

RECOVER

I RESEARCH QUESTIONNAIRE - II WORKPACKAGE

“ESTABLISHING THE SUBJECT MATTER OF THE REGULATION”:

NATIONAL CONFISCATION MODELS COVERED BY THE REGULATION no. 1805/2018. TYPES, FEATURES AND SAFEGUARDS.

For each question it is important to answer considering the scholars' opinion and the evolution of the jurisprudence/case law (Constitutional Court, Supreme Court, etc.)

- 1) Which are the different models of forfeiture/confiscation in Your system of law (direct confiscation, confiscation of the value, extended confiscation, non-conviction based confiscation, confiscation against third parties, etc.)? Please, explain which are the different models in general, also the ones not falling under the scope of the Regulation.

SPANISH LEGAL CONFISCATION SYSTEM AT A GLANCE

Spain did notify the Commission the timely transposition of the Directive 2014/42/EU into its national legal system. Domestic implementing measures were adopted in 2015 by mean of LO n° 1/2015 amending the Spanish Criminal Code (SCC), which had been previously amended in Law 5/2010, of 22 June 2010 transposing Framework Decision 2005/212/JHA, of 24 February on Confiscation of Crime-Related Proceeds, Instrumentalities and Property. LO 1/2015 triggered relevant changes in relation to several legal concepts as non-conviction based confiscation; extended confiscation and its scope of application; third-party confiscation; safeguards...

As regards to the **Spanish confiscation legal framework**, confiscation is currently regulated in the Spanish Criminal Code (hereinafter SCC) in Title VI of Book I (General Part), under the heading "Of the accessory consequences. Apart from the above mentioned general provisions setting up the different confiscation models in the Spanish legal system, confiscation is also provided under specific provisions in the Special Part of the SCC (Book III) for the following offences:

- concerning organisation of the territory and urban planning (art. 319 SCC),
- offences against public health set forth in Article 362 sexies SCC;
- Drug trafficking (Article 374 SCC);
- crimes against Road Safety (Article 385 bis SCC);
- Hate crimes (Article 510 (6) SCC);
- Smuggling (Article 5 of Law 12/1995)

Regarding the Spanish procedural legal framework the Spanish Criminal Procedure Code (SCPC) is concerned, and this issue is mainly foreseen in Title III ter: "On the intervention of third parties affected by the confiscation and the procedure of autonomous confiscation".

Being said this, for all these offences provisions included in the general part of the SCC (Articles 127 and followings) are applicable.

In general terms, as of the reform carried out by LO 1/2015, the legal regime of confiscation can be summarized as follows:

1.a.- Direct confiscation (art. 127 (1) and (2) SCC):

Standard /direct confiscation (also known as standard conviction-based confiscation) refers to a judicial order concerning property related to a specific crime for which the owner has been convicted. The targeted assets are the direct proceeds or the instrumentality of a crime, following a criminal conviction for that crime. The offences are twofold:

- As regards to intentional crimes (art. 127.1 SCC). This particular provision¹ allows judges and courts to order the confiscation of goods, instrumentalities and proceeds of crime as regulated prior to 2015. However, the previously existing exception that they did not belong to *bona fide* third parties was removed. Confiscation requires a criminal conviction sentence for any intentional crime, even if it is appealable.

It is possible to confiscate both effects and direct or indirect proceeds from crime as well as goods, means or instruments with which it was prepared or executed, whatever changes they may have experienced. It refers to goods of any kind, of any nature (furniture, real estate, expendable, non-expendable, etc.). Therefore, it does not refer exclusively to the material object of the crime (thing on which the behavior of the active subject falls) nor only to patrimonial crimes.

In general terms, Spain enabled freezing and confiscation for all intentional crimes.

- As regards reckless crimes (art. 127.2 CP) for which a custodial sentence of more than one year is foreseen, confiscation is a possibility (not mandatory, as in intentional crimes, but under the discretionary criteria of the Court in a motivated decision including the proportionality test).

1.b.- Confiscation of the value (Articles 127 (3) as well as Arts. 127 quater (1) and 127 septies SCC).

Value confiscation refers to a confiscation measure targeting property of equivalent value to the proceeds or instrumentality of a crime. It is applicable most often in cases where criminals transform proceeds of crime into other property to hide its illicit origin and camouflage any audit trail. In case of impossibility of direct confiscation (because it is not possible to trace them, they are out of reach of the courts, they have been destroyed, their value has decreased or for any other circumstance) assets are confiscated in an amount that corresponds to their value, adding the profits obtained with them.

Value confiscation is also provided for when the value of the confiscated property is lower than the value of the goods, effects or profits at the time of acquisition. Even if they are of legitimate origin.

Art. CP 127.3 SCC provides that, if for any reason direct confiscation is not possible, “other assets corresponding to the equivalent value thereof, and to the gains that may have been obtained, shall be confiscated”, extending this provision also to the cases in which the value of the goods is lower than that of their acquisition.

¹ Article 127 SCC

1. All penalties imposed for criminal offence shall lead to loss of the assets obtained therefrom and of the goods, means or instruments with which they were prepared or executed, as well as the gains obtained from the criminal offence, whatever the transformations these may have undergone.

2. In cases in which the Law foresees imposing a sentence of imprisonment exceeding one year for committing an imprudent criminal offence, the Court may order the loss of the assets obtained thereby and of the assets, means or instruments with which this has been prepared or executed, as well as the gains from the criminal offence, whatever transformations they may have undergone.

3. If, for any circumstance, it were not possible to confiscate the assets stated in the preceding Sections of this Article, other assets corresponding to the equivalent value thereof, and to the gains that may have been obtained, shall be confiscated. The same shall apply in the case of confiscating certain goods, assets or gains, when their value is lower than at the time of acquisition.

Art. 127 septies SCC completes the previous regulation allowing also value confiscation during the execution phase (so-called Ejecutoria) whenever by the nature, situation or any other circumstances that concurs in the goods, it would not have been possible to carry out the confiscation.

Both precepts provide the same solution to make the confiscation effective in the assumptions of impossibility that they include, although each of them will be applicable in different procedural moments: when the confiscation is decided by the Court in the sentence (art. 127.3 SCC) and in the moment of making it effective through its actual execution (art. 127 septies SCC), in line with the so-called *wertersatz* under the German Law (Art. § 74.c) of the German CC). Confiscation by substitution occurs when the seizure of an asset becomes the seizure of an amount of money that, in turn, can also become other different property, which can be done directly in the sentence or later in its execution phase.

This possibility is also applicable to cases of confiscation of third-party assets (art. 127 quater 1 SCC) and extended confiscation (art. 127 septies SCC).

These provisions (Articles 127 (3); 1 art. 127 quater 1 and 127 septies SCC) are complementary and facilitate a solution for actual confiscation in the given cases of impossibility of actual confiscation (for whatever reason) but in different procedural moments. The first modality is mandatory and should apply when the confiscation is decided in a sentence and the second is optional and comes up afterwards, when the sentence has to be enforced in the execution phase. However

Value confiscation was introduced in our legislation in 2003, transposing Article 3 of the Framework Decision of 26 June 2001, *on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime*. However, in the vast majority of cases value confiscation is redundant, taking into account that the exercise of the civil action under the umbrella of criminal proceedings in Spain is mandatory.

So, for the confiscation of property, the value of which corresponds to such instrumentalities and proceeds, the Spanish legislation provides the possibility to confiscate other assets of equivalent value to the instrumentalities and proceeds of crime on the basis of a final conviction sentence.

1.c.- Non conviction-based confiscation -NCBC- or “autonomous confiscation” (Art. 127 ter SCC)².

Non-conviction based confiscation refers to a confiscation measure taken in the absence of a conviction against assets of illicit origin. In the case of Directive 2014/42/EU, it covers cases where a criminal conviction is not possible because the suspect has become ill or fled the jurisdiction, but the court is nevertheless convinced in a criminal procedure that the assets are of criminal origin, and a conviction would have been reached had it not been for the illness of absconding of the defendant. So, confiscation is also possible in cases when the initiated criminal proceedings could not move forward and no conviction can be handed down. Under the Spanish legal system NCBC is provided since 2010 (and later on amended in 2015) in Art. 127 ter of the whenever exemption³ or extinction⁴ of the criminal

² Article 127 ter

1. The Court may order the confiscation outlined in the preceding Articles even if no sentence has been handed down, when the unlawful financial position has been demonstrated in adversarial proceedings and in any of the following cases:

a) That the subject is deceased or suffers from a chronic illness impeding his trial and that there is a risk that the criminal offences may prescribe;
b) He is in a situation of default, preventing a trial within a reasonable period of time; or
c) No sentence is handed down as the individual is exempt from criminal responsibility or said responsibility has been finalised.

2. The confiscation referred to in this Article may only be adopted against individuals who have been formally accused or against defendants for whom there is circumstantial evidence of criminality when the situations outlined in the preceding Section have prevented criminal proceedings from continuing.

³ Article 20 of the Spanish Criminal Code.

⁴ Article 130 of the Spanish Criminal Code (in particular, dead and prescription of the offence as the only pre-conviction legally provided causes)

responsibility coexists in the framework of the criminal procedure initially opened against an investigated/accused person. However we must take into account the adversarial principle and the need of a criminal procedure procedural framework. In this regard, it should be noted that the Spanish criminal procedure allows the joint exercise of civil action, unlike *common law* systems that admits separate civil confiscation orders issued by civil courts within civil procedures indirectly linked with criminal offences.⁵

So, in Spain NCBC is possible due to:

- ✓ the persistent illness or death of the perpetrator
- ✓ absconding or fleeing of the investigated person with impossibility of prosecution within a reasonable time,
- ✓ when there is a risk of statute of limitations and
- ✓ any other exemption from liability or extinction of criminal liability.

Furthermore, Spanish legal framework goes beyond the provisions of the 2014/42/EU Directive covering confiscation when the conviction of the accused or suspected person is not possible due to the ending of his/her criminal liability (e.g. expiry of the statute of limitations or if the criminal proceedings ceased or were declared inadmissible). In those cases an accusation act against the person to whom the given assets are intended to be confiscated should be delivered by the Public Prosecutor whenever the illicit patrimonial situation could be proven.

The procedural framework is mainly covered by the so-called new *autonomous confiscation procedure* set up in Articles 803 ter e and followings for the NCBC (See ANNEX I) of the Spanish Criminal Procedure Code (hereinafter SCPC), guaranteeing the adversarial principle.

SCC enables confiscation without a prior conviction in those given cases and it is noteworthy that NCB confiscation is not mandatory under the Spanish legal system in place.

1.d.- Extended confiscation (Article 127 bis as well as Articles 127 quinquies and sexies SCC).

Extended confiscation concerns orders which go beyond the direct proceeds of a given investigated offence. The order follows a criminal conviction, targeting property “beyond the direct (and concrete) proceeds of the crime for which the offender was convicted, where the property seized is derived from criminal conduct.” A direct link between the property and the offence, such as in the case of standard confiscation measures, is not needed if the court assesses that the offender’s property was nevertheless derived from other unlawful conduct. Therefore, extended confiscation enables deprivation of property belonging to a convicted person when: (i) the crime is likely to give rise to economic benefit; and (ii) the circumstances of the case indicate that the property is derived from criminal conduct.

Under the Spanish legal system, the court must ‘decide, based on well-founded objective evidence’ that the property (here the Spanish Criminal Code does not refer to the instruments) derives from illegal activities.

This powerful type of confiscation is intended to cover cases in which, based on well-founded objective evidence, it is determined that certain goods or effects come from a previous criminal activity but their specific legal origin is not determined. The factors to be particularly assess by the Court on a *iuris tantum* presumption basis are the followings:

⁵ While the term "civil confiscation" is broader as includes both civil and administrative forfeiture, given that the notion 'civil' includes both common law sanctions imposed by the civil courts as those imposed by the authority administrative. Among the states that are regulated we can find out UK, Australia, South Africa, United States of America, Ontario in Canada (2007), Ireland, Italy, Slovenia, Slovakia and most recently New Zealand Act 2009.

- The disproportion between the value of the given goods/financial situation and lifestyle with the lawful income of the convicted person.
- The concealment of ownership or of any power of disposal over the goods or effects using natural or legal persons or entities without interposed legal personality, or tax havens or off-shore territories used to hide or hinder the identification of the beneficial owner.
- The transfer of goods or effects through operations that hinder or prevent their location or destination and that lack a valid legal or economic justification.

In order to avoid any infringement of *ne bis in idem* principle, extended confiscation is not applicable to prescribed crimes or whenever and acquittal or dismissal has been decided with effects of *res judicata* (Art. 127 bis.5 CP).

On the other hand, prior extended confiscation should be considered at the time of issuing a sentence by the competent Court re an ongoing criminal proceedings based on similar criminal acts (art. 127 bis.4 CP)

In a nutshell, extended confiscation is based on the enlargement of its consequences to groundless assets and profits whose connection with the given offence cannot be determined with certainty. In Spain the **background landmark judgement** in relation to extended confiscation is the judgement issued by the Supreme Court the 5th October 1998 in a drug trafficking case clarifying the scope of Article 374 SCC setting up the following agreement: “*Confiscation of proceeds of crime referred to in article 374 must be extended to profits from operations prior to the specific investigated and prosecuted criminal act, provided that said origin is proven and the accusatory principle is respected.*”. Extended confiscation was introduced in Art. 127 (1) SCC by Law 5/2010 implementing both FD 2002/457/JHA and FD 2005/212/JHA and later on updated by Law 1/2015 implementing Directive 2014/42/UE which rephrase the wording of extended confiscation in the new Article 127 bis SCC (enlarging its scope to a wider range of offences “*The Court shall also order the confiscation of the goods, assets and gains pertaining to a convicted person of any of the following criminal offences when it is determined, based on well-founded objective evidence, that the goods or assets were obtained from a criminal activity, and their legal origin cannot be determined*”).

There are two types of extended confiscation:

1st.- **Ordinary extended confiscation.** The above mentioned extended confiscation of assets, effects and profits from a criminal activity criminal. This modality supposes the seizure by the Court of any goods, effects and proceeds of crime y that belong to the person convicted of any of the crimes of art. 127 bis.1 SCC. This confiscation is mandatory for the Judge or Court as long as the above mentioned circumstances concur and there are “reasonable evidence” of its criminal origin and the defense “does not prove their lawful origin” (arts. 127 bis and quinquies SCC).

2nd.- **Extended confiscation from a previous continued criminal activity or persistent criminal activity.** In this case, the Court can seize the assets, effects and gains related to the continued activity of the convicted person, prior and different from that for which he/she is sentenced (arts. 127 quinquies and sexies SCC). This subtype of extended confiscation is based on the verification of the existence of other criminal activities, different from those for which the accused person is convicted and that they have made up their illegitimately obtained patrimony.

The essential note that differentiates both modalities of extended confiscation lies in the ultimate criterion established to delimit the assets subject to confiscation. While that the extended confiscation itself (provided in Art. 127 bis SCC) will reach all assets that, by virtue of existing evidence, can be linked to previous criminal activities of the subject, the **extended confiscation by criminal reiteration** (Arts 127 quinquies and 127 sexies SCC) will be extended to all the goods acquired and to all the expenses incurred

in a certain period of time, provided that the legal requirements are met. To ease that objective a special role is attributed to certain additional legal presumptions with certain specific requirements.

In order to decide on the extended confiscation, the Court has to verify that the subject has been convicted of one of the crimes of art. CP 127 bis. It is also required that the crime has been committed in the context of a previous continuous criminal activity (a sort of criminal life style), there being "reasonable indications" that a relevant part of the subject's assets comes from it, as long as the defense "does not prove its lawful origin" (arts. 127 bis and quinquies CP).

In order to facilitate the Court the accreditation of the illicit origin of the assets, effects or profits of which the confiscation is intended, the same presumptions are applicable as for the previous extended case. However, due to the proportionality principle, a de minimis criteria is set up and confiscation will be carried out provided that such activities generated a profit greater than 6,000 euros.

Additionally, there is continuous economic activity in cases where the subject had been convicted in the same criminal proceeding for at least three crimes or for a so-called continuous crime (which includes three or more criminal offences, provided that a direct or indirect economic benefit has been derived from them). However, when the conviction is delivered within the six years prior to the start of the procedure for one of the crimes listed in Art. 127 bis SCC, the minimum number of offenses or criminal offenses within a continuous offense decreases from three to two.

Under this subtype of extended confiscation (keeping the same legal system of presumptions), it would be considered as proceeds of crime, unless the specific circumstances of the case reveal this approach to be disproportionate, all assets acquired by the convicted person within a concrete period of time, namely during six last years prior to the date of the opening of the criminal proceedings when they were acquired free of charge and/or when the expenses triggered were paid with funds from such criminal activity. For these purposes, the date of acquisition is understood to be the earliest in that such assets were at the disposal of the accused person (art. 127 sexies CP).

The main difference between both types of extended confiscation is its mandatory or optional nature. Under Art. 127 bis CP the ordinary extended confiscation is mandatory for the Court being the adoption of the later extended confiscation from a previous continued criminal activity provided in art. 127 quinquies SCC optional for the Court.

On the other hand, extended value confiscation or **extended confiscation of equivalent assets is provided** under Art. 127 septies SCC⁶ and is possible whenever, for any circumstance, direct or extended confiscation of the assets, effects or profits related to the crime or to the previous criminal activity is not an option or when these no longer have the value they had at the time of their acquisition. In these cases, the confiscation of assets owned by the investigated person, even if they have a lawful origin, for equivalent value to the part that could not be effectively executed is also possible.

There is a possibility of compensation with new confiscations orders enacted in relation to criminal acts previously committed. It does not apply when the criminal activities from which the assets or effects originate have prescribed or have already been the subject of a criminal proceeding resolved by an acquittal or definitive dismissal.

⁶ Article 127 septies

If it were not possible to proceed with the confiscation, in whole or in part, due to the nature or status of the goods, assets or gains in question, or for any other reason, the Court may, via a ruling, order the confiscation of other goods, even those of lawful origin, owned by the individuals criminally liable for the criminal offence, with a value equal to that of the part of the confiscation initially decreed and not carried out.

The same shall apply in the case of confiscating certain goods, assets or gains, when their value is lower than at the time of acquisition.

Extended confiscation is limited to crimes listed in Art. 127 bis SCC.

1.e.- Third-party Confiscation (Art. 127 quáter SCC)⁷.

Third-party confiscation refers to a confiscation measure made to deprive someone other than the offender – the third party – of criminal property, where that third party is in possession of property transferred to him or her by the offender. It is employed most often when criminals transfer property to a knowing third party in order to maintain its enjoyment without being the legal owner, thus attempting to avoid the confiscation of such property in case of conviction. Spain put in place specific provisions on third-party confiscation reflecting the so-called *mental requirement* that the third person ‘knew or ought to have known [...] that the purpose of the transfer or acquisition was to avoid confiscation’. SCC implemented this provision from the 2014/42/EU Directive ensuring the rights of *bona fide* third parties are preserved. This type of confiscation is optional and not mandatory when ill-gotten assets, effects and profits of the above-mentioned confiscation models have been transferred to third parties.

In these cases:

- As regards to items/effects and profits: whenever they have been acquired with knowledge (or at least reasons for this knowledge by a diligent person) of the illegal origin of the possession.
- As regards to other assets: whenever they have been acquired with knowledge (or at least reasons for that knowledge by a diligent person) that its confiscation is being hindered.

Third party good faith excludes the application of this type of confiscation, provided that, with reversal of the burden of proof, the basis for the questioned free/gratuitous or low-priced acquisition is explained. So, knowledge of the criminal act is required for the third-party confiscation, unlike the illicit enrichment of Art. 122 SCC (which requires restitution even in cases of good faith). Said knowledge is presumed, as Art. 127 quáter SCC points out, on the basis of the reference purchase price (free of charge or considerably less than the market value).

2.- Pre-trial freezing of assets. In order to prevent the destruction, transformation, removal, transfer or disposal of property with a view to an eventual confiscation a freezing order can be issued in the pre-trial stage. This need is urgent when the proceeds of crime is nothing other than money, as occurs on numerous occasions in economic crimes, frauds and, of course, in money laundering cases. As money is totally fungible and easily transferable, even from one country to another, without the need to be physically transported, thanks to the telematic and electronic means currently available, in these cases, the seizure in the investigative phase is crucial to avoid an evident *periculum in mora*.

The Spanish legislator, implementing Art. 7 of FD 2014/42/JHA in order to guarantee the effectiveness of confiscation authorizes the Investigating Judge to freeze assets, means, instruments and proceeds of crime from the very beginning of the criminal proceedings (art. 127 octies SCC). In the event that its nature or characteristics prevent its conservation in its original form, the Judge

⁷ Article 127 quáter

1. Judges and Courts of Law may also order the confiscation of the goods, assets and gains referred to in the preceding Articles that have been transferred to third parties, or others of an equal value, in the following cases:

a) In the case of assets and gains, when they were acquired with full knowledge that they were obtained from a criminal activity or when a diligent individual would have had reasons to suspect their unlawful origin, given the circumstances of the case;

b) In the case of other goods, when they were acquired with full knowledge that such an acquisition would hinder their confiscation or when a diligent individual would have had reasons to suspect that such an acquisition would hinder their confiscation, given the circumstances of the case.

2. It shall be assumed, unless evidence to the contrary is produced, that the third party knew or had reasons to suspect that the goods in question were obtained from a criminal activity or that they were transferred to avoid confiscation, when the goods or assets were transferred for free or for a price below real market value.

could also decide on the best form of conservation and managements of the frozen goods including the possibility of an interlocutory selling (Article 367 quáter SCPC) and destruction (Art. 367 ter SCPC) .

Actually, the Spanish legislator has only come to recognize what traditionally was already a common practice, where the confiscation was decided *ex officio* and *apriori* to the final conviction, provided there was an appearance of -good- fairness (*fumus boni iuris*), based on a reasonable consistency on the existence of a given crime (*fumus delicti comissi*) and a risk of delay (*periculum in mora*). However it is worth mentioning that the definition of “embargo” -meaning freezing as a confiscation precautionary measure-, has been “grafted” in our legal system, giving rise to endless discussions.

2) For each model of confiscation:

- a) **Which is the object of the confiscation and its meaning/interpretation?** (proceeds, products of the crime, instruments of the crime, etc.). Clarify if and in which case it is possible to confiscate the ‘value equivalent’.

Models of confiscation	Objects: meaning/interpretation
<p>Direct confiscation Art. 127 (1) and (2) SCC combines two main purposes of confiscation: to avoid the potential danger that crimes will continue to be committed if the assets to be confiscated continue in the hands of the offender (in the case of effects, means or instruments) and to prevent them from being used to finance new criminal activities or serve as furtherance of such criminal activities (in the case of proceeds or ill-gotten gains).</p>	<p>Is mandatory in relation to the following categories of properties:</p> <ol style="list-style-type: none"> 1) Goods/property of any type derived directly from a criminal offence (<i>productum sceleris/ Verfall</i>) 2) Goods, means or instrumentalities or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences (<i>objetum sceleris & instrumentum sceleris/ Einziehung</i>) 3) Proceeds of crime whatever are the changes they may have undergone, (<i>fructus scaeleris</i>)
<p>Confiscation of the value Articles 127 (3); 127 quater 1 and article 127 septies SCC</p>	<p>Art. 127.3 SCC only refers to properties and proceeds.</p>
<p>NCBC Art. 127 ter SCC</p>	<ol style="list-style-type: none"> 1) Goods/property of any type derived directly from a criminal offence (<i>productum sceleris/ Verfall</i>) 2) Goods, means or instrumentalities or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences (<i>objetum sceleris & instrumentum sceleris/ Einziehung</i>) 3) Proceeds of crime whatever are the changes they may have undergone, (<i>fructus scaeleris</i>)
<p>Extended confiscation Art. 127 bis Art. 127 quinquies and sexties SCC</p>	<p>Art. 127 bis SCC does not refer to the instrumentalities. Extended value confiscation or extended confiscation of equivalent assets is provided under Art. 127 septies SCC and is possible whenever, for any circumstance, direct or extended confiscation of the assets, effects or profits related to the crime or to the previous criminal activity is not an option or when these no longer have the value they had at the time of their</p>

	<p>acquisition. In these cases, the confiscation of assets owned by the investigated person, even if they have a lawful origin, is also possible for equivalent value to the part that could not be effectively executed.</p> <p>In our opinion the the reference to goods, effects and proceeds made in both art. 127 bis and 127 quinquies SCC, with omission of the means and instrumentalities, should be understood as superfluous, as instrumentalities and means used in previous criminal activity should be also considered included within the general and inclusive concept of assets.</p>
<p>Third-party Confiscation Art. 127 quárter SCC</p>	<p>Art. 127 quarter SCC only refers to goods, items, and proceeds. This means, instrumentalities are excluded.</p>
<p>Pre-trial Freezing Art. 127 octies SCC Articles 367 ter and quáter SCPC</p>	<p>Art. 127 octies SCC refers to goods, means, instruments and profits in its first section, goods, and effects in the second section and goods, instruments and profits in the third.</p>

- b) **Which is the (material) scope of its introduction?** (the fight against organised crime/money laundering/corruption/terrorism, etc., the application of the principle that crime doesn't pay, etc.)

Models of confiscation	Material Scope.
<p>Direct confiscation Art. 127 (1) and (2) SCC Art. 319 SCC), Article 362 sexies SCC; Article 374 SCC; Article 385 bis SCC; Article 510 (6) SCC; Art. 5 of LO 12/1995</p>	<p>Since Spain follows the 'all crimes'-approach, enabling standard conviction-based confiscation to a larger number of crime areas than the euro-crimes foreseen under the 2014 Directive, direct confiscation is the most widely used confiscation tool because</p> <p>In general terms, Spain has enabled confiscation for all intentional crimes whenever they are likely to give rise to economic benefit, as Article 127 (1) SCC provides. So, it covers confiscation related to criminal offences covered by Directive 2014/42/EU, as well as confiscation related to other criminal offences. The criminal offences covered by this SCC provision should therefore not be limited to particularly serious crimes that have a cross-border dimension (Article 82 of the TFEU).</p> <p>As regards to reckless crimes, custodial sentence of more than one year is requested for confiscation of properties, goods, means and instrumentalities.</p> <p>Apart from the general provisions in Book I of the SCC, confiscation is specifically provided in scattered provisions in the Special Part of the SCC (Book III) for the following offences:</p> <ul style="list-style-type: none"> - concerning organisation of the territory and urban planning (art. 319 SCC),

	<ul style="list-style-type: none"> - offences against public health set forth in Article 362 sexies SCC; - Drug trafficking (Article 374 SCC); - crimes against Road Safety (Article 385 bis SCC); - Hate crimes (Article 510 (6) SCC); <p>Also confiscation is provided in a Special Criminal Law on Smuggling (Article 5 of Law 12/1995)</p>
<p>Confiscation of the value Articles 127 (3); 127 quater 1 and article 127 septies SCC</p>	<p>Legally speaking the scope of value confiscation is the same as direct confiscation and is applicable to assets, goods, means and instrumentalities with the all crimes approach</p> <p>This wide scope is the interpretation assumed by General Prosecutor's Circulars nums. 1/2005 and 4/2010, confirmed by Law 1/2015 in line with Directive 2014/42/UE.</p> <p>There is a restrictive interpretation in the Academia excluding it from the instrumentalities considering that its objectives wouldn't be reached in confiscation of value cases</p>
<p>NCBC Article 127 ter SCC</p>	<p>NCBC will apply if the criminal proceeding failed due any of the circumstances provided for in art. 127 ter SCC, although the subject of confiscation was the suspect or accused person under art. 127 or 127 bis with their respective scope of offences.</p> <p>Proceeds of crime are also included under the scope of value confiscation.</p> <p>Confiscation of the value is applicable to extended confiscation (Art. 127 bis 3 SCC), to NCBC (Art. 127 ter 1 SCC); to third-party confiscation (Art. 127 quater 1 SCC) as it is specifically provided for each of this modalities.</p> <p>However it is not applicable to the confiscation of goods stemming from persistent criminal activities (Art. 127 quinquies and sexies SCC)</p> <p>As previously mentioned value confiscation is possible in the execution phase after the conviction sentence when actual confiscation is not possible, then the Court can decide in a separate decision a more flexible approach inherent in the value confiscation re any property owned by the convicted person (Art. 127 septies SCC)</p>
<p>Extended confiscation Art. 127 bis Art. 127 quinquies and sexties SCC Extended confiscation powers do not cover all revenue-generating criminal markets where organised crime is active.</p>	<p>In line with the Confiscation Directive based on Article 83 (1), is applicable to listed 'eurocrimes'.</p> <p>Furthermore, in 2015 and under Article 127 bis SCC the scope was enlarged from organized crime groups and terrorism offences (as it was since 2010) to other 18th offences, namely:</p> <p>a) trafficking in human beings;</p>

<p>There is a legal gap, as extended confiscation does not cover firearms trafficking, environmental crime, contract killing (including murder, grievous bodily harm and kidnapping), organ trafficking, organised armed robbery, trafficking in cultural goods, swindling, racketeering and extortion, counterfeiting, documents forgery, forgery of means of payment, trafficking of nuclear materials and of illicit hormonal substances, illicit tobacco trade, leaving aside a wide area of criminal profits generating from offences organised crime.</p>	<p>b) prostitution and the sexual exploitation and corruption of minors and sexual abuse and aggression against minors under the age of sixteen; c) Computer-related crimes; d) Organised property crimes; e) bankruptcy or crimes related to punishable insolvency; f) intellectual or industrial property; g) corruption related crimes; h) receiving stolen goods; i) money laundering; j) Fraud of Inland Revenue and the Social Security; k) offences against workers' rights; l) offences against the rights of foreign citizens; m) offences against public health; n) counterfeiting currency, including the euro; o) bribery; p) misappropriation; q) terrorism; r) offences committed within a criminal organization or group.</p>
<p>Third-party Confiscation Art. 127 quárter SCC</p>	<p>Same material scope as direct confiscation under art. 127 SCC.</p>
<p>Pre-trial Freezing Art. 127 octies SCC Articles 367 ter and quáter SCPC</p>	<p>As already mentioned, in general terms Spanish legal system has enabled confiscation for all intentional crimes whenever they are likely to give rise to economic benefit, as Article 127 (1) SCC provides. So, pre-trial freezing orders cover confiscation related to criminal offences comprised by Directive 2014/42/EU, as well as confiscation related to other criminal offences.</p>

c) **Which are the elements to be realised and/or to be assessed for its application?**

e.g., conviction for a crime,
property or availability of the confiscation object,

link -between the crime and the proceeds/instruments/products, etc.,

disproportionality (*"the value of the property is disproportionate to the lawful income of the convicted person"*),

illegal origin (suspects/presumption of illegal origin),

temporal connection with the crime,

the lack of a justification of the legal origin by the owner, etc.

Models of confiscation	Elements to be realized/assessed
<p>Direct confiscation (Article 127 (1) and (2) SCC)</p>	<p>According to Art. 127 (1) and (2), two elements should be met:</p>

	<p>1st Direct confiscation is a conviction-based confiscation. Namely, a conviction sentence for an intentional crime, or reckless crime sentenced to at least one year prison. Exceptionally there are cases where an acquittal also leave room for a direct confiscation of illicit trade goods (Supreme Court sentence n° 272/2007, of 18 April). Actually these cases of confiscation with acquittal sentences are a sort of case-law intermediate category between "direct" and "NCBC" derived from civil nature of the domain expropriation action in which really consist the confiscation of the ill-gotten gains.</p> <p>In reckless crimes cases (art. 127.2 CP) a custodial sentence of more than one year is foreseen. However confiscation is not mandatory, as in intentional crimes, but optional and the Court could decide in a motivated decision assessing the proportionality of this measure.</p> <p>Among these reckless crimes cases, so-called crimes against traffic or road safety stand out. In these sort of crimes Article 385 bis SCC considers the car/bike as instrumentality for the purposes provided in Articles 127 and 128 SCC and GP's Circular n° 10/2011 encourages Public Prosecutors to assess the opportunity of requesting the Court the confiscation of the car with a flexible approach: whenever the seriousness of the offence and the specific circumstances of the act, as well as the economic and personal situation of the perpetrator are in line with the proportionality criteria</p> <p>2nd a direct link between the crime and the proceeds/instrumentalities / products, etc. not referred in general terms but to be specifically analyzed in the judicial decision (Supreme Court judgements n° 442/2013, of 23rd Mayo) . However, even for direct confiscation the standard of proof for the illicit origin of the good is lower than that of criminal behavior (Supreme Court judgement n° 969/2013, of 18 December)</p>
<p>Confiscation of equivalent value (or value confiscation) Art. 127 (3) and 127 septies SCC</p>	<p>The requirements for the application of the confiscation of the value are:</p> <p>1st Impossibility to confiscate the assets referred to in art. 127.1 CP, that is, the impossibility of seizing the property and assign it to the State. The causes of this impossibility may differs. Art 127 septies SCC expressly refers to the nature or situation of the goods but subsequently also mentions "any other circumstances"(not meaning circumstances of the investigated person. Among the reasons that could make confiscation impossible, the Preamble of the LO 1/2015 refers to the fact that it is not possible to locate the assets, that they are out of the reach of courts, that have been destroyed or that their value has diminished compares to that they had when they were incorporated into the patrimony of the perpetrator, concluding</p>

	<p>with an open formula that admits any other circumstance (such as its fortuitous loss or intentional profitable transfer, bearing in mind <i>bona fide</i> third parties or when the investigated person wasted, spends or squandered the ill-gotten gains)</p> <p>2nd In addition, value confiscation will also take place whenever there is a depreciation of the asset from the moment of its acquisition, to the moment in which the seizure takes place. Depreciation is an objective data that must remain duly proved through the timely valuation of the property.</p> <p>Both in the case of loss of assets and in the case of their depreciation, confiscation of equivalent value will be mandatory for the Court, unless the judicial authority considers in a motivated decision that confiscation is disproportionate, in accordance with the provisions of art. 128 SCC. However, in case of value confiscation during the execution phase (art. 127 septies SCC), confiscation should be optional for the Court, in order to give the judicial authority margin of maneuver or judicial discretion in relation to a measure that, in certain cases, could unduly prolong the execution phase.</p> <p>Las but not least, confiscation of the value implies the need of an estimation of the goods. Sometimes this valuation is not easy, namely when the good is not available or it would entail large or exceptional costs. In those cases an early estimation is recommended to assure a later value confiscation decision (GPO Circular n° 10/2011). In any case a flexible generic estimation could be admissible.</p>
<p>NCBC (Art. 127 ter SCC)</p>	<p>The application of the NCBC requires, necessarily, the concurrence of three successive requirements:</p> <ul style="list-style-type: none"> a) the unlawful patrimonial situation of the goods must be proved in an adversarial proceedings; b) when the owner of the assets has died, suffers from a chronic illness that prevent his/her prosecution, there is a risk of prescription of the facts, a absconding situation of the investigated person (in absentia), which prevents prosecution of the facts within a reasonable period, or whenever he/she is exempted from criminal responsibility or it has been extinguished c) That the owner of the assets referred to in the previous requirement has been formally accused, existing rational indications of criminality against him. <p>The first of these requirements is in line with the right to an effective judicial process (Art. 47 of the Chart) in order to make this modality of confiscation possible.</p> <p>So NCBC is limited to the following cases:</p> <ol style="list-style-type: none"> 1. Persistent illness or death of the perpetrator; 2. Absconding or fleeing of the investigated person with impossibility of prosecution within a reasonable time;

	<p>3. When there is a risk of statute of limitations and</p> <p>4. Any other exemption from liability or extinction of criminal liability.</p> <p>The person should have been accused or be suspect of committing a crime. This means a formal indictment or any judicial decision addressing a pre-trial proceedings against a person being investigated on the basis of evidence of criminality, such as an arrest warrant, an intervention of telecommunications, a house search order or any other precautionary measure. In the case of deceased persons, not only charges prior to death would suffice, but post-death resolutions could be valid in which the rational evidence of criminality linking the person to the illegal origin of the assets was assessed.</p> <p>The second of the requirements provides meaning to this modality of confiscation: the impossibility of prosecuting the owner of the assets, in the assumptions included in letters a and b of art. 127 ter.1 SCC, or the impossibility of imposing a penalty, in the case provided for in art. 127 ter.1.c SCC. The SCC goes beyond the scope foreseen in art. 4 Directive 2014/42/UE, which limited it to the illness or flight of the suspect. It is a numerus clausus list of assumptions that does not admits its extensive interpretation to others</p>
<p>Extended confiscation (ordinary) Art. 127 bis SCC)</p>	<p>The note that truly characterizes this modality of confiscation is that the affected goods do not come from the crime that is prosecuted, but from the criminal activity of the investigated person. The mechanism of extended confiscation is focused on unjustified assets not linked with the concrete prosecuted offences (nor even with others that have been previously prosecuted). Therefore, the accreditation of a cause-effect relationship between the prosecuted crime and the good is not needed. However, as pointed out in GP's Circular n° 4/2010, it will be necessary to prove that the accused person has been carrying out illegal activities and that the value of the seized assets is disproportionate in relation to the income that the prosecuted person could legally obtain.</p> <p>Summing up, we can distinguish between the goods, effects and profits that may be related to, or originate from, the offense being prosecuted and those who have with or in previous activities; the first will be subject to direct confiscation and the second, in the cases that proceed, of extended confiscation.</p> <p>So we need:</p> <ol style="list-style-type: none"> a) A conviction sentence related to any of the art. 127 bis SCC listed crimes. b) Confiscation based on well-founded objective evidence, proving that the goods or assets were obtained through criminal activity, and their legal origin cannot be accredited. <p>Additionally the following aspects shall be evaluated, among others:</p> <ul style="list-style-type: none"> - The disproportion between the goods and assets in question and the lawful income of the convicted individual.

Extended confiscation from a previous continued criminal activity or criminal reiteration
(Arts. Quinquies and sexies SCC)

- The concealment of the ownership or any power of disposal over the goods or effects by using natural or legal persons or bodies without legal personality, or tax havens or territories without taxation that hide or hinder the identification of the true ownership of the assets.

- The transfer of the goods or assets via transactions that hinder or prevent ascertaining their location or destination and that have no valid legal or economic justification.

c) The confiscation shall not be ordered when the criminal activities from which the goods or assets were obtained have prescribed or have already been subject to criminal proceedings, resulting in an acquittal or a ruling for acquittal with the status of *res judicata*.

Extended confiscation from a previous continued criminal activity: In order to agree on the extended confiscation, it is necessary that the subject has been convicted of one of the crimes of art. CP 127 bis. It is also required that the crime has been committed in the context of a previous continuous criminal activity (a sort of criminal life style), there being "reasonable indications" that a relevant part of the subject's assets comes from it, as long as the defense "does not prove its lawful origin" (arts. 127 bis and quinquies CP).

Likewise, in order to facilitate the Court the accreditation of the illicit origin of the assets, effects or profits of which the confiscation is intended, the same presumptions are applicable as for the ordinary extended confiscation.

However, due to the proportionality principle, a *de minimis* criteria is set up and confiscation will be carried out provided that such activities generated a profit greater than 6,000 euros.

Additionally, there is **continuous economic activity** in cases where the subject had been convicted in the same criminal proceeding for at least three crimes or for a so-called continuous crime (which includes three or more criminal offences, provided that a direct or indirect economic benefit has been derived from them). However, when the conviction is delivered within the six years prior to the start of the procedure for one of the crimes listed in Art. 127 bis SCC, the minimum number of offenses or criminal offenses within a continuous offense decreases from three to two.

Under this subtype of extended confiscation (keeping the same legal system of presumptions), it would be considered as proceeds of crime, unless the specific circumstances of the case reveal this approach to be disproportionate, all assets acquired by the convicted person within six last years prior to the date of the opening of the criminal proceedings when they were acquired free of charge and when the expenses triggered were paid with funds from such criminal activity. For these purposes, the date of acquisition is understood to be the earliest in that such assets were at the disposal of the accused person (art. 127 sexies CP).

	<p>The main difference between both types of extended confiscation is its mandatory or optional nature. Under Art. 127 bis CP the ordinary extended confiscation is mandatory for the Court being the adoption of the later extended confiscation from a previous continued criminal activity provided in art. 127 quinquies SCC optional for the Court.</p>
Third-party Confiscation	<p>Following criteria should be met:</p> <p>a) In the case of assets and gains, when they were acquired with full knowledge that they were obtained from a criminal activity or when a diligent individual would have had reasons to suspect their unlawful origin, given the circumstances of the case.</p> <p>b) In the case of other goods, when they were acquired with full knowledge that such an acquisition would hinder their confiscation or when a diligent individual would have had reasons to suspect that such an acquisition would hinder their confiscation, given the circumstances of the case.</p> <p>It shall be assumed, unless evidence to the contrary is produced, that the third party knew or had reasons to suspect that the goods in question were obtained from a criminal activity or that they were transferred to avoid confiscation, when the goods or assets were transferred for free or for a price below real market value. Art. 127 quater.</p>
Pre-trial freezing (Art. 127 octies SCC)	<p>As a precautionary measure freezing requires the concurrence of a series of circumstances that lead to the appearance that such assets are forfeitable. Namely, the Investigating Judge can decide ex officio the freezing of assets, provided there is an appearance of -good- fairness (fumus boni iuris), based on a reasonable consistency on the existence of a given crime (fumus delicti comissi) and a risk of delay (periculum in mora).</p> <p>In addition, the Judge should take into account the specific requirements that the legislator imposes for each type of confiscation (e.g. the existence of "substantiated objective indications" about the illicit origin of the goods or effects, as long as the defense "does not prove its lawful origin" (art. 127 bis CP), for which it must be ruled by the legal assumptions and presumptions established in said article.</p> <p>On the other hand, if the adoption of such a precautionary measure is intended against third parties or in order to guarantee the extended confiscation, the requirements established for such assumptions by criminal law (art. 127 quater, quinquies and sexies CP) applied.</p>

d) Can this form of confiscation be applied when the owner or the convicted is dead?

Models of confiscation	Legal framework in case of death of the owner or convicted person
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Direct confiscation	Direct confiscation is to be adopted in a conviction sentence and would be executed even if the convicted person died after the trial. Otherwise, in case of death of the defendant or suspect before the trial, the NCBC would be applicable.
Confiscation of the value	Confiscation of the value, adopted in a conviction sentence, would be executed even if the convicted person has died after the trial. Otherwise, in case of death of the defendant or suspect before sentencing in the trial, the NCBC would apply.
NCBC	<p>Death of the perpetrator owner of the assets is one of the cases in which the NCBC is provided under Art. 127 ter SCC aimed to avoid any impunity that would arise if, upon extinguishing the criminal responsibility based on the death of the investigated/accused person, the assets could no longer be confiscated.</p> <p>Is worth mentioning that the Spanish legislator did not include the dissolution of the legal entity as an equivalent case to the death of the natural person. In his case, the principle of legality and the prohibition of analogical application of criminal provisions (art. 4.1 SCC) would prevent extending NCBC to assets hold by ended up legal persons. However, the actual closure of a legal person (not covert or merely apparent) does operate as a cause for extinction of criminal liability, in accordance with Art. 130.2 SCC, so NCBC could be redirected through art. 127.1.c) SCC.</p> <p>There is a specific proceedings provided in the SCPC for NCBC in arts. 803 tyer e to 803 ter u.</p>
Extended confiscation	Extended confiscation of goods, instrumentalities, means or properties, adopted in a conviction sentence, will be executed even if the convicted person died after the trial. Otherwise, in case of death of the defendant or suspect before the trial, the NCBC would apply.
Third-party Confiscation	<p>Third party confiscation, adopted in a conviction sentence, would be executed even if the convicted person died after the trial phase. Since the existence of prior conviction of the perpetrators of the crimes, confiscation of property of a third party is possible, within the process regulated by such an effect. According to the Spanish Criminal Procedural Code, art. 803 ter a to 803 ter d, the judge or court will order, ex officio or at the request of a party, the intervention in the criminal proceedings of a third-party being affected by confiscation where there is a record of facts from which the following could reasonably ensue:</p> <p>a) that the asset whose confiscation is sought belongs to a third party other than the accused, or</p> <p>b) that there are third party holders of rights over the asset whose confiscation is sought, who may be affected by it.</p>

- e) For the model of confiscation which demands the conviction for a crime:
Can this model of confiscation be applied when the crime is statute barred (i.e. after the prescription) or somehow (in particular circumstances) without the conviction?

Paragraph 5 of Art. 127 bis SCC **excludes extended confiscation** in certain cases in which the criminal responsibility has been extinguished, specifically, when the crime is statute barred after

the prescription or the subject has been exonerated from his/her criminal liability by and acquittal judgment or a previous decision discontinuing the criminal proceedings with *res judicata* effects.

However the wording of this article could be improved as it refers to prescription of criminal activities when it should be referred to offences.

It is worth noted that in the extended confiscation modality for criminal reiteration (Article 127 quinquies SCC) , the exclusion provided in Art. 127 bis.5 SCC is not applicable

- f) **Which is the legal nature?** (a criminal sanction - accessory or principal criminal penalty -, a preventive measure - *ante delictum* criminal prevention measure -, security measure in a broad sense, administrative measure, civil measure *in rem*, a civil consequence of committing an offense - provided for by criminal law -, another type of autonomous - *sui generis* - instrument, etc.)

Despite of the traditionally criminal nature inherent to confiscation in the Spanish legal system, amendments overcome by the Spanish legislator in the last decade, for the sake of normative approximation, in line with Unión Law, has chosen to provide confiscation with certain civil Law features, always compatible with the procedural guarantees. So in some cases, new confiscation models have been set up halfway between criminal and civil law, as will be seen below.

Models of confiscation	Legal nature
<p>Direct confiscation and confiscation of the value.</p>	<p>Direct confiscation of goods, properties, means, effects, or instrumentalities is an accessory consequence of a criminal penalty. Confiscation does not appear in the catalogue of penalties within Art. 33 SCC - thought it has a clear punitive component- nor within security measures provided under Art. 96 SCC, spite of it is sometimes based on the danger of recidivism. In addition it is not civil liability either, because it is possible to confiscate assets whose value does not serve to compensate the victim. So, SCC regulates confiscation as a so-called <i>accessory consequence</i>, though in certain cases it does not require a conviction or link of the confiscated effects with any crime. Thus, Spanish Supreme Court case-law has considered the confiscation as an "accessory consequence", a sort of third category together with penalties and security measures, shaping confiscation as a type of sanction of patrimonial nature</p> <p>However, the Spanish Constitutional Court judgement n° 220/2006, of July 3, states that the confiscation of assets is outside the right to the presumption of innocence that "implies that no one can be declared criminally responsible for a crime without valid proof of charge" and that "operates "as the right of the defendant not to suffer a sentence unless the guilt has been established beyond all reasonable doubt" and that, therefore, "once the existence of evidence based on which the Tribunal reasonably consider the guilt of the accused to be proven, the right to the presumption of innocence is no longer in question".</p> <p>Likewise, Supreme Court judgement No. 338/2015, of June 2, specifies: "the same canon of certainty is not required, when it comes to verifying respect for the right to the presumption of innocence, as when it comes to determining</p>

	the factual assumption that allows for the imposition of confiscation” (in line with ECHR judgement of 05.07.2001 in case Philips v. UK).
NCBC	<p>NCBC cannot be considered accessory consequences of the criminal penalty, since any penalty is being imposed on the owner of the assets. These are accessory consequences of the offence, which arise as a result of it, but without the need for the crime to be previously convicted or sentenced (in autonomous confiscation proceedings) or a penalty be enforced on the owner of the property (re third-party confiscation). Both models share, therefore, the same nature as civil liability stemming from a crime, though they have different notions.</p> <p>Furthermore, the Spanish Legislator in the Preamble of Law 1/2015 made a reference to ECoHR case-law on NCBC pointing out that "it is not based on the imposition of a sanction attuned to the guilt for the act, but " it is more comparable to the restitution of unjustified enrichment than to a fine imposed under criminal law" because "since the confiscation is limited to the real (illicit) enrichment of the beneficiary for the commission of a crime, this does not show that it is a sanction regime”. Therefore, considering the above-mentioned authentic interpretation included by the Spanish legislator in the Preamble of LO 1/2015 in line with the Spanish Civil Code, the civil nature of NCBC leads us into the assumption that they are not conditioned by the criminal principles of guilt, legality, or presumption of innocence. Thus, it will not be required for the Public Prosecutor to prove -in accordance with constitutional requirements- that a person is responsible for criminal behavior, but simply that the assets whose confiscation is requested do not have a lawful origin in accordance with the provisions of civil law. The object of the process will have to focus exclusively on the cause of acquisition, being enough for the confiscation purpose to provide facts or indications of the lack of justification of the lawful origin of the goods (reverse of the burden of proof).</p> <p>Thus, the legal nature of NCBC is mainly a civil nature, as the vast majority of the Spanish Academia rightly points out.</p>
Extended confiscation	<p>In the case of extended confiscation a criminal conviction of the perpetrator who is the owner of the assets will always be needed, although not necessarily for the crime from which the assets directly comes as provided in arts. 127 bis and 127 quinquies SCC, which refer to the convicted person.</p> <p>In this model the compliance with the criminal principles of guilt, criminal legality and presumption of innocence will be needed, although not referring to the confiscation decision but to the commission of the criminal offence by the perpetrator. So, there is a need for a crime and a penalty to be individualized in a conviction sentence and a conviction-based confiscation though the confiscates assets could not directly come from that crime nor are related to the penalty imposed, as confiscation is based on the unlawful cause of acquisition (civil nature). Both aspects, criminal and civil, that make up its nature, are inextricably linked as, the unlawfulness of the cause of acquiring the assets is presumed due to the existence of the crime. Therefore we can speak of a <i>mixed legal nature</i> while its effectiveness will no longer appear conditioned by the right to the presumption of innocence.</p>

	<p>Spanish General Prosecutor’s Circular n° 4/2010, <i>on the role of the Public Prosecutor in patrimonial investigations</i>, already indicated, in relation to extended confiscation, that the establishment of presumptions does not affect the fundamental right to the presumption of innocence, as such presumptions do not affect the core of the criminal action being prosecuted or indicted to a particular person. This Circular also added that the presumption “operates with respect to persons convicted in criminal proceedings previously prosecuted with all the guarantees and in which the accused person has had the opportunity to duly exercise his right to defend himself against the charges made against him; its consequences, therefore, are exclusively patrimonial and economic in nature, derived in any case from the accreditation of the commission of illegal activities related to organized crime”.</p> <p>Being its purpose to dismantle the illicit patrimonial situation, in order to avoid unlawful enrichment, the Preamble of LO 1/2015, of 30th March, -in accordance with the jurisprudence and European legislation - has come to recognize its nature “rather civil and patrimonial, close to legal institutions as the illicit unjustified enrichment” and refers to extended confiscation, stating that "it is not based on full accreditation of the causal connection between the criminal behavior and enrichment, but in the verification by the Court, based on well-founded and objective evidence, that there have been other criminal activities, different from those for which the subject is convicted, from which the patrimony derives that is intended to be confiscated", adding that "the extended confiscation is not a criminal sanction, but rather an institution through which the illegal patrimonial situation to which the criminal activity has given rise is put to an end.”</p> <p>Consequently, it is possible to affirm that the right to the presumption of innocence is not applicable to the decision on the extended confiscation of assets, since it is not about deciding on the guilt of a person and the imposition of a penalty. Nor does the principle of guilt apply because confiscation is not a penalty, even if it is imposed in a criminal proceeding. The consequence of this consideration of the extended confiscation as a “sui generis” institution, of a “rather civil nature”, since the extended confiscation does not involve a declaration of guilt for the criminal activity carried out by the perpetrator nor is it a penalty. In short, the same guarantees cannot be required to declare guilt and enforce a sentence, as to decide on the extended confiscation of assets.</p>
<p>Third-party Confiscation</p>	<p>The confiscation of third-party assets constitutes a statement of deprivation of their ownership that, unlike what happens with the confiscation of assets of the perpetrator, does not imply a criminal sanction, neither in the sense of a third type of sanction.</p> <p>This modality of confiscation presumes an <i>in personam</i> duty to pay a certain amount of money to the State by the perpetrator who has illegally enriched himself.</p> <p>It is regulated with an imperative nature, in contrast to other legislation, such as the German one, in which the various circumstances that the matter might be taken into account. It is a very useful technique. Since no unlawful origin of the goods to be confiscated is needed in cases where this is difficult to prove or whenever the assets belong to bona fide third parties.</p> <p>The confiscation action against the third party is civil in nature and the guarantees established for the exercise of <i>ius puniendi</i> do not govern the process</p>

	<p>in which it is carried out. Its foundation is to avoid illicit enrichment as stated in the decision issued by the Audiencia Nacional Appeal Chamber the 1st of September 2020 -Appeal nº 6/2020-. This sentence, in relation to ds to the legal nature of third-party confiscation states: "The confiscation of third-party assets constitutes a statement of deprivation of ownership of the assets that, unlike what happens with the confiscation of assets of the author, does not imply a criminal sanction, neither in the sense of a third type of sanction. The confiscation action against the third party is civil in nature and the guarantees established for the exercise of <i>ius puniendi</i> do not govern the process in which it is carried out. Its foundation is to avoid illicit enrichment"</p> <p>In addition, the Spanish Legislator in the Preamble of Law 1/2015 remains the ECoHR case-law on NCBC pointing out that "<i>it is not based on the imposition of a sanction attuned to the guilt for the act</i>", but "<i>it is more comparable to the restitution of unjust enrichment than to a fine imposed under criminal law</i>" because "since the confiscation is limited to the real (illicit) enrichment of the beneficiary for the commission of a crime, this does not show that it is a sanction regime". Therefore, considering the above-mentioned authentic interpretation included by the Spanish legislator in the Preamble of LO 1/2015 in line with the Spanish Civil Code, the civil nature of third-party confiscation leads us into the assumption that they are not conditioned by the criminal principles of guilt, legality, or presumption of innocence. Thus, it will not be required for the Public Prosecutor to prove -in accordance with constitutional requirements- that a person is responsible for criminal behavior, but simply that the assets whose confiscation is requested do not have a lawful origin in accordance with the provisions of civil law. The object of the process will have to focus exclusively on the cause of acquisition, being enough for the confiscation purpose to provide facts or indications of the lack of justification of the lawful origin of the goods (reverse of the burden of proof).</p>
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- ✓ Summing up, we end to the conclusion that **NCBC/autonomous confiscation and third-party confiscation** have a **civil nature** due to the fact that enabled deprivation of property would be done in violation of the traditionally essential principles of criminal law and taking into account the above mentioned authentic interpretation included by the Spanish legislator in the Preamble of LO 1/2015 in line with the Spanish Civil Code. So, the civil nature of NCBC and third-party confiscation leads us into the assumption that they are not conditioned by the criminal principles of guilt, legality, or presumption of innocence. Therefore, it will not be required for the Public Prosecutor to prove -in accordance with constitutional requirements- that a person is responsible for criminal behavior, but simply that the assets whose confiscation is requested do not have a lawful origin in accordance with the provisions of civil law . The object of the process will have to focus exclusively on the cause of acquisition, being enough for the confiscation purpose to provide facts or indications of the lack of justification of the lawful origin of the goods (reverse of the burden of proof).

3) In particular, in Your national legal order is confiscation without conviction possible in cases of death, illness, absconding, prescription, amnesty, etc.

and which are the relevant legal bases?

NCBC or *autonomous confiscation* is provided under Article 127 *ter* of SCC:

1. *The Court may order the confiscation outlined in the preceding Articles even if no sentence has been issued, when the unlawful financial position has been proved in adversarial proceedings and in any of the following cases:*

a) *That the investigated person passed away or suffers from a chronic illness impeding his trial and that there is a risk that the criminal offences may prescribe;*

b) *He fled, preventing a trial within a reasonable period of time; or*

c) *No sentence is handed down as the individual is exempt from criminal responsibility or said responsibility has been finalised.*

2. *The confiscation referred to in this Article may only be adopted against individuals who have been formally accused or against defendants for whom there is circumstantial evidence of criminality when the situations outlined in the preceding Section have prevented criminal proceedings from continuing.*

NCBC is possible in cases of dead or chronic disease as provided for in Art. 127 *ter*.1.a) SCC. When the investigated person pass away, Art. 127 *ter* SCC requires that the owner of the property has been already charged, indicted or formally accused based on rational evidence of criminality. This means a formal indictment or any judicial decision addressing a pre-trial criminal proceedings against a person being investigated on the basis of the merits of the case, such as an arrest warrant, an intervention of telecommunications, a house search order or any other precautionary measure decision. In the case of deceased persons, not only charges prior to death would suffice, but post-death resolutions could be valid in which the rational indication of criminality linking the person to the illegal origin of the assets was assessed.

Chronic illness means "the impossibility of the suspect or defendant to appear in the criminal proceeding for a prolonged period of time" provided that "this entails that the procedure cannot continue under normal conditions", as set up in Directive 2014/42/EU. Although, as a general rule, any illness that lasts for a period of time that could prescribe the facts will deserve to be considered chronic, this type of confiscation cannot depends on the greater or lesser accuracy of a medical diagnosis and a time limit should be legally added as there is a risk of prescription.

It also refers to art. 127 *ter* 1 CP, in its section b, to the impossibility of prosecuting the subject within a reasonable time for being in absentia (absconding) as regulated by arts. 834 and following CCP

Within the notion of extinction of criminal liability mentioned in Art. 127 *ter* SCC, it is possible to include any hypothesis that leads to this consequence, such as, for example, **the forgiveness of the offended party** (art. 130.5 CP) or the **dissolution of a legal person**, as long as it is actual, so not covert or merely apparent (art. 130.2 CP).

However NCBC would not proceed in the cases of prescription of the crime (art. 130.1.6° CP). Since confiscation is an accessory consequence of the crime, its statute of limitations must entail also the confiscation legal action as it has no sense to maintain this lawsuit once the crime on which it depends has been prescribed. This conclusion is in line with arts. 127 *bis* 5 SCC, which prohibits extended confiscation in the case of prescription of "criminal activities from which the goods or effects originate", and in line with Art. 127 *ter* 1.a) SCC which refers to "death or chronic illness that prevents the prosecution and there is a risk of prescription of the facts". In addition, it would not make much sense that the confiscation of some assets related to a crime that, however, could no longer be prosecuted because it had prescribed.

As regards to the coexistence of the cause of exemption from criminal responsibility that prevents the conviction of the subject, it will be necessary to comply with those contained in art. 20 SCC, as well as

the *acquittal excuses* (*excusas absolutorias*) that appear scattered throughout the SCC. In any case, the estimation of a complete exemption circumstance will lead to the issuance of an acquittal which, thanks to the provision of art. 127 ter 1 SCC may entail, however, the confiscation of assets. When the exemption from criminal responsibility comes from a justifiable cause (legitimate defense, state of necessity or acting in the performance of a duty or in the legitimate exercise of an official right or position), the unfairness that could be implied by applying the confiscation of goods must be compensated through the proportionality clause provided for in Art. 128 SCC.

As regards to the scope of application of NCBC and whether this confiscation model would be only applicable to assets subject to direct confiscation (Art. 127.1 SCC), value confiscation (art. 127.3 SCC) and extended confiscation (art. 127 bis SCC) or, on the contrary, would also cover third-party confiscation (art. 127 quáter SCC) and the extended confiscation for criminal reiteration (art. 127d SCC), taking into account the literal wording of art. 127 ter.1 SCC, when it states: "The judge or court may order the confiscation provided for in the previous articles...", we are strongly in favor of the possibility of including all types of confiscation under the umbrella of NCBC. As regards to extended confiscation due to criminal reiteration, because it is nothing more than an type of direct confiscation. As regards to third-party confiscation on the basis of Art. 803 ter j of CCP which refers to third person affected by the confiscation as well as to the investigated person.

4) For each model of confiscation:

a) which is the procedure for its application? (the qualification/nature, the competent authority, the different steps, etc.)

Models of confiscation	Procedural rules SPANISH CRIMINAL PROCEDURE CODE (SCPC)
<p>Direct confiscation. Confiscation of value. Extended confiscation: The Procedural legal framework is the SCPC, namely the ordinary proceedings and the abbreviated proceedings depending on the seriousness of the penalty provided for the relevant offences</p>	<p>1. The judicial authority responsible for carrying out the criminal investigations in its first stages is not the Public Prosecutor, but the investigating judge, being the investigative powers of prosecutors during this phase of the proceedings very limited. Some measures, such as seizure or freezing of assets, are not under the remit of competences of the prosecutors and can only be allowed by the Investigating Judge as provided in our XIX Century SCPC.</p> <p>2. In the criminal proceedings both the criminal and the civil actions are filed together, and the victims have the right to intervene in the proceedings exercising both criminal and civil actions. In any case, even if the victims do not file the civil action, Public Prosecutor is obliged to do so on their behalf unless they expressly renounce.</p> <p>Some consequences of these peculiarities are the following:</p> <p>a) Investigating judges must trace and seize assets of the suspect person ex officio at the beginning of the criminal proceedings. No specific request either from the victim or the prosecutor is needed.</p> <p>b) Moreover, to be seized by the investigating judge, the assets owned by the suspects do not need to be proceeds of crime strictly speaking, pursuant to</p>

	<p>the common rule of Civil Law, according to which debtors are responsible throughout all their properties.</p> <p>c) Additionally, all instruments and proceeds of crime must be confiscated whenever there is a final conviction, even if there are not any direct victims and consequently there is no possibility of filing the civil action (e.g. most drug trafficking cases). Also in this case, investigating judges must search and seize the instruments and proceeds of crime from the beginning of the criminal procedure, as expressly provided for in our Criminal Code with regard to drug trafficking offences (article 374), and in general in our Criminal Procedure Act (article 338).</p>
<p>NCBC Articles 803 ter.e to 803 ter.u of the SCPC and in art. 127 ter SCC.</p>	<p>As regards to NCBC we have in place a special civil procedure that was set up in 2015 within the SCPC (so-called autonomous confiscation procedure). The Public Prosecutor put forward this procedure before a criminal Court as long as the requirements established in art. 803 ter.e and followings of the SCPC and in art. 127 ter SCC are met.</p> <p>As Art. 4.2 of Directive 2014/42/UE does not foreseen a purely civil action, since it is addressed against the accused person (in personam) and not against goods of illegal origin, moving away, therefore, from the common law model (or of some Latin American countries), in which the action is in rem <i>in nature</i>, the Spanish legislator set up a proceedings halfway between civil and criminal nature, since although the requirements for opening, competence and legitimacy are, in any case, criminal, the procedure follows, on many occasions, the form of a civil process.</p> <p>According to the regulation provided for in art. 803ter.e to 803. ter.u of the SCPC, the so-called procedure for autonomous confiscation must be carried out in accordance with the civil provisions of the verbal trial, beginning with the writ of demand submitted by the Public Prosecutor. It is provided that the Public Prosecutor has to list the properties to be confiscated as one of the requirements of the lawsuit, for which there must have been a prior financial investigation of the defendant's assets carried out by the Public Prosecutor . In this task the Public Prosecutor can request the support from the Spanish ARO, the Judicial Police or from the Tax authorities or the Ministry of Finance. The collaboration of such authorities or officials is mandatory. Likewise Public Prosecutor can collect information from other entities such as "financial entities, public bodies and registries and any natural or legal person".</p>
<p>Third-party Confiscation Art. 803 ter.a to 803 ter.c of the SCPC</p>	<p>A special proceedings is provided in relation to third-parties affected by confiscation is in place in Art. 803 ter.a to 803 ter.c of the SCPC.</p>
<p>Freezing/Early confiscation Art. 127 octies SCC</p>	<p>Freezing/Early confiscation is provided in Art. 127 octies SCC, together with the interlocutory sale or provisional use of the frozen assets (Art. 367 bis and followings and article 803 ter and followings of the SCPC).</p>

<p>Art. 367 bis and followings and article 803 ter and followings of the SCPC</p>	<p>According to the SCPC, destruction of judicial effects may be ordered, leaving sufficient samples, where it is necessary or appropriate due to the nature of the effects themselves or due to the real or potential danger involved in their storage or custody, after hearing the Public Prosecution Service and the owner, if known, or the person in whose possession the effects it is intended to destroy were found /art. 367b SCPC). In this regard, Judicial effects which are legal trade may be realised, without waiting for judgment to be passed or final, if they are not pieces of evidence or must remain at the expense of the proceedings, in any of the cases mentioned under art. 367c. SCPC</p> <p>Management expenses should be covered by the final price after the payment of compensation to the victims and procedural costs</p> <p>Frozen assets may also be allocated to the Spanish ARO without prejudice to the provisions on the Fund of confiscated assets due to illegal drug trafficking and other related crimes.</p> <p>In the case of interlocutory selling based on a mutual recognition certificate, Spanish mutual recognition Law 23/2014 will apply /art. (Article 367 d SCPC).</p> <p>Provisional use of frozen assets as a precautionary measure may be authorised by the Investigating Judge on the basis provided for in art. Article 367 e. SCPC</p>
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b) which is the standard of the proof/is the reversal of the burden of the proof admitted?

Models of confiscation	Remarks on the standard of proof
<p>Direct confiscation and confiscation of the value</p>	<p>The Constitutional Court judgement n° 220/2006, of July 3, states that the confiscation of assets is outside the right to the presumption of innocence that "implies that no one can be declared criminally responsible for a crime without valid proof of charge" and that "operates "as the right of the defendant not to suffer a sentence unless the guilt has been established beyond all reasonable doubt" and that, therefore, "once the existence of evidence based on which the Tribunal reasonably consider the guilt of the accused to be proven, the right to the presumption of innocence is no longer in question". Likewise, Supreme Court judgement No. 338/2015, of June 2, specifies: "the same canon of certainty is not required, when it comes to verifying respect for the right to the presumption of innocence, as when it comes to determining the factual assumption that allows for the imposition of confiscation" (in line with ECHR judgement of 05.07.2001 in case Philips v. UK).</p>
<p>NCBC</p>	<p>NCBC model is aimed to avoid/ prevent the immunity of the perpetrator. Thus, it will be possible without a conviction sentence or when the crime is statute barred, due to:</p> <ol style="list-style-type: none"> 1) the persistent illness or death of the perpetrator; 2) absconding or fleeing of the investigated person with impossibility of prosecution within a reasonable time; 3) when there is a risk of statute of limitations <u>and</u>

	<p>of disproportion of its value in relation to the legal income of the perpetrator, use of straw-men, tax havens or off-shore territories that allow concealing their ownership or carrying out operations lacking justification and hindering their location or destination). There must be well-founded evidence that the investigated person has obtained, from his criminal activity, a profit of more than 6,000 euros.</p> <p>Concept of "continuing criminal activity" (similar to United Kingdom's "criminal lifestyle/modus vivendi") means that a conviction sentence is required (in the same criminal proceedings or in a previous one) for 3 or more crimes or for a <i>continuous crime</i> derived from 3 criminal offenses that imply direct or indirect benefit or a conviction for 2 or more crimes or for a <i>continuous crime</i> derived from two criminal offenses that imply a benefit during a period of 6 years before the opening of the criminal proceedings on the basis of the offences listed in art. 127 bis (1) SCC.</p> <p>In relation to assets that can be subject to confiscation (here there is no room for value confiscation), art. 127 sexies SCC establishes a series of presumptions (which the judge does not necessarily have to apply when they are revealed to be incorrect or disproportionate) by which it is assumed that the assets are of criminal origin.</p> <p>Last but not least, confiscation on criminal reiteration basis (art. 127 quinques and sexies SCC) is optional a needs to be evaluated by the Court</p>
<p>Third-party Confiscation</p>	<p>According to article 127 <i>quater</i>, Judges and Courts of Law may also order the confiscation that have been transferred to third parties in the following cases:</p> <p>a) In the case of assets and gains, when they were acquired with full knowledge that they were obtained from a criminal activity or when a diligent person would have had reasons to suspect its unlawful origin, given the circumstances of the case;</p> <p>b) In the case of other goods, when they were acquired with full knowledge that such an acquisition would hinder their confiscation or when a diligent person would have had reasons to suspect that such an acquisition would hinder their confiscation, given the circumstances of the case.</p> <p>In these cases, it shall be assumed, unless evidence to the contrary is produced, that the third party knew or had reasons to suspect that the goods in question were obtained from a criminal activity or that they were transferred to avoid confiscation, whenever the goods or assets were transferred free of charge or for a price below real market value.</p> <p>Therefore, in order to proceed with the confiscation of assets derived from property crime of third parties it is necessary the accreditation, by the judicial body, that they themselves acquired them with knowledge of their origin or the maneuver made its confiscation difficult. The proof of that knowledge is not necessary when, given the circumstances of the case, any "diligent person" would have had "reasons to suspect" either the origin illicit, or that in this way it hindered its confiscation (art. 127 <i>quater</i>.1 SCC).</p>

Thus, the legislator allows the Court to carry out the confiscation based on the knowledge or the negligence of third parties.

At the same time, the Spanish legislator sought to preserve the interests of bona fide third parties, banning the confiscation of assets in the absolute absence of knowledge or in the absence of negligence.

In this sense, and in order to facilitate confiscation and speed up the procedure, bad faith will be presumed *ex lege*, and unless proven otherwise, —whether in the form of knowledge or negligence - when the owner of the goods had acquired them free of charge or for a lower price than the market (art. 127 quater.2 SCC).

Even if the legislator has not expressly regulated it, confiscation is possible in cases in which the holders are legal entities, provided that the natural persons who acted in their name and on their behalf when proceeding with the legal transaction, they would have known or should have known of the illegal origin of the assets or the obstruction of the confiscation that the change of domain brought with it.

There are practical difficulties when it comes to distinguishing between the figure of the so-called *participant for profit* (participa a título lucrativo, art. 122 SCC) and the confiscation of third parties (art. 127 quater SCC). The existence of good or bad faith in the acquisitions for profit becomes the defining parameter of both cases.

However, as long as the third party demonstrates the existence of good faith in the gratuitous acquisition of the goods, his/her statement could be considered as a participant lucrative title self-incrimination.

However, even in the event that the acquisition had been for valuable consideration and in good faith, confiscation could be guaranteed thanks to the value confiscation forfeiture formula (Art. 127.3 SCC)

Last remark re third-party confiscation: there are cases in which the third parties on which confiscation falls could have been charged with a crime of money laundering. In these cases, reasons of efficiency prevail and this individual is summoned as third party and not as suspect, which would bring a complete criminal process covered by the appropriate guarantees.

c) Which are the safeguards (limitations e.g. proportionality clauses, relevant legal remedies)?

Proportionality clause (Art. 128 SCC)⁸: The Court is allowed not to decide (or decide partially) on the confiscation of effects and instruments (it does not allude to the goods, means or profits), that are of

⁸ Article 128

legal trade and whose value is not proportional to the nature or seriousness of the criminal offense at stake or when resulting civil compensation has been fully satisfied.

Relevant legal remedies: ordinary ones as provided in SCPC

Models of confiscation	Remarks on procedural safeguards
<p>Direct confiscation</p>	<p>Proportionality clause (Art. 128 SCC) allows the relevant judicial authority to decide (or decide partially) on the proportionality of the confiscation of assets and instrumentalities of legal trade (it does not refer to the assets or instrumentalities of illegal trade, neither to goods, means or profits), taking into account the nature or seriousness of the criminal offense at stake or whether the civil compensation owed to the victim has been fully satisfied.</p> <p>The confiscation order adopted in the conviction sentence may be subject of legal remedies on the legal basis provided for in the SCPC under Art. 790 and following.</p>
<p>NCBC</p>	<p>As regards to NCBC and Third-party confiscation the SCPC “On the intervention in the criminal proceedings of third parties who may be affected by confiscation” (Articles 803 ter a to 803 ter c) and on the autonomous confiscation procedure (Articles 803 ter d) to Art. 803 ter u) provide for specific safeguards:</p> <p>The rules regulating the accused’s right to the assistance of a lawyer, provided for in this Act, will be applicable to all persons whose assets or rights may be affected by confiscation.</p> <p>The individuals against whom the action is directed due to their connection to the assets to be confiscated will be summoned to court as defendants. The accused in default will be summoned by a notification addressed to their court representative in the stayed proceedings and by placing an edict on the court bulletin board.</p> <p>The third party affected by the confiscation will be summoned in accordance with the provisions of paragraph 3 of article 803 b. II.</p> <p>If the defendant declared in default in stayed proceedings does not appear in the autonomous confiscation (NCBC) proceedings, a procurator and lawyer will be appointed ex officio and will represent and defend them.</p>

When those assets and instruments are of lawful trade and their value is not proportional to the nature or seriousness of the criminal offence, or when the civil liabilities have been fully settled, the Court may decide not to order the confiscation, or may order only a partial one.

	<p>The appearance of the accused with modified legal capacity to appear in the stayed criminal proceedings in the autonomous confiscation proceedings will be governed by the rules in the Civil Procedure Act.</p> <p>The trial will be carried out in accordance with the provisions of article 433 of the Civil Procedure Act and the judge or court will pass judgment within 20 days of its conclusion, with one of the following rulings:</p> <ol style="list-style-type: none"> 1. Uphold the claim for confiscation and order definitive confiscation of the assets. 2. Partially uphold the claim for confiscation and order definitive confiscation for the relevant amount. In this case, such precautionary measures as may have been ordered with respect to the remainder of the assets will become null and void. 3. Dismiss the claim for confiscation and declare that it is inappropriate as one of the grounds for objection occurs. In this case, all the precautionary measures which may have been ordered will become null and void. <p>Where the judgment upholds the claim for confiscation, in whole or in part, it will identify those suffering damages and set the appropriate compensation.</p> <p>The rules regulating appeals applicable in fast-track criminal proceedings are applicable to autonomous confiscation (NCBC) proceedings. The rules regulating review of final judgments are applicable to separate confiscation proceedings.</p> <p>Non-appearance of the accused in default and the affected third party in the autonomous confiscation proceedings will be governed by the provisions of article 803 b. IV.</p> <p>In the event that the case brought against the accused in default or person who is legally incapacitated continues for the trial of one or more accused, the separate confiscation action against the former may be joined to the same case.</p>
Extended confiscation	<p>Proportionality clause (Art. 128 SCC): The Court is allowed not to decide (or decide partially) on the confiscation of effects and instruments (it does not allude to the goods, means or profits), that are of legal trade and whose value is not proportional to the nature or seriousness of the criminal offense at stake or when resulting civil compensation has been fully satisfied.</p> <p>The confiscation order adopted in the conviction sentence may be subject to ordinary legal remedies on the legal provided for in the SCPC under art. 790 and following.</p>
Third-party Confiscation	<p>As regards to Third-party confiscation the SCPC On the intervention in the criminal proceedings of third parties who may be affected by confiscation Article 803 ter a to 803 ter d provide for Third party specific safeguards:</p>

	<p>The person who may be affected by the confiscation may take part in the criminal proceedings once their intervention is ordered, although this intervention will be limited to such aspects as directly affect their assets, rights or legal position and may not be extended to matters relating to the criminal liability of the accused.</p> <p>The person affected by the confiscation will be summoned to court in accordance with the provisions of this Act. The summons will indicate that the trial may be held in their absence and that it may, at any event, decide on the confiscation sought.</p> <p>The person affected by the confiscation may act through their legal representative at the trial, without it being necessary for them to be physically present at it.</p> <p>Non-appearance of the person affected by the confiscation will not prevent the trial from continuing.</p> <p>In order for the third party affected by the confiscation to intervene, assistance from a lawyer will be compulsory.</p> <p>The appeals provided for in this law may be lodged against the judgment. If a statement of defence against the claim is not submitted within the time limit or the third party does not appear, duly represented, at the hearing, judgment will be passed, without further ado, reverting to that rescinded in the affected rulings.</p>
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d) Is the trial *in absentia* possible in your legal system in order to apply the confiscation?

Models of confiscation	Remarks
<p>Direct confiscation and confiscation of value.</p>	<p>According to Article 786 SCPC, it is mandatory the attendance to trial for the defendant legally represented and assisted by his/her defense lawyer.</p> <p>Trial <i>in absentia</i> is possible whereas the unjustified absence of the defendant, who had been summoned personally, or at his/her address or in the designated person (as mentioned in article 775 SCPC), will not be cause for the adjournment of the trial if the Court considers that there are sufficient elements for prosecution and the requested penalty does not exceed two years of imprisonment or, being of a different nature, when its duration does not exceed six years.</p> <p>The unjustified absence of the duly summoned civil responsible third party will not by itself cause suspension of the trial.</p>

NCBC	<p>With regards to trial <i>in absentia</i>, under Article 803 b. xi. SCPC if the defendant absconding is judicially declared and he/she does not appear in the separate/autonomous confiscation proceedings, a procurator and lawyer will be appointed ex officio and will represent and defend them.</p> <p>The appearance of the accused with modified legal capacity to appear in the stayed criminal proceedings in the separate confiscation proceedings will be governed by the rules in the Spanish Civil Procedure Act.</p>
Extended confiscation	<p>Listed crimes under art. 127 bis SCC are mostly serious crimes, so an assessment on a case-by-case basis will be needed to comply with the requirements provided for in art. 786 SCPC.</p>
Third-party Confiscation	<p>According to the Spanish Criminal Procedural Code, art. 803 ter a to 803 ter d SCPC, non-appearance of the third party affected by the confiscation who was summoned in accordance with the provisions of this law will have the effect of them being absconding declared. The absconding of the third party affected will be governed by the rules set out in the Civil Procedure.</p>

e) For the confiscation without conviction: **can this form of confiscation be applied also in case of acquittal?**

In principle, the conviction of the suspect who owns the assets and proceeds of crime is raised as an essential prerequisite for its confiscation, although legal practice has revealed exceptions to this general rule. For instance, Supreme Court judgement n° 272/2017, of 18th April, imposes confiscation, even without a request from the accusation and without conviction, when it comes to goods of illicit trade as it seems to have no sense to deliver back the drug shipment to the accused of drug trafficking who was acquitted for the nullity of the evidence that incriminated him, or the false watches to the acquitted in an industrial property crime. But even our courts have come to confiscate legally traded assets belonging to an individual acquitted on the basis of the unlawfulness of the acquisition cause of such assets, notwithstanding the criminal acquittal of the purchaser thereof.

In case of NCBC, the prior existence of a final judgment in accordance with the provisions of the third paragraph of art. 803 ter SCPC is needed but not necessarily a conviction sentence, as cases in which an acquittal is delivered as a consequence of a cause of exemption from liability are also possible.

However, it should be noted that in the extended confiscation for criminal reiteration is not affected by Art. 127 bis.5 CP, which excludes extended confiscation when the offenses from which the assets originate have prescribed or have already been judged with an acquittal or

dismissed with effects of *res judicata*. The reasons are based on the legality principle as the above mentioned provision itself expressly limits its scope to extended confiscation but also considering that under extended confiscation due to criminal reiteration the assets to be confiscated refers to a wider period of time. Consequently, the prescription, dismissal or acquittal for a specific activity criminal activity should not have an effect on the confiscation of assets originating from another activity.

5) For each model of confiscation:

Does it comply with the principles of:
legality?
legal specificity of a statute?
non-retroactivity of the /more severe/statute?
the right to private property?
the proportionality?
the right to a fair trial?
the right to defence?
the presumption of innocence?
the *ne bis in idem* principle?
and other relevant rights – what sort of?

7) For each model of confiscation:

- a) **Are there constitutionality issues which have been detected in the legal doctrine and is there any relevant jurisprudence ruling on the constitutionality (or not) of the confiscation measure?**
- b) **Are there European Court of Human Rights cases in relation to “Your” model of confiscation?**

Please, explain the position of the ECHR about “Your” model of confiscation.

- c) **Is there any CJEU decision concerning “Your” confiscation model?**

As far as I know, there is no EUCJ judgment

	Remarks
Principle of legality	No relevant remarks on this regards

<p>Non-retroactivity principle</p>	<p>According to the Supreme Court Judgment 400/2022 passed on 9th February, the non-retroactivity principle is applicable to the NCBC. However, it distinguishes between the penalty and the procedural aspect. It is not possible to apply the confiscation retroactively, but according to the Supreme Court (citing ECHR case-law to support its thesis) the NCBC can be enforced if another kind of confiscation was applicable to the subject of the NCBC when the crime was committed.</p>
<p>Right to private property</p>	<p>From the Constitutional viewpoint, the Right to property is proclaimed in article 33 of the Spanish Constitution of 1978 in similar terms to Art. 17 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as "the Charter") . Art. 17 guarantees a right to own, use, dispose and bequeath lawfully acquired possessions. This right to property is not however absolute: it can legitimately be subject to restrictions when the legislator pursues a valid objective of public/general interest adding that this restrictions are subject to fair compensation being paid in good time for their loss or the need to protect the rights and freedoms of others (justified interference).</p> <p>As both articles 33 of the Spanish Constitution and Art. 17 of the Chart refer to lawfully acquired possessions, a <i>sensu contrario</i>, it seems to corroborate the possibility to confiscate the direct and indirect proceeds of crime, which by definition have been proven to have an illicit origin, obviously without any compensation.</p>
<p>Right to a fair trial</p>	<p>Articles 5 and 6 of the European Convention on Human. Rights (hereinafter referred to ECHR) enshrines the right to a fair trial. Within the scope of this fundamental right, the ECHR establishes two main obligations on the relevant authorities to provide information to suspects or accused persons:</p> <p>Article 47 of the Charter incorporates the right to a fair trial into EU law and Article 48(2) of the Charter guarantees respect for the rights of the defence.</p> <p>European Court of Human Rights (hereinafter referred to as "ECtHR") Judgment Sardón Elvira against Spain was passed on 24th December 2013. In this case the applicant was sentenced by the Audiencia Nacional to seven years' imprisonment and to a fine of EUR 100 per day for fourteen months for continuous misappropriation and to two years' imprisonment and a fine of EUR 100 per day for ten months for the continuous making of false statements in commercial documents.</p> <p>The Supreme Court accepted his casation appeal and acquitted him, but maintained the NCBC. The Supreme Court stated that the Audiencia Nacional had violated the</p>

applicant's right to the presumption of innocence. It found that there was no evidence for a conclusion that the applicant had managed the funds invested in the enterprise through which the misappropriation took place. However, the Supreme Court ordered the applicant to reimburse the ... amount of EUR 88,671.78

ECHR first analysed if NCBC had a criminal or a civil nature according to the Engels criteria and ECHR reached the conclusion of the civil nature of that kind of confiscation.

Once that civil nature was established, ECHR stated that the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases. Nevertheless, certain principles concerning the notion of a "fair hearing" in cases regarding civil rights and obligations emerge from the Court's case-law. In so far as is relevant for the instant case, that notion includes the right of the parties to civil proceedings to submit any observations that they consider relevant to their case. It also includes the principle of equality of arms, which requires a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents (see *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 56, ECHR 2004-III). This in turn includes the opportunity for the parties to comment on all observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision

Turning to the instant case, the Court observes that the Supreme Court found that the arguments put forward by the applicant had fully served to defend him in respect of both criminal and civil liability and that if the applicant's criminal responsibility could be excluded, the same could not be said of his civil

liability under that provision ECHR did not find that there were any compelling reasons to depart from that conclusion.

As regards to third-parties, these set of guarantees also apply to witnesses whenever they are in reality suspects of a criminal offence, as the formal qualification of the person is immaterial. Accordingly, in the procedural law of several Member States a new personal category has been introduced: the "assisted witness" ("témoin assisté"), i.e., a person summoned up during the investigation of the case, not formally suspect or accused but which, due to his or her close relations with the case and the eventual future charges, is granted with some rights due to the accused, namely the right of having access to files and documents and of being assisted by a lawyer. Contrary to regular witnesses, the "assisted witness" enjoys the right of being

	<p>assisted by a lawyer at the delivery of their statement, at the hearings and to have access to the case file .</p> <p>In the case <i>Silickienė v. Lithuania</i>, [ECtHR No. 20496/02, 10 April 2012], concerned the confiscation of property of an accused’s widow. The Court highlighted that although in principle persons whose property was confiscated should have been formally granted the status of a party to the proceedings resulting in such measures, it was acceptable that in the particular circumstances of this case the national authorities offer the widow a reasonable and sufficient opportunity to adequately protect her interests. The applicant could challenge the initial seizure measure in 2000, and she could also have explained the origin of her property. After her husband’s death the national court had appointed a lawyer to represent her interests in the criminal proceedings. The ECtHR herewith referred to the opportunity for a contradictory trial, the possibility to appeal as well as to the courts establishing the assumption that assets liable to confiscation are proceeds of crime by objectively assessing the facts.</p>
<p>Right to the defense</p>	<p>Fundamental rights, such as defence rights declared in Article 48 of the Charter and Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; see ECtHR, <i>Imbrioscia v. Switzerland</i>, n°. 13972/88, 24 November 1993), presumption of innocence (Art. 48 of the Charter and art. 6 of the ECHR; see ECtHR, <i>Saunders v. the United Kingdom</i>, n°. 19187/91, 17 December 1996), the principle of <i>ne bis in idem</i> (Art. 50 of the Charter; see CJEU, <i>C-7/72, Boehringer Mannheim GmbH v. Commission of the European Communities</i>, 14.XII.1972, or CJEU, <i>C-308/04 P, SGL Carbon AG v. Commission of the European Communities</i>, para. 26), as well as the principle of legality and proportionality of criminal offences (Art. 49 of the Charter and Art. 7 of the ECHR; see ECtHR, <i>Streletz, Kessler and Krenz v. Germany</i>, n°.s. 34044/96, 35532/97 and 44801/98, 22 March 2001), are applicable to confiscation mechanisms where the nature of the respective proceedings would be considered to amount to (to be equivalent to) a criminal charge – Articles 48 to 50 of the Charter.</p> <p>The European Union legal framework of the rights of the parties to access to judicial criminal proceedings as parties (suspects/defendants/accused persons or even victims and affected persons in some legal systems like Spain) or even to its information (as interested or affected persons e.g.: data protection regulation) throughout the different procedural phases, has to be considered as the main case law of the ECtHR on the concept of “fair trial” in order to ensure the right of defence.</p>
<p>Presumption of innocence</p>	<p>From a domestic point of view and regarding to the principle of presumption of innocence, widespread</p>

invoked in courts, we must accurate its relationship to the new types of confiscation. The “*iuris tantum*” legal presumption included in the new regulation of extended confiscation, despite of representing a reversal of the burden of proof regarding the lawful origin of the property forfeitable, does not affect this fundamental right to be presumed innocent because it does not affect the core or criminal action prosecuted, or the participation in such an action of a specific person. The presumption of innocence must operate on persons convicted in criminal proceedings dealt with all the guarantees and in which the accused has had an opportunity to properly exercise its right to defend itself against the charges. The use of the extended confiscation put together consequences which are therefore exclusively material and financial, in any case arising from the proper accreditation commission of illegal activities related to organized crime.

The Spanish Constitutional Court case-law on this particular issue (judgement nº 219 and 220/2006, of 3 July) set up clearly the limits of the right to the presumption of innocence in relation to seizure and confiscation, justifying the confiscation of property dealt on regular basis (a fortiori applicable to extended) does not refer to the principle of presumption of innocence, since this rule means that no one can be held criminally responsible for an offense without valid prosecution evidence, which must be referred to the essential elements of the offense and be evaluated by the courts under the rules of logic and experience (...). The presumption of innocence operates "as the defendant's right not to be convicted unless the culpability has been established beyond reasonable doubt" (JCC 81/1998, of April 2nd, LC 3; 124/2001, of June 4th; 17/2002, of January 28th). Having noted the existence of evidence from which the courts considered reasonably proven the guilt of the accused is no longer in question the right to presumption of innocence. "

At a higher level, the European Court of Human Rights (ECHR) has handed down several decisions that support the application of NCB confiscation orders in certain cases. As far as the Italian legislation is concerned (Law of May 31, 1965), the ECHR in the case Raimondo vs. Italy (application no. 12954/87), in the judgment of 22nd February 1994 supports that special legislation stating that represented a proportionate restriction of fundamental rights to the extent that it was a "necessary weapon" in the fight against the Mafia. In the Walch vs. United Kingdom judgment, delivered in November 2006 (appeal no. 43384/05) , the application of civil forfeiture regime in the UK was evaluated and the ECHR based on the criteria as

	<p>laid down in previous judgments , not considered a violation of the ECHR legislation, given that the English court considered the purpose of the procedure was not punitive or confiscatory deterrent but a preventive measure pursuing to recover assets unlawfully owned by the appellant. In relation to the principle of presumption of innocence in the case the ECHR <i>Butler vs. UK</i> (41661/98), referring to the seizure of cash, in the judgment of 27th June 2002, found that it was a preventive measure and could not be compared to a criminal penalty, whose proportionality had been tested under a judicial scrutiny basis.</p> <p>As for the presumption of innocence, the Constitutional Court judgement n° 125/2014 passed on 19th April rejected an application on the base that the right to the presumption of innocence includes the right to be convicted with valid evidence obtained with respect to the fundamental rights, administered in trial and stated by the Court beyond reasonable doubt. As this was a case where the confiscation order was based on the ownership of the asset by the convicted individual and having the judgment respected his presumption of innocence, the allegations of <i>bona fide</i> possession of the company were irrelevant because we are not dealing with a third-party confiscation but a direct one. The convicted person was also proven to own the asset through evidence beyond reasonable doubt. Consequently, the Constitutional Court states that there had not been a reversal of the burden of the proof.</p>
<i>Ne bis in idem</i> principle	<p>The Supreme Court Judgment 400/2022 passed on 9th February considers the confiscation as a criminal sanction on the sense of the art. 4 of the 7th protocol to the ECHR and consequently establishes that the case law of the ECHR about the <i>ne bis in idem</i> principle would be applicable. However, as we have seen in the earlier point regarding the non-retroactivity principle, Supreme Court rejects that it could be applicable in that specific case.</p>
Others	<p>In the case of freezing ECHR maintains (judgement n° 696/2005, in case <i>Dassa Foundation vs. Liechtenstein</i>, esp. p. 13) that the adoption of precautionary measures does not imply a violation of the rights of the alleged offender, nor does it prejudice the criminal proceedings carried out, since its main objective is to safeguard a future criminal sentence. The ECHR maintains that such assets should be returned to their owners, in the event of an acquittal. In principle, therefore, these should not be used by the State until judgment is passed. On the other hand, our criminal legislation allows the destruction, interlocutory selling or provisional use of assets, even if the precautionary measures have not been lifted, when the</p>

	circumstances of the case allow it (art. 127 octies 2 SCC, with reference to arts. 367 bis to 367 septies SCPC)
Relevant jurisprudence ruling on the constitutionality (or not) of the confiscation measure.	
European Court of Human Rights cases in relation to Spanish model of confiscation	
CJEU decision concerning “Your” confiscation model	

9) For each model of confiscation:

a) **How was the Directive 2014/42/EU transposed in Your national legal order and how did this affect national law?**

Spain did notify the Commission the timely transposition of the Directive 2014/42/EU into its national legal system. Domestic implementing measures were adopted in 2015 by mean of LO n° 1/2015 amending the Spanish Criminal Code (SCC), which had been previously amended in Law 5/2010, of 22 June 2010 transposing Framework Decision 2005/212/JHA, of 24 February on Confiscation of Crime-Related Proceeds, Instrumentalities and Property. LO 1/2015 triggered relevant changes in relation to several legal concepts as non-conviction based confiscation; extended confiscation and its scope of application; third-party confiscation; safeguards...

b) **Does the relevant confiscation procedure fall within the concept of “proceedings in criminal matters” which is provided for by the Regulation (EU) no. 1805/2018?**

In rem proceedings or civil confiscation models (action against the assets not the person) initiated to confiscate assets obtained through unlawful conduct are not in place in Spain **nor was the unexplained wealth offence** based on the comparison of the current wealth with income declared by the suspect without the need to establish a direct or indirect link to a predicate offence until the last amendment of the SCC operated by organic law 14/2022, in force as of January 2023, introducing this criminal category in new Art. 438 bis, punishing public officials who during the performance of their function or position and up to five years after leaving them, increase their patrimony or a cancellation of obligations or debts for a value greater than 250,000 euros, openly refusing to provide give due compliance to the requirements of the competent bodies destined to verify the justification of this unjustified wealth (they will be punished with a penalty of six months to three years in prison, a fine and special disqualification for employment or public office) . Traditionally, there has been some resistance to typify this crime of illicit or unjustified enrichment in Spain, because it is understood that it is a "crime of suspicion", which violates the right to the presumption of innocence. As the defendant himself is in charge of proving that the increase in assets has been legally obtained, this would mean a reversal of the burden of proof, contrary to said constitutional principle. The inconvenience of dealing with a "crime of suspicion" is wisely circumvented by the Spanish legislator, setting up the crime as a crime of disobedience: actually possessing disproportionate assets in relation to the legal income whose origin is not justified is not a crime, but there must be a prior requirement on the part of the competent

administrative or judicial bodies for the verification of said patrimony and, as the preamble of the law says, "only before the refusal to detail said bodies the origin of an increase in assets or a cancellation of debts or in the face of a manifestly false application on them would incur in the criminal behavior".

As in the majority of European legal systems, in Spain, assets recovery legal instruments are necessarily integrated in criminal proceedings and therefore forfeiture injunctions and confiscations orders must be issued in the framework of a criminal "*in personam*" procedure, although it is not necessarily linked to the presumption of innocence and the principle of culpability, considering likewise the proportionality principle and its nature as an "incidental consequence" of the punishment or penalty. Therefore, freezing orders and subsequent confiscation decisions must always be issued, either regular or extended, in the framework of a criminal proceedings. As previously mentioned the current art. 127.4 of the Spanish Criminal Code allows confiscation for non-convicted persons' assets due to the exemption⁹ or extinction¹⁰ of his/her criminal responsibility. Therefore, NCB confiscation is exceptionally provided in the SCC, taking into account the adversarial principle and within the inalienable procedural framework of a judicial criminal proceeding. In this regard, it should be noted that the Spanish criminal procedure allows the joint exercise of civil, unlike *common law* systems that recognizes the confiscation issued by civil courts indirectly linked with criminal offences.¹¹ Despite constitutional protection of private property, one of the main bottlenecks for admission civil confiscation in our system as an alternative solution to the failure of the criminal proceedings can be found in the *ne bis in idem* rule.

As a result of this limited engagement of legal recourse in our system, NCB asset confiscation granted by a foreign civil Court poses difficulties for recognition and enforcement of foreign judgments by our judicial authorities. Notwithstanding what has been said above, based on the art. 33.3 of the Spanish Constitution, a new legislation based on social interest reasons, this possibility may enter in our legal system.

However EU legislators are promoting the harmonization of a broader regulation of forfeiture, less limited from the material point of view as regards to mutual recognition and free movement of confiscation-based resolutions. Indeed, the European Judicial Area has overcome the confusing scenario in this field with the concentration of supranational assets recovery instruments in Regulation (EU) 2018/1805.

One of the most relevant aspects of the Regulation 2018 which also generates certain uncertainty in the Spanish judicial authorities, is the scope of application of the expression "within the framework of proceedings in criminal matters". Indeed, the scope of application is redefined in relation to existing instruments, in order to cover a broader range of confiscation cases, such as value confiscation and non-conviction-based confiscation, as well as extended confiscation, as well as in relation to any type of profitable crime (Recital 14).

Bearing in mind that 'Proceedings in criminal matters' is an autonomous concept of Union law interpreted by the Court of Justice of the European Union, notwithstanding the case law of the European

⁹ Article 20 of the Spanish Criminal Code.

¹⁰ Article 130 of the Spanish Criminal Code (in particular dead and prescription of the offence as the only pre-conviction legally provided causes)

¹¹ While the term "civil confiscation" is broader as integrates both civil and administrative forfeiture, given that the notion 'civil' includes both common law sanctions imposed by the civil courts as those imposed by the authority administrative. Among the states that are regulated we can find out UK, Australia, South Africa, United States of America, Ontario in Canada (2007), Ireland, Italy, Slovenia, Slovakia and most recently New Zealand Act 2009.

Court of Human Rights, Recital 13 of the Regulation states that, within the term criminal proceedings, decisions handed down without a final conviction or in criminal investigations carried out by the police and other law enforcement authorities may also be included, even though they do not exist in the legal system of the executing Member State, in which case the executing judicial authority must also recognize them and, consequently, execute the corresponding freezing and confiscation certificate, based on the principle of mutual recognition, without prejudice to the *ius loci* criteria that predominantly should rule the execution, in accordance with article 23 (1) of the Regulation.

This means that the Regulation would be applicable to any type of freezing and confiscation order provided that it has been issued in criminal proceedings, without the executing authority being allowed to deny its execution. In this case scenario, when the nature of the proceedings do not exist in the executing State legal system, grounds for refusal exhaustively provided for in articles 8 and 19 of the Regulation should be in place whenever there is a risk of infringement of fundamental rights. In particular the right to a due process, judicial effective protection and the right of defence. However, neither can the executing authority replace the confiscation with other alternative measures, without the consent and prior agreement with the issuing authority (article 18 (2) and (3) and article 23 (3) of the Regulation). Therefore, the Regulation encourages the recognition and enforcement of real precautionary measures that have not been subject to prior substantive harmonization at the EU level, even if they are not provided for in the law of the executing State.

In any case, the Regulation draws a "red line" re its scope of application: the freezing and/or confiscation judicial resolution has to be issued "within the framework of proceedings in criminal matters", expressly excluding resolutions adopted in "civil or administrative procedures".

Bearing in mind this flexible and at the same time slightly restricted approach inherent to the Regulation as well as its transnational effectiveness, as it is based on the principle of mutual recognition and free circulation of judicial decisions, it is worth asking why the possibility of recognition of freezing/confiscation resolutions issued in the framework of non-convictions based proceedings, in particular, in non-criminal proceedings, at least in its own nature, but which is related in a way, by reason of its related matter, to a lucrative crime or crimes. This is important since these sorts of certificates could be received or are being received, as of December 2020.

As the Impact Assessment of the Proposal for Regulation's report recalls, national confiscation systems differ substantially and confiscation legislation has evolved in response to national requirements, taking into account their own legal traditions and cultural differences. The aforementioned Impact Assessment Report also reminds us that we are losing the benefits of mutual recognition in relation to these civil or administrative confiscation with the prevailing uncertainty and "à la carte solutions", since the Recognition and execution of said resolutions depends on whether they are finally accepted or not by the executing authorities assessing on a case by case basis its compatibility with the national legal system of the executing State where the assets are located. For this reason, there are Member States where, despite having internally regulated only NCB criminal confiscation -as in the case of France-, civil confiscation orders are being recognized¹², in execution of certificates of former article 4 of DM 2006/783/JAI, issued by Italian judicial authorities, to give an example included in the Impact Assessment Report. Meanwhile, other Member States, such as Spain, systematically deny such recognition because they are certificates that, in fact, are based on confiscation orders that they consider to be civil or of an *in rem* nature.

The Regulation includes within its scope, in accordance with Directive 2014/42, confiscation without prior conviction, in certain cases of flight or illness of the defendant, as well as in cases of death of a

¹² Case "*Crisafulli*", France accepted the execution of a freezing order requested in a LoR issued on the basis of 1990 Convention and the "*Cour de Cassation*" ratified that decision though the resolution wasn't based on a criminal conviction.

person, immunity, statute bar limitations based on prescription, when the perpetrator of a crime cannot be identified or when a court decides to confiscate assets considering them as proceeds of crime. In any case, in order for them to be considered within the scope of application of the Regulation, the resolutions must be issued "in the framework of criminal proceedings", since, in this way, compliance with the level of standard of procedural guarantees provided for in the package of EU Directives could be properly safeguarded, taking into account these provisions are not applicable in administrative or civil proceedings.

For this reason, the key question regarding the scope of application of the Regulation, lies in clarifying what should be understood by "procedure in criminal matters", referred to in its article 1. To this end, we must bear in mind that it is a concept autonomous from Union Law and, therefore, subject to the hermeneutics of the Court of Justice of the EU. In this sense, it is necessary to attend, not only to its literal wording, also to the context in which it arises.

In relation to the context or background, the *in rem* modality is defined as a civil process, directly addressed against the property to be seized, in a manner disconnected from any criminal prosecution against the alleged perpetrator of the crime. Civil forfeiture is based on a legal fiction that the property itself -not the owner-, has violated the law. Therefore, the procedure is directed against the object related to some illegal activity, specified by law. Unlike *in personam* forfeiture, *in rem* forfeiture does not require a conviction, or even a prosecution or charge against the owner of the property. Faced with criminal confiscation, civil confiscation is not subject to the existence or proceedings of any criminal nature. In addition, the expression "Civil confiscation" is broader since it integrates both civil and administrative confiscation, in view of the fact that within the term 'civil', it includes in common law, both the sentences of the civil judge and the sanctions imposed by the administrative authority.

All these advantages make NCB civil confiscation, in general terms, a strategic instrument to fight against money laundering and organized crime, since this mechanism can be used when it is not possible or feasible to prosecute and/or conviction, acting directly on the proceeds of the crime, regardless of the difficulties (and delays) inherent in the criminal proceedings. In the context of a widespread concern about the rise of organized crime and the difficulties in obtaining convictions and being efficient in the field of assets recovery, this possibility -shortcut-has been promoted and recommended from European instances. Here we have, both its increasing interest and, at the same time, the fears of those who consider NCB civil confiscation as weakening of constitutional and procedural guarantees.

As the Impact Assessment Report reminds, Italy was the first Member State to introduce the preventive confiscation system in its law no. 575 of 1965, in order to fight against manifestations of Mafia-type organized crime. Subsequently, influenced by the law passed in 1970 in the United States of America, Ireland introduced civil forfeiture into its legislation in 1996. Years later, the United Kingdom followed this legal path in its Proceeds of Crime Act of 2002. More recently, Bulgaria, Slovakia and Slovenia have also introduced non-conviction-based forms of civil forfeiture "civil in rem actions".

However, in most Member States, confiscation is a sanction linked to a criminal conviction. Specifically, in Spain criminal confiscation is necessarily integrated into criminal proceedings and, therefore, must be decided in the framework of an "in personam" criminal proceedings. Being said that, it should be noted that being confiscation legally considered an "additional consequence of the crime", properly speaking, it appears disconnected with the principle of guiltiness and is not necessarily linked to the presumption of innocence, not even to the principle of proportionality, at least in all its extension. In any case, the confiscation, whether direct or extended, must be decided in the conviction sentence (post-conviction-based confiscation), except in the cases of NCBC (Art. 127 ter SCC), spite of the adversarial/accusatory principle. Likewise, it should be learned that Spanish criminal procedure, unlike common law systems and other legal systems that recognize civil forfeitures, allows the exercise of civil actions in the main criminal procedure.

Being said that, the expression procedures in criminal matters, although not defined in the primary legislation of the EU, does appear in Art. 82 (1) of Title V of the TFEU, which is the primary legal basis of the Regulation. For this reason, we can define it, first of all, in a negative sense, excluding civil matters regulated in paragraph 1 of art. 81 of the TFEU which is referred to “judicial cooperation in civil matters”. If we take a look to the jurisprudence of the CJEU related to Article 1 of the Brussels Convention, applicable, "in civil and commercial matters regardless of the nature of the court", said Court has declared that the concept of "civil and commercial matters", in The Brussels Convention is an autonomous concept of Union Law, which must be interpreted, referring, on the one hand, to the objectives and system of the Convention and, on the other, to the general principles resulting from all national legal systems. The CJEU has specified that the scope of application of the Convention must be determined fundamentally on the basis of the legal relations between the parties of the litigation or its subject. In this regard, the CJEU in the judgement issued in the case of the Netherlands v. Rüffer, C-814/79, stated in relation to the Brussels I Regulation, that a civil litigation between a public authority (administrator of the water supply), acting in the exercise of public powers and a person governed by private law, does not fall within the scope of application of the Brussels Convention (section 8), therefore, within the notion of “civil matters”.

On the other hand, the CJEU (Grand Chamber) in its judgment of 14 November 2013, issued in the Baláž case, C-60/12, has interpreted the concept of "court having jurisdiction, in particular, in criminal matters ” in the context of the application of Framework Decision 2005/214/JHA on the mutual recognition of financial sanctions, on the basis of the former TUE (third pillar). First, it considered that "jurisdiction in criminal matters" is an autonomous concept of EU law, spite of the domestic classification of the offense as criminal or administrative (paragraph 35). The national court may be set up as an independent administrative authority with competence as an appeal body in relation to administrative offenses (paragraph 39). What is important is that the court uses "a procedure that meets the essential characteristics of criminal proceedings, without, however, it being necessary for that court to have exclusively criminal jurisdiction" (section 36). In the mentioned judgement, the CJEU considered that the Austrian *Unabhängiger Verwaltungssenat* has full jurisdictional jurisdiction and applies appropriate procedural guarantees in criminal matters, such as the principle of indictment only in case of immutability or criminal responsibility and the principle of proportionality of the sanction to the liability and the facts (section 40 of the judgment in case C-60/12).

Based on this doctrine, the aforementioned Opinion of the Council's Legal Service was pro including in the scope of application of the Regulation freezing and confiscation orders issued in criminal proceedings, without specifying the competent Court for issuance. The logic behind is to admit within the concept of "procedures in criminal matters” resolutions issued, even by civil and administrative bodies, in the framework of procedures that are not criminal, but falls within the scope of "cooperation in criminal matters". So, the definition of "procedures in criminal matters”, is related to and depends on the question of whether the measure to be recognized complies with the fundamental rights and principles applicable to criminal proceedings, specifically, article 50 of the Charter of Fundamental Rights of the EU, with the Directives on rights proceedings based on art. 82 (2) of the TFEU and articles 6 and 7 of the ECHR as they have been interpreted by the ECHR in the so-called "Engel Criteria".

In this line, a new wording was given to Recital 18 of the Preamble of the Regulation, which in relation to the rights and procedural guarantees, established in the ABC Directives and the package of Directives approved in 2016, declares: " In any case, the safeguards under the Charter should apply to all proceedings covered by this Regulation. In particular, the essential safeguards for criminal proceedings set out in the Charter should apply to proceedings in criminal matters that are not criminal proceedings but which are covered by this Regulation.” Thus, the Regulation itself distinguishes between two types of procedures within its scope of application. On the one hand, the criminal procedures, properly speaking, and, on the

other hand, those "procedures in criminal matters, which are not criminal procedures", but to which the Regulation applies. The common denominator of both procedures would be the **procedural guarantees**, which "must be applied to all the procedures covered by this Regulation".

In other words, the confiscation order adopted without a final conviction would fall within the scope of application of the Regulation when, even if issued in a separate and autonomous proceeding of a civil nature or in rem, it was issued with full respect for the guarantees of a criminal procedure, including the presumption of innocence. On the contrary, purely civil confiscation, even if it generally refers to the proceeds of crime, if adopted in civil or administrative proceedings, would be outside the scope of the Regulation.

In light of the foregoing, it can be argued that the notion of "criminal proceedings" seems to refer, in addition to criminal proceedings in the strict sense, also to those judicial proceedings that

- 1) are linked to a crime, in the sense that they refer to assets related to criminal conduct, and
- 2) despite the initial classification or nature as civil or administrative proceedings in accordance with national legislation, they have procedural guarantees similar to those of a criminal proceeding or, rather, attract the essential guarantees of criminal law.

having the same legal basis in art. 82 (1) of the TFEU, a specific precedent could be found out in the European Protection Order (EPO), an instrument that also applies to decisions issued by authorities other than a criminal court, as they are also related to a crime and intended to provide protection against criminal conduct.

Consequently, those real precautionary measures adopted in a NCB proceedings, aimed at preserving or confiscating the proceeds of crime, could, in principle, fall within this notion of criminal proceedings, despite their formal classification as a sanction or preventive measure, always on the condition that the procedural guarantees inherent in criminal proceedings are present and respected in whatever said procedure.

What certainly falls outside the scope of the Regulation are, on the contrary, purely civil or administrative forms of confiscation not related in any way to criminal activities. In any case, the possibility of including in the scope of application of the Regulation the confiscatory measures adopted outside the walls of the criminal procedure, would be always subject to the condition that they respect the essential safeguards and guarantees of said criminal procedures provided for in the EU Charter.

- c) In Your opinion are the safeguards required by the Regulation enough for the protection of the defendants' rights? Is there any additional national legislation aimed at adjusting the national legal order to the provisions of Regulation or any relevant need thereof in order to make Your national confiscation models more compliant with the safeguards required by the Regulation? Are there any lessons that we should learn from Your national experience?**

The application of Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders sets the means for increased recognition of freezing and confiscation orders across the EU, the number of orders to be recognised is dependent on the capacity of the Spanish authorities to identify assets, the confiscation instruments available in Spain, and their willingness to apply them.

With the transposition of Directive (EU) 2019/115377 on access to financial information on July 2022, law enforcement authorities, including Asset Recovery Offices, have access to bank account registries system

Madrid, 30 January 2023

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