive confiscation is now regularly applied to systematic, and therefore dangerous, tax evaders. To date, this has been applied as a penalty measure[23], with everything that this entails from the standpoint of the general penal principles associated with this legal qualification.

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[19] The only "general" provision is in the Italian Code of Criminal Procedure, under art. 735-*bis*, concerning the enforcement of confiscation issued by foreign authorities within Italy, which was introduced following our country's ratification of the Strasbourg Convention.

[20] With regard to corruption between private parties, art. 3 of Italian Legislative Decree no. 202 of 29 October 2016, which implemented Directive 2014/42/EU, states that the measure of confiscation by equivalent pursuant to art. 2641 of the Italian Civil Code cannot under any circumstances amount to a value lower than that of the utilities given or promised (the value of the tangent).

[21] On this topic, more broadly, see P. VENEZIANI, "La confisca obbligatoria", cit., 670 et seq.

[22] Special scenarios of mandatory confiscation and confiscation by equivalent "1. For the crimes referred to under article 3 of this law, in the event that it is not possible to confiscate the items constituting the product, the profit, or the price of the crime, the judge shall order the confiscation of sums of money, assets, or other utilities available to the offender, even through a natural or legal person, for a value corresponding to that of the product, profit or price. In case of usury, the confiscation of an amount equal to the value of the interest or the other advantages or usurious compensation shall also be ordered. In such cases, the judge shall determine the sums of money, or shall identify the assets or utilities, to be subjected to confiscation, for a value corresponding to that of the product, the profit, or the price of the crime".

[23] Cass. pen., 16 January 2004, G. NAPOLITANO, in *Foro it*., 2004, II, 685.

Minimal provisions on confiscation[24]

So-called *Traditional* Confiscation Art. 240 of the Italian Penal Code	*"In the case of conviction, the judge can order the confiscation of the items that served or were used to commit the crime, and the items that constituted the product or the profit thereof.* *Confiscation is always ordered:* *1) for the items that constitute the price of the crime;* *2) for the items whose manufacture, use, carrying, possession, or disposal constitutes a crime, even if no conviction has been issued.* *The provisions of the first part and of point no. 1 of the preceding paragraph do not apply if the item belongs to a person unrelated to the crime. The provision of point no. 2 does not apply if the item belongs to a person unrelated to the crime, and if the manufacture, use, carrying, possession, or disposal of the same can be permitted by administrative authorisation".* + *no. 1-bis, which introduces a new scenario of mandatory, direct confiscation of the assets that constitute the profit or product of computer crimes, or confiscation by equivalent if the former is not possible.* (introduced by Italian Legislative Decree no. 202 of 29 October 2016, implementing Directive 2014/42/EU).
Ante delictum confiscations	– Applied prior to conviction; – Independent with respect to the *ante delictum* personal preventive measures; – *Objective* and *subjective* requirements; – It's applied by a specialised magistrate.
Other *direct* confiscations	Mere examples: – Confiscation concerning contraband under art. 116 of Italian Law no. 1424 of 1940 (now art. 301 of Italian Presidential Decree 43/1973); – those included as 416-*bis*, paragraph 7 of the Italian Penal Code; – art. 466-*bis* of the Italian Penal Code (amendment introduced by art. 2 of Italian Legislative Decree no. 202 of 29 October 2016, implementing Directive 2014/42/EU); – art. 493-*ter* of the italian Penal Code.
Indirect or *by equivalent* Confiscations	– in "general", see Art. 240, co. 2, § 1-*bis* of the Italian Penal Code[25]

[24] It should be noted that the following scheme does not fully cover the complex issue of confiscations in Italy.

[25] See (rightly with critical attitude) R. TARTAGLIA, "La confisca penale", *cit.*, 71; T. PADOVANI, *Misure di sicurezza e misure di prevenzione*, Pisa: Pisa University Press, 2014, 135

1.2. *Extended confiscation*

In Italy there are also scenarios of "extended confiscation" (or confiscation "by disproportion"), which eliminate the item derived (directly) from the crime committed.

Objective and subjective requirement are once again necessary in this case as well:

– the person must have engaged in one or more forms of criminal conduct expressly envisaged by law (this list is constantly increasing);

– the asset must be available to the person (directly or indirectly).

– there must be a disproportion between the person's declared income or occupation and the value of the assets. On this point it should be noted that, with a recent reform in 2017, a jurisprudential principle was introduced into positive law, according to which the defendant can not justify the origins of the assets by indicating them as the reinvestment of income generated through tax evasion.

Art. 5 of Italian Legislative Decree no. 202 of 29 October 2016, implementing Directive 2014/42/EU, introduces several amendments to the legal framework for this type of confiscation, as laid out by art. 12-*sexies* of Italian Decree Law no. 306 of 08 June 1992.

In particular, the new framework extends this special confiscation scenario's scope of application to include cases of conviction or plea bargaining:

– for the crime of criminal association pursuant to art. 416 of the Italian Penal Code, when the association is aimed at committing the crimes of *Counterfeiting of currency, spending and introducing counterfeit currency into the State, in conspiracy with others* (art. 453 of the Italian Penal Code), *Alteration of currency* (art. 454 of the Italian Penal Code), *Spending and introducing counterfeit currency into the State, not in conspiracy with others* (art. 455 of the Italian Penal Code), *Counterfeiting of watermarked paper in use for the production of public credit instruments or revenue stamps* (art. 460 of the Italian Penal Code) and *Fabrication or possession of watermarks or instruments used for making currency, revenue stamps or watermarked paper* (art. 461 of the Italian Penal Code);

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et seq.; A.M. MAUGERI, voce "Confisca (diritto penale)", *cit.*, 195. A missed opportunity is also related to the transposition of Council Framework Decision 2005/212/JHA of 24 February 2005, Article 2 of which provided that "each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds".

– for the crime of *self-laundering* envisaged by art. 648-*ter* 1 of the Italian Penal Code;

– for the crime of *bribery between private parties* envisaged by art. 2635 of the Italian Civil Code;

– for the crime of *improper use of credit or payment cards* envisaged by art. 55, paragraph 9, of Italian Legislative Decree no. 231 of 21 November 2007;

– for the *computer crimes* referred to under articles 617-*quinquies* (*Installation of equipment designed to intercept, impede or interrupt telegraph or telephone communications*), 617-*sexies* (*Falsification, alteration or suppression of the content of computer or electronic communications*), 635-*bis* (*Damage caused to computer information, data or programs*), 635-*ter* (*Damage caused to computer information, data or programs utilised by the State or by another public authority, or otherwise of public utility*), 635-*quater* (*Damage caused to computerised or telematics systems*), 635-*quinquies* (*Damage caused to computerised or telematics systems of public utility*), when the conduct described therein affects three or more systems.

Lastly, it is worth noting Italian Legislative Decree 21/2018, which introduced art. 240-*bis* ("*Confisca in casi particolari*") into the Italian Penal Code[26]: this article, which concerns extended confiscation, establishes that, for many specific offences indicated within the text of the provision, in cases of conviction (or plea bargaining)[27] it is always ordered to confiscate the money, assets, or other utilities whose origins are unable to be justified by the convicted person, and of which, even through a natural or legal person, he/she appears to be the owner or have the availability thereof in any capacity, for a value that is disproportionate to his/her income declared for tax purposes or his/her occupation. Whatever the case, the convicted person can not justify the legitimate origins of the assets on the assumption that the money used to purchase them constitutes the proceeds or the reinvestment of funds derived from tax evasion, unless the tax obligation was extinguished through compliance with the law.

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[26] Article 240-*bis* actually proposes part of a text of law already existing since 1994.

It is the well-known Art. 12-*sexies* contained in the legislative decree of 8 June 1992, No. 306, conv. with mod. in l. 7 August 1992, No. 356, concern "*Urgent amendments to the new code of criminal procedure and urgent measures to combat mafia crime*". The article has been inserted by Art. 2 of the Legislative Decree of 20 June 1994, n° 399, conv. with mod. in Italian Law 8 August 1994, No. 501. See A. Bernasconi, "La 'speciale' confisca introdotta dal d.l. 20 giugno 1994 n. 339 conv. dalla l. 8 agosto 1994 n. 501", in *Dir. pen. proc.*, 1996, 1417 et seq.

[27] For appropriate distinctions between these scenarios, §§ 2 et seq. the contribution of Dr. Eleonora Dei Cas.

The complete text is provided below.

Art. 240-*bis* of the Italian Penal Code

"*In cases of conviction or plea bargain pursuant to article 444 of the Italian Code of Criminal Procedure, for some of the crimes envisaged by article 51, paragraph 3-bis, of the Italian Code of Criminal Procedure, by articles 314* (embezzlement), *316* (embezzlement taking advantage of other's error), *316-bis* (embezzlement against the State), *316-ter* (misappropriation of funds against the State), *317* (extortion), *318* (bribery for the performance of an official function), *319* (bribery for actions contrary to official duties), *319-ter* (bribery in judicial proceedings), *319-quarter* (undue inducement to give or promise benefits), *320* (bribery of a public service employee), *322* (incitement to bribery), *322-bis* (Embezzlement, extortion, undue inducement to give or promise benefits, bribery, and incitement to bribery of members of the International Criminal Court, European Community bodies, and officials of the European Community and of foreign countries), *325* (use of inventions or discoveries known by reason of office), *416* (criminal association), *carried out for the purpose of committing the crimes envisaged by articles 453* (counterfeiting of currency, spending and introducing counterfeit currency into the State, in conspiracy with others), *454* (alteration of currency), *455* (spending and introducing counterfeit currency into the State, not in conspiracy with others), *460* (counterfeiting of watermarked paper in use for the production of public credit instruments or revenue stamps), *461* (fabrication or possession of watermarks or instruments used for making currency, revenue stamps or watermarked paper), *517-ter* (manufacture and sale of goods produced by usurping industrial property rights) and *517-quater* (counterfeiting of geographical indications or designations of origin of agricultural and food products), *as well as articles 452-quater* (environmental disaster), *452-octies, first paragraph* (aggravating circumstances for environmental crimes) *493-ter* (improper use of credit or payment cards), *512-bis* (fraudulent transfer of funds), *600-bis, first paragraph* (child prostitution) *600-ter, first and second paragraphs*, (child pornography) *600-quater 1*, (possession of pornographic material with minors) *in relation to the conduct of production or trade of pornographic material, 600-quinquies* (tourist initiatives aimed at exploiting child prostitution), *603-bis* (illicit brokering and exploitation of labour), *629* (extortion), *644* (usury), *648* (receiving stolen goods), *excluding the case referred to in the second paragraph, 648-bis* (money laundering), *648-ter* (use of money, assets or utilities of illicit origin) and *648-ter1* (self-laundering), *from article 2635 of the Italian Civil Code* (corruption between

private parties), *or for some of the crimes committed for the purposes of terrorism, even international, or of subversion of the constitutional order, it is always ordered to confiscate the money, assets, or other utilities whose origins are unable to be justified by the convicted person, and of which, even through a natural or legal person, he/she appears to be the owner or have the availability thereof in any capacity, for a value that is disproportionate to his/her income declared for tax purposes or his/her occupation. Whatever the case, the convicted person can not justify the legitimate origins of the assets on the assumption that the money used to purchase them constitutes the proceeds or the reinvestment of funds derived from tax evasion, unless the tax obligation was extinguished through compliance with the law. Confiscation pursuant to the above provisions is ordered in the case of conviction or plea bargain for the crimes referred to under articles 617-quinquies* (installation of equipment designed to intercept, impede or interrupt telegraph or telephone communications), *617-sexies* (falsification, alteration or suppression of the content of computer or electronic communications), *635-bis* (damage caused to computer and telematics systems), *635-ter* (damage caused to computer information, data or programs utilised by the State or by another public authority, or otherwise of public utility), *635-quater* (damage caused to computerised or telematics systems), *635-quinquies* (damage caused to computerised or telematics systems of public utility)*, when the conduct described therein affects three or more systems.*

In the cases described in the first paragraph, in the event that the money, assets, and other utilities referred to in the same paragraph cannot be confiscated, the judge orders the confiscation of other sums of legitimate money, assets, and other utilities available to the offender, for an equivalent value, even through a third party"[28].

1.3. *Other types of confiscation*

We shall now briefly discuss some of the different types of confiscation used in Italy.

These include, among others[29]:

a. *administrative confiscations*;

b. confiscation relating to Labour criminal law;

c. urban confiscation;

d. vehicle confiscation envisaged by the Highway Code.

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[28] The parentheses are ours.

[29] For examples: *agri-food confiscation*, see VARIOUS AUTHORS, *Codice delle confische*, cit., 167 et seq.

a) With regard to the former, "general administrative confiscations", the regulatory framework is outlined by art. 20 of Italian Law no. 689 of 1981: these types of confiscations are classified as either "*mandatory*", for the product of the administrative violation, the price and the profit of the transgression; or "optional", being at the discretion of the administrative authority responsible for the sanction or the criminal court judge, when an administratively sanctioned violation must also be imposed. Finally, according to a widespread legal opinion, there is also a so-called "necessary" administrative confiscation, which is also mandatory. In order to enforce this type of confiscation, it is necessary to first have the asset seized (so-called "administrative seizure") by the supervisory and control bodies.

b) With regard to *Labour criminal law*, there's also another type of confiscation pursuant to art. 9 of the Italian Decree Law no. 187 of 2010, which incorporated art. 20 of Italian Law no. 689/1981 previously cited (see letter a above), later converted into Law no. 217 of 2010, which, following serious or repeated violations of this type[30], requires the mandatory administrative confiscation of the items that served or were used to commit the specific violations, or the items that constituted the product, even in the absence of a payment ordinance/injunction[31].

c) *Urban confiscation*. The subject of so-called "urban confiscation" has occupied (and continues to occupy) a significant part of the Italian debate on confiscation.

Preliminary remarks: the d.P.R. 6.6.2001 no. 380 ("*Testo Unico delle Disposizioni legislative e regolamentari in materia edilizia*", so called "*Testo Unico dell'edilizia*") contains a series of criminal provisions to protect the proper conduct of urban and construction activities (art. 44). Among these criminal offences, at Article 44, comma 1, lett. *c*) there is the unlawful site development (*lottizzazione abusiva*). The second paragraph of Article 44 provides for a specific type of confiscation for cases in which the unlawful site development is ascertained: land and all structures built on it are confiscated. The *vexata quaestio* in this context is the understanding of the nature of this special type of confiscation: administrative sanction or security measure?

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[30] With regard to "repeated" violations, reference should be made to the provisions of art. 14 of Italian Legislative Decree 81/2008 and art. 8-*bis* of Italian Law no. 689/1981, from which it can be deduced that the conduct is considered to be repeated when another violation of the same nature is committed within five years following the violation ascertained by an enforcement provision (even if only one).

[31] This is an exception to art. 20 of Italian Law no. 681 of 1989, which only allows the Italian administrative authority to apply administrative penalties or criminal penalties after an order/injunction or conviction.

The point is that (only) if it is an administrative sanction it is possible:

– to apply it regardless of the outcome of the criminal trial;

– to apply it also against third parties (who have become owners of the property) who are not involved in the criminal trial.

At first, Italian case-law considered it an administrative sanction, with all the consequences that this entails in relation to the two points mentioned above[32].

This choice lasted until 2008, leading to the creation of three precise rules summarized as follows: 1) urban confiscation was an administrative sanction; 2) the measure could operate on the basis of the mere material existence of the unlawful site development; 3) the measure could affect bona fide third party owners not involved in the criminal proceedings.

After the Sud Fondi judgements, the legal nature of urban confiscation became "punitive" as it was included in the so-called criminal matters (*matière pénale*)[33]. Italian case law reacts to Sud Fondi case law by making urban confiscation conditional on the existence of a person affected by the measure who has participated psychologically (intentionally or at least through negligence) to the unlawful site development[34]. Idem for applying confiscation to third parties not involved in the criminal trial[35].

The next step – from the Sud Fondi jurisprudence to the Varvara v. Italy of 29 October 2013 case (appeal no. 17475/09) – takes place in terms of the operation of urban confiscation in the absence of a conviction. The Italian regulatory landscape seemed completely linear, at least on one point: apart from the case described under art. 240, paragraph 2 no. 2 of the Italian Penal Code (so-called *absolutely prohibited assets*), powers of removal could not be exercised if the accused were to be acquitted. In all other scenarios (excluding preventive confiscation), the penal legislation would therefore seem to consider the enforcement of a confiscation measure to be subject to a conviction being issued against the defendant. One part of the jurisprudence, on the other hand, found that, under certain conditions, the judge might even have such powers in

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[32] See from Cass. pen., sez. III, no. 16483/90, Licastro) to Constitutional Court No. 187/98. On the relationship between confiscation to the detriment of third parties and art. 27, paragraph 1 of the Italian Constitution., see, *ex plurimis*, Cass. pen., sez. III, no. 37096/04. Than see *ex plurimis* Cass. pen., sez. III, No. 38728/04.

[33] On this subject (*matière pénale*) the most recent italian research is contained in Various Authors, *La «materia penale» tra diritto nazionale ed europeo*, M. Donini, L. Foffani (eds.), Turin: Giappichelli, 2018.

[34] *Ex plurimis* Cass. pen., sez. III, n. 21188/09, n. 5857/10.

[35] *Ex multiplis*, Cass. pen., sez. III, 42741/08.

cases of acquittal; powers that, in some sectors, were completely systematic in the past, and constituted a widespread "practice". Without rehashing the entire Italian debate on the subject[36], it should nevertheless be noted that, with the famous ruling of Varvara v. Italy, the Second Section of the European Court of Human Rights found that the application of urban confiscation in cases of acquittal by statue of limitations constitutes a violation of the principle of legality sanctioned by art. 7 ECHR. The Court deliberated on the "criminal" qualification of urban confiscation envisaged by art. 44 of Italian Legislative Decree no. 380/2001 (the Consolidated Law on Construction), with a reference to the admissibility decision of 30 August 2007 within the context of the 2009 case of *Sud Fondi s.r.l. et al. v. Italy*. The ECHR found that art. 7 is not limited to requiring a legal basis for crimes and penalties, but also implies the illegitimacy of the application of criminal sanctions for deeds… not "legitimised by a *guilty verdict*".

In the period just after the Varvara sentence, the Italian jurisprudence apply the urban confiscation even in the absence of conviction: specifically, even after the intervention of the prescription of the crime. Two orders – one from the Court of Teramo and one from the Court of cassation[37] – have raised questions of constitutional legitimacy of urban confiscation.

The Italian Constitutional Court has declared constitutional legitimacy issues inadmissible[38].

Finally, it should be noted that, on 28 June 2018, the Grand Chamber of the ECHR ruled on the case of GIEM et al. v. Italy (appeal no. 1828/06), which, years after the decision handed down in the *Varvara* case, reintroduced the question of the compatibility of ECHR Prot. 1 articles. 6, 7 and 1 with the internal provisions governing the confiscation measure following an assessment of criminal liability for the crime of unlawful property subdivision (punished by art. 44 of Italian Presidential Decree no. no. 380 of 06 June 2001). Once again the ECHR reiterated that there had been a violation of art. 7 ECHR against all the plaintiffs. The point is that art. 7 of the Convention excludes the possibility of imposing a criminal sanction against a person without the verification and prior declaration (even incidental) of his/her criminal liability, which can be contained within a sentence that, nevertheless, declares the crime to

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[36] See Various Authors, *Codice delle confische*, cit., 675 et seq., 679 et seq.

[37] Court of Teramo, ord. 17.1.2014; Cass. pen., sez. III, ord. n. 20646/14.

[38] Constitutional Court No. 49/15 and No. 187/15. See V. Manes, "La 'confisca senza condanna' al crocevia tra Roma e Strasburgo: il nodo della presunzione di innocenza", in *Dir. pen. cont.*, 13 aprile 2015, *passim*.

be extinct by statute of limitations; urban confiscation must essentially be understood as such, although formally of an administrative nature, in the same manner as the *Engel criteria*.

d) We can cite also the vehicle confiscation – whereby, for example, the owner has committed the crime of driving while intoxicated – envisaged by art. 186 par. 2 letter C) of the Highway Code, which, by way of art. 224-*ter* of Italian law no. 120 of 29 July 2010[39], has received the express qualification of an accessory administrative sanction[40].

1.4. *Third-Party Confiscation*

By express legislative provision, third-party ownership of the asset precludes the application of the confiscations set out under article 240 of the Italian Penal Code, including optional confiscation, the mandatory confiscation of the price, and that relating to "absolutely criminal" items. Moreover, this rule is also typical of other provisions relating to our "security measures", which, by forcing the reader to respect legality as a principle, prevent the application of measures not envisaged by law, or against persons other than those contemplated by the criminal legislature[41].

The protection thus provided by the framework regarding the third parties can not actually be exploited by the perpetrator of the crime, who could resort to easy ploys, creating fictitious ownerships or simulated transfers of their assets. Precisely for this reason, certain exceptions can be found within our legal framework, sometimes resulting from an express legislative option, such as that expressed in the matter of so-called *extended* confiscation pursuant to art. 12-*sexies* d.l. 306/1992 (now partially transfused within art. 240-*bis* of the Italian Penal Code), pursuant to which confiscation affects the items owned by the convicted person, even through a third party, whose origins cannot be justified or that are of disproportionate value with respect to his/her income; sometimes resulting from magistrates' formulations, according to which (in the matter of confiscation by equivalent) 'availability' must be understood as a synonym of substantial ownership, even in the absence of the formal ownership of the asset, such that the offender acts *uti dominus* in relation to the item in question.

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[39] Various Authors, *Codice delle confische*, cit., 422 et seq.

[40] This administrative nature, for example, allows the confiscation to operate in the cases of 131-*bis* (*esclusione della punibilità per particolare tenuità del fatto)* of the Italian Criminal Code, on this see Sez. un., n. 13681/2016 and Various Authors, *Codice delle confische*, cit., 434 et seq.

[41] A.M. Maugeri, "Le moderne sanzioni", cit., 128.

The national jurisprudence has also clarified how a person who did not participate in the commission of the crime, and did not even (e.g. Due to lack of awareness) have any kind of guilty association with the commission of the same (even if indirect or not punishable), should be considered 'unrelated' (see Cass. 16405/2008).

The problem of the involvement of a subject entirely unrelated to the commission of the crime has also arisen with regard to:

1. confiscation envisaged by art. 44, paragraph 2 of the Italian Presidential Decree no. 380/2001 (unlawful subdivision of land, *lottizzazione abusiva*);

2. vehicle confiscation for driving under the influence pursuant to art. 186, paragraph 2, letter *c*) d.lg 30.4.1992 n. 285 (the Highway Code, *Codice della strada*)[42];

3. confiscation required by art. 474-*bis* of the Italian Penal Code (trademark counterfeiting hypothesis);

4. confiscation by equivalent of the assets of the legal person in relation to tax offences that do not entail liability for the organisation;

5. confiscation by equivalent pursuant to art. 19, par. 2 of Italian Legislative Decree no. 231/2001[43].

In all of these cases, in the presence of different conditions, the admissibility of confiscation of assets owned by a third party who did not participate in the commission of the crime was at least addressed (although sometimes denied or otherwise limited by jurisprudence).

With regard to the scenario described under point 1), the national courts, acknowledging the positions taken by the jurisprudence of the ECHR, have recognised the sanctioning nature of urban confiscation pursuant to art. 44, par. 2 of Italian Presidential Decree no. 380/2001. Consequently, urban confiscation cannot be considered applicable to those who, in good faith, have not committed any violation, such as the unaware buyers of unlawfully subdivided land (*lottizzazione abusiva*). Even if *de facto* material participants in the unlawful subdivision through their acts of purchase, it has been confirmed that these subjects can only be subject to confiscation in the event that they are found to be somehow culpable in relation to the unlawful subdivision (see Cass. 42178/2009). It seems appropriate to recall a recent ruling by the Court of Cassation, which is in stark contrast to that which has just been stated. With its ruling no. 50189/2015, the Court (even recalling one of its own precedents

[42] Among other, VARIOUS AUTHORS, *Codice delle confische*, cit., 430 et seq.

[43] On confiscation/d.lgs 231/2001 in general, see, among other, VARIOUS AUTHORS, *Codice delle confische*, cit., 957 et seq., and 963 et seq.

set by Cass. pen. 6396/2006) confirmed how the confiscation of the assets subjected to unlawful subdivision is linked to the objective illegality of the same, in such a way as to be even capable of affecting owners unrelated to the criminal proceedings. The ruling also reiterates how such an interpretation cannot be in conflict with art. 3 of the Italian Constitution "*insomuch as the subject who has committed the crime of unlawful subdivision is subject not only to confiscation (like the subject who did not commit it), but also to penal sanctions, and therefore there is no similar sanctioning treatment for objectively different situations*", nor with articles 41 and 42, par. 2 of the Italian Constitution *"taking into account the recognised social functions of property and economic initiative and the need for the primary protection and safeguarding of the territory, so that, in the conflict between the collective and private interest (…) it is rational that the former should prevail". Nor would there be any conflict with articles 24, 101 and 102 of the Italian Constitution, "because confiscation pursuant to art. 44 constitutes the conclusive measure of an overall system of sanctions with which it must nevertheless be coordinated".*

With regard to the scenario described under point 2), on the other hand, we have questioned the possibility of confiscating assets belonging to third parties with regard to the vehicle confiscation envisaged by the Highway Code, in the event that the vehicle is *leased*. It should be noted that the legislation in question expressly provides for a scenario of mandatory vehicle confiscation in the event of conviction or plea bargain, *unless the vehicle belongs to a person unrelated to the crime* (article 186, par. 2 of the Highway Code). Indeed this provision did not prevent a legal conflict in the aforementioned scenario, resulting in a debate later settled by the United Sections (Sezioni Unite) with ruling no. 144484/ 2012[44]. In view of the principles expressed by the Court of Strasbourg in its interpretation of art. 7 of the ECHR, the United Sections underlined how the form of confiscation under review has preventive and repressive characteristics, as it is structurally aimed at preventing the reiteration of the crime, in an intrinsically afflictive dimension. Therefore, as a substantially criminal sanction, it cannot be applied in the event that there is not found to be any element of responsibility in the conduct of the asset's owner. For this reason, it is not possible to confiscate a vehicle driven under the influence by an offender, who is using the vehicle under the conditions of a *leasing* contract, if the leasing party who owns the vehicle is unrelated to the crime. Any other interpretation of the law (even if envisageable) is to be considered detrimental to art. 7 of the ECHR and art. 1 Prot. 1 ECHR.

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[44] Various Authors, *Codice delle confische*, cit., 431 et seq.

The scenario described under point 3) involves the provisions of the third paragraph of art. 474-*bis* of the Italian Penal Code, concerning the counterfeiting of products or distinctive markings). The same expressly envisages a scenario of mandatory confiscation against the person unrelated to the crime, unless the same proves that he/she was unable to foresee the unlawful use of his/her assets (even occasionally) or their illegal origins, or that he/she was unaware. In this case, the intellectual connection that allows us to affirm the existence of an element of responsibility in the conduct of the subject affected by the confiscation (for the purposes of compliance with art. 7 of the ECHR) lies precisely (albeit in a somewhat nuanced form) in the foreseeability of the unlawful use or origin, and in the failure to exercise due diligence, thus avoiding a substantially objective responsibility on the part of the asset's owner.

In the scenario described under point 4) the company presents itself as a third party (i.e. a subject in its own right) with respect to the perpetrator of the tax offence (i.e. the company's director). The extraneousness is rendered even more evident by the non-inclusion of the tax offences on the list of crimes envisaged by Italian Legislative Decree no. 231/2001, with confiscation being consequently inapplicable pursuant to art. 19 of the same decree. According to the approach adopted by the United Sections (no. 10561/2014), the aggression of money, other fungible assets, or assets directly attributable to the tax offence committed by the corporate bodies may be admitted when they are *available* to that legal entity. Confiscation by equivalent against the same is not admissible, on the other hand, if the profit of the tax offence is not found, *unless the legal entity is a false screen*. The position taken by the jurisprudence (see Cass. 46797/2014) regarding the confiscation of assets conferred in a trust is the fruit of the same approach: confiscation is considered possible if it is shown that this conferment is, in fact, a situation of mere appearance, in order to have the conferring party retain the administration and full availability of the assets, thus operating as a trustee of him/herself (so-called *sham trusts*).

As for the scenario described under point 5), it is clear how third parties (or bankruptcy creditors) can suffer damage in the case of the confiscation of the bankrupt party's assets, with a consequent reduction of the total assets to which they are legitimately entitled. This results in a conflict between two interests, each with a profile of public importance: on the one hand there's the State's interest in exercising the punitive claim, and on the other hand there's the creditors' interest in respecting the dogma of generic patrimonial guarantee and the principle of *par condicio creditorum*. Indeed, the United Sections (ruling no. 11170/2015)

have pointed out how these two interests are not actually in conflict with one another, as art. 19 of Italian Legislative Decree itself requires *the safeguarding of the rights of third parties acquired in good faith*, even after confiscation. The Court specifies, however, that the term *third parties* is to be understood as those who not only did not take part in the commission of the crime, but also did not gain any benefit or utility from the same; the term "in good faith", on the other hand, is to be understood as applicable to those who, "using the diligence required of the actual situation, could not have had knowledge of the aforementioned relationship deriving from their subjective role in the crime committed by the convicted party". Moreover, the matter was already addressed by the United Sections in 2004 (ruling no. 22951/2004), when they affirmed the bankruptcy receivership could not be considered analogous to third party ownership: in fact, the concept of 'belonging' (used by article 19 cit.) is broader than the concept of 'property'. According to the judges, seizure for the purposes of confiscation would thus be insensitive to the bankruptcy proceedings.

The third party is granted various instruments of a procedural nature: precautionary measures, enforcement review, etc. (for further details, see below §§ 2 et seq.).

2. *Aspects of criminal procedural law*

2.1. *Introduction: seizures in the Italian penal system*

The 1988 Italian code of criminal procedure provides for three distinct forms of seizure, each with a different purpose and its own legal framework. Two are precautionary measures on property, restrictions upon the free availability of an asset, imposed during criminal proceedings, and therefore prior to final conviction.

The first of these scenarios consists of conservative seizure (Articles 316-320 of the Italian Code of Criminal Procedure), which protects the patrimonial guarantees of the State and the civil party (the person to whom the offence has caused damage, who may present him/herself during the criminal trial in order to claim compensation or repayment). In this regard, it should be noted that the 1988 Italian legislature drew a distinction between the concepts of "procedure" and "trial" within the code. The term "trial" is to be understood as the judicial phase following the issuance of the indictment. This therefore includes (with the exception of the multiple special proceedings envisaged by the system: e.g. summary trial, plea bargain/application of the penalty at the request of

the parties, which will be described further ahead) the preliminary hearing, the trial, and any appellate remedies. "Procedure", on the other hand, originates from a *notitia criminis* and concludes with the final judgment. It therefore also includes the phase of the preliminary investigations: the initial phase where, generally, no evidence is formed, but sources of evidence are sought that will sustain the prosecution in court[45].

Likewise, preventive seizure falls within the category of precautionary measures on property (Articles 321-323 of the Italian Code of Criminal Procedure), but in this case the provision is aimed at preventing the availability of the asset from creating an aggravating factor, extending the consequences of the offence, or facilitating the commission of other crimes (so-called "impeditive" preventive seizure).

Book III of the code, concerning evidence, regulates criminal seizure for evidentiary purposes (Articles 253-263 of the Italian Code of Criminal Procedure). The latter is a means of seeking evidence that consists of the acquisition of certain movable or immovable assets that can be used as evidence in the trial.

In addition to the different *rationale* that distinguishes each of the scenarios mentioned, they have also been regulated differently within the code in terms of (by way of example) the form of the generic provision, the authority competent for adopting it, the time at which it becomes applicable, and the legal remedies available.

The scenarios mentioned, however, do not provide a comprehensive overview of the cases of seizure envisaged by the system. In fact, there are additional seizure scenarios falling outside the code. For example, with regard to the administrative liability of legal entities[46], there is the possibility of imposing the preventive seizure of the same items that the decree allows to be confiscated (Art. 53 of Italian Legislative Decree no. 231 of 2001), as well as the seizure of the organisation's assets, as collateral on the amounts owed to the State (Art. 54 of Italian Legislative Decree no. 231 of 2001).

Furthermore, the so-called Anti-Mafia Code allows for preventive seizure, which is instrumental for subsequent confiscation (Art. 20 of Italian Legislative Decree no. 159 of 2011). As mentioned above, the preventive measures are ordered (regardless of whether a crime has been committed) with a procedure that does not have the same guarantees as the criminal trial. In fact, the relative legal action can be taken before the

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[45] M. CHIAVARIO, "Il nuovo codice al varco tra l'approvazione e l'entrata in vigore", in M. CHIAVARIO (ed.), *Commento al nuovo codice di procedura penale*, vol. I, Turin: Utet, 1989, 6-8, which reveals that the legislature has not always managed to firmly maintain this distinction.

[46] Introduced, as mentioned above, with Italian Legislative Decree no. 231 of 2001.

Court even independently of the criminal prosecution. This procedure is characterised by the fact that the evidence, which can be used in the trial, is collected by the police and the public prosecutor in secret and without hearing the parties, with fewer defensive guarantees[47].

2.1.1. *Evidentiary seizure*

Evidentiary seizure, otherwise known as criminal seizure, is a means of seeking evidence that's envisaged and regulated by Book III of the Code. Like inspections and searches, criminal seizures are "surprise" acts, for which the suspect's defender has the right to witness the execution of the act, but not to be notified in advance.

The relative provision is taken in the form of a reasoned decree ordered by the "judicial authority": this means that it can be ordered by both judicial magistrates and investigating magistrates (public prosecutors). During the preliminary investigation phase – which extends from the registration of the *notitia criminis* in the criminal records registry (Article 335 of the Italian Code of Criminal Procedure) to the issuance of the indictment –, the seizure in question is usually arranged by the public prosecutor, or else by the judge overseeing the preliminary investigations themselves[48]. During the preliminary investigation phase, the judicial police can only proceed with the seizure of evidence in cases of urgency, if a delay poses a hazard and the public prosecutor can not promptly intervene, or if the public prosecutor has not yet taken over the investigation (Article 354(2) of the Italian Code of Criminal Procedure). In these cases, the judicial police carry out the seizure and, within forty-eight hours, either return the seized items or else transmit the report to the prosecutor of the place where the seizure was carried out for validation (Article 355 of the Italian Code of Criminal Procedure). During the trial stage, on the other hand, the trial judge is responsible for ordering the seizure at the prosecutor's request.

Evidentiary seizure deals with the "body of the crime", the items upon which or via which the crime was committed and those that constitute the price, the product, or the profit[49], or the "items pertinent to

[47] In this regard, see L. Filippi, "Il procedimento di prevenzione", in Various Authors, *Procedura penale*, Turin: Giappichelli, 2017, 1029.

[48] The figure of the preliminary investigation judge was introduced by the 1988 code in place of the investigating magistrate: the preliminary investigation judge has no investigative functions, but *a*) intervenes during the preliminary investigation phase in order to provide a jurisdictional guarantee for interventions restricting personal freedom; *b*) oversees the execution of the prosecutor's activities; *c*) oversees the early taking of evidence.

[49] The "product" consists of that which was created, transformed, or obtained through the criminal conduct (i.e. an advantage of a financial nature or a patrimonial-type benefit

the crime" and necessary to ascertain the facts of the case (Article 253 of the Italian Code of Criminal Procedure). Unlike the term "body of the crime", the code does not provide a definition of "items pertinent to the crime"; this notion must therefore be inferred from the jurisprudence. According to the latter, all movable or immovable items that serve to ascertain (even indirectly) how the crime was committed, the perpetrator, and any other circumstances relevant to the case, must be considered[50]. The items to be seized, which fall under the aforementioned categories, must be indicated in the decree, unless the seizure is ordered within the context of a search.

The seizure is carried out by the judicial authority personally, or rather a judicial police officer delegated by the same decree. A copy of the provision must be handed over to the concerned party (not only the suspect or defendant, but also the person from whom the items were taken and the person entitled to their return), if present. The defender, who, as mentioned above, has the right to witness the execution of the act but not to be notified in advance, will subsequently have the right to examine the seized items at the place where they are kept.

Alongside the general legal framework, the code includes a number of *ad hoc* provisions relating to several specific scenarios.

First, special guarantees are envisaged with regard to the seizure of correspondence (Article 254 of the Italian Code of Criminal Procedure), since the freedom and secrecy of the same are considered inviolable by the Italian Constitution (Article 15 of the Constitution) and, therefore, can only be limited by a justified act on the part of the judicial authority, and with the guarantees established by the law. For this reason, the seizure of letters, envelopes, parcels, money orders, telegrams and other correspondence items, even sent electronically[51], is only permitted, from those who provide postal, telegraph, telematic, or telecommunication

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obtained from the illegal activity). The "profit" consists of the goods and utilities obtained from the product of the crime, and, according to part of the jurisprudence, corresponds to the financial advantage resulting directly and immediately from the crime itself (Court of Cassation, JC, 26 June 2015, no. 31617, Lucci, in *C.e.d.*, no. 264436; Court of Cassation, JC, 27 March 2008, no. 26654, Fisia Italimpianti s.p.a., in *C.e.d.*, no. 239924); according to other jurisprudence, it corresponds to any other utility that is even an indirect or mediated consequence of the criminal activity (Court of Cassation, JC, 24 April 2014, no. 38343, Espenhahn et al., in *C.e.d.*, no. 261116). Finally, according to the jurisprudence the "price" is defined as the compensation given to a person as consideration for unlawful conduct.

[50] Court of Cassation, sec. III, 22 April 2009, Bortoli, in *C.e.d.*, no. 243721.

[51] Italian law no. 48 of 18 March 2008, which implemented the Council of Europe's Convention on Cybercrime, signed in Budapest on 23 November 2001, amended Article 254 of the Italian Code of Criminal Procedure to include e-mail within the category of correspondence.

services, if the judicial authority has justifiable grounds to believe that the same have been sent by or are intended for the defendant (even under a different name or through a third-party), or that they may be otherwise related to the crime. If a judicial police officer decides to seize correspondence, the same must deliver that which has been seized to the judicial authority without opening or altering it, and without otherwise obtaining knowledge of its contents. Furthermore, as a guarantee of the fundamental defence function, it is not permitted to seize any correspondence between the defendant and his/her attorney, unless the judicial authority has grounds to believe that it is part of the body of the crime (Article 103(6) of the Italian Code of Criminal Procedure).

Second, with regard to the seizure of IT data from IT, telematic or telecommunication service providers, the judicial authority is permitted to the have the acquisition carried out by copying the data onto adequate media, using a procedure that ensures the inalterability of the acquired data and its consistency with the original files. The service provider is nevertheless ordered to properly preserve and protect the original files (Article 254-*bis* of the Italian Code of Criminal Procedure).

Furthermore, the judicial authority is permitted to seize documents, securities, values, sums deposited into bank/postal accounts and all other items, even if contained in safe-deposit boxes, when it has grounds to believe that they are pertinent to the crime, even if they do not belong to the defendant or are not registered in his/her name (Article 255 of the Italian Code of Criminal Procedure).

Getting back to the general legal framework of the scenario in question, in order to obtain the evidentiary seizure of an asset, a *fumus commissi delicti* is required. This does not mean that the judicial authority must prove a subject's criminal liability within the seizure order itself, but only that a crime has been committed[52]. Within the jurisprudence there is an open debate as to whether the existence of the evidential function of the criminal seizure needs to be justified in relation to the body of the crime as well: according to part of the jurisprudence, the evidentiary requirement, with reference to the *corpus delicti*, would be *in re ipsa*[53], while for the other part – which now constitutes the majority – the existence of evidentiary purposes can not be presumed even for the body of the crime[54]. This assumption has recently been reaffirmed by the Joint

[52] In this regard, see Court of Cassation, sec. III, 13 June 2007, Vitali, in *C.e.d.*, no. 237021.

[53] Among many, Court of Cassation, JC, 11 February 1994, P.m. in c. Carella et al., in *C.e.d.*, no. 196261.

[54] Court of Cassation, JC, 28 January 2004, P.c. Ferazzi in c. Bevilacqua, in *C.e.d.*, no. 226711; Court of Cassation, JC, 18 June 1991, Raccah, in *C.e.d.*, no. 187861.

Chambers of the Court of Cassation, which have affirmed that an evidentiary seizure decree, even if pertaining to items that constitute the body of the crime, must contain a specific justification regarding the objective pursued for the assessment of the facts[55].

The evidential function affects the duration of the seizure: in fact, the constraint of unavailability can not be maintained beyond the time strictly necessary to complete the investigations for which it was ordered[56]. Therefore, if the seizure no longer appears to be necessary for evidentiary purposes, the seized items are returned to those entitled to them, even before the sentence is issued. After the final judgment, the restitution of the seized items is ordered, unless their confiscation is ordered. For assets that don't have to be the subject of a confiscation order, therefore, the limit of the evidentiary seizure coincides with the irrevocable sentence. However, if the evidentiary requirements are no longer valid, the evidential seizure can be converted into a conservative seizure, if the public prosecutor or the civil party requests it (Article 262 of the Italian Code of Criminal Procedure). Otherwise, if there is danger that the free availability of the asset can prolong the consequences of the crime or facilitate the commission of other offences, the judge may decide not to return the asset and to maintain the seizure for preventive purposes.

Once five years have elapsed from the date of the sentence no longer subject to appeal, the sums of money seized are devolved to the State, provided that no confiscation has been ordered and no one claiming entitlement has requested their restitution.

2.1.2. *Conservative seizure*

Conservative seizure is ordered by the judge at the request of the public prosecutor whenever there are "reasonable grounds to believe that the guarantees for the payment of the pecuniary penalties, court costs, or any other sums owed to the Treasury of the State are lacking or will be dispersed" (Article 316 of the Italian Code of Criminal Procedure). In the presence of these conditions, the public prosecutor is obliged to ask the judge to apply this precautionary measure.

A civil party may also request the judge to order a conservative seizure in order to guarantee the civil obligations arising from a crime. Whatever the case, the conservative seizure ordered at the request of the public prosecutor also benefits the civil party.

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[55] Court of Cassation, JC, 19 April 2018, no. 36072, P.m. in c. B.A. and others.

[56] Court of Cassation, sec. IV, 22 November 2012, Genovese, in *C.e.d.*, no. 255077.

The above also applies with regard to the administrative liability of legal entities: in fact, in recalling several provisions of the Code of Criminal Procedure[57], Italian Legislative Decree no. 231 of 2001 allows for conservative seizure if there is good reason to believe that the guarantees for the payment of the pecuniary sanction, the court costs, and any other sums owed to the Treasury of the State are lacking or will be dispersed. In this case, the public prosecutor requests the seizure of the entity's movable and immovable assets or the sums or items owed to the State. Contrary to the Code of Criminal Procedure's provisions in relation to natural persons, during a trial against a legal entity only the public prosecutor (and not a civil party) can request the judge to impose the conservative seizure provision.

Unlike the other cases of seizure envisaged by the code, conservative seizure is only applicable during the proceedings on the merit of the case ("during any stage and instance of the proceedings on the merit of the case"), not during the preliminary investigations nor during the trial before the Court of Cassation.

The defendant can avoid the application of the measure by offering a suitable collateral to guarantee the credits held by the State or the civil party, consisting of a sum of money that, if deemed appropriate, triggers the revocation of the conservative seizure order or the non-enforcement of the same.

In terms of duration, the conservative seizure ceases to have effect once a judgment of dismissal or no grounds to proceed, no longer subject to appeal, is issued. The conservative seizure is automatically converted into a foreclosure when the sentence to pay a pecuniary penalty becomes irrevocable, or when the sentence requiring the defendant to pay compensation for damages to the civil party becomes enforceable.

A *fumus commissi delicti* is also necessary to order a conservative seizure: in this case, however (unlike the other cases of seizure), since the seizure can only be requested during the preliminary hearing or the trial, and therefore after the indictment has been issued, the *fumus* required consists of the existence of the indictment, and not, according to the jurisprudence, the likelihood of a conviction[58]. *Periculum in mora* is also necessary: a concrete risk that the assets guaranteeing the credit will be squandered or taken away, based on real and non-hypothetical data[59].

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[57] Art. 54 of the decree in question expressly states: "The provisions of articles 316, paragraph 4, 317, 318, 319 and 320 of the Italian Code of criminal procedure shall be observed, as applicable".

[58] Court of Cassation, sec. IV, 17 May 1994, Corti, in *C.e.d.*, no. 198681.

Likewise, in trials against legal entities, the *fumus* is implicit in the accusation brought against the organisation, and the *periculum* consists of well-founded reasons to believe that the patrimonial guarantees could end up missing or lost, based on concrete and specific evidence.

2.1.3. *Preventive seizure*

Preventive seizure is ordered with a motivated decree by the judge, who, at the request (*ne procedat iudex ex officio*) of the public prosecutor, proceeds when there is a risk that the free availability of an asset pertinent to the crime could aggravate or prolong the consequences of the crime itself, or facilitate the commission of other crimes (so-called impeditive preventive seizure, pursuant to Article 321(1) of the Italian Code of Criminal Procedure). If the conditions envisaged by law have been met, the seizure is mandatory[60].

During the preliminary investigation phase, if it is not possible to wait for the judge's preliminary ruling due to particular urgency, the seizure is ordered by the public prosecutor with a motivated decree. The seizure can also be ordered by judicial police officers in the same emergency situations.

The judge can also order the seizure of assets that are allowed to be confiscated, even by equivalent (in this latter case, the seizure is optional) (Article 321(2) of the Italian Code of Criminal Procedure). The request for the preventive seizure of assets for which confiscation is permitted is, on the other hand, mandatory in proceedings concerning certain crimes against the public administration by public officials[61].

With regard to preventive seizure during the trial of a legal entity, Article 53 of Italian Legislative Decree no. 231 of 2001 provides for the possibility of seizing the assets that the same decree (Article 19) allows to be confiscated, in order to prevent the dispersion of the entity's assets and to allow for their future confiscation, even by equivalent.

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[59] With regard to *periculum in mora* in conservative seizure, Court of Cassation, sec. II, 13 November 1997, Airaldi, in *C.e.d.*, no. 209599.

See also Court of Cassation, sec. VI, 7 January 2015, no. 14065, Baldetti, in *C.e.d.*, no. 262951.

[60] With regard to this notice, in the case law, see N. Triggiani, "La misura volta ad evitare il reiterarsi del reato o l'inadempimento dei suoi effetti", in M. Montagna (ed.), *Sequestro e confisca*, Turin: Giappichelli, 2017, 143.

[61] Art. 321(2-*bis*) of the Italian Code of Criminal Procedure: "During the course of the criminal proceedings concerning crimes covered under Chapter I, Title II of the second book of the Italian Penal Code, the judge shall order the seizure of the assets for which confiscation is permitted".

Unlike conservative seizure, preventive seizure can also be ordered during preliminary investigations. If it is not possible to wait for the judge's preliminary ruling due to particular urgency, the seizure is ordered with a motivated decree by the public prosecutor. In the same emergency situations, the seizure can also be carried out by judicial police officers and agents, who must transmit the seizure report to the public prosecutor of the place where the provision was taken within the subsequent forty-eight hours. After having verified that the asset does not have to be returned to the owner, the public prosecutor asks the judge to validate the seizure and to issue a motivated decree of preventive seizure within forty-eight hours, starting from the time of the seizure, if ordered by the public prosecutor, or from the time at which the report was received, if carried out by the judicial police.

The judge must validate the seizure and issue the relative order within ten days of receiving the request, under penalty of the seizure already ordered ceasing to have effect; in the same manner, the preventive seizure shall cease to have effect if the deadlines for transmitting the documents to the public prosecutor or for submitting the validation request to the judge are not respected. If these deadlines are respected, precautionary seizures do not have a duration limit. However, the measure is immediately revoked, at the request of the concerned party or the public prosecutor, whenever the conditions for applicability cease to exist, even due to unforeseen events. The preventive seizure subsequently ceases to have effect in the event that a sentence of acquittal or barring the opening of the trial phase (acquittal at the end of the preliminary hearing) is issued, even if subject to appeal. Once a sentence of conviction has been issued, the preventive seizure is maintained if the confiscation of the seized assets has been ordered, otherwise the assets are returned. At the request of the public prosecutor or the civil party, a preventive seizure can be converted into a conservative seizure in order to guarantee the credits held by the State or the civil party itself.

The question of the evidentiary standard required for impeditive preventive seizure and for the purpose of confiscation is particularly complex.

With regard to the former, *fumus commissi delicti* and *periculum in mora* are necessary to order a preventive seizure. In terms of the *fumus*, there is no need for serious evidence of guilt (which is required to apply a personal precautionary measure, such as custody in prison). For the purposes of preventive seizure, however, the jurisprudence is satisfied with the consistency between the hypothesised legal situation and the actual situation, and does not require that the case be proven at this stage

of the proceedings[62], nor does it require the elements from which the commission of the crime is deduced to be indicated[63]. The *periculum in mora* consists of the concrete and actual possibility (deduced from the nature of the asset and all the circumstances of the case) that the asset could be instrumental to aggravating or prolonging the consequences of the crime, or to facilitating the commission of other crimes. In fact, the pertinence must be excluded if there is only a casual relationship between the asset and the crime[64].

With regard to preventive seizure aimed at confiscation (Article 321(2) of the Italian Code of Criminal Procedure), the possibility of confiscating the asset was considered sufficient. Within this context, however, the Joint Chambers of the Court of Cassation clarified that, while the evidence does not necessarily concern the responsibility of the suspect, it must always refer to the existence of a concrete crime[65]. In the case at hand, according to the jurisprudence, the *fumus commissi delicti* would consist of the abstract possibility of the deed being subsumed within the commission of a crime[66], that is the possibility of framing the concrete deed within a hypothetical criminal offence envisaged by the legislature. From the standpoint of *periculum in mora*, seizure for confiscation purposes would require an assessment of the asset's dangerousness and its association with the crime, in the sense that the asset must have an instrumental link to the crime, and not merely a casual association[67]. The asset can be considered "instrumental", for example, if it has undergone any structural changes in order to render it useful for the commission of the crime (e.g.: a car that has been modified in order to conceal drug trafficking).

Otherwise, in the case of seizure for the purposes of confiscation by equivalent or extended confiscation, in which there is no link between the assets to be seized and the crime itself, the prerequisite for applying the measure is the presence of serious clues as to the existence of the conditions required for the application of confiscation[68], in addition to

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[62] In this regard, see P. Tonini, "Manuale breve di diritto processuale penale", Milan: Giuffrè, 2015, 346.

[63] Among many, Court of Cassation, sec. V, 15 July 2008, Cecchi Gori, in *C.e.d.*, no. 241632.

[64] Court of Cassation, sec. V, 30 October 2014, no 52251, Bianchi, in *C.e.d.*, no. 262164.

[65] Court of Cassation, JC, 31 March 2016, Capasso, in *Cass. pen.*, 2016, 3149-3150.

[66] Court of Cassation, sec. II, 30 September 2015, no. 40401.

[67] Court of Cassation, sec. V, 28 February 2014, no. 21882, Policarp, in *C.e.d.*, no. 260001.

[68] Court of Cassation, JC, 17 December 2003, no. 920, Montella, in *C.e.d.*, no. 226492.

the abstract possibility that a crime has been committed in relation to which the measure is permitted.

With regard to preventive seizure against legal entities (Article 53 of Italian Legislative Decree no. 231 of 2001), on the other hand, several authors believe that the abstract possibility that the entity has committed the crime is sufficient, without the need for any serious clues as to the entity's responsibility; it is also not believed to be necessary to assess the existence of a *periculum in mora*, which is presumed by the law because relative to assets that are subject to confiscation[69].

2.1.4. *Seizure "for prevention" envisaged by the "Anti-Mafia Code"*

Seizure for prevention is ordered by the Court, even *ex officio*, with a motivated decree, in relation to the assets that could be directly or indirectly available to a person against whom a proposal for prevention measures has been submitted, when their value is disproportionate to the subject's declared income or occupation, or when, based on "sufficient evidence", there is reason to believe that they are or constitute the re-use of the fruits of illegal activities (Article 20 of Italian Legislative Decree no. 159 of 2011).

In cases of urgency, there is the possibility of the seizure being carried out "in advance" with respect to the hearing. In this case, if there is a real danger that the assets intended to be confiscated will be lost, removed or alienated, the Public Prosecutor at the court of the capital city of the district where the person lives, the Public Prosecutor at the court in whose district the person resides, the national anti-Mafia and counter-terrorism Prosecutor, the chief of police, or the director of the anti-Mafia investigative directorate may, upon submitting the proposal, ask the president of the court responsible for applying the preventive measure to order the seizure of the assets before the date of the hearing has been set. The president of the court arranges for this with a motivated decree within five days of the request. The ordered seizure ceases to be effective if not validated by the court within thirty days of the proposal.

Moreover, during the course of the proceedings, in cases of particular urgency, the seizure is ordered by the president of the court with a motivated decree, and ceases to be effective if not validated by the court within the next thirty days (Article 22 of Italian Legislative Decree no. 159 of 2011).

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[69] In this regard, see G. Garuti, "La procedura per accertare la responsabilità degli enti", in Various Authors, *Procedura penale*, Turin: Giappichelli, 2017, 716.

Finally, there is also the possibility of "subsequent" seizure and confiscation, which can even be adopted after the application of a personal prevention measure, at the request of the legitimised subjects (Article 24(3) of Italian Legislative Decree no. 159 of 2011).

In order to subject an asset to seizure for prevention purposes, its current direct or indirect availability to the subject undergoing the prevention procedure must be proven. The *fumus* consists of the presence of a link between the asset and the illegal activity, deduced from "*sufficient clues*" indicating that the asset is or constitutes the re-use of the fruit of illegal activities. With regard to a disproportion with respect to the subject's declared income or occupation, the jurisprudence has clarified that reference to the ISTAT indexes is not sufficient, as it is necessary to verify the inadequacy of the income obtained by the family unit with respect to the value of the acquisitions, based on the established data[70].

In terms of duration, the seizure for prevention purposes ceases to be effective if the court does not file the confiscation decree within one year and six months from the date upon which the assets came into the judicial administrator's possession. In the case of complex investigations, this deadline may be extended for six-month periods by court decree (Article 24(2) of Italian Legislative Decree no. 159 of 2011).

The seizure for prevention purposes is revoked by the court when it is determined that it is targeting assets of legitimate origins or assets that could not have been directly or indirectly available to the suspect, or in any other case in which the proposal for the application of the patrimonial prevention measure is rejected. The court orders the resulting transcripts and annotations to be entered into the public registers, the corporate books, and the business register.

2.1.5. *The process of challenging seizures and the absence of a procedural remedy in the case of an injunction found to be unjustified.*

Only certain appellate remedies are common to each type of seizure envisaged by the code: in particular, the re-examination applies to all forms of seizure (Article 324 of the Italian Code of Criminal Procedure, to which the provisions regarding evidentiary seizure and precautionary measures on property refer). Furthermore, in opposition to the re-examination provisions (and appeals, where provided), an appeal before the

[70] Court of Cassation, sec. V, 4 February 2016, no. 14047, Fiammetta, in *C.e.d.*, no. 266426.

Court of Cassation for violation of the law is permitted (Article 325 of the Italian Code of Criminal Procedure). As an alternative to the request for re-examination, the original seizure provision can be directly challenged before the Court of Cassation, through a *per saltum* appeal.

For preventive seizure alone, on the other hand, there is the possibility of appealing (Article 322-*bis* of the Italian Code of Criminal Procedure) the provisions that can not be challenged by re-examination (e.g. the rejection of the request for restitution, or the refusal to grant or revoke the measure).

A ruling on the appellate remedy must be made by the collegiate Court of the provincial capital where the judge who issued the contested provision is located.

With regard to the re-examination, pursuant to Article 324 of the Italian Code of Criminal Procedure (which is also applicable to evidentiary seizure, pursuant to Article 257 of the Italian Code of Criminal Procedure), the request must be submitted within ten days of executing or obtaining knowledge of the seizure. This request does not have the effect of suspending the enforcement of the provision.

With regard to the liability of legal entities, on the topic of preventive seizure, the decree refers – as applicable – to Articles 322 and 322-*bis* of the Italian Code of Criminal Procedure; similarly, in art. 54, regarding conservative seizure, reference is made to the legal framework of the re-examination.

It is permitted, on the other hand, to challenge the proposal of the provision that provides for seizure for prevention purposes, which takes place before the same judge who ordered the seizure with the enforcement proceedings, as well as the appeal before the Court of Cassation[71].

In contrast, the instrument for monitoring the restitution provision, as well as for resolving any disputes arising during the enforcement of the seizure, is the enforcement hearing pursuant to Article 676 of the Italian Code of Criminal Procedure. In the event of a dispute concerning the ownership of the asset, on the other hand, the civil court has jurisdiction.

Scholars have highlighted how the prolonged seizure of assets could jeopardise their value and efficiency. The damage that a seizure order without a fixed duration causes to the concerned party can be considerable. However, the Italian penal system does not provide for compensatory measures in the event of a seizure order later found to be unjusti-

[71] M.F. Cortesi, "Il sequestro e la confisca nel procedimento di prevenzione", in M. Montagna (ed.), *Sequestro e confisca*, Turin: Giappichelli, 2017, 500.

fied: in fact, the law only envisages reparations for unjustified detention (Articles 314-315 of the Italian Code of Criminal Procedure), which does not extend, *de iure condito*, to precautionary measures on property[72].

2.2. *Procedural aspects of confiscations: judge competent to order mandatory or optional confiscation.*

The Italian Code of Criminal Procedure does not contain a comprehensive framework on the topic of confiscations: the institution is referred to by several provisions, many of which are relegated to the implementing and transitional provisions (Disp. Att. CPP, *i.e.* Italian Legislative Decree no. 271 of 1989).

Confiscation can or must be ordered by the trial judge who pronounces the sentence of conviction, or by the enforcement judge[73], if mandatory. In this case, the enforcement judge has the duty to order the confiscation during the enforcement phase, if the jurisdictional judge hasn't rule on it[74].

As stated earlier, optional confiscation is based on the perceived social dangerousness of the offender's possession of the assets that served or were used to commit the crime, and of the assets that constitute the product or the profit of the crime. It can only be ordered in the event of a conviction, even after a plea bargain. In our legal system, the so-called plea bargain, referred to in the code as the "Application of the penalty at the request" of the parties (Article 444 et seq. of the Italian Code of Criminal Procedure), is a special proceeding that consists of an agreement between the accused and the prosecutor, not on the indictment, but on the extent of the sentence, which can be reduced by up to one third, as the main, but not the only, reward[75] arising from the choice of this proceeding. The sentence issued at the end of the plea bargain is treated as a judgment of conviction.

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[72] From a critical perspective, see G. SPANGHER, "Considerazioni sul processo "criminale" italiano", Turin: Giappichelli, 2015, 114-116.

[73] The latter is the judge responsible for deciding on issues relating to the effective enforcement of the sentence, and coincides with the judge who has ruled on the relative provision.

[74] Court of Cassation, sec. III, 10 September 2015, no. 43397, Lombardo, in *C.e.d.*, no. 265093.

[75] Article 445(1) of the Italian Code of Criminal Procedure: "When the penalty imposed does not exceed two years of imprisonment, whether alone or in conjunction with a fine, the sentence envisaged by article 444, paragraph 2 does not entail the obligation to pay the costs of the proceedings nor the application of accessory penalties and security measures, with the exception of confiscation in the cases envisaged by article 240 of the penal code".

In addition to the conviction, on the other hand, mandatory confiscation is always ordered for the assets constituting the price of the crime, or the compensation given or promised to induce, instigate or cause another person to commit the crime, unless the asset belongs to a person unrelated to the crime. Mandatory confiscation is also ordered (in this case regardless of a sentence of conviction) for the assets whose manufacture, use, carrying, possession, or disposal constitutes a crime (article 240 (2, no. 2) of the Italian Penal Code), unless they belong to a person unrelated to the crime and their use, etc. is permitted by administrative authorisation. Finally, it should be noted that confiscation is mandatory for computerised and telematic assets and tools used to commit a series of computer crimes, as well as the assets constituting the profit or product of those crimes (Article 240 (2, no. 1-*bis*) of the Italian Penal Code).

With regard to extended confiscation, which is currently governed by Article 240-*bis* of the Italian Penal Code, since the criminal trial's characteristics of orality, immediacy, and brevity are not very conducive to the documentary checks required for confiscation to be applied, the practice of postponing the confiscation until the enforcement phase has been adopted. This solution was later accepted by the legislature, first with Italian Law no. 161 of 2017 (Article 12-*sexies* (4-*sexies*) of Decree Law no. 306 of 1992) and later with Italian Legislative Decree no. 21 of 2018, which transposed the contents of the Italian Code of Criminal Procedure's implementing provisions (Article 183-*quater* Disp. Att. of the Italian Code of Criminal Procedure, titled "Execution of confiscation in special cases")[76]. This law states that, once the final ruling has been issued, the power to order extended confiscation lies with the enforcement judge. In this case, upon receiving the request for seizure and confiscation from the public prosecutor, the enforcement judge arranges for the same without formalities (Article 667 (4) of the Italian Code of Criminal Procedure). This informal procedure allows the provision to be taken without hearing the parties. Opposition can be raised, however, under penalty of forfeiture, within thirty days of the decree's announcement or notification, based on which a chamber hearing for cross examination may be scheduled (Article 666 of the Italian Code of Criminal Procedure) and the provision adopted can be appealed to the Court of Cassation. In the event of the death of the subject in relation to whom the confiscation was ordered with a final judgment, the relative proceedings

[76] In this regard, see A.M. Maugeri, "La riforma della confisca (d.lgs. 202/2016). Lo statuto della confisca allargata *ex* art. 240-*bis* c.p.: spada di Damocle *sine die* sottratta alla prescrizione (dalla l. 161/2017 al d.lgs. n. 21/2018)", in *www.archiviopenale.it*, 20.

shall begin or continue against his/her heirs or assignees (Article 183-*quater* (2) Disp. Att.).

With regard to the administrative liability of legal entities, in addition to the conviction, the confiscation of the price or the profit of the crime[77] is always ordered, except for the part that can be returned to the damaged party and without prejudice to the rights acquired by third parties in good faith (Article 19 of Italian Legislative Decree no. 231 of 2001). It may even be ordered by equivalent[78]. In addition to this main scenario covering sanctions, the decree also includes criminal provisions with confiscation scenarios for various purposes. In particular: *a*) in the case of the entity's acquittal for having effectively adopted an organisational model, it is permitted to confiscate the profit that the entity gained from the crime (even by equivalent) (Art. 6 (5) of Italian Legislative Decree no. 231 of 2001); *b*) it is also permitted to confiscate the profit generated during the continuation of the activity through a judicial commissioner (Art. 15 (4) of Italian Legislative Decree no. 231 of 2001); *c*) it is permitted to confiscate the profit in the case of the failure to respect the prohibitive penalties (Art. 23 (2) of Italian Legislative Decree no. 231 of 2001).

Preventive confiscation is ordered by the Court for seized property whose origins are unable to be justified by the defendant, and of which, even through a natural or legal person, he/she appears to be the owner or have the availability thereof in any capacity, for a value that is disproportionate to his/her income declared for tax purposes or his/her occupation, as well as any assets that are or constitute the re-use of the fruits of illegal activities. Whatever the case, the defendant can not justify the legitimate origins of the assets if it is found that the money used to purchase them constitutes the proceeds or the reinvestment of funds derived from tax evasion[79] (Article 24 of Italian Legislative Decree no. 159 of 2011).

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[77] In the sense that the profit that can be confiscated is "the financial advantage resulting directly and immediately from the crime itself": Court of Cassation, JC, 27 March 2008, no. 26654, Fisia Italimpianti s.p.a., cit.

See also Court of Cassation, JC, 31 January 2013, no. 18374, Adami et al., in *C.e.d.*, no. 255036, in the sense that the profit consists of any financial advantage, including cost savings. For the broad definition of confiscable profit, including every benefit that's even an indirect or mediated consequence of the criminal activity, see: Court of Cassation, JC, 24 April 2014, no. 38343, Espenhahn, in *C.e.d.*, no. 261116. From the opposing perspective, see Court of Cassation, sec. VI, 22 April 2016, Giglio et al., in *C.e.d.*, no. 267065.

[78] On this point, see Court of Cassation, JC, 25 September 2014, no. 11170, Uniland s.p.a. et al., in *C.e.d.*, no. 263680.

[79] The above now also refers to extended confiscation: see P. Corvi, "La confisca in casi particolari, *alias* la confisca 'allargata' ", in A. Giarda, F. Giunta, G. Varraso (eds.), *Dai decreti attuativi della legge "Orlando" alle novelle di fine legislatura*, Milan: Wolters Kluwer Cedam, 2018, 43.

2.2.1. *Non-conviction-based confiscation*

As previously mentioned, Article 240 (2, no. 2) of the Italian Penal Code permits the confiscation of "*intrinsically dangerous*" assets (i.e. assets whose manufacture, use, carrying, possession, or disposal constitutes a crime), even in the case of acquittal.

Aside from the scenario cited above, the compatibility of confiscation with a judgment of non prosecution due to a cause of extinguishment of the offence (e.g. if the offence is time-barred) is a question that has led to a legal debate[80]. As is well known, the European Court of Human Rights has deliberated several times on the possibility of ordering confiscation in the absence of a sentence of conviction, ruling that, under penalty of violating of Article 7 ECHR, among others, confiscation cannot be ordered without an actual conviction[81].

Confiscation by equivalent, however, was not considered acceptable by the jurisprudence in the event of dismissal for extinguishment of the offence[82].

With regard to extended confiscation, Article 578-*bis* of the Italian Code of Criminal Procedure, introduced by Italian Legislative Decree no. 21 of 2018 and amended by Italian Law no. 3 of 2019, states that when confiscation has been ordered in special cases pursuant to Article 240-*bis* of the Italian Penal Code and other legal provisions or pursuant to Article 322-*ter* of the Italian Penal Code, the appeal judge or the Court of Cassation, in declaring the offence expired by a cause of extinguishment of the offence or by amnesty, shall deliberate on the appeal only with regard to the effects of the confiscation, after determining the

[80] The Joint Chambers of the Court of Cassation have deemed the direct confiscation of the price or profit of the crime to be applicable with the issuance of a sentence of acquittal by statute of limitations, provided that the relative ruling is preceded by a comprehensive determination of liability, and expressly excluding the possibility of the same solution being applicable for confiscation by equivalent: Court of Cassation, JC, 26 June 2015, no. 31617, Lucci, in *C.e.d.*, no. 264434.

The most prominent jurisprudence was of the opposing view: Court of Cassation, JC, 10 July 2008, no. 38834, De Maio, in *C.e.d.*, no. 240565; Court of Cassation, JC, 25 March 1993, no. 5, Carlea et al., in *C.e.d.*, no. 193119.

In the opposite sense, with regard to the confiscation of land for the crime of unlawful subdivision, see Court of Cassation, sec. III, 30 April 2009, no. 21188, Casasanta et al., in *C.e.d.*, no. 243630.

[81] In the case law, ECtHR, G.C., *G.I.E.M. s.r.l. and Others v. Italy*, 28.6.2018, in *www.echr.coe.int*; ECtHR, sec. II, *Varvara v. Italy*, 29.10.2013, in *www.echr.coe.int*; ECtHR, sec. II, *Sud Fondi v. Italy*, 20.1.2009, in *www.echr.coe.int*; Constitutional Court, no. 49 of 26 March 2015.

[82] Court of Cassation, JC, 26 June 2015, no. 31617, Lucci, cit.

liability of the accused[83]. It follows that, in order to apply the provision in question, the judge must have already ordered the confiscation before the offence is extinguished; in the end, if the confiscation has not already been ordered, it will still be possible to initiate the prevention proceedings for the purposes of applying confiscation as a patrimonial prevention measure[84].

2.2.2. *Rights and guarantees*

Since confiscations are applied following a conviction, the accused will have enjoyed the right to cross-examination during the trial, as well as every other guarantee offered by the criminal trial, and, in particular, the possibility of challenging the confiscation in his/her own legitimate interests. An appeal against the rulings of the enforcement judge may be filed with the Court of Cassation[85].

The same does not hold true for the preventive confiscation applied at the outcome of an inquisitorial proceeding, where the rights of the accused are less guaranteed. The accused will have the right to challenge the decree applying the patrimonial measure (Article 27 of Italian Legislative Decree no. 159 of 2011, which recalls Article 10 of the same decree, regarding the formalities for challenging personal preventive measures) by appeal, appeal before the Court of Cassation "for violation of the law" (challenges that have a suspensive effect with regard to confiscation) and, in the presence of the conditions envisaged by law, to request its revocation.

2.2.3. *Evidentiary standard required for confiscation*

For the purposes of optional confiscation (Article 240(1) of the Italian Penal Code), the judge must indicate the link between the asset and the crime as justification, in the sense that the asset must have an instrumental link to the crime, and not merely a casual association[86].

In the case of confiscation by equivalent, according to part of the jurisprudence, the judge only has to verify that the assets fall within the

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[83] According to P. Corvi, "La confisca in casi particolari, *alias* la confisca "allargata"", op. cit., 46, this provision seems contrary to Directive 2014/42/EU.

[84] A.M. Maugeri, "La riforma della confisca (d.lgs. 202/2016). Lo statuto della confisca allargata *ex* art. 240-*bis* c.p.: spada di Damocle *sine die* sottratta alla prescrizione (dalla l. 161/2017 al d.lgs. n. 21/2018)", op. cit., 31.

[85] A.M. Maugeri, "La riforma della confisca (d.lgs. 202/2016). Lo statuto della confisca allargata *ex* art. 240-*bis* c.p.: spada di Damocle *sine die* sottratta alla prescrizione (dalla l. 161/2017 al d.lgs. n. 21/2018)", op. cit., 22.

[86] Court of Cassation, sec. VI, 5 March 2013, no. 13049, Spinelli, in *C.e.d.*, no. 254881.

categories of things objectively subject to confiscation, without assessing the *periculum in mora* or the pertinence of the assets[87].

With regard to extended confiscation, according to the jurisprudence it is not necessary for there to be a pertinent link between the asset and the crime, nor do the assets to be confiscated need to be derived from the crime in question, nor do they need to originate from the convicted party's illegal activities[88]. With regard to the disproportion between the assets and the income or occupation of the convicted party, the ascertained imbalance gives rise to a presumption of illegal accumulation of assets[89], which can only be overcome by the subject justifying the origins of his/her financial resources. According to the most prominent thesis, since the concerned party was formerly asked to prove the legitimate origins of his/her assets, the burden of proof was reversed; the jurisprudence now considers this to be a burden of allegation[90]. Instead, it is the prosecution's duty to prove ownership of the assets. In the event that the asset is indirectly available to the convicted party, the burden of proving the existence of circumstances that reveal the divergence between the formal ownership and the actual availability of the asset lies with the prosecutor[91].

Preventive confiscation requires complete and rigorous proof[92] of the link between the asset and the illegal activity, since the "sufficient clues" necessary for the application of the relative seizure are not deemed suitable. Furthermore, both the illegal origins and the disproportion must be ascertained by the prosecution in relation to each individual asset, and with reference to their time of purchase, under penalty of violating the property right constitutionally guaranteed by Article 42 of the Constitution[93].

As we have seen, for the patrimonial prevention measures, the jurisprudence no longer requires the verification of the subject's current dangerousness, provided that it can be shown that he/she was dangerous

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[87] Court of Cassation, sec. III, 15 April 2015, no. 20887, Aumenta, in *C.e.d.*, no. 263408.

[88] Court of Cassation, JC, 17 December 2003, no. 920, Montella, in *C.e.d.*, no. 226492.

[89] Imbalance to be verified with regard to the time of the individual assets' acquisition: on the point, see Constitutional Court, no. 33 of 21 February 2018.

[90] Court of Cassation, sec. VI, 3 April 2003, Prudentino et al., in *C.e.d.*, no. 225920. Constitutional Court, no. 33 of 21 February 2018, cit.

[91] Court of Cassation, sec. I, 24 October 2012, no. 44534, Ascone et al., in *C.e.d.*, no. 254699.

[92] M.F. Cortesi, "Il sequestro e la confisca nel procedimento di prevenzione", op. cit., 504.

[93] Court of Cassation, sec. I, 13 May 2008, no. 21357, Esposito, in *C.e.d.*, no. 240091.

upon assuming ownership of the asset subject to the provision[94]. This is not a reversal of the burden of proof: however, the accused's inability to meet the burden of allegation on the points pertinent to the investigations has circumstantial value[95].

2.2.4. *The remedies*

Appellate remedies can be used against the confiscation provision, while the enforcement hearing (Article 676 of the Italian Code of Criminal Procedure) will be able to be used to contest the validity of the enforcement order. The enforcement judge has the power to ensure compliance with the requirements and conditions legitimizing the measure, resolving the issues relating to the enforcement order, and ruling on the extent and the methods of the confiscation[96].

With regard to preventive confiscation, Article 28 of Italian Legislative Decree no. 159 of 2011 introduced the possibility of revocation, which allows the confiscation to be rendered ineffective in the event that the conditions for its application are shown to be no longer valid. Under penalty of inadmissibility, the request for revocation must be submitted within six months from the date upon which one of the cases permitting the request occurred, unless the concerned party is able to prove that he/she was unaware of it through no fault of his/her own. The formalities of the revocation process are the same as those for the extraordinary appeal (usable against final judgements) referred to as a revision (Articles 630 et seq. of the Italian Code of Criminal Procedure), and will be available in one of the following mandatory scenarios: *a*) in the event of the discovery of new decisive evidence after the conclusion of the proceedings; *b*) in the event that facts ascertained with definitive penal judgements, arising or becoming known after the conclusion of the prevention proceedings, absolutely exclude the existence of the conditions for the application of the confiscation; *c*) in the event that the ruling on the confiscation was motivated, exclusively or in a determining manner, based on documents recognised as false, falsehoods during the trial, or an event envisaged by the law as a crime.

Definitive confiscation entails the assumption of the asset's ownership by the State.

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[94] Court of Cassation, sec. one, 26 June 2014, no. 4880, Spinelli et al., in *C.e.d.*, no. 262604-262605.

[95] Court of Cassation, sec. VI, 3 April 1995, no. 1265, Annunziata, in *C.e.d.*, no. 202310.

[96] Court of Cassation, sec. I, 2 February 2016, Violino et al., in *C.e.d.*, no. 266624.

2.3. *Seizure and confiscation of assets belonging to third parties.*

In the Italian legal system, the confiscation of assets belonging to persons unrelated to the commission of a crime[97] is generally excluded, both for confiscation pursuant to Article 240 of the Italian Penal Code, as well as for the special hypotheses relating to particular types of offences[98].

The confiscation referred to under Article 240 (1) of the Italian Penal Code does not enter into effect if it would affect assets belonging to a person unrelated to the crime (Article 240 (3) of the Italian Penal Code). This limitation does not apply, however, for "intrinsically dangerous" assets (Article 240 (2, no. 2) of the Italian Penal Code), such as those whose manufacture, use, carrying, etc., constitutes a crime.

For these purposes, the notion of ownership must be understood in the material sense, without having regard to the formal ownership of the asset. With regard to unrelatedness, an unrelated person is someone who has not made any contribution to the commission of the crime and has not obtained any benefit from the unlawful conduct of others[99], with the exception of cases in which the third party has innocently benefited from the crime in good faith[100]. The third party shall have the burden of proving the facts constituting his/her claim to the asset, providing all the elements constituting the conditions of "ownership" and "unrelatedness to the crime", regarding the absence of a link between his/her claim and the criminal conduct of others, or, in the event that the third party has in any way benefited from the latter, regarding the fact that this was done innocently and in good faith.

The confiscation ordered against the legal entity (Article 19 of Italian Legislative Decree no. 231 of 2001) is also ordered without prejudice to the rights acquired by third parties in good faith.

Third party protection is considerably weakened, however, when the confiscation not only regards a single asset, but potentially a person's entire estate. However, with regard to patrimonial prevention measures, in order to protect third parties, the accused's assets cannot be subjected to preventive seizure or confiscation when they have been legitimately

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[97] On the issue of third party protection, see F. Menditto, "Le confische di prevenzione e penali. La tutela dei terzi", Milan: Giuffrè, 2015.

[98] In this regard, see L. Capraro, "Disponibilità della res e tutela del terzo estraneo", in M. Montagna (ed.), *Sequestro e confisca*, Turin: Giappichelli, 2017, 335-336.

[99] Court of Cassation, JC, 25 September 2014, no. 11170, Uniland s.p.a. et al., in *Cass. pen.*, 2016, 2893.

[100] T.E. Epidendio, "La confisca nel diritto penale e nel sistema delle responsabilità degli enti", Padua: Cedam, 2011, 164-165.

transferred to third parties in good faith at any time: in this case, the seizure and confiscation are carried out in relation to other assets of equivalent value and of legitimate origins available to the accused, even through a third party (Article 25 of Italian Legislative Decree no. 159 of 2011).

With regard to extended confiscation, we have seen that Article 240-*bis* of the Italian Penal Code also concerns the assets owned by or available to the convicted party in any capacity, even through a natural or legal entity. As anticipated, like preventive confiscation (Article 18 of Italian Legislative Decree no. 159 of 2011), extended confiscation can also be applied in the event of the death of the person concerned, and can therefore remain in effect in relation to the person's heirs or assignees (Article 183-*quarter* Disp. Att. of the Italian Code of Criminal Procedure).

With regard to third party protection, the preventive procedure has become a reference for confiscation in particular cases to which the framework contained in the *Anti-Mafia Code* applies. In particular, Article 104-*bis* (1-*quinquies*) Disp. Att. of the Italian Code of Criminal Procedure, introduced by Italian Legislative Decree no. 21 of 2018, states that "third parties vested with property interests or personal rights of enjoyment on seized assets, available to the accused in any capacity, must be summoned"; the same (Article 104-*bis* (1-*sexies*) Disp. Att. of the Italian Code of Criminal Procedure) is also applicable in the event that, in declaring the offence extinguished, the appeal judge or the Court of Cassation deliberate on the appeal only with regard to the effects of the extended confiscation, after determining the liability of the accused (article 578-*bis* of the Italian Code of Criminal Procedure).

From the standpoint of burden of proof, the jurisprudence has confirmed that the prosecutor must rigorously demonstrate the existence of situations that concretely confirm the formal nature of the ownership, with the aim of leaving the asset effectively and autonomously available to the accused; this availability must be ascertained through rigorous, intense and in-depth investigation, as the judge is required to explain the reasons why he/she believes there might be false intermediation, based on factual elements[101].

If it is ascertained that certain assets have been falsely registered or transferred to third parties, the judge declares the relative acts of disposal to be null with the decree ordering their confiscation. For these

[101] Court of Cassation, sec. II, 23 June 2004, no. 35628, Palumbo et al., in *C.e.d.*, no. 229726.

purposes, the following are assumed to be fictitious: *a*) transfers and assignments, even for payment, carried out during the two years prior to the proposal of the preventive measure, involving a parent, child, spouse, or permanent cohabitant, as well as relatives within the sixth degree, and in-laws within the fourth degree; *b*) transfers and assignments, either free of charge or fiduciary, carried out during the two years prior to the proposal of the prevention measure. These assumptions are relative and allow for evidence to the contrary.

Furthermore, in order to ensure the protection of third parties in good faith, Article 52 of Italian Legislative Decree no. 159 of 2011 states that the confiscation mustn't affect the credit rights of any third parties indicated by documents with ascertained dates prior to the seizure, as well as any real guarantee rights established prior to the seizure, provided that the following conditions are met: *a*) that the accused does not have other assets suitable for satisfying the credit upon which the patrimonial guarantee can be enforced, with the exception of credits backed by legitimate pre-emptive rights on seized assets; *b*) that the credit is not instrumental to the illegal activity or to that which constitutes its fruits or the re-use thereof, provided that the creditor demonstrates good faith and an unawareness of the illegal activity; *c*) in the case of promise of payment or acknowledgement of debt, that the underlying relationship is proven; *d*) in the case of debt securities, that the bearer proves the underlying relationship and that which legitimises their possession.

2.3.1. *The remedies available to third parties in case of seizure or confiscation*

Unrelated third parties are among those entitled to challenge seizure orders: in fact, pursuant to Articles 322 and 322-*bis* of the Italian Code of Criminal Procedures, both the person from whom the assets have been seized and the person entitled to their return can request a re-examination or appeal. Furthermore, the third party can request the revocation of the measure pending the seizure order (Article 321(3) of the Italian Code of Criminal Procedure).

With regard to preventive seizure, if the seized assets are formally owned by a third party (or a third party is able to claim real or personal usage rights to the seized assets), they shall be called upon by the Court, with a motivated decree, to present themselves during the proceedings, within the thirty days following the enforcement of the seizure order (Article 23 of Italian Legislative Decree no. 159 of 2011). At the hearing, the concerned parties will have the opportunity to make their case with the

assistance of an attorney, as well as to request any elements useful for the purposes of the confiscation ruling. If the latter is not ordered, the Court will order that the assets be returned to their owners. The participation of the third parties in the proceedings, however, is not infallible: it follows that, in the event that they should fail to present themselves, the validity of the order will not be revoked. The third parties will then be able to make their case at an enforcement hearing, once they have already lost possession of their assets.

According to the jurisprudence of legitimacy, since he/she is not part of the criminal trial, the unrelated third party has no opportunity to make his/her case during the course of the trial[102], nor to challenge the portion of the criminal sentence regarding the confiscation[103] (although, as mentioned above, he/she can challenge the seizure provision). The third party can therefore only await the final decision and call for enforcement proceedings, since, pursuant to art. 676 of the Italian Code of Criminal Procedure, he/she is only able to use enforcement hearings to claim his/her right to have the confiscated asset returned[104]. The enforcement judge will be responsible for ascertaining the good faith of the third party, since the retention of his/her right to the confiscated asset depends upon that requirement[105]. It must, however, be taken into consideration that the aforementioned Article 104-*bis* (1-*quinquies*) Disp. Att. of the Italian Code of Criminal Procedure now states that "during the trial third parties vested with property interests or personal rights of enjoyment on seized assets, available to the accused in any capacity, must be summoned".

With regard to preventive confiscation, on the other hand, Chapter IV of Italian Legislative Decree no. 159 of 2011 contains a comprehensive system for the protection of third parties (accessible to all creditors), based on an incidental verification of the disputed claims and the subsequent establishment of a "payment plan", with time frames inspired by the insolvency law[106]. Furthermore, the third party has the right to attend the proceedings (Article 23 of Italian Legislative Decree no. 159 of 2011) and to independently challenge the first instance ruling (Article 27 of Italian Legislative Decree no. 159 of 2011), as well as the possibility of

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[102] Court of Cassation, sec. II, 10 January 2015, no. 5380, Purificato, in *C.e.d.*, no. 262283.

[103] Court of Cassation, sec. I, 14 January 2016, no. 8317.

[104] Court of Cassation, sec. II, 10 January 2015, no. 5380, Purificato, cit.

[105] Court of Cassation, sec. I, 8 January 2010, no. 301, P.g. in c. Capitalia Service J.v. s.r.l. et al., in *C.e.d.*, no. 246035.

[106] Court of Cassation, JC, 22 February 2018, no. 39608.

requesting the revocation of the confiscation (Article 28 of Italian Legislative Decree no. 159 of 2011).

The above mentioned system for the protection of third parties, provided for by the Legislative Decree no. 159 of 2011, has been extended to confiscation *ex* Article 240-*bis* of the Italian Penal Code[107] and to any form of seizure or confiscation in regard to crimes mentioned by Article 51 (3-*bis*) of the Italian Code of Criminal Procedure (Article 104-*bis* (1-*quater*) Disp. Att. of the Italian Code of Criminal Procedure)[108].

3. *Mutual recognition aspects*

The European Union aims to implement effective forms of legal cooperation in this area, using two main instruments: the mutual recognition of criminal rulings and the harmonisation of criminal law within the national legislation of the various Member States[109]. In other words, harmonisation is pursued by establishing minimum standards for the promotion of mutual trust and effective cross-border cooperation. These standards must also establish the indispensable guarantees required for mutual trust, upon which mutual recognition must be based, so that a Member State will recognise and domestically enforce the rulings issued by competent criminal courts in other Member States.

The European Union has therefore also adopted multiple legal instruments with regard to seizure and confiscation as well, which are mandatory in varying degrees, and are aimed at doing away with the conventional assistance system based on letters rogatory, and moving towards one based on the direct circulation of seizure and confiscation orders between judicial authorities.

Starting with the framework decisions adopted in the Aread of Freedom, Security and Justice when it was still referred to as the "third pillar", we have: the Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime; Council Framework Decision 2003/577/JHA of 22 July 2003 the execu-

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[107] In this regard, see P. Corvi, "La confisca in casi particolari, *alias* la confisca 'allargata'", op. cit., 53-55.

[108] Amended by Italian Legislative Decree no. 14 of 2019. See M. Bontempelli, R. Paese, "La tutela dei creditori di fronte al sequestro e alla confisca", *Dir. pen. cont.*, 2, 2019, 123.

[109] On this topic, see C. Amalfitano, "Sub art. 82", in A. Tizzano (eds.), *Trattati dell'Unione Europea*, Milan: Giuffrè, 2014, 866 et seq., and the bibliographical references cited therein.

tion in the European Union of orders freezing property or evidence; Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property; Council Framework Decision 2006/783/JHA of 8 October 2006 on the application of the principle of mutual recognition to confiscation orders.

The more recent instruments, adopted after the communitarisation of the third pillar, are represented by Regulation 2018/1805/EU of the Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders and by Directive 2014/42/EU of the Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, which replaces several, but not all, of the provisions of the aforementioned Framework Decisions 2001/500/JHA and 2005/212/JHA. Similarly, Directive 2014/41/EU of the Parliament and of the Council of 3 April 2014 on the European Investigation Order only partially replaced and repealed Framework Decision 2003/577/JHA, exclusively with regard to evidentiary seizure (with the exception of Ireland and Denmark, for which the old instrument will remain in force): this latter framework decision therefore remains in force precisely with regard to preventive seizure for the purposes of confiscation.

The objective was well-clarified in the Stockholm programme, adopted by the European Council on 10-11 December 2009, which calls for the creation of a comprehensive legal system, based on the principle of mutual recognition, to replace all existing instruments in this specific sector. Well before that, in fact, and specifically in the conclusions of the Tampere European Council of 15-16 October 1999, it was confirmed that there was a need, on the one hand, "to apply mutual recognition, as well as the final rulings, even of the ordinances that allow the competent authorities to seize evidence and confiscate easily transferable assets", and, on the other hand, to take "concrete initiatives to track down, seize, and confiscate the proceeds of crime".

And that's why, soon after, a project was launched, already with the aforementioned Council Framework Decision 2001/500/JHA, that aimed to require Member States to eliminate the reservations indicated in articles 2 and 6 of the Strasbourg Convention of 1990 on laundering and the confiscation of the proceeds from crime, and introduced rules permitting the confiscation of value "in both domestic proceedings and those held at the request of a Member State", "at least in cases where the proceeds of crime can not be traced". The stated objective is to establish a harmonised framework where "the requests submitted by other Member States regarding the identification, tracing, freezing, seizure and confisca-

tion of the proceeds of crime are treated with the same level of priority afforded to the same measures within the context of domestic procedures".

But the challenging policy objectives of the EU's highest policy-making body have never been received in a timely manner by the Italian legislature, which has never been very willing to incorporate the main decisions in the AFSJ area by the foreseen deadlines. Finally, Italy's legislature has recently taken it upon itself to acquire, during the downturn, the tools for mutual recognition and for the harmonisation of the confiscation tools. The stimulus could perhaps come from the expiration of the 5-year transitional period since the entry into force of the Treaty of Lisbon, which expired on 1 December 2014, whereupon the non-transposed framework decisions effectively became the law of the Union, and therefore infringement proceedings could have been launched against Italy.

3.1. *The legal framework for the mutual recognition of seizure orders*

Framework Decision 2003/577/JHA was transposed into Italy's legal system by Italian Legislative Decree no. 35 of 15 February 2016[110], and therefore with a delay of over ten years with respect to the deadline of 2 August 2005. This legislation allows the principle of mutual recognition to be applied to the pre-trial measures for the freezing of assets or the seizure of evidence. Since the Euro-Unitary legislation often makes reference to the terms "blockage" and "freezing", which don't have specific references within the Italian legal system[111], the transposing law sought to clarify the exact scope of application: "any provision adopted by the judicial authority of the issuing State in order to temporarily prevent any operation aimed at destroying, transforming, moving, transferring or disposing of assets envisaged as the body of the crime, or assets pertinent to the crime, that could be confiscated in the cases and within the limits envisaged by art. 240 of the Italian Penal Code". The reference to the cases and limits envisaged by art. 240 of the Italian Penal Code – entitled "confiscation" – might lead us to believe that so-called confisca-

[110] For further information, see A. Mangiaracina, "L'esecuzione nell'U.E. dei provvedimenti di blocco dei beni e di sequestro", in M. Montagna (eds.), *Sequestro e confisca*, Turin: Giappichelli, 2017, 551 et seq.; G. Daraio, "L'attuazione della d.q. 577/2003 sul reciproco riconoscimento dei provvedimenti di sequestro a fini di prova o di confisca", *Dir. pen. proc.*, 2016, 1133 et seq.

[111] As noted by F. Vergine, "Il d.lgs. 29 ottobre 2016, n. 202: un ulteriore ampliamento della confisca di estrazione europea, tra le 'solite' novità e i mancati adeguamenti", *Proc. pen. giust.*, 2017, 512, freezing represents something different than seizure, which is why the Italian legislature could have intervened with a specific legal framework on the topic, rather than "incorporating the freezing of assets within the much more close-knit framework of seizure".

tion by equivalent is excluded from the scope of the implementing legislation; however, the reference to the equivalent of the value of the product of the crime as an asset potentially subject to a seizure order – pursuant to art. 2 letter *d*) of Italian Legislative Decree no. 35 of 15 February 2016 – reveals a clear *voluntas legis* not to limit the framework decision's transposition to scenarios of direct confiscation only.

The provision must, however, be adopted "within the context of a criminal proceeding", thereby excluding seizure measures requested within the context of different types of proceedings, such as the Italian preventive seizure measure, or the Anglo-Saxon *actio in rem*[112].

The Italian legislature has substantially transposed the limited number of cases indicated in the framework decision for which double incrimination has been abolished and mutual recognition has been established, provided, however, that they are punished with a term of imprisonment of no less than three years. In the transposing law, however, the text of certain cases envisaged within the framework decision has been slightly limited, and despite the greater degree of specificity provided, they remain substantially unaltered: the broader case of fire was included in place of voluntary fire, which appears on the list; with regard to the crime of facilitating illegal entry and residence, is makes reference to non-EU citizens; the implementing decree uses the term criminal association instead of participation in a criminal organisation, and sexual violence instead of the term rape.

Whatever the case, mutual recognition is also permitted for cases that are punished as a criminal offences by Italian law, regardless of the constituent elements or legal qualification identified by the law of the issuing State, provided that preventive seizure for the purpose of confiscation is also permitted by the Italian legal system.

3.1.1. *The authorities responsible for proceeding with the enforcement of the seizure request*

The judicial authority identified as having jurisdiction upon receiving the freeze or seizure order is the Public Prosecutor at the court

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[112] For further information, see A.M. MAUGERI, "L'*actio in rem* assurge a modello di 'confisca europea' nel rispetto delle garanzie CEDU?", *Dir. pen. cont. - Riv. trim.*, 3/2013, 252 et seq.; ID., "Dall'*actio in rem* alla responsabilità da reato delle persone giuridiche: un'unica strategia politico-criminale contro l'infiltrazione criminale nell'economia?", in G. FIANDACA, C. VISCONTI (eds.), *Scenari di mafia. Orizzonte criminologico e innovazioni normative*, Turin: Giappichelli, 2010, 268 et seq.; ID., "La legittimità della confisca di prevenzione come modello di 'processo' al patrimonio tra tendenze espansive e sollecitazioni sovrannazionali", *Riv. it. dir. proc. pen.*, 2017, 559 et seq.

where the asset is located. It should be noted, however, that operational confusion can arise since, in cases where the request for preventive seizure for the purpose of confiscation was initiated by a foreign judicial authority through letters rogatory within the context of mutual assistance on criminal matters, rather than through the procedure in question, the jurisdiction is transferred to the Public Prosecutor at the district court of the Court of Appeal, despite the justified calls for the legislature to unify the jurisdiction on these matters[113].

If the provision issued by the issuing State concerns assets located in more than one Court district, the jurisdiction lies with the Prosecutor of the place where the greatest number of assets are located, or, in the case of an equal numbers, the judicial authority that first received the provision. If a Prosecutor should receive a provision that he/she believes must be carried out by the Public Prosecutor of a different Court, he/she shall immediately transmit the request and notify the authority of the issuing State.

The enforcement of the request is then assigned to the competent magistrate, according to the criteria established by the Italian code of criminal procedure. Therefore, if the issuing body requests a seizure for evidentiary purposes[114], the same Public Prosecutor identified above shall be responsible for the relative enforcement and shall proceed with the decree; if, on the other hand, a preventive seizure for the purpose of confiscation is requested, the Prosecutor submits a request to the preliminary investigation Judge of the Court, who issues the relative order.

For the determination of the territorial prosecutor's office, if multiple assets are indicated to be seized, the location of the asset of greatest

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[113] In its own resolution of 20 January 2016, the Supreme Judicial Council envisaged the opportunity to coordinate the provisions of the legislative decree implementing Framework Decision 2003/577/JHA with those of Italian Legislative Decree no. 149 of 3 October 2017 pending approval concerning the ratification and execution of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, finalised in Brussels on 29 May 2000. The suggestion, which wasn't accepted, consisted of concentrating the jurisdiction for receiving the request for the recognition and enforcement of the freezing or seizure order within the Office of the General Prosecutor, or rather the Office of the Public Prosecutor located in the district capital. The letters rogatory procedure is now regulated by art. 724 of the Italian Code of Criminal Procedure, while the mutual recognition procedure is regulated by art. 5 of Italian Legislative Decree no. 35 of 15 February 2016.

[114] As mentioned above, a seizure request for evidentiary purposes can now be submitted within the context of the European Investigation Order pursuant to Directive 2014/41/EU of the Parliament and of the Council of 3 April 2014, which has already been transposed within Italy with Italian Legislative Decree no. 108 of 21 June 2017. On this point, see G. De Amicis, "Dalle rogatorie all'ordine europeo di indagine: verso un nuovo diritto della cooperazione giudiziaria penale", *Cass. pen.*, 2018, 22.

value shall prevail, or, if the number or value is equal, the judicial authority that first received the seizure order to be enforced. In the event of a negative conflict of jurisdiction, if no court is deemed to be territorially competent, the Court of Cassation is responsible for resolving the dispute.

In order to guarantee the investigative coordination functions in cases where serious crimes have occurred (e.g. Mafia-like criminal association or criminal association involving drug trafficking, terrorism, human trafficking, kidnapping for the purpose of extortion, etc.), the request it is also transmitted, for information purposes, to the National Anti-Mafia and Counter-Terrorism Prosecutor's Office and to the General Prosecutor at the competent Court of Appeals.

The competent judicial authority promptly recognises the freeze or seizure provision by ordering its immediate enforcement. The suggestion to include a deadline to proceed within 24 hours of receiving the provision, contained in art. 5 par. 3 of the Framework Decision, was therefore not accepted by the Italian legislature.

With regard to the methods of enforcing provisions issued for preventive seizure purposes, as well as any additional measures necessary, compliance with the *lex loci* enforcement provisions is required[115].

3.1.2. *Reasons for not recognising or for postponing the enforcement of the freeze and seizure order*

As previously mentioned, the characteristic feature of the mutual recognition principle is "mutual trust" between the jurisdictions. However, while ideally aimed at ensuring automatic recognition of foreign provisions, this context also includes cases in which the enforcement of the requested provision can be refused by the enforcing State. In this specific case, Italy has not introduced any grounds for refusal beyond those indicated in the Framework Decision; moreover, it has maintained their optional and non-mandatory, nature[116].

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[115] This deviates from the way in which evidentiary seizure provisions are enforced, which instead requires compliance with the *lex fori* provisions of the issuing State, without prejudice to the fundamental principles of the internal legal system of the enforcing State. This provision, which requires compliance with the formalities and procedures expressly indicated by the authority of the issuing State, is aimed at facilitating the introduction of evidence obtained in a country other than that where the trial will be held.

[116] The framework decisions implemented after the establishment of the European arrest warrant no longer distinguish between mandatory and optional grounds for refusal. On this point, see C. AMALFITANO, *Unione europea e principio del reciproco riconoscimento delle decisioni penali*, in H. BELLUTA, M.C. GASTALDO (eds.), *L'ordine europeo di protezione. La*

The optional scenarios for refusing to recognise or enforce the requested provision therefore arise if:

– the certificate has not been transmitted, is incomplete, or is clearly not consistent with the confiscation order. In this regard it should be noted that the issuing State must transmit both the judicial title to be enforced and a certificate drawn up according to a standard format; however, a defect inherent in such documents is of a formal nature, and can be remedied, since the judicial authority may impose a deadline for the issuing State to produce the complete or correct certificate, or another equivalent document;

– the subject against whom the measure is to be enforced has immunities that restrict legal action from being exercised or pursued. In this sense, in the absence of a Euro-Unitary definition of immunity, the definition of immunity recognised by the Italian State applies;

– there is a clear violation of the *ne bis in idem* trial prohibition;

– the offence for which the enforcement request is made is not included on the list of crimes for which double punishability is excluded. In this case, however, the foreign seizure request for the purpose of confiscation can only be recognised and enforced in Italy if it regards an act constituting a crime for which preventive seizure is permitted.

There is a relevant exception to the rule of double punishability with regard to tax offences: in fact, if the seizure provision is issued in relation to tax, customs or currency violations, the enforcement can not be refused on the grounds that the law does not impose the same types of taxes, or that the Italian legislation on tax, currency and customs is different from that of the issuing State[117].

There remains a gap in the internal transposition legislation, however, as the certificate received from the issuing State does not have to be translated into Italian, while in the case of an active request it is expressly required for the certificate to be translated from Italian into the official language of the enforcing State. This gap flies in the face of both domestic Italian law and Euro-Unitary law: in fact, on the domestic level, requests from foreign authorities, as well as their relative acts and docu-

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tutela delle vitture di reato come motore della cooperazione giudiziaria, Turin: Giappichelli, 2016, 46.

[117] It has been observed, however, that the conjunction "nevertheless", with which this exception begins within the text of the law, can "be understood in the sense that it will always be necessary to find incriminating rules within the Italian legal system covering taxes substantially similar to foreign taxes in terms of taxable persons, basis of assessment, and purpose of the tax, regardless of the differences in the denomination of the tax and the detailed legal framework". On this point, see I. Palma, *Blocco dei beni e sequestro probatorio. Il mutuo riconoscimento delle decisioni giudiziarie in Europa*, *Il penalista*, 15 March 2016.

ments, must be accompanied by Italian translations[118]; on the European level, it is the framework decision itself (which takes care to establish all the constituent elements of the certificate, so that they are common to all Member States) that requires the certificate to be translated into the language of the enforcing State.

There are three circumstances, on the other hand, that allow the seizure order's enforcement to be postponed. In such cases, the enforcing authority immediately notifies the requesting authority, indicating the reasons for the postponement and, if possible, its duration, and later "promptly" enacts the enforcement measures as soon as the reason for the postponement has ceased.

The first case consists of the absence or incompleteness of the certificate: in this case, the Judicial Authority can impose a deadline for the Authority of the issuing State to produce the certificate.

The second case consists of circumstances in which the enforcement of the order could compromise the investigations within the context of other criminal proceedings already in progress; in this case, the "reasonable" duration of the postponement indicated by the framework decision has been limited by the implementing decree to a maximum period of 6 months.

Finally, the third case consists of circumstances in which the assets have already been frozen or seized within the context of other criminal proceedings; in this case, the postponement remains in effect until the seizure order is withdrawn. Under these circumstances, the enforcement is postponed until the provision in question ceases to have effect.

Finally, it may become objectively impossible to enforce the provision in the event that, for example, the asset to be confiscated has disappeared or been destroyed, or is not found to be in its indicated location. This latter situation, which must be promptly communicated to the issuing State's authorities, is that which occurs most often, as the seizure order must always be accompanied by the indication of the asset's exact location, since it is not possible to request the enforcing State to conduct further investigations aimed at tracking it down: such requests must be submitted specifically in the form of a European Investigation Order, in

[118] Art. 201 of the implementing laws of the Italian code of criminal procedure requires all requests from foreign authorities, as well as their relative acts and documents, to be accompanied by Italian translations. However, according to a single Supreme Court precedent (ref. Court of Cassation, sec. VI, 18 March 2008, no. 18704 in *C.e.d.*, no. 239678.), the omission of translations for the documents sent by the requesting State does not preclude the Italian judicial authority from resorting to the use of an interpreter in order to resolve the matter of the omitted translations of the documents required for the decision to be taken.

accordance with the procedures envisaged by Directive 2014/41/EU. This situation significantly limits the effectiveness of the seizure order, since the asset could go missing in the time that elapses between its identification via an instrument of cooperation and investigative coordination[119] and the issuance of a seizure order.

3.1.3. *The challenge process and the protection of third parties.*

The process of challenging the recognition and enforcement of the provision is similar to the Italian process regarding real precautionary measures. Nevertheless, there are those in the case law[120] who have noted that, in view of the text of the art. 9 of the transposing legislative decree, only the decree recognising and enforcing the freeze and seizure order can be appealed, and not the subsequent order issued to the preliminary investigation judge, thus seriously compromising the rights of defence.

All the parties concerned (the suspect or defendant, his/her defender, the person from whom the asset is seized and the person entitled to its return, including third parties acting in good faith) are entitled to appeal for the review of the seizure provision, and the resulting orders issued can be subsequently appealed before the Court of Cassation for violation of the law. The appeal is not of a suspensory nature and, as previously mentioned, it is not permitted to object to the substantive grounds upon which the provision is based, which can only be appealed to the authority of the issuing State.

The notice of the challenge and the date of the relative hearing is promptly communicated to the judicial authority of the issuing State, so that it can present its own observations.

Although not expressly envisaged in the implementing law, the subject from whom the assets are seized must be granted the right to be assisted by a lawyer and an interpreter, with the right to interpretation and translation in criminal proceedings envisaged by other Euro-Unitary legislation being extended to this context as well[121].

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[119] For an overview of the numerous cooperation tools available, see G. De Amicis, "Organismi europei di cooperazione e coordinamento investigativo - I Parte", *Cass. pen.*, 2016, 4586; Id., "Organismi europei di cooperazione e coordinamento investigativo - II Parte", *Cass. pen.*, 2017, 804.

[120] This is due to a strict application of the principle of legal certainty, hypothesised by G. De Amicis, "I decreti legislativi di attuazione della normativa europea sul reciproco riconoscimento delle decisioni penali", *Cass. pen.*, suppl. no. 5/2016, 5 et seq.

[121] This right was introduced by Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010, implemented in Italy by Italian Legislative Decree no. 32 of 04 March 2014.

In the event that the Italian State is found liable for damages caused during the enforcement of a seizure order, the Minister of Justice promptly requests the reimbursement of the amounts paid out to the parties as compensation from the issuing State, unless the damage is due exclusively to the conduct of the Italian State in its capacity as the enforcing State.

3.2. *The legal framework for the mutual recognition of confiscation orders*

In order to achieve mutual recognition of confiscation measures, it is necessary for a uniform system of guarantees (e.g.: fair and impartial judge, opposition, effectiveness of appeal) to be ensured in the area of freedom, justice and security, and from a different standpoint than the harmonisation of the various confiscation models present within the Member States' individual legal systems. In this sense, the aim is to overcome the model of traditional legal assistance in criminal matters, which leaves ample room for the refusal to recognise the provision and, even in the case of its acceptance, allows for broad discretion in choosing the enforcement methods.

In other words, a procedural stabilisation must be ensured in order to obtain an effective model of cooperation, or rather an adequate standard of protection that does not compromise any of the fundamental principles guaranteed at the conventional level or resulting from the Member States' common constitutional traditions.

It is in this context of harmonisation that Framework Decision 2006/783/JHA was implemented in the Italian legal system (albeit with a delay of approximately seven years) with Italian Legislative Decree no. 137 of 7 August 2015[122].

Mutual recognition concerns the confiscation scenarios harmonised by Framework Decision 2005/212/JHA and Directive 2014/42/EU Directive (the latter having already been implemented in Italy with Italian Legislative Decree no. 202 of 29 October 2016), and therefore direct confiscation, confiscation by equivalent, and extended confiscation. These confiscation provisions can be taken in relation to a wide range of seizure measures, given the breadth of the domestic legislation of reference[123]: not only within the context of a final ruling (the "final sanction

[122] For further information, see B. Piattoli, "L'esecuzione nell'U.E. delle decisioni di confisca, in M. Montagna (eds.), *Sequestro e confisca*, Turin: Giappichelli, 2017, 573 et seq.; M. Montagna, "Il d.lgs. 7 agosto 2015, n.137: il principio del mutuo riconoscimento per le decisioni di confisca", *Proc. pen. giust.*, 2016, 110 et seq.

[123] See art. 1, par. 3, letter *d*) of Italian Legislative Decree no. 137 of 07 August 2015.

or measure" referred to under art. 2 § 1 letter *c* of Framework Decision 2006/783/JHA), but also imposed by the enforcement judge pursuant to art. 240-*bis* of the Italian Penal Code (extended confiscation), as well as within the context of the anti-Mafia prevention procedure (articles 24 and 34 of Italian Legislative Decree No. 159 of 6 September 2011). In fact, with these latest projections the legislature has anticipated the implementation of the part of Directive 2014/42/EU[124] that envisages the introduction of certain forms of confiscation without conviction, such as that which can be ordered in cases in which a proceeding cannot be concluded with a conviction criminal law (art. 4 par. 2 of the aforementioned directive) in the event that the subject is suffering from an illness or has escaped. With the Regulation 2018/1805/EU of the Parliament and of the Council of 14 November 2018 on mutual recognition of confiscating orders[125], the European Commission expands these cases of confiscation without conviction to include cases of immunity, statutory limitation, inability to identify the perpetrator of the crime, or other cases in which the criminal justice authority can confiscate assets without conviction if it has decided that such assets constitute the proceeds of a crime; however, in order to fall within the scope of the regulation, these types of confiscation orders must be issued within the context of criminal proceedings, meaning that all the guarantees applicable to these proceedings must be respected in the issuing State.

3.2.1. *The authorities responsible for proceeding with the enforcement of the confiscation request*

The authority responsible for the receipt of the confiscation order is the territorially competent Court of Appeals, which can be assigned either directly or through the Ministry of Justice, which therefore retains

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[124] For further information, see 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' ", *Dir. pen. cont. - Riv. trim.*, 1/2015, 300 et seq.; A. Marandola, "Congelamento e confisca dei beni strumentali e dei proventi da reato nell'Unione europea: la 'nuova' direttiva 2014/42/UE", *Arch. pen*., 2016, 11 et seq., Id., "Considerazioni minime sulla Dir. 2014/42/UE relativa al congelamento ed alla confisca dei beni strumentali e dei proventi da reato fra gli Stati della UE", *Dir. pen. proc.*, 2016, 125 et seq.

[125] For further information, 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", *Dir. pen. cont.*, *16 January 2019*; about the previous proposal of regulation COM(2016)819 of 21 December 2016 of the Parliament and the Council see always 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", *Dir. pen. cont. - Riv. trim.*, 2/2017, 231 et seq.

an optional administrative coordination function. The Court decides with a formal chamber proceeding (art. 127 of the Italian Penal Code), and transmits the eventual decision of recognition to the Public Prosecutor's Office at the Court of Appeals for its enforcement.

While the Court's territorial jurisdiction is rooted in the place where the asset is located, if the object of the confiscation is a sum of money, the place where the natural person or legal entity has assets or income is considered instead. If this latter place is not known, jurisdiction is determined by the place of the natural person's residence or the legal entity's registered office.

It should be noted that the national transposition law has established specific methods for enforcing confiscations based on the types of assets to be confiscated:

a) Movable assets and credits entail the methods prescribed by the Italian code of civil procedure for garnishment from the debtor or third parties, where applicable;

b) Registered movable or immovable assets entail the registration of the provision with the competent offices;

c) Corporate assets organised for conducting business activities entail transfer to the possession of the director appointed by the judicial authority that ordered the confiscation, or, failing that, appointed by the Court of Appeals itself, with the provision being registered with business registry in which the company is registered;

d) Company shares and stocks must be annotated in the corporate books and registered with the business register;

e) Dematerialised financial instruments must be registered in the appropriate account held by the intermediary.

If any difficulties should arise with regard to the material apprehension of the asset, the enforcement authority shall proceed with the help of public law enforcement.

With regard to the allocation of the confiscated assets, in addition to what will be discussed in the following chapter, only 50% of the sum of € 10,000 is transferred to the issuing State, while the remaining portion is held in Italy and is paid into the Single Justice Fund. This law must, however, be harmonised with art. 14 of the United Nations Convention against Transnational Organised Crime, signed during the Palermo Conference of 12-15 December 2000, art. 14 of which states that "States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property

to their legitimate owners". This problem is nowadays solved by Article 30 of the Regulation 2018/1805/EU of the Parliament and of the Council of 14 November 2018 on mutual recognition of confiscating orders that contains disposal of confiscated property or money obtained after selling such property, but only since 19 December 2020.

Furthermore, if the confiscation request concerns a specific asset, the competent domestic authorities and the issuing authorities can arrange for the confiscation to be carried out in the form of a payment corresponding to the value of the asset itself. This method reverses the ordinary procedure followed in the confiscation procedure, which usually entails direct confiscation by priority, with the confiscation of value only being used in cases in which the asset has gone missing or can no longer be located.

Finally, the exemption granting the right not to sell or return the specific asset to which the confiscation order refers when it constitutes a cultural asset belonging to the national cultural heritage has been implemented.

3.2.2. *Reasons for not recognising or for postponing the enforcement of the confiscation order*

For the series of serious offences indicated in the framework decision (all of which have been transposed by Italy) double criminality for confiscation orders following convictions is excluded when they are punished in the issuing State with a prison sentence of no less than the maximum of three years. For other offences, Italy only allows for the recognition and enforcement of confiscation if the circumstances for which they have been requested constitute a crime within Italy, and the crime in question allows for confiscation under Italy's internal legislation.

The Italian legislature has merely decided to re-propose the list of the category of crimes for which there is no verification of double criminality, without reformulating the individual scenarios, thereby raising doubts in terms of compliance with the principle of legality due to lack of certainty[126]. With the transposition, the faculty to introduce certain limitations to the principle of mutual recognition, as envisaged by the

[126] As was the case, on the other hand, with the internal provision for the implementation of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, for which additional can be found in L. Picotti, "Il mandato d'arresto europeo tra principio di legalità e doppia incriminazione", M. Bargis, E. Selvaggi (eds.), *Mandato d'arresto europeo. Dall'estradizione alle procedure di consegna*, Turin: Giappichelli, 2005, 41 et seq.

framework decision, was adopted: in fact, in Italy's legal system, the optional hypotheses of refusal of recognition have been adopted in the event that:

– the certificate has not been transmitted, is incomplete, or is clearly not consistent with the confiscation order. In fact, the certificate must contain certain elements (issuing authority, offences for which the confiscation has been requested, type of confiscation, assets to be subjected to the measure and their location, indication of the natural person or legal entity to whom the asset is available), and must be translated into Italian, be signed by the issuing authority, and certify that the all elements contained therein are accurate. This document must also specify whether the asset to be subjected to confiscation constitutes an instrument of the crime, proceeds of the crime (or the relative equivalent), an asset of unjustified origin, or, finally, an asset acquired by third parties who have recognised relationships with the convicted party. The refusal to recognise the confiscation order is promptly communicated to the issuing State. The Court of Appeals may only impose a time limit for the issuing authority to produce the certificate in the event of refusal;

– there is a clear violation of the *ne bis in idem* trial prohibition;

– the confiscation order concerns events (beyond the scope of the cases for which double criminality is not verified) that do not constitute a crime for the internal legal system, with the exception of events concerning taxes, duties, customs, and foreign exchange;

– the subject against whom the measure is to be enforced has immunities recognised by the Italian State that restrict legal action from being exercised or pursued;

– the transmitted certificate shows that the concerned party never personally appeared and was not represented by a lawyer at the proceedings[127];

– the rights of the concerned parties, including third parties in good faith, make it impossible to enforce the confiscation order according to the law of the Italian State;

– the confiscation order concerns crimes that Italian law considers to be wholly or partially committed within the territory of the Italian

[127] The concerned party's non-participation in the proceedings that led to the issuance of the confiscation order, in the absence of a technical defence, is considered an important factor, provided that his/her absence is not due to a conscious choice. Directive 2009/299/JHA of 26 February 2009 (implemented in Italy by Italian Legislative Decree no. 31 of 15 February 2015), which strengthens the procedural rights of individuals, and promotes the application of the principle of the mutual recognition of the decisions made in the absence of the person concerned in the process, is applicable in this context.

State or committed outside the territory of the issuing State, for which reason articles 7 et seq. of the Italian Penal Code do not apply. This is an application of the *principle of territoriality*, already used also in the so-called European arrest warrant, for which a prevalence of national jurisdiction is recognised;

– the confiscation order concerns an extended confiscation ordered by an issuing State that, on the condition of reciprocity, does not provide for the recognition and enforcement of extended confiscation orders issued by the Italian authority.

The cases in which the Court of Appeals can postpone the enforcement of the provision with its own motivated decree, on the other hand, are the following:

– the order regards a sum of money so great that its confiscation would result in the amount specified in the provision to be enforced being exceeded due to simultaneous enforcement in more than one Member State;

– an appeal has been filed with the Court of Cassation; in this case, the postponement can only last until the final ruling;

– enforcement could jeopardise a criminal provision already in progress; in this case, due to the uncertainty of the framework decision, which indicated the postponement time using the adjective "reasonable", the Italian legislature indicated in six months as the maximum duration of the postponement;

– the asset in relation to which the provision is to be enforced has already been subjected to domestic confiscation, even of a preventive nature.

Once the reason for the postponement ceases to exist, the Court of Appeals promptly adopts the measures necessary for the confiscation order's enforcement.

The confiscation order is then recognised by the Court of Appeals, which "promptly" adopts all the measures necessary for its enforcement, without taking any other formalities. The provision is then sent by the Court of Appeals to the General Prosecutor's office, which enforces it immediately.

3.2.3. *The challenge process and the protection of third parties*

The sentence issued for recognition can be challenged by appeal with the Court of Cassation, and the sentence is suspended with the appeal being filed.

Within ten days of receiving legal notice of the provision, this appeal can be legitimately filed by the general prosecutor with the enforcing

Court of Appeals, by the person against whom the confiscation order was issued, by the person from whom the assets were confiscated and who would be entitled to their return, and their defenders.

Like with seizure orders, in this case it is also only possible to raise objections on grounds of legitimacy and not on issues of merit, which can only be raised by challenging the confiscation order of the issuing State, for which recognition is being sought in Italy.

The Court of Cassation rules within 30 days, allowing the parties to file written briefs up to 5 days prior to the hearing, which is held within the context of a chamber proceeding. In the event that the Court of Appeals' decision is nullified, the referring court rules within 20 days of receiving the documents, and promptly notifies the competent authority of the issuing State.

Like with the procedure for enforcing seizure requests, in the event that the Italian State is found liable for damages caused during the enforcement of a confiscation order, the Minister of Justice promptly requests the reimbursement of the amounts paid out to the parties as compensation from the issuing State, unless the damage is due exclusively to the conduct of the Italian State in its capacity as the enforcing State.

The rights of third parties are guaranteed in the forms and according to the methods envisaged by the internal legal system, as described in the second chapter.

4. *Management and disposal aspects.*

Article 10 of Directive 42/2014/EU calls upon Member States to take the necessary measures to ensure the proper administration of seized assets, and to ensure that they are allocated for public and social purposes once their confiscation is definitive. The same directive clarifies[128] that, pending their definitive confiscation, the seized assets must be managed appropriately in order to ensure that they don't lose their value, and that, once definitive confiscation is obtained, they can be used for crime fighting and prevention projects, and other projects of public interest and social utility, while at the same time preventing any criminal attempts to repossess them.

In order to achieve these objectives, Member States are urged to establish administrative structures specialised in the administration and management of seized and confiscated assets, as well as to adopt appro-

[128] In this regard see *whereas* 32 and 24 of Directive 42/2014/EU.

priate procedural mechanisms, the details of which are left to the discretion of the Member States themselves.

But article 10 of the Directive was not incorporated into the Italian law of transposition, as the domestic law already provided for similar institutions, which, having been adopted in 1996 within the limited context of preventive administrative patrimonial confiscations to be used against people dangerous to society, was also eventually extended to cover criminal confiscations. In fact, it is precisely within the context of Anti-Mafia Policy that, over time, a patrimonial type of crime fighting arose, in which the management and allocation of confiscated assets plays on a central role[129].

4.1. *The custody and dynamic management of assets subject to preventive seizure*

The length of criminal trials and proceedings amplifies the problems inherent to the management of seized assets, because in the time that elapses between the preventive seizure of the asset, its confiscation, and its allocation and final delivery to an asset manager in order to initiate a re-use project, the asset can become depleted to the point of rendering any use unprofitable and any attempt at social re-purposing useless.

The detention and management methods naturally differ based on the nature of the assets subject to preventive seizure, which can be divided into the following categories[130]: movable assets and credits; dematerialised financial instruments; registered real estate or movable property; corporate assets organised for operating a business; corporate stocks and shares.

In fact, certain assets are of a static nature, since, pending the definitive sentence ordering their confiscation, they can be passively guarded by merely carrying out sporadic activities simply aimed at preventing their dispersion or deterioration. Other assets, on the other hand, such as businesses or certain real estate properties, have a dynamic nature that demands active administration, or rather the performance of complex

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[129] See the Garofoli commission's report for the drafting of proposals on crime fighting, even of a patrimonial nature, established by the President of the Council of Ministers by decree on 7 June 2013, titled "Per una moderna politica antimafia. Analisi del fenomeno e proposte di intervento e di riforma", *Dir. pen. cont.*, 20 February 2014.

[130] The assets in relation to which a preventive seizure can be enforced are listed under art. 104 of Italian Legislative Decree no. 271 of 28 July 1989 that contains the enforcement provisions of the Italian code of criminal procedure. For further information, see T. Bene, "L'esecuzione del sequestro preventivo e l'amministrazione dei beni sequestrati", M. Montagna (eds.), *Sequestro e confisca*, Turin: Giappichellli, 2017, 259 et seq.

management activities aimed at preserving and, if possible, increasing their value[131].

4.1.1. *The Single Justice Fund*

A considerable portion of assets seized and allocated for confiscation consists of cash or cash equivalents (checks, bank account deposits). This can be the fruit of that which has already been found in relation to the suspect within the context of a search, or else derived from the sale of seized assets that cannot be detained without danger of deterioration or without significant expenditure[132], as well as assets that can be easily sold without their value deteriorating (e.g. gold or financial securities) during the preliminary investigation phase and that do not pose any critical detention issues, do not deteriorate over time, and can simply be kept pending the final assumption of the assets' ownership by the State, in the case of definitive confiscation, or else their return to their rightful holder in the event of the precautionary measure's forfeiture.

It is nevertheless evident that such passive detention is, in fact, wasteful, as it precludes an increase in the value of the seized money. For this reason, in 2008 the Single Justice Fund[133] was established, which essentially consists of a current account managed by Equitalia Giustizia Spa (a 100% public company) into which the cash and cash equivalents seized in each individual criminal, administrative, or civil proceeding (e.g. the assets acquired in corporate bankruptcies awaiting distribution) flows. The amounts are deposited into this account in a non-interest bearing capacity for their original owners, but are subsequently managed dynamically by making prudent investments in low-risk financial instruments; the profits thus obtained are retained by the State in order to increase the funding for the improvement of the justice system and public security.

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[131] See M. TORIELLO, "L'amministrazione dell'azienda sottoposta a sequestro preventivo, tra prassi applicative e prospettive di riforma", *Cass. pen.*, 2017, 3416.

[132] This right is granted to the magistrate carrying the procedure forward by art. 260 of the Italian Code of Criminal Procedure, and is specifically regulated by art. 151 par. 3 of Italian Presidential Decree no. 115 of 30 May 2002, the consolidated text of the legislative and regulatory provisions on judiciary expenses, as well as by art. 40 par. 5-*ter* and *quater* of the Anti-Mafia Code.

[133] Established by art. 2 of Italian Decree Law no. 143 of 16 September 2008, converted with amendments into Law No. 181 of 13 November 2008; amounts subject to administrative or civil confiscation are also deposited into this fund. The payment obligation is imposed by art. 61 par. 23 of Italian Decree Law no. 112/2008, converted into Law no. 133 of 06 August 2008.

4.1.2. *The actors of the administration*

In the past, the methods for preserving assets subject to both evidentiary and preventive seizure were defined by a single regulatory framework. The seized assets were therefore concentrated within dedicated evidence offices established at the courts or the law enforcement agencies, sent to "public depositories" (e.g. specifically entrusted with custody of motor vehicles), or, as a final option, entrusted to judicial custody.

However, with the introduction of confiscations "by disproportion" and "by equivalent", the state began to seize assets of considerable complexity, which not only needed to be guarded, but also needed to be dynamically managed: this resulted in the need to establish specific figures responsible for their management.

4.1.2.1. *The judicial custodian*

As previously mentioned, the custody of seized assets that do not need to be actively managed is generally entrusted to the records office of the judicial authority that ordered the provision. Whenever this is not possible (e.g. due to the voluminous nature of the assets themselves or their immovability), the judicial authority may entrust their custody to a different subject, known as the judicial custodian, who is tasked with particular duties, such as the obligation to preserve the assets and to present them whenever requested by the judicial authority.

The judicial custodian may also be the owner of the asset itself, who may even be granted the right to use the seized asset, provided that this does not result in its economic deterioration and that the provision does not consist of a so-called impeditive seizure. In this manner, the application of the precautionary measure is not very invasive, as the various needs of the preventive seizure are met, as are those of the subject upon whom the non-definitive precautionary measure is imposed.

4.1.2.2. *The National Agency for the management and administration of assets seized and confiscated during the seizure phase*

In order to resolve the critical issues relating to the management of confiscated assets, various administrative solutions have been proposed and subsequently modified over time. The evolutionary stages of this pathway date back to 1999, with the establishment of a permanent observatory[134] on the management of these assets, which, that same year, was immediately transformed into the office of the Special Commis-

[134] By Decree of the Minister of Finance on 3 February 1999.

sioner[135], tasked with ensuring operational coordination and monitoring. The figure of the Special Commissioner was abolished in 2003, and the relative duties were entrusted to the State Property Agency[136] until 2007, at which time the figure of the Commissioner was reinstated[137] with much more extensive powers relating to both the seizure and confiscation phases. This evolution culminated with the establishment of the National Agency for the management and administration of seized and confiscated assets (henceforth the ANBSC) in 2010[138], to which new responsibilities have been subsequently attributed[139] with regard to the management of the assets during the various phases of the removal and definitive acquisition procedures, the provision of advice and assistance to the court and the delegated judge, and the direct administration and custody of the assets themselves. The Agency has legal personality under public law, as well as organisational and accounting autonomy, and is subject to the supervision of the Ministry of the Interior and the control of the Court of Auditors[140].

The Agency, which was initially created to manage the assets confiscated within the context of the patrimonial prevention measures, is now capable of assisting the judicial authority with the administration and custody of the assets seized in relation to a wide range of crimes, up until the time of the confiscation order issued by the Court of Appeals[141].

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[135] With Italian Presidential Decree no. 510 of 28 July 1999, published in *Off. Gaz.* of 1 September 1999.

[136] The Agency is an autonomous department of the Ministry of Finance tasked with the management of State buildings. The function of managing confiscated assets was attributed by Ministerial Decree on 23 December 2003.

[137] With Italian Presidential Decree 06 November 2007.

[138] This Agency is named "Agenzia Nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata". The Agency was established with Italian Decree Law no. 4 of 4 February 2010, converted into Law no. 50 of 31 March 2010; its functionality is currently regulated by articles 110 et seq. of Italian Legislative Decree no. 159 of 6 September 2011, the code of the Anti-Mafia laws prevention measures. For more information on the legal nature of this body, see M. MAZZAMUTO, "Gestione e destinazione dei beni sequestrati e confiscati tra giurisdizione ed amministrazione", *Giur. it.*, 2013, 2, 477 et seq.

[139] The legislative interventions aimed at resolving the critical issues that emerged in the operational practices are contained in Italian Legislative Decree no. 218 of 15 November 2012, Law no. 228 of 24 December 2012, Law no. 208 of 28 December 2015, Law no. 161 of 17 October 2017.

[140] The latest audit conducted by the Court of Auditors' central control section on the management of State administrations dates back to resolution no. 5/2016/G of 23 June 2016, titled "The administration of assets seized and confiscated from organised crime and the activities of the national agency (ANBSC)".

[141] This regards the particular situation of extended confiscation adopted pursuant to art. 240-*bis* of the Italian Penal Code, as well as those indicated under art. 51 par. 3-*bis* of the

This reveals the two-fold nature of the Agency (administrative on the one hand, and as a jurisdictional auxiliary on the other), whose distinction, which is essential for defining the nature of the actions taken in one form or the other, is not always easy to define[142].

During the seizure phase, the Agency can ask the Court to revoke or amend the administrative provisions adopted by the delegated judge whenever it believes that they could compromise the allocation or assignment of the asset, and can recommend that the Court adopt all the measures necessary to ensure the best use of the asset, in consideration of its allocation or assignment.

It also plays a significant role with regard to the judicial administrator, as it "promotes agreements with the judicial authority in order to ensure (through transparency criteria) the rotation of positions, the coincidence of the professional profiles and the seized assets, and the publication of the compensations", "it assists the judicial administrator", it receives the "periodic report on the administration", and can recommend that the Court revoke the judicial administrator's position "in the event of serious irregularities or inability".

4.1.2.3. *The judicial administrator*

In the event that the preventive seizure concerns companies, businesses, or assets for which proper administration must be ensured, the judicial authority appoints a judicial administrator from among the individuals enrolled in a special register made up of professionals with specific managerial and management skills[143]. This figure was first introduced to the Italian legal system for the administration of assets confiscated within the context of anti-Mafia prevention measures, and has also

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Italian Code of Criminal Procedure pertaining to the anti-Mafia and counter-terrorism district prosecutors offices.

[142] On this topic, see M. Mazzamuto, "L'Agenzia nazionale per l'amministrazione e la gestione dei beni sequestrati e confiscati alla criminalità organizzata", *Dir. pen. cont.*, 11 December 2015, 4 et seq. The Agency's dual (administrative and jurisdictional) nature can also be inferred by the composition of its bodies: the director is appointed from among the prefects, while the board of directors also includes two magistrates, one appointed by the minister of justice and one by the national anti-Mafia prosecutor, as well as two experts on company and property management.

[143] The most suitable professional figures are typically chartered accountants and accounting experts. Over time, the relative trade association (the National Council of Chartered Accountants and Accounting Experts) has drafted a series of extremely useful documents, including the following: "Linee guida in materia di amministrazione giudiziaria dei beni sequestrati e confiscati", October 2015; "La riforma del d.lgs. n. 159/2011. Antimafia, corruzione e nuovi mezzi di contrasto", 5 December 2017; "La riforma del codice antimafia: le problematiche applicative e il ruolo del professionista post riforma", March 2018.

been used within context of ordinary confiscations since 2009[144]. This professional figure, and his/her assistants, are remunerated according to specific rate tables[145] that take into account the complexity of the seized assets and the activity to be carried out; if the resources of the proceedings aren't sufficient to cover these fees, the necessary amounts are advanced by the State, without the right to recovery.

The provisions of the anti-Mafia code are also applied to cases of seizure for the purpose of extended confiscation[146], as well as those issued within the context of proceedings for crimes pertaining to the anti-Mafia and counter-terrorism district prosecutor. The judicial administrator (who can even make use of additional assistants for the management of particularly complex technical aspects) automatically takes over the management of the company for the person affected by the seizure, as he/she is capable of performing all the ordinary administrative duties necessary for its management, while acts of extraordinary administration[147] require specific authorisation on the part of the judicial authority; whatever the case, the judicial administrator in charge of the company's entire complex of assets does not become the company's legal representative[148].

According to the criminal provisions, the transfer of possession to the judicial administrator (which, if necessary, can be carried out by the judicial police) allows the latter to exercise the necessary managerial powers, while at the same time highlighting the fact that the previous administrator has not lost his/her position, but is only deprived of the company to be administered as a result of the seizure. The corporate bodies

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144 Art. 2, par. 9, letter *b*) of Law no. 94 of 15 July 2009 introduced art. 194-*bis* to the implementing, coordinating, and transitional rules of the Italian Code of Criminal Procedure. The article is titled "amministrazione dei beni sottoposti a sequestro preventivo e a sequestro e confisca in casi particolari. Tutela dei terzi nel giudizio"and has recently been amended by Law no. 161 of 17 October 2017, and by Italian Legislative Decree no. 21 of 01 March 2018.

145 Regulated with Italian Presidential Decree no. 177 of 07 October 2015.

146 The extended confiscation referred to under art. 5 of Directive 42/2014/EU is ordered in cases where the assets belonging to subjects convicted of certain serious crimes are found to be disproportionate to their declared income. This form of confiscation is regulated by art. 240-*bis* of the Italian Penal Code, which contains the mandatory list of offences for whose conviction entails confiscation.

147 By way of example, extraordinary administration consists of standing trial, taking out mortgages, conducting transactions, stipulating arbitration agreements, taking out sureties, granting mortgages, and selling property.

148 See F. Fimmanò, R. Ranucci, "Sequestro penale dell'azienda e rappresentanza legale della società: la convivenza 'di fatto' di amministratori giudiziari delle 'res' e amministratori volontari delle persone giuridiche", *Diritto penale dell'impresa*, 21 October 2015, 1 et seq.; Id., "Sequestro penale d'azienda, spossessamento cautelare e rappresentanza legale della società", *Riv. not.*, 2015, 632.

therefore remain intact, even when all of the company's shareholdings are seized, and the director against whom the shareholdings seizure provision was ordered likewise remains in charge, although his/her functions of managing the corporate assets are basically suspended.

While on the one hand the administrator phase allows for a significant detachment of the company from the criminal context in which it arose (as well as other "problematic" assets, such as certain properties, as previously mentioned), on the other hand it can have a devastating impact upon the fate of the company itself.

This phenomenon is known as the "legalisation" crisis of a criminal enterprise, and consists of the emergence of significant costs that the judicial administrator must deal with, and which were previously hidden, insomuch as they were unlawfully repressed. The most considerable costs are naturally those resulting from the legitimisation of employees hired "under the table", the payment of back taxes, and the adaptation of the work environments to meet the health standards; it is sometimes even necessary to submit new requests for the licenses and authorisations needed to perform activities previously carried out illegally, or else to perform repair work upon buildings constructed without the necessary permits. In order to reduce the expenses in this respect, and simultaneously provide adequate protection, the State Prosecutor can assume the representation and defence of the judicial administrator for any disputes that may arise regarding the reports relating to the seized assets.

The hidden costs of the legalisation process are compounded by additional costs resulting from the start of the seizure procedure itself. Just think of the obvious damage caused to the company's reputation following the criminal judiciary intervention, which in turn can lead to further problems, such as the discontinuity of bank credit and investment support. Even if the State has allocated a special fund to financially sustain a portion of the legalisation costs in order to mitigate this specific problem, more than 90% of the companies seized still end up going bankrupt[149], while for the remaining companies it is necessary to decide whether it makes sense to continue their business activities, or to instead opt for liquidation, which in many cases is rendered necessary, such as when the confiscated company's equity has been completely eroded.

The costs necessary or useful for the preservation and administration of the assets are sustained by the judicial administrator by withdrawing amounts collected for any reason, or rather amounts seized, confiscated, or otherwise available for the purposes of the proceedings.

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[149] According to an estimate by the National Institute of Judicial Administrators.

The other administrative procedures devised by the Italian legal system are also worth summarising in this section.

As previously mentioned, the business activities should be continued by companies in which the distortions resulting from criminal infiltration have an impact upon production structures capable of generating illegal income. Therefore, within six months of his/her assignment, the judicial administrator must submit a detailed report on the actual make up of the corporate assets subject to precautionary seizure, and a detailed analysis regarding any concrete possibilities for the continuation or recovery of the business activities; based on this assessment, the delegated judge approves the programme with a motivated decree; if the judgement is negative, the company's liquidation is ordered.

In fact, the appointment of a judicial administrator may not be enough to disconnect the company from the criminal economic fabric if the relics of the previous management that bind it to the obligations assumed in the past continue to persist. The contracts in progress are suspended in order to definitively sever ties with the past, with the administrator's decision of whether to continue with or terminate the supply contract being postponed to a later stage: there is nevertheless the possibility of allowing the provisional execution of the previous relationships, if authorised by the delegated judge, in the event that the company would suffer serious damage as a result of the contract's suspension.

In order to support the continuation of the seized companies' business activities, qualified technical support is provided, which, under the coordination of the Prefectures (territorial government offices), entails the establishment of a "permanent provincial round table" made up of various representatives of the institutions, for the purpose of assisting the judicial administrator. And that's not all: since the seized companies often operate in highly specialised economic sectors, the delegated judge and the ANBSC have been given the possibility of obtaining free technical support from business owners operating in the same sector as the seized company itself.

Since confiscation entails the acquisition of assets "free of charges and burdens" by the State, civil enforcement actions are suspended, and creditors are able to assert their rights within the limits and according to the methods established by the laws of the anti-Mafia code, by petitioning the judge who ordered the preventive measures, and the assets subject to enforcement are taken over by the judicial administrator.

With regard to assets allocated abroad whose seizure or confiscation has been ordered by an Italian court, the assets are seized and managed by letters rogatory, but they are not managed by the Italian judicial ad-

ministrator because their transfer of possession does not take place. After receiving the provisions from the foreign judicial authority and the enforcement documents from the collateral police, the judicial administrator is kept up-to-date on both the judicial developments of the proceedings abroad (by consulting the enforcement file) and all the elements that, in the absence of an appraisal (if not ordered), will allow for the value of the assets to be promptly estimated.

4.2. *Management and allocation of confiscated assets*

The *aim* of these forms of confiscation is to definitively eliminate the assets of unlawful origin from their economic circuit of origin, and to insert them within another circuit devoid of criminal influence[150]. But in addition to this, a "symbolic" function of their allocation, consisting of a virtuous use of the assets themselves, has emerged over time. In addition to preventing the risk of the assets being "recaptured" by criminals, there is also the possibility of funding civil organisations dedicated to combating serious forms of crime, or otherwise maintaining the employment status of the seized companies' employees. In fact, the return of the illegally acquired economic resources to the local communities that have borne the highest cost of the criminal activity is fundamental for counteracting the activity itself, as it aims to weaken the social roots of these organisations and to promote broader and more widespread public approval of the State's repressive intervention to restore lawfulness.

The management and allocation of the assets themselves thus become the crime fighting tools, and represent a continuation of the jurisdiction's specific prevention goals. In fact, the asset's use for social purposes of greater symbolic value prevents the risk of further criminal infiltration.

4.2.1. *The social allocation of confiscated assets*

The use of confiscated assets for social purposes is an essential tool for asserting the legality and solidarity of a constitutional State over the abuse and injustice of crime. The Italian legislature was aware of this as far back as 1996[151], when it introduced specific guidelines for the management of confiscated assets, with their allocation being bound to specific uses of highly symbolic value.

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[150] See Constitutional Court, 30.9.1996 - 8.10.1996, no. 335, in *Off. Gaz.* no. 42 of 16 October 1996.

[151] With Law no. 109 of 07 March 1996.

However, the original text of article 10 of Directive 42/2014/EU did not include any obligation for the social allocation of assets definitively acquired by the State. The proposal to modify the original text with certain amendments that explicitly provided for the "possibility of using the confiscated assets for social purposes" (a possibility that, first and foremost, should be safeguarded through the far-sighted and prudent management of the seized assets themselves) was made by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs[152]; in fact, the justification for this amendment emphasises the opportunity for the Member States to better define "the management of the assets, even after the confiscation order, through their use for social purposes".

4.2.2. *The National Agency for the management and administration of assets seized and confiscated during the confiscation phase*

After their definitive confiscation, the assets' ownership is transferred to the State, free of any charges or burdens, without prejudice to the protection of the rights of third parties, which will be illustrated below. The definitive confiscation order is communicated by the records office of the judicial office that issued the order to the ANBSC, which in turn initiates the allocation procedure, which must be completed within ninety days, with the possibility of being extended for another ninety days. Despite this, there are typically considerable delays in the communication of the measure to the ANBSC: the Court of Auditors found that, given a sample of more than a thousand judicial procedures, the average delay is approximately 470 days.

The Agency pays the previously mentioned Single Justice Fund the sums of confiscated money that don't need to be used for the management of other confiscated assets, or that don't need to be used to compensate the victims of Mafia-type offences; the proceeds resulting from the sale of confiscated movable assets (even registered), even through private negotiations, including securities and corporate shareholdings, net of the proceeds from the sale of assets aimed at compensating the victims of Mafia-type offences; the sums resulting from the recovery of personal credits; the proceeds resulting from the dynamic management of corporate assets by the judicial administrator.

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[152] For an overview of the amendments made by the Committee to the text of the proposal of the 42/2014/EU Directive, see A.M. MAUGERI, "L'*actio in rem* assurge a modello di "confisca europea" nel rispetto delle garanzie CEDU?", *Dir. pen. cont. - Riv. trim.*, 3/2013, 252 et seq.

If the recovery procedure is unprofitable, or rather the debtor is found to be insolvent after verifying the his/her creditworthiness, even through the police, the credit is cancelled with a provision issued by the Agency's director.

4.2.3. *Criteria for the distribution of confiscated assets to beneficiaries*

The guidelines for the allocation of assets subject to definitive confiscation are somewhat confusing, as they vary depending on the types of assets and the beneficiaries[153]. These guidelines, which cover a wide range of cases, must therefore be simplified by taking the macro-categories of confiscated assets into consideration.

One first set of provisions is specifically dedicated to sums of money: these are allocated, on a priority basis, first to the ANBSC itself, in order to sustain the management costs, and then to compensate the victims of the crime. The remaining sums are paid into the Single Justice Fund, where they are then distributed among ministries mentioned above.

The allocation of immovable assets is more complex, because their sale is rendered indispensable due to the inability to allocate them for useful purposes, and only serves to compensate the victims of mafia-type crimes. In fact, priority is given to maintaining State ownership of buildings for general purposes, which primarily consist of justice, public order, or civil protection purposes, and, as a secondary option, for the institutional activities of other government administrations (universities, cultural institutions, tax agencies). However, immovable assets can also be allocated to the ANBSC for economic purposes, while their proceeds are reallocated for the upgrading of the same Agency. A third type of allocation entails the transfer of the immovable assets to the local authorities for institutional purposes (with priority being given to the Municipality where the property is located). In this case the Agency regulates the ways in which the asset is utilised, and may even revoke the transfer if these requirements are not observed.

Finally, corporate assets are subject to three types of allocation: rental, sale or liquidation. They can be rented for consideration to public or private businesses or companies, or else free of charge to co-operatives consisting of the confiscated company's employees. In order to prevent the company from once again falling under the influence of the criminal context from which it was removed, its entrustment is expressly

[153] On this point, see M. MAZZAMUTO, "L'Agenzia nazionale per l'amministrazione e la gestione dei beni sequestrati e confiscati alla criminalità organizzata", *cit.*, 20 et seq.

forbidden if the cooperative's members include a relative, spouse, cohabiting partner, or any other person with close ties to subject of the confiscation order. A sale is only carried out if it is believed that the proceeds will be more useful for the public good, or because it will help compensate the victims of the crime. The liquidation option is selected, on the other hand, if the company's facilities are clearly lacking in unity and functionality.

4.2.4. *Special hypotheses regarding the assignment of confiscated assets to police forces*

Certain assets can be specifically allocated to improve the prevention and suppression of certain categories of crime. The *rationale* underlying this decision is to provide police forces with the same tools (mainly vehicles, boats, and electronic equipment) used by criminals to commit crimes, thus reducing the technological gaps that are not always able to be quickly overcome by purchasing these assets on the free market through ordinary administrative procurement procedures.

The Italian legal system currently includes four cases of special allocation: in cases of smuggling, the administrative confiscation of the registered movable assets (vehicles, boats, aircraft) equipped with hidden double-floors is permitted (art. 301-*bis* of Italian Presidential Decree no. 43 of 23 January 1973); in drug-related cases, for the assets seized or confiscated as a result of anti-drug operations (art. 100 of Italian Presidential Decree no. 309 of 9 October 1990); within the context of the road traffic regulations, the registered movable assets seized or confiscated from subjects caught driving under the influence of drugs or alcohol (art. 214-*ter* of Italian Legislative Decree no. 285 of 30 April 1992); with regard to the legislation on foreign subjects, the confiscation of the registered movable assets seized during the course of police operations aimed at preventing and suppressing illegal immigration has recently been introduced (art. 12 par. 8 of Italian Legislative Decree no. 286 of 25 July 1998).

These vehicles are placed in judicial custody with the law enforcement bodies that request them or, in certain circumstances, with other government bodies for purposes of justice, civil protection, or environmental protection, as early as the seizure phase. Once their definitive confiscation has been ordered, they are definitively assigned to the body that used them temporarily during the seizure phase, but only if expressly requested: if this is not the case (because they have deteriorated with use, for example), the vehicles are destroyed.

With specific regard to the assets seized in violation of contraband and immigration laws, the burden of proof is reversed because the vehi-

cle's owner must prove that he/she could not have foreseen the illegal use of the vehicle, even occasionally, and did not fail to exercise proper supervision. In other cases, the system of protecting third parties in good faith requires that they be summoned by the judicial authority in order to make their cases and to request any elements useful for the purposes of restitution.

4.3. *The protection of third parties.*

The administration of the seized asset requires the resolution of any issues relating to credit claims asserted by third parties with real or personal usage rights, as well as real guarantee rights in relation to the seized assets. Likewise, the final allocation of the seized assets requires the resolution of any issues through which the third party tends to reduce the value of the asset itself.

The innovative system of third party protection contained within the anti-Mafia code for preventive confiscations has also recently been expanded[154] to include extended confiscation pursuant to art. 240-*bis* of the Italian Penal Code, and confiscations ordered in relation to serious crimes pertaining to the anti-Mafia district prosecutors' offices. The other confiscation models remain outside the scope of this protection system.

Whatever the case, to this day, only third-party creditors in good faith receive full protection, as this category exclusively consists of those who are able to prove the certainty of the credits claimed and the underlying relationship's unrelatedness to the illegal activities conducted by the accused.

The anti-Mafia code (which, as previously noted, applies in this case) has granted a specific protection to third parties, with the handling of the verification procedures being entrusted to the judge ordering the

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[154] Italian Legislative Decree no. 21 of 6 April 2018 inserted paragraph 1-*quater* into art. 104-*bis* of the implementing, coordinating and transitional provisions of the Italian Code of Criminal Procedure, which allow for the comprehensive application of title IV of the anti-Mafia code, titled *tutela dei terzi ed i rapporti con le procedure concorsuali* ("protection of third parties and relations with insolvency proceedings"), even in cases of preventive seizure and extended confiscation. This resulted in a jurisprudential contrast, which, over time, altered the application of these forms of protection formerly guaranteed to third parties affected by anti-Mafia preventive confiscations. The extension of the protection to cover third parties holding real guarantee rights, on the other hand, was introduced by art. 5 par. 7 of Law no. 161 of 17 October 2017, in art. 23 of the anti-Mafia code, and therefore, given the aforementioned reference, it also applies to preventive seizures and criminal confiscations. For a complete overview of this topic, see F. Menditto, *Le confische di prevenzione e penali - La tutela dei terzi*, Milan: Giuffrè, 2015.

preventive measures. The legislative mechanism developed consisted of an almost complete transposition of the framework contained in the bankruptcy law[155] for the relationships in progress at the time of bankruptcy, and for the makeup of the liabilities.

Prior to the start of the credit verification sub-proceeding, the judicial administrator must prepare the list of credits. This list accompanies the first report submitted to the judge (attached to the first report presented to the judge by the judicial administration – that referred to above evaluating whether it makes sense to continue the business activities), or one of the subsequent periodic reports, and consists of two sub-groups of lists, namely:

a) The list containing the names of creditors, with an indication of the credits and their relative due dates;

b) The list containing the names of those claiming real guarantee or usage rights, or personal usage rights, to the assets, with the indication of the assets concerned and bases for the rights claimed.

The list of credits must show the sources of the obligation, including any balance sheet items deemed to be false, and the positions of the creditors not indicated in the accounting records, but whose claims are justified in the correspondence.

The admission of third parties is granted following the verification of certain specific requirements, which have been well clarified jurisprudentially by the Constitutional Court[156]: the requirement of the non-instrumentality of the credit, unless the creditor is able to demonstrate his/her unawareness of such a link (credits resulting from services linked to the illegal activity or the reuse of its proceeds are therefore excluded); the requirement of the "non-abstractness" of the credit and its certain anteriority with respect to the seizure (in order to prevent the accused from being able to evade the effects of the confiscation by establishing prior creditorial positions of convenience or simulating their existence retrospectively); the requirement of unsuccessful prior payment for the other assets belonging to the accused (in order to prevent the person subjected to the proceeding from benefiting from the proceeds of the illegal activities in order to "liberate" his/her remaining personal assets from the assets subject to seizure or confiscation).

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[155] See C. FORTE, "Il codice delle leggi antimafia e la crisi dell'impresa sottoposta a misure di prevenzione patrimoniali: analisi della nuova disciplina dei rapporti tra gli strumenti di intervento ablativo statuale e le procedure concorsuali", *Diritto penale dell'impresa*, 10 February 2013.

[156] See Constitutional Court, 11.2.2015 - 28.5.2015, no. 94, in *Off. Gaz.* no. 22 of 03 June 2015.

As previously noted, the State acquires an asset no longer as a derivative, but free of any charges and burdens, despite being registered or transcribed prior the preventive measure itself. Third parties of good faith, holding real usage or guarantee rights, can be granted a form of compensatory protection, with the relative request being made through a special judicial/administrative procedure, which entails the intervention of the criminal enforcement judge for the recognition of the claim, and the ANBSC for liquidation. While these categories of third parties can find protection within the context of the proceedings in question, the asset guarantee, notwithstanding art. 2740 of the Italian Civil Code, is met by the State within the limit of 60% of the value of the seized or confiscated assets, as indicated on the estimate prepared by the administrator, or resulting from any lower amount obtained from the sale of the assets themselves. As a consequence of this provision, the State applies a sort of "sanction" to each creditor exclusively for having done business with a convicted person, even in good faith, effectively reducing the amount owed for the credit by 40%.

4.4. *The management and administration of assets located abroad*

The allocation of illicit assets abroad continues to pose problems, and only a small number of these are able to be resolved by the current regulatory framework, especially with regard to the administration and management of companies, which often have considerable economic value.

During the preventive seizure phase, in consideration of possible confiscation at a later time, article 10 of Directive 42/2014/EU requires Member States to guarantee the adequate management of the assets subject to seizure.

During the phase of the mutual recognition of confiscation orders, the procedure for the allocation of confiscated assets abroad is regulated by art. 16 of Council Framework Decision 2006/783/JHA of 6 October 2006, which requires any sums of money directly recovered or resulting from the sale of the confiscated items and certain movable assets to be transferred to Italy. If the asset cannot be sold or transferred, it is allocated in a different manner, in accordance with the national legislation of the Country in which it is located. Only assets whose management does not pose any critical issues (such as money and movable assets) can be transferred to Italy from abroad, after having been identified, in accordance with the rules defined by the framework decision; this regulation, however, doesn't provide a framework for the so-called dynamic man-

agement of seized assets awaiting confiscation, which can therefore encounter considerable implementation limits in countries that don't have administrative tools like those previously described.

This might justify the fact that fewer foreign companies are present among the total number of companies with confiscated assets[157].

4.5. *Statistics*

The statistical reports concerning the seizures and confiscations conducted are complicated by the confusing nature of the legislation and the sectoral nature of the communication obligations. Although the importance of statistical data for monitoring the suppression of economic crime and the steering of the administrative policy choices for the management of confiscated assets is well recognised, there is only partial data available in this sector.

This is due to various critical issues such as, for example, the lack of uniform IT platforms for collecting and processing data; the sectoral nature of the communication obligations; and the large number of actors involved.

Consistent analytical monitoring only exists in relation to assets seized within the context of prevention procedures, and assets subject to preventive seizure for the purpose of extended confiscation pursuant to art. 240-*bis* of the Italian Penal Code, as well as the more serious crimes pertaining to the anti-Mafia and counter-terrorism district prosecutors' offices: those subject to seizure and confiscation within the context ordinary criminal proceedings therefore aren't included.

Due to the technical limitations of the IT systems available to the Ministry of Justice and the ANBSC, the automation dynamics of the information flows already required by law have not yet been fully implemented[158]. Consequently, the data contained within the national statistical reporting is unfortunately neither complete nor reliable. It is however useful to report these official data, which, despite being partial, nevertheless allow an order of magnitude to be attributed to the established procedures or those in the process of being implemented.

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[157] Only 11 out of the 822 definitively confiscated assets, and only 52 out of the 1095 under management, are located abroad (source, Court of Auditors, resolution of 23 June 2016, cit.).

[158] Monitoring initially imposed by art. 3 of Law no. 109 of 7 March 1996 and implemented with the regulation contained in Ministry of Justice decree no. 73 of 24 February 1997. The data collection framework is now contained within articles 49 and 110 of the anti-Mafia code, whose implementing regulation was implemented with Italian Presidential Decree no. 233 of 15 January 2011.

The last semi-annual report presented to Parliament by the Ministry of Justice[159] showed that, as of 31.12.2017, the number of assets subject to non-definitive confiscation amounted to 36,196, the number of assets subject to definitive confiscation amounted to 27,529, and the number of final allocation decrees issued by the ANBSC amounted to 7,080. In addition to these assets, the ANBS's central database also keeps track of assets seized for possible confiscation, but later returned to those entitled due to cancellation or revocation, which amounted to a total of 177,906 assets[160].

Assets seized and confiscated	No.	
Released	55,552	
Proposed for seizure/confiscation, awaiting a decision	34,907	
Seizure	16,642	
Non-definitive confiscations	36,196	
Definitive confiscations	27,529	
of which companies		1,500
of which financial		2,670
of which Immovable		8,412
of which Movable		3,738
of which Registered movable		11,209
Confiscations with allocations	7,080	
to the State		1,115
to Municipalities and Local Authorities		5,965
Total assets	177,906	

The total number of assets seized and confiscated abroad constitutes a residual portion of the total number of seizures and confiscations conducted as a whole.

Finally, the data communicated by the ANBSC to the Ministry of Justice[161] show that there are 42 assets subject to seizure or confiscation

[159] Published on the Ministry of Justice's website, *www.giustizia.it*.

[160] See, in particular, table no. 7 attached to the semi-annual report, containing the analytical reporting of the macro-areas to which the 177,906 confiscated assets belong.

[161] Data communicated on 31 May 2018 to the Ministry of Justice, Department of Justice Affairs, Directorate General of Criminal Justice, Office I - Department of Statistical Data and Monitoring.

measures abroad (the EU, as well as Switzerland, the USA, Panama, Liberia, Costa Rica, China and Brazil), including 27 companies and 15 properties. Most of these measures were taken within the context of prevention procedures, while a lessor number were taken within the context of proceedings pursuant to art. 240-*bis* of the Italian Penal Code. With regard to the seizure and confiscation proceedings in progress abroad (both inside and outside the EU), the data reported by the National Anti-Mafia Directorate to the Ministry of Justice are as follows: 11 assets confiscated in 2016 (for a total value of € 13,908,106) and 5 in 2017 (for a total value of € 51,026,697); 90 assets seized abroad in 2016 (for a total value of € 38,557,680) and 23 in 2017 (for a total value of € 31,288,757).

The statistical reporting[162] of the sums of money seized and deposited into the Single Justice Fund is certainly more complete and reliable, which as of 31.12.2017 amounted to a total of:

Nature of the resource	Total amount €	Partial €
Total liquid resources	1,709,730,611	
of which already advanced to the State		667,550,000
Total non-liquid resources	3,019,538,692	
of which securities deposits		1,578,072,206
of which asset management		84,573,328
of which collective management of savings		132,137,337
of which insurance contracts		213,630,551
of which trustee mandates		960,462,888
of which other relationships		50,662,381
SJF Total	4,729,269,302	

Since the date of its establishment, the Single Justice Fund has paid the State Treasury € 1,588,288,862, including € 126,144,219 by way of profits generated from the management of the seized financial assets, € 794,594,643 following final confiscation, and € 667,550,000 by way of advances on future confiscations.

[162] The statistical reporting can be found at *www.giustizia.it/giustizia/it/mg_2_9_1.page#r1c*.

Payments to the State made by Equitalia Giustizia (in Euros)

Year	Judicial provisions (confiscation and transfers of ownership to the State)	Advances of seized sums to the State	Profit from financial management	Total
2009	26,845,189	–		26,845,189
2010	40,285,408	–	3,924,892	44,210,300
2011	59,733,274	343,000,000	6,340,935	409,074,209
2012	82,478,224	72,280,000	14,422,102	169,180,326
2013	75,026,387	–	23,058,806	98,085,193
2014	91,547,505	78,900,000	22,199,974	192,647,479
2015	97,888,052	105,840,000	21,011,240	224,739,292
2016	134,902,852	67,530,000	18,863,879	221,296,731
2017	130,131,748	–	16,322,391	146,454,140
2018 (as of 31 March)	55,756,004	–	–	55,756,004
Total	794,594,643	667,550,000	126,144,219	1,588,288,862

WOUTER S. DE ZANGER*

THE NETHERLANDS

SUMMARY: 1. Substantial aspects on confiscation. – 1.1. Confiscation. – 1.1.1. Criminal confiscation. – 1.1.2. Extended confiscation. – 1.1.3. Non-conviction based confiscation in the framework of criminal proceedings: in case of illness or absconding of the suspected person. – 1.1.4. Non-conviction based confiscation in criminal matters: the cases of death of a person, immunity, prescription, cases where the perpetrator of an offence cannot be identified and other cases when a criminal court has decided that asset is the proceeds of crime. – 1.1.5. Other types of confiscation. – 1.2. Third-Party confiscation. – 2. Procedural aspects. – 2.1. Freezing. – 2.1.1. Provisions regulating the freezing proceedings. – 2.1.2. Authorities competent to request the imposition of a freezing order. – 2.1.3. Authorities competent to impose a freezing order. – 2.1.4. Procedural conditions of a freezing order. – 2.1.5. Time limit for the issuing of the freezing order. – 2.1.6. Maximal duration of a freezing order. – 2.1.7. Rights and guarantees of the person addressed by the order and legal remedies against a freezing order. – 2.1.8. Possibilities to claim damages suffered by a wrongful freezing order. – 2.2. Freezing of third-parties' assets. – 2.2.1.-2.2.6. Possibilities of freezing assets belonging to a third-party. – 2.2.7. Rights and guarantees of the person addressed by the order and legal remedies against a freezing order. – 2.2.8. Possibilities to claim damages suffered by a wrongful freezing order. – 2.3. Confiscation. – 2.3.1. Provisions regulating the confiscation proceedings. – 2.3.2. Authorities competent to request the imposition of a confiscation. – 2.3.3. Authorities competent to impose a confiscation. – 2.3.4. Standard of proof needed in order to impose a confiscation. – 2.3.5. Time limit for the issuing of the confiscation order. – 2.3.6. Rights and guarantees of the person addressed by the order and legal remedies against a confiscation order. – 2.4. Third-party confiscation. – 3. Mutual recognition aspects. – 3.1 Freezing. – 3.1.1. Legal framework for the mutual recognition of freezing orders. – 3.1.2. Authorities (in the executing State) in charge of deciding on the request of freezing orders. – 3.1.3. Grounds for non-recognition and non-execution of freezing orders. – 3.1.4. Possibilities to postpone the execution of the freezing order. – 3.1.5. Time limit for the execution of the freezing order. – 3.1.6. Rights and guarantees of the person addressed by the foreign order in the execution phase and legal remedies against a freezing order in the executing State. – 3.2. Freezing of third-parties' assets. – 3.3. Confiscation. – 3.3.1. Legal framework for the mutual recognition of confiscation orders. – 3.3.2. Authorities (in the executing State) in charge of deciding on the

* Postdoctoral researcher at Utrecht Centre for Accountability and Liability Law and Willem Pompe Institute for Criminal Law and Criminology, Utrecht University.

request of confiscation orders. – 3.3.3. Grounds for non-recognition and non-execution of confiscation orders -3.3.4. Possibilities to postpone the execution of the confiscation order. – 3.3.5. Time limit for the execution of the confiscation order from the communication of the foreign decision. – 3.3.6. Rights and guarantees of the person addressed by a foreign confiscation order in the execution phase and legal remedies against a confiscation order in the executing State. – 3.4. Third-party confiscation. – 4. Management and disposal aspects. – 4.1. Freezing. – 4.1.1. Authorities responsible for the management of frozen assets. – 4.1.2. Possible activities with the frozen assets. – 4.1.3. Costs and earnings of the management of the assets. – 4.1.4. Possibilities to claim damages suffered by a wrongful management of frozen assets. – 4.1.5. Peculiarities when the assets are managed abroad. – 4.1.6. Peculiarities if the assets are managed on the basis of the decision of a foreign authority. – 4.2. Freezing of third-parties' assets. – 4.3. Confiscation. – 4.3.1. Authorities responsible for the disposal of confiscated assets. – 4.3.2. Modalities of the disposal. – 4.3.3. Uses, purposes and beneficiaries of the confiscated assets. – 4.3.4. Peculiarities when the assets are managed abroad in consequence of a mutual recognition request. – 4.3.5. Peculiarities if the assets are managed on the basis of the decision of a foreign authority. – 4.4. Third-Party Confiscation.

1. *Substantial aspects on confiscation*

1.1. *Confiscation*

1.1.1. *Criminal confiscation (covered by the Directive 42/2014/EU and by COM(2016) 819 final)*

1. *Does this type of confiscation exist in your domestic law?*

There are three sanctions in Dutch criminal law that serve as a form of criminal confiscation as covered by the 2014 Directive and by COM(2016) 819 final. First of all, there is the 'withdrawal from circulation' of objects (*onttrekking aan het verkeer*, hereinafter: 'withdrawal'). This sanction is laid down in articles 36b until 36d of the Dutch Criminal Code (hereinafter: 'CC'). Secondly, there is the sanction of the 'forfeiture' of objects (*verbeurdverklaring*) as governed by the articles 33 until 34 CC. Thirdly, there is the sanction of deprivation of illegally obtained advantage (*maatregel ter ontneming van wederrechtelijk verkregen voordeel*, also: *ontnemingsmaatregel*), which I will hereinafter refer to as the 'confiscation order'. This sanctions is governed by article 36e CC. All these three sanctions can target the proceeds of crime and are therefore part of the analysis in this country report. Although they show substantial overlap in their possible application, they do differ on some important aspects.

In one respect, the withdrawal and the forfeiture have a broader scope of application: they can also target the instrumentalities of criminal

offences (including e.g. objects used to commit or prepare the offence)[1], whereas the confiscation order can solely aim at the proceeds of crime. For this reason, I reserve the term 'confiscation order' for the *ontnemingsmaatregel* of article 36e CC[2]. Another important difference is that the withdrawal and forfeiture are regarded as object-based confiscation; they target specific objects. This is different for the confiscation order, which can be characterized as a type of value based confiscation[3]. It aims at taking away the financial advantage that the defendant has obtained as a result of criminal activity. It thus serves a restorative aim[4]. As a result, the payment obligation can only relate to financial advantage that the defendant has, in the specific circumstances of the case, actually obtained[5].

This sanction is not aimed at specific objects. This means that if the financial advantage is embodied by a specific object, the judge has to determine the value thereof, and the defendant is in principle given the opportunity to pay this amount and keep the object (if it is not already withdrawn on the ground of its 'dangerousness')[6]. The characterization as 'value-based' also means that if the defendant at the time of the imposition of the sanction no longer possesses the object he has gained as a result of criminal activity, the confiscation order can still be imposed. The defendant is held accountable for the financial advantage he has, at a certain point in time, obtained. Therefore it is not at odds with the character of the confiscation order if the defendant fulfills his payment obligation to the State by means of property that has no relation with the criminal acts whatsoever. There are more differences in applicability between the three mentioned sanctions. They will be explained below.

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[1] See articles 33a, paragraph 1 and 36c CC.

[2] It must be admitted that my choice to translate the *verbeurdverklaring* to 'forfeiture' and the *ontnemingsmaatregel* to 'confiscation order' is somewhat arbitrary. In Dutch criminal law, there is a distinction between 'penalties' (such as the *verbeurdverklaring*) and 'measures' (such as the *ontnemingsmaatregel*). The first type of sanction is thought to be of a punitive nature, whereas the measure is not intended to punish the offender. Since this distinction provides no guidance in the application of these types of sanctions, I do not pay any attention to it in this country report. See M.J. Borgers, *De ontnemingsmaatregel* (diss. Tilburg), The Hague: Boom juridisch 2001, 77-83.

[3] See T. Kooijmans in his annotation under Hoge Raad (Netherlands Supreme Court, hereinafter: HR) 29 May 2018, ECLI:NL:HR:2018:783, *Nederlandse Jurisprudentie* (hereinafter: *NJ*) 2018/312, point 2 and *Kamerstukken II* (Parliamentary Papers of the Lower House) 2018/19, 29911, 31477, no. 221, 7.

[4] *Kamerstukken II* 1989/90, 21504, no. 3, 3, 8, 55, 78, 81 and extensively Borgers 2001, 41-49, 77-83, 264 and W.S. de Zanger, *De ontnemingsmaatregel toegepast* (diss. Utrecht), The Hague: Boom juridisch 2018a, 45-55.

[5] HR 1 July 1997, ECLI:NL:HR:1997:AB7714, *NJ* 1998/242.

[6] See de Zanger 2018a, 98-100.

2. *Which legal nature is connected to such different types of confiscation (criminal, administrative, civil, other kinds)?*

All three confiscation sanctions are ascribed a criminal nature. They are sanctions that can be imposed by a *criminal* judge and they are all laid down in the Dutch Criminal Code[7]. The confiscation order is imposed in a procedure that is separated from the 'regular' criminal trial (see below), but this procedure is characterized as a criminal procedure. In this procedure, a public prosecutor demands the imposition of the sanction from a criminal judge[8].

3. *In which conditions is it applicable?*

The conditions for application of the three confiscation sanctions, differ. The *withdrawal* of article 36b can be imposed after a conviction for a criminal offence. The judge then imposes this sanction as a part of the general sanctioning in the criminal trial. Imposition is also possible if the defendant is acquitted or when the criminal charge is dismissed, but the judge nevertheless rules that a criminal offence has been committed. It is also possible that the public prosecutor orders the withdrawal in a separate procedure (art. 36b, paragraph 1, sub 1, 3 and 4 CC). The sanction of withdrawal can relate to objects that are the proceeds of crime, but also objects in relation to which the offence was committed (*corpora delicti*), objects that have been used to commit or prepare the offence (*instrumenta delicti*), objects used to obstruct the investigation of the offence or that have been manufactured or intended for committing the offence (art. 36c, sub 1 until 5 CC).

A general requirement for the withdrawal is that it can only see to objects of which the uncontrolled possession is in breach of the law or contrary to the public interest. It is therefore a sanction that aims at removing dangerous objects from society[9]. The Dutch Supreme Court has ruled that money, as a lawful currency, cannot satisfy this requirement,

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[7] Confiscation can also take place out of court, by means of a so-called consensual 'transaction' preventing prosecution (art. 74 CC), a sanction imposed by the public prosecutor (*strafbeschikking*, art. 257a-257h Code of Criminal Procedure, hereinafter: CCP) or a consensual settlement relating to the confiscation only (art. 511c CCP). These forms of out-of-court settlement fall outside of the scope of this country report.

[8] Currently, there is a legislative proposal to amend the law in such a manner, that confiscation orders will as rule be imposed in the regular criminal procedure. Under the proposed law, only in 'difficult' cases a separate procedure will be followed. See W.S. DE ZANGER, 'Gemoderniseerde voordeelsontneming', *Tijdschrift voor Bijzonder Strafrecht & Handhaving* 2018b, 229-240.

[9] T. KOOIJMANS, *Op maat geregeld? Een onderzoek naar de grondslag en de normering van de strafrechtelijke maatregel* (diss. Rotterdam), Deventer: Kluwer 2002, 41.

regardless of its origin, destination or its owner[10]. This sanction can therefore only be used to confiscate the proceeds of crime if these proceeds concern illegal *objects*, for instance when the defendant receives illegal substances or a weapon in exchange for his criminal activities.

The sanction of *forfeiture* of article 33 CC can only be imposed when the judge convicts the defendant. It is imposed as a part of the regular sanctioning in the criminal trial. It can aim at the same objects as the withdrawal (see *supra*) and any rights *in rem* and rights *in personam* pertaining to these objects (art. 33a, paragraph 1, sub a until f CC)[11]. It thus concerns both the proceeds of crime, the *corpora delicti* and *instrumenta delicti*. These objects can be real estate, objects subject to registration (e.g. boats), claims on a third party or shares.

Both the withdrawal and the forfeiture target specific objects. As seen under, 1.1.1, they are forms of object-based confiscation. If the object to be subjected to a forfeiture is seized prior to the judgment in the criminal trial, its ownership automatically transfers to the State with the passing of the verdict by the judge. But if the object is not seized, the public prosecutor can order its surrender. This is governed by article 34 CC. The judge then has to make an estimation of the value of the object. The defendant subsequently has the choice to either surrender the object or to pay its estimated value. If he does not do either of those things, the estimated amount can be executed as a criminal fine, including the potential use of imprisonment for non-payment (see article 24c CC).

The confiscation order of article 36e CC can solely aim at the proceeds of crime. *Corpora delicti* and *instrumenta delicti* cannot be subjected to this sanction. The confiscation order aims at restoring the legal situation prior to the criminal activities[12]. It is imposed by means of a separate judicial decision. Although the confiscation decision is formally taken in a separate procedure, the criminal trial and the confiscation procedure can take place simultaneously (see 2.3.1). In the confiscation procedure, the judge has to determine whether the defendant has obtained a financial advantage through criminal actions.

The confiscation order can only be imposed on a person who is convicted of a criminal offence. This does not mean that only offences for

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[10] HR 8 March 2005, ECLI:NL:HR:2005:AR7626, *NJ* 2007/437.

[11] There is one small difference, since the forfeiture cannot relate to objects that have helped to conceal the discovery of the crime or that are manufactured to commit the crime, if the criminal offence is a minor offence (*overtreding*). This limitation is not in place for the withdrawal.

[12] See *Kamerstukken II* 1977/78, 15012, 1-3, 29, *Kamerstukken II* 1989/90, 21504, 3, 3, 8, 55, 78, 81, Borgers 2001, 41-49 and de Zanger 2018a, 45-55.

which the defendant has been convicted can give rise to confiscation. Besides from the proceeds of these offences, the proceeds of *other offences* of which a judge rules that there are 'sufficient indications' that the defendant has committed them can, under article 36e, paragraph 2 CC, be subject to confiscation. I will refer to this as the second 'type' of confiscation under article 36e CC. For the application thereof, it is not necessary that the offences for which the defendant has been committed led to a financial gain. If the defendant has for instance been convicted of an assault or sexual offence, the judge in the confiscation procedure can rule that he has obtained a financial advantage with other offences.

Under the *third* type of confiscation, if it is 'plausible' that other offences have, in any way, led to a financial gain for the defendant, these proceeds can be confiscated under article 36e paragraph 3 CC. This is only possible if the defendant has been convicted of a criminal offence that is, by law, threatened with a fine of the fifth category. The fine categories are laid down in article 23 CC[13]. This requirement is designed to limit this type of confiscation to cases of (rather) serious crime. As we will see under 1.1.2, this third type of confiscation allows for 'extended confiscation' of assets.

Not only *direct* assets of crime can be confiscated. Both the confiscation order and the forfeiture can also relate to *subsequent* profit that the defendant has obtained using his initial profit. Articles 33a paragraph 1, under a, and 36e paragraph 2 CC allow the confiscation of advantage that the defendant has obtained 'from the proceeds of' criminal offences. It can for instance concern interest that he has obtained by putting his illegally obtained assets on a bank account, or the return on investment of those assets.

Not only assets that the defendant has obtained, but also the *costs he did not make* as a result of criminal activity can (under article 36e paragraph 5 CC) qualify as an illegally obtained advantage. If a company for instance saves money by processing waist in an illegal manner, the money it has saved because of this omission can be subject to a confiscation.

The confiscation order of article 36e CC thus has a broad scope of application and far-going possibilities to target the proceeds of crime. Therefore, it is the instrument most used to confiscate the proceeds of crime. The forfeiture of article 33b CC however has some advantages over the confiscation order. It is imposed in the regular criminal trial, so

[13] The fifth category currently has a maximum of € 83.000.

the judge does not need to pass a separate judgment[14] or, like in the separate confiscation procedure (see art. 511f CCP, see 2.3.4), substantiate the calculation of the proceeds with evidence. There are hence efficiency arguments to use the forfeiture of article 33b CC.

Furthermore, since the forfeiture can also relate to objects that have been the subject of crime, it is possible to confiscate assets that have been laundered by the defendant. This is somewhat more difficult using the confiscation order of article 36e CC, since that sanction only aims at taking away the financial advantage that the *defendant* has obtained. If this defendant has been convicted of money laundering (art. 420-*bis* until 420-*quater*.1 CC) the assets that he has laundered do not necessarily represent *his* financial advantage. His earnings could just as well be the reward he receives for laundering someone else's assets. In that case, those laundered assets cannot be subject to a confiscation order imposed on this defendant[15]. Because the forfeiture of article 33b CC is also applicable on *corpora delicti*, it allows for the confiscation or objects that have been the subject of money laundering, irrespective of whether these objects represent financial advantage for this defendant.

An important restriction to the forfeiture is that it targets specific objects (or their value), whereas the confiscation order can also relate to assets that are no longer in the possession of the defendant. The judge can therefore establish the advantage that the defendant has obtained *at any point* in time, and then impose a confiscation order for that amount, irrespective of whether the defendant still holds the illegally obtained assets.

4. *Is their imposition mandatory or facultative?*

As a rule, the imposition of sanctions is never mandatory in Dutch criminal law. Article 9a CC provides the judge the power to refrain from imposing a criminal sanction where he deems this advisable, by reason of the lack of gravity of the offence, the character of the offender, or the circumstances attendant upon the commission of the offence or thereafter. This is also visible in the articles regulating the imposition of the three confiscation sanctions: they all stipulate that the sanctions 'can' be imposed. The imposition of all of the confiscation sanctions is therefore fac-

[14] As seen in footnote 8, a current legislative proposal aims to make a separate confiscation procedure optional.

[15] HR 19 February 2013, ECLI:NL:HR:2013:BY5217, *NJ* 2013/293, annotated by J.M. Reijntjes. See de Zanger 2018a, 133-134, 287-288, with further references.

[16] See for the confiscation order: Borgers 2001, 103-104. See also article 511e, paragraph 1 sub a CCP.

ultative[16]. In the context of the confiscation order, it is established in the law that even when the judge establishes that an illegal profit was obtained, he can decide not to impose a confiscation order. Article 36e paragraph 5 CC provides him with a discretionary power to do so[17].

5. *For which crimes are they applicable and under which conditions? (answer in light of the scope of application of the directive, of the third-party confiscation in the directive, and of the framework decision still applicable)*

All three sanctions can be imposed as a reaction to practically all types of criminal offences. There is one exception in place: the confiscation order of article 36e CC cannot be imposed when the illegal profit has been obtained by fiscal offences or customs offences. This is stipulated in article 74 State Taxes Act (*Algemene Wet inzake Rijksbelastingen*) and article 10:14 General Customs Act (*Algemene Douanewet*). The State is given specific powers to collect payment obligations that are the result of the commitment of offences in these laws. Therefore, the confiscation order does not have to be used to collect these financial obligations. A combination of a confiscation order and a fiscal or customs payment obligation could, furthermore, result in a 'double' financial sanctioning for the same financial advantage. To prevent this, article 36e CC cannot apply to tax or customs offences[18]. This exception is not in place for the withdrawal and the forfeiture.

As seen above, proceeds that are obtained through offences of which the defendant has not been convicted can also be confiscated. It can concern offences with which the defendant was not charged, of which the prosecution is time-barred[19], or of which the prosecution is discharged[20]. However, if the defendant is *acquitted* of a criminal offence, the proceeds that the defendant has – allegedly – obtained with that offence can no longer be subject to a confiscation order. This is the result of the ruling of the European Court of Human Rights in the case of Geerings against The Netherlands[21]. Before this ruling, such confiscation was deemed admissible by the Dutch Supreme Court[22].

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[17] See HR 8 April 2014, ECLI:NL:HR:2014:860, *NJ* 2014/363, annotated by M.J. Borgers.

[18] *Kamerstukken II* 1989/90, 21504, 3, 49 and HR 2 May, ECLI:NL:HR:1995: ZD0174, *NJ* 1995/613.

[19] HR 7 July 2009, ECLI:NL:HR:2008: BI2307, *NJ* 2009/422.

[20] HR 26 November 2013, ECLI:NL:HR:2013:1433, *NJ* 2014/52.

[21] ECHR 1 March 2007, appl. no. 30810/03. See HR 9 September 2008, ECLI:NL:HR:2008:BF0090, *NJ* 2008/497.

[22] HR 13 April 1999, ECLI:NL:HR:1999:ZD1173, *NJ* 1999/483.

6. *Which assets can be confiscated? Are there any qualitative or quantitative limits?*

When the confiscation order is executed, there are no qualitative or quantitative limits relating to the assets that can be confiscated. As seen, the payment obligation is maximized by the financial advantage that the defendant has, in the particular circumstances of the case, actually obtained[23]. The law however does not provide any maximum amount. The financial capacity of the defendant is not a 'hard' limit to the amount that is confiscated under him. The judge can mitigate the confiscation order due to the defendant's lack of ability to pay, but he is not obliged to do so[24]. This is different for the forfeiture. For this sanction, the judge is obliged to take the defendant's ability to pay into account (art. 33, paragraph 2 in conjunction with 24 CC).

There is one quantitative limit in place, which occurs when the public prosecutor summons the transfer of the defendant's income from a third person (e.g. the employer of the defendant) for the purpose of executing the confiscation order. In that case, the third party is in principle obliged to obey, but only insofar as the defendant's income exceeds the 'protected earnings level' (*beslagvrije voet*). This is stipulated in article 576, paragraph 5 in conjunction with articles 476b and 476c of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*). In this way, the defendant is prevented from being brought below the social minimum level.

There are no other limits to the assets that can be confiscated by means of a confiscation order, a withdrawal or a forfeiture sanction, other than those that have been discussed *supra*.

1.1.2. *Extended confiscation (covered by the Directive 42/2014/EU and by COM(2016) 819 final)*

As seen under 1.1.1, article 36e paragraph 3 CC stipulates that if it is plausible that other offences have in any way led to a financial gain for the defendant, and the defendant has been convicted of an offence of a certain severity, this financial gain can be confiscated. Because of the wording 'in any way', it is not necessary that the defendant himself has committed these offences. In fact, the judge does not need to substanti-

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[23] HR 1 July 1997, ECLI:NL:HR:1997:AB7714, *NJ* 1998/242.

[24] See W.S. DE ZANGER, 'The role of financial capacity in Dutch confiscation law: changes in legislation and an alternative approach', in F. DE JONG et al. (eds.), *Overarching views of delinquency and deviancy. Rethinking the legacy of the Utrecht School*, The Hague: Eleven International Publishing 2015, 311-331.

ate which specific offence(s) it concerns[25]. This opens the door for an 'abstract calculation' of the proceeds: if the public prosecutor shows that the defendant has in a certain period obtained property and the defendant is unable to show a legitimate source for this property, and the case file does not contain any indications for such a source, the judge can deem it illegally obtained profit that can be subject of a confiscation order. Under current law, no additional indications that it concerns *criminally obtained* profits are necessary[26]. In this way, an illegal origin of assets found on the defendant can be determined without the determination of a direct causal link between the advantage and specific criminal offences[27]. In this manner, article 36e, paragraph 3 enables extended confiscation. This type of confiscation has been introduced in article 36e CC in 1993[28]. Therefore, when Directive 42/2014/EU was adopted, the Dutch government deemed it unnecessary to make any adjustments to Dutch confiscation law[29].

1.1.3. *Non-conviction based confiscation in the framework of criminal proceedings: in case of illness or absconding of the suspected person (covered by the Directive 42/2014/EU and by COM(2016) 819 final)*

The confiscation order of article 36e CC and the forfeiture of article 33 CC can only be imposed on someone who has been convicted of a criminal offence. In case the defendant suffers from illness or has absconded and he is, as a result, unable to stand trial, the rules concerning *trial in absentia* make it possible for the judge to nevertheless pass a judgment in both the criminal trial and in the confiscation procedure. Article 280 CCP allows for the continuation of the case when the defendant does not appear at the court hearing, and the court finds no reasons to declare the summons void or to issue an order to bring the defendant to court. In that case, the defendant can be convicted and both criminal sanctions can be imposed[30]. In a strict sense this is not 'non-conviction based confiscation', since the defendant is convicted (*in absentia*).

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[25] *Kamerstukken II* 1989/90, 21504, B, 18, *Kamerstukken II* 1991/92, 21504, 8, 9, *Kamerstukken II* 1991/92, 21504, 20, 1, *Kamerstukken I* 1992/93, 21504 and 22083, 53a, 5. See HR 4 april 2006, ECLI:NL:HR:2006: AV0397, *NJ* 2006/247.

[26] See DE ZANGER 2018a, 212-213.

[27] See BORGERS 2001, 128-134, 293-306, 337-358, KOOIJMANS 2010, 227-228, HR 28 May 2002, ECLI:NL:HR:2002:AE1182, *NJ* 2003/96, HR 17 September 2002, ECLI:NL:HR: 2002:AE3569 and DE ZANGER 2018a, 66-71, 203-216.

[28] *Staatsblad* 1993, 11.

[29] *Staatscourant* 2015, no. 11370, 3.

[30] Because of this possibility of *in absentia* conviction, the Dutch government decided

The withdrawal of objects *can* be imposed in case the defendant is not convicted, but the court judges that (notwithstanding the acquittal or the dismissal of the criminal charges) a criminal offence has been committed. This is due to aim the aim of this sanction, which is to take dangerous objects out of circulation (see 1.1.1). That objective also needs to be achieved if the defendant is not found guilty of any criminal offence.

1.1.4. *Non-conviction based confiscation in criminal matters: the cases of death of a person, immunity, prescription, cases where the perpetrator of an offence cannot be identified and other cases when a criminal court has decided that asset is the proceeds of crime (covered only by COM(2016) 819 final)*

Non-conviction based confiscation in criminal matters is not possible under the application of the sanctions of forfeiture and the confiscation order. Both sanctions require a criminal conviction of the person on whom it is imposed[31]. As seen under 1.1.1, the confiscation order of article 36e CC can target proceeds that are obtained through offences of which the defendant has not been convicted, but this is not non-conviction based confiscation, since a criminal conviction for another offence is still a prerequisite. In 1993, the minister of Justice proposed an amendment of the law to make non-conviction based confiscation possible[32]. This legislative attempt was however withdrawn after it spurred criticism from several political parties in parliament[33].

Only the sanction of withdrawal is possible if the defendant has not been convicted of any criminal offence. In that case, the court must establish that, notwithstanding the acquittal or dismissal of the criminal charges, a criminal offence has been committed. An important limitation to this sanction is that it cannot target money, since that is not an object of which the uncontrolled possession is in breach of the law or contrary to the public interest (see 1.1.1, *supra*).

1.1.5. *Other types of confiscation*

Besides from the mentioned forms of confiscation in criminal law, there are other instruments that can be used to recover the profits from

not to amend the law after the adoption of the Directive 42/2014/EU, see *Staatscourant* 2015, no. 11370, 3.

[31] If the confiscation order of article 36e CC is already imposed, its execution is *not* barred by the death of the defendant. Article 75 CC thereto makes an exception to the general rule.

[32] *Kamerstukken II* 1993/94, 23704, 1-3.

[33] *Kamerstukken II* 1994/95, 23704, 4-5.

crime. In criminal law, a punitive fine can also (partially) be used with this aim[34]. A compensation order with the aim of compensating victims of crime (art. 36f CC), can in practice also take away the profits of the offender. Outside of criminal law, administrative bodies can reclaim payments that were distributed unjustly, and the Central Tax Authority (*Belastingdienst*) can impose an additional tax assessment.

1.2. *Third-Party confiscation*

1. *Does this type of confiscation exist in your domestic law?*

Confiscation orders of article 36e CC can only be imposed on people that have been convicted of a criminal offence (see 1.1.4). In that sense, imposition of a confiscation order on a third party is not possible. Freezing of assets under a *mala fide* third party however *is* possible. The objects frozen under this person can subsequently be sold in order to execute the confiscation order imposed on the convicted person. For the particularities of this freezing of assets under a third party, see part 2.2.

The sanction of forfeiture can also target objects under a third party. Article 33a paragraph 2 CC allows for the forfeiture of assets that do not belong to the defendant, in case the third person they belong to knew, or could reasonably suspect the link with criminal activities. Hence, for this sanction it is also required that it concerns a *mala fide* third party.

The sanction of the withdrawal does not require the object to be in the possession of the defendant. This sanction can therefore also be applied to objects that belong to a third party.

2. *Which legal nature is connected to such different types of confiscation (criminal, administrative, civil, other kinds)?*

On this point there are no peculiarities: these forms of third-party confiscation are also considered to be of a criminal nature, since they are specific forms of application of the three criminal sanctions.

3. *In which conditions is it applicable?*

For application of the confiscation order and the forfeiture sanction under a third party, it is required that it concerns a *mala fide* person. For the forfeiture, this is expressed by the requirement that the person the object belongs to, knew or could reasonably suspect that the object was obtained by means of criminal activity (art. 33a paragraph 2, under a CC). For the freezing of assets under a third party with the aim of fulfill-

[34] HR 18 May 1999, ECLI:NL:HR:1999:ZD1333, *NJ* 2000/105.

ing the payment obligation from the confiscation order of article 36e CC, article 94 paragraph 4 CCP lays down the relevant requirements. Since these aspects relate to freezing, they will be discussed further under 2.2.

4. *Is their imposition mandatory or facultative?*

On this issue there are no peculiarities: the imposition of these forms of third-party confiscation are not mandatory.

5. *For which crimes are they applicable and under which conditions? (answer in light of the scope of application of the directive, of the third-party confiscation in the directive, and of the framework decision still applicable)*

On this issue there are no peculiarities: these forms of third-party confiscation are applicable for the same offences as a regular confiscation order, forfeiture sanction or withdrawal.

6. *Which assets can be confiscated? Are there any qualitative or quantitative limits?*

On this issue there are no peculiarities: the same assets can be confiscated.

2. *Procedural aspects*

2.1. *Freezing*

2.1.1. *Provisions regulating the freezing proceedings*

In the phase before a criminal sanction is imposed, objects can be frozen with a view to the successful execution of the forfeiture of article 33 CC, the withdrawal of article 36b CC or of the confiscation order of article 36e CC. Article 94, paragraph 2 CCP governs the freezing with the aim of securing the execution of the first two sanctions. The law does not stipulate any specific requirements for this form of freezing, other than that the objects can be subject to forfeiture or withdrawal. If the court then imposes one of these two sanctions, the ownership of the objects will transfer to the State. Dangerous objects will subsequently be destroyed.

Article 94a, paragraphs 2 until 6 CCP govern the freezing with the aim of securing the execution of the confiscation order[35]. This is *value* freezing: since the defendant can be held accountable with his entire belongings (also the property that he has obtained legally), the object that

[35] It is also possible to freeze assets that can be used to bring the truth to light, or to show the existence of illegally obtained profits, e.g. bank receipts. This is governed by paragraph 1 of article 94 CCP.

is frozen does not have to relate to any criminal offence[36]. The purpose of this freezing is to secure the execution of a confiscation order. This possibility has been introduced by the legislation aiming to enhance the execution of confiscation orders[37]. The objects to be frozen do not need to be physical objects; debts of a third party and shares can also be subject to a freezing.

When a confiscation order is imposed and becomes final, the frozen objects can, without further interference of a judge, be used to execute the confiscation order. This is made possible by article 574 CCP, which allows the State to sell frozen objects in order to execute the payment obligation stemming from the confiscation order. The defendant is however first given the opportunity to fulfil his payment obligation by paying (art. 573 CCP).

Objects can also be frozen in the execution phase. Article 575 CCP offers the possibility to freeze objects that have not (on the basis of article 94a CCP) been frozen before the confiscation order has become final. This freezing serves to execute the imposed confiscation order. For this freezing, a writ of execution by the public prosecutor is necessary, which is then executed as a judgement by a civil court.

No writ of execution is necessary if the confiscation order is executed by means of article 576 CCP, which offers the possibility to seize specific assets to which the defendant has a right. It can concern the defendant's income, pensions, redundancy payments, and credit he holds on a bank account. By summoning the third party (employer, bank etc.) to pay the relevant sums of money, the public prosecutor can execute the payment obligation.

2.1.2. *Authorities competent to request the imposition of a freezing order*

2.1.3. *Authorities competent to impose a freezing order*

The public prosecutor is competent to freeze objects with the aim of confiscation, but he must have a written authorization to do so by the examining magistrate (*rechter-commissaris*). This authorization can be provided orally if it concerns a situation in which the offence is discovered in its commission (art. 103 CCP).

The authorization to freeze objects is simpler in the context of a 'criminal financial investigation' (*Strafrechtelijk financieel onderzoek*). This is a special investigative framework designed to precede the imposition of a confiscation order, which is laid down in a separate title of the

[36] *Kamerstukken II* 1989/90, 21504, 3, 10, 13.
[37] *Staatsblad*. 1993, 11.

code of criminal procedure (art. 126 until 126fa CCP)[38]. In order to initiate such a financial investigation, an authorization by the examining judge is required. This general authorization provides the public prosecutor the power to freeze objects without a further, specific authorization.

Whereas the public prosecutor is entitled to freeze objects, he can delegate this power to a police officer. In practice, assets are usually frozen by a police officer. Police officers are, furthermore, entitled to freeze objects with the aim of confiscating them when they exercise another specific investigative power, such as an arrest (art. 95, paragraph 1 CCP) or a search of a vehicle (art. 96b CCP). They do still need an authorization by the investigative magistrate to do so[39].

In the execution phase of a criminal sanction (such as the confiscation order), a judge has already ruled on the case. Therefore, an authorization of an investigative magistrate is not necessary to freeze objects in this phase.

2.1.4. *Procedural conditions of a freezing order*

Freezing assets with the aim of securing the execution of a confiscation order is only possible if the defendant is suspected of having committed a criminal offence for which a fine of the fifth category can be imposed, or if he is convicted of such an offence (art. 94a, paragraph 2 CCP)[40]. This requirement is not in place for freezing with the aim of executing a forfeiture or a withdrawal (art. 94, paragraph 2 CCP).

The manner in which the objects are frozen is, in principle, not governed by regulation. Articles 94b and 94c CCP however do contain some specific rules governing the freezing of objects, for instance when the object is a debt or a share. The investigating (police) officer produces a notification of the freezing and, if possible, sends an acknowledgement of receipt to the person under whom the object is frozen (art. 94, paragraph 3 CCP).

Freezing with the aim of executing the confiscation order is, furthermore, only possible if there is at least a reasonable expectation that a

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[38] In the already mentioned plans to 'modernize' the Code of Criminal Procedure, it is proposed to abolish this specific context for financial investigations. According to the legislature, the regular criminal investigation should be used for financial investigation. See DE ZANGER 2018b, 233.

[39] This requirement of an authorization is not needed if the freezing aims at securing evidence, see article 103 CCP.

[40] This is a much-used mechanism in Dutch criminal law to ensure that certain measures can only be used for offences of a certain severity. The categories are defined in article 23, paragraph 4 CC. The fifth category currently has a maximum of € 83.000.

confiscation order of a certain amount will be imposed. Some proportionality between the value of the frozen assets and the expected payment obligation is therefore necessary[41].

In the past, the public prosecutor's office had laid down in its policy that such freezing was only applied if the amount of estimated illegal advantage was at least € 5.000. The public prosecutor could deviate from this policy if cash money of a certain amount was found, or if the freezing was part of an approach targeting a specific problematic type of crime[42]. This rule is no longer present in the policy documents[43].

2.1.5. *Time limit for the issuing of the freezing order*

The investigating magistrate that has the power to authorize the public prosecutor to freeze assets, is not legally bound by a time limit to respond to the public prosecutor's request.

2.1.6. *Maximal duration of a freezing order*

There is no legal maximum duration of a freezing order.

2.1.7. *Rights and guarantees of the person addressed by the order and legal remedies against a freezing order*

The person whose objects are frozen can lodge a written complaint to a court relating to *inter alia* the freezing, the usage of the frozen asset and the non-return of the object. This is governed by article 552a CCP. The complaint procedure is, in principle, held publicly. If it concerns freezing with the aim of executing the confiscation order, the complaint can succeed if the court finds that there is no suspicion or conviction for an offence for which a fine of the fifth category can be imposed, or if it is 'highly improbable' that the court will later impose a confiscation order[44]. This is a limited review, since the judge has to anticipate the outcome of the subsequent confiscation procedure. Although the court is not obliged to do so, it can also test the proportionality and the subsidiarity of the freezing. Under the proportionality test, it can be relevant to investigate the relationship between the claim of the public prosecutor and the value of the frozen assets[45]. Under the subsidiarity test, alternatives for the freezing can be observed. It can for instance be relevant that other objects whose freezing is less burdensome for the defendant can also serve as se-

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[41] *Kamerstukken II* 2001/02, 28079, 6, 15.
[42] Aanwijzing afpakken, *Staatscourant* 2013, 35782, 3.
[43] Aanwijzing afpakken, *Staatscourant* 2016, 68526 and 72371.
[44] HR 28 September 2010, ECLI:NL:HR:2010:BL2823, *NJ* 2010/654.

curity for the execution of the payment obligation, or that the defendant offers a financial security for the value of the frozen objects[46].

If the freezing takes place in the execution phase a complaint can also be lodged to a court. This is laid down in article 575, paragraph 3 CCP and is also possible if the public prosecutor executes the confiscation order by claiming money from a third person, for instance by claiming the salary of the defendant from his employer (art. 576, paragraph 6 CCP, see 2.1.1). In these procedures, the defendant can for instance claim that executing the confiscation order by means of selling his property is disproportionate, since this selling costs the defendant money. He has to do so within seven days after the freezing of the object, and before the object is sold.

If the objects have been frozen before the confiscation order became final and the public prosecutor wants to sell them in the execution phase in order to execute the confiscation order, the defendant can only complain about this intention to a civil court. On the basis of article 438 Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) all execution actions can be challenged to a civil court.

2.1.8. *Possibilities to claim damages suffered by a wrongful freezing order*

If after the freezing no confiscation order is imposed (for instance when the defendant is acquitted of all charges), the civil procedure is also the only possibility for the person involved to claim damages. It is however very difficult for him to successfully do so[47]. Damages that result from investigative powers exercised by the police or the public prosecutor upon a suspect are, *prima facie* regarded to be justified. This legal justification ground lapses only if in the civil case, it becomes clear that the suspect was in fact innocent or that the proven acts do no qualify as a criminal offence. A mere acquittal is in principle not sufficient for such a judgement[48]. Therefore, a large burden of proof lies on the former suspect. This is severely criticized in academic literature[49].

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[45] HR 15 January 2008, ECLI:NL:HR:2008:BB9890, *NJ* 2008/63, HR 7 January 2014, ECLI:NL:HR:2014:38, *NJ* 2014/66 and HR 10 January 2010, ECLI:NL:HR:2010:30.

[46] HR 1 October 2013, ECLI:NL:HR:2013:833, *NJ* 2014/278, HR 7 January 2014, ECLI:NL:HR:2014:38, *NJ* 2014/66, HR 18 November 2014, ECLI:NL:HR:2014:3311 and HR 29 September 2015, ECLI:NL:HR:2015:2881.

[47] See E. Engelhard et al., 'Let's Think Twice before We Revise! 'Égalité' as the Foundation of Liability for Lawful Public Sector Acts', *Utrecht Law Review* 2014, 64-70.

[48] HR 26 January 1990, ECLI:NL:HR:1990:AD1019, *NJ* 1990/794, HR 23 November 1990, ECLI:NL:HR:1990:ZC0055, *NJ* 1991/92 and HR 13 October 2006, ECLI:NL:HR:2006:AV6956, *NJ* 2007/432.

[49] Engelhard et al. 2014 and S.A.M. Stolwijk, *Onschuld, vrijspraak en de praesumptio innocentiae*, Amsterdam: Universiteit van Amsterdam 2007, 26-27.

2.2. *Freezing of third-parties' assets*

2.2.1.-2.2.6. *Possibilities of freezing assets belonging to a third-party*

As seen under 1.2, assets under third parties can be frozen with the aim of fulfilling the confiscation payment obligation of the defendant. This form of third-party freezing is regulated by article 94a paragraphs 4-5 CCP. If a confiscation order is imposed subsequently, the frozen assets can be executed in order to fulfil the payment obligation of the defendant, as if it concerned assets that are frozen under him[50].

If freezing under a third party takes place in the execution phase of the confiscation order, it is governed by article 575, paragraph 1 CCP. This option has been introduced in 2011, in order to increase the freezing possibilities and hence improve the execution of confiscation orders[51]. As for the competent authorities, procedural conditions, time limits, and duration of the freezing there are no peculiarities compared to freezing of assets under the defendant.

There is an additional substantial condition. Freezing of objects under a third party is only allowed if there are sufficient indications that the objects were transferred to the third party with the 'apparent aim' of frustrating the execution, and the third party knew or could reasonably suspect these malicious intentions of the defendant (art. 94a, paragraph 4 CCP)[52]. In this case, other objects belonging to such a *mala fide* third party can also be frozen, to a maximum value of the object that was transferred to him with the aim of frustrating the execution (art. 94a, paragraph 5 CCP). This is for instance possible if these other objects are easier to execute than the specific objects that were transferred from the defendant[53]. Since this is also possible for objects which the third party has obtained lawfully and that have no link to a criminal offence, the possibilities to freeze objects under a third party are rather far-reaching.

2.2.7. *Rights and guarantees of the person addressed by the order and legal remedies against a freezing order*

The person under whom the assets are frozen has the opportunity to challenge the freezing and the non-return of the object before a court

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[50] *Kamerstukken II* 2001/02, 28079, A, 9.

[51] *Kamerstukken II* 2009/10, 32194, 7, *Staatsblad* 2011, 171.

[52] *Kamerstukken II* 2010/11, 32194, C, 10-11. In the past, there was a third requirement for freezing assets under a third party: the objects had to be, directly or indirectly, obtained by means of a criminal offence. See *Kamerstukken II* 2009/10, 32194, 3, 11-12. Before this was amended in 2011 (*Staatsblad* 2011, 171), the knowledge or suspicion of the third party had to relate to this illegal origin of the object.

[53] *Kamerstukken II* 2001/02, 28079, 3, 20-21.

(see 2.1.7). When this person is a third-party, he can claim that the requirements of third-party freezing are not met, i.e. that he did not know or could have reasonably suspect that the objects were transferred to him with the aim of frustrating the execution of the confiscation order. If the court judges that this claim holds true, and that the third party is in fact the lawful owner of the object, it will be returned to him.

If the defendant has filed a complaint against the freezing, the third party whose objects are frozen is notified of this complaint and of his right to file a complaint himself.

If the freezing takes place in the execution phase of the confiscation order, the third party can only file a complaint about the manner of execution to a civil court on the basis of the Code of Civil Procedure (art. 574, paragraph 3 and 575, paragraph 4 CCP). In case the execution takes place by claiming money from a third party such as an employer, the specific criminal complaint procedure *is* open to the third party (art. 576, paragraph 6 CCP).

Third parties whose objects have been subjected to a forfeiture or withdrawal that was imposed on the defendant, can file a complaint to a court about the imposition of these sanctions. This complaint must be filed within three weeks after the sanction has become final. If the court finds that the complaint is justified, it will revoke the sanction of forfeiture or withdrawal and order the return of the object to the third party (art. 552b CCP).

2.2.8. *Possibilities to claim damages suffered by a wrongful freezing order*

Just as for defendants under whom objects are frozen, third parties who claim that the freezing was wrongful need to resort to a civil liability procedure.

2.3. *Confiscation*

2.3.1. *Provisions regulating the confiscation proceedings*

The sanctions of withdrawal and forfeiture are regulated by the regular provisions of the criminal trial. It goes beyond the scope of this country report to explain them in detail. The court that imposes these sanctions is, on the basis of articles 358 and 359 CCP, obliged to provide the grounds that justify this imposition.

The confiscation order of article 36e CC can only be imposed in a procedure that is separated from the regular criminal trial in which a judge rules on the indictment. This procedure is laid down in a specific

title in the Code of Criminal Procedure. The articles 511b until 511i CCP regulate this procedure. In this separate procedure, the judge only rules on the confiscation claim by the public prosecutor. The public prosecutor claims to the court that a confiscation order of a certain amount should be imposed. The court is in no way obliged to adhere to this claim. It can, also when it is established that the defendant has gained a criminal profit, decide not to impose a confiscation order (see 1.1.1, *supra*). It can, on the basis of article 36e, paragraph 5, CC also decide to impose a payment obligation of a lower amount than the amount of illegally obtained profits.

This procedure is qualified as 'criminal' in nature. In this procedure, the confiscation judge is bound by the decisions of the judge in the regular criminal trial. Because the confiscation order can, as seen under 1.1.1, relate to financial gains that stem from offences that were not included in the indictment, this confiscation procedure can however also concern the question whether the defendant had committed a criminal offence. The confiscation judge then has to establish whether there are 'sufficient indications' that the defendant has committed other offences than those of which he was convicted.

This division in procedures was introduced by the legislature in 1993, when the possibilities to apply the confiscation order were drastically broadened. The minister provided several arguments for this breach with the so-called 'concentration principle', which states that the same judge should, on the basis of the investigation during trial, rule on all of the decisions of the case, including the sanctioning decision. Most of these arguments relate to the possibility that the confiscation order would be of a complex, financial nature. The regular criminal trial should not be delayed by such financial investigations. Furthermore, by separating the confiscation decision from the criminal trial, the minister enabled the transfer of proceedings to a foreign State for only the confiscation case and the introduction of particularities in the confiscation procedure (such as the exchange of written documents, see article 511d, par. 1 CCP). Another argument related to the introduction of a consensual mechanism that only settles the confiscation case (art. 511c CCP, see footnote 7)[54].

These arguments are hence of a mainly practical nature. The only argument that seems to be of a more fundamental nature was that, according to the minister, the confiscation order was not to be regarded as a part of the total arsenal of sanctions available to the judge. It is how-

[54] *Kamerstukken II* 1989/90, 21504, 3, 10-11, 30, 35-36, 38, 66, *Kamerstukken II* 1990/91, 21504, 5, 19 and *Kamerstukken II* 1991/92, 21504, 8, 7-8, 16-18.

ever argued that the possibility to coordinate the confiscation order with other sanctions, is essential for the restorative aim and should be left open[55]. Since this is nowadays also acknowledged by the minister, the public prosecutor's office and the Dutch Supreme Court alike, this argument has to be disregarded[56].

The legislature expressly stated that although the confiscation procedure and the regular criminal procedure cannot be merged, they *can* take place simultaneously and parallelly. In that case, the same judge(s) can investigate both the criminal and the confiscation case[57]. In practice, this often occurs. Even though the same judge then rules on both cases, he always has to take two separate decisions.

Since there are only good arguments to separate the procedures in difficult confiscation cases, it has been argued that the division of procedures should be optional. In an upcoming legislative attempt to modernize the Code of Criminal Procedure, it is accordingly proposed to abolish this obligatory separation of procedures. According to the current plans (which are not definite), the two will only be separated if it concerns a difficult case. It will be at the discretion of the public prosecutor to decide whether this is the case. In all other cases, the confiscation order will be dealt with in the regular criminal trial[58].

2.3.2. *Authorities competent to request the imposition of a confiscation*

A public prosecutor has to order a confiscation order from the judge. The sanctions of withdrawal and forfeiture do not need to be requested; the judge can impose them on his own initiative. In practice, the imposition of these sanctions usually follows a request by the public prosecutor.

2.3.3. *Authorities competent to impose a confiscation*

The sanctions of withdrawal and forfeiture and the confiscation order are imposed by a criminal court. This can be either a judge ruling alone, or a multi-judge division of the court[59]. The three mentioned crim-

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[55] Borgers 2001, 104-106.

[56] Aanwijzing afpakken, *Staatscourant* 2016, 72371, 1-2, *Kamerstukken II* 2003/04, 26268, 6, 11, *Aanhangsel der Handelingen II* 2008/09, 948, 1985, and HR 17 mei 2016, ECLI:NL:HR:2016:874, *NJ* 2016/283, m.nt. Reijntjes. See W.S. de Zanger, 'De schakelbepalingen van de ontnemingsprocedure: de kunst van het weglaten', *Ars Aequi* 2017, 960 en de Zanger 2018a, 291.

[57] *Kamerstukken II* 1989/90, 21504, 3, 10, 35, *Kamerstukken I* 1992/93, 21504, 22083, 53a, 2.

[58] See de Zanger 2018b, 231-233, 239-240 with further references.

[59] See article 21 CCP.

inal sanctions can also be part of an out-of-court settlement, either consensual or imposed by the public prosecutor. As seen under, 1.1.1, these forms of out-of-court settlement are not elaborated on in this country report.

2.3.4. *Standard of proof needed in order to impose a confiscation*

There is no specific standard of proof needed for the imposition of the sanctions of forfeiture and withdrawal. The decision to impose a certain criminal sanction does not, as a rule, need to be substantiated with evidence. The judge merely has to give reasons for this decision (art. 359, paragraph 5 CCP). This is different for the imposition of the confiscation order of article 36e CC. Since the legislature wanted to prevent calculations of the illegally obtained profits that are made with too much discretion, he stipulated that the judge is obliged to underpin the calculation with lawful evidence (art. 511f CCP)[60].

The court however still has much discretion in calculating the obtained profit. Since it must make an 'estimation' of the profit and the legislature has expressed that a 'reasonable and fair division of the burden of proof' is allowed[61], much can be expected from the defendant in the confiscation procedure. As seen under 1.1.2, if the defendant has been convicted of an offence of a certain severity and the public prosecutor shows that he has obtained property without an apparant legal source, it is up to the defendant to substantiate his statement that it *does not* concern illegally obtained profits.

Besides, the court can apply evidentiary presumptions and general rules in its calculation. It can for instance assume that narcotics are sold for a specific price or that stolen products are sold on the illegal market for a specific percentage of their legal value, even when there is no evidence in the specific case before him supporting this assumption. In that case, it is up to defendant to substantiate his statement that he has obtained less advantage[62].

Another often-used mechanism is that of 'extrapolation', whereby a court uses information concerning a specific circumstance, and then assumes it holds true for another, similar circumstance. For instance, if evidence shows that a person has sold narcotics for 10 weeks, and the only

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[60] *Kamerstukken II* 1977/78, 15012, 3, 29, 53.

[61] *Kamerstukken II* 1989/90, 21504, 3, 15, 58, 63 and *Kamerstukken II* 1990/91, 21504, 5, 2, 37.

[62] See for instance: HR 14 February 2006, ECLI:NL:HR:2006:AU9127, *NJ* 2006/163. See DE ZANGER 2018a, 182-188.

evidence relating to the specifics of this trade provides information concerning one of these 10 weeks, the court can multiply those circumstance by ten in order to calculate the total amount of illegal profit. When doing so, the Dutch Supreme Court does not demand any evidence of the representativity of the extrapolated circumstance. On the contrary, it is up to the defendant to produce evidence or at least cast doubt on the calculation[63].

As indicated under 1.1.1, the second and third type of the confiscation order of article 36e CC do not aim at confiscating the proceeds of the offence for which the defendant has been convicted. Instead, they target the profits that are gained through other offences for which there are 'sufficient indications' that the defendant has committed them (art. 36e, par. 2 CC), or that result from offences of which it is 'plausible' that they have in any way let to a financial gain (art. 36e, par 3 CC).

At first sight, there therefore seems to exist a different standard of proof compared to the criminal trial, in which the judge can only convict someone if he is, on the basis of the evidence, 'convinced' of the guilt of the defendant (art. 338 CCP). The question whether 'sufficient indications' and 'plausible' indeed implicate lower thresholds to come to a decision, is however debated. The minister has on some occasions referred to the civil standard of a 'balancing of probabilities'[64], but he has also denied the suggestion in parliament that there has been a reversal of the burden of proof. The Supreme Court has not clarified this issue as of yet. In academic literature, it is argued that due to the possibly far-reaching consequences of a confiscation order and due to the fact that the confiscation judge also rules on the possible commission of offences, the same standard of proof should apply. The desired mitigation of the evidential rules can, in this view, be found in the non-applicability of the minimum evidential rules (see 2.3.6)[65].

2.3.5. *Time limit for the issuing of the confiscation order*

The sanctions of forfeiture and withdrawal are imposed in the regular criminal procedure. There is no specific time limit in which they must be imposed, other than the standard rule that the court must pass its judgement within two weeks after the closing of the examination in court (art. 345, paragraph 3 CCP). Article 6 ECHR furthermore dictates that the criminal procedure must be finalized 'within a reasonable time'.

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[63] HR 25 March 1997, ECLI:NL:HR:1997:AK1364. See Borgers 2001, 276-277 and de Zanger 2018a, 188-194.

[64] *Kamerstukken II* 1989/90, 21504, 3, 63. See Kooijmans 2010.

[65] Borgers 2001, 280-286 and de Zanger 2018a, 172-175, with further references.

The procedure leading to imposition of the confiscation order must be initiated within two years at the latest after the criminal procedure has, in first instance, led to a conviction (art. 511b, paragraph 2 CCP). After the confiscation procedure is opened, there is no time limit in which the court must impose a confiscation order. The only 'hard' time limit is that the court must do so within six weeks after the closing of the examination in court (art. 511e, paragraph 1, sub b CCP). In practice, confiscation procedures can take a long time, and it occasionally occurs that confiscation orders are imposed years after the commitment of the criminal offence. As the rights of article 6, paragraph 1 ECHR apply in the confiscation procedure, the confiscation order must be imposed within a reasonable time. If the court fails to meet this time limit, the amount of the confiscation order must be mitigated[66], unless the undue delay is compensated in the sanctioning in the related criminal procedure[67].

2.3.6. *Rights and guarantees of the person addressed by the order and legal remedies against a confiscation order*

As regards the sanctions of forfeiture and withdrawal, the regular rights and guarantees of the criminal procedure apply. It goes beyond the scope of this country report to explain them in depth.

As seen under 2.3.1, the confiscation order of article 36e CC can only be imposed in a separate, but possibly parallel confiscation procedure. The framework of this confiscation procedure is modelled after that of the regular criminal trial. Thereto, most of the regular provisions are declared applicable in the confiscation procedure[68]. As a result, the defendant enjoys most of the same guarantees he has in the criminal trial. He can, for instance, not be forced to make a statement: he enjoys the right not to incriminate himself. He can also adduce evidence and request the summoning and hearing of witnesses and experts.

By making some explicit exceptions in the law and by *not* declaring some provisions applicable, the legislature has however also created some differences between the two procedures[69]. The judge can for instance pass his verdict six weeks after the closing of the investigation on trial. In regular criminal trials this is two weeks[70]. The judge also has

[66] See HR 11 February 2014, ECLI:NL:HR:2014:296, *NJ* 2014/135.

[67] HR 17 November 2015, ECLI:NL:HR:2015:3321.

[68] See articles 511b, paragraph 4, 511d, paragraph 1, 511e, paragraph 1 and 511g, paragraph 2 CCP.

[69] See DE ZANGER 2017.

[70] See articles 345, paragraph 3 and 511e, paragraph 1 sub b CCP.

more discretion to deviate from the claim of the public prosecutor. Whereas in the regular criminal trial he is in principle bound by the selection of offences in the indictment, this is not the case in the confiscation procedure[71].

More fundamentally, the provisions concerning the use of evidence in criminal cases do not fully apply in confiscation procedures. Several limitations are therefore not applicable. Written evidence cannot only be used 'in relationship to other evidence'. The rules regulating the admissibility of anonymous witness statements do not apply fully either, although the *Hoge Raad* has mitigated this difference by introducing similar guarantees[72]. Most importantly, the minimum evidential rules play no role in confiscation procedures. Therefore, the judge can base his calculation of the illegally obtained profit on a single witness statement or a statement of the defendant. This is not allowed in the regular criminal trial. As the confiscation procedure can also deal with the question whether (there are sufficient indications that) the defendant has committed criminal offences, this is not unproblematic. On this point, the defendant enjoys fewer safeguards.

Furthermore, the *Hoge Raad* has added to these differences. Even though the same provisions apply relating to the possibility to hear and summon witnesses and experts (see art. 511b, paragraph 4 and 260-263 CCP), it has ruled that courts in the confiscation procedure can apply a stricter criterion in ruling on requests by the defendant[73]. Furthermore, the rules concerning witnesses that have not been heard by the defendant[74], do not apply in confiscation procedures[75]. The *Hoge Raad* justifies these differences by pointing out that confiscation procedures are of a different nature than regular criminal trials. By ruling in this manner, the *Hoge Raad* has however contributed to this different nature[76].

The defendant can file an appeal against the confiscation judgement of the court. If he finds that the subsequent judgement by the appellate

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[71] Surprise decisions should however be prevented, see HR 15 May 2007, ECLI:NL:HR:2007:BA0487, *NJ* 2007/506, m.nt. Reijntjes and HR 26 September 2017, ECLI:NL:HR:2017:247, *NJ* 2018/132, m.nt. Vellinga-Schootstra. This means that the judge has to give the defendant the opportunity to respond to a possible change in offences giving rise to a confiscation order.

[72] HR 22 January 2008, ECLI:NL:HR:2008:BA7648, *NJ* 2008/406, m.nt. Borgers.

[73] HR 25 June 2002, ECLI:NL:HR:2002:AD8950, *NJ* 2003/97, m.nt. Mevis.

[74] These rules result from several ECtHR rulings, see ECtHR 10 July 2012, appl. no. 29353/06 (Vidgen/The Netherlands).

[75] HR 2 March 2010, ECLI:NL:HR:2010:BK3424, *NJ* 2011/100, m.nt. Borgers and HR 7 April 2015, ECLI:NL:HR:2015:898.

[76] See de Zanger 2018a, 227-236.

court (*gerechtshof*) is ill-motivated or errs in law, he can appeal to the *Hoge Raad*. Practically the same rules apply as in regular criminal procedures (art. 511g and 511h CCP).

2.4. *Third-party confiscation*

There are no peculiarities on these issues. As seen under 1.2, third-party application of the confiscation order is made possible by means of freezing assets of a (*mala fide*) third party. The confiscation procedure that precedes the imposition of the confiscation order does not alter if objects are frozen under such a third party.

3. *Mutual recognition aspects*

3.1. *Freezing*

3.1.1. *Legal framework for the mutual recognition of freezing orders*

The mutual recognition of foreign freezing orders is governed by the articles 5.5.1 until 5.5.8 CCP. These provisions only govern the mutual recognition of freezing orders within the context of the European Union, so in that sense there is a specific legal framework. These provisions were (in different articles) introduced in 2005[77], in order to implement Council Framework Decision 2003/577/JHA[78]. In July 2018, they were (without modification) transposed to the current articles[79].

3.1.2. *Authorities (in the executing State) in charge of deciding on the request of freezing orders*

The public prosecutor is qualified to decide on the request of the freezing order (art. 5.5.3 CCP).

3.1.3. *Grounds for non-recognition and non-execution of freezing orders*

Article 5.5.3 CCP (paragraphs 2-3) lays down the (optional) grounds for non-recognition and non-execution of the freezing order. The public prosecutor can decide to refuse the recognition and the execution, in case:

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[77] *Staatsblad* 2005, 310.
[78] See *Kamerstukken II* 2004/05, 29845, 3.
[79] *Staatsblad* 2017, 247, which entered into force on 1 July 2018.

a. the certificate (mandatory on the basis of article 5.5.2 CCP) was not submitted, was incomplete or at odds with the content of the order, and the public prosecutor has given the foreign authority the opportunity to remedy this within a certain period (see article 5.5.2, paragraph 4 CCP), but this did not happen within the set time limit;

b. the recognition and execution of the freezing order would be at odds with a privilege or immunity under Dutch law;

c. the execution of the accompanying request for mutual legal assistance concerning the transfer or confiscation of the objects[80] would be at odds with the principle of *ne bis in idem*, as laid down in articles 68 CC and 255 CCP;

d. the order relates to a criminal offence which, if it were committed in the Netherlands, is not punishable under Dutch criminal law, *unless* it concerns an offence which has been identified in an order in council (*Algemene maatregel van bestuur*) and that is threatened with a maximum prison sentence of at least three years in the issuing State;

e. it is clear from the outset that a request for mutual legal assistance concerning the transfer or confiscation of the objects cannot be complied with.

3.1.4. *Possibilities to postpone the execution of the freezing order*

Postponement of the freezing order is governed by article 5.5.4 CCP. The public prosecutor can decide to do so, in case:

a. the execution would be at odds with an on-going criminal investigation;

b. another freezing decision has, in a criminal investigation, already been taken in relation to the object;

c. a freezing decision has already been taken in relation to the object, and this decision has priority over the freezing in a criminal investigation.

The public prosecutor promptly informs the foreign authorities of his decision to postpone the execution of the freezing decision. He specifies the grounds and the expected duration of the postponement. As soon as the grounds for postponement have ceased, the freezing decision is executed. The foreign authorities also receive a notification thereof. If any restrictive measures are taken in relation to the objects, the public prosecutor also informs the foreign authority thereof.

[80] The freezing orders must, on the basis of article 5.5.2 CCP, be accompanied by such a request.

3.1.5. *Time limit for the execution of the freezing order*

Under article 5.5.3, paragraph 4 CCP, the public prosecutor decides on the order promptly and if possible within 24 hours after he has received the order. He informs the foreign authorities promptly and in a written manner of his decision. In case the public prosecutor refuses the recognition and execution of the order, he must specify his reasons for that decision. The law does not sanction the potential non-compliance with the mentioned time-limit.

3.1.6. *Rights and guarantees of the person addressed by the foreign order in the execution phase and legal remedies against a freezing order in the executing State*

The person addressed by the foreign freezing can, just as in a national case, file a complaint about the freezing of his assets. On the basis of article 5.5.6 CCP, the procedure that is laid down in article 552a CCP is also open to him[81]. The court can however not investigate the ground for the freezing order. In order to challenge this ground, the defendant should complain to the issuing authority or the court in the issuing country. To enable this, the foreign authority is obliged to specify the legal remedies open to the defendant in the certificate that accompanies the freezing order. The public prosecutor must inform the defendant of this information.

The public prosecutor is, on the basis of article 5.5.6, paragraph 2 CCP, obliged to inform the foreign authority of the complaint and its grounds, and of the judgement of the court.

3.2. *Freezing of third-parties' assets*

There are no peculiarities on this issue.

3.3. *Confiscation*

3.3.1. *Legal framework for the mutual recognition of confiscation orders*

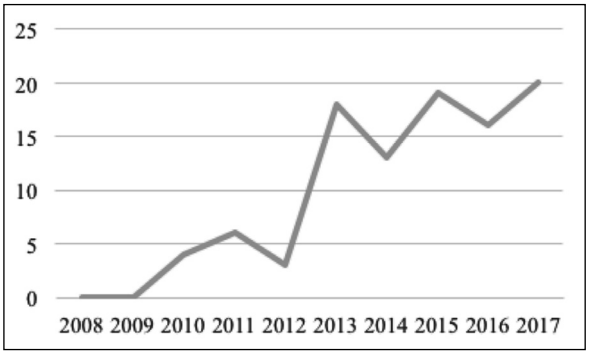
The mutual recognition of confiscation orders in the context of the European Union is governed by the Financial Penalties and Confiscation Orders Mutual Recognition and Enforcement Act (*Wet wederzijdse erkenning en tenuitvoerlegging geldelijke sancties en beslissingen tot confiscatie*, hereinafter: WWETGC). This law was first introduced to implement the

[81] See on this procedure: 2.1.7 of this country report.
[82] *Staatsblad* 2007, 354 and 432.

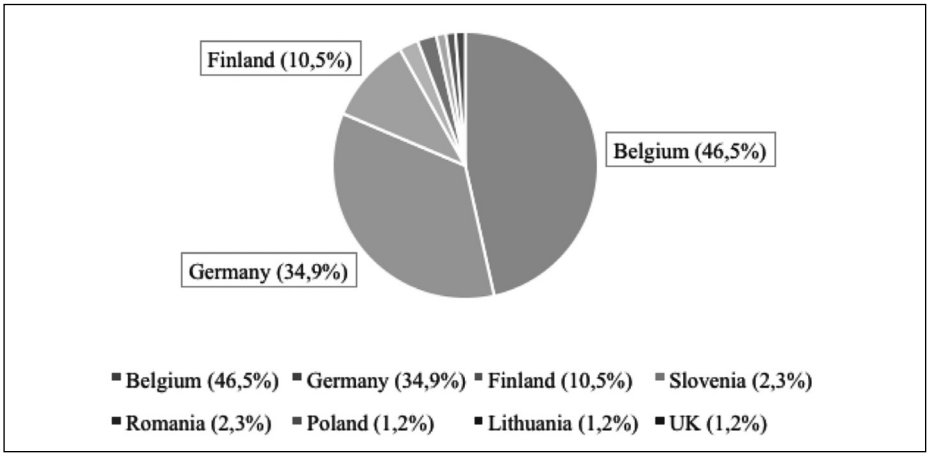
Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties. Accordingly, it initially only governed the mutual recognition and execution of such financial sanctions[82]. After the adoption of the Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders, the WWETGC was amended to implement this new European legislation. The adjustments came into force on 1 June 2009[83]. Since then, it is also applicable to confiscation orders.

Since the Netherlands has implemented Council Framework Decision 2006/783/JHA, the following amount of confiscation decisions were sent to the Netherlands until 2017 on the basis of this European instrument[84]:

2009	0
2010	4
2011	6
2012	3
2013	18
2014	13
2015	19
2016	16
2017	20
Total	99



They were sent in from the following issuing countries:

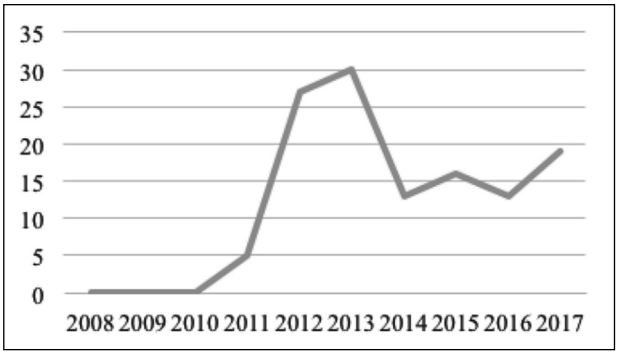


[83] *Staatsblad* 2009, 124 and 224. See *Kamerstukken II* 2007/08, 31555, 3.

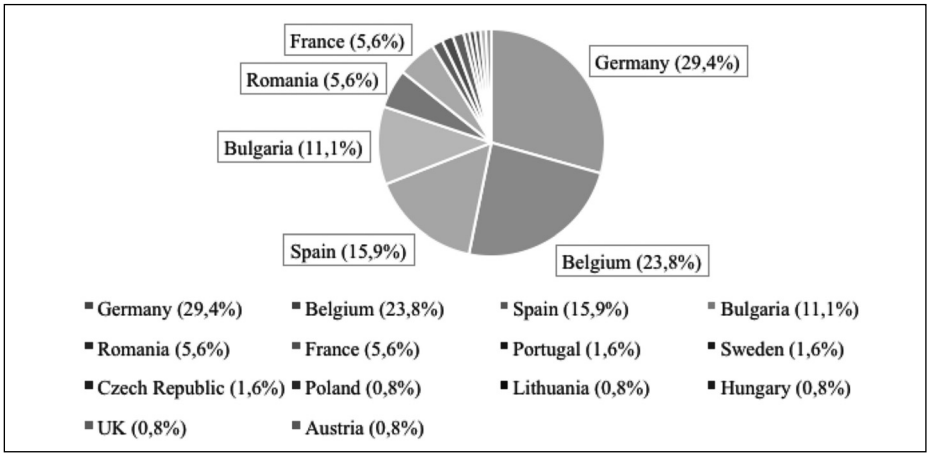
[84] Source: European legal affairs division of the Central Judicial Recovery Agency, CJIB.

The Netherlands has sent out the following amount of confiscation decisions to other European countries[85]:

2009	0
2010	0
2011	5
2012	27
2013	30
2014	13
2015	16
2016	13
2017	19
Total	123



They were sent to the following countries:



Approximately 10% of these confiscation decisions were not recognized and executed by the foreign authorities. As a reason for this non-recognition, they provided that the assets were not found, the judgement was too old, the person was not found or was deceased.

3.3.2. *Authorities (in the executing State) in charge of deciding on the request of confiscation orders*

According to article 4 WWETGC, the public prosecutor in the department of Leeuwarden is in charge of deciding on incoming requests

[85] Source: European legal affairs division of the Central Judicial Recovery Agency, CJIB.

for recognition and execution of (financial sanctions and) confiscation decisions. Due to a revision of the 'Judicial Map' of the Netherlands, this has become the department 'Noord-Nederland' (North Netherlands). The public prosecutor in this department is assisted by the Central Judicial Recovery Agency (*Centraal Justitieel Incassobureau*, hereinafter: CJIB), the central collection agency of the ministry of Justice and Security. It is appointed as the central authority as meant in article 3, paragraph 2 of the 2006 framework decision. It supports the public prosecutor in its legal tasks, by *inter alia* fulfilling a 'mailbox function' for the public prosecutor, checking the request for completeness, and (if necessary) requesting the foreign authorities for additional documents and information[86].

In the past, practice was that the CJIB itself ruled on the recognition and execution of incoming confiscation decisions. It determined for instance whether there were grounds for refusal. The public prosecutor was informed of these decisions afterwards. In case there was doubt as to the recognisability of the request, the CJIB would pass the case on to the public prosecutor. Since the competent court has ruled that this practice was in violation of the WWETGC and the parliamentary history thereof, the public prosecutor's office has changed its policy[87].

Due to a change in the law, the responsibility for the execution of criminal sanctions (in general) will in the future (when the law will enter into force) transfer from the public prosecutor's office to the Ministry of Justice and Security. The CJIB will no longer act under the responsibility of the public prosecutor's office, but under that of the minister. This law has passed the parliament and has been published in the 'Staatsblad', but its implementation date is yet to be determined[88]. As a result of this law, the public prosecutor will remain the competent authority to decide on the recognition of incoming confiscation decisions, but the Minister of Justice and Security will become the authority to execute such decisions. Article 4 WWETGC will be amended accordingly.

If a foreign confiscation order is recognized, it is executed according to Dutch law[89]. This means that if the defendant does not fulfil his payment obligation, the public prosecutor can request permission from the court to imprison the defendant for failure to comply with the con-

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[86] *Kamerstukken II* 2007/08, 31555, 3, 7 and Uitvoeringsbesluit wederzijdse erkenning en tenuitvoerlegging van geldelijke sancties en beslissingen tot confiscatie, *Staatsblad* 2007, 433, *Staatsblad* 2009, 190, *Staatsblad* 2011, 343 and *Staatsblad* 2012, 400.

[87] District Court of North Netherlands (*Rechtbank Noord-Nederland*) 23 January 2013, ECLI:NL:RBNNE:2013:BZ8760.

[88] *Staatsblad* 2017, 82.

[89] Article 22 WWETGC.

fiscation order (see art. 22 WWETGC and art. 577c CCP). The European Court of Justice has recently (after a request for a preliminary ruling from the Rechtbank Noord-Nederland) ruled that such imprisonment is not odds with article 12 of the 2006 Framework Decision (2006/783/JHA). This is not different if the law of the issuing State also authorises possible recourse to a term of imprisonment for the non-execution of the confiscation order. Since this imprisonment does not replace the payment obligation, article 12 paragraph 4 of the Framework Decision does not require permission from the issuing State before the imprisonment[90].

3.3.3. *Grounds for non-recognition and non-execution of confiscation orders*

Articles 24, 24a and 25 WWETGC lay down the grounds for non-recognition and non-execution of foreign confiscation orders. Some of the optional grounds for refusal of the framework decision have become mandatory in Dutch law[91]. These mandatory grounds are laid down in articles 24 and 24a, whereas article 25 provides for optional grounds for refusal. Article 24 WWETGC states that the public prosecutor refuses the recognition and execution of confiscation orders in case:

– the foreign confiscation decision has been taken in response to an offence:

- on which a Dutch court has already taken a final decision pertaining to this defendant (*ne bis in idem*);

- for which another (foreign) court has already imposed a criminal sanction on the defendant, and this sanction has been executed (*ne bis in idem*);

- which, if it were committed in the Netherlands, is not punishable under Dutch criminal law, *unless* it concerns an offence which has been identified in an order in council[92] and that is threatened with a maximum prison sentence of at least three years in the issuing State.

– the Netherlands would have had jurisdiction over the offence which has led to the criminal case which led to the confiscation decision, and that the legal time limit for execution for that offence would have lapsed[93].

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[90] Court of Justice EU (First Chamber) 10 January 2019, C-97/18 (ECLI:EU:C:2019:7).

[91] See *Kamerstukken II* 2007/08, 31555, 3, 14-17.

[92] This order in council (*Algemene maatregel van bestuur*) will contain the offences that are listed in article 6 of the framework decision.

[93] This period of limitation is laid down in article 76, paragraph 2 CC.

– the execution of the confiscation decision would be at odds with an immunity under Dutch law (such as in relationship to a diplomat).

– the execution of the confiscation decision would be at odds with the rights of interested parties, such as third parties.

If the public prosecutor considers refusing the recognition and execution of a confiscation decision on the mentioned *ne bis in idem* grounds, or on the ground of rights of interested third parties (unless a legal remedy under article 27 is invoked, see 3.3.6), he must first grant the issuing authority the opportunity to provide him with information concerning the relevant circumstances.

On the basis of article 24a WWETGC, the public prosecutor is also obliged to refuse the recognition and execution in case:

– the certificate shows that the person concerned did not appear at the investigation in court that led to the imposition of the confiscation order, *unless* it is laid down in the certificate that he was (in accordance with the rules of procedure of the issuing State):

- summoned to appear in time and in person, or was otherwise informed of the date and place of the court investigation, in such a manner that he unambiguously knew about the court procedure in which a decision could be passed if he did not appear;

- aware of the court investigation, but he chose to be represented by an attorney, and this attorney conducted his defence in the procedure;

- he expressly did not contest or file an appeal against an imposed confiscation order within the prescribed term, even though he was informed of his right to do so.

If the public prosecutor wants to apply this ground of refusal, he is obliged to grant the issuing authority the possibility to provide him with information concerning the relevant circumstances[94].

Article 25 provides for the optional grounds for refusal. The public prosecutor can decide not to recognize and execute the foreign decision, in case:

– the offence[95] that led to the imposition of the confiscation decision was (in whole or in part) committed:

- within the territory of the Netherlands or on a Dutch ship or aircraft;

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[94] This ground for refusal was introduced to implement the Council Framework Decision 2009/299/JHA.

[95] If the confiscation is the response to both money laundering and another offence, the 'offence' in this ground for refusal relates to this other offence.

- outside of the territory of the issuing State, while the Netherlands would not have jurisdiction over the offence if it were committed outside of Dutch territory.

– it concerns extended confiscation, other than the forms of confiscation defined in article 3, paragraphs 1 and 2 of Council Framework Decision 2005/212/JHA.

These optional grounds for refusal can only be applied if the public prosecutor has granted the issuing authority the opportunity to provide him with information concerning the relevant circumstances. If the public prosecutor decides to refuse the recognition and execution, he will notify the issuing authority promptly and supported by reasons (see art. 29 WWETGC).

As seen under 3.3.1 *supra*, since the Netherlands has implemented Council Framework Decision 2006/783/JHA in June 2009, a total of 99 foreign confiscation decisions were sent to the Netherlands until 2017. All these 99 incoming confiscation decisions were recognized by the Dutch authorities. Hence, until 2017 there have been no cases in which one of the grounds for refusal was used. In the 12 published cases in which a defendant has, on the basis of article 27 WWETGC (see 3.3.6), challenged the decision to recognise and execute a foreign confiscation decision, the court has never squashed the decision of the public prosecutor on the basis that one of the above-mentioned grounds for refusal should have been applied[96].

3.3.4. *Possibilities to postpone the execution of the confiscation order*

Article 26 WWETGC governs the possible postponement of the execution of foreign confiscation decisions. The public prosecutor can decide to do so, in case:

a. the confiscation decision concerns a sum of money and has been sent to several countries, where the public prosecutor rules that there is a risk the total receipt of the execution would exceed the amount laid down in the confiscation decision;

b. the procedure of article 27 WWETGC has been initiated (see 3.3.6);

c. the execution would be at odds with an on-going criminal investigation;

d. he deems translation of the confiscation decision necessary;

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[96] See for instance: District Court of North Netherlands (*Rechtbank Noord-Nederland*) 6 November 2013, ECLI:NL:RBNNE:2013:8370, 14 October 2015, ECLI:NL:RBNNE:2013:8370 and 20 April 2018, ECLI:NL:RBNNE:2018:1562.

e. the confiscation decision relates to a specific object which is already the subject of an on-going confiscation procedure.

The public prosecutor promptly informs the foreign authorities of his decision to postpone the execution of the confiscation decision. If this decision is based on one of grounds b-e, he specifies these grounds and the expected duration of the postponement. As soon as the grounds for postponement have ceased, the confiscation decision is executed. The foreign authorities also receive a notification thereof.

3.3.5. *Time limit for the execution of the confiscation order from the communication of the foreign decision*

There is no legal time limit in place for the execution of the foreign confiscation order. In practice, the period between the receipt of a foreign confiscation decision and its recognition strongly depends on the specific case and whether it is sent in containing all the necessary documents. If that is the case, the recognition can take place within 30 until 45 days[97].

3.3.6. *Rights and guarantees of the person addressed by a foreign confiscation order in the execution phase and legal remedies against a confiscation order in the executing State*

Article 27 of the WWETGC grants the defendant (and other interested parties) a legal remedy to challenge the decision of the public prosecutor to recognize and execute the confiscation decision. He can lodge an appeal to the District Court of North Netherlands (*Rechtbank Noord-Nederland*) within seven days from the day he is informed of the public prosecutor's decision[98]. This appeal postpones the execution of the confiscation decision. The foreign authority is promptly informed of a lodged appeal. As seen under 3.3.3, published case-law does not demonstrate any successful application of this appeal procedure.

Article 22 WWETGC states that if the foreign confiscation decision is recognised, it is executed according to Dutch law. This means that the Dutch authorities can seize and sell assets belonging to the defendant in order to execute the payment obligation. This mechanism has been described under 2.1.1, *supra*. As seen under 2.1.7, *supra*, defendants can challenge such a freezing and selling of assets before a court[99]. On the

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[97] Source: European legal affairs division of the Central Judicial Recovery Agency, CJIB.
[98] *Kamerstukken II* 2008/09, 31555, 6.
[99] Article 575, paragraph 3 CCP.

basis of article 27, paragraph 4 and article 15 WWETGC, this possibility is also open to defendants whose confiscation decision is recognized and executed in the Netherlands. They can file a complaint before the District Court of North Netherlands (*Rechtbank Noord-Nederland*). This complaint cannot challenge the payment obligation as such; it merely aims at the manner of execution thereof.

Dutch confiscation law offers defendants the possibility to request a mitigation or remittance of the payment obligation in the execution phase (art. 577b, paragraph 2 CCP[100]). Since this *does* affect the payment obligation, it is not applicable to foreign confiscation decisions that are executed in the Netherlands[101]. The defendant can however request to be granted a pardon on the basis of article 558 CCP, as this is expressly stated in article 37 WWETGC. In case the pardon is granted, the foreign authority is promptly informed of that decision.

3.4. *Third-party confiscation*

In case the Netherlands has received a request to recognize a foreign confiscation decision (see 3.3), the public prosecutor can freeze and sell assets in order to execute the confiscation sanction. It can concern either specific objects pointed out in the request or other objects that can serve to execute the confiscation decision. The general rules concerning the freezing and subsequent selling of assets in order to execute national confiscation orders apply[102]. This means that assets under a *mala fide* third party can be seized and sold in order to execute a foreign confiscation decision that is executed in the Netherlands (see 1.2 *supra*). If a third party claims to have ownership of objects that have been frozen on the basis of the WWETGC, he can use the provisions of the Civil Code of Procedure to challenge the execution (art. 27, paragraph 2 WWETGC).

Article 30 WWETGC furthermore allows for the freezing of assets during the period in which the confiscation decision is reviewed for recognition, or when the execution thereof is postponed. Such freezing is only possible if there are valid reasons to expect that the confiscation decision will shortly be executed in the Netherlands.

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[100] See DE ZANGER 2018a, 333-373 concerning this procedure.

[101] District Court of North Netherlands (*Rechtbank Noord-Nederland*) 13 November 2005, ECLI:NL:RBNNE:2015:6359.

[102] Art. 22 WWETGC refers to art. 577b, paragraph 1 CCP, which governs the execution of confiscation orders.

4. *Management and disposal aspects*

4.1. *Freezing*

4.1.1. *Authorities responsible for the management of frozen assets*

Frozen assets are managed under the responsibility of the public prosecutor. With this aim, a 'national freezing authority' (*Landelijke Beslag Autoriteit*, LBA) has been introduced, which is part of the National Office for Serious Fraud, Environmental Crime and Asset Confiscation of the public prosecutor's office. It coordinates all the seizures and freezing of assets, and serves as a centralised office in the sense of article 10 of Directive 2014/42/EU[103]. It thus has a supervising role, in which it *inter alia* advices public prosecutors and manages the freezing and disposal of assets abroad.

The actual remand in custody (*bewaring*) is done by several custodian authorities. Which authority is competent depends on the nature of the seized assets. When it concerns movable property, this is as a rule done by the State Property Service (*Domeinen Roerende Zaken*, DRZ), which is a part of the Ministry of Finance. If the frozen asset concerns cash money, it is managed by the National Service Centre for the Public Prosecution Service (*Dienstverleningsorganisatie OM, DVOM, afdeling landelijk beheer inbeslaggenomen gelden*)[104]. These custodian authorities store, value and sell or destroy the assets in accordance with the judgement of a public prosecutor.

4.1.2. *Possible activities with the frozen assets*

Frozen assets can be given back (without a guaranty) to the person under whom they were frozen or a third party who is the entitled party to the asset (art. 116 CCP). If it concerns assets that are not suited for storage (e.g. drugs, car wrecks, fireworks *et cetera*), of which the costs of storing are disproportionate to their value, or that are exchangeable and which value can be easily determined, the public prosecutor can authorize the selling, destruction or abandonment to the custodian authority. If the public prosecutor does not respond to a request for such an authorization within six weeks, the custodian authority can decide to sell, destruct or abandon the assets without an explicit authorization. Before

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[103] *Staatscourant* 2015, no. 11370, 5.

[104] Other authorities are responsible for the management of specific assets, such as firearms, falsified documents and counterfeit money. See article 1 of the Besluit Inbeslagneming Voorwerpen, *Staatsblad* 1995, 699 and 2012, 615.

doing so, the value of the objects is estimated by an expert[105]. If frozen assets are sold, the proceeds of the selling are subsequently frozen with the aim of executing the confiscation order (art. 117 CCP).

After the assets have been frozen for two years, the custodian authority can (also if it does not concern assets described above) decide to sell, destruct or abandon the frozen assets, unless the public prosecutor objects thereto within two weeks after he is given notice of the custodian authority's intention (art. 118 CCP).

Frozen assets can also be returned to its owner with a financial guaranty. The guaranty can also be fulfilled by a third party (art. 118a CCP).

4.1.3. *Costs and earnings of the management of the assets*

The public prosecutor's office bears the costs of managing the frozen assets. In the execution phase, the costs of freezing the assets and subsequently selling them in order to execute the confiscation order are however borne by the defendant (see 4.3.2).

4.1.4. *Possibilities to claim damages suffered by a wrongful management of frozen assets*

If the manner in which the object is managed is wrongful, for instance when the object is damaged, the person concerned can initiate a civil liability procedure against the State. The minister deemed it unnecessary to design a specific procedure for such claims[106].

4.1.5. *Peculiarities when the assets are managed abroad*

If the Dutch public prosecutor issues the mutual recognition of a freezing order abroad, the articles 5.5.9 until 5.5.13 CCP apply. The public prosecutor can formulate procedural requirements which the executing authorities must obey as much as possible in the execution.

Interested parties can, on the basis of articles 552a and 552c CCP, file a complaint against the issuing of the order at the court of the district to which the issuing public prosecutor is assigned.

4.1.6. *Peculiarities if the assets are managed on the basis of the decision of a foreign authority*

If assets are managed in the Netherlands on the basis of the decision of a foreign authority, some peculiarities occur. The custodian authority

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[105] Article 14 of the Besluit inbeslaggenomen voorwerpen, *Staatsblad* 2012, 168.
[106] *Kamerstukken II* 1989/90, 21504, 3, 28-29.

can only decide (on the basis of article 117 CCP, see 4.1.2) to sell, destruct or abandon the assets, if the public prosecutor has consulted the foreign authority (art. 5.5.5, paragraph 5 CCP). The public prosecutor can furthermore, after consulting with the foreign authority, set conditions in order to limit the duration of the freezing. If he ends the freezing in conformity with these conditions, he promptly informs the foreign authority (art. 5.5.7, paragraph 3 CCP).

4.2. *Freezing of third-parties' assets*

There are no peculiarities on this issue. Article 5.5.5, paragraph 1 CCP states that the regular legal provisions concerning freezing are applicable to the execution of a foreign freezing order. This means that the provisions that govern the freezing of assets under a *mala fide* third party (art. 94a paragraphs 4-5 CCP, see 2.2 *supra*) also apply.

4.3. *Confiscation*

4.3.1. Authorities responsible for the disposal of confiscated assets

The disposal of confiscated assets is as a rule done by the custodian authorities mentioned under 4.1.1, *supra*. As seen, for movable assets this is the State Property Service (*Domeinen Roerende Zaken*). Assets that have been frozen can also be disposed of with the aim of executing the confiscation order by a bailiff (*deurwaarder*), who operates in accordance with the Code of Civil Procedure[107]. The execution of criminal sanctions falls under the responsibility of the public prosecutor, so the disposal of confiscated assets is his responsibility.

4.3.2. *Modalities of the disposal*

Apart from the specific rules governing the disposal of assets in order to execute the confiscation order (see 2.1.1), the disposal is governed by the rules of the Code of Civil Procedure[108]. This means that the assets are disposed of by means of a selling by public auction. The costs of selling the assets with the aim of executing the confiscation order are borne by the defendant. It concerns costs a bailiff makes for corresponding with the defendant and for freezing and selling the assets. The proceeds of selling the assets are firstly employed to satisfy the costs, so the pay-

[107] *Kamerstukken II* 1994/95, 23692, 5, 9.
[108] *Kamerstukken II* 1989/90, 21504, 3, 43.

ment obligation of the defendant is only mitigated with the amount that remains after that[109].

4.3.3. *Uses, purposes and beneficiaries of the confiscated assets*

If assets are confiscated, their value as a rule flows into the State treasury. If the execution consists of payments by the defendant, these are added to the budget of the State. The same goes for the value of objects that are frozen and subsequently sold. After the turnover from the sell is used to pay for any costs of the selling process (e.g. bailiff costs), the rest becomes property of the State. As a rule, the proceeds are not 'earmarked' for specific goals, but they contribute to the general budget. In recent years however, there have been examples of cases in which specific investments by the Ministry of Justice – e.g. in specific confiscation teams of regional parts of the public prosecutor's office – are monitored and reinvested for the same purpose.

Objects that have been subject to a withdrawal are as a rule destroyed, since it concerns objects of which the uncontrolled possession is in breach of the law or contrary to the public interest, i.e. dangerous objects (see 1.1.1).

If there are victims involved in the case, they will be compensated first, if they have a civil claim on the defendant or if the judge has ordered a criminal compensation order on the ground of article 36f CC. In that case, the payments by the defendant and the yield of the frozen assets will first be used to fulfil these payment obligations[110].

The Netherlands has practically no tradition of social reuse of confiscated assets. In April 2015, the Minister stated that he did not, at that moment, see reason to reserve the income from confiscation for specific purposes[111]. Recently however, there has been a first experiment in this direction when a boat that was allegedly used to transport drugs was frozen in a money laundering case. Instead of being sold it, the boat has been donated by the public prosecutor's office to a maritime and transport educational organization. Because of the specifics of the ship, it was expected that a public auction would enable criminals to buy the ship and use it for drug trafficking purposes (again). Furthermore, the symbolic effect of this donation is emphasized. The public prosecutor's office intends to increase such initiatives to reuse criminal assets and instrumentalities[112].

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[109] DE ZANGER 2018a, 318-324.
[110] Article 36f, paragraph 6 CC.
[111] *Staatscourant* 2015, no. 11370, 5.
[112] See *https://www.om.nl/@101163/voormalige-drugsboot/* (5 April 2019).

4.3.4. *Peculiarities when the assets are managed abroad in consequence of a mutual recognition request*

There are no peculiarities on this issue.

4.3.5. *Peculiarities if the assets are managed on the basis of the decision of a foreign authority*

If assets are to be managed in the Netherlands on the basis of a confiscation decision of a foreign authority, they are managed and disposed of as if it concerns assets that serve to execute a Dutch confiscation decision. If the Netherlands has recognized a foreign confiscation order (see 3.3) and the amount of money that results from the execution is higher than € 10.000, half of the received amount is transferred to the issuing State. If the execution yields € 10.000 or less, it flows to the Dutch State. If the confiscation concerns specific objects, they can either be sold (after which the yield is divided between states), transferred to the issuing State or destroyed[113]. The minister of Justice can however agree with the foreign State to make an alternative division of the yields of execution (art. 28 WWETGC).

4.4. *Third-Party Confiscation*

There are no peculiarities on this issue.

[113] Objects that concern Dutch cultural heritage are however not sold or transferred to the foreign State.

DAN MOROŞAN - FLORIN STRETEANU - DANIEL NIŢU

ROMANIA

SUMMARY: 1. Substantive aspects on confiscation. – 1.1. Criminal confiscation. – 1.2. Extended confiscation. – 1.3. Non-conviction-based confiscation. – 1.4. Other types of confiscation. – 1.5. Third party confiscation. – 2. Procedural aspects. – 2.1. Freezing. – 2.2. Confiscation. – 3. Aspects of mutual recognition. – 3.1. Freezing. – 3.2. Confiscation. – 4. Management and disposal aspects. – 4.1. Freezing and confiscation. – 4.2. Third party rights and claims for damages for wrongful management.

1. *Substantial aspects on confiscation*

First and foremost, confiscation in Romania is regulated through several instruments, the most important, substantial wise, being the Romanian Criminal Code – therefore confiscation has a predominant criminal nature. In the following lines, all the existing types of confiscation present in the national legal landscape will be presented, as well as each of their particular features. The institutions of criminal nature are criminal confiscation, extended confiscation and non-conviction-based confiscation. In the last part of this first section, an overview will be made with regard to administrative confiscation and confiscation on the basis of Law no. 55/1996.

1.1. *Criminal confiscation*

Confiscation (otherwise known as criminal confiscation or special confiscation) is regulated in the Romanian legal framework in the Criminal Code, being an institution with tradition. Currently, the legal regime is regulated in Title IV, Chapter II, at art. 112 of the Criminal Code (adopted in February 2014), beforehand being regulated similarly in the Criminal Code of 1968, in art. 118.

Per its legal nature, beforehand and now, confiscation is a security measure, being applied alongside the compulsion to undergo medical treatment, admission to a medical facility, prohibition to become employed or to practice a certain profession and extended confiscation.

Since its nature is that of a security measure, *confiscation can become applicable only against a person who committed an unjustified offense under criminal law*. Which regard to the concept of unjustified offense, two elements need to be fulfilled in order to be able to order a security measure: (1) the perpetrator must commit an act provided by criminal law and (2) the act must be performed unjustifiably, respectively without the application of any of the regulated justifiable causes (legitimate defense, state of necessity, exercising a right or meeting an obligation and the consent of the victim). If any of these cases are present, security measures cannot be ordered.

Having this condition in mind, it is important to note that in the wording of article 107 of the Criminal Code, *security measures seek to eliminate any state of hazard and prevent the commission of offenses provided by criminal law* and *security measures may also be taken in case no penalty is applied to the offender*. Having analyzed the article, one can observe that the purpose of security measures in the Romanian legal system (and commonly) is the elimination of a source of hazard – on the one side, and the prevention of the commission of other offenses, on the other side. No further explanation is thus needed in this sense, being self-evident the conditions under which a security measure may be ordered and the procedural standard that must be attained so as a security measure to be pronounced against a certain individual. Turning back to the applicable legal provision concerning confiscation, the law states the following:

Art. 112 of the Criminal Code

(1) The following shall be subject to special confiscation:

a) assets produced by perpetrating any offense stipulated by criminal law;

b) assets that were used in any way, or intended to be used to commit an offense set forth by criminal law, if they belong to the offender or to another person who knew the purpose of their use;

c) assets used immediately after the commission of the offense to ensure the perpetrator's escape or the retention of use or proceeds obtained, if they belong to the offender or to another person who knew the purpose of their use;

d) assets given to bring about the commission of an offense set forth by criminal law or to reward the perpetrator;

e) assets acquired by perpetrating any offense stipulated by criminal law, unless returned to the victim and to the extent they are not used to indemnify the victim;

f) assets the possession of which is prohibited by criminal law.

(2) In the case referred to in par. (1) let. b) and c), if the value of assets subject to confiscation is manifestly disproportionate to the nature and severity of the offense, confiscation will be ordered only in part, by monetary equivalent, by considering the result produced or that could have been produced and the asset's contribution to it. If the assets were produced, modified or adapted in order to commit the offense set forth by criminal law, they shall be entirely confiscated.

(3) In cases referred to in par. (1) let. b) and c), if the assets cannot be subject to confiscation, as they do not belong to the offender, and the person owning them was not aware of the purpose of their use, the cash equivalent thereof will be confiscated in compliance with the stipulations of par. (2).

(4) The stipulations of par. (1) let. b) do not apply to offenses committed by using the press.

(5) If the assets subject to confiscation pursuant to par. (1) let. b) - e) are not to be found, money and other assets shall be confiscated instead, up to the value thereof.

(6) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such, except for the assets provided for in par. (1) let. b) and c), shall be also confiscated.

Having observed the structure of the legal provision, before analyzing each of the conditions that need to be met in order to confiscate, we believe that it is essential to answer one fundamental question: is the imposition of confiscation, as regulated by art. 112 of the Criminal Code mandatory or is it optional? The answer seems rather simple if one considers the legal nature of the institution and paragraphs. 1 let. *a-f.* of art. 112 of the Criminal Code.

According to the aforementioned provision, confiscation shall be applicable to (1) assets produced by the commission of any criminal offense, (2) assets used or intended to be used in the commission of the offense, (3) assets used immediately after the commission of the offense in order to escape or to ensure the retention of proceeds, (4) assets given to bring about the commission of the offense or to reward the perpetrator, (5) assets acquired by perpetrating the offence and (6) assets the possession of which is prohibited by criminal law.

As it can be seen, there are 6 categories of assets that can be confiscated. However, since confiscation is a security measure and the categories are expressively enumerated without any supplementary clarifications, the inference is that confiscation is compulsory to be ordered, since the purpose of a safety measure is to eliminate hazard and prevent the commission of further offenses. The law thus presumes that if the as-

set falls within one of the categories presented above, it constitutes a source of hazard. As an example, a pot *per se* used in the commission of an offense is not dangerous given its nature; however, since it has been used in the commission of the offense, the law presumes it is a source of danger and the court must therefore order its confiscation.

Regarding the persons against whom the order to confiscate may be imposed, an analysis must be made in each hypothesis provided. As a general rule, the concept of *committing an offence* relates in the Romanian legal framework to all the participants to the offence, regardless of their input. As such, confiscation may be ordered against the perpetrator himself, the instigator and the accomplice (even in the modality of improper participation, under certain conditions).

Starting with the first hypothesis provided, the Criminal Code imposes the issuing of a confiscation order if the assets are produced by the commission of any criminal offense. In legal doctrine[1], it was stated that such assets must be considered those that did not have an existence before the commission of the offense, being a consequence of the commission. Other authors have extended the understanding and stated that even though the asset existed beforehand, it will still be considered an asset produced by the commission of the offence insofar as the modification of the asset resulted from the commission of the offense[2]. As examples of assets preexisting, the authors described the situation of goods introduced by contraband, medicine containing illicit substances and so on. Per the classic examples, assets produced by the commission of the offense could be new coins, falsified credit titles, falsified instruments of payment, falsified check, counterfeited tickets and so on.

The second situation concerns the case of assets that were used or intended to be used in the commission of any criminal offense. The provision was subject to debate both in legal practice and in doctrinal research, several opinions being presented. However, legal scholars[3] consider that confiscation can be ordered with respect to all assets that were used in the commission of the offense, irrespective of their input. Moreover, considering assets destined to be used, legal practice[4] has stated that since they

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[1] See M. Vasile, *Confiscarea specială şi expulzarea în dreptul penal român*, ed. Universul Juridic, Bucureşti, 2012, 91.

[2] See I. Lascu, *Confiscarea specială ca măsură de siguranţă. Condiţii generale reglementate de Noul Cod* Penal, Dreptul, no. 12, 2005, 207.

[3] See V. Dobrinoiu, I. Pascu, M.A. Hotca, I. Chiş, M. Gorunescu, C. Păun, N. Neagu, M. Dobrinoiu, M. Constantin, *Noul cod penal comentat. Partea generală*, ed. a-III-a, ed. Universul Juridic, Bucureşti, 2016, 645.

[4] See Supreme Court, S. pen., Dec. nr. 3933/2003, în RDP nr. 1/2006, 171.

were not used in the commission, such assets can be confiscated only insofar as they were transformed, prepared, modified or adapted for the commission of the offense. In this sense[5], even though some debate existed beforehand, it is now relatively clear that confiscation on the basis of letter art. 112 par. 1 let. *b*) can be rendered only for the commission of offenses that have an intentional basis and not offense characterized only by negligence (used, destined to be used, for the commission).

Limit-wise, confiscation relying on this article can be rendered only for assets that pertain to the offender or to a third party who knew the purpose of their use and not for offenses committed through press. Concerning the concept of a third party that knew, the respective party will be qualified, according to Romanian legislation as an accomplice or instigator, the institution not being applicable to *per se de bona fide* third parties. As such, confiscation will be render on the basis of participation to the offense. The second limit, respectively the inability to confiscate if the offense was committed through press, relates to the right to be informed and the very serious effect that confiscating the technical instruments of a press institution can have[6].

The third case relates to assets used immediately after the commission of the offense to ensure the perpetrator's escape or the retention of the proceeds obtained. This is a new motive so as to order confiscation; the regulation being lobbied for by the judiciary. In this sense, the assets, as in the previous case, must pertain to the offender or a third party that knew the purpose of their use. As such, there is no *bona fide* third party affected, the person who knew being sanctioned either as a coperpertrator, accomplice or instigator. As well, if the instrument is given by a participant to the initial offense, it must be confiscated as well on the basis of let. *b* of art. 112 of the Criminal Code.

The fourth case concerns assets given to bring about the commission of an offense set forth by criminal law or to reward the perpetrator. In this sense, no special issues seem relevant, the following conditions being required: (1) the assets need to be offered with the scope of determining the commission of the offense or the reward the perpetrator, (2) the assets need to be given voluntarily (3) the deed for which the assets are given needs to be a crime provided by criminal law, committed unjustifiably. Per legal doctrine[7], several judicial decisions were criticized

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[5] See D. Niţu, *Modificările aduse în materia confiscării de prevederile legii nr. 278/2006*, Caiete de Drept Penal, nr. 3/2006, 46.

[6] *Ibidem*.

[7] See M. Basarab, V. Paşca, C. Butiuc, G. Mateuţ, *Codul penal comentat*. Vol. I, *Partea generală*, ed. Hamangiu, Bucureşti, 2007, 601.

because in situations as the one described above, confiscation was ordered on the basis of art. 112 let. *e*) (assets acquired by the commission of the offense), stipulating that the key difference between the two is that in the case of the latter, the assets found in the possession of the offender were acquired by the commission of the offence and they were not given so as to reward or to influence the commission of the offense. As such, the consummation of the crime as well as the obtaining of the asset is an effect of the commission of the offense on the basis of let. *e*) of art. 112 of the Criminal Code.

The fifth hypothesis concerns partly the situation described above, respectively the confiscation of assets acquired by perpetrating any offense stipulated by criminal law. This would be the most used basis for confiscation, as for many common offenses, confiscation is rendered (theft, robbery, fraud and so on). The main limitation in this case is the exclusion of confiscation if the assets are returned to the victim and to the extent they are not used to indemnify the victim. As such, confiscation can be ordered only in cases when the victim is not known, or he or she did not have any civil claims against the offender. In the remainder of cases, usually the asset is given back to the victim, or if it was destroyed or modified, the value of the asset is returned to the victim.

Finally, the sixth situation regard the case of assets the possession of which is prohibited by criminal law. Without dwelling too much on the situation, confiscation is compulsory and the rationale for its ordering is relatively straightforward. In this sense, the first condition would be that the assets are held contrary to criminal law provisions and secondly, that they be subject to a special regime, regulated by norms of a criminal nature. To clarify this, according to article 173 of the Criminal Code, a provision of criminal law is defined *as any criminal stipulation included in organic laws, emergency ordinances or other regulatory acts which, at the date they were adopted, had legal power*. Such assets could be: weapons, ammunition, explosive substances, toxic substances, drugs and so on.

Regarding the special limits that operate with regard to the institution of confiscation, these would be, according to article 112 par. 2-6: (1) partial confiscation (2) value-based confiscation and (3) confiscation of assets obtained from the exploitation or use of assets subject to confiscation.

Concerning the possibility to confiscate only partially, several preliminary observations are due.

The first observation that needs to be issued is that partial confiscation applies only for *assets used in any way or destined to be used for the commission of the offense* and for *assets used immediately after the com-*

mission of the offense to escape or to keep the proceeds obtained. The rationale behind this limitation is relatively simple and it concerns the intensity of the state of hazard that is produced by the assets in question. In the rest of the cases, respectively in the cases of (1) the assets produced by the commission of the offense, (2) assets given so as to commit or reward the commission of the offence, (3) assets acquired by the commission of the offense and (4) the assets the possession of which is prohibited by criminal law, the intensity of the state of hazard in higher than in the previous cases[8].

The second observation is that if the assets in question (used, destined to be used or used to escape or keep the proceeds) were produced, modified or adapted in order to commit the offense, the possibility to partially confiscate does not exist. The difference in regime relates to the difference in malice that exists between a person that uses a licit asset in order to commit an offense versus a person that modifies or adapts set asset in order to be useful in the commission of the offense.

Finally, the third observation is that partial confiscation will operate by monetary equivalent, meaning that the assets in question will be initially evaluated and after the evaluation, (1) considering the result produced, (2) the result that could have been produced and (3) the assets contribution to the result or potential result, confiscation will be ordered.

Considering the analysis *per se*, some authors have stated that even though the text seems to suggest a two-step approach – the first being the analysis of the disproportion between the nature and severity of the offense and the value of the asset, the evaluation will be done in a single process, as the degree of disproportion between the value of the asset and the nature and severity of the offense is very hard to quantify[9]. In this sense, the contribution of the asset towards the commission of the offense will have a prevalent role if the offense in question is of a patrimonial nature, being relatively simple to compare the two values and conclude. However, if the offense is one that cannot permit a value-based approach, the situation will be relatively difficult and the only solution in the evaluation phase will be to use the general criteria for the purpose of sentencing, provided in article 74 of Criminal Code[10].

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[8] As an example, it would be irrational to confiscate only partially the assets given in order to hurt a certain person or just a part of the whole quantity of drugs used in the commission of an offense. For further explanations see D. Nițu, *Modificările aduse în materia confiscării de prevederile legii nr. 278/2006*, Caiete de Drept Penal, no. 3/2006, 54.

[9] *Ibidem*.

[10] *Establishing the length or amount of a penalty shall be made on the basis of the seriousness of the offense and the threat posed by the convict, all of which shall be assessed based*

Turning towards the issue of value-based confiscation, two observations are essential, given the context.

The first one is that the institution is applicable in all situations, with the exception of the situation provided in art. 112 para. 1 let. *a*), where the assets produced by the commission of the offense are always to be confiscated.

The second observation is that an apparent difference in regime seem to apply, since for the case of *the assets used or destined to be used in the commission of the offense* and the *assets used in order to escape or retain the proceeds of the offense*, a special provision exists. The rationale behind this legislative technique relates to the limitations that exist concerning letter *b*) and *c*) of art. 112 para. 1 on the one side, and the fact that partial confiscation is applicable only in these instances, on the other side. Regardless, the general reasons for which value-based confiscation is to be applicable remain the same. As such, value-based confiscation should apply in all situations where the assets subject to the measure do not exist in the moment when the order was issued. The situation is applicable even when the assets subject to confiscation have been transferred to another third party, insofar as the third party is qualified as *de bona fide*. If the asset is transferred to the third party, and the person in question knew that the asset originated from the commission of an offense, value-based confiscation will not be applicable, the asset in question being confiscated directly (if it still exists).

Finally, concerning the confiscation of assets obtained from the exploitation or use of assets subject to confiscation, the legal provisions of article 112 state that it will be applicable in all cases, with the exception of those provided in par. 1 let. *b*) and *c*). The rationale behind the rule, as it was introduced in 2006, is that the offender should not remain with anything from the commission of the offense. As such, it should be fair to confiscate the eventual profits that are realized by the assets that were produced or whose possession is prohibited by criminal law. With regard to the relevant exceptions, the rationale behind them was that the assets in question pertain either to the perpetrator or the third party that knew their use, but their possession until the point of the commission of the offense was legal. As such, since their possession is not prohibited by any

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on the following criteria: a) the circumstances and manner of commission of the offense, as well as the means that were used; b) the threat to the protected social value; c) the nature and seriousness of the outcome produced by the offense or other consequences of the offense; d) the reason for committing the offense and intended goal; e)the nature and frequency of offenses in the convict's criminal history; f) the convict's conduct after committing the offense and during the trial; g) the convict's level of education, age, health, family and social situation.

norm, it would be unjust for the court to confiscate profits made by legitimate use. A well know example is that of a car bought by the offender used in the commission of an offense and afterwards used by the offender as a taxi. In this case, it would be illogical to confiscate the sums of money produced by the use of the car in the taxi business on the basis that the same car was used to hit a person out of spite.

1.2. *Extended confiscation*

Extended confiscation was firstly devised by the EU legislator by means of Framework Decision 2005/212/JAI and it was further refined through Directive 2014/42/EU. For Romania and allegedly for most EU Member States, the institution is rather new, and it proved more challenging to implement than expected. In the national legal framework, the institution was first envisaged in the project of the New Criminal Code, before 2009[11], but it was eliminated during the parliamentary debate. However, it was regulated afterwards under the aegis of Law no. 63/2012 on amending and supplementing the Criminal Code and Law no. 286/2009 on the Criminal Code, with the purpose of transposing the aforementioned Framework Decision. The institution suffered several challenges alleging unconstitutionally[12], but it was kept in the new Criminal Code in a very similar form. According to the legal text in force:

1) Assets other than those referred to in Art. 112 are also subject to confiscation in case a person is convicted of any of the following offenses, if such offense is likely to procure a material benefit and the penalty provided by law is a term of imprisonment of 4 years or more:

a) drug and precursor trafficking;

b) trafficking in and exploitation of vulnerable people;

c) offenses on the state border of Romania;

d) money laundering offenses;

e) offenses related to the laws preventing and fighting pornography;

f) offenses related to the legislation to combat terrorism;

g) establishment of an organized crime group;

h) offenses against property;

i) failure to observe the law on firearms, ammunition, nuclear materials and explosives;

j) counterfeiting of currency, stamps or other valuables;

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[11] Compared to the regulated version, in the project, the institution was designed with no limitations concerning the list of offenses for which is was to be applicable.

[12] See Constitutional Court: Decision no. 78 of 11 February 2014, Decision no. 365 of 25 June 2014, Decision no. 11/2015.

k) disclosure of economic secrets, unfair competition, violation of the stipulations on import or export operations, embezzlement, violations of the laws on imports and exports, as well of the laws on importing and exporting waste and residues;

l) gambling offenses;

m) corruption offenses, offenses assimilated thereto, as well as offenses against the financial interests of the European Union;

n) tax evasion offenses;

a) offenses related to customs regulations;

p) fraud committed through computer systems and electronic payment means;

q) trafficking in human-origin organs, tissues or cells.

(2) Extended confiscation is ordered if the following conditions are cumulatively met:

a) the value of assets acquired by a convicted person within a time period of five years before and, if necessary, after the time of perpetrating the offense, until the issuance of the indictment, clearly exceeds the revenues obtained lawfully by the convict;

b) the court is convinced that the relevant assets originate from criminal activities such as those provided in par. (1).

(3) In enforcing the stipulations of par. (2), the value of the assets transferred by a convicted person or by one-third party to a family member or to a legal entity over which that convicted person has control shall also be considered.

(4) Sums of money may also constitute assets under this Article.

(5) In determining the difference between the legitimate income and the value of the assets acquired, the value of the assets upon their acquisition and the expenses incurred by the convicted person and their family members shall be considered.

(6) If the assets to be seized are not to be found, money and other assets shall be confiscated instead, up to the value thereof.

(7) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such shall be also confiscated.

(8) Confiscation shall not exceed the value of assets acquired during the period referred to in par. (2) that are above a convicted person's lawfully obtained income.

Observing the legal text, the conditions required to order extended confiscation become clear. As such:

(1) the offender must commit a triggering offense sanctionable by at least 4 years imprisonment;

(2) the offense must be likely to procure a material benefit;

(3) the solution for the commission of the offense must be a conviction;

(4) the value of the assets in the propriety of the convicted persons must clearly exceed the revenues obtained lawfully in a period of maximum 5 years;

(5) the court must be convinced that the difference in value originated from criminal activities similar to the ones for which conviction was decided.

With regard to the first two conditions, the national legal regime is fairly clear on the matter. As such, in order for extended confiscation to be ordered, first and foremost the offender must commit a list offense for which the penalty provided by law must be at least 4 years and the offense must be likely to procure a material benefit.

With regard to the list and the provided penalty, the first observation is that both criteria relate to the nature of the offenses *in abstracto*. In this sense, the court must simply observe if the triggering offense is provided in the list and verify if the punishment provided by law is of at least 4 years. Considering the latter condition, it is essential to see what the Criminal Code defines as a punishment provided by law. In this context, according to article 187 of the Criminal Code, by punishment provided by law, one should understand *the penalty stipulated by the text of the law incriminating the completed offense, not considering the circumstances for the aggravation or mitigation of the penalty*. As a conclusion to the ideas presented above, the condition shall be met only insofar as the offense committed is sanctionable without any aggravation or mitigation circumstances applicable. As well, it is possible to convict the persons to a fine and still have the condition met, since it only relates to the punishment provided by law.

With regard to the likeliness to procure a material benefit, the condition is intimately linked with the types of offenses provided in the list, but it is however insufficient. This condition should be analyzed in a strict manner by the court that rules on the potential triggering offense, since, even though most of the offense relate to patrimonial gain, this is not the case for all of them. As presented in legal doctrine[13] the condition is to be analyzed *in concreto*, on a case by case basis. As examples, the offense of pandering was put forward, being stated that even though in most cases, the offense is committed in order to gain some financial ben-

[13] F. Streteanu, *Consideraţii privind confiscarea extinsă*, Caiete de Drept Penal, no. 2/2012, 23-24.

efit, this is not always the case, some individuals not following a patrimonial gain.

Turning toward the third condition, as stated in the legal text, the decision of the court in order to trigger the possibility to confiscate extensively must be a conviction. The procedural solutions that meet this requirement are (1) the conviction by which the court orders the execution of the penalty (life imprisonment, imprisonment, or a fine) and (2) the conviction by which the court suspends the service of the sentence under supervision. Both are valid solutions that permit the ordering of extended confiscation, but in the case of the suspension of service of the sentence, the penalty applied *in concreto* must be imprisonment in a term of maximum 3 years. Per the solutions that do not permit the issuing of an extensive confiscation order, these are (1) acquittal, (2) the postponement of penalty enforcement and (3) the waiver of sentence enforcement. Without providing more detail on the manner, it is sufficing to say that these solutions are possible for some of the offenses provided in the list in article 112^1 of the Criminal Code and the attitude of the judge will, in this case, render extended confiscation impossible to order, if the triggering offense was seen as not dangerous enough so as to warrant a conviction.

Concerning the fourth condition, it was a topic of debate, both from a constitutionality standpoint and in the sense of material implications (what is an asset in this context, how should the reference period be calculated and how is the revenue analyzed with regard to the lawfully obtained assets).

With regard to the constitutionally of the provisions, The Constitutional Court settled the conflict in a first stage, being challenged with an unconstitutionality claim concerning art. 118^1 par. 2 lit. *a*) of the Criminal Code. The main criticisms regarded the violation of the constitutional provisions of art. 16 par. 1 of the Constitution, regarding the equality of citizens before the law and art. 15 par. 2 regarding the rules concerning the retroactive application of criminal law. The claim relied as well on the provisions of art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (*nullum crime sine lege principle*). By Decision no. 78 of February 11, 2014, the Court held that art. 118^1 par. 2 lit. *a*) is constitutional insofar as it applies only to the acts committed under the new legislative solution, namely after 22 April 2012. A second exception concerning unconstitutionality was raised with regard to the same text but, in addition to the arguments presented above, there was a different state of affairs (the goods were acquired before the regulation of extended confiscation) and the text was reported to be unconstitutional

in relation to art. 44 par. 8 of the Constitution – text governing the presumption of the licit nature of the acquisition of property. By Decision no. 365 of June 25, 2014, the Court held that the text invoked is constitutional, since the presumption in Art. 44 is a relative one that allows for overthrowing by other presumptions and evidence, and the text of art. 118[1] par. 2 let. *a)* is constitutional only to the extent that confiscation does not apply to assets acquired before the entry into force of Law no. 63/2012. Concerning the constitutionality of the text of the New Criminal Code, a last exception of unconstitutionality was raised for the same reasons and by Decision no. 11/2015, the Constitutional Court held that art. 112[1] par. 2 let. *a)* is constitutional insofar as it is not applicable to assets and acts committed prior to the entry into force of Law no. 63/2012.

Turning towards the material implications of the provision, the first aspect that needs to be clarified is the meaning of an asset in the case of extended confiscation. We believe that the situation is identical with the one in the case of criminal confiscation. Therefore, assets will be considered any movable or immovable goods that pertained to the defendant, any sums of money received, services for which he or she paid for or were offered free of charge, as well as any other assets that have an economic value (credit titles, shares in a joint stock company and so on). Concerning the assets that will not be calculated in this endeavor, it is evident that the assets confiscated or returned to the victim per the triggering offense will not be calculated, as well as any other assets that were forcefully removed beforehand as a consequence of any prior convictions and ordering of criminal confiscation.

In this context, with the purpose of shedding light on the so-called third-party confiscation, it is worth mentioning that the provision stipulated in article 112[1] par. 3 do not permit third-party confiscation. The provision simply states that when calculating the difference in worth – legally obtained vs subject to extended confiscation, the court or the investigative bodies must also look at assets transferred by the convicted person to a family member or to a legal entity over which he or she has control. Moreover, in our view, the provision is simply exemplificative since it would be surreal to believe that other means of circumventing this limitation do not exist. As such, a good friend could be used so as to extract sums of money and if interpreting the text literally, it would be impossible to confiscate. As a final note, as provided in para. 5 of article 112[1], when calculating the worth difference between the legitimate income and the value of all the assets that the convict has as a proprietary, attention must be given both to the value upon acquisition and the expenses that the specific asset incurred. In this sense, as an example, if the

asset was acquired at the sum of 2.000.000 EUR in January 2016 and the maintenance for the asset was 1.000 EUR monthly, if confiscation is decided in January of 2018, and the assets value is at the time of the sentencing 1.000.000 EUR, the total sum that needs to be considered when compared to the licit assets would be 2.000.000 EUR plus 24 multiplied by 1.000 EUR. As such, the total value of the asset in question when compared to the licit income since 2016 would be 2.024.000 EUR.

Concerning the reference period, respectively within five years before and, if necessary, after the time of perpetrating the offense, until the issuance of the indictment, the formulation was criticized by doctrine as being, on the one hand, unclear[14], and on the other hand, ineffective[15], since the term was seen as a regressive one that is calculated starting with the indictment. Others[16] have stated that the aforementioned opinion is erroneous, and the reference point is to be considered as the commission of the offense. It was deemed that the latter view can be the only one compatible with the intent of the legislature, since otherwise, as well stated, the institution would be useless.

Finally, concerning the last condition, respectively that the court must be convinced that the difference in value originated from criminal activities similar to the ones for which conviction was decided, the key issue is the establishment of the incumbent standard of proof. The provision was the most discussed in legal doctrine, being of essential importance.

Starting with the legal requirements, as a rule, according to article 103 of the Code of Criminal Procedure, *(1) Pieces of evidence do not have a value pre-established by law and are subject to the free discretion of the judicial bodies, based on the assessment of all pieces of evidence produced in a case. (2) In deciding the existence of an offense and on a defendant's guilt, the court decides, on a justified basis, on the basis of all the assessed pieces of evidence. Conviction is ordered only when the court is convinced that the charge was proven* beyond any reasonable doubt. As it can be seen, the general standard of proof required in criminal proceedings is that of beyond any reasonable doubt.

With regard to the persons responsible for the gathering of evidence, article 99 of the Code of Criminal Procedure states that (1) *In a*

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[14] M. Hotca, *Neconstituţionalitatea şi inutilitatea dispoziţiilor care reglementează confiscarea extinsă*, published online *at https://www.juridice.ro/199507/neconstitutionalitatea-si-inutilitatea-dispozitiilor-care-reglementeaza-confiscarea-extinsa.html*.

[15] F. Streteanu, *Consideraţii privind confiscarea extinsă*, Caiete de Drept Penal, no. 2/2012, 22-23.

[16] A.A. Danciu, *Confiscarea extinsă*, Caiete de Drept Penal, no. 4/2013, 89.

criminal action, the burden of proof rests primarily with the prosecutor, while in a civil action it rests with the civil party or, as applicable, upon the prosecutor initiating the civil action. (2) A suspect or defendant benefits from the presumption of innocence, has no obligation to prove their innocence, and has the right not to contribute to their own incrimination. Concerning the production of evidence, it is stated in article 100 of the Code of Criminal Procedure that *(1) During the criminal investigation, criminal investigation bodies gather and produce evidence both in favor and against a suspect or a defendant, ex officio or upon request. (2) During the trial, the court produces evidence upon request by the prosecutor, the victim or the parties and, in subsidiarity, ex officio, when it deems it necessary for the creation of its own conviction.*

As it can been seen, the general rule is that the standard is that of beyond all reasonable doubt, the burden of proof rests primarily with the prosecutor and during criminal investigation, the prosecutor must gather evidence both in favor and against the suspect or the defendant.

In the case of extended confiscation, the general rules do not apply specifically, the problem being one of fact (proving ties to criminal activities that were not proved and committed a long time before the proceedings) and of law (the Constitution provides the presumption of the licit nature of fortune).

In this sense, it was stated by one author[17] that the belief of the court, as a condition to order extended confiscation, must bring into consideration both the way in which the belief is realized, as well as the way in which set belief is related to the presumption of the licit character of fortune. It was deemed as well that in this context, the problem of equality of arms must be respected per the evidence that can be requested so as to overturn the evidence brought forward by the prosecutors. The conclusion was that the two opposing presumptions that work in this situation are: (1) the legal presumption of the licit character of fortune and (2) the judiciary presumption that the assets in the case of extended confiscation originate from offenses similar to those provided in the list for which the person was convicted. The solution, with which we agree, was reached for plain purposes. As such, if the standard of proof would be the same as in regular proceedings (beyond all reasonable doubt), the normal consequence would be to order criminal confiscation and convict. But, the issue is that this was exactly the reason for which extended confiscation was introduced – so as to give the possibility to confiscate in situations that beforehand, it would have been impossible.

[17] L. Lefterache, *Confiscarea extinsă*, Curierul Judiciar, no. 7/2015, 389-390.

Having set the context, the standard of proof must be that of balance of probabilities. It must be proved that it is more likely for the assets in question to originate from criminal activities and not from licit gains – reasons for which the use of presumptions is mandatory.

Turning back to the use of presumptions, the sole legislation that defines presumptions is the Civil Code of Procedure, which regulates legal presumptions and judicial presumptions[18]. Having observed the structure of the legal texts, the next question that needs to be answered is how this interplay of presumptions works and what should be considered the known fact – subject to be proven so as to presume that all or a part of the assets of the convicted person are derived from criminal activities. In trying to answer this question, as it was stated by legal doctrine[19] it is required that a link be established by the prosecution between similar offenses and the assets that exceed the value of the proven (by the prosecution) licit assets. In this sense, the assets in question must be individualized, but the offense that generated the assets does not need to be proved beyond all reasonable doubt.

However, elements such as: *the way in which the assets were obtained, the existence of signed contracts, the identity of the parties to the verbal or written contracts, the relationship between offenders, the existence of prior convictions, the financial situation of the defendant before and after, the financial profile, the frequency of prior convictions and the frequency of the obtaining of assets* and so on can be useful elements in proving, on a balance of probability, that the assets in question were most probably obtained by similar offenses as the one that generated the conviction. With regard to the equality of arms, in a nutshell, it is prescribed that the above-mentioned elements must be proven. If not, a presumption cannot be built on another presumption. In this sense, if a certain element – the existence of a simulated contract, for example, has been proven until a point by the prosecution, the defense must be given the opportunity to combat the evidence and prove that the contract was legitimate, and it was, for example, the consequence of business deal that

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[18] *Article 327* Notion: *Presumptions are the consequences that the law or judge takes from a known fact to establish an unknown fact*; *Article 328* Legal presumptions: *(1) The legal presumption exempts the person in whose favor he is established in all the facts considered by law as proved. However, the party that takes advantage of the presumption must prove the known, neighboring and related fact on which it is based. (2) The legal presumption may be removed by the contrary, unless the law provides otherwise. Article 329* Judicial presumptions: *In the case of presumptions left to the judge's wisdom and wisdom, he can only rely on them if they have the weight and the power to give birth to the probability of the alleged fact; they can only be received in cases where the law admits evidence with witnesses.*

[19] *Ibidem*.

was conclude beforehand. As a final note, we believe that the presumption system can work only insofar as the predicate offense is similar to the offenses for which extended confiscation is applied and the illicit nature is searched for[20]. Otherwise, a system of evidence, in opposition with the required similarity would allow for a very large margin of appreciation, the type of evidence and the link that can be created being unconvincing and the scope too wide.

Having in mind the aforementioned, a very clear decision was pronounced by the Constitutional Court of Romania, respectively Decision no. 650/2018[21]. According to this decision, the standard of proof in extended confiscation procedures must not be the one of beyond all reasonable doubt, since, if this standard of proof is reached, the applicable institution would be special confiscation. Moreover, in a very in-detailed argumentation, the Constitutional Court explained why the standard of proof of beyond all reasonable doubt must not be used, why the use of simple presumptions is acceptable given the existing relative constitutional presumption of the licit accumulation of fortune and why the whole mechanism should be envisaged as an interplay of presumptions with the goal of providing a fair balance, since the overarching interest is the deprivation of assets obtained illicitly though criminal activities.

Limit wise, extended confiscation provides for the possibility to confiscate the value of the assets identified as being the result of similar activities than those for which the conviction was render. Also, the maximum limit – value wise, can be reached when comparing the total value existing in the patrimony of the convicted person and the total licit value. Therefore, according to par. 8 of article 112[1], *confiscation shall not exceed the value of assets acquired during the period referred to in par. (2) that are above a convicted person's lawfully obtained income*

1.3. *Non-conviction-based confiscation*

In what concerns non-conviction-based confiscation, the situation is rather peculiar in the Romanian legal framework, no specific institution being created, even after the adoption of Directive 2014/42/EU[22]. How-

[20] F. Streteanu, *Consideraţii privind confiscarea extinsă*, Caiete de Drept Penal, no. 2/2012, 28.

[21] See Constitutional Court of Romania, Decision no. 650/2018, available at the following internet page: *https://www.ccr.ro/files/products/DEC_650.pdf*.

[22] 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 (*available online at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042*).

ever, paradoxically, according to the Romanian authorities, the institution was deemed to be present in the Romanian legal order. In this sense, in the words of the Directive:

Where confiscation on the basis of paragraph 1 (criminal confiscation) 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.

Turning towards the national legal order, one must look at criminal confiscation and extended confiscation – condition wise, in order to observe whether these institutions permit confiscation even without a conviction[23].

Concerning extended confiscation, the provisions of article 112[1] permit extended confiscation only insofar as a conviction is reached – conviction that needs to relate to the triggering offense that permits the working of the institution. As such, in a *per a contrario* rationale, it is impossible to have non-conviction-based confiscation in tandem with extended confiscation, even when the impossibility to convict is the result of illness or absconding of the defendant, as provided by Directive 2014/42/EU.

Regarding criminal confiscation, the situation is rather different, since for its ordering the only two requirements needed are the ones common to the ordering of any security measure, as provided by article 107 of the Criminal Code. In a nutshell, as shown above, in order to issue criminal confiscation (1) the perpetrator must commit an act provided by criminal law and (2) the act must be performed unjustifiably, respectively without the application of any of the justifiable causes provided by law. If the conditions are met, provided that a type of asset as provided by art. 112 is identified, the court must, according to the Romanian legal order, order confiscation without ever reaching a conviction.

Per the reasons for which a non-conviction decision can be reached, according to article 16 of the Code of Criminal Procedure[24], these can be

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[23] Since, as shown above, a new institution has not been created to deal specifically with this type of imposed confiscation.

[24] *a) the action in question does not exist; b) the action is not covered by the criminal law or was not committed with the guilt required by law; c) there is no evidence that a person committed the offense; d) there is a justifying or non-imputability cause; e) a prior complaint, an authorization or seizure of the body of competent jurisdiction or other requirement set by the*

several, and the prosecutor, during the investigative phase, must close the case or drop the charges, while the court must order an acquittal or a termination of criminal proceedings during trial.

As for the type of assets that can confiscated (according to article 112), no distinction exists. However, even though some could be incompatible with the reaching of a solution of non-conviction[25], the only one that will apply regardless of reason is that provided in article 112 para. 1 let. *f* (*assets the possession of which is prohibited by criminal law*).

Concerning the rest of the cases, the main idea is that confiscation should be ordered insofar as it is not incompatible with the reason provided for closing the case[26]. As an example, in the case of reaching the status of limitations, there are no obstacles in ordering confiscation on any of the regulated basis[27]. The reason is that reaching the statute of limitations for any criminal offense has the effect of rendering criminal liability mute. Therefore, rendering criminal liability mute has no effect on the two conditions that need to be met 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. In this sense, even though the statute of limitation is reached, the offender still committed an unjustified offense under criminal law, if so is proven until the statute of limitations is reached.

Another example would be in the case when the prior complaint required so as to start he criminal proceedings was withdrawn. Just as in the case beforehand, the offender still committed an unjustified offense under criminal law, but the solution must be to close the case. As such, the prosecutor must close the case and formulate a request to the Preliminary Chamber Judge to order confiscation. The preliminary chamber judge will decide on the request and if the conditions of article 112 of the Criminal Code are fulfilled, will order confiscation.

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law, required for the initiation of criminal action, is missing; f) amnesty or statute of limitations, or death of a natural-person suspect, or defendant occurred, or de-registration of a legal-entity suspect, or defendant was ordered; g) a prior complaint was withdrawn, for offenses in relation to which its withdrawal removes criminal liability, reconciliation took place, or a mediation agreement was concluded under the law; h) there is a non-penalty clause set by the law; i) double jeopardy (res judicata); j) a transfer of proceedings with a different country took place under the law.

[25] This would the case when it is established that there is no evidence that a person committed the offense.

[26] In the context of dropping the charges, confiscation can be ordered regardless (the reason for dropping the charges relate to state of hazard of the offense).

[27] Only insofar as evidence has been gathered before the status of limitations was reached.

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. Therefore, in this specific circumstance, the prosecutor should close the case and request confiscation only if a situation as that provided in article 112 par. 1 let. *f*) is present, otherwise refraining from requesting confiscation.

Considering the hypothesis provided strictly in the Directive, respectively the possibility to order confiscation when the suspect or accused was not present as a result of absconding or in case of illness, the two must be analyzed separately.

Considering the situation of absconding, the solution in the Romanian legal framework is that confiscation can be ordered, since even a conviction can be reached. According to article 364 of the Code of Criminal Procedure:

1) The case shall be adjudicated with the defendant present. It is mandatory to bring the detained defendant at the trial.

(2) The court proceedings may take place with the defendant absent*, if the latter is missing, flees justice or changed their address without informing thereupon the judicial bodies and, following the controls carried out, their new address remains unknown.*

(3) The court proceedings may also take place with the defendant absent if*, even though lawfully served the summons, the defendant provides no justification for their absence during the adjudication of the case.*

(4) Throughout the court proceedings, the defendant, including the case when deprived of liberty, may apply, in writing, to be tried in absentia, as represented by the retained or the publicly appointed counsel.

(5) When the court deems it mandatory for the defendant to be present, it may order the former's presence including with a bench warrant.

As it can be seen, the possibility is regulated *expressis verbis*, the aforementioned provisions being complemented with the ones on citation[28] and in the investigative phase, with the provisions of article 309 par. 5 of the Criminal Code which state that *the criminal investigation body shall continue investigations even in the absence of the defendant, when the latter is absent without justification, is avoiding responding to summons or is missing.*

With regard to the issue of medical condition, the situation is different in the sense that confiscation cannot be ordered and *a fortiori*, nei-

[28] Art. 257 and the following of the Code of Criminal Procedure.

ther a conviction. The relevant provisions, in the investigative phase (article 312 of the Code of Criminal Procedure) and during trial (art. 367 of the Code of Criminal Procedure), state essentially that *when based on a medical expert report, the court finds that the defendant is severely ill, which prevents him from participating at trial, the court, in a report, shall order the stay of proceedings until the health of the defendant will allow him to take part at the trial.* Observing the formulation of the legal text, it can be seen that a stay of the proceedings will be ordered until the defendant regains his or her health, making it impossible to order confiscation in this context.

1.4. *Other types of confiscation*

Besides criminal confiscation, extended confiscation and non-conviction-based confiscation – all of a criminal nature[29], there are two more types of confiscation measures present in the Romanian legal landscape. Of the two, only one is strictly speaking a different type of confiscation, while the other – confiscation imposed on the basis of Law no. 115/1996 on the declaration and control of property of dignitaries, magistrates, civil servants and of persons with leading positions is a hybrid version.

Starting with confiscation on the basis of Law no. 115/1996, the legal instruments was created so as to impose on dignitaries, magistrates, civil servants and some persons with leading position, the duty to declare their fortune, and in cases of discrepancies, to permit the control and subsequent confiscation of property.

The persons that have this duty according to complementary legal provisions[30], are, *inter alia*: the President of Romania, members of Parliament, members of the Government, secretaries and sub-secretaries of state (as well as those assimilated to them), magistrates, county and local councilors, mayors, civil servants working within the central or local public authorities, persons with leading positions, from directors, including upwards, within autonomous registers of national or local interest, to companies with majority state capital, the State Property Fund, the National Bank of Romania, banks with state capital (total or of a majority).

Turning towards the control of the fortune, it is stated that if between the declared wealth at the date of investiture or appointment and

[29] Arguably in the view of the ECtHR as well.

[30] Art. 1 of Law no. 176/2010 on integrity in the exercise of public office and dignity, amending and completing Law no. 144/2007 regarding the establishment, organization and functioning of the National Integrity Agency, as well as for the modification and completion of other normative acts.

the one acquired during the exercise of the position, a significant difference[31] exists and there is definite proof that the goods and values could not be obtained from the legal proceeds realized or by other licit ways, the wealth is subject to control.

The control described above is realized in tandem and it has, since 2010[32], been divided – competence wise, with the National Integrity Agency[33] who has jurisdiction so as to provide for an administrative control. Concerning the administrative control, after an adversarial procedure is finalized, an evaluation report is submitted (in cases of discrepancies) to the potential competent authorities so as to enact judicial control. Per the authorities involved, these can be (1) the investigative criminal authorities – requesting criminal or extended confiscation, (2) the fiscal authorities, (3) the disciplinary wealth investigation committee constituted by the basis of Law no. 115/1996 and (4) the authorities competent to impose administrative sanctions for public officials[34]. As a final remark, art. 19 of Law no. 176//2010 states that the conclusions of the reports *will be obligatorily assessed by these institutions, including the proposals, and the necessary measures will be taken as a matter of urgency and above all, according to the legal competences.*

Turning back to the control realized by the wealth investigation committee, it will render a decision based on the report, but with the participation of the persons accused, and it can issue three types of solutions: (1) send the case to the court of appeal within the jurisdiction of which the person whose assets are subject to control (2) close the case – when it finds that the assets are justified (3) suspend the control and refer the case to the competent prosecutor's office, if a link is suspected between the existence of the assets and any criminal offenses.

Concerning the last two solutions, the situation is covered either by the rendering or not of a criminal / extended confiscation order. However, concerning the first case, it is provided in article 17 and the following that the Court of Appeal will be notified with the case and it could render one of three different decisions, based on an adversarial procedure with the possibility to introduce evidence. As such, the Court can:

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[31] By significant differences, according to art. 18 of Law no. 176/2010, is it considered the difference of more than EURO 10,000 or its equivalent in lei between the wealth during the exercise of public positions and the revenues from the same period.

[32] According to Law no. 176/2010, regarding the Integrity in exercising the function of Public Officials, published in the Official Gazette, no. 621 of 2 September 2010.

[33] Established under Law no. 144//2007 regarding the Establishment, Organization and Operation of the National Integrity Agency, published in the Official Gazette, no. 535 of 3 August 2009.

[34] For details concerning the authorities responsible, see art. 26 of Law no. 176/2010.

(1) order the confiscation of assets or an equivalent sum of money if it finds that part of the fortune is unjustified, (2) order the closing of the case, if no evidence is presented arguing the unjustified provenance or (3) send the file to the competent prosecutors' office if evidence of the commission of a criminal offense is present. Concerning the nature of the confiscation in this case, we believe that it is very similar to the administrative confiscation presented below. However, when compared to the jurisprudence of the ECtHR, after the latest Grand Chamber Decision[35] on the topic, confiscation in this sense should be regard as a criminal penalty, triggering the protection provided in art. 7 of the Convention.

Regarding administrative confiscation, the institution is regulated by a general norm, respectively Government Ordinance no. 2/2001[36]. Administrative confiscation is considered, according to art. 5 para. 3 of the Ordinance as a complementary sanction, alongside closure of the unit, blocking the bank account and suspension of the activity of the economic operator.

Per the situations in which administrative confiscation must be ordered, the legal instruments states that confiscation must be applied to assets intended for, used or resulting from misdemeanors (also knowns as contraventions, minor offense, administrative trespasses). For reasons of consistency, the inferences made when analyzing criminal confiscation remain valid, as to the meaning of use, intended use and resulting from the commission of illicit acts.

Turning towards the compulsory nature of the measure, article 5 para. 5 of Government Ordinance no. 2/2001 states that the applied sanction must be proportionate to the legitimate aim pursued and the degree of hazard that the misdemeanor entails. As such, it seems that confiscation is applicable only insofar as the agent responsible with the execution of the measure considers so[37].

Moving on to the persons that can apply the sanctions, according to art. 24 of Government Ordinance no. 2//2001, the person empowered to impose the primary sanction can also order the confiscation of assets destined to be used, used, or resulting from contraventions. In all cases, the determining agent shall describe in the report the goods subject to con-

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[35] See G.I.E.M and others v. Italy (GC), no. 1828/06, 34163/07 şi 19029/11.

[36] Government Ordinance no. 2/2001, published in the Official Gazette no. 410 of 25 June 2001.

[37] For more detail, see F. Mihăiţă, *Drept contravenţional. Aspecte privind măsura complementară a confiscării mijlocului de transport prevăzut de OUG nr. 12//2006*, Revista Forumului Judecătorilor, no. 3//2009, available at *http://www.forumuljudecatorilor.ro/wp-content/uploads/Art-12-forumul-judecatorilor-nr-3-2009.pdf*.

fiscation and shall take any necessary conservation measures provided for by law, making the appropriate entries in the report. As well, it is provided that *the investigating officer has the obligation to determine who owns the confiscated goods and if they belong to a person other than the offender, the report shall, if possible, mention the owner's identification data or state why the identification was not possible*[38].

As final remarks, administrative confiscation can be provided in any legislative act that entails the application of administrative sanctions[39], the application being conditioned of it being provided for each administrative misdemeanor. However, it is essential to state that it can be applied only insofar as the general norm is respected. Value-based confiscation is applicable where the assets subject to the order are not found and when ordered, confiscation can be challenged alongside the report by which the primary sanction was ordered, either by the proprietary of the asset or the offender, if he or she is the proprietary. The complaint is ruled upon by a judge and the challenge suspends the execution of the measure.

1.5. *Third party confiscation*

In what concerns third party confiscation, the institution is not regulated in the Romanian legal framework, even after the adoption of Directive 2014/42/EU[40]. Several ideas were put forward in the sense that third-party confiscation is regulated and should apply[41], but as we have showed beforehand, in the case of extended confiscation, the institution does not permit the confiscation of assets directly from third parties that are *de bona fide* or from third parties that did not commit an unjustifiable act provided by criminal law. The reason for this view, alongside the fact that the text of extended confiscation does not permit it, is that confiscation in all its forms is a security measure and as shown before, in or-

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[38] The provision was heavily criticized by legal doctrine, stating that the provision contravenes the jurisprudence of the ECtHR, a conviction being imminent. See O. PODARU, R. CHIRIŢĂ, I. PĂSCULEŢ, *Regimul juridic al contravenţiilor, O.G. nr. 2/2001 comentată*, ed. a III-a, ed. Hamangiu, Bucureşti, 2019, 76-79.

[39] As examples, see art. 3 of Law no. 12/1990, art. 61 para. 1 of Government Ordinance no. 21/1992, art. 11 para. 1 of Government Emergency Ordinance no. 28/1999.

[40] 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 (*available online at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042*).

[41] see *Perspective asupra recuperării prejudiciului şi confiscării, aspecte teoretice şi de practică judiciară*, Freedom House, C. CHIRIŞĂ, *Identificarea bunurilor în vederea confiscării speciale şi extinse în cazul circuitelor de fraudare a TVA intracomunitar - studiu de caz, available at http://confiscare.lfwd.io/#book/ch04-00.*

der for a security measure to apply, the persons subject to the measure must have performed an unjustifiable act provided by criminal law that is proven beyond any reasonable doubt. Or, in the case of third parties, the standard of proof cannot be met if they are not considered offenders and certainly in the case of the *bona fide* third parties, there is no basis for ordering confiscation. Moreover, the ECtHR rendered several decisions in which non-conviction-based confiscation of third parties is incompatible with the Convention when the procedural and substantial requirements of art. 6, 7 and art. 1 of Protocol 1 are not met[42].

Having in mind the aforementioned, in the case of *mala fide* third parties, the mechanism that works is the Romanian legal framework is that it is considered that the third parties knew or ought to have known the illicit provenance of the asset and thus the contract between the offender and themselves is void as having an illicit cause (if the assets was transferred). The effect is that of absolute nullity of the contract and the retroactively return of the asset in the patrimony of the offender. After the return, the asset must be subject to confiscation.

However, even though the correct mechanisms are those presented above, the judiciary in the Romanian legal order have rendered several decisions that seem to contravene the aforementioned.

One seminal judgement is the one pronounced against Mr. O. Tender, a notorious business man. Mr. Tender was convicted for fraud, incitement to abuse of service, constituting an organized crime unit and money laundering. In the decision, the Court confiscated regardless of the owner and from third parties without providing a *mala fides* attitude and without identifying precisely the assets, the owners, the guarantees provided by other third parties and so on. Another important judgement that caught the eye of the press is the judgement pronounced against Mr. D. Voiculescu, a famous business man and politician. Mr. D. Voiculescu was convicted for money laundering to 10 years of imprisonment. Considering confiscation, the Court confiscated from a company GRIVCO S.A the sum of 3515756,4 USD, arguing that Mr. Voiculescu was the sole beneficiary of the sums of money. In the same sense, the Court confiscated several important sums of money from relatives of Mr. Voiculescu. As such, considering C.R. Voiculescu, the Court confiscated directly the sum of 2.984.358,3 RON, respectively the value of the shares owned in another company – SC ICA S.A, which were donated by Mr. D. Voiculescu. With regard to another person, respectively C.M Voiculescu, the Court confis-

[42] See G.I.E.M and others v. Italy (GC), no. 1828/06, 34163/07 and 19029/11, 28.6.2018, Varvara v. Italy, no. 17475/09, 29.10.2013, Sud Fondi v. Italy, no. 75909/01, 20.1.2009.

cated directly the sum of 2.984.358,3 RON, respectively the value of the shares owned at SC ICA S.A, which were as well donated by Mr. D. Voiculescu. Regarding the same person, the Court confiscated all the sums that were received as a shareholder of the company GRIVCO S.A, since 2006, shares that were donated by Mr. D. Voiculescu, as well as other sums of money received through a lease contract.

It is worth mentioning that all transactions in these cases were legally contracted through public notaries, being transparent and the Courts did not confiscate from the patrimony of Mr. D. Voiculescu, taking into the account the sums of money that were donated. The Court thus confiscated directly from the third parties that had no procedural quality in the criminal trial and without any relevant justification as to the sums *per se.*

As per the relevant conclusions for third-party confiscation, we would refrain to state that the Constitutional Court of Romania adopted a Decision recently in which it stated black on white that third party confiscation cannot be accepted in the Romanian legal framework as it is, the practice that established this phenomena being wrong – Decision 650/2018[43].

2. *Procedural aspects*

In the following lines the procedural aspects of asset freezing and confiscation orders will be discussed. In essence, the focus will be on the legal basis, the authorities that can request and impose the freezing / confiscation order, as well as other procedural conditions and limitations.

2.1. *Freezing*

Starting with the freezing of assets, the institution is regulated in Title V, Chapter III, art. 249-256 of the Code of Criminal Procedure. The general rule is regulated by art. 249 and it states:

(1) The prosecutor, during the criminal investigation, the Preliminary Chamber Judge or the Court, ex officio or upon request by the prosecutor, during the preliminary chamber procedure or throughout the trial, may order asset freezing, by a prosecutorial order or, as the case may be, by a reasoned court resolution, in order to avoid concealment, destruction, disposal

[43] See Constitutional Court of Romania, Decision no. 650/2018, available at the following internet page: *https://www.ccr.ro/files/products/DEC_650.pdf.*

or dissipation of the assets that may be subject to special or extended confiscation or that may serve to secure the penalty by fine enforcement or to pay court fees or to compensate damages caused by the committed offense.

(2) Asset freezing consists of freezing movable and immovable assets, by establishing distraint upon such.

(3) Asset freezing guaranteeing the enforcement of a penalty by fine may be ordered only against a suspect's or defendant's assets.

(4) In case of special or extended confiscation, asset freezing may be ordered only against assets belonging to the suspect or defendant or to other persons owning or holding the assets that are to be forfeited.

(5) Asset freezing intended to the repair damages caused by the offense and to guarantee the payment of court expenses may be ordered against the assets of the suspect or the defendant and of the person with civil liability, up to the concurrence of their probable value.

(6) During the criminal investigation, the preliminary chamber procedure and the trial, the asset freezing listed under par. (5) may be ordered also at the request of the civil party. Asset freezing taken ex officio by the judicial bodies set out in par. (1) may also be used by the civil party.

(7) The asset freezing ordered under the terms stipulated by par. (1) is mandatory if the victim lacks mental competence or has a limited mental competence.

(8) Neither the assets belonging to a public authority or institution or to other public-law legal person nor the property exempted by law can be seized.

As it can be seen, asset freezing – procedural wise, differs depending on the procedural framework in which it is ordered and the reason for ordering it, the legal regime being different in each case. However, the sole constant is that asset freezing is optional, and it may be ordered only insofar as the reasons presented above are present, with one exception – if the victim of the offense lacks mental competence or has a limited mental competence. Of course, without hijacking the purpose of the paper, it is worth noting that the status of the victim must be proven on the same standard of proof used in all criminal proceedings.

Starting with the persons competent to order asset freezing, they are the prosecutor in the investigative phase, by means of a prosecutorial order and the Court and the Preliminary Chamber Judge during trial, or during the Preliminary Chamber Phase. The order can be given *ex officio* in all cases, but it can also be requested by the investigative bodies or the civil party – during criminal investigation, or by the prosecutor or the civil party during the Preliminary Chamber Phase and throughout trial.

Having in mind the reasons for ordering the freezing of assets, these can be the risk of avoiding concealment, destruction, disposal or dissipation of the assets that may be subject to criminal confiscation or extended confiscation – on the one side, and the reason that the assets may serve to secure the payment of the fine penalty, the court fees or serve as compensation for damages caused by the commission of the offense – on the other side.

Turning towards the persons that can be subjected to the order, one must note that it is dependent on the aforementioned scope. Therefore, if freezing is ordered for the enforcement of a penalty by fine, the only persons that can be directly affected by the order are the suspect and the defendant. In other words, this legal approach permits the freezing of assets even if the criminal investigation is solely in the *in rem* phase and there is no official accusation against a person. Moving on, if the decision to freeze, irrespective of judicial phase, is ordered in order to guarantee the execution of criminal confiscation or extended confiscation, the subjected persons may be the suspect, the defendant and any third party that holds the asset on the basis of any title. In this phase, since confiscation is not yet operative, the legal framework permits that the measure affects third parties, as they can lodge a complaint against the measure, as we will see further on. With regard to the scope of repairing damages, the freezing order may affect the suspect, the defendant and the person being held civilly liable. The reason for this approach is that the provisions of the Criminal Code of Procedure are in sync with the provisions of the Civil Code that permit under certain conditions, the obligation incumbent on a third party to repair damages provoked by another, if a special contractual, natural or legal relationship exists[44]. Finally, the last reason, respectively the guarantee by seizure of the obligation to pay court fees, is extremely similar if not identical in rationale with the one concerning the repairing of damages.

With regard to the rights and guarantees provided by law for the persons that can be subjected to the measure, the legal framework does not provide specific provisions that deal strictly with this procedure. However, depending on the procedural identity of the person (i.e. suspect, defendant, third party, person civilly liable), the law prescribes several rights. For example, in the case of the person civilly liable, he or she has at least the following rights in any criminal procedure: (1) to be informed of his / her rights; (2) to propose production of evidence by the

[44] For details see Book V, Chapter IV, Section IV of the New Civil Code - articles 1372-1374.

judicial bodies, to raise objections and to make submissions; (3) to file any other applications related to the settlement of the criminal part of the case; (4) to be informed, within a reasonable term, on the status of the criminal investigation, upon explicit request, provided that they indicate an address on the territory of Romania, an e-mail address or an electronic messaging address, to which such information can be communicated; (5) to consult the case file, under the law; (6) to be heard; (7) to ask questions to the defendant, witnesses and experts; (8) to receive an interpreter, free of charge, when they cannot understand, cannot express themselves properly or cannot communicate in the Romanian language; (9) to be assisted or represented by a counsel; (10) to use a mediator, in cases permitted by law; (11) to have access to legal assistance.

Regarding the limits of assets freezing, one must look both at the applicable time frame and the type of assets that can be frozen. Asset wise – there are two limitations. The first one relates to the quality of the owner of the assets. As such, assets cannot be subject to a freezing order if they pertain to a public authority or institution or to other public-law legal person. The second limitation appear as natural and it entails that freezing cannot be ordered if the property subject to the order is exempted by law, irrespective of nature. Time-wise, even though an express time limit is not provided, it becomes apparent that seizure can function only insofar as the scope for which it had been ordered has not been attained. In other words, the order seizing an asset will cease when the fine is paid, confiscation is executed, the damages are repaired or when the court fees have been reimbursed.

Turning towards legal remedies, at an overview of the applicable legal framework, two solutions become relevant. The special procedure is that regulated in article 250 and 250[1] of the Code of Criminal Procedure, entitled *Challenging of asset freezing*. According to the legal instrument, two different challenges can be filed, depending on the person who ordered the seizure and the procedural framework in which the measure was ordered.

The first situation concerns the situation in which, in the criminal investigation phase, the prosecutor ordered, by a prosecutorial order, the freezing of assets. In this case, the suspect, the defendant and any interested party may challenge the asset freezing order within 3 days of the communication of the order or the enforcement date, before the Judge of Rights and Liberties of the court which would have jurisdiction to settle the case in first instance. The procedure does not suspend enforcement and upon the challenge, the judge shall rule in chambers, by sum-

moning the person who filed the challenge and any interested parties. The decision is final.

The second procedure now provided in art. 250[1] concerns the challenge of the order when issued during trial or the Preliminary Chamber Phase. It is worth noting that before 2016, this article did not exist, the former article permitting only the lodging of complaints reasoned on the manner in which the order was enforced. In a nutshell, the latter described article was subject to multiple complaints to the Constitutional Court of Romania (Decision no. 207 of 31 May 2015[45], Decision no. 497 of 23 June 2015[46] and Decision no. 543 of 14 July 2015[47]), all being repealed. The solution came with decision 24/2016[48] of the Constitutional Court, in which the judges reasoned against their former jurisprudence, stating that even though the decision on the merits can be appealed alongside the final decision on the culpability of the defendant, the remedy would not be applicable if the decision to freeze would be ordered during the appeal procedure, which has no ordinary remedy. As such, by means of Government Emergency Ordinance no. 18//2016[49], a new provision was introduced. According to the new wording, if during trial, or the Preliminary Chamber phase, a decision to freeze is ordered by the trial judge or the Preliminary Chamber Judge, the defendant, the prosecutor or any interested person may appeal against the order within 48 hours from the pronouncement, or, when applicable, the communication of the order. The complaint is to be ruled on by a judge from the superior court or the preliminary chamber judge from the superior court of the one that ordered the freezing of the assets. The complaint does not suspend the execution of the measure and it will be ruled upon within 5 days, in a public hearing, by summoning the person who filed the challenge and any interested parties.

Concerning the second procedure provided by law, it is regulated by means of art. 336 of the Code of Criminal Procedure, being a generally applicable one. The article states that:

Any individual is entitled to file complaint against criminal investigation measures and acts, if the latter have harmed their legitimate interests.

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[45] Published in the Official Gazette, Part I, no. 387 of 3 June 2015.

[46] Published in the Official Gazette, Part I, no. 580 of 3 August 2015.

[47] Published in the Official Gazette, Part I, no. 694 of 15 September 2015.

[48] Published in the Official Gazette, Part I, no. 256 of 12 April 2016.

[49] Emergency Ordinance no. 18/2016 for amending and completing Law no. 286/2009 on the Criminal Code, Law no. 135/2010 on the Criminal Procedure Code, as well as for the completion of art. 31 par. (1) of the Law no. 304/2004 on judicial organization, in force since 23 May 2016.

The complaint shall be submitted to the prosecutor in charge of supervising the work of the criminal investigation body, either directly or at the criminal investigation body. Filing the complaint does not suspend completion of the measure or act that is the object of the complaint.

As it can be observed, the procedure in question does not deal specifically with issues of asset freezing, representing a general rule. The idea behind would be that if any person feels harmed in their legitimate interests, they can file a complaint before the prosecutor, during the investigative phase, if the measures in question ordered by the prosecutor, has harmed their legitimate interest. In essence, it is a request to revoke the measure and it can be realized only in the investigative phase. The practical utility of the institution, as shown in case law[50], at least theoretically, is to avoid on the one hand, the burdensome 3 days deadline in order to file the complaint according to art. 250 of the Code of Criminal Procedure, and on the other hand, to afford a legal remedy to third parties that had no knowledge of the freezing of their assets. As a note concerning this last procedure, on the negative side, as shown by others[51], the instrument seems rather ineffective, since members of the Public Ministry are the ones that need to revoke the order and not an impartial judge. The author further details similar experiences when the orders, even though extremely disproportionate to the legitimate aim, were kept.

As a final consideration regarding the possibility to claim damages suffered by a wrongful freezing order, the solutions would be to turn towards the common provisions for claiming damages for wrongful illicit acts, respectively the Civil Code. No specific institution is created within the criminal landscape to deal with the issuing of wrongful freezing orders. However, there is a procedure for material and / or moral compensation in cases of judicial error or illegal deprivation of liberty, but, in our view, it is debatable whether it is applicable. To argue each of the possible solutions, a reading of art. 538 would be required. As such, according to the aforementioned legal provision:

A person who received a final conviction, irrespective of whether the penalty or custodial educational measure was enforced, is entitled to receive compensation from the government for their losses in the situation where a final acquittal judgment is returned following retrial of the case, nullifica-

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[50] Tribunalul Mehendinţi, Dec. Pen. No. 374/2014, 23 June 2014.

[51] T.C Godâncă Herlea, *Măsurile asigurătorii luate în cursul urmăririi penale asupra bunurilor persoanelor juridice*, Caiete de Drept Penal no. 3/2013, 56.

tion or quashing of the conviction judgment on grounds of a new or recently-discovered fact that proves a judicial error has taken place.

In establishing the extent of compensation consideration shall be given to the duration of unlawful deprivation of freedom, as well as to the consequences it caused for the person, their family or the person found in the situation described at Art. 538.

Compensation shall consist of a sum of money or the setting up of an annuity, or of the obligation that the government pays for the unlawfully detained person to be placed in the care of a social or medical care institute.

In selecting the manner and extent of compensation, consideration shall be given to the situation of the person entitled to it and the nature of loss they suffered.

Having read the legal provisions, the conditions that need to be met in order for this procedure to be applicable become clear: (1) a final conviction must be ordered against the defendant (2) a triggering final decision must be ordered in which the solution must be an acquittal after conviction (3) evidence of judicial error must be present.

In light of the aforementioned conditions, one must note that the link with the potential wrongful freezing order is weak, if not inexistent and the sheer difference in time between the issuing of the freezing order and the final acquittal would be, in most cases, staggering. As such, to qualify this procedure as one that would encompass damages suffered from a wrongful freezing order would be hard.

In the sense of the latter, it is important to note that the primary focus on compensations in this procedure rests with the conviction and the consequences that sprung with the solution. An interpretation could be given that if applied, it is not an exercise of analogy, but an extensive interpretation of the legal provisions and thus compensation should be covered, if acquitted. The consequences in the depreciation in value of the assets frozen and the inability to make use of them would be the injury. However, without any steadfast case law, it is difficult to assess whether this interpretation is simply far-fetched, or it is simply a form of analogous reasoning.

2.2. *Confiscation*

As a preliminary note, it is important to observe that in the Romanian legal landscape, the procedural limb concerning confiscation orders is intimately intertwined with the substantial type of confiscation that is applicable. As such, procedurally, different regimes exist in the case of

criminal confiscation and extended confiscation following a conviction, in opposition with that can be classified as non-conviction-based confiscation. Having said the aforementioned, the analysis will be dual, focusing on the peculiarities of each regime.

With regard to criminal and extended confiscation, since the required standard of proof was analyzed in the context of the substantial limb, the aspects that remain to be presented concern only the authorities that can request and impose confiscation, the enforcement of the security measures and the potential remedies available.

With regard to the authorities that can request confiscation, we believe that the measure can be requested by the prosecutor, or by any other party with competence to formulate requests with regard to the criminal action. As well, the court is obliged to impose confiscation *ex officio*, if the state of affairs is one that warrants the existence of a triggering element[52].

Concerning the issue of enforcement of the security measures, it is worth noting that confiscation is usually ordered when the final decision on culpability is rendered. In this sense, two new procedural solutions have been introduced by the New Criminal Code adopted in February 2014. As such, in the subsequent step after the rendering of culpability, respectively of sentencing, the Court may choose, depending of the offense committed, not to order the execution of the penalty, but to waiver the sentence enforcement or to order the postponement of penalty enforcement. An in-detail assessment of the two different solutions would exceed the limits of the present paper, but what is important to stay with is that criminal confiscation can be ordered if the two solutions are ordered, even though they are not, strictly speaking, decisions that imply the conviction of the defendant. In this sense, regardless of the procedural solution, confiscation can be ordered (being a security measure) and the moment in which it is ordered is within the final decision of culpability – identical with the classic solutions that criminal confiscation is rendered at the same time with the conviction.

In terms of extended confiscation, the measure can be ordered only in the case of a conviction, the existence of the decision being a condition for the ordering of extended confiscation[53].

Returning to the issue of enforcement, article 574, entitled *Enforcement of special confiscation and extended confiscation* describes the ap-

[52] As provided by art. 404 para. 4 of the Code of Criminal Procedure.

[53] According to art. 112^1 para. 1 of the Criminal Code, extended confiscation can be rendered only if a conviction is reached, among other conditions.

plicable procedure in case the court takes, by decision, the security measure.

The general rule applicable is that when confiscation is ordered, the assets subject to the measure are surrendered to the competent authorities in order to be used or sold. As it is shown in the paper, the immediate effect of confiscation in the Romanian legal order is that the assets in question pass from the patrimony of the owner to the private property of the state[54]. One important issue that needs clarifying is that in the Romanian legal framework only freezing can be realized so as to pay for the fine penalty, repair damages caused to the victim or a third party or guarantee the payment of court fees. As such, confiscation *per se* is compulsory to be ordered only if the conditions set forth in art. 112 and 112[1] of the Criminal Code are fulfilled and the sole effect is the deprivation of property with regard to the offender and the passing of the property to the private property of the state.

Returning to the issues concerning enforcement, it is provided, as a secondary rule, that if the confiscated assets are in the custody of law enforcement bodies or other institutions (frozen beforehand), the judge delegate in charge of enforcement must take the burden and communicate with these bodies, send a copy of the decision in which confiscation was ordered and afterwards, the bodies in question will hand over the assets to the competent authorities to be used or sold. As is can be seen, the sole difference between the first and second rule on executions is the prior status of the assets – while in the first situation, the person that needs to surrender the assets is the owner, while in the second, the institutions where the frozen assets are situated are responsible with the surrender. However, as evidence goes, the secondary rule would be in fact the most common practice in Romania, at least for criminal confiscation, since most assets subject to confiscation are beforehand frozen, either during the investigative phase, or during trial. As a note in addition, the same procedure as the one described above applies when the goods in question subject to confiscation are sums of money that were not deposited with banking units. The sole difference are the authorities involved, in the sense that the judge delegate in charge of enforcement is obligated to send the court decision to tax bodies, in order for them to enforce the decision, per the provisions referring to budgetary receivables.

Moving forwards, the last situation provided in article 574 deals with the case in which destruction of the assets that are confiscated is re-

[54] With regard to the procedure applicable afterwards, more details will be given when the management of seized and confiscated assets will be analyzed.

quired. The provision only states that when destruction of seized assets was ordered, these shall be destroyed in the presence of the judge delegate in charge or enforcement and a report shall be filed, submitted with the entire case file. This provision is complemented with those provided in Law no. 318/2015 that regulated the functioning of the National Agency for the Management of seized Assets and Government Ordinance no. 14/2007 on the regulation of the manner and conditions for the capitalization of goods entered, according to the law, in the private property of the state (as shown below).

Concerning non-conviction-based confiscation, we will use partly the definition provided in the substantial limb, with the exception of the situation of ordering the waiver of the sentence enforcement or the postponement of penalty enforcement, since procedurally, the two follow the exact same legal regime as the one prescribed for classic criminal conviction-based confiscation.

Turning towards the part of enforcement of the security measure, as in the case of extended and criminal confiscation, a special procedure is provided in art. 549[1] of the Code of Criminal Procedure. Per the article:

(1) In the situation where the prosecutor has ordered the case closed or dropped charges and requested the Preliminary Chamber Judge to order criminal confiscation or a document to be invalidated, the prosecutorial order to close the case accompanied by the case file shall be sent to the court that would have legal jurisdiction to try the case on the merits, after expiry of the deadline stipulated at Art. 339 par. (4)[55] *or, as the case may be, at Art. 340*[56] *or after a ruling to deny the complaint.*

(2) The Preliminary Chamber judge shall fix the time limit for settlement, depending on the complexity and particularities of the case, which may not be shorter than 30 days.

(3) The appointed term stipulates the notification of the prosecutor and cites the persons whose legitimate rights or interests may be affected, to whom a copy of the ordinance is communicated, considering that within 20 days from the receipt of the communication they can submit written notes.

(4) The Preliminary Chamber judge shall pronounce in a public hearing after hearing the prosecutor and the persons whose legitimate rights or interests may be affected, if present.

(5) The Preliminary Chamber judge may decide one of the following solutions:

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[55] The procedure is entitled: *Complaint against the prosecutor's acts.*

[56] The procedure is entitled: *Complaint orders for not starting a criminal investigation or to drop charges.*

a) rejects the proposal and dispenses, as the case may be, the return of the property or the lifting of the precautionary measure taken for confiscation;

b) accepts the proposal and orders the confiscation of the goods or, as the case may be, the dissolution of the document.

(6) Within 3 days from the communication of the conclusion, the prosecutor and the persons referred to in par. (3) can make a reasoned objection. The unmotivated challenge is inadmissible.

(7) The contestation shall be settled according to the procedure provided for in paragraph (4) by the preliminary chamber judge from the hierarchically superior court or, where the court seized is the High Court of Cassation and Justice, by the competent body according to the law, which can dispose of one of the following solutions:

a) dismisses the appeal as belatedly, inadmissible or unfounded;

b) admits the challenge, abolish the conclusion and revives the proposal according to para. (5).

Ab initio, what is deemed to be observed is that the provisions of article 549[1] have been challenged before the Constitutional Court for reasons of incompatibility with the European Convention of Human Rights. As such, by means of Decision no. 166/2015[57], the former wording of article 549[1] – which provided for a faster, in chambers hearing and without the summoning of the interested parties, was declared unconstitutional and infringing on the principles enshrined in the case-law of the ECtHR.

Turning to the present procedure, one must note that it is applicable only after a final solution is determined in what concerns the accusation. In the Romanian legal framework, after the prosecutor decides to close the case or to drop the charges, one of two situations can arise. The first one is that the deadline for the challenge against the solution expires (20 days) and then the solution becomes final. The other can entail the formulation of a complaint against the solution. The first step in this procedure concerns the analysis of the complaint by the superior prosecutor of the one who ordered the solution. The second, if the so called „remedy" procedure is unsuccessful, entails the formulation of a complaint with the Preliminary Chamber Judge. Finally, in this scenario, only after the complaint is rejected by the Preliminary Judge, the procedure regulated in article 549[1] becomes applicable. As such, what is essential to note is that in this procedure, the question of the legality of confiscation measures is not applicable, the object being, for the purposes of this pa-

[57] Published in the Official Gazette, Part I, no 264 of 21 April 2015.

per, the legality of the solution ordered by the prosecutor by which he closes the case or drops the charges.

In what concerns the authorities that can request the imposition of the confiscation order in this case, it is expressively provided in the provisions of art. 315 of the Code of Criminal Procedure. According to the article, *the order to close a case comprises the information described (…), as well as obligations to: a) lift or maintain asset freezes; such obligation shall lawfully cease to apply if the victim does not file civil action within 30 days since the order to close the case was issued; b) return seized assets or the bail money; c) ask the Preliminary Chamber Judge to order criminal confiscation as a security measure; d) ask the Preliminary Chamber Judge to nullify a document totally or in part; e) ask the jurisdictional court of law as under the special law on mental health to rule for non-voluntary commitment; f) judicial expenses*[58].

As per the authorities that can impose the confiscation order, the situation differs, since the decision to confiscate is ordered by the Preliminary Chamber Judge and not the trial judge. It is important to note in this context that the Judge of Rights and Freedoms cannot order criminal confiscation, even though, according to art. 53 of the Criminal Code, the judge, *during the course of the criminal investigation, decides upon applications, proposals, complaints, challenges or any other motions referring to: a) preventive measures; b) asset freezing; c) temporary security measures; d) acts performed by prosecutors, in cases explicitly stipulated by law; e) approval of searches, of the use of special surveillance or investigation methods and techniques or of other methods of proof, under the law; f) anticipated hearing procedures; g) other situations explicitly stipulated by law*. The solution is further reinforced when one looks at the provisions of article 245 and 247 of the Criminal Code of Procedure which gives competence to the Judge of Rights and Freedoms solely with regard to temporary medical admission and the temporary compelling to undergo medical treatment, both being, as the name suggest, temporary security measures.

Concerning strictly the procedure, if the solution to drop charges or close the case is maintained or it becomes final and within the solution, the prosecutor requests the ordering of criminal confiscation, the proposal must be analyzed by the Preliminary Chamber Judge. Given the aforementioned intervention performed by the Constitutional Court, the Code of Criminal Procedure was modified, and the text as it is was in-

[58] The same obligations are provided in the case in which the prosecutor decides to drop the charges.

troduced by means of Government Emergency Ordinance no. 18/2016[59] which provides for a time limit far exceeding the former one[60]; the procedure is public, and all interested parties are to be cited. The rationale behind the modification and the new deadline was the increasingly critical decisions pronounced by the ECtHR on the topic of deprivation of property and fair trial rights in the context of confiscation procedures[61]. The idea was that by fixing at least 30 days, the deadline will be sufficiently long so that any interested party that may have an interest in the assets that are to be confiscated can intervene and provide the court with adequate defenses, if applicable. Moreover, by having a public hearing and summoning any person whose legitimate rights or interests may be affected, the legislator tried to align with the European trend and provide some protection to interested parties, in the sense of the protection provided by art. 6 and art. 1 Protocol 1 of the Convention – the procedural limb. Solution-wise, the Preliminary Chamber Judge may either accept the proposal of the prosecutor and order the confiscation of the assets – if the conditions of article 112 of the Criminal Code – explained above, are fulfilled, or he or she can reject the proposal. In this latter case, the judge must dispense, if applied, any freezing of assets ordered on the basis of later confiscation. If the assets were not frozen during the investigative phase, the Preliminary Chamber Judge is obliged to order the return of the property to the rightful owner.

In what concerns the legal remedies applicable in this procedure, the persons mentioned above can file a complaint within a maximum of 3 days after the communication of the first decision. The procedure applicable in the appeal phase is identical with the first one, all the initially provided safeguard being in place. Per the solutions, the Preliminary Chamber Judge at the higher court – who rules on the appeal, can either dismiss it as belatedly, inadmissible or unfounded or admit the appeal and depending on the solution given at first instance, reverse it. The decision pronounced in the appeal procedure is final.

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[59] Emergency Ordinance no. 18/2016 for amending and completing Law no. 286/2009 on the Criminal Code, Law no. 135/2010 on the Criminal Procedure Code, as well as for the completion of art. 31 par. (1) of the Law no. 304/2004 on judicial organization, in force since 23 May 2016.

[60] respectively at least 30 days.

[61] For example, ECHR, Sud Fondi SRL v. Italy, no. 75909/01, 20.1.2009, ECHR, Varvara v. Italy, no. 17475/09, 29.10.2013, ECtHR, Grande Stevens and others v. Italy, no. 18640/10 and others, 4.3.2014, ECtHR, Microintelect Odd v. Bulgaria, no. 34129/03, 4.3.2014, ECtHR, Paulet v. Great Britain, no. 6219/08, 13.5.2014, ECtHR, Gogitidze and others v. Georgia, no. 36862/05, 12.8.2015, ECtHR, Berland v. France, no. 42875/10, 3.9.2015, ECtHR.

3. *Aspects of mutual recognition*

In the following lines, the issue of mutual recognition of freezing and confiscation orders will be analyzed. *Inter alia*, we will try to answer whether there is a specific legal framework for the mutual recognition of such orders, which authorities are in charge on deciding on the request in the executing member state, the potential grounds for non-recognition, the possibility to postpone the execution of the orders, limits concerning the procedure, as well as the rights, guarantees and legal remedies available.

3.1. *Freezing*

As a preliminary observation, since the issue of mutual recognition of freezing orders can be qualified as a form of mutual assistance in criminal matters *largo sensu*, the mechanisms that regulate all mutual assistance issues in the Romanian legal framework are provided in Law no. 302//2004[62] on International judicial Cooperation in Criminal Matters.

The legal regime is regulated in Title VII, Section III, art. 219-232 of Law no. 302//2004, transposing Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

First and foremost, it is important to note that the form in which the procedure is regulated is very similar with the form of the Framework Decision, so as such, elements that are identical will not be dealt with (i.e. definitions, objective, the certificate and so on).

In what concerns the competent authorities, in terms of ordering a freezing order, the prosecutor, during the investigative phase and the court, during trial, can issue a freezing order. However, when it regards the execution of the order issued by another Member State, the competent authority during the investigative phase is the Prosecutors Office alongside the Tribunal and during trial, the Tribunal, both of which in whose constituency the assets subject to freezing are located. Complementary, when the freezing order refers to more than one asset located in the territorial jurisdiction of two or more authorities, the legislative instrument provides that the competence to recognize and execute rests with either the Prosecutors Office alongside the Bucharest Tribunal or the Bucharest Tribunal. As a supplementary note, if a procedure is already ongoing concerning the assets requested to be recognized and ex-

[62] Published in the Official Gazette, Part I, no 377 of 31 May 2011.

ecuted per freezing, or a final decision has been reached, the competence to order the recognition rests with the Tribunal or Prosecutors Office alongside the Tribunal, competent territorially, irrespective of the judicial phase. As an example, for this situation, even if the procedure is in the appeal phase before the Court of Appeal, if a recognition of a freezing order is requested, the competent authority in this case would be the Tribunal competent under the Court of Appeal.

Offense-wise, the procedure, according to article 223 of Law no. 302//2004 differs depending on the scope for which the freezing is requested: (1) for the purpose of gathering evidence and (2) for the purpose of latter confiscation. For the latter purpose, since the instrument does not provide which type of confiscation is possible to be requested as scope, we believe that both extended and criminal confiscation are suitable candidates. However, for certain offense, irrespective of their denomination in the issuing Member State, if provided legally with a prison sentence of at least 3 years in Romania, they will be subject to recognition and execution attached with a freezing order (without analyzing the criterion of double criminality). The offenses are:

1. participation to an organized criminal group; 2. terrorism; 3. human trafficking (including minors); 4. sexual exploitation of children and child pornography; 5. illicit trafficking in drugs and psychotropic substances; 6. illicit trafficking in arms, munitions and explosives; 7. corruption; 8. fraud, including that affecting the financial interests of the European Union within the meaning of the Convention of 26 July 1995 on the Protection of the European Communities' Financial Interests; 9. money laundering; 10. counterfeiting of currency, including counterfeiting of the euro; 11. facts related to cybercrime; 12. offenses against the environment, including illicit trafficking of endangered animal species and endangered plant species and varieties; 13. facilitation of illegal entry and stay; 14. murder, serious bodily injury; 15. illicit trafficking in human organs and tissues; 16. Abduction, unlawful deprivation of liberty and hostage-taking; 17. racism and xenophobia; 18. organized or armed theft; 19. illicit trafficking in cultural goods, including antiques and works of art; 20.the crime of deception; 21. racketeering and extortion; 22. counterfeiting and piracy of products; 23. falsification of official documents and use of forgery; 24. forgery of payment means; 25. illicit trafficking in hormonal substances and other growth factors; 26. illicit trafficking in nuclear or radioactive materials; 27. trafficking in stolen vehicles; 28. rape; 29. intentional arson; 30. crimes under the jurisdiction of the International Criminal Court; 31. illegal seizure of ships or aircraft; 32. sabotage.

Turning back to the difference between the freezing disposition ordered for the purpose of gathering evidence and that for the purpose of ordering confiscation, the main debacle is that for the purpose of evidence gathering, article 223 para. 2 of Law no. 302/2004 provides that if the offense is not present in the above-mentioned list – the criterion of double criminality is applicable, irrespective of the denomination or the difference or constitutive elements requested in the issuing Member State. Confiscation based freezing on the other hand, provides that recognition and execution will be realized, if the offense is not one present in the list, if for the specific offence, in the executing Member State, the dispossession of the asset is possible. In this regard, per the definition given in article 219 of Law no. 302/2004, dispossession in this sense relates strictly to freezing orders and not the possibility of ordering confiscation.

Moving towards the applicable procedure, articles 225-228 of Law no. 302/2004 describe the steps that need to be taken so as an order to be recognized and executed by the Romanian authorities. The regime is partly different, as is the order requested to be executed in the investigative phase or the trial phase.

As a general principle, it is provided that the competent judicial authority, irrespective of the judicial phase, will recognize a freezing disposition ordered by a Member State of the EU without delay and without any supplementary formality and it will execute the order in the exact same manner as it would do if the order was issued by a Romanian authority. Per the steps required in the procedure, it is provided that a report shall be drafted concerning the execution, on the basis of the report submitted by the criminal investigation bodies that *de facto* executed the order and the report shall be transmitted to the issuing authority by means of any instrument that permits a written confirmation. If any supplementary coercive measures are required for execution, it is provided that the competent authorities shall make use of any and all instruments at their disposal, as would be the case when the order was issued internally.

The general limits of the above-mentioned procedure entail the presence of ground for non-recognition or a situation of postponement of recognition and, in the case of freezing orders by which it is required to respect certain standards of proof (substantial and procedural), the Romanian authorities are required to respect the express indications provided, only insofar as they do not infringe on the rights and guarantees provided in the Constitution. With regard to the latter limit, we believe that the cases in which a provision of the Constitution would be infringed are fairly rare, given that a common standard is applicable within the EU with respect to protecting fundamental rights[63] and not only.

Moreover, by regulating this condition, it is evident that the express requests of the issuing Member State are to be checked not only with the Romanian Constitution, but also with the provision of the ECHR, as Romania is a member. Therefore, according to art. 20 para. 2 of the Constitution, entitled *International treaties concerning human rights*:

(2) If there are inconsistencies between the covenants and treaties on fundamental human rights, to which Romania is a party, and the national laws, priority shall be given to the international regulations, unless the Constitution or the national provisions contain more favorable provisions.

Moving forward, as administrative aspects, before ruling on the recognition and execution of a freezing order issued by a Member State, the Romanian authorities must first check the formal requirements of the documents received and the issue of jurisdiction.

Article 226 of Law no. 302/2004 provides, as formal requirements, that if the Romanian authorities receive a freezing order required to be executed, they must check, within 24 hours of the receiving of the order (1) if it is accompanied by the standard certificate or any equivalent document[64] and (2) if the documents are translated. If no translation exists, the competent Romanian authorities must solicit the issuing Member State the issuing of the translation in a term of maximum 3 days. After this remedy procedure is concluded, if the translation is received, within 24 hours, the Romanian authority must check its competence. If the institution in question considers that it is not competent to rule on the request, it will send the order on the basis of the special legislation to the competent authority and inform the authorities of the issuing Member State. However, if competence cannot be determined given the improper description of the assets within the freezing order, the Romanian authorities will solicit clarification to the issuing Member State in a term of maximum 3 days. Per the character of the procedure, since it is purely administrative, it is confidential[65] and the maxim duration, if the translation is not submitted initially and the assets cannot be *ab initio* clearly identified, is of 8 days.

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[63] For details see The European Charter for fundamental rights and freedoms, available at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT.*

[64] The issues concerning the substance of the certificate or the equivalent documents relate to grounds for non-recognition.

[65] In accordance with the provision of article 226, if the request is made to a Tribunal, the court has the obligation to fix a term that is no longer than 5 days since the decision, the distribution being made in accordance with the Supreme Council of Magistracy Decision no. 1375 of 17 December 2015, establishing the new rules on Internal Court Order.

Concerning the situation when the order is requested to be executed in the investigative phase, as shown above, the competent Prosecutor from the Prosecutors Office alongside the Tribunal in the constituency of which the asset subject to freezing is situated, can order the recognition and execution of the freezing order by prosecutorial ordinance within 5 days after the concluding of the check incumbent in the formal preparatory phase.

The law is silent on the formal and substantial requirements that need to be fulfilled in what concern the prosecutorial order. As such, we believe that the general requirements provided in the Code of Criminal Procedure will be applicable, insofar as Law no. 302/2004 is *lex specialis* when compared to the Code.

With regard to the legal remedies available in this procedure, it is worth observing that only the prosecutorial order by which the request to freeze is approved and executed ca be challenged. The reason for this is self-evident, as in the case of refusal, the only motives for rendering such a decision are the ground for non-recognition, that will be presented below. Therefore, the refusal in such cases will be resolved in an inter-state exchange of information and not in a judicial procedure.

Coming back to the issue at hand, according to article 227 para. 2 of Law no. 302/2004, after the rendering of the recognition, any interested party, including *bona fide* third parties, may challenge the order with a complaint addressed to the Tribunal in whose jurisdiction the Prosecutors Office that was competent to issue the recognition is situated, if they can prove that their legitimate interests have been inflicted. The deadline for the submission of the complaint is within 5 days of the communication of the order, while the submission of the documents must be realized within 2 days after they were solicited, and the court must render a decision within 5 days of receiving the dossier. The complaint is ruled upon in a public hearing, the lodging of the complaint does not suspend the execution, the admissible evidence are only new documents and the decision is final. As such, the court can either (1) dismiss the complaint as being formulated after the expiration of the deadline or inadmissible and maintain the contested order or (2) admit the complaint, abolish the contested order and revoke the freezing measure.

Per the motives based on which one can lodge the complaint, it is provided that the substantive reasons which lead to the freezing order cannot be invoked, being of the jurisdiction of the issuing state. As such, the only motives that can be invoke concern the formal requirements and motives for postponement and non-recognition, as well as any inconsistencies in respecting the prescribed procedure.

Concerning the issuing of the order during trial, article 228 of Law no. 302//2004 provides that the request is ruled upon by the Tribunal, in chambers, by a single judge. The decision can be challenged within 5 days after the communication / the delivery of the judgement by any interested party. The Court to rule on the challenge is the one superior to the Tribunal, respectively the Court of Appeal and the aforementioned dispositions applicable to the challenge during the investigative phase are to be applicable in this context as well. As deadlines, the dossier is sent to the Court of Appeal within 24 hours after the formulation of the challenge, the ruling must be ordered within 5 days and it does not suspend the execution of the freezing order.

Regarding the duration of the freezing order in this special procedure and the fate of the assets in question, the provisions of article 229 of Law no. 302/2004 state that the freezing order is to be maintained until the scope for its ordering has been fulfilled – confiscation or gathering of evidence. As such, even though a time-based deadline is not delineated, the maximum duration will be until the conclusion of the criminal trial (by closing the case, renouncing the charges, final conviction, acquittal).

However, as an exception, it is provided that the Romanian authorities can, according to the national legislation, impose the execution of the order for a shorter period of time. As well, if the competent authority chooses to revoke the measure, it is compulsory that the issuing authority be notified, with the possibility to make observations. This procedure is available originating from the opposite side as well, so that if the authorities from the issuing Member State decide to revoke the order, the Romanian authorities shall be informed. As a last specification, concerning the measure of confiscation and gathering of evidence – as reasons for the freezing order, the national provision state that the measures shall be executed according to the provisions regulating mutual cooperation on confiscation measures.

As per the grounds for non-recognition, these are compulsory, and they are four. The conclusion is drawn from the formulation of the Romanian legislation, which is different from the wording of the Framework Decision, alongside with comparing the provisions with the ones regulating postponement. As such, the formulation in the case of non-recognition states "*cannot be refused with the exception of*" while in the case of postponement, the formulation is "*may postpone*".

Returning to the reasons for non-recognition, the first one concerns the quality of the certificate on the basis of which the request is made. As such, if the certificate is not present, it is incomplete, or it does not

clearly match the request, the competent Romanian authority will refuse the recognition and execution. The second reason states that the recognition will be refused if the Romanian legislation provides for an immunity or a privilege that renders impossible the execution of the freezing order. The third reason provides that the recognition will be refused if it is immediately clear from the information provided in the certificate that the handling of the request for the criminal offense that is the subject of the criminal proceedings would be contrary to the principle of *ne bis in idem*.

In this last sense, we urge that the situation is not incompatible with the provisions relating to competence. As such, as shown before, the Tribunal would be competent to rule on the recognition of a freezing order, if the case is settled definitely. This does not preclude the court to rule firmly that the measure requested was issued already, a solution was given and thus the principle of *ne bis in idem* will be infringed if the order is recognized. Finally, the last reason for refusal relates to the criterion of doubly criminality, as explained above – with its particularities.

In the case of postponement, the wording of article 231 of Law no. 302/2004 is identical with that of the Framework Decision. In this sense, according to the provisions:

1. The competent judicial authority of the executing State may postpone the execution of a freezing order transmitted:

a) where its execution might damage an ongoing criminal investigation, until such time as it deems reasonable;

(b) where the property or evidence concerned have already been subjected to a freezing order in criminal proceedings, and until that freezing order is lifted;

(c) where, in the case of an order freezing property in criminal proceedings with a view to its subsequent confiscation, that property is already subject to an order made in the course of other proceedings in the executing State and until that order is lifted. However, this point shall only apply where such an order would have priority over subsequent national freezing orders in criminal proceedings under national law.

2. A report on the postponement of the execution of the freezing order, including the grounds for the postponement and, if possible, the expected duration of the postponement, shall be made forthwith to the competent authority in the issuing State by any means capable of producing a written record.

3. As soon as the ground for postponement has ceased to exist, the competent judicial authority of the executing State shall forthwith take the

necessary measures for the execution of the freezing order and inform the competent authority in the issuing State thereof by any means capable of producing a written record.

4. The competent judicial authority of the executing State shall inform the competent authority of the issuing State about any other restraint measure to which the property concerned may be subjected.

Concerning the available legal remedies and guarantees, Law no. 302/2004 provides, as shown above, special procedures relating to the challenging of the recognition and execution of freezing orders, but the rights and guarantees of the persons with interest in the procedure are the same as those provided in the Code of Criminal Procedure. The latter statement is valid, given the procedural relation between Law no. 302/2004 and the Code of Criminal Procedure, this one being a *lex specialis* vs *lex generalis*. As such, if not specific provisions exist in Law no. 302/2004, it will be complemented by the provisions of the Code of Criminal Procedure, insofar as the general provisions do not overlap or go contrary to the provisions of Law 302/2004.

As a final remark in this regard, Law no. 302/2004 transposes almost identical the words of article 12 of the Framework Decision. As such, where the Romanian authorities are responsible for injuries caused by the execution of the freezing order, the issuing state is obliged to reimburse the sums paid in damages by virtue of the incumbent responsibility. The only exception provided concerns the case where the injury or part of it is exclusively due to the conduct of the Romanian authorities.

3.2. *Confiscation*

Concerning the issue of recognition of confiscation orders, the legal regime is regulated in Title VII, Section V, art. 248-268 of Law no. 302//2004, transposing Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

Regarding the definition of concept, since confiscation in Romania is regulated as a safety measure and the terms used in the proceedings can have different meanings[66], clear lines were required to be drawn so as to understand the extent to which the procedure is applicable. In this sense, the following definitions are provided:

[66] Especially since the Proposed Regulation on Recognition of confiscation orders has not yet been adopted. SWD(2016) 468 final, {SWD(2016) 469 final.

"confiscation order" shall mean a final penalty or measure imposed by a court following proceedings in relation to a criminal offence or offences, resulting in the definitive deprivation of property; Property

"property" shall mean property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such property, which the court in the issuing State has decided: (1) is the proceeds of an offence, or equivalent to either the full value or part of the value of such proceeds, (2) constitutes the instrumentalities of such an offence and (3) may be confiscated on the basis of extended confiscation powers under the law of the issuing State.

"proceeds" shall mean any economic advantage derived from criminal offences. It may consist of any form of property;

"instrumentalities" shall mean any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;

Concerning the institutions that have jurisdiction in order to execute a confiscation measure, the general rule is that it belongs to the Tribunal in whose constituency the property subject to confiscation is located. However, as in the case of the freezing order, several exceptions are regulated on the basis of either the location of the assets subject to confiscation or on the time of the request. Therefore, asset wise, if the confiscation order concerns:

1. more movable assets, then jurisdiction will pertain to be Bucharest Tribunal;

2. one, or more than one movable asset and real estate, the jurisdiction lies with the Tribunal in whose constituency the real estate is located;

3. more than one real estate in the jurisdiction of different Tribunals, jurisdiction lies with the Tribunal in whose constituency the real estate has the highest value;

With regard to the time aspect, it is provided that if more than one Member State issues confiscation orders for the same asset, jurisdiction lies with the Tribunal which was firstly noticed.

Offense wise, as was the case in the situation of the freezing order, when the maximum sentence provided by law is at least 3 years and the offense is one provided in the list (the same list), the condition of double criminality is not to be verified, irrespective of the constitutive elements of the offense in the issuing Member State. For other offenses not provided in the list, the order to confiscate will be recognized (1) insofar as the act is qualified as on offense in Romania and (2) only if confiscation

would be possible for the respective offense in Romania. Having observed that the provision does not relate to extended confiscation separately from criminal confiscation, the correct deduction, from our point of view, is that both are applicable. Therefore, if the order is issued for extended confiscation, then the executing authorities must check if extended confiscation can be applied. In the same manner, if criminal confiscation is required, the same analysis must be realized. Even though the process seems simple at first glance, we believe that in practice it will be relatively hard to assess a full pledge compatibility, since, Member States have implemented differently the institution (i.e. standard of proof requirement, triggering offense, time limits for evaluations and so on).

An intriguing issue is further regulated in article 252 which states that amnesty and pardon may be granted by both the issuing State and the executing State and the review of the confiscation order may only be ordered by the issuing State.

Considering the grounds for non-recognition, these are provided in article 262 of Law no. 302/2004. As such, there is only one compulsory ground for non-recognition, the others being optional.

Starting with the sole compulsory reason, this concerns the criterion of double criminality coupled with the possibility to order confiscation for the specific asset. As in the case of asset freezing, there is no need for identical constitutive elements or the same qualification in the issuing Member State.

Per the legal text, the recognition and execution of a confiscation order may be refused if:

1. the certificate is not attached to the request, is incomplete or it does not correspond to the confiscation order;

2. the execution of the confiscation order would be contrary to the principle of *non bis in idem*;

3. the Romanian legislation provides for an immunity of privilege that makes the execution of the confiscation order impossible;

4. the rights or any interested party, including *bona fide* third parties, make the execution of the confiscation order impossible;

5. the person concerned by the order was not present at trial in the issuing Member State, only insofar as several other conditions are not met[67];

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[67] If the following conditions are met, then the execution of the order cannot be refused. As such, confiscation will be executed even if the defendant was not present at trial, if:

a) He or she was duly notified in writing, by written notice, handed in person or by telephone, fax, e-mail or by any other means, in respect of the day, month, year and place of appearance and the legal consequences in the event of failure to appear; or

6. the confiscation order was issued considering criminal proceeding which, under Romanian law, were committed at least partially on the territory of Romania, or were committed outside the territory of Romania, but the Romanian legislation does not permit the issuing of measures concerning those specific offenses;

7. the execution of the confiscation order will affect principles enshrined in the Constitution;

8. the execution of the confiscation order was prescribed according to the Romanian law, provided that the crimes are the responsibility of the Romanian authorities according to national criminal law;

9. the confiscation order was issued on the grounds of extensive confiscation powers which are incompatible with the provisions of the Romanian legislation in the matter. In this case, the confiscation order may be executed at least to the extent stipulated by the Romanian legislation.

As is the case with the freezing order, when the quality of the certificate is in question, the Tribunal may fix a deadline in which to request clarification or the completion of the inexact data. Moreover, as common rules concerning the communication with the issuing authorities from the other Member States, it is provided that any decision, regardless of the solutions, must be notified to the authorities of the issuing Member State as soon as possible, explaining the result and the motives for non-recognition.

Postponement of the execution of the confiscation order is possible according to the Romanian legislation. The reasons for postponement are optional and they were basically taken *expressis verbis* from the text of the Framework Decision. Therefore, per the legal text:

The court may postpone the execution of a confiscation order transmitted:

(1) if, in the case of a confiscation order concerning an amount of money, it considers that there is a risk that the total value derived from its execution may exceed the amount specified in the confiscation order because of simultaneous execution of the confiscation order in more than one Member State;

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b) having knowledge of the day, month, year and place of appearance, mandated his or her own chosen lawyer or appointed ex officio to represent it, and legal representation and defense before the court were effectively carried out by that lawyer; or

c) after having been personally handed down the conviction and has been informed that the case may be re-judged, or that the judgment is subject to appeal and that it can be checked on the basis of new evidence, and the possibility of admitting the appeal may be terminated, the convicted person either expressly renounced the retrial or the appeal, either did not request a retrial or did not declare the appeal in the prescribed period.

(b) in the cases of use of legal remedies by any interested parties;

(c) where the execution of the confiscation order might damage an ongoing criminal investigation or proceedings, until such time as it deems reasonable;

(d) where the property is already the subject of a national confiscation order.

In conjunction with the reasons provided above, Law no. 302/2004 provides that if postponement is ordered, the court is obliged to take all and any necessary measures for the purpose of a latter confiscation – it basically requires to order the freezing of the assets if national legislation permits. Moreover, the issuing authority is to be informed as soon as possible about the reason for the postponement, and in the case where postponement was ordered because of the use of legal remedies by interested parties and where it was ordered so as to avoid damaging an ongoing criminal investigation, a report must be drafted and sent. If possible, in the report, the total estimated duration of the postponement will be provided.

As a last provision in this context, immediately after the expiration of the reasons for postponement, it is provided that the court must take all required measures so as to execute the confiscation order and, at the same time, inform the issuing authority.

As special rules in this procedure, it is provided that if more than one confiscation orders have been requested to be executed against the same person (confiscation of sums of money that are insufficient for the execution of all orders) or concerning the same assets, several criteria will be considered so as to establish which order will be executed. These are: (1) the prior freezing of the assets, (2) the gravity and the place where the offense was committed and (3) the date of transmission of the orders.

Finally, in what concerns the rights of interested parties and the available legal remedies, Law no. 302/2004 does not regulate any procedural avenues that are to be applied. However, it does regulate the right of any interested person to claim damages if the execution of the confiscation order has produced injuries.

With regard to empirical evidence, given the request submitted to the National Agency for the Management of Seized Assets[68], it was provided that since 2015, only 6 confiscation orders were issued in order to be recognized by the Romanian authorities. Therefore, the following were confiscated:

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[68] Answered by a document no. 2//806/2018, of 2.7.2018 issued by the General Manager.

1. 65.000 euros, confiscation order requested to be executed by Liege Court of Appeal;

2. two constructions and a parcel of land in Cluj, confiscation order requested to be executed by the Paris Tribunal;

3. one construction in Brasov, confiscation order requested to be executed by the Innsbruck Tribunal;

4. one construction and a parcel of land in Călăraşi, confiscation order requested to be executed by the Paris Tribunal;

5. one vehicle, confiscation order requested to be executed by Sofia Court of Appeal;

6. two vehicles, confiscation order requested to be executed by Sofia Court of Appeal.

4. *Management and disposal aspects*

In the following lines, an overview will be made with regard to the management and disposal of frozen and confiscated assets. From the outset, it is important to note that relatively recent, the entire legal framework concerning the management of the assets described above has changed, starting with the year 2015. In a nutshell, in the Romanian legal framework, there is no distinction between the institution that manages frozen assets vs. confiscated assets. As such, both dimensions will be analyzed together. However, at the end of this chapter, a section will be dedicated to third-party right or lack of in the proceedings.

4.1. *Freezing & Confiscation*

Essentially, since 2015, a new agency has been established so as to manage frozen and confiscated assets, respectively the National Agency for the Management of seized Assets.

The agency was created by means of Law no. 318/2015, which considered the best practices identified in other European states (FR, BE, NL, IT), the US and consequently transposed the obligation that Romania had according to article 10 of Directive 42/2014/EU. As well, the Agency is seen as a result of both the aforementioned and the Anti-Corruption Strategy 2012-2015. Per its mission, the ultimate goal of ANABI (NAMSA) is to ensure an increase in the execution rate of confiscation orders issued in criminal matters through effective administration of seized assets that are allocated to the Prosecutor's Office and judges. Correlatively, the agency, by its activities, increases the revenues to the

state budget, as well as those for the compensation of the victims of crimes, including the state – when a civil party in the criminal trial.

Per the issue of financing, according to article 17 of Law no. 318/2015, the Agency is financed entirely from the state budget through the budget of the Ministry of Justice and expenditure incurred in the performance of the tasks of the Agency is borne by its budget. As well, it is provided that the Agency may receive donations, sponsorships and may access other sources of funding, in accordance with the incident legal provisions. In the same sense, article 272 of the Criminal Code of Procedure states that the expenditures necessary for the performance of procedural acts, the administration of evidence, the preservation of the material means of evidence, the fees of the lawyers, as well as any other expenses occasioned by the criminal proceedings are covered by the state in advance or paid by the parties.

Functions-wise, according to Law no. 318/2015, the Agency has the following functions:

a) to facilitate the tracing and identification of property arising from the commission of offenses and other property related to offenses and which could be subject to a provision of seizure or confiscation issued by a competent judicial authority in criminal proceedings;

b) to administrate assets, in the cases provided by Law no. 318/2015, consisting of movable goods disposed of in criminal proceedings;

c) to exploit (sell at auction), in the cases provided by Law no. 318/2015, movable assets seized in criminal proceedings;

d) to manage the integrated national computer system for the recording of claims arising from criminal offenses;

e) to support, under the law and according to best practices, the activity of authorities that deal with the administration of property that may be subjected to measures of seizure and confiscation in criminal proceedings;

f) to coordinate, evaluate and monitor at the national level, the implementation and enforcement of legal procedures in the field of recovery of claims arising from criminal offenses.

With regard to the functions provided above, several marks need to be made, as they are divided in classes of attributions that the Agency is to perform. In the order provided in the legal instrument, the classes of attributions are:

1. Attributions to facilitate the identification and tracking of assets that may be subject to precautionary measures during criminal court proceedings, special or extensive confiscation.

2. Attributions concerning the management of:
a. Seized sums of money
b. movable seized assets
c. immovable seized assets
3. Attributions concerning confiscated assets
4. Attributions concerning the management of the integrated informatic system concerning the registry of claims arising from criminal offences
5. Other attributions

For the purpose of the present paper, only the attributions that relate strictly to the management of frozen and confiscated assets will be discussed.

With regard to the attributions concerning the management of seized sums of money, it is provided in article 27 of Law no. 318/2015 that the agency manages and keeps records of amounts of money (1) subject to seizure, (2) resulting from the capitalization of perishable good, (3) in special cases of exploitation of movable seized goods or (4) own to an interested party and subject to garnishment according to the provision of the Code of Criminal Procedure (art. 252 and the following). The management aspect essentially concerns the custody of the amount obtained through seizure or garnishment and the permanent monitorization of the fate of the trial. In a nutshell, the Agency ensures that the sums seized or garnished are available when a final decision is made and according to the legal basis used by the judicial authorities, it either transfers the sums to the state (if confiscation is ordered), to the injured party (if the sum was garnished for this reason) or back to the offender (if acquittal or other similar decision is reached).

Turning towards the attributions concerning movable seized assets, the Agency acts as a custodian at the request of the prosecutor or the court and it temporarily deposits and manages only seized assets with a value – at the moment when seizure was ordered, of at least 15.000 EUR – equivalent in RON. After the taking into custody, the main function is to preserve the assets, but, under certain conditions (with the authorization of the prosecutor or the court, it can request the consent of the owner in order to capitalize the assets).

In this sense, according to art. 29 of Law no. 318/2015 and art. 252^1 - 252^4 of the Code of Criminal Procedure, it is possible, in exceptional circumstances, to capitalize movable seized assets.

The rule within this exception would be that, with the authorization of the prosecutor or the court, the Agency would try to contact the owner of the goods and obtain his or her consent to capitalize the assets.

If consent cannot be obtained, the assets can be capitalized (1) when, within one year from the distraint ordering date, the value of the seized goods has decreased significantly, i.e. by at least 40% compared to the time of enforcing the asset freezing, (2) where there is the risk of expiry of the guarantee or when the distraint was applied against live stock or birds, (3) when the distraint was enforced against flammable or petroleum products or (4) when the distraint was enforced against goods the storage or maintenance of which involves expenses disproportionate to the value of the property.

In the same sense, another exception is provided when the assets in question are motor vehicles that can be sold while they are only seized (1) when they were used, in any manner, in the commission of the offense and (2) if a time period of one year or more has passed since the date of ordering asset freezing.

Procedurally, the agency may propose, *ex officio*, to the prosecutor, the judge of rights and freedoms or the court, the initiation of the process of capitalizing the seized movable goods and the capitalization may be realized (1) by the Agency, by public auction, (2) by specialized entities or companies, selected in compliance with the legal provisions regarding public acquisitions, (3) through bailiffs, according to their own procedures or (4) by the tax authorities, according to their own recovery procedures – the General Manager of the Agency decides on the method of sale.

Turning towards the attributes that the agency has with regard to seized immovable assets, the legal instruments refrains in describing only that the National Agency for the Management of Seized Assets keeps records of the buildings on which seizure was ordered, based on the prosecutor's order or the conclusions of the judge. According to paragraph 2 or article 30 of Law no. 318//*2015, the prosecutor, the preliminary chamber judge or the court that ordered the seizure shall send to the Agency a copy of the ordinance or closure by which the seizure was ordered and a copy of the seizure record*. After the reception, the Agency shall communicate the order to all and any interested public institutions by electronic mail and it shall pass any information relevant to the situation of the assets.

Concerning the attributes that the agency has with reference to confiscated assets, they can be qualified as attributes concerning (1) statistics, then (2) capitalization or transfer and finally, (3) destruction.

The first task that is provided is that the Agency keep records of the decision in which confiscation was ordered, on the basis of extended and special confiscation, as well as those communicated to the Romanian authorities by foreign courts. In this sense, the judge in charge of the execution of the security measure shall send a copy of the decision to the

Agency, which is turn takes over the assets. The agency provides quarterly statics on the changes occurring in this domain, considering the final destination of the confiscated assets.

Having in mind the previous statement, the agency, according to art. 31, 34 and 35 of Law no. 318/2015 has two main options. It can either administer the assets and then hand them over to the competent authorities in order to be capitalized according to Government Ordinance no. 14/2007 on the regulation of the manner and conditions for the capitalization of goods entered, according to the law, in the private property of the state *OR* it can administer the assets and then pass them free of charge to other public entities or to associations and foundations.

Concerning the latter prospect, respectively *the re-use of confiscated property*, the practice entails a relatively new concept that consist of the passing free of charge or putting into use of the proceeds of crime to public institutions, administrative authorities or non-governmental organizations in order to be used for social or public interest purposes.

In accordance with the information presented on its website[69], it is very well known that at EU level, there is an increasing interest in this method of capitalizing on confiscated assets that resulted in the adoption on the 3rd of April 2014 od Directive 2014/42/EU on the freezing and confiscation of proceeds of crime. The European Union thus urged Member States to *consider adopting measures to enable seized goods to be used in the public interest or for social purposes. Such measures could include, inter alia, the allocation of those assets for law enforcement and crime prevention projects as well as for other projects of public interest and social utility. The obligation to consider adopting such measures implies a procedural obligation for Member States, such as carrying out a legal analysis or discussing the advantages and disadvantages of introducing such measures. When managing frozen goods and adopting measures on the use of confiscated goods, Member States should act appropriately to prevent criminal or illegal infiltration*.

In this spirit, article 34 of Law no. 318/2015 states that *The immovable property entered through confiscation in the private property of the state may be transmitted free of charge in the private domain of the administrative-territorial units* at the request *of the county council, respectively of the General Council of the Bucharest Municipality or of the local council, as the case may be, by government decision, initiated by the Ministry of Public Finance at the Agency's proposal, to be used for social objectives*.

Article 35 of the same Law further states that *the immovable property entered through confiscation in the private property of the state may be*

[69] For details see *https://anabi.just.ro*.

given free use to associations and foundations, as well as to the Romanian Academy and branch academies established under a special law by Government decision initiated by the Ministry Public Finance, on a proposal from the Agency*, to be used for social, public-interest purposes, or in relation to their subject-matter, as the case may be.*

Complementary to the aforementioned legal provisions, if the assets were initially ordered to be capitalized, a remedy procedure is provided by the governing legal instrument, respectively Government Ordinance no. 14/2007. The provisions are essentially redacted so as to avoid the compulsory capitalization in cases where the assets could be used legitimately, and they could be more useful to other bodies when opposed to the obtaining of sums of money. According to the instrument[70]:

The Ministry of Public Finance may submit or, as the case may be, propose to the Government the free transfer of goods subject to capitalization to natural or legal persons as follows:

a) to the General Secretariat of the Government - motor vehicles, ambulances with related facilities, boats and motors attached to them, which will be distributed by the interministerial commission, free of charge, to the ministries, central and local public authorities, within the limits of the endowment norms, as well as cult institutions, the Romanian Red Cross Society and non-governmental organizations accredited by the Ministry of Labor, Family, Social Protection and the Elderly as social service providers / social canteens and who actually carry out such activities;

b) nurseries, kindergartens, foster care centers and childcare centers, old people's homes, poor canteens, asylums, hospitals, schools, libraries, religious institutions, disabled people, the Romanian Red Cross National Society, as well as non-governmental organizations accredited by the Ministry of Labor, Family, Social Protection and the Elderly as providers of social services / social canteens and actually carrying out such activities, as well as natural persons who suffered from natural disasters at the proposal of the recovery bodies, by order of the minister or decision of the head of the recovery body, according to the provisions of the methodological norms for the application of the present Ordinance;

c) Ministries, central and local public authorities - communication equipment, computer equipment and office equipment, supplies, durable goods, household inventory, maintenance and repair materials, observing the declaration and evaluation procedures, by order of the Minister of Public Finance or decision of the head of the recovery body, as the case may be;

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[70] Ordinance no. 14 of January 31, 2007 regulating the manner and conditions for the capitalization of the assets entered, according to the law, in the private property of the state, published in the Official Gazette no. 694 of 23 September 2014.

d) Ministry of Foreign Affairs - movable and immovable goods abroad, by Government decision;

e) legal persons administering memorial houses, by a Government decision;

As it can be seen, steps have been taken in order to align to the European trend and make re-use of confiscation assets so as to help public institutions and associations and foundations to use set assets in their day to day activity. However, an important and unjust difference is made within the legal instrument. As such, according to art. 34, with regard to public institutions, the potential transfer is initiated at the request of set authority, while according to art. 35, private bodies may obtain the assets only insofar as the Agency makes a proposal in this sense. From our point a view, the difference of treatment is rather unjustified, the state having an unmotivated advantage.

In this sense, in order to complete the aforementioned provisions within the procedural limb, the Romanian Parliament adopted Law no. 216/2016 on the determination of the purpose of confiscated immovable property, that entered into force on the 18th of November 2016.

According to article 1 *The immovable property entered through confiscation in the criminal proceeding in the private property of the state may be transmitted free of charge in the public domain of the state and in the administration of the central public administration authorities, other public institutions of national interest, after or the Autonomous Registrars of National Interest, hereinafter referred to as Beneficiary Entities, by a Government Decision initiated by the Ministry of Public Finance at the proposal of the National Agency for the Management of Non-Disposable Goods, hereinafter referred to as the Agency, under the terms of the law.*

Further details are provided in the legislative instrument. *Inter alia*, it is provided that the assets described in article 1 will be made available for the institutions known as beneficiaries by means of a management contract, only for the purpose of setting the immovable assets as primary or secondary headquarters.

Procedurally, within 45 days of the communication on the value of the immovable property, the Agency must analyze whether it would be appropriate to initiate the procedure according to article 34 (transmission free of charge to a public institution) or according to art. 35 (transmission to private entities or the Romanian Academy) by means of a bailment agreement.

The criteria for the selection process are provided in the same legal instrument and they are: (1) lack of office space, (2) the need to expand the current location, (3) the location of the building, (4) the surface,

(5) the technical condition of the building, (6) the current destination, (7) the date of receipt of the request, (8) the financial situation of the applicant, (9) the possible impact on the state budget.

An important addition must be made with regard to the lack of initiative in the procedure. As such, if the Agency does not initiate or is not required to initiate one of the procedures described above, in accordance with its functional law, the assets will be capitalized according to Government Ordinance no. 14/2007 for the regulation of the manner and conditions for the capitalization of the assets entered, according to the law, in the private property of the state. As a final note, according to the same legal instrument, if the capitalization is not successful after at least three public auctions, the competent authority in charge of capitalization can request the agency to repeat the initial procedures provided by article 34 and 35 of Law no. 318/2015.

Turning back to the issue of capitalization, the functional law of the National Agency for the Management of Seized Assets only provides that the agency can choose to directly opt for capitalization, in accordance with Government Ordinance 14/2007. Concerning the sums resulting from capitalization, the legal instrument only states that they shall be allocate on the basis of the annual balance presented by the Agency as follows:

a) 20% for the Ministry of National Education and Scientific Research;

b) 20% for the Ministry of Health;

c) 15% for the Ministry of Internal Affairs;

d) 15% for the Public Ministry;

e) 15% for the Ministry of Justice.

Going back to the complementary legal instrument (Government Ordinance 14/2007), it states that as a rule, if chosen to, *assets of any kind entered under the law in the private property of the state shall be capitalized under the terms of the present ordinance by the National Agency for Fiscal Administration through the competent authorities, unless the law stipulates otherwise*. However, when the assets are situated abroad, the competent authority in charge of capitalization is the Ministry of Foreign Affairs.

Since the rule provides for assets of any kind, it is important to note that a yet clear exemption is introduced. As such, assets will not be capitalized if they do not fulfill the necessary conditions in order to be commercialized. For assets of this type, the required action is destruction. Procedurally, according to art. 1 para. 3, they *will be destroyed at the ex-*

pense of the natural or legal persons from whom they were confiscated or the holder, if they cannot be identified. The destruction shall be carried out in the presence and with the signing of a takeover and destruction commission made up of representatives of the holder, the National Authority for Consumers Protection, the Recovery Authority, the Ministry of Internal Affairs and the Ministry of Environment and Climate Change.

Concerning the evaluation procedure, it is stated that when recovery involves assets seized in criminal proceedings, a representative of the agency may also be a member of the Evaluation Commission. In this case, the Evaluation Committee consists of 5 members: 2 representatives of the Recovery Authority, one representative of the agency, one representative of the National Authority for Consumer Protection and one representative from the Ministry of Internal Affairs.

Regarding the income and expenses resulting from the capitalization of property entered into the private property of the state, several remarks are required.

First, the rule is that provided in article 37 of Law no. 318/2015, concerning the allocation of income to central institutions. Second, several exceptions are provided in Government Ordinance no. 14/2007, but these exceptions concern only assets confiscation by means of administrative confiscation by local authorities. In this case, art. 11 of the legal instrument provides that *the goods confiscated by the bodies of the local public administration authority are handed over to the recovery bodies and the proceeds collected from their capitalization are paid to the local budget, after deduction of the expenditures with the capitalization under the legislation in force and a commission of 20% of the incomes remaining after the deduction of expenses with capitalization. The commission of 20% shall be paid to the state budget, within 5 working days from the receipt.*

Regarding the income and expenses resulting from confiscation ordered as requested by another Member State of the EU, the situation is regulated by article 265 of Law no. 302/2004. Per the article, in what concerns the sums of money resulted by capitalization:

a) if the amounts of money obtained following execution of a confiscation order have a value less than EUR 10,000 or the equivalent in lei of this amount, they shall be made available to the state budget;

(b) in all other cases, 50% of the amount obtained following the execution of a confiscation order shall be transferred to the issuing State[71].

[71] Very important in this context is the fact that the capitalization by sale or the use of the assets will be realized in accordance with the Romanian legislation presented above.

If capitalization is not desired or its execution is impossible[72] the legal provisions state that the confiscated property may be transferred to the issuing State (optionally). However, when the confiscation order covers part of the value of the order, the property shall be transferred to the issuing State if the competent authority in the issuing Member State agrees. If consent is given, the transfer is compulsory.

As a final note, concerning cooperation with other institutions within the EU in the area of seized and confiscated assets, the National Agency for the Management of Seized asset is a part / works alongside the CARIN Network and the ARO Platform. As well, according to article 38 of Law no. 318/2015, the agency has competence in the execution of orders of seizure of goods issued by another state, in executing confiscation orders issued by another state and the ability to dispose of confiscated goods within the meaning of art. 265 of the Law no. 302/2004 (judicial cooperation in criminal matters).

4.2. *Third party rights and claims for damages for wrongful management*

Concerning the possibility to claim damages for wrongful management of frozen assets, it is deemed worthy to note that the possibility is not regulated through the law governing the functioning of the agency - Law no. 318/2015. However, one could try to endeavor and claim damages based on general provisions provided in Civil Code and the Code of Civil Procedure.

Contrary to the aforementioned, in the exceptional situation when a freezing order was issued and the assets in question fall within the ones that can be capitalized before the issuing of a confiscation or restitution order, article 252[4] of the Code of Criminal Procedure states that against the accomplishing of the measure, the prosecutor, the suspect, the defendant, the custodian, the party with civil liability and any interested party can lodge a complaint with the court competent to settle the case at first instance. It is also provided that the court shall rule in an emergency procedure, in a public session, with the summoning of the parties. As a final note, in order to protect the interests of third parties, the law states that if after the final settlement of the criminal trial, no challenges were filed against the manner of enforcing the court's decision regarding the capitalization of the seized movable assets, another challenge is admissible under civil law.

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[72] Article 265, para. 2 let. *c.* of Law no. 302/2004 provides that cultural goods belonging to the national patrimony subject to confiscation may not be sold or transferred.

Section III

HORIZONTAL COMPARATIVE ANALYSIS

DAN MOROŞAN - FLORIN STRETEANU - DANIEL NIŢU

SUBSTANTIVE ASPECTS OF CONFISCATION

SUMMARY: 0. Introduction. – 1. Criminal confiscation. – 1.1. Function & common framework. – 1.2. Particularities - country-based. – 1.3. Legal nature. – 1.4. Common approach. – 1.5. Requirements concerning confiscation of instrumentalities. – 1.5.1. Common views. – 1.5.2. Particularities - country-based. – 1.5.3. Limitations - exempted assets or offenses. – 1.5.4. Proportionality test. – 1.5.5. Confiscation through equivalent. – 1.5.6. Mandatory vs. optional confiscation. – 1.6. Requirements concerning the object of the offense and the proceeds of crime. – 1.6.1. Common views. – 1.6.2. Particularities - country-based. – 1.6.3. Limitations - exempted assets or offenses. – 1.6.4. Proportionality test. – 1.6.5. Confiscation through equivalent. – 1.6.6. Mandatory vs. optional confiscation. – 1.6.7. Assets whose possession is illegal. – 2. Extended confiscation. – 2.1. Common views. – 2.2. Legal nature. – 2.3. Requirements. – 2.3.1. The Court Order. – 2.3.2. Triggering offenses. – 2.3.3. Applicable test - disproportionality. – 2.3.4. Standard of proof. – 2.4. Mandatory vs. optional confiscation. – 3. Non conviction-based confiscation in the case of illness of the defendant & absconding. – 4. Non conviction-based confiscation in the case of the death of the defendant., immunity, prescription and other cases. – 5. Third-party confiscation. – 6. Conclusions

0. *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.

1. *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.

1.1. *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

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

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.

1.2. *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 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.

1.3. *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.

1.4. *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.

1.5. *Requirements concerning confiscation of instrumentalities*

1.5.1. *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.

1.5.2. *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 pro-

vided 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.

1.5.3. *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.

1.5.4. *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.

1.5.5. *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.

1.5.6. *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.

1.6. *Requirements concerning the object of the offense and the proceeds of crime*

1.6.1. *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.

1.6.2. *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 / re-

placement 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.

1.6.3. *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.

1.6.4. *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.

1.6.5. *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.

1.6.6. *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.

1.6.7. *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.

2. *Extended confiscation*

2.1. *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.

2.2. *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.

2.3. *Requirements*

2.3.1. *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 convic-

tion 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*.

2.3.2. *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.

2.3.3. *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.

2.3.4. *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.

2.4. *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.

3. *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.

4. *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 ex-

tended 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, 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.

5. *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 availabil-

ity, 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.

6. *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.

OLIVIER CAHN - JULIETTE TRICOT

PROCEDURAL ASPECTS OF FREEZING IN EUROPE A COMPARATIVE ANALYSIS (BELGIUM, FRANCE, GERMANY, ITALY, NETHERLANDS, ROMANIA)

SUMMARY: 1. Introduction. – 1.1. Freezing in the criminal policy of the EU. – 1.2. Interest and difficulties of the comparison. – 2. Physionomy of the procedures: requirements for the use of freezing. – 2.1. Convergence of national frameworks: a relative increase in similarities. – 2.1.1. The concept of freezing. – 2.1.2. The legal framework for freezing: a reflection of national procedures. – 2.2. Divergence of national frameworks: the persistence of differences. – 2.2.1. The variety of special frames. – 2.2.2. The competent authorities. – 3. Remedies and guarantees: safeguards against the use of freezing. – 3.1. The application of general guarantees. – 3.2. Specific guarantees. – 3.2.1. Enforcement of a freezing order. – 3.2.2. Challenging a freezing order.

1. *Introduction*

1.1. *Freezing in the criminal policy of the EU*

While European law enforcement systems have for long had "freezing", and in particular "seizure" mechanisms, the approach of such a measure consisting in temporarily placing assets under the control of justice has been profoundly renewed at international[1] and European level over the last twenty years. At the international level, several instruments have led to the development of seizures for the purpose of confiscation in the Member States. At EU level, the field of seizures has been – as a continuation of the field of confiscations – one of the 'privileged areas'[2] where EU law and criminal law have been brought together.

[1] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna 1988), United Nations Convention against Transnational Organized Crime (Palermo, 2000), United Nations Convention against Corruption (Merida, 2003). At the level of the Council of Europe: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 1990).

[2] LIONEL ASCENSI, *Droit et pratique des saisies et confiscations 2019-2020*, Dalloz, 2019, 00.005.

As a result of the desire to bring the fight against crime to the patrimonial (economic) field, such a strategy has led national and European legislators to develop and enhance the use of the confiscation measures. To this end, seizures have quickly become an essential tool, i.e. serving no longer only as measures aimed to truth the truth (probational function), but also (and above all) as measures ensuring the enforcement of confiscations that may be ordered at the end of criminal proceedings, whether they are proceedings conducted within the national framework or those conducted in another Member State of the Union. Indeed, according to the now famous formula, in order to ensure that the 'crime does not pay'[3], the confiscation measure had to be incurred more frequently. However, in order to ensure that such a measure is effectively implemented, it was necessary to organise the placing under judicial control (and the management) of confiscable assets from the pre-trial phase of the criminal proceedings. Convinced of the crucial role played by an effective link between confiscation and seizure, national and European legislators have been driven to promote the deployment of mechanisms designed to organise, facilitate and consolidate this link.

This general context, drawn up briefly, already points out all the interest but also all the difficulties of comparing the legal systems, and, in this case, the German, Belgian, French, Italian, Dutch and Romanian systems.

1.2. *Interest and difficulties of the comparison*

On the one hand, the increasing attention and renewed approach of national lawmakers towards seizure has led to numerous and recent transformations of the applicable legal frameworks, which has led to a relative instability or uncertainty in the analysis and comparison. On the other hand, while the objective of this collective research – dedicated to confiscation measures in Europe – requires isolating and focusing attention on the legal mechanisms that organise the freezing and confiscation relationship, the fact remains that domestic systems are not designed in this way and, on the contrary, mix various provisions that are both specifically founded and activated by this link and more generally applicable to all types of seizure. In other words, the main difficulties include legal frameworks that have sometimes been built up in successive layers as national texts have been reformed and European instruments

[3] Communication from the Commission to the European Parliament and the Council - Proceeds of organised crime: ensuring that 'crime does not pay', COM/2008/0766 final.

transposed, without, in particular, the different types of seizures and procedures being distinguished according to a clear and common criterion; in particular, without the criterion of the purpose of the seizure (probative, compensatory, patrimonial, etc.) constituting the distinctive criterion. These difficulties do not in any way detract from its interest in the comparison, quite the contrary. This is all the more so as the Union has recently adopted the first Union regulation in this field in criminal matters[4]. The comparison thus makes it possible to evaluate recent changes and anticipate the promised transformations while placing them within the framework of the Union's criminal policy, whose ambitions, failures and successes (real or potential) are thus usefully revealed.

It is true, however, that these difficulties require a delicate exercise. What is required is to unravel complex legal frameworks, the complexity of which is fuelled by several and combined factors. First, as mentioned above, the complexity results from the fact that the applicable provisions and standards are not only recent but also evolving – as further amendments are expected as a result of the entry into force of the Regulation. Second, it then results from the regular extension of the scope of freezing procedures, due, on the one hand, to the broadening of the concept of freezing itself within EU law (whether in terms of the type of procedure likely to be included, the procedural framework or the competent authorities concerned) and, on the other hand, to the broadening of the scope of the freezing (as the scope of the confiscation expands). Finally, the complexity results from a weak harmonisation strategy undertaken by the Union, so that the internal diversity of national procedures[5] is maintained or even reinforced while no rationalisation is undertaken.

It is this ambition to go beyond the acknowledgement of complexity that guides the comparative analysis. To achieve this, it is proposed to differentiate, according to a very traditional distinction, between the conditions for the use of freezing procedures in a first part, from the safeguards against the use of freezing procedures, in a second part.

Thus, the first part, by specifying the scope of national measures, will make it possible to identify the features of these procedures, while the second, by presenting remedies and guarantees against freezing procedures, will make it possible to identify the basis for safeguards which guarantee, as required by the EU, respect for fundamental rights.

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[4] Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders (OJ EU| L 303/1).

[5] Diversity within and between national procedures.

2. *Physionomy of the procedures: requirements for the use of freezing*

The complexity and variety (within each national system) of the procedures examined here makes it difficult to establish any typology or classification. Nevertheless, the comparison makes it possible to identify constants, and thus the common points or points of convergence of the systems (2.1), but also to isolate variants, and thus differences or points of divergence between the systems (2.2.).

In so doing, the degree of approximation of systems, possible points of friction or tension and, consequently, the triggers and obstacles to the circulation of freezing orders within the Union, which are known to be as much conditioned as they are conditioned by the effectiveness of the domestic mechanisms in place, are revealed.

2.1. *Convergence of national frameworks: a relative increase in similarities*

The comparative analysis results in the uncovering of an apparent paradox. Indeed, the fact that national systems are converging does not necessarily imply the fostering of mutual recognition.

2.1.1. *The concept of freezing*

In the legal systems under consideration, it is through "seizure" procedures that Member States implement EU law requirements relating to freezing.

The concept of "freezing" appears broader and has the advantage of encompassing, for the purposes of mutual recognition, all measures aimed at "prevent[ing] the destruction, transformation, removal, transfer or disposal of property with a view to [its] confiscation"[6]. The regulation thus joins the directive that defines freezing as: "the temporary prohibition of the transfer, destruction, conversion, disposal or movement of property or the temporarily assuming the custody or control of property"[7].

Framework Decision 2003/577 was aimed at "any measure taken by a competent judicial authority in the issuing State to temporarily prevent any destruction, transformation, removal, transfer or disposal of property subject to confiscation or evidence" (French version translated). More laconically, the English version of the Framework Decision provides that the terms "freezing order" mean "property that could be subject to confiscation or evidence".

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[6] Art. 2 Règlement 2018/1805.

[7] Art. 2 Directive 2014/42.

Thus, gradually, the nature of the authority responsible for the issuing of the freezing order, has disappeared from the definition, while the temporary nature of the measure has been highlighted, as has the variety of legal operations that constitute its manifestation.

The inclusive approach – for the purposes of harmonisation and mutual recognition – thus allows European rules to be based on the very wide variety of national provisions without disrupting (or therefore erasing) their particularities and, as the case may be, their inconsistencies.

On this common basis, all the systems under study have in common that they provide for mechanisms – sometimes specific or separate, sometimes combined or confused with existing mechanisms – aimed at guaranteeing the future confiscation of property and having as their main features: a temporary nature, of indeterminate duration, inscribed mainly in the pretrial phase and therefore subject to the regimes and guarantees that characterize that phase.

Thus, first of all, the domestic procedures converge with regard to the objective pursued, which is to guarantee the effective execution of any confiscation measure. This confirms the finding of the "Comparative law study of the implementation of mutual recognition of orders to freeze and confiscate criminal assets in the European Union"[8], which concluded that "in practice, freezing orders are used for similar purposes in all Member States"[9].

The purpose of confiscation, often introduced recently as a result of the adaptation of national legislation to European requirements, is indeed present everywhere. However, depending on the case, it is isolated – and benefits from a specific regime – or linked to other objectives – whose regime it follows. In this respect, the design and construction of the confiscation mechanism seems to be crucial. Thus, the "confiscatory purpose" may vary the applicable legal framework. However, this variation may be further increased depending on the type of confiscation envisaged (extended, non-conviction based) and the type of asset to be confiscated (immovable, intangible, etc.). And, it is not always easy to understand the reasons and legitimacy of these variations, especially when, as in France, for instance, the choice between one legal framework and another is partly open to the authorities.

Such variations can also be explained by the fact that the nature of the measure is not perfectly and uniformly established. As already noted in the above-mentioned comparative study, depending on the system, freezing can be designed as a coercive or precautionary measure. How-

[8] Luxembourg: Publications Office of the European Union, 2014 (available online).
[9] P. 46.

ever, in all the systems studied, although seizures may be ordered after conviction, the common denominator is the possibility of seizures during the pre-trial phase, pending a confiscation order. It should also be noted that, with some reservations, the measure is in principle optional and not mandatory[10].

Thus, the other significant common denominator is the nature of the measure itself, which results both from its provisional nature[11] (and therefore its liability to revocation/termination) and from its inclusion in the pre-trial phase. The supreme or constitutional courts[12] then deduce from this the inapplicability of the guarantees of Articles 6 and 7 of the ECHR. In view of the autonomisation of the confiscatory purpose, it is questionable whether the weakness of the standard of protection lies in the combination of these two characteristics (provisional, on the one hand, and falling within the pre-trial phase, on the other) or only in one and in particular its provisional and revocable nature.

This question is linked to the issue of time limits (to request and/or pronounce the measure) and the issue of the duration of the measure. In-

[10] In Germany, if they are "cogent reasons to believe that the assets are liable to confiscation", the seizure is the rule. In Romania, seizure is mandatory in case of mental illness. In Italy, only the "impeditive" form seems obliagtory. In France, where confiscation is mandatory, seizure should follow the same regime.

[11] In Germany and in France: it is a «provisional measure»; in Belgium, according to the Court of cassation it is a «precautionary measure which does not have the character of a penalty"; in Italy, it is a "precautionary measure", which, as regards the type of seizure that is of primary interest here, is called «preventive». As for the Netherlands and Romania, although not explicitly specified in the national reports, the approach to seizure for the purpose of confiscation appears similar.

[12] In 2005, the Belgian Court of Cassation held that "a freezing measure is a precautionary measure which does not have the character of a penalty". It follows that the guarantees attached to Articles 6 (fair trail) and 7 (legality) of the European Convention on Human Rights do not extend to them (Cass. 22 June 2005, *Pas.*, 2005, n° 365). This Court also stated that "the freezing provided for in Articles 35 and 35-*ter* of the C.C.P, the formalities of which are specified in Article 37 of the C.C.P., are consistent with Article 1 [of Additional Protocol n° 1 of the European Convention on Human Rights]. These provisions also satisfy the principle of legality and the rule of law » and that "the respect of the procedural safeguards provided for by the law at the time of the freezing is neither prescribed on penalty of nullity, nor substantial" (Cass., 17 October 2006, *Pas.*, 2006, n° 403). In France, the Constitutional Council (Conseil constitutionnel) has found the provisions governing the special criminal seizures consistent with the Constitution. The Council stated that sufficient guarantees are provided, sine the measures are ordered by a magistrate and can only refer to assets likely to be confiscated in case of a criminal conviction, since any person claiming rights on the asset may request the public prosecutor, the general prosecutor or the investigating judge to release the seizure, and since appeals can be lodged before the investigation chamber of the Court of appeal against the orders allowing the seizure (CConst., déc. n° 2016-583/584/585/586 QPC du 14 october 2016, Société Finestim SAS et autre [Saisie spéciale des biens ou droits mobiliers incorporels], JORF, 16 october 2016 text n° 48).

deed, most of the systems studied are featured by the absence of a time frame for the measure: no deadlines nor time limits are set for the measure. However, the common explanation put forward is precisely due to the provisional nature of the measure and the purpose pursued: once this purpose has been achieved (or as soon as it is established that it cannot be achieved), the measure must cease. In this sense, the provisional nature of the measure seems to take precedence over any other consideration that may affect or should determine its regime. However, this statement must be qualified immediately since, as mentioned above, the regime (the conditions for the application and enforcement of the measure) varies according to the type of confiscation envisaged and/or the object to be confiscated.

2.1.2. *The legal framework for freezing: a reflection of national procedures*

In addition to the fact that the notion of freezing is understood in all the systems studied through seizure measures, designed – exclusively or not – as provisional measures belonging to the pre-trial phase and as such – except in special cases – subject to the rules and standards of this phase of the procedure, its legal framework is commonly implemented within the national code of criminal procedure. It is therefore in principle within this Code that seizure procedures for the purpose of confiscation are regulated. Only one important reservation should be noted: the mechanism provided for by the so-called anti-mafia code in Italy and the regime – of an administrative nature – applicable to legal persons.

This common point noted, then emerges the very wide variety of seizure mechanisms for the purpose of confiscation. Another common point then appears: there is no unitary regime in the systems studied.

All of them distinguish not only seizures for other purposes (compensatory[13], probative[14], or other[15]), but they also provide for different regimes within seizures for confiscatory purposes. These regimes are gen-

[13] This is particularly the case in Romania, where seizures are made in order to guarantee the property interests of the State and the civil party.

[14] The distinction between evidentiary seizures and seizures for the purpose of confiscation is characteristic of most of the States studied, in particular Germany, Belgium, Italy (see following note) and France. With regard to the latter, the distinction is doubled and complicated by a main distinction between ordinary law seizures (probationary and for the purpose of confiscation) and special seizures (only for the purpose of confiscation).

[15] Italy distinguishes three main forms, the last of which is of particular interest here: first the conservative seizure (art 316-320 CPP), then the probative seizure (art 253-263) and finally the preventive seizure (art 321-323 CPP). The Netherlands also distinguishes three forms, all applicable to seizure for the purpose of confiscation: seizure to secure forfeiture, withdrawal and value freezing.

erally differentiated by considering two criteria: on the one hand, the investigative framework (flagrante delicto, preliminary investigation, "instruction", financial investigation, anti-mafia or corporate proceedings) and on the other hand, the type of confiscation, which is itself determined either by the nature of the seized asset (movable, intangible) or by the nature of the confiscation itself (value/equivalent, extended, general). Thus, the regime of confiscatory seizures appears to be determined first in Belgium and Romania by the investigation framework, and then within each investigation framework by the type of confiscation likely to be considered. Italy seems to adopt, although in a singular way, a similar structure distinguishing in particular the anti-mafia framework and the framework specific to legal persons. In France, Germany, or the Netherlands, it is first and foremost the type of confiscation that appears to be decisive, although the investigative framework also influences the seizure measures that may be considered.

In any case, it is above all the variety of national mechanisms that emerges from a more in-depth examination of national procedures that should now be considered.

2.2. *Divergence of national frameworks: the persistence of differences*

Just as the convergence of systems does not necessarily foster mutual recognition, divergences do not necessarily hamper mutual recognition.

However, it is necessary to distinguish between the question of the variety of "special" procedures for seizures for the purpose of confiscation (2.2.1) and that of the difference between the competent authorities (2.2.2).

2.2.1. *The variety of special frames*

While the national codes of criminal procedure generally constitute the common base for seizure procedures for the purpose of confiscation, the Codes then reflect the variety of seizure procedures. This variety, as noted above, is based on different criteria (mainly the investigative framework and the type of confiscation). Despite differences, however, the seizure regime appears, first and foremost, to be determined by the choices (and criteria) that governed the construction of the confiscation framework.

This allows for a distinction to be made between systems that provide for one, two or three forms/types of seizures that may contribute to the objective of confiscation.

Belgium, Italy and Romania thus seem to retain one form of seizure for the purpose of confiscation. It is called "preventive seizure" in Italy and differs from conservative and probative seizure. However, it is divided into three regimes: the one set out in the CPP (art. 321-323 CPP), the one of the Anti-Mafia Code and the one deriving from provisions applicable to legal persons. Similarly, in Belgium and Romania, the framework for seizure varies according to the procedural framework in which the measure is taken.

Germany and France then distinguish two forms of seizures for the purpose of confiscation on the basis of a different distinctive criterion but which in both cases is linked to the construction of the legal framework for confiscation. In Germany, the CPP distinguishes between the seizure of criminal proceeds on the one hand and the freezing in order to secure value confiscation on the other. In France, the CPP distinguishes between ordinary law seizures on the one hand and so-called special seizures on the other. While at first sight the distinction covers the distinction between evidentiary seizures and patrimonial seizures, it appears that this overlap is in reality only partial. Of course, special seizures only pursue a patrimonial purpose. They must be implemented in the event of confiscation of assets, when the property concerned is immovable, intangible or rights, or, finally, when the seizure is carried out without deprivation of possession. But seizures under ordinary law may also have a patrimonial purpose. Consequently, apart from the above-mentioned cases in which the special seizure procedure is required, the ordinary law procedure may apply.

Finally, in the Netherlands, three forms of seizure are provided for, reflecting exactly the three types of criminal confiscation provided for: forfeiture, withdrawal and value freezing. In addition, there is the special framework applicable to financial procedures (art. 126 CPP and f).

Thus, within each legal system, a variety of procedures are often applicable – sometimes, as highlighted in the French and Dutch reports, with risks of overlaps. This variety leads to little or no variation in the competent authorities. On this point, however, the relative internal unity (i. e. within each system) does not extend to convergence on a comparative scale, as we will see.

2.2.2. *The competent authorities*

As pointed out in the introduction and as highlighted in the above-mentioned comparative study, the competent authority criterion has gradually disappeared from the European definition of the concept of

freezing, both for harmonisation purposes (Art. 2 of the Directive) and for mutual recognition purposes (Art. 2 of the Regulation).

This is due first of all to the fact that the requirement of a "judicial" authority, as provided for in the Framework Decision, departed too far from the practices and provisions of many Member States which entrust the prosecution service, or even the police, with the execution of seizures. This role of the Public Prosecutor's Office and the police is confirmed by the comparative analysis, even if it tends to be combined with the prior (authorization) or subsequent (validation) intervention of the judge.

Union law also reflects this involvement of the judge so that the disappearance of (i. e. silence on) the competent authority in the definition of freezing is only relative insofar as the Directive states in Article 8(4) that "Member States shall provide for the effective possibility for the person whose property is affected to challenge the freezing order before a court, in accordance with procedures provided for in national law. Such procedures may provide that when the initial freezing order has been taken by a competent authority other than a judicial authority, such order shall first be submitted for validation or review to a judicial authority before it can be challenged before a court". As for the Regulation, it states in recital 22 that: "In some cases, a freezing order may be issued by an authority, designated by the issuing State, which is competent in criminal matters to issue or execute the freezing order in accordance with national law, and which is not a judge, court or public prosecutor. In such cases, the freezing order should be validated by a judge, court or public prosecutor, before it is transmitted to the executing authority".

Within the systems under study, as regards authorities vested with the power to request or order freezing measures, half of the Member States entrust the prosecutor and, under his/her control, the police forces to enforce pre-trial seizures. In criminal justice system which have kept the institution of investigating judges, these magistrates also owe jurisdiction to implement such measures. More precisely, two situations may be distinguished: in some countries (Belgium, France, Romania), the prosecutor is the relevant authority, mainly in charge of ordering freezing; in other countries (Germany, Netherlands and Italy), Courts are primarily vested with such a prerogative, and it is only in case of an emergency that the prosecutor and/or police officers may proceed on their initiative.

In more detail, within the first group of countries, in Belgium first, the public prosecutor and the investigating judge may order freezings or seizures during the preliminary investigation, either *in flagrante delicto* or in proactive inquiries, in special inquiry into economic benefit or within

a judicial investigation. The enforcement of the measure may be delegated to police officers.

Then, in France, the public prosecutor, the investigating judge and, subjected to their previous authorization, judicial police officers, may enforce seizures or implement the acts necessary for the seizure of estates and their conservation[16]. Such measures (common law seizures) may be implemented at any stage of the investigation. Nonetheless, this common law framework is complicated by the multiplication of derogatory proceedings, which involve other actors in the undertaking of special seazures. The 2010 *circulaire* relating to the implementation of the Loi du 9 juillet 2010, provides that, in the context of an *in flagrante delicto* or preliminary investigation, the prosecutor shall request the authorization of the freedoms and custody judge (*JLD*). Besides, at the preliminary investigation stage, the previous authorization of the JLD, granted on request of the public prosecutor and by reasoned order, is required to enforce patrimonial, immovable or intangible assets seizures, seizures without deprivation[17].

Finally, in Romania, the prosecutor at the investigation stage and the Court or the Preliminary Chamber Judge at Preliminary Chamber or trial stage, owe jurisdiction to order freezing measures[18] to prevent risks of concealment, destruction, disposal or dissipation of the assets that may be subject to criminal confiscation or extended confiscation or if they feel it necessary to secure the payment of a fine, of court fees or of damages.

Within the second group of countries, in Germany first, criminal courts owe primary jurisdiction to order freezing measures. Nonetheless, when justified by an emergency, seizure may also be ordered by the prosecution service or by police and customs officers; a court confirmation is nonetheless required when immoveable estates were seized[19].

Then, in the Netherlands, the public prosecutor owes jurisdiction to order freezing measures with the aim of confiscation, but subjected to a prior authorization from an examining magistrate (*rechter-commissaris*). Furthermore, in «criminal financial investigations»[20], the examining judge may deliver a general authorization providing the public prosecutor with the power to issue freezing orders without requesting further specific authorizations. Finally, police officers may, subjected to the authorization of the examining magistrate, carry out seizures on their own

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16 Art. 706-42 CCP.
17 Art. 706-150 to 706-158 CCP.
18 Art. 249 (1) CCP.
19 Sections 111b ff. StPO; section 111j StPO.
20 Art. 126 until 126fa CCP.

initiative in the course of enforcing others of their specific investigation prerogatives[21].

Finally, similarly, in Italy, preventive seizures may be ordered by a judge on request of the public prosecutor[22]. But, in case of an emergency making the awaiting for the Court decision likely to impair the proceedings, the seizure may be ordered by the public prosecutor and judicial police officers may also act on their own initiative, subjected to an a posterior control of the public prosecutor. Preventive seizures may also be ordered by the President of a criminal Court, acting if necessary *ex officio*, on ground of the *Anti-Mafia Code*[23]. In case of an emergency, seizure may be ordered before any hearing, on request of either the district Prosecutor, the National Anti-Mafia and Counter-Terrorism Prosecutor, the Chief of Police or the Director of the Anti-Mafia Investigation Directorate. The decision must then be approved by the court itself[24].

3. *Remedies and guarantees: safeguards against the use of freezing*

In the same way as the distinction made in Article 8 of the Directive, a distinction must be made between the general guarantees (3.1.) applicable to all measures and to all persons (suspect, victim, third party) and the specific guarantees for freezing (3.2.).

3.1. *The application of general guarantees*

In addition to the general affirmation that the Directive (cons. 33 and 38) and the Regulation (Art. 1.2) generally respect fundamental rights, the right to an effective remedy is particularly guaranteed.

This requirement is specifically recalled by the Directive in Article 8.1: "Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights".

This requirement is largely met in the systems studied which provide remedies against the decision to seize and/or the conditions for its execution, including the (non-)return of property.

These are ordinary law appeals applicable to measures taken during the pre-trial phase and/or appeals specially organised to challenge deci-

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[21] Art. 103 CCP.
[22] Article 321(1) CPP.
[23] Article 20 of Legislative Decree no. 159 of 2011.
[24] Article 22 of Legislative Decree no. 159 of 2011.

sions and the execution of freezing measures (this is particularly the case for appeals relating to the return of property). Remedies are generally not suspensive and the availability of an appeal is variable.

The control exercised generally concerns the legality and proportionality of the measure; it is on this occasion that the evidentiary conditions required for the adoption of the measure are assessed. These tend to be limited to the verification of the potential confiscability of assets in all systems, possibly with a special condition of subsidiarity/proportionality of seizure (BE, RO).

3.2. *Specific guarantees*

In addition to the "general" right to an effective remedy, the Directive lists guarantees specifically attached to freezing measures, whether in respect of the implementation of the freezing (3.2.1) or the challenging of the freezing (3.2.2).

3.2.1. *Enforcement of a freezing order*

As for the implementation of the freezing measures, two guarantees, specifically set out in the Directive[25], concern the right to information and deadlines. With regard to the latter, it has been seen that while national systems do not provide for pre-determined time limits for the execution of the freezing measure, all procedures imply that the measure must cease (and the remedies for claiming cessation by any interested person are organised for this purpose) as soon as the conditions for its adoption are no longer met.

With regard to the right to information, that is to the communication of the freezing order, subject to the silence on this point in the case of Italy and Romania, the systems studied lay down the conditions for this communication. These are more or less detailed and explicit. The communication in Germany is based on the analogous application of the procedure applicable to probationary seizure. In France, notification is explicitly provided for; it may be postponed for the requirements ("*nécessités*") of the investigation. The same is true in Belgium, where the

[25] Member States shall take the necessary measures to ensure that the freezing order is communicated to the affected person as soon as possible after its execution. Such communication shall indicate, at least briefly, the reason or reasons for the order concerned. When it is necessary to avoid jeopardising a criminal investigation, the competent authorities may postpone communicating the freezing order to the affected person (8.2).

The freezing order shall remain in force only for as long as it is necessary to preserve the property with a view to possible subsequent confiscation (8.3).

Court of Cassation has specified that notification is a formality without nullity, the absence of notification not being in itself an infringement of the rights of the defence. In the Netherlands, finally, the seizure for value freezing must be notified.

3.2.2. *Challenging a freezing order*

In line with the requirements of the Directive, two special guarantees concern the challenging of the freezing measure: on the one hand, the right to restitution of property[26] and, on the other hand, compensation in the event of wrongful freezing.

The right to restitution is guaranteed by the consequences that must be drawn in all systems from the provisional nature of the measure: as soon as the conditions for the seizure are no longer met, the property must be returned. However, as in France, restitution may be subject to the existence of a prior request by the owner of the property. The right to restitution is also limited in cases where the property must be destroyed and/or presents a danger.

Besides, with regard to the hypothesis of wrongful freezing, when it is organised, it is the procedure – often very restrictive – of the State's liability that applies (BE, DE, FR, NL); it may be combined with a civil compensation procedure (DE, NL, RO).

Finally, the possibility of obtaining compensation for a freezing order is generally organised, either before the criminal courts or before the civil courts. Various restrictions may limit this compensation. In Germany, for example, the claim for compensation is excluded if the court has confiscated the assets[27], or if the accused intentionally or grossly negligently caused the seizure[28]. In France, although the law provides for the possibility for the owner who regains possession of his property to obtain compensation, this is not a general right, as it relates only to "the loss of value that may have resulted from the use of the property"[29]. Compensation is therefore only available in relation to the loss of value in respect of the property itself, and not the losses incurred from being deprived from use of the property. If the property has been disposed of in the course of proceedings, the amount received on the sale is returned without being re-assessed according to changing market values.

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[26] Frozen property which is not subsequently confiscated shall be returned immediately. The conditions or procedural rules under which such property is returned shall be determined by national law (8.5).

[27] Section 5 para. 1 No. 4 StrEG

[28] Section 5 para. 2 StrEG

[29] Art. 41-5, par. 3, CCP.

JOHN A.E. VERVAELE - WOUTER S. DE ZANGER*

PROCEDURAL ASPECTS OF CONFISCATION

SUMMARY: 1. Introduction. – 2. Provisions regulating the confiscation proceedings. – 3. Authorities requesting and imposing confiscation orders. – 4. Standard of proof. – 5. Time limits. – 6. Rights, guarantees and legal remedies. – 7. Conclusion.

1. *Introduction*

This chapter provides a comparative analysis of the procedural aspects of the legislation regulating the confiscation procedures in six European countries. The respective procedures differ rather strongly in both design and in substance. This finding can hardly surprise, since the domestic procedural part of the confiscation process remains mostly untouched by international and European legislation.

This is for instance different for the international cooperation aspects of confiscation. The United Nations Convention against Transnational Organized Crime (UNTOC) and the United Nations Convention against Corruption (UNCAC) both contain obligations related to international cooperation in confiscation and asset recovery cases[1]. At the European level, the influence of the European Union on this topic is even stronger. Council Framework Decision 2006/783/JHA and (as of 19 December 2020) Regulation (EU) 2018/1805 oblige EU member states[2] to apply the principle of mutual recognition to the recognition and execution of foreign confiscation orders.

As a consequence, the legal instruments regulating this cooperation are under a strong international and European influence. The grounds for non-recognition and non-execution are for instance limited in article 19 of

* J.A.E. Vervaele is professor in economic and European criminal law at Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE). W.S. de Zanger is postdoctoral researcher and assistant professor at Utrecht Centre for Accountability and Liability Law. Both are affiliated with the Willem Pompe Institute for Criminal Law and Criminology, Utrecht University.

[1] See article 13 UNTOC and articles 54-56 UNCAC.

[2] Except for Denmark and Ireland, see Recitals 56 and 57 preceding the Regulation.

the recent Regulation. The substantial aspects of confiscation are also increasingly affected by European legal instruments. Directive 2014/42/EU strives at a certain harmonization of confiscation laws of the member states[3] and therefore prescribes member states to, among other things, introduce forms of extended and non-conviction based confiscation.

The international and European influence on the *procedural* aspects of national confiscation regimes however remains rather minimal. They are considered to fall under the institutional autonomy and discretion of the member states. This does not mean that the European legislation leaves procedural aspects of confiscation completely untouched. The harmonizing nature of the European instruments might have an influence on the confiscation procedure as well. This is because the EU is increasingly looking to approximate the national laws in order to allow for forms of confiscation that are new to some of these legislations, more particularly extended confiscation[4]. This might have procedural consequences for the confiscation procedures of these member states, for instance as to questions concerning (the division of) the burden of proof and the standard of proof applied by judges.

Extended confiscation is laid down in article 5, paragraph 1 of Directive 2014/42/EU. Under this provision, member states must enable the confiscation of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where:

> 'a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct'[5].

The reference to the disproportionality between the property held by the defendant and his lawful income as a relevant circumstance suggests that the burden proof might lay (partly) with the defendant. A closer look on this European instrument however shows that the member states still enjoy much discretion in applying rules of evidence. Although this provision seems to aim at introducing forms of extended confiscation in the member states, it does not strictly oblige member states to do so. The cited article of the Directive merely obliges member states to allow for confiscation in cases where the court is satisfied that the property in question stems from crime. The suggested alteration or division of the burden

[3] See Recital 19 preceding the Directive.
[4] See further in this volume.
[5] Article 5, paragraph 1.

of proof (on the basis of the disproportionality of the property to the lawful income) is not imperatively prescribed by the Directive[6].

The term 'satisfied' in article 5 of the 2014 Directive (cited above) furthermore suggests that a *lower standard of proof* may be introduced in confiscation procedures. But again, the precise design of the procedure is left to the member states. The directive leaves them discretion as to the question how to interpret the term 'satisfied'[7]. They are not obliged to implement a lower standard of proof than the usual 'beyond a reasonable doubt' or comparable standards such as the 'innermost conviction' of the judge.

This also apparent from the wording of Recital 21 preceding the Directive, which states that member states *may provide* that it is sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable that property has been obtained from criminal conduct. It is stated nowhere that lower standards of proof *must* be applied.

These two questions of the burden of proof and the standard of proof are thus, just as other procedural aspects of confiscation, still left to the discretion of the member states. That triggers the need to analyse and compare the national systems. By assessing a possible 'common ground' and by mapping relevant differences, a state-of-the-art picture can be provided, which might prove useful in case harmonization at the (international or) European level will be sought in the future. In order to contribute to the further discussion on how to improve confiscation in the European Union, this chapter therefore provides an overview of the procedural aspects of the studied confiscation regimes and compares these regimes on several crucial aspects.

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[6] See also Recital 21 preceding the Directive, which states that the fact 'that the property of the person is disproportionate to his lawful income *could be* among those facts giving rise to a conclusion of the court that the property derives from criminal conduct' (italics added). See also Recital 10 preceding the Council Framework Decision 2005/212/JHA, which states that the aim of that instrument was to 'ensure that all Member States have effective rules governing the confiscation of proceeds from crime, *inter alia*, in relation to the onus of proof regarding the source of assets held by a person convicted of an offence related to organized crime.' Article 3 of that framework decision however did not oblige any alteration to the onus of proof in national law. At the international level, article 12, paragraph 7 UNTOC, stipulates that States Parties '*may consider* the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings' (italics added).

[7] 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. Challenges and Perspectives on Asset Recovery in the EU*, Oxford/Portland: Hart 2017, 5-7.

This analysis is based on the country reports on the confiscation regimes in Belgium, Italy, France, Germany, Romania and the Netherlands, as published in section II of this book[8]. More specifically, part 2.3 of the questionnaire for the country reports deals with the procedural aspects of confiscation and therefore chapters 2.3 of the country reports form the basis of this horizontal analysis[9]. This chapter follows the questions of this part of the questionnaire, hence dealing with the legal provisions regulating the confiscation proceedings (§ 2), the authorities requesting and imposing confiscation (§ 3)[10], the standard of proof applied when imposing a confiscation order (§ 4), time limits in place for such a decision (§ 5) and the rights and guarantees of the person addressed and the legal remedies open to him (§ 6). The chapter ends, in § 7, with a conclusion.

2. *Provisions regulating the confiscation proceedings*

Before describing the specific features of confiscation procedures in more detail, a first, short typology of all six confiscation regimes might provide some clarification. Practically all of the regimes differentiate between forms of confiscation and the procedural rules often differ accordingly. It is therefore necessary to sketch these types of confiscation, in order to understand their procedural characteristics. This description is accompanied by mentioning the relevant legal provisions regulating the confiscation proceedings.

In *the Netherlands*, three criminal sanctions can be identified as serving a confiscation purpose[11]. They differ in their scope: the confiscation order (*ontnemingsmaatregel*) of article 36e of the Dutch Criminal Code (CC) can solely target the proceeds of crime, whereas the withdrawal from circulation (*onttrekking aan het verkeer*, hereinafter: withdrawal, art. 36b-36d CC) and the forfeiture (*verbeurdverklaring*, art. 33-33a CC) can also aim at the instrumentalities of criminal offences, in-

[8] If information was unclear or missing in a country report, the authors thereof were asked to provide additional information.

[9] Except for the Italian country report, which deals with the procedural aspects of confiscation in § 2.2.

[10] We have chosen to take questions 2.3.2 and 2.3.3 of the questionnaire together in one paragraph.

[11] Besides from these sanctions imposed by a judge, out-of-court means of confiscation are also in place, both consensual (see art. 74 CC and 511c CCP) and unilaterally by the public prosecutor (art. 257a CCP). These forms of confiscation are not an integral part of the analysis.

cluding for instance the objects used to commit or prepare the offence. The confiscation order is value-based, while the other two sanctions target specific objects; they are forms of object-based confiscation. The withdrawal specifically targets 'dangerous' objects, of which the uncontrolled possession is in breach of the law or contrary to the public interest. All of these sanctions[12] are ascribed a criminal nature by the Dutch legislature and they are imposed in criminal proceedings.

The confiscation order can however only be imposed in a separate procedure that is governed by a specific title in the Dutch Code of Criminal Procedure (art. 511b-511i), although this procedure can be parallel to the criminal trial. The judge always has to provide two separate rulings[13]. The sanction of forfeiture is imposed in the regular criminal trial. The withdrawal is usually also imposed in the criminal trial, but it can also be the result of a specific, separate procedure.

Belgian law provides for two forms of confiscation, either as an accessory penalty in addition to a main penalty (criminal confiscation) or as a safety measure aimed to put dangerous products or objects out of circulation. The latter is independent of a criminal conviction. The former is the most prominent in the country report and therefore the main object taken into account in this comparative analysis.

This criminal confiscation is governed by articles 42 to 43-*quater* of the Belgian Penal Code. Besides from these provisions, specific rules apply to confiscation in relation to certain criminal offences[14]. This form of criminal confiscation aims at property related to the criminal offence or, if this property cannot be transferred, a sum of money equivalent to the value thereof. It can aim at *corpus delicti*, instruments of the offence, proceeds of the offence (objects that have been produced by the offence, e.g. counterfeit banknotes and illegal narcotics), profits derived or generated by the offence, additional patrimonial benefits removed from the offence (extended confiscation), and assets of a criminal organization. Different rules govern these different types of objects liable to confiscation and dependent on the mentioned type of property confiscated (corpus delicti, instruments of the offence etc.), differences exist on whether con-

[12] Although the confiscation order and the withdrawal are characterized as non-punitive 'measures' and the forfeiture qualifies as punitive 'penalty', this difference is not regarded as having an impact on the practical application of these sanctions.

[13] A current legislative proposal aims to amend the law in such a manner, that confiscation orders will as rule be imposed in the regular criminal procedure and only in 'difficult' cases a separate procedure will be followed.

[14] A preliminary draft to change the Belgian legislation with an aim of enhancing consistency and simplification is currently under discussion.

fiscation is compulsory or optional, on whether confiscation 'by equivalent' (payment of a sum of money equivalent to the value of the property that should have been confiscated), extended confiscation and third-party confiscation are possible.

In *France*, article 132-21 of the Criminal Code lays down the legal regime for criminal confiscation. It differentiates between several types of confiscation, and is supplemented by special legal regimes allowing for specific forms of confiscation after conviction for a specific criminal offence (such as theft or corruption). Since in French law the confiscation measure (with the exception when it concerns customs confiscation) is part of the 'regular' criminal law and is imposed as a criminal sanction, the general rules of criminal procedure, as laid down in the Code of Criminal Procedure, apply to its imposition. Articles 706-141 and further of the French criminal code furthermore provide for legal provisions concerning the enforcement of confiscation measures. The confiscation is primarily a penalty, but may in some cases present itself as a security measure, in which case it is not primarily targeted at a person, but at the property itself[15]. It can be imposed as an additional, alternative or principal penalty. The French confiscation sanctions can be imposed after a conviction for a criminal offence for which the Criminal Code stipulates that confiscation is possible.

Under *German* law, confiscation is considered a criminal 'measure'. Confiscation proceedings are part of the criminal proceedings and therefore governed by rules of criminal procedural law. The different types of confiscation are laid down in sections 73 until 76a of the German criminal code (*Strafgesetzbuch*, *StGB*). The confiscation measure can target both illegal profits from crime and objects that were generated by or used in the commission or preparation of the crime. It requires a criminal conviction, either by judgement or by penal order (*Strafbefehl*)[16]. In case no link can be established between the offence the defendant is charged with and the objects to be confiscated, extended confiscation is a possibility.

Confiscation of illegal profits (section 73 StGB) and extended confiscation (section 73a StGB) are considered to be of a restorative nature since they aim at reallocating assets[17]. They require the commission of a

[15] For this reason, the confiscation is in that case for instance not subject to the principle of the necessity of penalties.

[16] This is a simplified procedure by which a judge rules on the case without a public oral hearing.

[17] Although scholars have argued that since a gross profit is confiscated (thereby excluding criminal costs from the calculation of the profit), the confiscation holds the character of a criminal (punitive) sanction, both the German Constitutional Court and the German Supreme Court confirm the restitutive character of the criminal confiscation measure.

criminal offence, but not the establishment of personal guilt of the defendant relating to the offence giving rise to confiscation. This is different for confiscation of objects generated by or used for the commission or preparation of the offence (section 74 paragraph 1 StGB), which is considered to be a punitive sanction. Such confiscation requires personal guilt of the defendant and is part of the sentencing process. No personal guilt is however needed if it concerns confiscation of objects that pose a danger or that are supposed to be used for the commission of a crime (section 74b paragraph 1, under b StGB). Such confiscation does not aim at punishing the offender, but at protecting the general public. It is hence considered to be a preventive measure.

Both mentioned forms of confiscation can furthermore take the shape of so-called 'independent confiscation' (section 76a StGB). This is a form of non-conviction based confiscation in case the defendant cannot be prosecuted or convicted, but the court establishes the elements of a criminal offence (and other requirements for confiscation). The inability to convict can be the result of either factual or legal obstacles to prosecution, e.g. if the prosecution is time-barred. This legal instrument enables confiscation in case the defendant is dead, is ill and unable to stand trial, or if he cannot be identified. This latter type is called 'non-conviction based confiscation of proceeds of unknown origin' (section 76a paragraph 4 StGB) and mainly serves a preventive aim. It is the only form of 'independent' confiscation that is limited to a list of specific offences[18].

Romanian confiscation law knows three different types of confiscation: criminal confiscation, non-conviction based confiscation and extended confiscation. They are all ascribed a predominantly criminal nature and are hence regulated by the Romanian Criminal Code and the Code of Criminal Procedure. The first type of confiscation is governed by article 112 of the Romanian Criminal Code and serves as a security measure. It can be imposed on a person who has committed an unjustifiable criminal offence, also in case no penalty is imposed on him. A conviction for this offence is not necessary, so non-conviction based confiscation is also possible under this legal provision. In that case, confiscation should however only be ordered insofar as it is not incompatible with the reason for closing the case, for instance when the statute of limitations is reached or a complaint required to start the criminal proceedings was withdrawn[19]. This criminal confiscation can aim at objects produced by an offence, (intended to be) used to commit an offence, used

[18] Compare paragraphs 1-3 with paragraph 4 of section 76a StGB.

[19] In this respect, attention should be paid to judgement of the European Court of Human Rights on 1 March 2007, appl.no. 30810/03 (Geerings v. the Netherlands).

after an offence in order to escape or to ensure the retention of the proceeds of the offence, given to bring about the commission of an offence, acquired by the offence or the possession of which is prohibited by criminal law. Criminal confiscation is considered to be of a mandatory nature.

The second type of confiscation is regulated by article 112[1] of the Criminal Code. This extended confiscation is possible if the defendant is convicted of one of the seventeen types of offences listed in that article, that offence is likely to procure a material benefit and is endangered with a term of imprisonment of at least four years. In that case, imposition of a confiscation order is possible if the value of the assets acquired by the defendant in a period of five years before and after the commission of the offence, 'clearly exceeds' his lawfully obtained revenues. The court must be convinced that these assets originate from criminal activity similar to those provided in the list of (types of) offences.

In *Italian* law lastly, a great variety of forms of confiscation exist. This is due to several legislative interventions targeted at mafia types of crime. First of all, there is 'traditional confiscation', which has been in place for a long time. It can aim at objects that have served or were used to commit the crime, or the items that constituted the product or the profit of the crime. It is governed by article 240 of the Italian Penal Code and provisions of the Italian Code of Criminal Procedure. There is a specific provision relating to assets that are the profit or product of computer crimes. These laws do not, however, contain a comprehensive framework, since implementing and transitional provisions also play an important role on this topic.

This traditional confiscation can be optional or mandatory, dependent on the assets that are targeted. It is optional if it concerns assets that served or were used to commit the offence, and assets that are the product or profit of the crime. In this case, confiscation is only possible in the event of a conviction. Confiscation is mandatory if it aims at assets constituting the price of the crime or the compensation given or promised to induce, instigate or cause another person to commit the crime, or at assets related to specific computer crimes. It is also mandatory if there are assets whose manufacture, use, carrying, possession or disposal constitutes a crime. In that case no conviction is necessary.

Confiscation can also take the shape of extended confiscation, in case the defendant is convicted (or has plea bargained) for a specifically listed offence and there is a disproportion between the value of the assets and his income declared for tax purposes or his occupation. This extended confiscation (or confiscation 'by disproportion') is laid down in article 240-*bis* of the Italian Penal Code.

Besides from such traditional confiscation, the so-called Anti-Mafia Code contains several possibilities to confiscate assets. Confiscation is a preventive measure here, which is applied *ante delictum*, prior to a conviction ('preventive confiscation'). This form of confiscation is imposed by a specialized magistrate. It has both subjective and objective requirements. The first relate to the defendant: it must concern a 'dangerous subject', a person who is suspected of participating in mafia associations or associations devoted to the commission of serious crimes, or a person who lives off the commission or the proceeds of crime. These people must, as a second requirement, contain 'social dangerousness'. They must have a predisposition for crime, which must be inferred from their personality. The objective requirements on the other hand relate to the asset to be confiscated. They must be available to the defendant and there must be 'sufficient clues' (regarding seizure prior to preventive confiscation) that they stem from an illegal origin.

Preventive measures can be personal (affecting the person) or material (affecting assets). As of 2008, material measures can be imposed irrespective of the imposition of any personal measures, although the 'social dangerousness' of the person in charge of the asset must still be established. This dangerousness does not need to exist at the time of the imposition; it is sufficient that the defendant was dangerous to society in the past and has accumulated considerable wealth.

Due to the variety of the Italian confiscation landscape, an all-encompassing overview cannot be provided here. It is important to notice that other important forms of confiscation exist, such as but not limited to administrative confiscation, confiscation relating to labour law, urban confiscation (which has spurred both academic debate and several judgements by the European Court of Human Rights) and vehicle confiscation.

3. *Authorities requesting and imposing confiscation orders*

In France, Belgium and the Netherlands criminal confiscation is imposed as part of the criminal sentencing process. Therefore, in these countries confiscation sanctions can only be imposed by a criminal judge. They can be requested by public prosecutors, but whether such a request is a prerequisite depends on the legal system, the type of confiscation sanction and the object it targets. In the Belgian system for instance, it depends on the object to be confiscated whether a request by the public prosecutor is necessary. In case the confiscation is mandatory, no requisi-

tion is required. In case confiscation is optional, the judge[20] has discretion on the matter and – thus – the public prosecutor must request confiscation.

The German confiscation measures are also imposed by a criminal judge, either in the final judgement in the regular criminal trial or by means of a penal order, (*Strafbefehl*). There is however a specialized option in place: the court has the option to postpone the confiscation decision if it would considerably delay the regular criminal trial. In that case, a separate confiscation procedure is followed. In both cases, confiscation is ordered *ex officio* without a request by the public prosecutor. This is different if it concerns non-conviction based confiscation (so-called 'independent' confiscation); in that case a request by the prosecution service or the private prosecutor is required. The judge then has discretion concerning the possible imposition of the confiscation.

Apart from such imposition of confiscation by rather 'regular' authorities, confiscation is regularly characterized by special procedures. Confiscation is seen as 'something different', for which particular legal arrangements are deemed necessary. Similar to the mentioned postponed procedure in German law, in the Netherlands the imposition of a confiscation order (*ontnemingsmaatregel*) can only take place in a procedure that is legally separated from the regular criminal procedure. Although both procedures can take place simultaneously and before the same judges, it is always required that two separate decisions are taken[21]. None of the other criminal sanctions has such a special position in Dutch criminal law.

Italian law also has special procedures in place in order to confiscate assets. Given the many legislative efforts to target serious (mafia type) crimes, this can hardly surprise. Here, the authorities imposing the confiscation differ according to the type of confiscation. Traditional confiscation (art. 240 Italian Penal Code) is imposed by either the trial judge who pronounces the sentence of conviction, or the enforcement judge. The latter is a judge who decides on issues relating to the effective enforcement of the sentence. He is competent in case confiscation is mandatory, and he is obliged to order the confiscation if the trial judge hasn't ruled on it in the trial stage.

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[20] The judge imposing a confiscation sentence can either be a court of law or an investigating court, when it decides as a court of judgement 'on a suspension of the pronouncement of the sentence or internment'.

[21] This distinguishes this Dutch system from the German, *optional* postponed confiscation procedure. In the Netherlands, a similar *optional* division of the criminal trial and the procedure leading to the imposition of a confiscation order is currently under discussion.

Extended confiscation as laid down in article 240-*bis* Italian Penal Code can solely be imposed by the enforcement judge after a request by the public prosecutor[22]. He does so in a procedure that has, in principle, an informal character without hearing the parties. The defendant however has the possibility to oppose the decision by the enforcement judge within 30 days. In that case, a hearing in chambers will be scheduled in which cross-examination is applied. Whether the confiscation is imposed with or without a hearing therefore depends on the actions of the defendant or other interested parties[23].

Confiscation as a *preventive measure* is imposed by a specialized magistrate, who decides after a simplified, inquisitorial procedure that shows strong differences from the regular penal procedure. This procedure is independent from the regular criminal procedure, although it is still part of the same *genus*: the imposing magistrate here is part of a specialized section of a criminal court.

All types of Romanian confiscation are imposed by a criminal court. A public prosecutor, or any other party that is competent to formulate requests with regard the criminal action can request their imposition. The procedure that leads to this imposition depends on whether it concerns criminal or extended confiscation on the one hand, or non-conviction based confiscation on the other. Criminal and extended confiscation are ordered when the final decision on culpability is rendered. In general, this is the decision in which the defendant is convicted and sentenced to a penalty. Romanian criminal law furthermore offers two 'solutions' that exist after the court has ruled on the culpability. The court may at that point also choose not to order the execution of the penalty (but to waiver the imposition of the penalty), or to postpone the enforcement of a penalty. In both these options, (regular) criminal confiscation can be ordered as well.

Non-conviction based confiscation is – per its nature – not imposed in a decision convicting the defendant. It can be ordered in the mentioned situations where the court decides to waiver the imposition of the penalty or to postpone the enforcement of the penalty, but also in the situation where the public prosecutor decides to drop the charges or to close the case. In that decision, the public prosecutor can propose the confiscation of assets[24]. An affected party such as the defendant can then

[22] At first, postponement of the imposition was the result of judicial practice. It was later codified in the law.

[23] This 'extremely simple procedure' is followed when extended confiscation is ordered by the enforcement judge, after that the conviction becomes final.

[24] This 'solution' is not limited to the confiscation decision; it can for instance also entail the invalidation of a document.

challenge this proposal within 30 days. When the proposal is challenged, a superior public prosecutor analyses the complaint. If that does not lead to annulment of the proposed confiscation, the affected party can formulate a complaint with the Preliminary Chamber Judge. The judge will rule on the case after a public hearing in which all affected persons are heard[25]. He will either accept the proposal of the prosecutor and order the confiscation of the assets, or reject the proposal in which case no confiscation will be ordered.

4. *Standard of proof*

As seen in § 1 of this chapter, the European instruments suggest that member states may allow judges to apply a lower standard of proof in confiscation procedures, for instance when using a form of extended confiscation. The member states are however not obliged to do so. To what extent do national confiscation laws actually allow for a lower standard of proof? This is one of the most prominent aspects in discussions concerning confiscation[26]. We understand the 'standard of proof' to mean the degree of conviction required of the judge when he makes a decision. Is it for instance enough that the judge deems one scenario ('the assets stem from crime') more plausible than the other ('the assets have a legal origin')?[27]

The French law on criminal confiscation is silent on the standard of proof that applies to the confiscation decision. It is therefore assumed that the regular standard of proof applies: the 'innermost conviction' of the judge, which must be based on evidence 'which was submitted in the course of the hearing and contradictorily discussed before him'[28].

The criminal confiscation in Belgium is a criminal sanction following a conviction for a criminal offence. It hence requires a prior conviction of the accused to a principal sentence, which must be based on the regular standard of conviction of the judge. A form of extended confiscation is also possible in Belgium. In that case, the judge orders confis-

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[25] See article 5491 of the Romanian Code of Criminal Procedure.

[26] See for instance J. Boucht, 'Extended Confiscation: Criminal Assets or Criminal Owners?', in Ligeti & Simonato, 2017, 130-133.

[27] Closely tied to this matter is the question who bears the burden of proof; what should the public prosecutor prove and what can be expected from the defendant in this respect? Is he ought to prove that his assets stem from legal conduct, or is it enough if he makes a reasonable claim that it doesn't concern criminal assets?

[28] The public prosecutor furthermore has to prove the 'adequacy' of the confiscation, which means that the confiscation is necessary and a proportionate punishment of the offender.

cation of property that is not directly related to the sanctioned offence. It is not clear which standard of proof must be reached for such an extended confiscation. The Belgian law determines that if the defendant has acquired property over a relevant period of time, while there are serious and concrete indications that these benefits stem from offences which can give rise to an economic benefit, and that are of the same category of offences for which the defendant has been convicted, it is up to the defendant to credibly assert the contrary. This form of confiscation raises a question as to the applicable standard of proof, but whether the standard of proof is in fact lowered, is not clear from Belgian law.

Two of the Dutch confiscation sanctions that can target the proceeds of crime (confiscation order and forfeiture) require a conviction for a criminal offence[29]. This conviction can only be reached if the judge is 'convinced' of the guilt of the defendant. For the subsequent imposition of a withdrawal or forfeiture, no specific standard of proof is stipulated. The decision to impose one of these two sanctions does not need to be substantiated with evidence, since it is part of the regular sentencing process.

This is different for the confiscation order, which requires the judge to calculate the illegally obtained profits on the basis of evidence. The legislature has expressed that when the court conducts this calculation, it can apply a 'reasonable and fair division of the burden of proof'. In literature, it is argued that this 'division' cannot go as far as to reverse the burden of proof. This burden must in this view always lie with the public prosecutor. The defendant is then in the position to actively oppose the public prosecutor's claim. Much can be expected from him in this respect, since the public prosecutor and the judge can apply evidentiary presumptions and general rules (e.g. by means of extrapolation or by assuming certain prices in the criminal market), which must then be disputed by the defendant.

Imposition of the confiscation order is possible if 'sufficient indications' exist that the defendant has committed offences of which he is not convicted, or if it is 'plausible' that such offences have led to a financial advantage. It is debated whether these two terms indicate a lower threshold to come to a decision. Since the first of the two relates to the question whether someone has committed an offence, a lower standard of proof would be especially problematic. Although the legislature has

[29] In both Belgian and Dutch law, the confiscation of assets with the aim of avoiding the circulation of objects that are dangerous or harmful to health and public safety does not require a prior conviction for a criminal offence.

sometimes referred to the civil standard of 'balancing of probabilities', his viewpoint on this issue is not consistent. In literature, it is argued that the judge must be 'convinced' before coming to a confiscation decision and that the desired mitigation of the evidential rules can be found in the non-applicability of the minimum evidential rules (see § 6). The Dutch Hoge Raad has not (yet) clarified this issue in its case law.

Three of the compared jurisdictions explicitly *do* allow for a lower degree of conviction to be used in confiscation proceedings: Germany, Romania and Italy. Under German law, the types of confiscation show some differences as to the relevant standard of proof. When it concerns regular confiscation of illegal profits (section 73 StGB) a high standard of proof applies: the court must rule beyond a reasonable doubt that the proceeds were derived from the offence that the defendant was charged with. This is different for extended confiscation and non-conviction based confiscation of proceeds of unknown origin (sections 73a and 76a paragraph 4 StGB)[30]. For these forms of confiscation the court must be fully convinced that the assets stem from criminal conduct. The court may however base that finding on a balance of probabilities test, in which the gross disproportionality between the value of the property and the legal income of the defendant plays a role. This specific standard of proof is laid down in section 437 of the German Criminal Procedure Code and is, according to the legislature, similar to the standard of proof applied in civil cases.

In case of confiscation of proceeds of unknown origin, no defendant is identified. It is considered a form of *in rem* confiscation. Extended confiscation however requires the finding that the defendant has committed the offence that the object stems from, even though he has not been convicted of that offence. That finding cannot be based on a civil standard of proof: the standard of proof is only lowered for the decision in relation to the illicit origin of the proceeds; the commission of the offence must still be ruled on beyond a reasonable doubt.

In Romanian law, criminal confiscation as governed by article 112 of the Romanian Criminal Code requires a conviction for a criminal offence. The standard of proof for this type of confiscation is therefore that of 'beyond a reasonable doubt'. Extended confiscation as defined by article 112[1] CC requires that the court is 'convinced' of the illicit origin of the assets. The applicable standard of proof is however that of the balance of

[30] For confiscation of objects generated by or used for the commission or preparation of the offence (section 74 StGB) a criminal conviction of the offence is necessary. Therefore, the applicable standard of proof is also 'beyond a reasonable doubt'.

probabilities. The public prosecutor must prove that it is more likely that the assets originate from criminal activities (similar to the criminal offence that generated the conviction) than from a legal source. The Romanian Constitutional Court has in fact confirmed that the standard of proof of 'beyond a reasonable doubt' should not be used in this context.

The different confiscation options in Italian law also allow for different evidential regimes. If it concerns *traditional* confiscation, the court must indicate the link between the asset and the crime. This is different when it comes to *extended* confiscation. In that case, a possible disproportion between the value of the assets and the legal income of the defendant or his occupation gives rise to the presumption that the assets stem from a criminal origin. This presumption can be overcome if the defendant justifies the origins of these assets. In case law this is seen as a 'burden of allegation'. Whereas the conviction for a criminal offence should be based on the regular standard of 'beyond a reasonable doubt', this decision concerning the origin of the assets is made on a standard that is lower than that.

The far-going *preventive* confiscation under Italian law can be imposed using several assumptions as well. These assumptions are applicable for both the subjective and the objective requirements described in § 2. As for the requirement that the defendants are 'dangerous subjects'[31], there must be 'clues indicating a reasonable probability that the subject belongs to these categories of people'. Another requirement is the 'social dangerousness' of the defendant at the time of assuming ownership of the asset. It cannot be based on mere suspicions, but needs to be grounded on objectively identifiable conduct and clear circumstances.

The objective requirements relate to the assets, which must be available to the defendant and must be of an illegal origin. For both of these requirements, assumptions can be used. Any transfer or assignment of assets during two year prior to the proposal of the preventive measure involving family members, relatives, in-laws or permanent cohabitants can be assumed to be fictitious. The same assumption can be used for transfers and assignments that were performed free of charge or fiduciary. As for the origin of the assets, there must be 'sufficient clues' of an illegal source. One of such clues can be a disproportion between the value of the assets and the declared income of the defendant and his or her occupation. According to Italian case law, this standard of 'sufficient clues' is

[31] People suspected of participating in mafia associations or associations devoted to the commission of serious crimes, or people who live off the commission of crimes, and the proceeds resulting from them.

a lower degree of conviction than 'beyond a reasonable doubt'[32]. This is hence the second place in Italian confiscation law where a lower standard of proof is applied.

Hence, this study shows that a civil law standard of proof (as is often used in confiscation regimes in Anglo-American legal systems[33]) has also made an introduction in some of the confiscation legislations on the European mainland. When applying extended confiscation, where illegal assets are calculated on the basis of a disproportion between the value of assets and legal income, some legal systems allow for a civil law standard of proof to be applied. If the judge rules that it is more plausible that it concerns illegal assets than that the assets stem from a legal origin, he can decide to have them confiscated. For other systems, it is still under debate what the exact standard entails. Hence, future will tell whether this development will spread throughout Europe.

5. *Time limits*

In case the confiscation is issued in a regular criminal trial, no specific time limits are in place. This is always the case in France and Belgium and for some of the confiscation sanctions in the Netherlands and Romania.

The Italian confiscation options of extended confiscation and confiscation as a preventive measure are regulated by some specific time limits. For example, preventive *seizure* ceases to be effective if preventive *confiscation* is not ordered within a year and a half from the moment the judicial administrator gains the assets (art. 24, paragraph 2 Anti-mafia Code). If the decision is appealed, confiscation becomes ineffective if the Court of Appeal does not rule within a year and a half from the moment the appeal is presented (art. 27, paragraph 6 Anti-mafia Code). The imposition of extended confiscation (see § 2) takes place without a hearing of the parties, unless one of them opposes the decision within 30 days of the announcement or notification of the decision.

As seen in § 2, the confiscation measure in Germany can be issued in both the regular criminal procedure and in a separate, postponed procedure. In the latter case, the court should decide on the confiscation within six months after the conviction has become final, although this

[32] It is however stated that none of these assumptions bring about an actual reversal of the burden of proof on the defendant. If the defendant is unable to meet the burden of allegation on the mentioned aspects, that fact has circumstantial value only.

[33] See for instance C. KING, 'Civil Forfeiture in Ireland: Two Decades of the Proceeds of Crime Act and the Criminal Assets Bureau', in Ligeti & Simonato (eds.) 2017, 81-86.

rule is not strictly binding. German law also provides for a form of 'independent', non-conviction based confiscation. In that case, no specific time limits are in place. Similar to the possible postponed confiscation procedure in Germany, one of the confiscation sanctions in the Netherlands is imposed in a separate procedure. This procedure must be initiated within two years after the conviction in the criminal trial in first instance. The confiscation judgment must be passed within six weeks after the closing of the examination in court (this is two weeks for regular criminal trials), but there are no strict time limits within which this examination should be conducted.

In Romania, non-conviction based confiscation is imposed by means of a request by the public prosecutor in his decision to drop the charges or close the case. Then, the defendant can oppose the proposed confiscation in a public court procedure, by intervening in the procedure within 30 days. The procedure that follows is not limited by any strict time limits.

In every instance, article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) must be respected, which dictates that the judgement must be given 'within a reasonable time'. Given the results of the comparison of the six jurisdictions, this criterion often turns out to be the only criterion in place to govern the imposition of confiscation sanctions. In some countries (e.g. the Netherlands), the value of the confiscation order is, as a rule, mitigated in case this time limit is not met. None of the six country reports account of structural unreasonable delays of confiscation procedures.

6. *Rights, guarantees and legal remedies*

As § 4 has showed that many of the compared confiscation regimes allow for a system in which a strong burden lies on the defendant to substantiate his claim and, in some cases, for the application of a civil law standard of proof, the legal guarantees of the defendant are of particular importance. After all, the European Court of Human Rights has ruled that such confiscation systems are not inconsistent with the presumption of innocence, as long as the assumptions are used within reasonable limits that take into account the importance of what is at stake, and the rights of the defence are maintained. The practical possibilities that the defendant has to rebut the presumptions, and the safeguards offered to him are therefore essential[34]. Two specific safeguard aspects of confisca-

[34] ECtHR 5 July 2001, appl.no. 41087/98 (Phillips v. United Kingdom) and ECtHR 23 September 2008, appl. nos. 15085/06 and 19955/05 (Grayson & Barnham v. United King-

tion law are investigated in the six country reports: the rights and guarantees of the defendant in the procedure in which the confiscation is imposed, and the legal remedies available to him in order to appeal the imposition of the confiscation.

Rights and guarantees

In France and Belgium, where the confiscation is imposed as a part of the criminal sentence, the full set of rights and guarantees of the criminal procedure apply to the imposition of the confiscation measure. This is the same for Germany, as long as it concerns confiscation measures addressed to the defendant (instead of *in rem*, non-conviction based confiscation). Under Dutch law two of the available confiscation sanctions are imposed in the regular criminal trial as well. Since a conviction is required for the imposition of both the confiscation order and the forfeiture, at least one offence must be proven in a procedure in which the defendant enjoyed all the regular rights and guarantees of the criminal procedure.

Dutch confiscation law however also provides for confiscation of assets that were not obtained from the facts of which the defendant has been convicted. Other offences can also be ground for confiscation. They are solely dealt with in the separate procedure in which the confiscation order (*ontnemingsmaatregel*) is imposed. In this procedure, most of the 'regular' rights and guarantees apply, but the legislature has made some alterations, most notably by declaring the rules concerning the use of evidence not applicable in confiscation procedures; the minimum evidential rules do not fully apply. The calculation of the obtained financial advantage, but also the decision that there are 'sufficient indications' that the defendant has committed offences (see § 4) can therefore be based on the statement of one witness only, whereas the *unus testis, nullus testis* rule applies in the regular criminal procedure. Furthermore, courts can (as a result of case-law of the *Hoge Raad*) apply a higher threshold in ruling on a request by the defendant to summon and hear witnesses and experts. In addition, the obligation to summon and hear witnesses who have made an incriminating statement but who have later altered that statement (if that statement is the only evidence directly linking the defendant to the offence), does not apply in confiscation cases. The defendant in this procedure hence holds a legal position that is less strong than the legal position of the defendant in the regular criminal trial.

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dom). See already ECtHR 7 October 1988, appl.no. 10519/83 (Salabiaku v. France). See J. Boucht, 'Civil asset forfeiture and the presumption of innocence under article 6(2) ECHR', *New Journal of European Criminal Law* 2014, 252-255.

Under Italian confiscation law, the applicable rights and guarantees vary depending on the type of confiscation. If the confiscation is applied following a conviction, the defendant will have enjoyed every guarantee offered to him in the regular criminal procedure. If it concerns *preventive* confiscation however, his rights are less guaranteed. Such confiscation is imposed by a specialized magistrate, who decides after a procedure that shows strong differences from the regular penal procedure. This is a simplified procedure in which the rights and guarantees of the regular criminal procedure do not apply fully. The right to a defence council does apply, but this is not clear for – for instance – the right not to incriminate oneself.

Legal remedies

The six compared jurisdictions all provide for the possibility to lodge an appeal against a confiscation decision[35]. Only when special procedures are in place, a special legal remedy is sometimes available. In Belgium, France and the Netherlands confiscation sanctions are part of a criminal sentence[36] and are therefore subjected to the regular rules governing appeal proceedings. Some differences occur in the level of scrutiny exercised by the appeal and cassation courts. In Belgium for instance, the Court of Cassation in principle does not exert control on the imposed confiscation, since it deems it a question of sentencing that is supremely determined by the trial judge. This is different in the Netherlands, where the confiscation order (*ontnemingsmaatregel*) is imposed by a separate judgement that is subject to the regular possibilities to lodge an appeal and appeal in cassation. The appeal here only targets the confiscation decision, and the confiscation decisions are under full control of the Dutch court in cassation (*Hoge Raad*)[37].

Romanian confiscation orders are subject to the regular possibilities of appeal as well. The special 'solution' that can be applied in order to impose non-conviction based confiscation in case the public prosecutor decides to drop the charges or close the case (see § 3), is (within three days) subject to a complaint at the Preliminary Chamber Judge at the higher court. His or her decision on the matter is final.

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[35] Under Belgian confiscation law, the appeal judge can impose confiscation even when the judge in first instance has not order any confiscation.

[36] Even though the Dutch confiscation order (art. 36e CC) is imposed in a separate procedure, this procedure is regarded as a continuation of the criminal procedure.

[37] The court is bound by the decisions of the criminal court in the corresponding regular criminal trial.

As a rule, German confiscation law also offers the regular appeal possibilities, since the confiscation decision can be part of the criminal conviction or a penal order (*Strafbefehl*). These different appeal options represent the regular legal remedies in the German legal system[38]. In case of a postponed and therefore separated confiscation procedure or an independent confiscation procedure, the court decision is given without a public hearing. It can be challenged by means of an immediate complaint (*sofortige Beschwerde*). The court may however, on a request by the parties or *ex officio*, decide to hold a trial. In that case, the confiscation is imposed by a judgement, which is open to the mentioned regular forms of appeal.

A similar division is in place in Italian confiscation law. Here, regular confiscation that is imposed with the criminal conviction can be appealed, both at the appellate court and the court of cassation. Furthermore, the enforcement procedure can be used to challenge the validity of the enforcement order. The possibilities to appeal a confiscation however diminish in case confiscation is imposed as a preventive measure. Such confiscation can only be appealed by means of a so-called 'revocation'. When this remedy is applied, the confiscation can be rendered ineffective if the conditions for application of the confiscation are no longer valid. The formalities of this revocation are the same as those of revision of criminal judgements. Therefore, revocation can only be applied when new decisive evidence is discovered after the proceedings, facts (ascertained with definitive penal judgements) arise or become known after the conclusion of the proceedings, the ruling was motivated exclusively or in a decisive manner on false documents, falsehood during the trial or events that pertain to crimes. The possibilities of 'revocation' are hence stricter than regular appeal options. A full reconsideration of the merits of the case is not provided for this form of (preventive) confiscation. The defendant can however challenge the preventive confiscation measure before the Court of Cassation for 'violation of the law'.

7. *Conclusion*

The type of procedure followed in order to impose a confiscation differs throughout and also within the six compared jurisdictions. Some of these differences are merely the result of the legal tradition of the spe-

[38] In the first case, the confiscation can be challenged on appeal on grounds of fact and/or law (*Berufung*) and on appeal on grounds of law only (*Revision*). If the confiscation is imposed by means of a penal order, it can be appealed by means of an objection (*Einspruch*).

cific country, whereas other differences are the result of developments specifically initiated in respect to confiscation and its promotion by the legislature. In several jurisdictions, confiscation is regarded as an instrument of particular importance, which therefore justifies specific legal provisions and procedures. This begs the question what can be learned from the previous evaluation of the six country reports. In our opinion, this analysis provides useful insight into the state-of-the-art in the six jurisdictions on issues that are sometimes seen as problematic, most notably the issues relating to the applicable rights and guarantees and the standard of proof.

As for the rights and guarantees in place for defendants facing a possible confiscation, the picture is quite clear: whereas some countries have lowered the legal protection (e.g. the Netherlands, Italy), most of the compared jurisdictions have granted the defendant in the confiscation procedure the same rights and guarantees that apply in the criminal proceedings (France, Belgium and Germany).

A lower level of protection of the defendant is also visible on the issue of the standard of proof. As seen in § 1, this is an increasingly controversial matter in confiscation proceedings, also since EU instruments suggest this as an area where member states can make adjustments in order to enhance the effectivity of confiscation law. Generally speaking, confiscation procedures require an active rebuttal of the statement of public prosecutor by the defendant. This especially holds true when it concerns extended confiscation. In certain circumstances (for instance after a conviction for certain offences) defendants are required to credibly assert and sometimes substantiate a legal origin of unexplainable assets.

In three of the compared legal systems, this has gone as far as to bring about a lower burden of proof than that of conviction 'beyond a reasonable doubt'. In those cases, the court can order confiscation even though it is not as convinced of the illegal origin of assets as would be required to convict the defendant of a criminal offence. In two other systems (the Netherlands and Belgium), it is as of yet not fully crystalized whether a lower threshold is in place. Although the wording of the Dutch law ('sufficient indications') seems to imply that this is in fact the case, there is debate on this issue in academic literature.

Whether this development will spread to the other European jurisdictions, is hard to predict. In our opinion, it can be highly doubted whether national procedures governing the imposition of confiscation sanctions will be harmonized in the near future. Practically all of the compared confiscation procedures are developing, but only few of these *procedural* developments seem to be the direct result of European legis-

lation. Procedural issues like these are usually strongly connected to the legal tradition of the country. This is in itself not problematic. Successful confiscation can be achieved by different means; it does not seem to be confined to a specific procedural design. And although questions relating to evidence (such as the burden and standard of proof) increasingly attract the interest of the European legislature (see § 1), the aspirations of the European legislation are at this moment still rather modest on this issue. Although it could be argued that this has the potential to undermine the effectiveness of confiscation procedures, there is no solid (empirical) proof of such a claim. For now, European law leaves the member states with enough discretion to make their own decisions on how to design their evidential rules in confiscation procedures.

VERA WEYER

MUTUAL RECOGNITION ASPECTS

SUMMARY: Introduction. – 1. Freezing orders. – 1.1. Implementation. – 1.2. Scope of application. – 1.2.1. Framework Decision. – 1.2.2. Regulation (EU) 2018/1805. – 1. Procedure. – 1.3.1. Competent authority. – 1.3.2. Time limits. – 1.3.3. Language regime. – 1.3.4. Regulation. – 1.4. Grounds for non-recognition and non-execution. – 1.4.1. Framework Decision. – 1.4.2. Regulation. – 1.5. Grounds for postponement. – 1.6. Legal remedies. – 2. Confiscation Orders. – 2.1. Implementation. – 2.2. Scope of Application. – 2.2.1. Framework Decision. – 2.2.2. Regulation. – 2.3. Procedure. – 2.4. Grounds for non-recognition and non-execution. – 2.4.1. Framework Decision. – 2.4.2. Regulation. – 2.5. Legal remedies. – 3. Conclusion.

Introduction

The current EU legal framework on the mutual recognition of freezing orders and confiscation orders consists of Framework Decision 2003/577/JHA[1] and Framework Decision 2006/783/JHA[2]. As from December 2020, however, the two Framework Decisions will be replaced by Regulation EU 2018/1805)[3] which is why the analysis will make reference to all three instruments.

1. *Freezing orders (Framework Decision 2003/577/JHA/ Regulation (EU) 2018/1805)*

1.1. *Implementation*

Except for *Germany* and *Italy*, that had been behind schedule for three and ten years, the Member States more or less met the transposition deadline (August 2005, Art. 14 (1) Framework Decision 2003/

[1] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property (OJ L 196, 2.8.2003, 45).

[2] Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, 59).

[3] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders (OJ L 303, 28.11.2018, 1).

577/JHA)[4]. In comparison with the implementation of Framework Decision 2006/783/JHA on the mutual recognition of confiscation orders that turned out to be exceedingly slow (see below 2.1), this might be a bit of a surprise. However, it has to be kept in mind that the Framework Decision also covered the freezing of evidence[5].

1.2. *Scope of application*

1.2.1. *Framework Decision 2003/577/JHA*

The Framework Decision applies to every freezing order that has been issued by a judicial authority in the framework of criminal proceedings for the purpose of subsequent confiscation (Art. 1 Sent. 1 and Art. 3 (1) (*b*) Framework Decision 2003/577/JHA). As the Framework Decision does not define the term "confiscation", its scope is not strictly limited to the freezing of proceeds or property liable to ordinary conviction-based confiscation, but may also be interpreted to cover freezing orders related to other types of (criminal) confiscation.

Among the Member States, however, there seems to be some confusion as to the exact scope of application: while in *France*[6] and *Romania*[7], it is at least doubtful whether the legislation extends to freezing orders concerning property that is not directly linked to the offense in question, *Italy*[8] has expressly limited the scope to freezing orders made for the purpose of criminal (conviction-based) confiscation.

The Framework Decision applies to all categories of criminal offenses, though – except for the offenses listed in Art. 3 (2) Framework Decision 2003/577/JHA – the execution of a request may be subject to the requirement of dual criminality (Art. 7 (1) (*d*) Framework Decision 2003/577/JHA, also see below).

1.2.2. *Regulation (EU) 2018/1805*

The Regulation will cover freezing orders "issued within the framework of proceedings in criminal matters" (Art. 1 (1) Regulation (EU)

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[4] As for the other Member States, see *https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=24* (last reviewed on 7 May 2019). The implementation seems to be pending in Luxembourg.

[5] The corresponding part has been replaced by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, 1).

[6] National Report France, 3.1.1.

[7] National Report Romania, C.I.

[8] National Report Italy, 3.1.

2018/1805 – as opposed to "proceedings in civil or administrative matters", Art. 1 (4) Regulation (EU) 2018/1805). Even though the exact meaning remains far from clear (for more details see below 2.1), the Regulation will apply to freezing orders that have been issued with a view to non-conviction based confiscation (or as described by the Regulation: "confiscation without a final conviction", see recital 13 and Article 2 (2) Regulation (EU) 2018/1805).

1.3. *Procedure*

1.3.1. *Competent authority*

According to Art. 4 (1) Framework Decision 2003/577/JHA, the request (comprising the standard certificate and the original freezing order) shall be sent directly to the "competent judicial authority for execution" (principle of direct contact), i.e. transmission via a central authority is not required[9].

In *Belgium*[10], *France*[11] and *Italy*[12], the power to rule on the execution in general lies with the criminal court, though the request has to be sent through the prosecution service[13]. In *Germany*[14] and the *Netherlands*[15], the public prosecutor is competent to both receive and to grant the request while in *Romania*[16], depending on the judicial phase (investigation or trial), the prosecution service and/or the court will decide on the execution.

The competence of the judicial authority *ratione loci* is usually established by the location of the assets in question or the majority thereof. Some Member States have also adopted rules on "conflicts of jurisdiction": for example, if, in *Romania*[17], the request falls within the jurisdiction of several authorities, the prosecution service and/or the court in

[9] If the judicial authority addressed has no jurisdiction, it has to transmit the request ex officio to the competent one (Art. 4 (4) Framework Decision 2003/577/JHA). The issuing state has to make the necessary inquiries, e.g. via the EJN contact point (Art. 4 (3) Framework Decision 2003/577/JHA).

[10] National Report Belgium, 3.1.2.

[11] National Report France, 3.1.2.

[12] National Report Italy, 3.1.1.

[13] As for the other Member States, see Council Document 14349/16.

[14] National Report Germany, 3.1.2. The freezing must, however, be authorized by the Court.

[15] National Report The Netherlands, 3.1.2.

[6] National Report Romania, C.I: during the investigative phase, prosecution service alongside the court and during trial, only the court.

[17] National Report Romania, C.I.

Bucharest will be competent (see above), while in *Italy*[18], the competence of the judicial authority that first received the request will prevail.

As can be seen from the information submitted by the Member States to the European Commission as to their "competent judicial authorities", the principle of direct contact as enshrined in Art. 4 (1) Framework Decision 2003/577/JHA is widely recognized. *Romania*, however, makes an exception because, contrary to its domestic legislation, it has notified that requests for freezing shall be transmitted to the Ministry of Justice[19].

1.3.2. *Time limits*

The Framework Decision does not lay down specific time limits, though the executing State shall decide on (granting) the request "as soon as possible and, whenever practicable, within 24 hours" (Art. 5 (3) Framework Decision 2003/577/JHA) while the execution is to be carried out "immediately … in the same way as for a freezing order made by an authority of the executing State" (Art. 5 (1) Framework Decision 2003/577/JHA).

Except for *Belgium* (decision at the latest within 5 days)[20] and *Romania* (decision within 24 hours)[21], the Member States have not set any time frames, either. Nevertheless, they all stipulate that requests for freezing shall be executed swiftly (e.g. *France*: "immediately"; *the Netherlands*: "promptly"). In either case, the implementing legislation does not provide for sanctions for the failure to execute the freezing order within due time.

1.3.3. *Language regime*

According to Art. 9 (2) Framework Decision 2003/577/JHA, the certificate (unlike the freezing order) shall be translated into the official language or one of the official languages of the executing State. Otherwise, the executing authority may refuse the request (Art. 8 (1) lit. *a* Framework Decision 2003/577/JHA, see below). Member States may, however, declare that they will also accept certificates translated into other languages (Art. 9 (3) Framework Decision 2003/577/JHA)[22].

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[18] National Report Italy, 3.1.1.
[19] *Cf.* Council Document 14349/16.
[20] National Report Belgium, 3.1.5.
[21] National Report Romania, C.I.
[22] For an overview see Council Document 14349/16.

Except for *Belgium* (French, Dutch, English and German) and the *Netherlands* (Dutch and English), the Member States have been reluctant to recognise other language regimes: *France*, *Italy* and *Romania* have notified that the certificate must be translated into the official languages while *Germany* will accept other language versions on the basis of reciprocity only[23].

1.3.4. *Regulation (EU) 2018/1805*

The Regulation maintains the procedure provided for by the Framework Decision, albeit with a few changes: First, Member States do no longer have to transmit the original freezing order but only the certificate to the "executing authority" (Art. 4 (1) Regulation (EU) 2018/1805)[24] and second, it provides for specific time limits: Member States shall decide on the request within 48 hours while the measures necessary to execute the order must be taken no later than 48 hours afterwards (Art. 9 (3) Regulation (EU) 2018/1805). However, a failure to comply with these time frames will not be sanctioned[25].

1.4. *Grounds for non-recognition and non-execution*

1.4.1. *Framework Decision Regulation 2003/577/JHA*

The Member States may deny the execution of a request only for one of the grounds listed exhaustively in Art. 7 Framework Decision 2003/577/JHA ("The competent judicial authorities of the executing State may refuse to recognise or execute the freezing order only if", Art. 7 (1) Framework Decision 2003/577/JHA). Even though all of them are optional ("may refuse"), the Member States partly transposed them as mandatory grounds. As will be seen, this is especially the case with *Belgium*, *France, Germany* and *Romania*:

– The certificate is incomplete or incorrect (Art. 7 para. 1 lit. *a* Framework Decision 2003/577/JHA): This ground for refusal has been implemented as optional by all Member States. As a matter of fact, it

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[23] Council Document 14349/16.

[24] Member States may, however, declare that the issuing authority shall transmit the original freezing order together with the freezing certificate, Art. 4 (2) Regulation (EU) 2018/1805.

[25] See also Art. 9 (6) Regulation (EU) 2018/1805: "The expiry of the time limits set out in paragraph 3 shall not relieve the executing authority of its obligation to take a decision on the recognition and execution of the freezing order, and to execute that order, without delay".

might also be considered a ground for postponement because in all Member States, the competent authority may impose a deadline for completion, correction or submission (see Art. 7 (2) Framework Decision 2003/577/JHA).

– There is immunity under the law of the executing State which makes it impossible to execute the freezing order (Art. 7 para. 1 lit. *b* Framework Decision 2003/577/JHA)[26]: In *Belgium*, *France*, *Germany* and *Romania*, the refusal is mandatory while in *Italy* and *the Netherlands*, it is optional.

– *Ne bis in idem* principle (Art. 7 para. 1 lit. *c* Framework Decision 2003/577/JHA)[27]: *Belgium*, *France*, *Germany* and *Romania* implemented this ground for refusal as mandatory, *Italy* and *the Netherlands* as optional.

– Lack of dual criminality (Art. 7 (1) (d) Framework Decision 2003/577/JHA): the executing State may refuse a request if the requirement of dual criminality is not met (also see above 1.3.1). Except for *Italy* and *the Netherlands*, this ground for refusal has been implemented as mandatory by the Member States. For the offenses listed in Art. 3 (2) Framework Decision 2003/577/JHA, however, the dual criminality check has been abolished. Art. 3 (2) Framework Decision 2003/577/JHA seems to have been transposed in compliance with the Framework Decision. *Belgium* yet considers abortion and euthanasia not to be covered by "murder or grievous bodily harm", i.e. still verifies the dual criminality in these cases[28].

Some Member States even included additional grounds for refusal: *Belgium*[29] and *Germany*[30] will not recognize freezing orders that violate the fundamental rights and legal principles enshrined in Art. 6 of the TEU, i.e. the European *ordre public*, while in *France*[31], the freezing order must be in line with its public order or the fundamental interests of the

[26] This ground of refusal presumably dates from the time when the Framework Decision also covered the freezing of evidence because at least in the context of confiscation of proceeds, such a scenario is difficult to imagine.

[7] Contrary to the Framework Decision on the European Arrest Warrant, the EU legislator refrained from specifying the conditions under which the principle applies, thus the characterization is up to the Member States. In *Belgium*, *Germany* and *France*, the relevant provisions have been drafted in the style of Art. 54 CISA/Art. 50 CFR.

[28] Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, COM(2008) 885 final, 3; National Report Belgium, 3.1.3.

[29] National Report Belgium, 3.1.3.

[30] National Report Germany, 3.1.3.

[31] National Report France, 3.1.3.

nation, i.e. the national *ordre public*. The French authorities will also refuse to execute freezing orders that were taken for discriminatory reasons or that might have a discriminatory effect on the party concerned[32].

1.4.2. *Regulation (EU) 2018/1805*

The Regulation will introduce two additional grounds of refusal: Apart from the grounds mentioned above, Member States may deny a request due to the territoriality principle (Art. 8 (1) (d) Regulation (EU) 2018/1805) or "where in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the freezing 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. 8 (1) (f) Regulation (EU) 2018/1805). The latter provision corresponds to the European *ordre public* clause (see below 2.4.2) that has been established by some Member States' in their domestic legislation (see above 1.4.1.).

1.5. *Grounds for postponement*

Art. 8 provides for a list of (optional) grounds for postponement that are mainly based on a conflict of interests:

– Ongoing criminal investigation (Art. 8 (1) (*a*) Framework Decision 2003/577/JHA) and property subject to a freezing order in criminal proceedings (Art. 8 (1) (*b*) Framework Decision 2003/577/JHA): These two grounds have been transposed almost verbatim by all Member States.

– Property subject to a freezing order in non-criminal proceedings (Art. 8 (1) (*c*) Framework Decision 2003/577/JHA): This ground can be found in the legislations of *France*, *the Netherlands* and *Romania*.

Except for *France*[33] which will also defer proceedings if the property concerned is a document or medium protected for national defence purposes, the Member States did not lay down additional grounds for postponement.

1.6. *Legal remedies*

The executing State must ensure that all interested parties, i.e. all parties affected by the freezing order, have effective legal remedies against the decision on the recognition and execution of a freezing order

[32] National Report France, 3.1.3.
[33] National Report France, 3.1.4.

(Art. 11 (1) Framework Decision 2003/577/JHA). The substantive reasons, however, e.g. whether the freezing order is based on reasonable suspicion, can only be reviewed by a court in the issuing State (Art. 11 (2) Framework Decision 2003/577/JHA).

In general, the legal remedies provided for by the Member States correspond to the remedies against a domestic freezing order.

2. *Confiscation Orders (Framework Decision 2006/783/JHA/Regulation (EU) 2018/1805)*

2.1. *Implementation*

In contrast to Framework Decision 2003/577/JHA, Framework Decision 2006/783/JHA has been implemented considerably slowly: Almost all Member States exceeded the transposition deadline (November 2008, Art. 22 (1) Framework Decision 2006/783/JHA), *Italy* for even seven years[34].

2.2. *Scope of Application*

2.2.1. *Framework Decision 2006/783/JHA*

According to Art. 2 (*c*) Framework Decision 2006/783/JHA, the term "confiscation order" denotes "a final penalty or measure imposed by a court following proceedings *in relation* to a criminal offence". This broad definition notwithstanding, its context suggests that the scope of the Framework Decision is limited to conviction-based confiscation orders in the framework of criminal proceedings: First, references to special types of confiscation are limited to the concept of extended confiscation (Art. 2 (d) Framework Decision 2006/783/JHA) and second, the confiscation order must have been imposed by a court competent in criminal matters (Art. 1 (1) Framework Decision 2006/783/JHA), thereby excluding "civil" non-conviction based confiscation.

None of transposition laws seems to specify the scope of application nor is there any case law on this matter.

2.2.2. *Regulation (EU) 2018/1805*

The Regulation will apply to all kinds of confiscation orders, provided they have been issued "within the framework of proceedings in

[34] As for the other Member States see *https://www.ejn-crimjust.europa.eu/ejn/lib documentproperties. aspx?Id=211* (last reviewed on 7 May 2019).

criminal matters" (as opposed to "framework of proceedings in civil or administrative matters", Art. (1) (4) Regulation (EU) 2018/1805). In particular, it will also include "criminal" non-conviction based confiscation orders (referred to as "confiscation without a final conviction", see recital 13 and Art. 2 (2) Regulation (EU) 2018/1805). The exact scope, however, remains obscure even though it can be derived from the legislative procedure that Italy's *misure di prevenzione* will be covered[35].

2.3. *Procedure*

The procedural framework adopted by Framework Decision 2006/783/JHA is very similar to the rules on mutual recognition of freezing orders (principle of direct contact (Art. 4 (1) Framework Decision 2006/783/JHA), language regime of the executing State (Art. 19 (1) Framework Decision 2006/783/JHA), no time limits), even though Member States may also notify a central authority as "competent authority" (see Art. 3 (2) Framework Decision 2006/783/JHA).

2.4. *Grounds for non-recognition and non-execution*

2.4.1. *Framework Decision 2006/783/JHA*

Similar to the mutual recognition of freezing orders, the enforcement of confiscation orders may only be refused for the grounds exhaustively listed in Art. 8 (1) Framework Decision 2006/783/JHA of the Framework Decision ("The competent authorities in the executing State shall without further formality recognise a confiscation order … unless the competent authorities decide to invoke one of the grounds for non-recognition or non-execution provided for in Article 8, Art. 7 (1)"). Though designed as optional ("may refuse", Art. 8 (1) Framework Decision 2006/783/JHA), these grounds have often been transposed as mandatory by the Member States. As a matter of fact, *Italy* happens to be the only Member State that implemented all refusal grounds as optional.

– The certificate is incomplete or incorrect (Art. 8 (1) Framework Decision 2006/783/JHA): This ground for refusal has been implemented by *Germany*, *Italy* and *Romania* as optional, by *France* as mandatory.

– Principle of *ne bis in idem* (Art. 8 (2) (*a*) Framework Decision 2006/783/JHA): Refusal is mandatory in *Belgium*, *France*, *Germany* and *the Netherlands* while in *Italy* and *Romania*, it is optional.

– Lack of dual criminality (Art. 8 (2) (*b*) Framework Decision 2006/783/JHA): The request must be refused in *Belgium*, *Germany*, *the*

[35] *Cf.* Council document 5482/18. For more details see V. Weyer, Chapter V, 91 ff.

Netherlands and *Romania*. However, the offenses listed in Art. 6 (3) Framework Decision 2006/783/JHA are not subject to a double criminality check.

– Immunity or privilege (Art. 8 (2) (*c*) Framework Decision 2006/783/JHA): This ground is mandatory in *Belgium*, Germany, *France* and *the Netherlands*, while optional in *Italy* and *Romania*.

– The rights of any interested party (Art. 8 (*d*) Framework Decision 2006/783/JHA): This ground has been implemented as optional in *Belgium*, in *Germany* and *France* (limited to third parties) as mandatory[36].

– Trials in absentia (Art. 8 (2) (*e*) Framework Decision 2006/783/JHA): Except for *Italy* and *Romania*, the refusal is mandatory in the Member States.

– Territoriality principle (Art. 8 (2) (*f*) Framework Decision 2006/783/JHA): this ground of refusal has been transposed partially as optional and partially as mandatory by *Germany*[37] and the *Netherlands*[38] while *Belgium*, *France*, *Italy* and *Romania* provided for an optional ground for refusal.

– Extended confiscation not provided for by the law of the executing State (Art. 8 (2) (*g*) Framework Decision 2006/783/JHA): in *Germany* and *France*, the recognition must be denied whereas in *Belgium*, *Italy*, *the Netherlands* and *Romania*, refusal is optional.

– The execution is time-barred (Art. 8 (2) (*h*) Framework Decision 2006/783/JHA): Refusal is mandatory in *the Netherlands*, partially optional and partially mandatory in *France*[39] and optional in *Belgium*.

Belgium, *Germany* and *France* also apply the grounds for refusal mentioned in the context of the mutual recognition of freezing orders (see above 1.5.1).

2.4.2. *Regulation (EU) 2018/1805*

The Regulation adopts most of the grounds for refusal laid down in Art. 8 of the Framework Decision, although the Member States will no longer be able to deny the enforcement of a confiscation order simply due to its type[40]. Art. 19 (1) (*h*) Regulation (EU) 2018/1805, however, provides for a European *ordre public* clause: Accordingly, Member States

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[36] National Report France, 3.3.3.

[37] National Report Germany, 3.3.3.

[38] National Report The Netherlands, 3.3.3.

[39] National Report France, 3.3.3.

[40] This aspect has been of special concern to the EU legislator, see Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders (COM(2016) 819 final), 13.

"may decide not to recognise and to execute a confiscation order … 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"[41].

2.5. *Legal remedies*

Except for the, Art. 9 Framework Decision 2006/783/JHA corresponds to Art. 11 of Framework Decision 2003/577/JHA. Likewise, the legal remedies provided for by the Member States are similar to the remedies against domestic confiscation orders (see above 1.6).

3. *Conclusion*

As seen above, the Member States' legislations considerably differ from the Framework Decisions with regard to the scope and the grounds for refusal. However, as almost no national report provided for relevant case-law and/or practical experience on the national regimes, the lack of application often criticized might not be due to the limited scope or the extensive grounds for refusal, but may also result from other factors and impediments to an effective implementation in court practice such as factual difficulties in identifying and recovering proceeds of crime. This is also why the Regulation seems unlikely to improve the situation because it focuses on legal, but not on practical issues.

[41] Article 19 (1) (h) of the Regulation has been drafted in the style of the recent CJEU case law in Arranyosi & Căldăraru, eucrim 2018, 202. For more details see V. Weyer, Chapter V, 91 ff.

THIBAUT SLINGENEYER*

MANAGEMENT OF FROZEN ASSETS

SUMMARY: Introduction. – 1. Freezing. – 1.1. Institutional aspects of the management of frozen assets. – 1.2. Disposal methods. – 1.3. Costs related to management of frozen property. – 1.4. Protection of bona fide third party. – 1.5. Possibility to claim damages suffered by a wrongful management of frozen assets. – 1.6. Statistics and databases. – 1.7. Management of frozen property in the context of mutual recognition. – 2. Freezing of third-parties' assets. – Conclusion.

Introduction

The EU legislative framework about the management of frozen property is composed of the Directive 2014/42/EU and the Regulation (EU) 2018/1805. The main goal of the management of seized assets is to protect the property and reduce its deterioration[1]. Taking action as soon as the items are seized is important: "it would be impossible to achieve the (…) objectives of confiscation if the value of the property that is seized and to be confiscated depreciated"[2]. Furthermore, the practice in some MS (Belgium, the Netherlands) shows that it is less easy to confiscate assets if they have not been previously seized. Italy is the MS with the longest experience in the field of management of assets and in particular when the seizure concerns real estate or businesses.

1. *Freezing*

1.1. *Institutional aspects of the management of frozen assets*

1.1.1. Multiple actors

The decisions relating to the management of frozen property are usually made by the same (judicial) authorities as the ones who ordered

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[1] B. VETTORI, T. KOLAROV, A. RUSEV, *Disposal of confiscated assets in the EU Member States. Law and Practices*, Sofia, Center for the Study of Democracy, 7 and 19.

[2] B. VETTORI, T. KOLAROV, A. RUSEV, *op. cit.*, 19.

the freezing (cf. *supra*). The public prosecutor (and, in some MS, the investigative judge) remains a central decision-maker. In France, the judge of freedoms and detention, and in Romania, the judge of rights and freedoms also play a role in decisions relating to the management of frozen property.

Nevertheless, the implementation of this decisions relating to the management of frozen property involves the intervention of many different actors depending on the MS. Thus, the implementation of the decision, which depends on the type of the asset, is undertaken by the Ministry of Finance and Tax Authorities (the Netherlands, Belgium, Romania), by the Ministry of Foreign Affairs (Romania), by the Public Prosecution Service (the Netherlands, France, Germany), by the bailiff (the Netherlands, Germany, Romania), by the registry (Italy, Belgium, Germany), by the police (Belgium, France, Germany), by a notary (Belgium, Germany, the Netherlands), by private administrators and companies (Germany, Italy, France, Belgium, Romania)…

1.1.2. Asset Management Office

To overcome the disadvantages associated with this multitude of actors, Directive 2014/42/EU invites the MS to provide centralized offices to ensure the adequate management of frozen property (art. 10). The recital 47 of the Regulation (EU) 2018/1805 also mentions the concept of "national centralized office". The studied MS (except Germany) have implemented an Asset Management Office (AMO). In Belgium, there is the COSC (Central Office for Seizure and Confiscation), in France, there is the AGRASC (Agency for Management and Recovery of Assets Seized and Forfeited), in Italy, there is the ANBSC (National Agency for Administration and Destination of Assets Seized and Confiscated), in the Netherlands, there is the LBA (Landelijke Beslag Autoriteit) and in Romania, there is the NAMSA (National Agency for the Management of Seized Assets).

In accordance with these institutional aspects, the studied MS can be divided in three categories[3]: a centralized approach with specialized institutions (France, Italy), a centralized approach with non-specialized institutions (Belgium, the Netherlands, Romania) and a decentralized approach (Germany). Theoretically, the first approach minimizes the communication problems, allows a high level of specialization and can produce more accurate statistics.

[3] B. Vettori, T. Kolarov, A. Rusev, *op. cit.*, 23 to 31.

1.1.3. Private asset manager

The MS have understood that even with an efficient AMO, it often makes more commercial sense to outsource certain functions. Thus, a court-appointed asset manager can deal efficiently with complex assets (Belgium, France, Germany, Italy). The AMO can judiciously conclude different types of partnership agreements with private or public actors (e.g. in the context of seizures of jewelry, antiques, real estate, company…)[4]. The management of businesses (Italy, France) remains one of the most complex managements[5], often ending (in 90% of cases in Italy) in bankruptcy[6]. In those cases, it is particularly interesting to name an independent (from the private sector) and insured asset manager[7]. In Italy, the judicial administrator of the seized company must be chosen from a special register. This judicial administrator (often accounting experts) is automatically able to carry out all the acts of ordinary administration. In order to carry out the extraordinary administration, the judicial administrator will need a specific authorization of the judicial authority.

1.2. *Disposal methods*

1.2.1. Conservation

If the frozen assets do not involve disproportionate storage costs or if there is no risk of deterioration, the MS allow that these frozen assets be stored (in tribunal registries, with AMO…). For these reasons, some legislators (Belgium) have clearly indicated that this conservation in kind should not be the preferred solution for frozen assets.

The frozen asset will be kept in the custody of responsible public entities, by the owner or possessor or by a third party (e.g., a bank). This distinction allows us to understand the difference in vocabulary sometimes made between the terms "freezing" and "seizure". There is a "freezing" when the asset is in the hands of the owner or possessor or in the hands of a third party (Belgium, the Netherlands, Germany, Italy).

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[4] G8 Criminal Legal Affairs Subgroup, *Best Practices for the Administration of Seized Assets*, 2005, 5.

[5] AGRASC (France) and ANBSC (Italy) are the two AMO with the best experience in the management of complex assets, like companies.

[6] Basel Institute on Governance, *The Need for New EU Legislation Allowing the Assets Confiscated from Criminal Organisations to be Used for Civil Society and in Particular for Social Purposes*, Brussels, European Parliament, 2012, 51 and 89. This high failure rate can be explained by a phenomenon called "crisis of legalization". Indeed, the management of the company by the judicial administrator will cause significant costs (regularization of employees, payment of taxes, adaptation of workplaces to health standards…).

[7] G8 Criminal Legal Affairs Subgroup, *op. cit.*, 6.

They must then respect the use restrictions related to the assets: the transfer, the destruction, the conversion, the disposition or the movement of the asset are temporarily prohibited or limited. One talks of "seizure" when the asset is stored in the custody of law enforcement.

Theoretically, freezing seems to be the best choice to keeps cost (storage cost) at a minimum. This is why, for example, in France, the general principle is that the owner of the frozen asset is responsible for the management of the asset, and it is only under special circumstances that the asset will be put under the management of AGRASC. In the same way, in Belgium, regarding the management of dematerialized securities, the current good practice is to not necessarily transfer these securities to an account opened with the COSC but to continue to have them be managed by the financial institution from which these securities are frozen. The person continues to be informed by their financial institution and to be liable for management fees, which reduces the legal costs.

Nevertheless, it would be a mistake to assume that freezing does not entail expenses. Indeed, putting into place an efficient control of the respect of use restriction involves costs as well. In order to ensure the observance of these use restrictions, some MS under study (Belgium, the Netherlands, Germany) provide for freezing with a bond: the assets may be handed back to the person against a payment. Ensuring that the frozen asset does not lose in value (in view of a possible confiscation) also features costs and is not easy to put into practice. For instance, it is necessary to ensure that the owner maintains the real estate in a state of repair, and continues to pay mortgage…

In the management of seized assets, some MS are more reluctant than others. Thus, in Belgium, the management must be done "with due diligence" and "in accordance with the principles of prudent and passive management". Likewise, in Romania, the NAMSA preserves the movable assets and ensures that the sums seized are available when a final decision is made. In Germany, the management aims at maintaining the asset's value rather than earning profits. Other MS accept more active managements to ensure the enhancement of the assets and to make profits (France, Italy)[8]. For instance, in Italy, Equitalia giustizia Spa (a public company) the sums are managed dynamically by low-risk financial instruments.

1.2.2. Sale or transfer

For technical or economic reasons, the MS authorize a pre-confiscation sale. The MS use different arguments to justify a pre-confiscation

[8] B. Vettori, T. Kolarov, A. Rusev, *op. cit.*, 78.

sale ("interim sale"). Regarding economic reasons, we find in relevant legislations formulations referring to "perishable assets" (Belgium, Romania), "rapidly depreciating property" (Belgium, France, Germany, Romania) and "asset with a disproportionate storage or maintenance costs" (Belgium, France, Germany, Romania, the Netherlands). However, no MS provides for interim sale "to defray the cost of maintaining the value of other assets, such as paying a mortgage"[9]. Regarding technical reasons, we find in legislations formulations sending one back to "assets too difficult to administer" (the Netherlands, Germany), "assets without a known owner" (Belgium, France, Romania), "assets frozen over a period of time" (two years in the Netherlands, one year for motor vehicles in Romania, three months for motor vehicles, boats and airplanes in Belgium), "assets that have not been claimed in time" (France) and "assets in the case of which the public prosecutor did not make a decision within the appointed time to authorize a sale". (the Netherlands). The following assets are often presented as particularly susceptible to a interim sale: vessels, aircraft, cars, animals[10].

This pre-confiscation sale is not authorized for all assets. There are conditions to authorize this measure: the asset must be "replaceable" (Belgium, the Netherlands), the asset must have an "easily determinable value" (Belgium, the Netherlands), or no longer be "necessary to ascertain the truth" (Belgium, France). Some MS allow a pre-confiscation sale for real estate (Belgium, France, Italy), while others do not allow it (Romania). In practice, it would seem that the pre-confiscation sale does not frequently involve real estate. Italy also provides for the sale of companies.

It is preferable that the pre-confiscation sale be made with the owner's consent. Indeed, the requirement of the owner's consent allows to "strike a balance between the cost-efficiency of asset management and the legitimate interest of the owner in the preservation and return of the asset when a confiscation order is not granted"[11]. Some MS do not explicitly provide for this consent requirement (Belgium, France[12]) while others provide not only for such consent (Romania) but also formally

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[9] UNODC, *Effective management and disposal of seized and confiscated assets*, Vienna, Unodc, 2017, 20.

[10] G8 CRIMINAL LEGAL AFFAIRS SUBGROUP, *op. cit.*, 3.

[11] OPEN-ENDED INTERGOVERNMENTAL WORKING GROUP ON ASSET RECOVERY, *Draft non-binding guidelines on the management of frozen, seized and confiscated assets*, Vienna, United Nations, 2018, 4.

[12] The AGRASC does not have to obtain the consent of the owner of the seized property. Only economic interests are taken into account.

provide that the asset's owner could be the person formulating the request (Romania). The person concerned ought to be heard (Germany) and informed (Belgium, Germany) about the sale. Furthermore, MS may provide for remedies so that concerned parties may oppose the sale (Belgium, Germany, Romania). To avert the sale, some MS accept that an interested party provides security against the return of the asset (Belgium, the Netherlands, Germany).

In any event, there are situations where such consent is not desirable and is not required for the economic or technical reasons explained above. For instance, in Romania, the asset can be capitalized without the owner's consent when, within one year from the distraint ordering date, the value of the seized goods has decreased significantly, i.e. by at least 40% compared to the time of enforcing the asset freezing. The MS that allow a pre-confiscation sale without the owner's consent require often a court decision or a decision of another authority such the AMO or the prosecuting authority (Belgium, the Netherlands).

The studied MS give priority to a sale by public auction (sometimes online) (Belgium, Germany, Romania) but, circumstances permitting, they accept a sale through private treaty (Belgium, Romania). For instance, it is necessary to be attentive to the "risk of selling such property to individuals or entities associated with a criminal enterprise"[13]. The proceeds of the sales are sometimes negatively impacted by the reputation of the previous owner (e.g.: real estate of the Mafia), by the rights of bona fides third party (immovable properties with mortgage, properties under shared ownership). The MS should provide for assumptions in which "the identity of buyers should be protected to avoid retaliation by the former possessor"[14]. The costs of the sale are borne by the buyer (Belgium) or by the defendant (the Netherlands).

The proceeds of the pre-confiscation sale are deposited into a bank account usually controlled by the AMO with the aim of executing the future confiscation order (Belgium, France, Romania, the Netherlands). If the proceeds of this sale (deposited into a bank account) accrue interest, it's important that the law determines who receives said interest if, in the end, there is no confiscation order. In which case, some MS reimburse the capital and the interest to the person (Belgium), other MS retain the interest for the funding of the AMO or for a fund allocated to improving justice and public security (France, Italy). For instance, in France, the proceeds of asset's sales of drug-related cases are deposited in a specific

[13] B. Vettori, T. Kolarov, A. Rusev, *op. cit.*, 42.

[14] Open-ended Intergovernmental Working Group on Asset Recovery, *op. cit*., 6.

fund and are allocated to the public services involved in the fight against drug trafficking[15].

1.2.3. Social re-use

The term "social re-use" has a symbolic impact: "this method allows the transparent return to the public of assets misappropriated from society"[16]. This allows "to enhance the trust of citizens in public institutions"[17]. The re-use of seized assets have also an economic impact. The re-use "of crime proceeds for social purposes [allows] to re-inject the funds of criminal organizations into legal and transparent economic activities"[18]. This also allows "to create jobs in regions that are under heavy influence of criminal economy"[19]. The social re-use is therefore different from a traditional transfer of the assets to the state budget[20]. These assets are not mixed with other public resources and "proceeds of crime are openly given back to society"[21].

Not everyone share this enthusiasm for the re-use of assets. As such, some critics are favorable to the fact that assets go into the state budget: "there is no risk of competition or attempts of manipulation by civil society organizations or other groups that could hope to become the beneficiary of confiscated monies that the state wants to use for social purposes"[22].

The social re-use of assets is also criticized when it is actually a "institutional re-use", this means that the beneficiary is not the civil society but a state institution. The "interim" re-use by the police is sometimes portrayed as "inappropriate because it signals to the public that the police can cavalierly target and take property and use it without the imprimatur of the court"[23]. To avoid a conflict of interest, Belgium and France do not authorize that the assets be used personally by law enforcement representatives involved in the seizure[24].

Some countries do not permit the interim use of asset "because of the inherent risk of the asset deteriorating over time and depreciating in

[15] Basel Institute on Governance, *op. cit.*, 35.
[16] B. Vettori, T. Kolarov, A. Rusev, *op. cit.*, 9.
[17] B. Vettori, T. Kolarov, A. Rusev, *op. cit.*, 42.
[18] B. Vettori, T. Kolarov, A. Rusev, *op. cit.*, 46.
[19] Basel Institute on Governance, *op. cit.*, 50.
[20] B. Vettori, T. Kolarov, A. Rusev, *op. cit.*, 33.
[21] B. Vettori, T. Kolarov, A. Rusev, *op. cit.*, 34.
[22] Basel Institute on Governance, *op. cit.*, 49.
[23] Th. S. Greenberg, L.M. Samuel, W. Grant, L. Gray, *Stolen Asset Recovery. A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, Washington, The World Bank, 2009, 89.
[24] G8 Criminal Legal Affairs Subgroup, *op. cit.*, 2.

value as a result of its use"[25]. If this interim re-use is permitted, it is necessary to ensure that the asset will be returned in a fit state. To do this, it is necessary to provide, as means of guarantees, a compensation or a damage claim in the event of deterioration of the asset due to the use.

The fundamental right of the owner "could potentially be violated, particularly if a court later orders the return of the asset"[26]. Despite these comments, some studied MS authorize the re-use of seized assets. But from one MS to another; there are differences in the types of assets involved and in the types of possible beneficiaries.

In Belgium, the Federal Police can use the seized assets to fight or prevent acts committed within the framework of a criminal organization[27]. This institutional re-use must respect a principle of proportionality (the asset concerns acts committed within the framework of a criminal organization), a principle of purpose (the asset must be useful to the fight against criminal organization) and a principle of subsidiarity (the police not already have similar assets in sufficient numbers).

Italy is the MS that most frequently resorts to this re-use with real estate. Beneficiaries are various and one can as such talk both of 'institutional re-use' and 'social re-use'. Italy is the most transparent country (a lot of information is available on the internet) with regards to beneficiaries of social re-use[28]. Italy is also the MS seeking to ensure that social re-use be done to the benefit of 'regional' community, where the asset has been seized. The idea being that this social re-use may allow for "compensating local communities affected by serious and organized crime"[29]. Before the confiscation, the re-use is mainly "institutional" (the beneficiaries are the police or others bodies of the State for purposes of justice, civil protection or environmental protection) and concerns assets seized within the frame of some criminal cases (drug trafficking, road traffic regulations, driving under the influence of drugs or alcohol, illegal immigration…).

The Dutch and German laws do not provide for such re-use. In Romania, re-use concerns the immovable property and the beneficiaries are public institutions, administrative authorities or non-governmental organizations. For procedural reasons, public beneficiaries ("institutional re-use") are favored over private ones ("social re-use"). It is not, however, a

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[25] UNODC, *op. cit.*, 24.

[26] UNODC, *op. cit.*, 24.

[27] There is a second possible beneficiary: a scientific institution can use the asset for didactic or scientific reasons.

[28] BASEL INSTITUTE on GOVERNANCE, *op. cit.*, 39.

[29] BASEL INSTITUTE on GOVERNANCE, *op. cit.*, 50.

case of interim re-use as it only concerns confiscated assets (cf. *infra*). In France, the police services, the gendarmeries units or services of the customs administration may also be authorized (by the public prosecutor) to use (free of charge) the movable assets, when these services or units carry out judicial police missions. It is not, however, a case of interim re-use as it only concerns confiscated assets (cf. *infra*).

In practice, it seems that the sale is a disposal method much more used than the re-use of asset. The MS which resorts most often, and has for a long time, to this re-use of assets, is Italy. The Italian situation may be explained by the fact that serious and organized crimes of the Mafia do not always have identifiable victims. And so, "If society as a whole is perceived as a victim (…), it can be argued that the compensation can take the form of re-use"[30].

Some difficulties concerning interim sales can be found in the interim re-use of asset: mortgages, property under joint ownership, third party claims, the re-use benefits to a criminal organization… There are also specific difficulties: the costs for restoration before the asset can be used.

1.2.4. Rent

Even if national legislations do not explicitly provide for it, renting out of seized assets is a practice occasionally encountered, especially if selling is considered pas opportune. This possibility is limited in its application. Renting out concerns mainly real estate (Belgium, Italy) and corporate assets (Italy).

1.2.5. Destruction

The MS allow the destruction of hazardous assets and assets that poses a threat to public safety (e.g. drugs, counterfeit goods)[31]. Some MS (Belgium) also explicitly provide for a destruction for economic reasons: the conservation of the property has a disproportionate cost compared to the value of the property (e.g. obsolete electronic equipment).

If the administering of the evidence so requires, the taking of samples, or a photographic or video recording of the property should take place before it is destroyed.

1.2.6. Restitution to the victim

Even if the procedures are different in the studied MS, victims can usually all obtain restitution of seized property. This right to the restitu-

[30] B. Vettori, T. Kolarov, A. Rusev, *op. cit.*, 38.
[31] Unodc, *op. cit.*, 25.

tion is the consequence of the property right he/she owns on the asset. This restitution can be postponed for the needs of an investigation or after the confiscation order (cf. *infra*).

1.3. *Costs related to management of frozen property*

In France, "the owner or property holder managing the seized property, or AGRASC when the seized property is put under its management, are responsible for the costs of managing such seized property"[32]. In Belgium, costs related to the management of seized property are legal costs that are taxed by the AMO. In the Netherlands, Romania and Germany, the system is similar: the state (public prosecutor's office) bears the costs of managing but in the execution phase, this cost will be borne by the convict.

The management of frozen property can be a costly business. Some MS (France, Italy) have put into place a national fund (replenished among others by the profits from sums seized or acquired by the management of assets seized) to allow the AMO to pay its operation costs. In addition, AGRASC is financed from the profits of sums seized. With such a mechanism, AGRASC was promptly able to self-finance itself.

1.4. *Protection of bona fide third party*

MS provide that frozen assets can be given back to a third party (Belgium, France, Germany, the Netherlands, Italy). For the protection of bona fide third parties to be infringed, these persons must be able to challenge the decisions relating to the management of frozen property. The concept of "affected persons" provided for by the Regulation (EU) 2018/1805 (art. 2 and 33) is interesting because it allows to include third parties in the persons who can challenge the decisions relating to the management of frozen property.

In practice, "it is not always possible or easy to distinguish legitimate third parties from persons associated with the suspect or acting at the suspect's behest. (…) The following factors need to be assessed: Did the third party take action to prevent the offence? Is the third party implicated in any other related offence? Does this third party have a legitimate interest in the property and have an arm's length relationship with the suspect? Did the third party act diligently according to the law in the creation of the interest in the asset?"[33].

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[32] Basel Institute on Governance, *op. cit.*, 35.

[33] UNODC, *op. cit.*, 27.

1.5. *Possibility to claim damages suffered by a wrongful management of frozen assets*

The State's civil responsibility may be engaged if the asset is wrongfully managed. However, the studied MS have not provided for a specific procedure, the person concerned can initiate a civil liability procedure against the State. In Germany, the freezing of assets creates a contractual relationship between the State and the person affected. France has been particularly severe in this regard, as no compensation can be claimed by the owner in case the asset is sold prior at a price he/she regards as undervalued. Since the sale is made publicly and competitively on the market, there is an irrefutable presumption of sale at the correct price.

Case law does not seem to be abundant in any studied MS and chances of success seem thin, since the obligation of management is considered more like an obligation of means than like an obligation of result. For instance, in Germany, the state is liable only for intentional and negligent violation of professional duties of civil servants who have caused individual harm or damages.

1.6. *Statistics and databases*

At the interim management stage, the databases must allow for "keeping track of the costs incurred in the management (…) of seized assets to ensure that such cost do not exceed the value that may ultimately be recovered from realization of the asset"[34]. Such databases must allow to produce accurate statistics and thus enhance accountability of the system.

Except for Italy, the MS find it difficult to provide statistics on decisions relating to the management of frozen property. These difficulties are related, in the different MS, to the multiplicity of actors charged with enforcement of these decisions (cf. *supra*). Indeed, the databases of some AMO have improved in recent years (Belgium, France, the Netherlands). The following is a set of criteria that could be used as a guide for the construction and improvement of these databases[35]: all agencies involved in the process should provide information on their activities; information should be collected by a centralized agency, in a centralized and customized database; said database should be structured so as to cover all the phases of the process (investigation, seizure, custody, administration

[34] UNODC, *op. cit.*, 59.

[35] UNODC, *op. cit.*, 47 and 60; TH. S. GREENBERG, L.M. SAMUEL, W. GRANT, L. GRAY, *op. cit.*, 87.

and disposal); the nature, the description, the physical location, the condition, the value and the identity of the owner of the asset should be recorded (and updated).

1.7. *Management of frozen property in the context of mutual recognition*

1.7.1. Institutional aspects of the management of frozen assets

No European text specifies what authorities are responsible for the decisions relating to the management of frozen property. It is simply provided that decisions relating to the management of frozen property "shall be governed by the law of the executing State" (Regulation (EU) 2018/1805, art. 28, par. 1).

The MS are encouraged to "ensure the adequate management of property frozen (…) for example by establishing centralized offices" (Directive 2014/42/EU, art. 10, par. 1 and recital 32; Regulation (EU) 2018/1805, recital 47). We have noticed that all the studied MS have a AMO (except Germany).

1.7.2. Disposal methods

1.7.2.1. Conservation

Frozen property shall remain in the executing State until a confiscation certificate has been transmitted and the confiscation order has been executed (Regulation (EU) 2018/1805, art 28, par. 3).

Recital 35 of the Directive 2014/42/EU specify that the MS must "take appropriate action to prevent criminal or illegal infiltration". This demand is missing from the directive as such.

1.7.2.2. Sale or transfer

National legislations must provide for "the possibility to sell or transfer property where necessary" (Directive 2014/42/EU, art. 10, par. 2). The objective is to avoid or minimize the economic depreciation of frozen assets (Directive 2014/42/EU, recital 32; Regulation (EU) 2018/1805, art. 28, par. 2).

Money obtained after selling such property shall remain in the executing State until a confiscation certificate has been transmitted and the confiscation order has been executed (Regulation (EU) 2018/1805, art. 28, par. 3).

The executing State shall not be required to sell cultural objects (Regulation (EU) 2018/1805, art. 28, par. 4). This affirmation is surprising in two counts at least. First, it only concerns confiscated property, or

it could also make sense in the case of frozen property. Secondly, this formulation seems to suggest that in the case of other assets, the executing State could be forced to sell. However, article 28, par. 2 makes no mention whatsoever of such a constraint: the executing State "shall be able to sell (…) frozen property".

1.7.2.3. Social re-use?

Frozen property could be earmarked, as a matter of priority, for law enforcement and organized crime prevention projects and for other projects of public interest and social utility (Regulation (EU) 2018/1805, recital 47).

Is it relevant to provide for such assignment in the case of frozen assets but for which there has not been a decision of confiscation made yet? There is besides a contradiction between recital 47 and the text of the Regulation itself, since Regulation provides for this use for public interest or social purposes only for the confiscated property (art. 30, par. 6, point d).

1.7.2.4. Destruction

The Regulation (EU) 2018/1805 does not explicitly mention the destruction of frozen property. But the article 28 provides that the decisions relating to the management "shall be governed by the law of the executing State".

1.7.2.5. Restitution to the victim

The Regulation (EU) 2018/1805 restates that the notion of 'victim' is to be interpreted in accordance with the law of the issuing State (recital 45). A legal person could be a victim (recital 45).

The priority given to victim's rights to compensation and restitution over executing and issuing States' interest was not provided for in Directive 2014/42/EU (art. 8, par.10) and in the Proposal of regulation COM/2016/0819 final (recital 32 and art. 31, par. 5) only for the confiscated property. In the Regulation (EU) 2018/1805, this priority for the victims concern also the frozen property (recital 45 and art. 29).

The decision to restitute frozen property to the victim is made by the competent authority of the issuing State (Regulation (EU) 2018/1805, art. 29, par. 1). This issuing authority informs the executing authority of this decision to restitute frozen property to the victim (art. 29, par. 1 and 2). The executing authority should take the necessary measures to ensure that the frozen property is restituted "as soon as possible" (recital 46; art. 29, par. 2). The executing authority should be able

to transfer the frozen property to the issuing State or be able to restitute this property directly to the victim (recital 46).

For frozen property to be returned to the victim, it is necessary that (Regulation (EU) 2018/1805, art. 29, par. 2; recital 46):

– the victim's title to the property not be contested;

– the property not be required as evidence in criminal proceedings in the executing State;

– the rights of affected persons not be prejudiced (in particular the rights of bona fide third parties).

Where an executing authority is not satisfied that these conditions have been met, it shall consult with the issuing authority in order to find a solution. If no solution can be found, the executing authority may decide not to restitute the frozen property to the victim (Regulation (EU) 2018/1805, art. 29, par. 3).

1.7.3. Costs related to management of frozen property

The costs related to management of frozen property must be borne by the executing State (Regulation (EU) 2018/1805, recital 49 and art. 31, par. 1). But, if the executing State has had large or exceptional costs, for example "because the property has been frozen for a considerable period of time" (Regulation (EU) 2018/1805, recital 49), it may propose to the issuing State that the costs be shared (Regulation (EU) 2018/1805, art. 31, par. 2). Such proposals shall be accompanied by a detailed breakdown of the costs incurred by the executing authority. Following such a proposal the issuing authority and the executing authority shall consult with each other. Where appropriate, Eurojust may facilitate such consultations (Regulation (EU) 2018/1805, art. 31, par. 2).

1.7.4. Obligation to inform affected persons

The obligation to inform affected persons is provided for the execution of a freezing order (Regulation (EU) 2018/1805, art. 32, par. 1). But this obligation is not provided for decisions relating to the management of frozen property. Indeed, the Regulation (EU) 2018/1805 limits itself to affirm that «the management of frozen (…) property shall be governed by the law of the executing State (art. 28, par. 1). It thus seems that information of affected persons with regard to these decisions depend on what is provided by the law of the executing State.

1.7.5. Legal remedies

The Regulation (EU) 2018/1805 provides for legal remedies in the executing State against the recognition and execution of a freezing order (art. 33). But this Regulation does not provide for legal remedies for the decisions relating the management of frozen property. It thus seems that the existence or not of legal remedies for the decisions relating the management of frozen property depend on the law of the executing State (Regulation (EU) 2018/1805, art. 28, par. 1).

The formulation retained by Directive 2014/42/EU concerning legal remedies seem broader than the one provided for by the Regulation (EU) 2018/1805. Indeed, article 8, par. 1 of this Directive provide that "Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy". However, among these "measures provided for this Directive", one should take into account "necessary measure (…) to ensure the adequate management of property frozen", provided in article 10. So, in the matter at hand, this Directive imposes, unlike the Regulation (EU) 2018/1805, legal remedies.

Article 33, par. 4 of the Regulation (EU) 2018/1805 specifies: "This Article is without prejudice to the application in the issuing State of safeguards and legal remedies in accordance with Article 8 of Directive 2014/42/EU". But, with regard to decisions relating to the management of frozen property, the legal remedies should be provided for in the executing State (since it is an authority of the executing State that has taken the decision relating to the management).

1.7.6. Compensation for the damage suffered

The Regulation (EU) 2018/1805 provide for reimbursement to an affected person in the case of damage resulting from the execution of a freezing order (art. 34). But the article 34 of this Regulation does not provide for reimbursement for the decisions relating the management of frozen property. It thus seems that the existence or not of reimbursement to an affected party for the decisions relating the management of frozen property depend on the law of the executing State (Regulation (EU) 2018/1805, art. 28, par. 1). As such, an affected person could receive reimbursement only if this procedure be possible in the internal law of the executing State.

The procedure enabling an executing State to be reimbursed by the issuing State for any damages paid to the affected person, provided for in article 34 of the Regulation (EU) 2018/1805 does not apply here.

1.7.7. Statistics

The Regulation (EU) 2018/1805 require that the MS collect comprehensive statistics (art. 35). However, it was never required that statistics be collected regarding the decisions relating to the management of frozen property.

1.7.8. Reporting and review

Every five years, the Commission shall submit a report to the European Parliament, to the Council and to the European Economic and Social Committee on the application of Articles 28, 29 and 30 in relation to the management and disposal of frozen property, the restitution of property to victims and the compensation of victims (Regulation (EU) 2018/1805, art. 38).

1.7.9. Traces of decisions relating to the management of frozen property in the model for the freezing certificate

The is no specific section of the freezing certificate dedicated to decisions relating to the management of frozen property. Only the Section K is dedicated to a decision to restitute frozen property to the victim.

If the issuing authority wishes to send a specific request to the executing authority about the management of the frozen property, it seems to us that it could use point "Need for specific formalities at the time of execution" of the F Section.

1.7.10. Conclusion

Difficulties noted at the level of obligation to inform affected persons, legal remedies, compensation for the damage suffered, demands at the level of statistics and at the level of the model for the freezing certificate are correlated to the fact that the Regulation (EU) 2018/1805 evokes only in passing the question of management. Indeed, the two key concepts of the Regulation (EU) 2018/1805 are "recognition" and "enforcement" of freezing and confiscation orders. The two main chapters (II and III) of the Regulation (EU) 2018/1805 are entirely devoted to these, but there is no chapter devoted to the next stage, that of management. Only sparse dispositions are mentioned in a chapter devoted to "general provisions" that we find some elements relating to management. This situation is regrettable. It might have been interesting to define the concept of "execution of freezing order" more broadly to include all subsequent decisions relating to the management of frozen property.

2. *Freezing of third-parties' assets*

The rules on asset management and disposal apply irrespective whether the freezing order has been addressed to the defendant or a third party. As there are no peculiarities, the foregoing explanations apply accordingly.

Conclusion

After this overview of the issues at hand, it seems to us that the management of frozen property could be facilitated in at least two ways.

First, before the seizure, MS could consider more closely what is called "pre-seizure planning". This pre-seizure planning can be defined as "the process of evaluating assets and confiscation scenarios prior to freezing or seizure of property"[36]. The objectives of pre-seizure planning are numerous. "If the asset is left in the custody of the owner, pre-seizure planning assists in devising the kind of restrictions that ought to be placed on the use of the assets as well as the measures needed to monitor compliance with such restrictions. If the asset is to be seized, pre-seizure planning will focus on determining the best way to avoid high costs for storing it and to manage legal liabilities as well as reputational risk. The objective is for law enforcement to fully assess the options available for securing an asset in a way that best preserves its value and to evaluate and mitigate the risks associated with the freezing or seizure of that asset"[37]. The aim is to determine "what property is being targeted for seizure, how and when it will be seized"[38]. The AMO "should have the capacity to provide advice and support to law enforcement officials on questions relating to the costs of storage, maintenance, security and disposal of the asset"[39]. From this perspective, the work of AGRASC (France) must be considered best practice.

Secondly, the introduction of the possibility of value-based seizure should allow MS to "avoid some of the challenges posed by the need to manage complex assets"[40]. The value-based seizure and confiscation feature however so-called symbolic complications: the criminals retain the

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[36] UNODC, *op. cit.*, 27; G8 CRIMINAL LEGAL AFFAIRS SUBGROUP, *op. cit.*, 2; TH.S. GREENBERG, L. M. SAMUEL, W. GRANT, L. GRAY, *op. cit.*, 85.

[37] UNODC, *op. cit.*, 27 and 28.

[38] G8 CRIMINAL LEGAL AFFAIRS SUBGROUP, *op. cit.*, 2.

[39] UNODC, *op. cit.*, 63.

[40] UNODC, *op. cit.*, 30; B. VETTORI, T. KOLAROV, A. RUSEV, *op. cit.*, 37.

[41] B. VETTORI, T. KOLAROV, A. RUSEV, *op. cit.*, 38.

asset and this seems "to defeat one of the objectives of criminal asset confiscation, namely maintenance of public confidence in the justice system"[41].

We take the advantage of this latter remark to stress the omnipresence of a rhetoric triggered at the trust of the public in discourses correlated with justifications of seizure (and confiscation). This is particularly the case with social re-use of assets and, to a lesser extent, in the case of the use of information technology systems (databases, statistics), promoted in the name of demands of "transparency" and "accountability"[42]. These discourses did illustrate the emergence of a new basis for the sentence focused on public opinion or more specifically on the perception that the (conservative) political world has of expectations of a certain (repressive) public opinion[43]. It is thus the public trust in the administration of justice, rather than the protection of society (deterrent, denunciation, rehabilitating) which becomes central. Is it positive for criminal politics to rely on the perceptions of a public often poorly informed of the functioning of criminal justice[44]?

[42] G8 Criminal Legal Affairs Subgroup, *op. cit.*, 2 and 3.

[43] R. Dubé, M. Garcia, «L'opinion publique au fondement du droit de punir: fragments d'une nouvelle théorie de la peine?», *Déviance et Société*, 42, 2, 2018.

[44] This issue can be formulated in the following way: it does not matter if "in the reality of facts" a measure does not protect society effectively, it matters on the other hand that, "in the reality of perceptions", a measure makes it possible to reinforce the confidence of the public in the administration of justice.

SAMUEL BOLIS

THE DESTINATION AND ADMINISTRATION OF CONFISCATED ASSETS

SUMMARY: 1. Preamble: The original form of destination and administration of confiscated property. – 2. The emerging need to restrict the destination of confiscated goods. – 3. The opportunity to establish "Central Coordination Offices" for the administration of confiscated assets. – 3.1. The destination and administration of particular goods. – 3.2. The destination and administration of assets allocated abroad. – 4. The current lack of harmonised models of destination and administration of foreign confiscated assets.

1. *Preamble: the destination and administration of confiscated assets in their original size*

As is now well known, confiscation consists of the perpetual coercive removal of property of illegal origin from the person who disposes of it and its transfer for the benefit of State property. The definitive removal of the asset in question from its natural economic circuit therefore entails its insertion in another context free from criminal conditioning.

Originally – but in some States this still happens today – the destination of the goods could only entail their destruction (for goods intrinsically dangerous to society), or their attribution to the indistinct patrimony of the State Treasury. In more detail, confiscation could entail a direct transfer (for example, confiscated properties conferred to State property) or an indirect transfer (for example, through the sale of the confiscated goods).

This traditional model involves a general allocation to the general budget of the State without it being possible to assign a specific use to the confiscated assets. It is therefore not possible to link the destination of such assets – or, more frequently, their economic value – to specific works, given the principles of the unity and universality of the state budget, which attributes to national parliaments the political decision on the distribution of general taxation among the economic initiatives decided on at that level from time to time.

2. *The emerging need to restrict the destination of the confiscated goods and properties*

Only in more recent times has the idea emerged of putting the confiscated asset to ethical use, giving its destination a "symbolic" character. In this way, not only is the general-preventive function of the confiscation highlighted, but also the compensatory-restoration function. In fact, on the one hand, the risk of "recapture" of the goods and property by their original owners is contained, thus preventing Libe the risk of a further criminal infiltration and, on the other hand, the role of Non-governmental organizations in social contexts characterized by high criminality is clearly strengthened.

The management and destination of the goods therefore become themselves instruments in the fight against crime, also from a preventative perspective. Moreover, the economic resources illegally acquired by criminals are thus returned to the territories that have suffered most from the social repercussions of criminal activities. This use, therefore, represents a fundamental instrument in contrasting criminal activity, since it aims both to weaken the social roots of such organizations and to promote a greater and more widespread consensus of public opinion towards the repressive intervention of the State in order to restore legality.

In fact, the use of confiscated assets for social purposes represents, as many European documents underline, a fundamental instrument for affirming the rule of law against crime. For example, the Italian legislator has been aware of this since 1996[1], when it regulated, in its anti-mafia legislation, the regime for the execution of final confiscation orders, introducing a restriction on the destination of assets for specific uses; this destination does not consist of a generic assignment to public bodies active in the field of justice, public order and civil protection, rather a specific assignment for "social purposes". Thus, in Italy, agricultural land confiscated from the mafia is allocated to voluntary associations active in the education of young people and the destination of real estate to communities operating in the field of therapeutic recovery for drug addicts. In relation to the Netherlands, the social destination of confiscated assets was clear in a case where a boat previously used for drug trafficking was transferred to a sailing school. The restriction on specific uses, therefore, takes on high symbolic value for the purpose of clearly demonstrating to the community that "*crime does not pay*"[2].

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[1] By Law No 109 of 7 March 1996.

[2] On this topic see Communication from the Commission to the European Parliament and the Council of 20 November 2008 titled *Proceeds of organised crime: ensuring that "crime does not pay"*, in document COM(2008)766 def.

The European Union legislator followed in these footsteps by providing in the text of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 the right for Member States to consider the adoption of measures allowing the use of confiscated assets for purposes of public or social interest. Recital 35 of the Directive[3] clarifies that such measures could include, for example, the use of such assets for law enforcement and crime prevention projects as well as other projects of public interest and social utility.

However, the original text of the Directive did not include a provision for which the assets acquired by the State were to be used for social purposes. It was a Committee of the European Parliament[4] that proposed amendments to the original text, which expressly provide for the "possibility of using confiscated property for social purposes". This possibility should be implemented, first of all, through far-sighted and prudent management of the assets already during the seizure phase: in fact, the reason for this amendment underlines that it would be appropriate for Member States to define "in greater detail the management of the assets *also* [non-textual italics] after the confiscation order, through their use for social purposes".

Moreover, the transposition of the social purpose of the goods is, as highlighted above, merely optional. Among the Member States participating in this research project, this type of destination is currently explicitly provided for under Italian, French and Romanian legislation; it is only partially envisaged in Belgium and the Netherlands, while it is completely absent in Germany where confiscated assets are generally assigned to the *Bundesland* where the court that first decided on confiscation is placed.

3. *The opportunity to set up Central Coordination Offices for the administration of confiscated assets*

The management of confiscated assets undoubtedly relates to the stage of the enforcement of judgments. This function is generally[5] carried

[3] In substantially identical terms, it was thus also taken from recital 47 of Regulation 2018/1805.

[4] This is the Committee on Civil Liberties, Justice and Home Affairs For a review of the amendments produced by the Committee on Civil Liberties, Justice and Home Affairs on the text of the proposal for Directive 42/2014/EU, see A.M. Maugeri, *L'*actio in rem *assurge a modello di 'confisca europea' nel rispetto delle garanzie CEDU?*, in *Dir. pen. cont. - Riv. trim.*, 3/2013, 252 ff.

[5] There is an exception, in the Belgian case, where the Court refers the execution to the

out by the public prosecutor's office, within which there is usually an "execution office" expressly dedicated to this purpose.

The social use of the confiscated goods and properties requires a monitoring activity, in relation to the fact that the goods and properties assigned are effectively employed, at least for a significant period of time, for the purposes indicated by the Judge, in compliance within those specifically provided for by law. This is the only way to be sure that such goods and properties do not become available to criminal organizations or that there is no diversion from the purposes for which they were assigned. However, such monitoring necessarily involves the organisation of a qualified administrative service dedicated thereto.

Article 10 of Directive 2014/42/EU provides for the possibility that the management of confiscated assets may also be carried out by an authority other than the judiciary: for example, a central authority (Asset Management Office - AMO) or a network of offices responsible for acquiring the management of confiscated assets and accompanying them up to the stage when the final confiscation is enriched with specific elements relating to its destination. Regulation 2018/1805/EU (hereinafter "the Regulation") of the European Parliament and of the Council of 14 November 2018 seeks to request[6] the establishment of such authorities or offices in Member States where they do not yet exist.

This choice has its origins in two orders of reasons.

Firstly, the aim is to increase the percentage[7] of cases of execution of final confiscation orders even in countries where there is a certain rate of ineffectiveness in the execution of sentences[8]. In fact, a national authority could monitor criminal proceedings in which preventive seizures have

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Department of Finance, which opens an asset investigation into the financial assets of the convicted person, when the confiscation concerns an amount due in excess of € 10,000.

[6] Recitals 47 of the Regulation stipulates that "*Each Member State should consider establishing a national centralised office responsible for the management of frozen property, with a view to possible later confiscation, as well as for the management of confiscated property. Frozen property and confiscated property could be earmarked, as a matter of priority, for law enforcement and organised crime prevention projects and for other projects of public interest and social utility*".

[7] According to the latest data published by the European Commission (*Europol, Does Crime still pay? Criminal Asset in the EU*, 2016), in the EU alone, illicit proceeds amount to approximately 110 billion euro per year. Only 2.2% of this amount is seized, while 1.1% reach final confiscation.

[8] On the subject see, albeit in a more general perspective, *L'ineffectivité des peines*, edited by M. Danti-Juan, Paris, 2015; L. Eusebi. *Politica criminale e riforma del diritto penale*, in *Democrazia e diritto*, 2000, 2, 114 ff.; as well as, with specific reference to the pecuniary penalty, see, L. Goisis, *L'effettività (rectius ineffettività) della pena pecuniaria in italia, oggi*, in *Dir. pen. cont.* November 13, 2012.

taken place, urging those within its jurisdiction to execute final confiscation orders as ordered by the judiciary.

Secondly, the intention is to establish a highly specialized authority capable of tackling and resolving the complex problems – of a legal, economic and social nature – that the management of certain confiscated assets causes.

The management of confiscated assets has become increasingly complex over time. In the past, it is true that the main form of confiscation concerned issues directly related to the crime and such things were easily manageable by the form of destruction or sale. The subsequent introduction of further forms of confiscation – such as extended and valuable confiscation – now extends to assets with a complex structure, which may not even be directly linked to criminal acts. For example, the profit from the crime of drug dealing or VAT fraud is easily manageable if money directly related to the crime committed is found. However, if such profit cannot be directly found and assets of equivalent value are confiscated – consisting, for example, of a building or a company – the management of such assets may take place in different forms from those mentioned above. In this regard, it should be borne in mind that a company is an organized set of goods and capital with the purpose of generating an income; the overall value of the company is therefore greater than the sum of the individual goods and capital contained therein. This value must therefore be preserved, also in view of the fact that it is functional to maintaining the employment of those who work for the company itself. Under these circumstances, the management of the confiscated property is therefore considerably more difficult as it requires the "dynamic" administration of the property and the creation of appropriate administrative structures is therefore necessary.

The purpose of the centralised offices referred to in Article 10 of the Directive is ultimately also to prevent the depreciation of the value of the assets seized[9] (and then confiscated), while providing administrative and legal assistance to the judicial authority.

The nature of this centralised office – if provided[10] – may in theory

[9] On this topic, see recital 32 of Directive 42/2014/UE: "*Property frozen with a view to possible subsequent confiscation should be managed adequately in order not to lose its economic value. Member States should take the necessary measures, including the possibility of selling or transferring the property to minimise such losses. Member States should take relevant measures, for example the establishment of national centralised Asset Management Offices, a set of specialised offices or equivalent mechanisms, in order to effectively manage the assets frozen before confiscation and preserve their value, pending judicial determination*".

[10] Germany, for example, does not yet have such structures and has a decentralised approach.

be judicial (Belgium[11]) or administrative (France[12], Italy[13], Romania[14]). In reality, beyond the formal data, the office carries out administrative functions that actually end up influencing the choices of the judge with regard to final confiscation orders. In reality, this structure has a double utility: it performs both administrative functions, especially in the phase of the execution of final confiscation orders, and tasks of assistance to the criminal jurisdiction, generally during the preliminary investigations. In this way, on the one hand, the aim is to support the judicial administration of the assets already during the seizure phase and, on the other hand, to prepare the ground for their subsequent destination and management in the event that definitive confiscation is reached.

The set of functions described above must be properly regulated as it risks, in the abstract sense, constricting the rights of third parties. In fact, this centralised office is an auxiliary body of the criminal judge, but its subsequent role in the management and destination of confiscated property undoubtedly also makes it a "party" to the proceedings that may clash, for example, with the original owner or third parties who have rights over the confiscated property. There is therefore a risk that the performance of the auxiliary tasks of the jurisdiction will call into question the independence and third party status of the judge himself, in breach of the right to a fair trial required by the European Convention on Human Rights.

The centralised offices are bodies governed by public law and may be attached to the Ministry of the Interior (Italy), Justice (Belgium, Romania) or at the same time to the Ministry of Justice and Budget (France). The Netherlands has not set up a similar structure, but delegates the management of the confiscated assets to an existing structure of the Ministry of Finance[15].

In some countries (France, Romania), the Central Authority responsible for the management of confiscated assets also deals with the identification of assets to be subjected to confiscation, in implementation of Article 9[16] of Directive 2014/42/EU. In order to carry out this specific

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[11] Central Office for Seizure and Confiscation. It is a member of the Public Prosecutor's Office, which carries out its tasks under the authority of the Ministry of Justice.

[12] AGRASC, Agency for the Management and Recovery of Seized and Forfeited Assets, established by Law no 768 of 9 July 2010.

[13] ANBSC, National Agency for the Management of Assets Seized and Confiscated from Organized Crime, established by Legislative Decree No. 4 of 4 February 2010.

[14] ANABI, Agenţia Naţională de Administrare a Bunurilor Indisponibilizate, established by Law No 318 of 11 December 2015.

[15] The "Dienst Domeinen", under the Ministry of Finance.

[16] This article provides that "Member States shall take the necessary measures to en-

mission of tracing the assets to be confiscated, the structure is equipped with investigative powers, so as to respond on its own to requests for mutual assistance or international cooperation from the CARIN network and the Asset Recovery Offices. Undoubtedly, this synergy of functions can be indicated as a model to be followed by other countries.

In some countries, however, the central authorities mentioned above are not the only points of reference for the management or destination of confiscated assets: in Italy, for example, they only manage confiscated assets in relation to certain offences (such as organised crime) or in the context of confiscation without conviction. In Romania, the central authority limits itself to managing assets with a value of more than 15,000 ron (about € 3,000), while in Belgium the lack of systematic communication to the Central Office of final confiscation decrees is complained of.

3.1. *The destination and administration of particular goods.*

It is possible to classify confiscated assets in the following homogeneous categories: movable property and credits; dematerialised financial instruments; registered immovable or movable property; company assets organised for running a business; shares and quotas.

Some of these assets (in particular, movable property, credits and dematerialised financial instruments) are of a static nature and therefore, pending the final judgment ordering their confiscation, they can be kept passively at most through the mere performance of sporadic acts simply aimed at preventing their dispersion or deterioration. Other assets (such as companies or some real estate) have a dynamic nature that requires an active type of administration, i.e. the performance of complex management activity for preserving and, if possible, increasing the value of the asset as required by recital 32 of Directive 2014/42/EU[17].

It is the judge that passes the final confiscation order who decides at his/her discretion whether to use the confiscated assets for particular activities or to sell them. In these cases, we talk about the destination of

able the detection and tracing of property to be frozen and confiscated even after a final conviction for a criminal offence or following proceedings in application of Article 4(2) and to ensure the effective execution of a confiscation order, if such an order has already been issued".

[17] Which provides that: "*Property frozen with a view to possible subsequent confiscation should be managed adequately in order not to lose its economic value. Member States should take the necessary measures, including the possibility of selling or transferring the property to minimise such losses. Member States should take relevant measures, for example the establishment of national centralised Asset Management Offices, a set of specialised offices or equivalent mechanisms, in order to effectively manage the assets frozen before confiscation and preserve their value, pending judicial determination*".

the confiscated property which is normally requested by the administrative bodies – public or private – that can make a request either directly or through the National Authority for the seized and confiscated property.

In some legal systems, such as the Italian one, there is a tendency to avoid the sale of companies and properties that require dynamic management, favouring other forms of employment.

The methods of using real estate can be as follows:

– Use by the State for purposes of justice, public order or social protection or assigned to research organisations;

– Management for economic purposes by the National Authority for Confiscated Assets (e.g. leased data);

– Destination for social purposes carried out by charities;

– Assignment to local authorities (municipalities);

– Sale.

The ways in which companies can be used are as follows:

– Rental, if their business is viable;

– Sale as an undivided unit;

– Liquidation, with the consequent transfer of the individual assets contained in it.

When there is a risk of a public order problem or that goods sold by public auction may return to a criminal environment, some States have special administrative arrangements for selling them. In Belgium and Italy, it is possible to negotiate directly with the buyer in such cases, thus avoiding sale by public auction. This is covered by the Directive itself, in recital 35[18] which expressly provides for the possibility of laying down special procedural rules in order to prevent criminal infiltration.

However, it should be noted that also in these cases, the maintenance of public order must be balanced against the protection of competition in the free market. In the Community legal order, public policy certainly constitutes a valid overriding reason in the general interest for restricting the free movement of goods or the principles of competition. There is no doubt, however, that public policy must be interpreted in a

[18] Which stipulates that: "*Member States should consider taking measures allowing confiscated property to be used for public interest or social purposes. Such measures could, inter alia, comprise earmarking property for law enforcement and crime prevention projects, and for other projects of public interest and social utility. That obligation to consider taking measures entails a procedural obligation for Member States, such as conducting a legal analysis or discussing the advantages and disadvantages of introducing measures. When managing frozen property and when taking measures concerning the use of confiscated property, Member States should take appropriate action to prevent criminal or illegal infiltration*".

restrictive sense, just as its protective measures must be proportionate, fit for the purpose and respectful of the right over the property[19].

The choice of the contractor may therefore lead to the exclusion of certain persons (e.g. the owner of the confiscated property and his family members) or give preference to certain categories of recipients (such as associations with social, educational purposes, etc.). This choice should, however, always be made in accordance with the principles of transparency, adequate publicity, equal treatment and proportionality[20].

National legislation in this area may also require harmonisation by the European legislator, in accordance with the principle of subsidiarity.

Almost all the national laws analysed provide for registered movable property and computer equipment being intended for public purposes, with primary use in the field of police activities. However, this is only possible for property confiscated in the context of particular offences (such as smuggling, drug trafficking and, more generally, transnational offences). Once confiscated (but in some legal systems already in the seizure phase), vehicles, boats and areas can be assigned to the police, generally respecting a constraint of purpose: that is, they must be used to fight against specific criminal activities that normally coincide with those that legitimize their confiscation.

The principle of subsidiarity in Belgian legislation is interesting, providing for the allocation of resources only if the police force does not already have sufficient assets at its disposal. This particular application of the principle of subsidiarity clearly fulfils the shared function of preserving the integrity of the financial allocations to the justice sector so that it can equip itself with adequate instruments for the achievement of its mission: in other words, it intends to prevent the police forces having a shortage of means to combat crime while waiting for the uncertain, future, allocation of goods.

Let us return to the question of the destination of real estate and companies. The Italian experience allows us to reflect on some specific problems of these goods. The management of the property – first in the seizure phase and then during confiscation – by the State allows, as mentioned, its detachment from the original criminal context. However,

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[19] See on public policy: CJEU, judgment of 14 October 2004, C-36/02 (*Omega Spielhallen*), § 36. On national security: CJEU, judgment of 2 October 2008, C-157/06 (*Commission v. Italy*), § 32.

[20] For example, the Court of Justice ruled that a protocol of legality leading to the automatic exclusion of a candidate who fails to provide a declaration concerning situations of control, liaison and subcontracting with other companies does not comply with the principle of proportionality.

this detachment can have traumatic effects on the survival of the asset itself.

The phenomenon is known as a crisis of "legalization" of the criminal enterprise and implies significant costs that the judicial administrator (be it the National Authority or an administrator appointed by the judge) must necessarily face and that were previously illegally evaded. The costs may be, for example, those arising from the regularisation of employees hired "illegally", the payment of taxes due, the adaptation of workplaces to health standards; sometimes it is necessary to apply *ex novo* for the issue of planning permission for properties without it or administrative permits to carry out activities previously carried out unlawfully. In order to limit these expenses as much as possible while at the same time allowing the confiscated companies to return to legality, in some countries (Italy, France) the Government Legal Service may represent and defend the judicial administrator free of charge in disputes concerning relations relating to these particular assets.

The hidden costs of the legalisation process are added to further "costs" deriving from the very beginning of the procedure, first of seizure and then of confiscation, e.g. the evident damage to the reputation of the same company as a result of the intervention of the criminal judiciary, which may result, for example, in the loss of continuity of bank credit. This explains why almost all seized companies are destined to go bankrupt[21], while for the remaining ones an assessment must be made as to whether it is appropriate to continue their economic activity or to liquidate them, which is necessary in many cases where, for example, the confiscated company has completely eroded net assets. Confiscated property may, on the other hand, have been built without planning permission and must therefore be demolished.

In order to make the procedure for the management of confiscated assets effective, it seems desirable to adopt further administrative procedures. We can cite those provided in the Italian legal system, even if they only refer to the confiscation of anti-mafia prevention and to extended confiscation.

In fact, in these cases, an assessment must first be made of the actual size of the company's assets confiscated and a detailed analysis of the existence of concrete possibilities for the continuation or resumption of business activities, and if the judgment is negative the liquidation of the company must be ordered.

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[21] According to an estimate by the Italian National Institute of Judicial Administrators, more than 90% of confiscated companies in Italy go bankrupt.

If, on the other hand, the management of the confiscated property is to be continued, the Italian legal system in the above cases imposes the adoption of certain measures. In fact, to disconnect the company from the criminal economic fabric, the appointment of a judicial administrator may not suffice if the legacy of the previous management continues to remain, binding it to obligations undertaken in the past. The automatic suspension of ongoing contracts is then provided for in order to definitively sever ties with the past, postponing to a later stage the administrator's choice to continue or to terminate the contract (for example, supply or tender); this is however without prejudice to the possibility of temporarily executing, if authorised by the managing judge, the previous relationships where the suspension of the contract could result in serious damage to the company.

Something similar is also happening in French law, where there is provision for the suspension of ongoing civil enforcement proceedings and the initiation of new civil enforcement proceedings concerning the same assets is prohibited.

In Italy, to support the continuation of the economic activity of seized companies, qualified technical support is provided which, under the coordination of the Prefectures[22], contemplates the institution of a "permanent provincial table" composed of various representatives of the institutions with the purpose of assisting the judicial administrator. Not only that, since the seized companies often operate in very specialised economic sectors, the anti-mafia legislation provides the possibility for both the delegated judge and the Central Authority to avail themselves of the free technical support of entrepreneurs active in the same sector as those in which the seized company operates.

3.2. *The destination and administration of assets allocated abroad*

The confiscation order is transmitted by means of a confiscation certificate according to the procedure established by articles 14 et seq. of Regulation 2018/1805/EU. In particular, Art. 28 of the cited Regulation provides that the management of confiscated assets be governed by the law of the State of execution, while Art. 30 establishes certain minimum rules for the destination of confiscated assets. Article 23(1) also specifies that only the authorities of the executing State are have jurisdiction to

[22] In Italy, the "Prefettura" is the "Territorial Office of Government"; it has provincial competence and is governed by a Prefect who coordinates central and local public administrations in certain matters, such as, for example, that of public security.

decide on the manner in which the confiscation order is to be executed and to determine the measures relating thereto.

During the phase of the mutual recognition of confiscation orders, the procedure for the distribution of confiscated goods and properties allocated abroad foresees[23] the transfer in the issuing State of the measure of the sums of money directly found or the proceeds of the sale of the confiscated goods and properties. Only 50% of the excess of € 10,000 is transferred, while the remaining part is retained as a lump sum as compensation for the management costs incurred by the country of execution. However, this provision must now be integrated with that provided for by Article 29 of Regulation 2018/1805/EU, which will enter into force on 19 December 2020 and which implements Article 14 of the United Nations Convention against Transnational Organised Crime signed at the Palermo Conference of 12 – 15 December 2000. This latter article provides that "States Parties shall consider as a matter of priority, to the extent permitted by domestic law and if so requested, the return of crime-related proceeds or property confiscated from crime to the requesting State Party, so that the requesting State Party may compensate the victims of crime or return such proceeds or property to its rightful owners". The internal legislation of a Member State can therefore now guarantee a higher level of protection for the victim of the crime, compared to what is provided for by European law: in almost all legal systems, confiscated property belonging to the victim of the crime must be returned to the victim of the crime.

In fact, one of the possible uses of the proceeds from the sale of the confiscated property is the compensation of damages suffered by the victims of the crime or the civil parties to the criminal proceedings. This destination clearly serves a compensatory-reparatory purpose. Essentially, all countries provide for the possibility of allocating part of the funds collected from the sale of the confiscated assets to the restoration of the victims of the crime. Generally, however, there is a pre-deduction from these revenues of the charges incurred for the management of the assets before the sale. In Belgium, the State's claims are met before they are allocated to other entities.

Where the request for confiscation relates to a specific item of property, the competent national authorities and the issuing authorities may agree that the confiscation shall take the form of a request for payment

[23] The provision is contained in Article 16 of Council Framework Decision 2006/783/JHA of 6 October 2006 and in Article 30 § 7 of Regulation 2018/1805/EU, which will enter into force on 19 December 2020.

of a sum corresponding to the value of the property. This provision is present in all States which have ratified the 1990 Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Article 14 of this Convention – also incorporated in the cited EU[24] Regulation – allows the subversion, in cases of execution of requests for foreign confiscation, of the normal procedure followed in the national legal systems: usually, priority is given to the direct confiscation of the property, carrying out the confiscation of value only in cases where the property has been dispersed or is no longer traceable.

In short, only assets whose management is not critical – such as money, and assets that can be easily sold – can therefore be transferred from the State of execution to the foreign State of issue. It is also easy to take action against goods that can easily be sold on the market.

Regulation 2018/1805/EU states[25] that property other than money may be disposed of in an alternative way to its sale or transfer to the issuing State of the confiscation order; in fact, it is possible that the executing State may, in accordance with its national law and subject to agreement with the issuing State, decide on a different purpose, for example social purposes or public interest.

However, in the abstract sense, two orders of problems may arise for the destination of more complex confiscated assets (e.g. real estate or companies that cannot find a buyer). First of all, if the State of enforcement of the foreign measure does not have the particular legal instruments provided for in the most advanced laws of certain Member States and mentioned above in brief, there is a risk of their dynamic management being impossible. Secondly, there could be a disincentive for the forwarding of confiscation orders against these assets due to the high risk that, if they were not sold, operating costs would arise, the amount of which cannot be anticipated (for example, the maintenance of the buildings or their supervision), the restoration of which would be requested by the executing State from the issuing State pursuant to Article 31 of the Regulation.

The statistics reported in the Italian National Report seem to support the latter hypotheses, since cases of cross-border confiscation of companies and real estate are limited to only a few units.

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[24] Art. 18 § 2 of the Regulation provides that "where a confiscation order concerns a specific item of property, the issuing authority and executing authority may, where the law of the issuing State so provides, agree that confiscation in the executing State can be carried out through the confiscation of a sum of money corresponding to the value of the property that was to be confiscated".

[25] Art. 30 § 6, point (*c*), (*d*).

4. *Evolutionary perspectives: the lack of a uniform model in the current European legal framework*

The rules on the management and destination of confiscated property have not been harmonised at EU level and, as a result, the individual national laws differ from one another and are not homogeneous. Today, only some Member States – those where organized crime is particularly marked in the economic fabric – envisage the possibility of maintaining a particular bond of destination for purposes of public or social interest of the confiscated assets, as mentioned above. These countries have consequently set up centralised administrative bodies specialising in the administration, management and destination of confiscated assets. Article 10(3) of Directive 42/2014/EU only introduces a mere right for Member States to adopt such measures, without therefore providing minimum standards of implementation; similarly, Article 10(1) merely calls for "the adoption of the *necessary measures, for example through the establishment of centralised national offices, a series of specialised offices, or equivalent mechanisms, to ensure the proper management of frozen assets with a view to possible subsequent confiscation*".

The absence of harmonisation in this area undoubtedly makes the mutual recognition of confiscation orders issued by the authorities of a Member State requesting a special assignment of assets located in another Member State whose legislation does not provide for such assignment problematic. In fact, as we have just seen, Regulation 1805/2018/EU provides that the execution of the confiscation order be governed by the law of the State of execution, whose Authorities have sole jurisdiction to decide on the manner of its execution and to determine all the measures relating thereto.

ALESSANDRO BERNARDI

CONCLUSIONS AND RECOMMENDATIONS

SUMMARY: SECTION I. *Summary of the research "Improving cooperation between EU Member States in confiscation procedures"*. – 1. The three phases of research. – 2. The investigation in the first phase of the research. – 3. The investigation in the second and third stages of research – SECTION II. *Proposals for more effective European cooperation on freezing and confiscation.* – 4. Foreword. – 5. Harmonising freezing and confiscation safeguards as a prerequisite for better cooperation between EU Member States. – 6. Duplication of freezing and confiscation requests from different States in relation to the same offence: the *ne bis in idem* principle and possible solutions to the conflict of jurisdiction. – 7. Concurrence of requests for freezing and confiscation from different States for various offences: proposals on the criteria for choosing the measures to be favoured. – 8. Alternative measures to freezing and confiscation in Annexes I and II to Regulation 2018/1805, and their choice: guidelines. – SECTION III. *Proposals for better management of frozen and confiscated assets*. – 9. Foreword. – 10. The desirable additions to Regulation 2018/1805 on the management of frozen assets: "pre-freezing planning" and the rights of the holder. – 11. The vagueness of the regulatory rules on the management of frozen assets: the Gordian knot of their restitution to the victim and its possible dissolution by interpretation. – 12. The harmonisation of penalties for the holder of the assets who violates the constraints related to the freezing.

SECTION I

SUMMARY OF THE RESEARCH "IMPROVING COOPERATION BETWEEN EU MEMBER STATES IN CONFISCATION PROCEDURES"

1. *The three phases of the research*

As mentioned in the final part of the *Presentation of* this *volume*, the research "Improving cooperation between EU Member States in confiscation procedures" was carried out in three distinct phases, during which freezing and confiscation were examined from three different points of view. In the first phase, in fact, the evolution of freezing and confiscation in the European panorama was examined, the different models of confiscation provided for by the EU sources were analysed and the problems posed by these models with a view to judicial cooperation were high-

lighted, also taking into account the difficult coexistence of these models with the fundamental rights of the affected person. In the second phase, the current discipline of these institutes in the six countries involved in the research was explored in more depth. In the third stage, a horizontal comparison of the above-mentioned national disciplines was made. In each of these three phases of the research, complementary works were drawn up in order to identify solutions aimed, above all, at improving judicial cooperation on freezing and confiscation, as well as the management of frozen and confiscated assets, also through an overall increase in the safeguards provided within the overall framework of these instruments.

2. *The investigation in the first phase of the research*

More specifically, four wide-ranging studies were carried out in the first phase of the research.

The first study shows that the growing variety of confiscation models found within partner States has led to a parallel increase in recourse to the ECtHR to explore the conventional legitimacy of these models. The same study also highlights the extreme difficulty of this Court in establishing consolidated case law on the many questions raised by confiscation with respect to ECHR principles and rights, first and foremost the question of the nature, criminal or otherwise, of confiscation. This should not be surprising, however, when one considers a whole series of factors which are capable of hindering homogeneous jurisprudential solutions. In the first place, the multiform profiles that confiscation assumes according to both the model of confiscation considered, and the configuration in a preventive, restorative, compensatory or punitive sense[1] assumed by each model, and, finally, the overall impact of confiscation on the patrimonial situation of its recipient[2]. Secondly, the large

[1] From this point of view, the different characterisation (restitutory or punitive) assumed, within the direct confiscation, by the subtraction of the profit or the product of the crime is emblematic. In this respect, the Italian Constitutional Court (judgment of 10 May 2019, No 112) declared the constitutional illegitimacy of art. 187-*sexies* of Legislative Decree No. 58 of 1998, in so far as it provided that compulsory confiscation, either directly or by way of equivalent, entailed the subtraction not only of the *profit* of the illicit act (in the present case, the increased value of the shares acquired in violation of the rules on insider trading), but also of the *product* of the illicit act (in the present case, the total sum allocated to the purchase).

[2] Given the very close link between the lawfulness of that measure and compliance with the principle of proportionality. See, in particular, ECtHR, Section I, judgment 6 November 2008, *Ismayilov v. Russia*, par. 34 ff., where confiscation was considered disproportionate in

and growing number of arguments used by member States to induce the ECtHR to recognise the conventional legitimacy of the regulation[3] given by the countries in question to the forms of confiscation envisaged in them. Thirdly, the further specific details of the cases where the different forms of confiscation are assessed by the ECtHR. In any case, it emerges from the work in question that the current fragmentation and evolution of the jurisprudence of this Court on the subject of freezing and confiscation is such as not to offer precise points of reference. Therefore, this jurisprudence is still not able to guide the development of freezing and confiscation in European countries and even in legislation of EU origin.

The second study provides an evolutionary overview of EU legislation on non-conviction based confiscation. As is well known, in European countries this model of confiscation traditionally constituted an exceptional hypothesis, also because of the doubts of constitutional legitimacy, especially with reference to the principles of presumption of innocence and guilt, as well as with reference to the right to property. Moreover, following the recent tendency of many States to stand this model of confiscation within their own legal systems, also in the wake of suggestions to this effect that can be found in some important texts of international law[4], Directive 2014/42 has imposed the adoption of this model of confiscation. The study, however, does not fail to point out that the directive restricts this imposition only to specific cases, and in particular in the event that confiscation is used in the context of "proceedings in criminal matters". It is, however, a rather vague formula, which can be implemented in various ways in the national legal systems. Future experience will make it possible to ascertain whether the limited scope conferred by the Directive to non-conviction based confiscation will be sufficient to limit the problems of judicial cooperation in relation to an institution with respect to which the constitutional sensitivities of the European countries remain non-standardised.

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that it was excessive in relation to the offence caused by the applicant's unlawful conduct, also taking into account the fact that, in the present case, confiscation was to be combined with custodial sentence; ECtHR, section I, judgment 26 February 2009, *Grifhorst v. France*, par. 87 ff.; ECtHR, section I, sent. 9 July 2009, *Moon v. Commission. France*, par. 46 ff., in which confiscation of the entire sum not declared by the applicants to the French customs authorities, together with the financial penalties imposed, was considered disproportionate.

[3] For example, on prescription.

[4] This essentially refers to the 2003 United Nations Convention on Corruption, as well as to the recommendations concerning the "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation", adopted in 2012 and recently updated in 2017, of the Financial Action Task Force (FATF). Both texts did not impose, yet advised the adoption of forms of confiscation without conviction.

The third study focuses on the discipline progressively developed within the EU sources on extended and third-party confiscation. As for extended confiscation, the process of progressive expansion is underlined, both of the goods and properties subject to this type of confiscation (in fact, pursuant to Art. 2 of Directive 2014/42, every "proceed of crime" is now subject to extended confiscation)[5], and of the crimes which legitimise its application[6]. Something similar happens, *mutatis mutandis*, with regard to third-party confiscation, given that this model of confiscation is now extended to "proceeds of crime" and to other assets of value corresponding to such proceeds transferred to (or acquired from) third parties to whom the illegal origin of such assets was known, or at least should have been known. These two models of confiscation also appear to be increasingly used. In this regard, however, the study highlights the importance of the role of the EU Court of Justice in resolving the questions that the Member States have already begun to ask in preliminary rulings regarding the actual scope of application of these models[7].

The fourth study explores the issue of mutual recognition of confiscation orders in the EU, for which Framework Decision 2006/783/JHA and Regulation 2018/1805 were adopted. The finding that the cooperation impact of the Framework Decision is modest prompted the author to look for its causes. The latter are summarily indicated by some EU documents in the great differences in the field of confiscation existing from one Member State to another, which can only in part be remedied by the aforementioned directive. More specifically, in the view of the author, these causes should be identified, first and foremost, within the narrow scope of the Framework Decision and the wide scope given by this legal instrument to the legitimate grounds for refusal of cooperation. Moreover – as already pointed out in the *Presentation*[8] – a further reason for the modest impact of the Framework Decision stems from the inherent limitations of this instrument, the rules of which may be poorly transposed or disregarded in practice without the State responsible for such failures being able to be tried and sentenced by the Court of Justice. One might believe that Regulation 2018/1805, by not presenting the abovementioned limits of the Framework Decision, could solve the continuing

[5] This term means "any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits".

[6] See, in particular, Art. 5 of Directive 2014/42/EU.

[7] See, for example, the reference for a preliminary ruling made by *Sofiyski gradski gradski sad* (Bulgaria), 3 April 2018, case C-234/18, in *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CN0234&from=EN*.

[8] In *this volume*: see par. 9.

problems of mutual recognition in the field of confiscation. It is true, however, that, in the view of the author, doubts about the scope of the Regulation[9] are likely to jeopardise its implementation. The latter is also affected by problems of both a practical and a theoretical nature, to which no EU source can offer a satisfactory response (particularly, the issue of the dubious constitutional legitimacy of certain models of confiscation covered by the regulation).

3. *The investigation in the second and third phase of the research*

As mentioned above, in the second phase of the research, the statutes of freezing and confiscation in Belgium, France, Germany, Italy, the Netherlands and Romania were examined in detail. Each national research group drew up a complete study in which it gave account, in particular, of how European sources have been implemented in these countries to harmonise these institutions and to promote judicial and administrative cooperation in this area.

On the basis of the data collected in these studies, the third phase of the research was then launched, in which a horizontal comparison of these national disciplines was carried out. Within this comparison, it was considered appropriate to distinguish between: the substantial aspects of freezing and confiscation (*a*); the procedural aspects of freezing (*b*) and confiscation (*c*); the mutual recognition mechanisms of these two institutions (*d*); the management and disposal of frozen (*e*) and confiscated (*f*) assets.

Before briefly summarising the six horizontal comparison studies, a premise must be made. Reading them immediately reveals the extreme difficulty encountered by the authors in comparing the national disciplines on the subject of freezing and confiscation. This difficulty is due to the fact that – despite the similarities found at a socio-cultural level between the countries of the European Union, and despite the harmonisation of laws carried out both spontaneously by the States, and under the obligations imposed by the European Union – these disciplines are still significantly dissimilar. These are differences that, in fact, operate on different levels – theoretical and practical, substantial and procedural, conceptual and functional – making it particularly complicated to extrapolate the moments of convergence and divergence between the different legal systems.

[9] The Regulation only operates with regard to "freezing orders and confiscation orders issued by another Member State within the framework of proceedings in criminal matters". This scope, actually, proves to be ambiguos.

(*a*) Certainly, the differences are less obvious in the field of substantive law. In this regard, *the first of these six studies*[10] shows in fact that confiscation is an institution well known in European countries, applicable to all property of which the convicted person is formally or substantially the owner: to movable and immovable assets, to divided and undivided ones, to assets related in various ways to the crime and to the equivalent to them in economic terms. The limit placed on confiscation by the principle of proportionality is also generalised. This principle is explicitly sanctioned in relation to this institution in all the partner States (with the sole exception of Italy, where, however, the same principle tends to be affirmed by way of interpretation, conditioning the constitutional legitimacy of confiscation)[11]. The fact remains that even in the field of substantive law, the differences between the partner States appear not to be marginal, especially with reference to the most invasive models of confiscation. For example, with regard to extended confiscation related to a conviction, the study highlights a number of significant differences, the main of which are listed below. Firstly, the time limit within which the presumption of illicit acquisition allowing the confiscation of the property may be reversed differs from one State to another. Secondly, a similar difference is found in relation to the proportional parameter used to consider unjustified the possession of the property consequently deemed to be confiscable. Thirdly, the level of probability of the illegal origin of the property justifying the confiscation varies from one State to another. However, these differences do not succeed in erasing the abovementioned generalised convergence of the contents and functions of confiscation. This convergence undoubtedly facilitates judicial cooperation and, in particular, adherence to the mechanism of mutual recognition of freezing and confiscation orders.

b) The differences between the partner countries emerge more clearly from a comparative examination of the procedural regulation of freezing, to which *the second study*[12] is specifically dedicated. Certainly, it is true that in practice freezing measures are used for similar purposes in all Member States. However, it is also true that the procedures used to freeze assets vary greatly from one EU country to another and may even differ significantly within the same country, depending on the type of confiscation for which the freezing is ordered. This makes all types of partitions and classifications extremely difficult.

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[10] D. Moroşan, F. Streteanu, D. Niţu, *Substantive aspects of confiscation.*

[11] See the aforementioned judgment of the Italian Constitutional Court of 10 May 2019, no. 112 (*supra*, *sub* par. 2, nt. 1).

[12] O. Cahn, J. Tricot, *Procedural aspects of freezing in Europe.*

However, an examination focusing on the traditional distinction between the conditions for the use of freezing procedures and the guarantees against the use of these procedures makes it possible to identify certain convergences between the national systems, which, moreover, would appear to be in a minority compared to their divergences. Fortunately, the latter are not necessarily an obstacle to the mutual recognition of freezing measures. Nor are these differences an obstacle to the recognition of guarantees concerning both the right to restitution of assets frozen but not confiscated and compensation in the event of unlawful freezing. Moreover, these guarantees are generally negatively conditioned by the tendency to recognise the responsibility of the State in a very restrictive way.

c) *The third study*[13] carried out a comparative analysis of the procedural legislation of the six partner States on confiscation. In particular, following the same pattern adopted by the questionnaire on which each national unit based its reports, the author compared the provisions in force in the legal systems of the above-mentioned States that regulate: i) the confiscation procedures; ii) the authorities competent to request and issue confiscation orders; iii) the standards of evidence to be met to impose such orders; iv) the deadlines to be respected in the procedures in question; v) the guarantees available to the recipient of confiscation orders to protect its fundamental rights.

As mentioned above, despite the willingness of the EU legislator to recompose national legislations and procedures that are still very different from each other, the discrepancies between the rules on confiscation with respect to the five points listed above appear particularly marked. This emerges not only from the comparison of the laws of the six EU countries, but also from the ever-increasing differentiation of the procedural rules on confiscation even within each national system. This differentiation, as mentioned under *b*), derives mainly from the proliferation of models of confiscation highlighted several times in this *volume* and from the specific profiles of each European procedural system. In this respect, according to the author, the discretion of States in regulating confiscation procedures is essentially due to two reasons. The first is that the EU legislator has focused its harmonisation efforts on the substantive rules in this area. The second is the choice of the EU legislator to make procedural guarantees and the regulation of evidence optional. As far as the latter aspect in particular is concerned, the Member States are divided into two groups. The first includes countries that maintain intact or almost unchanged, even for confiscation procedures, the rule of "be-

[13] W.S. DE ZANGER, *Procedural aspects of confiscation.*

yond reasonable doubt". The second group includes countries that make exceptions of various nature and intensity to the above rule in order to ensure the maximum possible effectiveness of national law in this area. To this end, this second group of countries adopts evidence-based rules that range (not always in a sufficiently clear manner) from the "balance of probabilities" to "reasonable suspicion" or "reasonable belief". The use of these rules has been particularly successful in relation to procedures aimed at issuing extended confiscation orders, in which their possible recipients are forced to rebut presumptions about the illegal origin of the targeted property.

d) Faced with this intricate picture, composed of profiles both of a converging tendency and of still considerable differentiation of national systems, *the fourth study*[14] analysed the national forecasts on the subject of mutual recognition adopted in transposition of the Framework Decisions 2003/577/JHA and 2006/783/JHA[15]. These provisions cover different aspects: the competent authorities in freezing and seizure procedures; any special rules for resolving conflicts of jurisdiction within the State; the time limits for carrying out freezing and seizure procedures; the languages that can be used to request the cooperation of another Member State; the reasons for postponing freezing and seizure procedures. The author focuses on certain key aspects of judicial and administrative cooperation on freezing and confiscation, and in particular on: the evolution, at both EU and national level, of the rules concerning the grounds (some optional, some mandatory) for legitimate refusal to cooperate; the potential consequences of this evolution on cooperation; the models of confiscation which may fall within the scope of the two Framework Decisions and Regulation 2018/1805 replacing them. At EU level, the adoption of this Regulation has expanded the catalogue of grounds for refusal by adding the protection of the principle of territoriality and the "exceptional" cases of "a manifest breach of a relevant fundamental right as set out in the Charter [CFREU]"[16]. These reasons were then (further) extended also to the national level, by provisions that refer both to other types of EU[17] principles and rights, and to national interests that can be evaluated with

[14] V. Weier, *Horizontal analysis on mutual recognition.*

[15] As regards, respectively, the execution in the European Union of freezing orders with respect to property or evidence and the application of the principle of mutual recognition of confiscation orders.

[16] Art. 8, paragraph 1 reads as follow: «in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the freezing 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».

a very wide margin of discretion (exemplary, in this regard, is "public order"). The author also points out that, in some cases, certain fundamental principles – for example, that of *ne bis in idem* – have been counted as *optional* grounds for refusing judicial and administrative cooperation on freezing and confiscation. The non-compulsory refusal to cooperate in the case of *bis in idem* calls into question the adequate protection of this principle in an area where the duplication (or even multiplication) of proceedings and orders for freezing and confiscation on a continental scale could prove to be particularly frequent. The fact remains that the standards of protection of fundamental principles and rights in this area are somewhat safeguarded by the space left by Regulation 2018/1805 to the grounds for refusal by the EU Member States. This may also have a negative impact on judicial and administrative cooperation in this area.

As far as the confiscation models that can be recognized and executed outside the issuing State is concerned, the entry into force of Regulation 2018/1805, exalting the principle of mutual recognition, could abstractly remove – despite the use of the ambiguous formula "within the framework of proceedings in criminal matters" – the obstacle to cooperation represented by the increasing differentiation of the confiscation models and the different recourse to them made in the European scope. However, beyond the attempt to improve cooperation on freezing and confiscation, regardless of the differences that can be found in Europe at both substantive and procedural level, the author considers that the malfunctioning of the cooperation itself emerges mainly in practice. The introduction of EU rules, even if they are binding and contained in an instrument directly falling under national law, can therefore have little impact on it.

(*e*) Finally, in the light of the aims of the research, the last two studies concerning the horizontal comparison of national rules on the administration of frozen and confiscated assets have proved to be of great interest. In particular, *the fifth study*[18] focuses on two different and complementary issues. The first one concerns the moments of convergence and divergence that can be found in the national rules in relation to the management and disposal of frozen assets. The second one concerns the conformity of these regulations with the relevant EU rules contained in Directive 2014/42/EU and Regulation (EU) 2018/1805.

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[17] As in the case of Belgium and Germany, whose national rules refer to Art. 6 TEU and, therefore, also to the fundamental principles and rights enshrined in the ECHR, to those covered by the other international conventions in which EU States participate and those derived from the constitutional traditions common to those States.

[18] T. Slingeneyer, *Horizontal report management freezing.*

With regard to the first issue, the author points out first of all that while decisions on the management of frozen assets are generally taken by the judicial authorities that ordered the freezing, the implementation of these decisions implies the intervention of very different bodies from one State to another. However, the creation of centralised national offices in all partner countries (with the exception of Germany) makes it possible to overcome many of the difficulties posed by this heterogeneity, particularly when the offices in question are exclusively responsible for the management of frozen and confiscated assets. In the latter case too, however, recourse to external asset managers appointed and supervised by the judicial authorities is common.

With specific reference to the problem of the safekeeping of assets, almost everywhere the basic distinction is that between leaving the thing in custody to its owner (freezing) or giving it to the police (seizure). The first solution is less expensive (even if we must not underestimate the costs related to the control of the behaviour of the subject maintained in the ownership of the property), but it entails the loss of that "exemplariness" which, in the eyes of the community, only an order of seizure can have. Moreover, asset management techniques differ – in some States they are more conservative and in others more dynamic. With regard to the sale of assets during their freezing or seizure, it is generally allowed, with solutions that differ from State to State as to the categories of saleable assets, the manner of sale, the person to whom the related costs are to be charged and whether or not the consent of the owner is required. The rules on social re-use of seized assets (called for by Regulation 2018/1805) also differ from one partner State to another, while there is a common concern to protect bona fide third parties.

With the exception of Italy, which in response to organised crime has long experience in seizing and confiscating illicit assets, the other partner States lack adequate databases and statistics on frozen assets and their management.

Ultimately, the European legislation on the management of frozen assets lays down two essential rules capable of overcoming, at least in part, the resistant differences between European countries on this point. The first rule is that "The management of frozen and confiscated property shall be governed by the law of the executing State" (Article 28(1) of Regulation 2018/1805). The second is that the notion of "victim" (whose rights over frozen and confiscated assets are increasingly being taken into account in the aforementioned European texts)[19] must be interpreted in accordance with the legislation of the issuing State. The latter State is

[19] See, in particular, Art. 29 of Regulation 2018/1805.

also responsible for the decision to return frozen assets to the victim; this decision must be followed up by the executing State, except in the cases specified in Article 29 of Regulation 2018/1805.

The above Regulation also deals with expenditure on the management of frozen assets and the destination of the latter. However, despite all this, the author considers that this management, previously neglected by the framework decisions on freezing and confiscation and by the 2014 directive itself, is also insufficiently regulated by the regulation in question. This would be demonstrated by the fact that Chapters II and III of the Regulation, which are indeed full of very specific rules, focus entirely on the subjects of transmission/recognition/enforcement of freezing and confiscation orders, while only three articles of Chapter IV cover the subject of the management of confiscated assets. In this way, even the most recent European legislation shows that it underestimates the need to focus properly on issues which, if sufficiently regulated at European level, could undoubtedly facilitate the delicate management phase.

f) Lastly, the *sixth study*[20] focuses on the problems posed by the State management of assets that are much more complex than those traditionally confiscated. In this regard, the author recalls that, with the emergence of increasingly pervasive models of confiscation, the types of goods confiscated and, consequently, the forms of destination of the same have also changed. In this way, we have moved from a simplified management, which can be reduced to the alternative between the destruction of the property and its simple assignment to the State, to much more complex types of management which reflect the same complexity of the confiscated property. At the same time, the "functional" and "symbolic" need to allocate confiscated assets to specific forms of crime-fighting or victim compensation emerged, first at national level and then at European level. In particular, Directive 2014/42/EU provides for the possibility for Member States to use confiscated property for purposes of public or social interest. However, these are destination forms currently not adopted by all partner countries. Similarly, not all partner countries followed the suggestion (also contained in the 2014 directive) to set up central coordination offices for the administration of confiscated assets. These offices are the natural recipients of specialised expertise, thus being able to solve the legal, economic and social problems underlying the confiscation of the most complex assets (companies, large real estate) even if not directly related to criminal acts. The assets in question usually require a "dynamic" administration in order to prevent their depreciation.

[20] S. Bolis, *The destination and administration of confiscated assets.*

Moreover, as the author points out, also in the countries in which central authorities have been created for the management of the confiscated assets and properties, such authorities differ from one country to another, especially with regard to the categories of assets and properties to be managed and the relative, concrete operating methods. In this regard, the author emphasises the importance of the Italian experience in the management of companies characterised, during confiscation, by "legalisation" costs of various kinds (officially hiring the employees, adaptation of the purification plants, closure of previous relationships with entities or individuals belonging to or otherwise close to organised crime) that often lead to the bankruptcy of the company. A little less problematic (but still complex) is the management of buildings, often assigned to local authorities or intended for social purposes. In other cases, as specifically allowed by the 2014 Directive, real estate may be sold. Also, in light of the case-law of the Court of Justice, the author stresses that this should be done in such a way as to reconcile, on the one hand, the need to prevent repurchase by persons belonging to the same criminal environment and, on the other hand, the need to safeguard the principles of transparency, equality and proportionality.

Finally, after illustrating the specific methods of use of the confiscated goods by the police forces in the single countries, the author dwells on the problems posed by the diversity of the national systems with respect to the administration of the goods allocated abroad. These problems are only partly solved by the principle of mutual recognition which has been progressively established since Framework Decision 2006/783/JHA. Nor are they entirely resolved by the adoption of international and European rules aimed at giving priority to the return of assets or proceeds of crime confiscated, in order to allow compensation to victims of crime or the restitution of such assets and proceeds to their rightful owners.

Section II

PROPOSALS FOR MORE EFFECTIVE EUROPEAN COOPERATION ON FREEZING AND CONFISCATION

4. *Preliminary remarks*

As we have seen, the reports referred to in the previous paragraphs examined, in addition to national legislation, all the relevant EU sources, highlighting how many of them are capable of promoting harmonisation and inter-state judicial cooperation. Even so, despite the large amount of

legislation adopted in this area within the Union, certain issues that are far from marginal would appear to have escaped the EU legislature or been deliberately left unresolved.

Here, after a brief *excursus* on some possible reforms aimed at harmonising fundamental rights on freezing and confiscation with a view to facilitating inter-state cooperation, some specific issues relating to judicial cooperation will be addressed. In this regard, in this *Section* the focus will be on certain issues concerning coordination between requesting and requested authorities, distinguishing between cases of multiplication of freezing and confiscation orders, and cases of application of alternative measures to the freezing or confiscation originally envisaged. Finally, in *Section III*, cases of management of frozen or confiscated assets will be considered. Following these investigations, proposals will be made for possible improvements to the abovementioned system of cooperation between EU Member States on freezing and confiscation.

Despite the fact that, when the research began, Regulation 2018/1805 had not yet been adopted (which, moreover, is not yet applicable), everything proposed below takes for granted the full operation of this instrument. Moreover, the regulation in question has already been in force for a number of months[21], and even though in its first two years of life the EU Member States are not required to apply it, this two-year period does not constitute an unburdened period for them, since it is precisely intended to allow them to equip themselves to fully implement the regulatory provisions. Not to mention the fact that the date from which the regulation will become applicable is now quite close[22]. It is therefore all the more clear from the outset that it must be taken into account as much as possible, as it is the basis for any further proposals.

5. *Harmonising freezing and confiscation guarantees as a prerequisite for better cooperation between EU Member States*

The main aim of the research "Improving cooperation between EU Member States in confiscation procedures" is not to identify good practices to raise the guarantees applicable to the discipline of freezing and confiscation. However, it is clear that, as previously mentioned[23], the

[21] In accordance with Art. 41, "This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union" (on 28 November 2018).

[22] In accordance with Art. 41 thereof, the regulation "shall apply from 19 December 2020".

[23] A. Bernardi, *Presentation*, in *this volume*, par. 7.

multiplication of confiscation models and their increasingly pervasive profiles in conflict with fundamental rights may hinder inter-state cooperation in this area. On the other hand, cooperation itself is further hampered by the current tendency of some EU countries to increasingly use their constitutional principles and rights to oppose the constraints of EU harmonisation and cooperation. There is therefore an urgent need to develop a system of common guarantees, aimed at minimising the risk of EU Member States refusing to cooperate in freezing and confiscation procedures in the name of safeguarding their own constitutional standards.

Both the study on the relationship between confiscation and fundamental rights in the ECHR carried out in the context of this research[24] and comparative law investigations carried out in the same circumstances[25] have made it possible to highlight certain problematic aspects of the current rules governing these institutions, which are likely to be improved.

In this regard, it is worth noting, first of all, the difference between the legal guarantees generally available to defendants in criminal proceedings and the guarantees available to them in freezing and confiscation proceedings. In the latter cases, guarantees are often reduced. Thus, for example, with respect to what is generally established in relation to evidence in ordinary criminal proceedings, cases of summoning and hearing of witnesses and experts may be limited. In particular, in relation to cases of confiscation for the equivalent, the issue of the order may take place at a stage of the procedure that no longer allows the celebration of an oral hearing to ascertain the belonging of the "equivalent property" to the recipient of the measure (and not to a bona fide third party). Similarly, the extended confiscation order may be adopted in the enforcement judgment. The latter, by its very nature, does not allow an oral hearing to be held with witnesses and experts able to refute, if necessary, the charges. This refutation, however, seems both more appropriate and easier when the above theses are based on presumptions not of a criminal but of a civil nature, such as that of the "more probable than not".

Such recourse to legal conjecture unfavourable to those affected by freezing and confiscation orders is not, in itself, incompatible with the presumption of innocence. In such cases, however, the right to refute such conjectures in accordance with the right of defence must remain

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[24] M. Simonato, M. Fernandez-Bertier, *Confiscation and fundamental rights: the quest for a consistent European approach*, in *this volume*.

[25] See Section III in *this volume*.

unaffected. In fact, in some cases, in freezing and confiscation procedures this right is being sacrificed, giving the requested authorities the opportunity to refuse cooperation in the name of fundamental rights.

For these reasons, it would seem appropriate to harmonise at European level the guarantees of the person affected by the freezing and/or confiscation. It would therefore be desirable for the EU Commission to commit to drawing up hard law legislation aimed at providing a catalogue of minimum guarantees for people at risk of confiscation.

6. *Duplication of requests for freezing and confiscation from different States in relation to the same offence: the* ne bis in idem *principle and possible solutions to the conflict of jurisdiction*

It is now time to address the problems to which the research "Improving cooperation between EU Member States in confiscation procedures" paid particular attention, starting with those concerning coordination between requesting and requested authorities in cases of freezing and confiscation orders.

This coordination is, however, entirely compromised in cases of non-recognition and non-enforcement of freezing[26] and confiscation[27] orders. The first of the cases considered here occurs when the enforcement of the measure is contrary to the principle of *ne bis in idem*. The problem arises whenever two or more freezing or confiscation orders have been issued (in relation to the same property located in an EU State as a *result of the same crime*), at least one of which has been issued by a court belonging to an EU State other than the issuing State.

At first sight, it would seem to be a minor problem in practice, as these hypotheses of *bis in idem* can be considered difficult to verify. In reality, this is not the case, when one considers that inter-state cooperation in matters of freezing and confiscation concerns also, if not above all, assets of subjects belonging to trans-national organised crime, or assets belonging to a legal person operating within a trans-national criminal organization. These are therefore assets owned by (or otherwise available to) persons whose same conduct (starting with that of criminal association) can take place in several States, thus justifying a plurality of criminal proceedings all based on the principle of territoriality. Also, sometimes, the same illegal conduct committed in a single State may trigger two criminal proceedings in two different States: for example, where

[26] See Art. 8, Reg. 2018/1805.
[27] See Art. 19, Reg. 2018/1805.

one of these proceedings is based on the principle of territoriality and the other on the principle of active or passive personality[28]. In turn, each of these proceedings may justify the adoption of an extended confiscation order, possibly affecting all assets of the said persons.

In relation to such *bis in idem* cases, the question is which freezing or confiscation order should take precedence. Since *the offence is the same*, some of the possible selection criteria shall not apply but can be used in cases where measures are combined (for example, the criterion concerning the greater or lesser seriousness of the specific fact is not applicable)[29]. However, also in this case, there are more than one possible selection criteria. The first to come to mind are the chronological order, which favours the freezing or confiscation order first notified to the executing authority, as well as the "territorial" criterion, which would give priority to a measure by the State in which the property to be frozen or confiscated is located[30]. However, there are also other possible criteria[31] of which Council Framework Decision 2009/948/JHA of 30 November

[28] See in this respect *Green Paper on conflicts of jurisdiction and the ne bis in idem principle in criminal proceedings* {SEC(2005) 1767, *https://publications.europa.eu/it/publication-detail/-/publication/.../language-it*. This Green Paper underlines that "the scope of many national criminal jurisdictions has been extended considerably in the past years" (3).

[29] On the other hand, priority to the most serious *abstract* offence could be given. It is in fact possible that the same fact is abstractly considered to be of greater or lesser gravity depending on the State in which it is being prosecuted.

[30] Indeed, Regulation 2018/1805 does not lack rules that place the expectations of the executing State in a very favourable position. For example, under Art. 21, paragraph 1 of the Regulation, "The executing authority may postpone the recognition or execution of a confiscation order transmitted in accordance with Art. 14 where: [...] (c) the property is already the subject of ongoing confiscation proceedings in the executing State". In this case, therefore, a confiscation proceeding pending in the executing State may even first paralyse the execution of a confiscation order issued in another State, and then subordinate the execution to the rules on "multiple orders" in force in the executing State. In theory, these rules can privilege the confiscation of "internal" origin over those of "external" origin in any case.

[31] A further criterion could distinguish between freezing and confiscation orders, giving priority to the latter. This additional criterion, in fact, would seem superfluous, since the right not to suffer a double trial for the same crime is enshrined in Art. 50 CFREU and the defendant, once convicted in one of the two criminal proceedings, is very much interested in communicating this information to the other judicial authority with a view to enforce the transnational side of the *ne bis in idem* principle. On the contrary, at first sight, cases in which two freezing measures are issued would seem difficult to occur. It is more likely that, well before a possible conviction, "a suspected or accused person invokes, while giving details, that he is subject to parallel criminal proceedings in respect of the same facts in another Member State" (see *recital 5* of Council Framework Decision 2009/948/JHA of 30 November 2009, *on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings*). In practice, however, it is not possible to prevent every situation where jurisdiction over the unlawful act is controversial and where there is no consensus about the interruption of one of the two parallel criminal proceedings.

2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings" offers examples[32].

Regulation 2018/1805 says nothing about which criterion or criteria are to be given priority and, more generally, does not contain any rules capable of guiding the choice of the executing authority[33]. This instrument, like the Framework Decision referred to above, therefore seems to promote a case by case approach, in respect of which the Member States enjoy a wide margin of discretion. This is, in fact, the approach traditionally used when drafting European proposals and legislation to regulate hypotheses of dual jurisdiction, characterised by the absence of any hierarchy among the criteria suggested, as well as the absence of a closed catalogue. Indeed, the lack of binding criteria seems to reflect the recurrent political difficulties encountered in regulating conflicts of jurisdiction at European level[34]. These difficulties were, moreover, further reiterated by the resistances of the EU countries to adapt effectively to the albeit minimal constraints enshrined at EU level[35].

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[32] In particular, *recital 9* of this framework decision lists, as "relevant criteria" for the risolution of conflicts of jurisdiction, "the place where the major part of the criminality occurred, the place where the majority of the loss was sustained, the location of the suspected or accused person and possibilities for securing its surrender or extradition to other jurisdictions, the nationality or residence of the suspected or accused person, significant interests of the suspected or accused person, significant interests of victims and witnesses, the admissibility of evidence or any delays that may occur". At least some of these criteria could be used to choose the freezing/confiscation order to recognise.

[33] For example, a European body could be envisaged in an EU text to act as a mediator, as suggested in general by the *Green Paper on conflicts of jurisdiction and the principle of ne bis in idem in criminal proceedings* (5).

[34] See, in particular, the Action Plan of the Council and the European Commission for implementing the provisions of the Treaty of Amsterdam on the construction of a common area of freedom, security and justice, adopted in Vienna in 1998; the Programme on mutual recognition of decisions in criminal matters of 2000; the Hague Programme of 2004, dedicated to strengthening the area of freedom, security and justice of the European Union. Furthermore, following the Tampere European Council in 1999, the European Commission (COM [2000] 495) placed the issue of prevention and resolution of conflicts of jurisdiction between Member States on the agenda of initiatives to strengthen the principle of mutual recognition of judicial decisions in criminal matters. On the subject, see C. Ligeti, G. Robinson (eds.), *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law*, Part I and Part 2, Oxford, 2018; Max Planck Institut of Freiburg, *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, 2003.

[35] These difficulties are witnessed, above all, by the generalised delay with which many Member States have transposed the above-mentioned Framework Decision, while many other Member States appear not to have yet adopted the appropriate transposing legislation: see European Commission, *Report from the Commission to the European Parliament and the Council on the implementation in the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of jurisdiction in criminal proceedings*, Brussels, 2.6.2014, COM(2014) 313 final; and, last but not least, by providing data

In cases of *bis in idem*, the choice to leave to the judicial authority of the country of execution maximum freedom to adopt the criterion that it considers preferable to identify the freezing or confiscation order to be privileged could perhaps constitute the lesser of two evils. From a different perspective, it might be worth trying to work towards the adoption of a European text that identifies the criterion or criteria to be favoured[36], in a perspective of overcoming national fragmentation and strengthening judicial cooperation. This is, of course, an optimistic choice based on the hope (if not the conviction) that the problems of duplication of freezing and confiscation measures in the European context can be resolved on the basis of shared rules.

The only certain thing is that, in cases of *bis in idem*, the requested authority will not be able to fairly distribute the assets to be frozen or confiscated between the two prosecuting authorities, necessarily giving priority to one or the other. The case in which two or more requests for freezing or confiscation are linked to the commission of different crimes is different and will be examined below.

7. *Concurrence of requests for freezing and confiscation from different States for several offences: proposals on the criteria for choosing the measures to be favoured*

Apart from the cases of *bis in idem*, problems of judicial and administrative cooperation which are difficult to resolve arise in relation to further and even more frequent cases, in which more freezing or confiscation orders affect the same property, or affect more assets which are incapable of fully satisfying the claims of these measures. These are cases in which the asset or assets are subject to more than one freezing or confiscation order issued by different EU[37] countries in relation to two or more offences committed there.

As mentioned, compared to the hypothesis of *bis in idem*, these hypotheses can occur even more frequently for at least three orders of reasons: 1) because it is not limited by the "Right not to be tried or pun-

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which often appear to be incompatible with those set out in the abovementioned *Commission Report*, *https://eur-lex.europa.eu/legal-content/IT/NIM/?uri=CELEX:32009F0948.*

[36] That is to say, to make sure that the choice of the preferred criterion is made on a case-by-case basis by the executing authority after consulting Eurojust. The latter is indeed responsible for "strengthening judicial cooperation, including through the settlement of conflicts of jurisdiction" (Art. 85(1)(c) TFEU).

[37] Or from the same EU country, as long as both are different from the EU country in which the asset to be frozen or confiscated is located.

ished twice in criminal proceedings for the same criminal offence" referred to in Article 50 of the CFREU; 2) because, as mentioned above, inter-state cooperation on freezing and confiscation is required to operate, above all, in relation to assets owned by persons belonging to transnational criminal organisations, i.e. persons normally involved in multiple offences often committed in different States; 3) because, frequently, the hypotheses in question give rise to one or more money laundering or self-laundering offences committed in the requested State.

The hypotheses considered here could be defined as "*bis in bis*"[38] and give rise, to use the terminology used in Regulation 2018/1805, to multiple orders[39]. Of course, there could be more than two freezing or confiscation orders, just as there could be more than two offences on which these measures are based. In the following, we will limit ourselves to examining the most basic hypothesis of "*bis in bis*", aware that the phenomena we are dealing with could be more complex, in that they are characterised by more than two measures adopted in relation to more than two offences ("*plus in plure*").

All the mentioned hypotheses can have a wide range of variants, of which here we focus on the three main ones: (1) the one in which the two (or more) offences giving rise to the two (or more) measures were committed in the same issuing State, which is different from the State in which the property is located; (2) the one in which the two (or more) offences were committed in two (or more) issuing States, and neither of these two States is the State in which the property or properties are lo-

[38] As two freezing or confiscation orders (*bis*) related to two different illegal acts (*in bis*) are issued, and at least one of these orders have been issued in a Member State other than the one where the asset to be frozen or confiscated is located. However, of course, the freezing or confiscation orders issued could also be more than two, as well as there could be more than two offences for which the freezing or extended confiscation is requested in relation to the same asset. The text only examines the most basic hypothesis of "*bis in bis*", even though the phenomena could be more complex, since they are characterized by a plurality of measures for a plurality of illicit facts ("*plus in plure*").

[39] See art. 26 del suddetto regolamento: "If the executing authority receives two or more freezing orders or confiscation orders from different Member States issued against the same person and that person does not have sufficient property in the executing State to satisfy all of the orders, or if the executing authority receives two or more freezing orders or confiscation orders in respect of the same specific item of property, the executing authority shall decide which of the orders to execute in accordance with the law of the executing State, without prejudice to the possibility of postponing the execution of a confiscation order in accordance with Art. 21. 2. In taking its decision, the executing authority shall give priority to the interests of victims where possible. It shall also take all other relevant circumstances into account, including the following: (a) whether the assets are already frozen; (b) the dates of the respective orders and their dates of transmission; (c) the seriousness of the criminal offence concerned; and (d) the place where the criminal offence was committed".

cated; (3) the one in which one (or more) offences were committed in the issuing State and one (or more) in the executing State.

In all these cases, given that the asset(s) in question proves to be generally inadequate with respect to the claims contained in the freezing or confiscation orders, the problem arises of identifying the criterion to be followed for the choice of the measure to be given priority. As already mentioned, compared to the "*bis in bis*" hypotheses, the possible selection criteria (alternative or cumulative) are even more numerous than the criteria that can be used in the case of *bis in idem*. For example, priority could be given to the measure notified first in chronological order[40]; or the measure based on the most serious crime; or the measure that provides for the use of the property to compensate the victim of the crime; or the measure issued in the State where the property is located.

While Regulation 2018/1805 makes no mention of the selection criteria that may be used in relation to *bis in idem* cases, "*bis in bis*" cases are governed by the aforementioned Article 26 of the Regulation[41]. Moreover, in its first paragraph, this article merely states that where the recipient of the measures "does not have sufficient property in the executing State to satisfy all of the orders [...] the executing authority shall decide which of the orders to execute in accordance with the law of the executing State"[42]. Therefore, even in cases of *bis in bis*, the regulation is fully in line with the legislation in force in the state requested.

It is true that, in the event that the national legislation leaves to the implementing body some margin of discretion, the second paragraph of Article 26 seems to be intended to guide that discretion by asking that body give, first and foremost, priority to the interests of victims. It is true that the same paragraph leads the body in question to take "all other relevant circumstances into account, including the following: (a) whether the assets are already frozen; (b) the dates of the respective orders and their dates of transmission; (c) the seriousness of the criminal offence concerned; and (d) the place where the criminal offence was committed". However, the Regulation does not establish any hierarchy between the above-mentioned circumstances, which, moreover, do not constitute a closed catalogue. In fact, the rule in question leaves the door open to

[40] This criterion, however, has the negative aspect of favouring the jurisdiction of the fastest State ("first come, first served"), thus inevitably neglecting substantially more significant criteria, such as, above all, those centred on the seriousness of the fact for which freezing or confiscation is requested. or the existence of a victim to be compensated.

[41] See, *above*, *sub* footnote 47.

[42] As the abovementioned paragraph reads, "without prejudice to the possibility of postponing the execution of a confiscation order in accordance with Article 21".

the assessment of other circumstances not explicitly provided for by it, but able to influence the discretionary choice of the implementing body[43].

The flexibility of the indications provided for in Article 26 makes it difficult to assume that, on freezing and confiscation, the legislation of the executing State is contrary to this article of the regulation. Likewise, this flexibility leaves largely unchanged the possible scope for discretion conferred by the law of the executing State to the requested authority. The latter could therefore, national law permitting, give priority to certain requests for freezing and confiscation and penalise others. But it could also, unlike what happens in cases of *bis in idem*, agree to allow more than one freezing/confiscation on the same asset or on all the assets of the person affected, with a view to a fair and equitable distribution of realised or unearned income between the two or more authorities that have made the above requests.

Certainly, at this stage of inapplicability of Regulation 2018/1805, it may seem premature to suggest possible further developments of the EU rules on judicial cooperation on freezing and confiscation. Nevertheless, even if this regulation proves its worth in practice, it would be appropriate to prepare legislative texts with more detailed and therefore more binding content: capable, in short, of harmonising on a European scale the rules and criteria for the award of confiscated assets. A first step in this direction could be a more explicit "hierarchy" of the criteria laid down in Article 26 of the Regulation. In particular, the criterion constituted by the "seriousness of the criminal offence" could be placed immediately after the one concerning the interests of victim.

8. *Alternative measures to freezing and confiscation in Annexes I and II, and their choice: guidelines*

A further problem in the area of judicial and administrative cooperation on freezing and confiscation concerns cases in which it is not possible to execute, in full or in part, a freezing or confiscation order. This hypothesis seems to be underlying Article 23(3) of Regulation 2018/1805, according to which "the executing State may not impose alternative measures to the freezing order [...] or confiscation order [...] without the consent of the issuing State".

[43] The absence of any hierarchy among the suggested criteria and of a closed catalogue represent the solution traditionally adopted when drafting European proposals and legislation on conflicts of jurisdiction.

The issue of alternative measures to freezing or confiscation is specifically addressed, respectively, in Section J of Annex I and Section I of Annex II of the Regulation. According to these sections, the issuing State must indicate to the executing State whether it authorises it to apply "alternative measures" in the event of non-execution or partial execution of freezing or confiscation orders. If so, the issuing State must also indicate which measures or sanctions may be applied.

In this regard, the English text has been translated inaccurately, at least into Italian[44]. Assuming that both in section J of Annex I and in section I of Annex II there is a perfect correspondence between the measures respectively indicated in the first and second subparagraphs, these rules shall have the following meaning: whereas under Article 28(1) of Regulation 2018/1805 "The management of frozen and confiscated property shall be governed by the law of the executing State", the possibility of applying alternative measures instead of freezing or confiscation is left to the discretion of the issuing State. It is also left to the discretion of the issuing State to indicate the types of measures applicable in place of freezing or confiscation.

All this may be plausible, given that in Sections J and I of the above annexes reference is made to freezing or confiscation resulting from violations committed in the requesting State. Consequently, the requested State, in which the offence has not been committed, is not entitled to proceed autonomously with the freezing of the asset, with its confiscation or, *a fortiori*, with the imposition of alternative measures to such instruments.

More problematic are the clarifications contained in paragraph 2 of the above sections, relating to the indication by the issuing State of the measures applicable instead of freezing or confiscation. In this respect, there is a difference between section J of Annex I and section I of Annex II. While the first of these sections does not contain any indication of the alternative measures applicable on the indication of the issuing State, the second section seems to take for granted that the alternative measures applicable may include custody and community service (or equivalent measures) The issuing State must also indicate the maximum period of duration of these specific alternative measures.

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[44] In particular, in Section J of Annex I, the term "alternative measures" (paragraph 1) has been translated as "*alternative measures*", while the term "measures" (paragraph 2) has been translated as "*sanctions*". However, this translation is certainly incorrect: not being by definition a sanction, freezing cannot be "converted" into a sanction. That is confirmed by the fact that, in Section I of Annex II, the term "measures" (paragraph 2) is translated by the term "*measures*" (notwithstanding that, in the latter case, the term "*sanctions*" would not have been incorrect).

In any case, the above mentioned difference between these two sections appears to be of modest importance with respect to the analogies they present. In the event that freezing or confiscation is not possible, both sections allow the issuing State to authorise the executing State to apply alternative measures, the content and maximum duration of which shall be decided by the issuing State itself.

It almost seems that these sections are based on the assumption that the harmonisation of alternative measures on a European scale, first pursued by the Council of Europe and then more vigorously by the European Union, has essentially led to the unification of such measures[45]. On the other hand, despite the aforementioned harmonisation, the differences between the EU Member States are still considerable. While the basic models of alternative measures are now very similar, it is also true that in some national legal systems there are alternative measures that are completely unknown in other EU States.

In any case, even alternative measures shared at European level often take on an infinite variety in different national legal systems. More generally, in Europe, alternative measures apply within often very different criminal systems (substantive and procedural). These differences inevitably have an impact on these alternative measures and have a significant impact on their afflictiveness[46] and effectiveness[47] depending on the EU State where they are applied.

In view of the above, it is clear that the issuing State cannot expect the executing State to apply alternative measures to freezing or confiscation which are not provided for by its national law. The issuing State may not even expect the executing State to apply its alternative measures in a manner (temporal, quantitative, etc.) which it does not allow. Also, from a law-in-action perspective, it would be appropriate for the issuing State not to suggest to the executing State that it adopt alternative measures, the low reliability/effectiveness rate of which is well known in the latter State. As can be seen, therefore, the choice by the issuing State of the al-

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[45] See A. Bernardi, *L'evoluzione in Europa delle alternative alla pena detentiva tra comparazione e impulsi sovranazionali*, in *Riv. it. dir. proc. pen.*, 2016, 51 ff.

[46] For example, there are very different obligations among the Member States in relation to public works.

[47] For example, unlike what happens in most EU countries, pecuniary penalty (which sometimes tends to converge, and even merge, with confiscation: see A. Bernardi, *Presentation*, in *this volume*, XI, nt. 8) has a very low effective rate in Italy. In fact, only about 3% of the fines imposed are actually paid: see A. Bernardi, *The development of alternative sanctions in Europe and the issue of prison overcowding*, in A. Bernardi (ed.), A. Martufi (coord.), *Prison overcrowding and alternatives to detention. European sources and national legal systems*, Naples, 2016, XXV.

ternative measures to be applied in the executing State and the manner in which they are to be carried out cannot take place without prior recognition of the similarities and differences between these countries in this area. A prior dialogue between the issuing authority and the executing authority would therefore be appropriate. It would also seem appropriate to grant Eurojust an important role in connecting authorities in this area. As is well known, Eurojust is the most qualified body to communicate with the authorities of the Member States with a view to adopting the most appropriate measures in the fight against transnational organised crime[48].

Finally, it is worth pointing out that, within the vast range of alternative measures provided for in the EU Member States, measures which differ not only in content but also in purpose can be found, since they are designed to perform, as a matter of priority, a wide range of functions[49]. In parallel, as already pointed out[50], depending on the case, confiscation predominantly takes the form of preventive, repressive, restorative, reparatory or compensatory functions. Therefore, it is appropriate for the issuing State, when authorising the executing State to apply alternative measures, to indicate the measures having the most similar functions to the privileged ones from freezing or confiscation that might not be possible in the present case.

Such a choice is particularly useful in cases of "multiple orders", where only one of the issued orders can obtain what is required. In fact, it is not known at the outset whether the measures affecting the same assets (or the total assets of the affected person) will be "multiple" or not, nor whether or not all the measures will be able to obtain the freezing or confiscation required. The inconveniences caused by the freezing or confiscation measures which have not been carried out would be minimised if alternative measures with similar functions were applied instead of the above measures. That does not mean, of course, that in such cases the executing authority must use all its remaining discretion to ensure that the treatment accorded to the measures issued is fair and proportionate. This means, in short, that if the executing State cannot satisfy all the requests for freezing or confiscation, it will, in the light of the criteria mentioned above (of which a more precise hierarchy has been advocated

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[48] See G. De Amicis, G. Iuzzolino, *Guida al mandato d'arresto europeo*, Milan, 2008; A. Weyembergh, *The Development of Eurojust: Potential and Limitations of Article 85 of the TFEU*, in *New Journal of European Criminal Law*, 2011, Vol. 2, Iss. 1, 75 ff.

[49] See A. Bernardi, *The development of alternative sanctions in Europe and the issue of prison overcowding*, cit., X.

[50] See A. Bernardi, *Presentation*, cit., par. 5.

[51] See, *supra*, *sub* par. 7.

here)[51] satisfy the most urgent requests, giving priority, first and foremost, to the needs of the victims. For further requests, the lesser evil would be precisely that of applying alternative measures indicated by the issuing State capable of performing functions similar to those of freezing or confiscation.

Future EU legislation on freezing and confiscation could therefore profitably contain such clarifications.

Section III

PROPOSALS FOR BETTER MANAGEMENT OF FROZEN AND CONFISCATED ASSETS

9. *Foreword*

Turning now to the problems posed by the management of frozen and confiscated assets, it was rightly pointed out in the course of the research that the rules laid down in Regulation 2018/1805 on the subject are undersized compared to those concerning the recognition and enforcement of freezing and confiscation orders[52]. In fact, while two special chapters are dedicated to the latter, only Articles 28, 29 and 30 of the Regulation are dedicated to the management of these assets. These articles therefore inevitably end up being incomplete. In addition, they appear to be rather vague in several parts, thus compromising their degree of coerciveness and deserving of integration by future, desirable EU sources.

10. *The desirable additions to Regulation 2018/1805 on the management of frozen assets: "pre-freezing planning" and the rights of the holder*

As regards the shortcomings in Regulation 2018/1805, it does not provide for a possible "pre-freezing planning" phase, which could also be important for the issuing of the freezing order. Such planning could make it possible, first and foremost, to assess whether, in light of the value of the asset, its greater or lesser capacity to depreciate and the costs of its safekeeping, the measure transmitted to the executing State should provide for the freezing or seizure of the asset, so as to prevent the risk that "the costs of managing the asset [...] exceed the value of the asset upon realisation". Certainly, one way of preventing this risk could be to leave the property in the custody of its owner. Even in this case, however, adequate pre-freezing planning could maintain its usefulness, helping to

[52] Cfr. T. Slingeneyer, *Management of frozen assets*, in *this volume*, par. 1.7.10.

clarify in advance the obligations to be imposed on the owner of the property to ensure the best preservation thereof[53]. The same planning could also help to clarify "the kind of restrictions that ought to be placed on the use of the asset as well as the measures needed to monitor compliance with such restrictions"[54].

However, account must be taken of the fact that, as has been pointed out several times, pursuant to Article 28(1) of Regulation 2018/1805 "The management of frozen and confiscated property shall be governed by the law of the executing State". It therefore seems legitimate to ask whether, in cases of judicial cooperation, the pre-freezing planning proposed here should or should not be considered binding on the executing authority.

A further gap in Regulation 2018/1805 and, more generally, in EU sources on freezing and confiscation concerns the hypotheses of sale of frozen or seized property. In this regard, it should be noted that under Article 10(2) of Directive 2014/42 "Member States shall ensure that the measures referred to in paragraph 1 include the possibility to sell or transfer property where necessary". In connection with that provision, Article 28(2) of the abovementioned regulation states: "The executing State shall manage the frozen or confiscated property with a view to preventing its depreciation in value. To that end, the executing State [...] shall be able to sell or transfer frozen property". As can be seen, none of these rules refers to the need for the sale of frozen/disposed assets in the executing State to take place with the prior consent of the owner of the assets in question, nor is there any mention of the possibility of the owner himself having the right to appeal against the decision to put these goods up for sale.

First of all, the rules in question would not pose a problem in relation to Article 1 of the Additional Protocol to ECHR and Article 17 CFREU, both concerning the right of property. In fact, the principle according to which no one can be deprived of his property allows exceptions for reasons of public utility/public interest and under the conditions provided for by law. However, the case law of the ECtHR concerning Article 1 of the Additional Protocol anchors this derogation from the right of property to the respect of the principle of proportionality. In turn, pursuant to Art. 52.3 CFREU[55], Article 17 of the CFREU must be

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[53] For example, in the case of real estate, the obligation of ordinary and extraordinary maintenance, the payment of mortgage installments, etc.

[54] UNODC, *Effective management and disposal of seized and confiscated assets*, Vienna, Unodc, 2017, 28.

[55] Article 52, par. 3 CFREU reads: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and

interpreted in light of the case-law of the ECtHR. That said, at least in very exceptional cases, it is difficult to consider that the sale of a seized asset can be considered so indispensable for public utility purposes that it can be carried out without the consent of the owner of the asset in question. It would therefore seem appropriate to supplement Article 28 of Regulation 2018/1805 with a provision aimed at making the sale of frozen or seized property subject to the consent of the owner[56]. In the alternative, there could be an obligation to notify the sale of the property, explicitly providing for the possibility of appealing against this decision.

At least one other omission from the current rules on the management of frozen assets deserves to be mentioned. It alludes to the absence of rules on the right of the holder of the frozen but subsequently not confiscated property to receive annuities produced by the asset in question. An example could be any interest accrued in relation to the sums of money seized, coupons on shares and bonds frozen, rent from real estate removed from the full disposal of the owner. In some EU countries, including Italy, the law does not adequately recognise these rights, which, on the other hand, certainly deserve to be fully protected by European legislation.

In short, it therefore seems very appropriate that European legislation on judicial cooperation concerning the freezing and confiscation of assets should recognise the rights of the owner whose presumption of innocence is confirmed in the final judgment. This would, moreover, radically prevent conflicts between the authorities of the requesting State and the requested State, where in the absence of EU rules the above-mentioned rights could receive a very different level of protection.

11. *The vagueness of the regulatory rules on the management of frozen assets: the Gordian knot of their restitution to the victim and its possible dissolution by interpretation*

The rules on the management of frozen assets laid down in Regulation 2018/1805 are, in some cases, rather vague (if not intrinsically con-

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Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

[56] At most, the rule in question could specify that the consent of the owner to the sale for public utility/public interest is not indispensable in cases of absolute exceptionality. As such, selling frozen assets without their owner's consent would be justifiable under the proportionality principle. In turn, this absolute necessity should be adequately accounted for in the offer for sale measure.

tradictory). Evidence of this claim seems to be provided by Article 29 concerning the "Restitution of frozen property to the victim".

In particular, paragraph 2 of that article states that "Where the executing authority has been informed of a decision to restitute frozen property to the victim as referred to in paragraph 1, it shall take the necessary measures to ensure that, where the property concerned has been frozen, that property is restituted as soon as possible to the victim, in accordance with the procedural rules of the executing State, where necessary via the issuing State". However, this restitution can only take place as long as one of the different conditions indicated in the same paragraph does not subsist.

Indeed, the two conditions provided for by letters a) and b) do not pose any kind of problems. In fact, it is absolutely clear that there is no opportunity to arrange the restitution of the frozen asset in cases in which "(a) the victim's title to the property is […] contested" e "(b) the property is […] required as evidence in criminal proceedings in the executing State".

The condition referred to in point (c) is, on the other hand, completely different, as it prohibits the return of the property where "the rights of affected persons are prejudiced". According to Article 2(10) of Regulation 2018/1805, "affected person" means the person deemed to be both the holder of the frozen asset and the bona fide third party[57]. However, the rights of these persons (first and foremost the right to property, but also the mere right to enjoyment) are by definition affected by a measure to return frozen assets to the victim. It is therefore easy to understand that Article 29(2)(c) contains a condition which, if interpreted literally, would always frustrate the restitution obligation laid down in Article 29.

A different interpretation is required in relation to this rule, based on which the competent authority of the executing State, when determining whether or not to return frozen assets immediately to the victim, must strike a balance between the damage caused to the holder of the property by the restitution thereof to the victim and the damage caused to the actual victim (or rather, to the injured party)[58] by failure to return

[57] In accordance with the abovementioned Art. 2 (10), "'affected person' means the natural or legal person against whom a freezing order or confiscation order is issued, or the natural or legal person that owns the property that is covered by that order, as well as any third parties whose rights in relation to that property are directly prejudiced by that order under the law of the executing State".

[58] Indeed, the term "victim" presupposes a conviction which, at the time of the request for restitution of *frozen* (and not confiscated) property, cannot have occurred. On the other hand, the term "injured party" only presupposes the establishment of a criminal proceeding.

the asset. This balance leaves a very wide margin of discretion to the competent body in the executing State, which may also not be familiar with the details of the case. This discretion is not attenuated by paragraph 3 of art. 29, according to which "Where the executing authority is not satisfied that the conditions of paragraph 2 have been met, it shall consult with the issuing authority without delay and by any appropriate means in order to find a solution. If no solution can be found, the executing authority may decide not to restitute the frozen property to the victim". Indeed, as is clear, this consultation still leaves the executing authority the final word. Moreover, the text of Article 29 in no way excludes the possibility of borderline cases consisting in the consolidation, in certain EU Member States, of systematic practices aimed at refusing such dialogue, or at pretextually avoiding the return of property to the victim, or even at automatically recognising the right to restitution without taking into account the rights of the accused.

In light of the above, the question arises as to whether there is any effective remedy available to the victim in the event of failure to return the property to him or her, or the other way round, at the disposal of the accused holder of the frozen property in the event of its restitution without regard to that person's rights. In the abovementioned borderline cases, it might be permissible for both the defendant and the victim to complain to the Commission that the executing State has failed to comply with Regulation 2018/1805. In any other case, however, it is unlikely that these subjects could benefit from such a remedy. Similarly, it is unlikely to assume that, by means of an interpretative reference for a preliminary ruling, it will be possible to obtain from the Court of Justice positions which are largely erosive of the discretionary power of the executing authority which Article 29 of the regulation expressly seeks to safeguard.

12. *Harmonisation of sanctions for the holder of the assets who violates the constraints related to freezing*

With regard to the management of frozen assets, one final issue deserves to be addressed. The need to respect the restrictions imposed on the owner to whom the frozen property remains entrusted, and more generally the need for him not to evade, alienate or disperse the property in question, raises the issue of the penalties applicable to that person in the event of non-compliance with custody obligations. Since these penalties are intended to ensure the proper functioning of an instrument (freezing) which is the subject of many European harmonisation rules,

they must necessarily be proportionate, effective and dissuasive[59]. They should also have a level of afflictiveness in the Member States of the European Union[60]. The progressive recourse to the most invasive forms of confiscation, which find their natural antecedent in freezing rather than in seizure, and the contextual multiplication of the cases of judicial cooperation in the matter, highlight in particular this need for harmonisation of penalties.

So far, no EU legislative text has addressed this problem, the real extent of which is, indeed, substantially unknown. In fact, there is a lack of adequate comparative studies showing how different the national penalties currently provided for in respect of these infringements are from one Member State to another in terms of severity and effectiveness, and whether and to what extent these penalties are not sufficiently dissuasive in some EU Member States. However, in view of the major differences between the Member States in the penalties applicable to the single categories of offences, especially where no EU harmonisation texts have been adopted, there is a well-founded suspicion that, at present, the penalties applicable in the event of a breach of the obligations relating to the freezing of assets vary considerably from one State to another.

Certainly, where the EU Member States ever considered it necessary to harmonise the penalties applicable to owners of frozen property who do not respect the constraints established in relation to them[61], it would not be difficult to find an appropriate legal basis within the TFEU. The problem concerns the choice between the first two paragraphs of Article

[59] As the Court of Justice has repeatedly pointed out. See especially judgment of 21 September 1989, case C-68/88, *Commission v. Greece*; judgment of 10 July 1990, case C-326/88 *Hansen*; judgment of 2 October 1991, case C-7/90, *Vandevenne*.

[60] On the reasons for a thorough harmonisation of penalties at European level, especially (but not only) in relation to national criminal law implementing EU law, see A. Bernardi, *Opportunité de l'harmonisation*, in M. Delmas-Marty, G. Giudicelli-Delage, E. Lambert-Abdelgawad (eds.), *L'harmonisation des sanctions pénales en Europe*, Paris, 2003, 451 ff.; Id., *L'harmonisation des sanctions en Europe*, in M. Delmas-Marty, M. Pieth, U. Sieber (eds.), *Les chemins de l'harmonisation pénale*, Paris, 2008, 289 ff.

[61] The harmonisation proposed above would avoid forms of *forum shopping*. The issuing authority could be led to require, in the presence of multiple assets belonging to the same person and located in different EU States, the freezing of assets located in the one that provides for the most severe sanctions for non-compliance with the obligations related to the order. In this way, in fact, the issuing authority would try to safeguard the value of the frozen asset as much as possible. In theory, further and earlier forms of *forum shopping* would not be excluded either. Indeed, the existence of strong sanctioning imbalances between EU Member States in the event of non-compliance with freezing requirements could lead to the offender placing potentially assets in one State rather than another. In this way, the owner of the frozen asset would minimize the risk-penalty resulting from his failure to comply with the constraints imposed by the freezing order.

83 TFEU. As known, according to paragraph 2 of this article, "If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned". Given that ensuring the proper functioning of judicial cooperation in criminal matters is an EU policy aimed at establishing an Area of Freedom, Security and Justice, and that this policy has been the subject of harmonisation measures which have also specifically concerned the regulation of freezing and confiscation, recourse to Article 83(2) TFEU could initially be envisaged. In this respect, the observation that the ancillary harmonisation provided for in this paragraph is conditioned by the requirement of its *indispensability*[62] does not seem to be a major obstacle. In fact, this requirement, although abstractly very strict, is potentially exposed to circumventions of all kinds, and therefore does not necessarily guarantee a selection of the hypotheses of accessory harmonisation that really respects the principle of *ultima ratio*[63].

Undoubtedly, a more significant obstacle to the use of Article 83(2) TFEU is the fact that the criminal harmonisation provided for therein concerns areas previously covered by *extrapenal* approximation measures. On the other hand, European legislation on freezing and confiscation undoubtedly has a *penal* nature, as is demonstrated by the fact that both the 2014 Directive and the 2018 Regulation were adopted on the basis of two Articles (82 and 83 TFEU) relating precisely to EU competence in criminal matters.

It would therefore seem more appropriate to use Article 83(1) TFEU as the legal basis for such a harmonisation of the penalties applic-

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[62] Scholars argue that the meaning of *indispensability* is more stringent than the one of *necessity* (which is provided for by Art. 83 TFEU, paragraph 1). In this regard, see (also for further bibliographical references) A. BERNARDI, *La competenza penale accessoria dell'Unione europea: problem e prospettive*, in *Dir. pen. cont. - Riv. trim.*, 2012, 1, *passim*. In particular, the a. stresses that "according to the first part of Art. 83.2 TFEU, recourse to the relevant harmonisation rules is conditional upon their being indispensable for the effective protection of EU policies. The fact that a given Union action must be indispensable rather than better (Art. 5(3) TEU) and necessary (Art. 5(4) TEU) [but also Art. 83(1) TFEU] seems to indicate a desire to restrict the scope of the accessory criminal jurisdiction: as if, in relation to it, the general limits placed on the Union's action by the principles of subsidiarity and proportionality were not only added but also exponentially strengthened" (64).

[63] R. SICURELLA, *Questioni di metodo nella costruzione di una teoria delle competenze dell'Unione europea in materia penale*, in *Studi in onore di Mario Romano*, Naples, 2011, 2606, complains about "the scarcely selective character of the requirement of 'indispensability'".

able in the event of non-compliance with the obligations imposed under the freezing system. Nevertheless, this paragraph refers to minimum harmonisation rules on offences and penalties in the areas of particularly serious crime. In principle, it does not appear that the breach of obligations arising from a freezing order constitutes a particularly serious offence.

It is true, however, that – as demonstrated by the 2014 Directive – the legal basis of Article 83(1) TFEU may be combined with that of Article 82(2) TFEU. The latter legal basis can in fact be used "to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension".

It is also for judicial cooperation purposes that the harmonisation rules envisaged here would be finalised. In fact, these rules would not only ensure the dissuasive effect of the requirements imposed by the authority of the executing State on the holder of the frozen asset, but would also pursue the objective of increasing the trust of the issuing authority in judicial cooperation focused on the freezing instrument.

Ultimately, Article 82(2) and Article 83(1) TFEU could probably legitimise an EU hard law provision aimed at harmonising the penalties applicable in the event of non-compliance with the obligations upon the owners of frozen assets. If, however, it is considered that the time for such a reform is not yet ripe, this harmonisation could be pursued through European *soft law* standards. The purpose of the latter would be to raise awareness among States as to whether non-compliance with the requirements accompanying freezing measures should be regarded[64] as a "particularly serious offence", or at least of a certain gravity, deserving of proportionate, adequate and sufficiently dissuasive criminal sanctions.

[64] In accordance with Art. 83(1) TFEU.

List of Contributors

Alessandro Bernardi, *Professor in Criminal Law at the University of Ferrara*

Michaël Fernandez-Bertier, *Attorney-at-Law Member of the Brussels and New York Bars & Research Associate in Criminal Law at the University Saint-Louis-Brussels*

Samuel Bolis, *Ph.D. in Criminal Law at the University of Ferrara*

Martin Böse, *Professor in Criminal Law at the University of Bonn*

Olivier Cahn, *Professor in Criminal Law at the University of Tours, IRJI, Association for European Criminal Research (ARPE)*

Yves Cartuyvels, *Professor in Criminal Law and Criminology at the University of Saint-Louis-Brussels*

Eleonora Anna Alexandra Dei Cas, *Ph.D. in Criminal Procedural Law at the University of Modena*

Francesco Diamanti, *Post-Doctoral researcher in Criminal Law at the University of Modena and Reggio Emilia*

Geneviève Giudicelli-Delage, *Professor Emeritus in Criminal Law at the University Paris 1 - Panthéon-Sorbonne, President of the Association for European Criminal Research (ARPE)*

Iryna Grebenyuk, *Ph.D. in Criminal Law at the University Paris 1 - Panthéon-Sorbonne*

Christine Guillain, *Professor in Criminal Law and Criminal Procedure at the University of Saint-Louis-Brussels*

Ciro Grandi, *Professor in Criminal Law at the University of Ferrara*

Nicolas Jeanne, *Associate Professor at the University Cergy Pontoise*

Dan Moroşan, *Ph.D. Candidate in Criminal Law at the University of Cluj-Napoca*

Marie Nicolas, *Associate Professor at the University Clermont-Auvergne, Centre Michel de l'hospital*

DANIEL NIŢU, *Senior Lecturer in Criminal Law at the University of Cluj-Napoca*

VERA WEYER, *Research Assistant in Criminal Law at the University of Bonn*

THIBAUT SLINGENEYER, *Professor in Criminal Law at the University of Saint-Louis-Brussels*

MICHELE SIMONATO, *Policy Advisor at the European Parliament, Committee on Civil Liberties, Justice and Home Affairs (LIBE)*

FLORIN STRETEANU, *Professor in Criminal Law at the University of Cluj-Napoca*

JULIETTE TRICOT, *Associate Professor at the University Paris Nanterre, Centre for Criminal Law and Criminology, Association for European Criminal Research (ARPE)*

JOHN A.E. VERVAELE, *Professor in Economic and European Criminal Law at Utrecht University*

WOUTER S. DE ZANGER, *Post-Doctoral Researcher and Assistant Professor in Procedural and Criminal Law at Utrecht University*

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