RECOVER
CRIME DOESN'T PAY

Co-funded by
the European Union
GA: 101091375

Project RECOVER – crime doesn't pay

1 workshop – online
January 31, 2023

"The concept of proceedings in criminal matters (art. 1 REG) and related safeguards"

Francisco Jimenez-Villarejo Fernandez (GP ES, Spain) - In the first place, thank you for organising these seminars and thank you also for your speech, because it really set up the scheme and the scheme is not an easy one. This is a very confusing scenario, I must confess. In Spain we managed to set up from the substantive law, a very clear regulation, introducing all the novelties stemming from the 2014 directive. And now our Criminal Code is in line with not conviction-based confiscation and extended confiscation, even in relation to extended confiscation you will have different model types. I think they are brand new legislation for us and a very important aspect to clarify in relation to our criminal law. But at the procedure level we are now facing a new building to adapt the Regulation. We try to compile all the mutual recognition instruments. And now we are trying to adapt our mutual regulation law to the 2018 regulation on freezing and confiscation. For us, the key question is: we understand that we have to regulation also is in favour of having a flexible approach in relation to these hybrid models, hybrid proceedings. But what happens with article one, paragraph 3? What happens with these freezing and confiscation orders that are issued within the framework of civil anomalies if proceedings in civil and administrative matters? Because there is a clear section and point n.13 of the preamble underlines that these type of civil or administrative proceedings are not included in the scope or are not under the scope of the regulation. For us is very difficult to distinguish which certificate has been issue in this sort of proceedings, and which are under the type of proceedings issuing the framework of criminal matters proceedings. In the in the previous years, we have a clear distinction in relation to this that is coming from United Kingdom. We decided not to execute and not to recognise the freezing orders coming from, for example, the Queens Bench Division code. But now, in relation to many of the Member States, in particular Italy, but also Slovakia, Bulgaria, even the Netherlands. We don't know if we are dealing with a pure civil or administrative freezing order, or steaming from civil or administrative proceedings, or on the contrary we are dealing with a freezing order issuing a separate confiscation procedure are not condition based on confiscation procedures, but clearly link with a criminal offenses and issue, and that is very important also by judicial authority. Also in a flexible approach, also considering the possibility of validation, that is a very interesting possibility also provided in the 2018 regulation. That is the scenario we are facing, and we are obligate to give a clear guidance to our prosecutors, and to our judges, and we don't know exactly how to do this, how to draught a guide or a manual to provide a clear guidance to our colleagues. And I think this is one of the main most interesting aspects of this project: to find a way to clarify this scenario. The case is another way of facing now, that is not clear also in the ongoing process that we are facing to adapt our mutual recognition law. Because this is not a national problem for us. We have a big clear legal system, but at the same time we are bounded by the mutual recognition obligations and is not a national issue, but a transnational issue. We must recognise and execute certificates coming from our neighbouring countries, our Member States within the European Union. We are obliged, based on mutual recognition, to recognise this sort of certificates.
If we deal with lottery letters coming from other countries, from the Council of Europe Conventions, i'm thinking about 1990 convention and 2005 convention. Perhaps we must apply another approach, considering the declarations on the reservations that Spain already made in relation to these Conventions and legal instruments. Within the European Union, the approach is completely different, that is what we need to clarify these concepts and we need to clarify which are the resolutions that should be a recognised and executed in Spain.
In this regard, I think that our project is a very nice an entirely project to do so.

Michele Fini (MoJ IT, Italy) - Good morning money to everyone and special greetings to my colleague Francisco and to all the other colleagues and Professor who are here. Thank you for your presentation, very clear and the best way to start up this workshop.
I do agree with your final advice on the actual implementation of the regulation, which is meant to be covering the Italian, not conviction-based confiscation. This is also my opinion and his captain considered, considering only each connected, I mean talking about the grounds and the contents of the discussion which went on during the formation of the working group meeting. The choice between the wording criminals' proceedings and the proceedings in criminal matters was done with a view to covering these special measures, so we will be dealing with for so long time. We know that that choice finally was made to cover these instruments, these tool within the scope of regulation, but also the conclusion can be drawn while considering the wording which had been eventually adopted according to the normal interpretation. Criminal matters are definitely involved when it comes to this kind of preventive measures adopted by the Italian system. We are talking about someone who has been involved in crimes, even though it's not the crime he's being judged, but it is a crime previously committed, which is also the base to evaluate the other elements which are taken into account when applying these kinds of measures.
But I have to say that this conclusion is justified by the new trends in the European system. These new trends normally include this kind of measure.
In 2018, I was involved in a meeting, and I delivered a speech based mainly on the article that Antonio Basmo and I have just published on a legal journal. And finally, the instant report the secretary stand out was was particularly careful to take account on what we have been saying, and so stressed out the important in new system or not conviction-based tools of confiscation.
The new trend justified this conclusion, which form me is that we are allowed to consider the Italian preventive confiscation measures to be covered by this regulation.

Witold Jakimko (MoJ PL, Poland) - Good morning. I have Josh and. I am representing Ministry of Justice trying to pull.
After having having followed the presentation, we can see how wide how broaches the problem, particularly from the comparative low point of view. Why? Because if We follow just only the regulation for the first sight, there is no better match. It is not that much problematic.
The problems are in the details, because if you follow from our national point of view, how to determine criminal matter?
Of course, criminal matter from the point of view of the regulation in as we have gone down through the optical from the first article, but then we jump to the second one and We can see issuing authority, executing authority. We see Judge, Public prosecutor and some other organs.
But then in articles three, we've clearly determined that the scope of application.
In the paragraph one, list of criminal offences and the beginning of it also is determined the maximum custodial sentence provided by the Lloyd at least three years.
In that way we see that first It has to be criminal offence even if it is a proceeding in there and it has to have a link with this case, problematic maybe can be paragraph two, article three, which makes a reference to the other criminal offences that can be also taken into account within a corporation based on this regulation.
What is your opinion about it? In the paragraph two we can have any criminal offence or also criminal offence not mentioned in the list of paragraph one, but those who are maximum of at least three years also custodial sentence. I believe that this condition is not included to the to the paragraph two, but however it may cause the problem.
The PT offices, you know, comparing in English terminology, these are misdemeanours and then whether we apply this in the criminal proceedings as such in case of paragraph two, can we consider misdemeanours if for

Polish system we have a special proceeding which is not Directly criminal? It is the proceedings in misdemeanour cases.
I also would like to know whether it may constitute a problem in some other countries. For example, I am aware of Spanish and French system where accept of criminal offences. We have a contravention in French. We have a scientist in Spain, but these are like a minor.
In Polish when we would execute this one, surely misdemeanour, held back on contravention and it is not a criminal offense.
Beyond that we have all the times of those cases who are investigated and who are intermate case there is no charge against person. It may constitute a problem. When the nation was established, we are still in process I believe in all the countries of the European Union, that are in the process of establishing special procedures to that, especially from the point of view of extended confiscation, which is not related with particular conditions. Is the same with responsibility of collective entity, which is also a kind of criminal proceedings, but different determined in many countries. We don't need this prejudicated which is a conviction of a natural person for the responsibility of a collective entity, then we face the same problem.
I believe that many things must be determined for the moment.
I'm fully aware that knowing more about your national system we can see immediately the problematic issue. First of all, we have to think and analyse this from the point of view of who will be in future, taking care about proper executing over request on the EU country, which is demanding to anything according to this regular place.

Anna Maria Maugeri (UniCt) - We will have also a specific workshop about legal person. The possibility to apply confiscation to legal person and all the issue connected: this is another a real big issue. The aim of our project is also tried to better know the different system law in order to understand if contravention is a criminal offence or not, if It is included or not. The next meeting is in specifically about each delegation, which is that we charge the form of confiscation which are included in the regulation.
In my opinion, the idea is that is it is a concept of a proceeding in Criminal matter it is a very broad concept that means each proceeding which deal with something which is connected, in particular proceedings, or instrument of a crime.
The court as a female of European Court of Justice, can be not accorded which has also competent in this sector but not only in criminal sector, also in another sector.
What is important is that it is a judicial authority, and which this judicial deal with the something which is connected to a crime.
In the opinion of the European Court of Human Rights, we will analyse in many cases has affirmed that what is important to recognise this form of extended confiscation and not conviction-based confiscation is demonstrated this link with a crime. For example, in a case against Romania, *Dimitri case,* the Court said that it was not possible to admit form of extended confiscation, not-conviction based and extended confiscation which was justified only to the aim to protect the economy dnd not to fight against the crime. What is important is the link with the crime.
The real problem is to understand which are in this broad concept over preceding criminal matter, which are the safeguard that we have to apply, because in the past the European legislator has always affirmed that Member States cannot be able to apply at the least this extended power, but they can apply more extended power. European legislator has not established which are the minimum safeguards to guarantee.
This is also the problem. Which are the necessary safeguards that the preceding criminal matter has to respect in order to be included in the regulation?
One problem is that in many of these proceedings in criminal matter in order to confiscate the procedural crime, the prosecutor is able to confiscate without the proof over the derivation from specific crimes but with the proof of illegal origin.

This can be a problem because in our regulation it is established that the criminal offences has to be or criminal offence which is included in the list in order to avoid the application with the principal double criminality, or if it is not included, it is possible the verification with an unformal way.
It is establishing that the verification of double criminality must be carried out in unformal way. This means the competent authority should verify whether the factor elements underlying the offence in question would be able to criminal prosecution the territory of the executing States, regardless of the offence and the perfect correspondence over the constituent elements of the internal crime, and they want configurated by the issuing authority. But it is means that at least in a proceeding criminal matter in some way it is necessary to give evidence of the origin from specific crime. This can be, in my opinion a problem, in the application for example over the Italian preventing confiscation. It true that the opener has to be suspect of some crimes, but it is possible to confiscate the assets also in case where the assets have a disproportionate value, in relation to the economic activity, without specific evidence over the origin from specific crime. We have a negative kind of evidence. There is no evidence of illegal origin. The asset has a disproportionate value and so this is the presumption of its illegal origin.
This can be a problem because, in any case, it is necessary a connection with a crime to establish if the crime is included or not in the list.

Vanya Ilieva (GP BG, Bulgaria) - Thank you Anna Maria for your presentation, which was very interesting for me because we had some practical issues in Bulgaria and I was very glad to hear the broader scope of the issues that might arise from the implementation of the regulation also in Bulgaria or when Member States execute our orders for freezing cold confiscation.
The topic of the proceedings in criminal matter is of course very important because every system has its own peculiarities.
Considering the Bulgarian legal system, from one hand, when we are talking strictly about criminal proceedings started by a prosecutor and related to a specific crime maybe there are not lots of issues connected with it. Of course in Bulgaria we have different proceedings connected with crimes, but they may end with an administrative punishment or they are some kind of mixed proceedings between criminal and administrative.
From the other hand, in Bulgaria we have a quite complex confiscation system: one system is connected with criminal proceedings, started by the prosecutor and, the other system refers to a special Authority which deals with the so-called civil confiscation. About the latter, this civil confiscation could be related to crimes or it could be used if there is no other legal origin from the proceeds in question.
The good thing in the light of the regulation is that confiscation in Bulgaria is a punishment or a measure imposed by a Court so this could not represent a problem. But when we are talking about freezing, that might be more problematic since for freezing orders the procedure is different and it might be connected with a special procedure which aims at depriving legal entities from a proceeds when representatives of legal entities are convicted for the committed crime. Therefore, lots of issues can be marked and discussed in relation to the topic so we are welcoming any description of other legal systems and of course we will be glad to give our contribution for this research. Thank you very much.

Anna Maria Maugeri – Thank you Vania for your speech which allowed us to understand the Bulgarian system. Francisco, do you have any questions?

Francisco Jimenez-Villarejo Fernandez (Spain) – thank you, yes, only in relation to the remarks made by the Polish judge Witold Jakimko, which are interesting in order to discuss what is the scope of what we consider offenses included in this mutual recognition system.
He referred to the possibility of issuing a freezing model or confiscation model in relation to misdemeanours. Of course, this is not an option in the Spanish legal system based on two main principles: first, the principle of proportionality – this measure is not proportional when applied for misdemeanours- and the second one is the

principle of legality. Indeed, we should considered that according to art. 23 of the EU Regulation on the *lex loci* criteria, the law of the executing State is what will govern both the freezing order and the confiscation order. Referring to the Spanish Criminal Code, article 127 specifically provides that confiscation is for offenses (intentional or recklessness), not for misdemeanours. No *faltas* are allowed to be the illegal basis for a freezing or confiscation model, and that is important to highlight in relation to double criminality also mainly because proportionality principle is one of the key principle of legal safeguards in relation to this particular field of confiscations. Thank you Anna Maria.

Anna Maria Maugeri – thank you for having highlighted this aspect. Witold, would you like to take the floor?

Witold Jakimko (MoJ Poland) - I just wanted to thank you for the explanation to Mr Francisco Jimenez Villarejo. He stressed the importance of the principle of proportionality that should guide any decision, and is valid not only for misdemeanours but generally for all cases of extended confiscation, including those cases of seizure or confiscation without a defendant or without a convicted person. This is a like for me basic issues to use an appropriate measure adopted by a court, so by the judicial system. we have those problems mainly when in fact there is no proceedings in persona we have a seizure or a blockade of bank accounts according to provisions preventing money laundering and terrorism. This provision is constructed in this way: for the period of six months, when -according to the prosecutor- there is only a possibility of committing a crime, the prosecutor can block the bank account of a enterprise. After this period of six months he can extend the measure for another six months even if there is no charge or no investigation pending against a person and the only possible remedy is to appeal this decision to the court.
The consequence in the "commercial sphere" is that this enterprise may just simply fall down after having its account blocked for one entire year. So just as an example, in our the questionnaire I will include this judgment of the Supreme Court on that issue. But this is extremely important: we are focused on fighting criminal offenses, but we should avoid of "killing those who are really randomly on the line of shooting". So thank you very much.

Anna Maria Maugeri – Thank you. We can go on with the German experience.

Martin Heger (UBER Ger, Germany) - Hello. It's very interesting for me, but I think the situation in Germany, perhaps it's a little bit different because in our implementation law of the regulation, we only focus on the fact that we should apply the regulation and then, in the context of a criminal proceeding, we have to accept it. The problem is that is not clear what is a criminal proceeding: it must be a confiscation order or a freezing order in the context of a criminal procedure?
Looking at the German procedure, perhaps it's interesting because when Germany is issuing a freezing order or confiscation order, then that order is always part of the criminal procedure law. It is up to the criminal courts to decide on freezing as well as on confiscation without a criminal case or not.
On this background, I think it is not really a problem for German courts because they only look if the order is the decision of a Criminal Court or if the order is taken in a criminal procedure according to the law of the other State. Under these circumstances, we can accept the order, and we must accept it.
In my opinion, there is not a big problem on this issue. I think Francesco has named the countries in which there is only a freezing or confiscation on the basis of private law or civil law or administrative law. In this case I think it's not possible for Germany to accept the order of the issuing State.
And so I believe the German one is a formal approach. Perhaps I misunderstood some of your aspects, but as I see for the German legislator this is not a problematic aspect: it focuses on the regulations which requests that the order must be the context of a criminal procedure, whether it is a criminal trial or not. We say it's up to the criminal courts to decide on all this measures and I think this is the background for us and so it must be a context to a criminal case, but it must not be a criminal proceeding in the sense that it is something like a

criminal trial with the aim of a conviction, this is not necessary, because otherwise it is not possible to impose a measures in between before the criminal trial starts, etc…
Yeah, perhaps this is the German approach, but I'm not sure. I did not see that we focused on this problem so, for me, it's very interesting to see that it is a big problem in other Member States.
But till now I do not think this as a problematic aspect from the German point of view. Thank you very much.

Anna Maria Maugeri – thank you, Martin. So the confiscation must be in the context of a criminal proceeding.

Martin Heger – yes. Normally is Germany is a criminal court adopting the measure in a criminal proceeding. The problem arises when the measure is set by a civil court or an administrative one: in such a case I believe that is difficult for the German Court to accept the measure, even if that measure is against a proceed, *i.e.* assets deriving from crimes. Indeed, since we have to implement the Regulation, is hard to affirm there is an obligation deriving from the Regulation.

Anna Maria Maugeri – In my opinion a distinction emerges from the Regulation. When the Regulation states that it is not applicable to "orders and confiscation orders issued within the framework of proceedings in civil or administrative matters", I believe it refers to orders or confiscation without any connection to a crime. We must distinguish between measures that have no connection to a crime and measures that have such a connection. Well, in the latter case I believe the Regulation is applicable since the measure deals with an asset which derives from crime, being an instrument or a proceed of it, even if the measure is adopted by a civil or administrative court, but if a link with a crime is established with all the safeguards.

Martin Heger -In Germany I believe it is necessary the context of the criminal proceeding. I believe that is not problematic when there is a connection between the civil or administrative proceeding and the criminal one, whereas it lacks such a connection the regulation is not applicable. But this is a particularity of our German system because the confiscation or freezing of money is under the competence of the criminal court. So I believe it will be problematic to recognize the measure of another member state adopted by a court that is not a criminal one. Perhaps it should be decided case by case.

Anna Maria Maugeri – Thank you Martin. I give the floor now to Janne Lise de Boer

Janne Lise de Boer (GP NL, Netherlands) – Thank you. First I would like to say that at this moment the Netherlands does not have a civil or non-conviction based procedure which is effective and used.
To date we have two forms of confiscation that fall under the scope of the Regulation of 2018: a) conviction based objects confiscation form; b) a conviction based and value confiscation form. For those two types of confiscation we also have two types of freezing in our legislation and also those are criminal forms of freezing of assets.
If we are the executing State, we use to recognize orders that are not conviction based. For example, we have recognized Italian confiscation order in 2006.
We have a national debate on confiscations which are no-conviction based but adopted in relation to a criminal offence. For example, that is the case when the confiscation order is adopted in the framework of a civil procedure related to a criminal offence.
In my opinion, even if it's a Civil Procedure, it can never be a civil matter in the context of European law, because European law already states in Regulation 44/2001 that several matters would be between two equal parties. Such an equality lacks when the two parties are the government on one side and a natural/legal person on the other side. In two cases, Bella case and case C-150/2021 of the EUCJ on financial penalties, was stated that proceeding in criminal matters can be decided by any court or tribunal (civil, administrative or criminal) because other elements of the procedure must be stressed, such us the judge's powers, the protection of the

person subject to the measure, his right to appeal, right to information, so all the safeguards he/she has. So the element of the criminal proceeding must be guaranteed.
In our legal system is not debated the concept of "criminal matters", whereas it is debatable when a certain proceeding is related to a criminal offence. I refer in particular to the judgment, 'Agro In 2001' (C-234/18), delivered on 19 March 2020 in relation to Bulgarian civil confiscation. In that occasion, the Court held that Framework Decision 2005/212 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property[1], does not preclude legislation of a Member State that provides that the confiscation of illegally obtained assets is ordered by a national court following proceedings which are not subject either to a finding of a criminal offence or, a fortiori, the conviction of the persons accused of committing such an offence[2].
The discussion in Netherladns concerns whether there is the relation to a criminal offence when the latter does not constitute the object of a proceeding.
The debate does not deal with the order of confiscation received by the issued country because we consider that the assessment concerning whether or not that measure falls within the scope of the regulation is up to the national court of the issuing state and we have to trust that assessment. As a consequence, we would execute non-conviction based confiscation issued by another member state.

Anna Maria Maugeri – thank you. Is interesting that the approach is to recognize the non-conviction based forms of confiscation issued by other judicial authorities. We move now to Romania.

Romanian representative – Thank you. Generally, we agree with the conclusion if the aspect of the if the case is only about the civil or administrative law, it's clear that the regulation, it's not applicable, but when the safeguards are respected it like in the criminal matter of course so we need to recognize the that order.
Thank you.

Anna Maria Maugeri - We can carry on with our debate with a speech from João Conde Correia, from Portugal.

João Conde Correia (GP PT, Portugal) - Good morning, everyone. Thank you, Prof. Anna Maria Maugeri, for your kind invitation at this very fruitful debate. I must confess that hearing all the morning speeches suggested me something to say: nowadays, we live in a world where criminal confiscation and civil confiscation are closing the gap between both. In the criminal realm, nowadays, we can see forms of

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

[2] From www.curia.europa.eu: That judgment is given in the context of proceedings between the Bulgarian Commission for the combatting of corruption and for the confiscation of illegally obtained assets ('the Commission for the confiscation of assets'), and BP, a private person, and a number of natural and legal persons associated with or controlled by BP, concerning an application for the confiscation of assets obtained illegally by BP and those persons. Criminal proceedings had been brought against BP, in his capacity as chairman of the supervisory board of a Bulgarian bank, for having incited other persons to misappropriate funds of that bank between 2011 and 2014. At the time of the reference for a preliminary ruling, those proceedings had not given rise to any final conviction. Following an investigation against BP in particular, from which it became apparent that BP had acquired assets through financing them by unlawful means, the Commission for confiscation of assets brought civil proceedings before the referring court seeking, inter alia, an order for the confiscation of assets held by BP and members of his family. According to BP and the other persons concerned, assets could be confiscated only on the basis of a final criminal conviction.
The Court rejected that line of reasoning in its judgment. To arrive at that conclusion, the Court stated that, having regard, in particular, to the aims and wording of the provisions of Framework Decision 2005/212, it must be held that that framework decision is to be regarded as an act aimed at obliging Member States to establish common minimum rules for confiscation of crime-related instrumentalities and proceeds, in order to facilitate the mutual recognition of judicial confiscation decisions adopted in criminal proceedings. Consequently, the Court held that Framework Decision 2005/212 does not govern the confiscation of the instrumentalities and proceeds derived from illegal activities ordered by a court of a Member State in the context of proceedings that do not concern the finding of one or more criminal offences. Taking the view that the decision that the referring court is called upon to adopt in the main proceedings does not fall within proceedings concerning one or more criminal offences, but within civil proceedings relating to assets that are alleged to have been obtained illegally, and which are conducted independently of such criminal proceedings, the Court held that that decision does not fall within the scope of Framework Decision 2005/212.

confiscation that are perhaps worse than forms of confiscation in the civil realm. For me – and I think also from the Portuguese perspective, regarding the regulation – is not a question of where the confiscation is done; it is a question of the quality of the confiscation. So, we must focus on the guarantees of the confiscation, not on the place where the confiscation is done. Imagine that in a civil proceeding a State confiscates someone because he had some kind of enrichment without cause: this is purely a civil case. It is not the same if in a civil proceeding the State confiscates something related to the crime. If this kind of cases needs for some guarantees similar to the ones of criminal proceedings, I think – taking into account the regulation and the Strasbourg Convention – that Portugal should be able to recognize it and to execute properly this type of confiscation. The problem regards the new forms of confiscation, like the "extended confiscation", which in Portugal is not directly related to a crime (it's quite similar to the Article 240-bis of the Italian Criminal Code). We need a crime to put this mechanism in order, but the confiscation is not related to that crime. The problem is here, not in the cases where there is a crime and the link between the crime and the assets is proved either in a civil proceeding or in a criminal proceeding. So, we should focus more on the guarantees, not on the true nature of the proceedings. I must say that we fully agree with what you said previously this morning, because the main point is this: we should pay attention to the quality and the guarantees of the confiscation, not to where it is done. Thank you very much.

Anna Maria Maugeri - Thank you. I absolutely agree. Now, we can hear the speech of another partner, Arnaud de Blesson, from the French Minister of Justice.

Arnaud de Blesson - Thank you very much. First of all, I'm very pleased to meet you all. I am going to tell just one or two things about the French national legislation regarding the forfeitures and the freezing orders. Our legal system is based on conviction. At the level of our office, which is the "Office for Mutual Legal Assistance" of the French Minister of Justice, we have the ability to receive the mutual legal assistance requests. Those are requests of confiscation or freezing of some assets from European Union or non-European Union States. What is interesting is that in France you cannot have the forfeiture of assets without a criminal conviction; but it is possible to execute a request of forfeiture from an European Union member without a sentence, according to our Case Law. Regarding the proceedings in criminal matters – as it was raised also by our colleagues – we have the possibility to pronounce the forfeiture as an additional punishment or as an alternative punishment for crimes or misdemeanors.

Anna Maria Maugeri: -Thank you. There was an interesting case in the past in France about the application of the Italian confiscation preventive measure. In 2002 the French Supreme Court upheld the decision of the Appeal Court of Aix-en-Provence, which authorized the implementation in France of confiscation of property considered the product of a money laundering from drug trafficking, issued by the Tribunal of Milan. The arguments of the Supreme Court were very interesting. The French Supreme Court based this decision on the fact that: pursuant to Articles 12 and 14 of the Strasbourg Convention of 1990, mutual assistance was required; the confiscation order was final and enforceable; the French law provided for the confiscation of the proceeds of drug trafficking and subsequent money laundering activities (even if with other instruments, like the general confiscation against drug trafficking and money laundering); and – the last argument – the French legal system didn't require the same identical legislation, because demanding the same legislation would mean hindering any cooperation. There was also the opinion of the Justice Commission of the Senate, which was favorable to the application of the Italian preventive confiscation in the French legal system. This was one of the first case of application of a preventive confiscation in France. Now, we can give the floor to the partner from Lithuania, Jūratė Radišauskienė.

Jūratė Radišauskienė (GP LT, Lithuania) - Good afternoon, everybody. In our Criminal Code we have two types of confiscation: the classic confiscation and the extended confiscation. In 2020 Lithuania adopted a law

on civil confiscation: it is possible to have civil confiscation when the person has been acquitted or the proceeding has been terminated. This confiscation can be applied in relation to particular crimes (there is a list) and in relation to organized crime. In our practical life, we have started cases of civil confiscation, but now we have obstacles to trace assets within European Union and we don't know how it will be in the future.

Anna Maria Maugeri - Thank you so much. It is my pleasure to introduce Antonio Balsamo, the President of the Tribunal of Palermo. He has been: Judge on the Roster of International Judges of the Kosovo Specialist Chambers; Deputy Prosecutor General of the Italian Supreme Court of Cassation; President of the Court of Assize of the Tribunal of Caltanissetta; Tribunal Judge seconded to the Supreme Court of Cassation. He has also been legal adviser of the Permanent Mission of Italy to the United Nation and presiding member of the Human Rights Review Panel of EULEX. He is an expert in the fight against organized crime. Dear Antonio, thank you so much for taking part in this workshop. Today, Antonio is going to speak about the safeguards which the regulation wants to guarantee.

Anna Maria Maugeri - Thank you so much, dear Antonio, for this rich presentation, which has given us a broad view of the possible application of safeguards. I would have a lot to say about the EU regulation, but I will only stress the importance of the "jurisdictionalization" in the application of these forms of confiscation. Your presentation of the procedural safeguards in the Italian legal system is very positive: it is a system with the guarantees of Article 6, § 1, and Article 6, § 3, of the European Convention on Human Rights. You also talked about the application of the presumption of innocence as a rule of judgment. This means that in some way we have to apply the criminal standard of the proof. Nevertheless, what happens in the praxis? Is there a real contradictory between the prosecutor and the defense in the proceedings to apply the preventive confiscation? Do we really have all these guarantees? Which is the real standard of the proof? In the opinion of many lawyers the standard of the proof is lower than the criminal one. I suppose that we have a lot to debate. Your painting about the procedural guarantee and the application of the principle of proportionality is very interesting for our research, because the model that you described could represent the aim that proceeding in criminal matter has to reach. Now, I would like to give the floor to Prof. Paulo Pinto de Albuquerque. I thank him for having accepted our invitation. Paulo Pinto de Albuquerque has been Judge of the European Court of Human Rights from 2011 until two years ago; between 1992 and 2004, he has sat on the bench of different Courts in Portugal; since 2015, he has been Professor Catédratico at the Law Faculty of the Catholic University of Lisbon, where he teaches "Criminal Law and Procedure", "Penitentiary Law", "Public International Law", "International Law, Human Rights and the Philosophy of Law". He has published widely in this field of law. He has been visiting Professor in the United States of America, in China and in several European countries. He has also worked as an expert for the Council of Europe and for the European Commission. The topic of his speech is the interpretation of the concept of proceeding in criminal matter in the Case Law of the European Court of Human Rights. I would like to remember that the approach of the European Court of Human Rights is not very sensitive to guarantees: in many cases the Court has not included in the concept of proceeding in criminal matter different types of proceeding in order to apply form of non-conviction based confiscation (also with regard to the Italian preventive confiscation). In one of those cases the Judge Pinto de Albuquerque has given a very famous dissenting opinion.

Paulo Pinto de Albuquerque - Dear Anna Maria, thank you so much for this kind invitation. It's a pleasure to meet you again and to discuss these issues with you and the other colleagues. What I intend to do very briefly is to remind you of the very problematic Case Law of the European Court of Human Rights in this regard. The Court has approached these issues from three different perspective: Article 1 of the Protocol No. 1 of the ECHR, Article 6 and Article 7 of the ECHR. Sometimes it has dealt with confiscation under two or more of these Articles. Unfortunately, the results are not always consistent. We see that, for instance, in

"G.I.E.M. S.r.l. and Others v. Italy": the way the Court deals with confiscation under one Article would imply a certain solution under another Article; yet the Court does not take this further step; so, there is an internal inconsistency of the judgment of the Court, because the Court – mainly for political reasons or judicial policy reasons – is not willing to take this additional step. I have tried to describe and analyze the Case Law of the Court until "Varvara v. Italy" (a very important judgment against Italy) and I wrote separately, trying to sum up basically the main problems of inconsistency of the Case Law of the Court. Let me start by saying that in the Case Law of the Court confiscation measures have been referred to – and dealt with – "productum sceleris", which means the product of a crime (like, for instance, the famous "Gogitidze and Others v. Georgia", "Silickiene v. Lithuania" and "Phillips and Others v. The United Kingdom"), or "objectum sceleris", which is the object of a crime (like, for instances, "Agosi and Others v. The United Kingdom" and "Ismayilov v. Russia"), or "instrumentum sceleris", which means the goods, the assets that have served or could have served for the practice of a crime (for example, all the cases regarding Macedonia and Romania, about cars that have been confiscated, that were used for trafficking people or trafficking drugs). These are the classical confiscations that can be found in any Criminal Code. But you also have cases of confiscation where there is no connection to the practice of a crime, like, for instance, "Todorov and Others v. Bulgaria", "Marcus v. Latvia" and "Rummi v. Estonia". The problems start here: when there is no connection with regard to a particular crime, we may enter into murky waters and we have probably leaved the classical confiscation and are faced with the so-called non-conviction based confiscations, because they do not suppose a previous condemnation on the basis of a guilty offence. The Court has dealt with these different types of cases – which I will later try to define a little bit more – under Article 1 of Protocol 1, as means of control of use of property or as means of deprivation of property. We know that Article 1 of Protocol 1 requires that any interference with property must comply with three basic requirements: lawfulness, proportionality and public interest. Why is there an interest in separating means of control of use of property and means of deprivation of property? There is a major practical relevance of this difference, which is – as the Court has repeatedly stated– that the margin of appreciation of the State is different. When we talk about control of use of property, the margin is larger, is wider. When we talk about deprivation of property, the margin is less wide, is narrower. This is relevant in practical terms because the Court with certain consistency has used a stricter standard of evaluation of the proportionality or the public interest, when there is deprivation of property, and has accorded a wider margin of appreciation while assessing proportionality and public interest, when there is a measure of control of use of property. So, this is the first big dogmatic and practical relevance of a different standard used by the Court. Now let me pass to the core of my speech. It is related to that type of confiscations that I mentioned previously: confiscations that are not necessarily connected with the practice of a crime, the so-called cases of non-conviction based confiscation. The practice of the Court has identified four groups of cases. First group: confiscation within a criminal procedure imposed on third parties, which means people that are not parties to the criminal conviction, to the criminal procedure. So, the first group of non-conviction based confiscation is a confiscation measure imposed within the criminal procedure (there's a criminal procedure pending), but it is imposed not on the convicted person or the suspected, it's imposed on a third party: a person that has no apparent link to the crime. You can find these, for instance, in "G.I.E.M S.r.l. and Others v. Italy", "Rummi v. Estonia", "Veits v. Estonia", "Silickiene v. Lithuania", "Sud Fondi and Others v. Italy" and "Yildirim v. Italy". Second type of cases: confiscation imposed within a criminal procedure that is pending on a person that is a party to the criminal procedure, but this person has been acquitted or the procedure has been dismissed or discontinued, for substantive or procedural reasons. The person is no longer accused, is not even a suspect person, the claim of the prosecution has been dismissed fully or not (the reason for dismission is irrelevant). Here you have the cases of "Balsamo v. San Marino", "Saliba v. Malta" and "Raimondo v. Italy". Third type: confiscation which is imposed in a non-criminal procedure (may be administrative or civil) on people suspected of the practice of criminal offences. Here you have "Walsh v. The United Kingdom", "Webb v. The United Kingdom" and "Butler v. The United Kingdom". Fourth – and final – group of cases: non-conviction based confiscation which has been imposed in a procedure that is not penal in nature on people that are third parties

to this procedure, which have some relation to a suspect person. They are third parties to the procedure, but they have somehow some relations to the practice of a crime. Here you have "Cacucci and Sabatelli v. Italy", "Bongiorno and Ohers v. Italy", "Perre and Others v. Italy", "Morabito and Others v. Italy", "Arcuri and Others v. Italy" and, of course, the famous Georgian case "Gogitidze and Others v. Georgia". These are the four main groups of cases of non-conviction based confiscation in the practice of the Court. Almost all of these cases have been dealt under Article 1 of Protocol 1, but some of them have also attracted the application of Articles 6 and 7. Here is the problem: the Court is not always consistent. Sometimes for cases which are identical, which show the same characteristics, the Court applies the guarantees of Articles 6 and 7, treating them as if they were a matter of criminal law, but sometimes it does not do the same with regard to very similar measures. There's a lack of credibility in the Case Law, because if you are not consistent with the guarantees that you accord in such a delicate matter, neither the Courts nor the defendants all over Europe know what the Court will do: they lack guidance for the proper and adequate application of the law. Let me insist on the strict applicability of the "Engel criteria". According to the "Engel criteria", the vast majority of these measures would be – and should be – dealt under the criminal limb of Article 6. And a consistent application of the law would also require the application of Article 7. In my view, the problem lies not with the Case Law of the Court under Article 1 of Protocol 1, which is more or less linear: the Court has identified these four groups of cases and it has applied more or less strictly the three requirements that I have mentioned (lawfulness, proportionality and public interest), with more or less margin of appreciation for the States, depending on the fact that the measure is considered a measure of control of use or a measure of deprivation of property (in these cases the amount of money, the value of the confiscation is absolutely relevant). The problem lies with the subsequent application of Articles 6 and 7, which is not always consistent. In my view, the vast majority of the cases of non-conviction based confiscation of these four groups that I have identified in the Case Law would necessarily require the application of the guarantees of the criminal limb of Article 6, including the cases where there is no formal accusation regarding the person whose assets are being confiscated, like in the first case, when the person is a third party: he's not even a subject in the criminal procedure, but is treated as such. We see that in several countries in Europe (for instance, in Italy), where third parties to the criminal procedure suffer a lot from the application of these measures. The Court is basically tempted to deal with these measures applied to third parties, which are not subjects of the criminal procedure, under Article 1 of Protocol 1, saying that the interference is disproportionate, but then it does not go a step further and it does not identify also the violation of Articles 6 and 7. The "Engel criteria" would be certainly satisfied in these cases and would require the application of the guarantees of the criminal limb of Article 6 and, consequently, also the guarantees of Article 7. So, this is basically the status quo right now. Unfortunately, "G.I.E.M." could have been a good occasion for solving this problem and could have been a good case where the Court would systematically and consistently apply also Articles 6 and 7. But the Court failed to apply the same set of guarantees under Article 1 of Protocol 1 and Articles 6 and 7. Now we see a very absurd result: the procedural guarantees under Article 1 of Protocol 1 are sometimes much richer than the guarantees that the Court is willing to accord under Article 6. This is totally absurd! The Court runs away from the discussion of these measures of confiscation under the criminal limb of Article 6 and then applies the same or even stricter guarantees, even wider procedural guarantees, under Article 1 of Protocol 1. This is really a nonsense! A coherent and consistent Case Law would need an application of the same set of procedural guarantees under Article 1 of Protocol 1, Article 6 and, subsequently, Article 7. In my view, there's still a long way to go, there's still a great effort to be made in terms of consistency of the Court. I don't see a problem in terms of Article 1 of Protocol 1, as I said; I see a problem under Articles 6 and 7. I see that the guarantees applied are not sufficient. The Court is very sensitive to the public pressure and to the pressure of the States, when, for instance, they argue that a certain measure of confiscation is absolutely crucial for the fight against corruption or the fight against terrorism. Then, the Court retracts, backtracks and is not willing to treat these measures under Articles 6 and 7; it only applies the principle of proportionality of Article 1 of Protocol 1, which is the easiest way out. I tried to the best of my ability to change the Case Law while I was a Judge, I did not succeed, but I think the seeds for renovation are already at

the Court and I hope that future colleagues will have more success than I did. I'm happy still that at least in "G.I.E.M." we found a violation, because the opposite result would send a wrong signal to Italy and to the entire Europe. In conclusion, I think that, when these measures are preventive in nature but intrinsically punitive, there should be no hesitation in the application of the guarantees of Article 6 and Article 7. What we see is that very severe measures are taken by the States and yet they are only dealt with the procedural guarantees of Article 1 of Protocol 1. Of course, this is convenient for the prosecution and for the fight against certain types of criminality; but this lacks consistency and coherence and is not good for the reputation of the Court. I think that good cases bring good law. My hope is that lawyers will be attentive and will bring these good cases to the Court, so that they will give an opportunity for the Court to make good law. I think this is a very important topic that still remains on the agenda: with initiatives of this sort, maybe we can do a little bit for the advancement of the protection of people that are subject to these kinds of measures. Thank you so much for your attention.

Anna Maria Maugeri - Thank you for your real systematic presentation about the case law of the European Court of Human Rights, where you also stressed the problems of the approach of the European Court of Human Rights, which is so sensitive sometimes to the pressure of the States to the justification in some cases. The aim justifies the instruments, the ends: for example, the fight against mafia, the fight against drug trafficking, the fight against corruption… they all justify this approach to less safeguards and the effectiveness of this instrument is more important than the guarantees.

Paulo Pinto de Albuquerque- yes, yes.

Anna Maria Maugeri - this interpretation that the confiscation is a preventive and compensatory measure, also according with the Italian Constitutional Court… Compensatory measure means that the aim is to eliminate the profits of the crime. In my opinion, there are no problems only when we assure that the profits are from crimes. The problem is that, in many cases, we apply confiscation without confiscation, leaving the stigmatization that somebody is implied in the crime, without the guarantees of the criminal matters.

Paulo Pinto de Albuquerque - No. The elements of stigmatization is only a semantic trick. If you say these are the profits of the crime and you take the money, you are stigmatizing. If you take the money, even without convicting, but you label the person as a suspect, someone is involved: there is the stigmatization and the punitive effect. You are punishing. You can say it's a way of reparation and neutralizing, but in fact you are stigmatizing. I'm not disputing it's effective, but it's not completable with the principles of liberal criminal law, because they are treated as penal nature but considered as non-criminal and not subject to the guarantees of articles 6.2, 6.3 and 7 of the convention (so they can be applied retroactively, there is no presumption of innocence, and so on). It's convenient and efficient, it's pragmatic under the criminal policy point of view, but it has nothing to do with the classical principles of liberal criminal law.

Anna Maria Maugeri - Should be proportionate on the basis of article 1, as stated by the Court, and we should also consider the reverse burden of proof, article 6, number 1 of the Convention in the forfeiture proceeding and the civil standard of high probability. It is legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence (civil standard).

Paulo Pinto de Albuquerque - Yes.

Anna Maria Maugeri - The preponderance of evidence, the civil standard. The proof based on a balance of probabilities, or high probability, combined with the inability of the owner to prove the contrary, they can't reverse the burden of proof that was found to satisfy the proportionality test under article 1 of protocol number

1. So, in some way, the presumption of innocence does not raise a problem of consistency with article 6 number 2, but with article 1.
Antonio Balsamo, you talked about many guarantees of jurisdictional approach. That is very important. But, in your opinion, it is enough that it respects article 6 number 1 and 3? It means a lot, because article 6 number 3 include also many guarantees on the procedural point to view (e.g., to be informed promptly, to have the time and facility to the preparation or the defence, to examine the witnesses against, and so on). But in your presentation, you also quoted the presumption of innocence as a rule of the judgment. But so it means that, under article 6 number 2, the presumption of innocence is relevant in this cases or it is not relevant? This is the opinion of the European Court that, for example, for Italian preventing confiscation, we have to apply article 6 number one, but we have we do not have to apply article 6 number 2.
Which is your opinion, Antonio?

Antonio Balsamo - Thank you, Anna Maria. I think that the presumption of innocence may be also applied. And, indeed, it is applied if we take into account the law in action, they real criterion, that is at the basis of the evaluations conducted by the court. It is consistent with the concrete meaning of the presumption of innocence. I think that there has been an evolutionary trend in the jurisprudence in Italy, due to the increase in the dialogue between the courts and also to the influence of important ideas those were adopted by some of the most prominent judges of the European Court, such as Paulo Pinto de Albuquerque, whose ideas have had a strong impact on the mindset of the Italian judiciary. In my opinion, on the basis of this evolution, at present the assessment is conducted by the judges when they have to decide on a confiscation both in a criminal and non-criminal proceeding, in compliance with the idea of reasonable doubt. The idea of preponderance of evidence is recessive, it belongs to the past and is typical of civil proceedings. I'm sure that now the criminal courts that deal with asset confiscation adopt a rule of judgment based on the burden of proof behind any reasonable doubt. Also the Court of Cassation has now clarified that no superficial assessment is admissible: there is an increase of the effectiveness of guarantees, beyond the formal qualification. Another dimension of the presumption of innocence to be reinterpreted in such a way, to avoid any confusion between criminal proceedings and specialised trial assets. It is important that every statement makes specific reference to the nature of the proceedings however there is a clear approached based on self-restraint in the way of communicating of strategy of justice. Nothing can be against the extension of the scope of application of article 6 paragraph 2.

Paulo Pinto de Albuquerque - I agree with Antonio because the Court found the violation of article 6 paragraph 2 with regard to Mr Gironda, but there was no violation of article 7. How could the Court states that there was a violation of article 6.2 and not find a violation of article 7? Given that violation of article 6 implies the violation of article 7, stated by the Court clearly in general part. It was no consistent.

Anna Maria Maugeri - this case was a formal confiscation recognized as a criminal sanction, but applied even when the crime is statue barred. Confiscation without conviction is applied without the guarantee of the statute of limitation.

Francisco Jimenez Villarejo - in the Regulation there is a specific reference to the case law of the EuCHR on the concept of proceedings in criminal matters, but no reference to the case law on recital 18 (set of guarantees applicable to proceedings in criminal matters that are not criminal proceedings).
The question is: is it necessary to apply the whole set of guarantees to this other kind of proceedings in criminal matters? Because it would be very difficult to double check for the executing authority the compliance to this set of guarantees that we are not familiar with. We are used to check the compliance with the Engel criteria. Is it a good solution? Whenever non judicial authorities are releasing this certificate, we have the institute of validation and the release on the mutual trust principle.

Paulo Pinto de Albuquerque - we have the same Spanish problem in Portugal, because we do not have preventive confiscation as you do have in Italy. So, if there is a request of judicial cooperation with regard of such a measure, should we focus or not on the basic fundamental guarantees? Yes, those of article 6 number 2 and 3. This request of international cooperation comes from non-judicial authorities, and we should rely on the validation of the authorities (that are independent parties). The problem is that I think that confiscation has been upgraded as the most effective means of fighting against organized crime and this is correct in practical terms, it is an extremely efficient mean, but if it is so efficient it has to be supported by the guarantees of articles 6.2 and 6.3 of the convention and article 7 as to be applied too, as the Court stated in GIEM. It's a great judgment in the general part, because it states that if there is a violation of article 6, than there is a violation of article 7, but this general principle was not applied in the concrete case, and so it was inconsistent. To sum up, the answer is yes: basic guarantees should be compliant with both the requesting State and the requested State, in case of international cooperation, and if it comes from non-judicial authority a validation should be required regarding this guarantees. It is not necessary a judge, but an independent assessment of the compatibility of the measure with the basic guarantees of article 6.2 and 6.3.

Anna Maria Maugeri: About this aspect of the safeguards, the guarantees to apply this regulation (for example, first of all, the standard of proof). Also another aspect, the application or the principle of legality, that means also the principle of non-retroactivity. Because if we talk about the guarantee of the criminal matter, we have to talk not only about legality: it is not enough that there is a law that gives the rule for the application of the conversation, but it's also important the principle of non-retroactivity, that is a specific principle of criminal law in Italy. For example, the principle of non-retroactivity is not applied to the extended confiscation, even if a constant conversation is applied after conviction or to the preventive confiscation, because it's a preventive measure of security and not a criminal sanction. If we want to apply the guarantee of the criminal matter, we have to apply also this principle.
Let me now introduce Filippo Spiezia, head of the Italian desk in Eurojust and expert of judicial cooperation. He will talk about the first praxis in the application of the Regulation and the issues connected to the first application of the Regulation. In particular, analysing this aspect, we will talk about what means "proceeding criminal matter" and which are the safeguards in order to apply this Regulation.

Filippo Spiezia – Thank you, professor Maugeri. Good afternoon to you all, dear professors, colleagues and friends world-wide connected. First of all, my apologies: I managed to join you for this very interesting workshop only now, but as Francesco Jimenez is very well aware, having been the previous Spanish NM for Eurojust, on Tuesday we have college meeting at Eurojust, so I beg your pardon if probably I'm saying also something that has already been expressed during the workshop so far. Thank you, Prof.ssa Maugeri, for your kind introduction in relation to my person and professional career. When I hear all these, I get persuaded that I'm getting older, because only when you are quite old, you can count some achievements. It short, I can say that I prefer to be presented only in this way: I'm an enthusiastic of my work, judicial cooperation. And in this position, I would like to share some considerations, some thoughts, with you in relation to this very interesting topic that you have chosen. I would like to start that uh from some data. In the view of this meeting, I've requested to my analysts to calculate the number of cases registered at the Eurojust and, as far as the Italian desk is concerned in relation to freezing and confiscation from 2016 to December 2022, and we count more than 200 cases, 223 operational cases. Overall, this is a considerable amount of operational cases (with cases I'm referring to corresponding proceedings in Italy). Overcome judicial cooperation problems, especially in the field of assets recovery, confiscation of criminal aspects in an area that remain very challenging. The EU legislator is aware of this: in this area we can count many treaties and legal instruments, but this can be interpreted also as a sign of the persisting problems in this area. The main output of Eurojust expertise has been shared at National level with practitioners trough dedicated reports, for example the report of 2019 on

assets recovery and with the last year report on money laundering. In relation to the title of one of this reports, the fight against crime and its complexity, I can see a link with Falcone's speech of 1988: how much time has passed, and how the situation still remain the same. It is worth recalling what Falcone said *"the money has the hearts of the rabbits, but the legs of the hare"*

Filippo Spiezia – We are confronting with criminal organizations which have enormous power in terms of economic capacities. The key message, according to Giovanni Falcone, is the possibility to deprive criminal organizations of the proceeds of crimes. I also would like to talk about an initiative we took in the context of Eurojust, which involved Guardia di Finanza, an Italian military force devoted to trace criminal assets: it was a protocol to start bilateral cooperation by analyzing so called "cold cases" regarding asset recovery and confiscation of criminal assets. The outcome of this protocol was first release on 2022 and it has a chapter on the issue of non-conviction-based confiscations. There are four models of this type of confiscations in the context of EU Member States: the "classic" non-conviction-based confiscation, which apply when the conviction is not possible because of the death of the defendant or because of immunity, etc.; the second type of non-conviction-based confiscation includes the "extended confiscation", which apply on assets that are not related to crimes for which a conviction has been issued; the third one consists in an actio in rem, i.e. types of confiscation ordered in proceedings against property and not people; the fourth type of confiscation, which includes Italian misure di prevenzione, consists in confiscation of unexplained wealth, such as goods that are not proportional to legal incomes of the person. The majority of EU Member States adopted the first type of non-conviction-based confiscation, while only thirteen of them established other types of measures such as, for example, actio in rem. In the matter of the notion of "criminal proceedings" and in order to define the concept it is the essential to consider the features enlightened in relation to the ne bis in idem principle. According to the Jursdprudence of the Court of Justice the main features of proceedings in criminal matter can be considered are the following: the proceeding must be foreseen and ruled by a law; the proceeding must be held by a judicial authority (such as a judicial courts); the proceeding must offer safeguards, such as the right to appeal the decision; the final decision should have the features of substantial penalty, although it has the form of civil or administrative sanction, for its gravity and seriousness. From this point of view, it's difficult to fully apply the Regulation 1805/2018 to proceedings whit nonconviction-based confiscation as Italian misure di Prevenzione.:the aim of these types of confiscation is to deprive someone of enrichment that is not legally justifiable. So It would not be possible to affirm that these proceedings led to a "substantial penalty" unless we enlarge the notion itself.
I think that we need to decide, at European level, if we want to have a common answer to this question: do we want to have efficient instruments in order to deprive criminal organizations of proceeds of crime and of any sort of unexplained wealth? In my opinion, the main flaw of the discipline provided by the Regulation is that its concrete applicability still depends on the decision of national judges, in line with the legal features of their national systems. Because the latter remain quite disharmonized, the implementation of the not conviction based confiscation remain a challenged at EU level although there is an attempt to broaden to scope of the action in the matter in the Regulation 1805/2018.If we scrutinize other international legal instruments we can say that the main feature and the ground to have some legal chances in order to impelement aborad not conviction based confiscations is that the proceeding, of judicla nature, should always present some link nwith criminal activity. The more such link is evident and demonstrated the more we can count on the possibility to execute such decision.

Anna Maria Maugeri - Thank you Mr. Spiezia. Now I would like to give the floor to other participants if they have questions on these topics.

Ernesto Savona (Transcrime) - I would like to thank Mr. Spiezia for his intervention. I have a question: how can we get some data on the application of the regulation? It would be extremely relevant for us to gain information about the number of EU States who requested to apply its discipline or about the possible reasons for refusing execution.

Filippo Spiezia – Thanks a lot Prof. Savona for your question. First of all, some of these cases dealt at Eurojust are still pending, so it's not possible to have disclosure on some of them. Also, we have in house all the data you mentioned but the problem is that we don't have sufficient power to make a systematic analysis of all the Eurojust cases: we need more staff members in order to do that. In relation to the Italian situation, we're preparing the 2022 report and one of the topics of this report will be, indeed, the level of implementation of the 2018 regulation: you might find some relevant data about the requesting States or concerning the reasons of refusal.

Ernesto Savona - May I ask another question? Mr. Spiezia you are an expert in this field. What do you think about the experience of judges in evaluating the request from another Country?

Filippo Spiezia - It's an important issue. Surely, training of national Courts would be needed. Another option, in order to guarantee a uniform response, could be identifying a competent court at national level.

Anna Maria Maugeri - I have one question for you, Mr. Spiezia. Why do your colleagues think that Italian *confisca di prevenzione* or other similar types of non-conviction-based confiscations don't fall within the scope of the regulation?

Filippo Spiezia – In my opinion we don't have yet a definition of "proceeding in criminal matters" because the 13th recital was simply a text of compromise, that was introduced to give an answer to the Italian delegation during the negotiation for the need to enlarge the scope of the instrument, but, when we have a compromise solution without sufficient clarity, the results are what we see on the table. So, to be frank with you, I don't think this is a clear concept, which can justify the application of the principle of mutual recognition proceedings in EU Member States in the specific matter. When we talk about measures that might restrict the right of property, we need clear definitions and clear legal basis this is not the case. This is the reason why my colleagues struggle to include this type of confiscation when they resort to the Regulation 1805.

Anna Maria Maugeri - I think this is the aim and the challenge to our research. Maybe Francisco has some questions.

Francisco Jiménez-Villarejo Fernández - I fully agree with Filippo on the necessity of having guidance on the meaning of the concept of "proceeding in criminal matters". The issue that we have on the table is very relevant. I would like to make a reference to the decision taken by the Luxembourg Court on the 19th of march 2020: in that case (C-234/2018) the Court pointed out that EU Law does not preclude the legislation of a Member State to provide the confiscation of illegally obtained assets ordered by a national court following proceedings which are not subject to national criminal law.

Anna Maria Maugeri - Another topic I would like to talk about is the safeguards provided by the proceedings which fall within the scope of the regulation. The 18th recital concerns this matter. My question is: may we

include among these guarantees the ones established for criminal proceedings? For example, those that concern the standard of prove.

Filippo Spiezia - The answer to this question is strictly related to the nature of the proceedings we are talking about: if we deal with proceedings in "criminal matters", although not criminal proceedings, the level of guarantees have to reach to a high standard. Surely, as the European Court of Human Rights and the European Court of Justice states, we must avoid the so called *"truffa delle etichette"* (lit. fraud of labels). In order to do so, we have to look to the substance of proceedings. As I said before, relevant results can be achieved with different procedures such as civil or administrative procedures

Joao Conde Correia (GP PT- Portugal) - I think that the level of guarantees depends on the nature of the measure and the proceeding that led to its application. In Portugal, we have both criminal and non-criminal measures, but the common opinion here is that confiscation usually is not a penalty. Therefore, in this case, we should not apply the safeguards provided for criminal proceedings.

Arnaud de Blesson (MoJ FR – France) - I share the point of view of Mr. Correia. I would like to point out that in French legislation we have also the possibility to appeal the decision that applies freezing order.

Janne Lise de Boer - The situation in Netherlands is quite complex. We have two confiscation procedures in criminal law: we have the object confiscation procedure and the value confiscation procedure. In the latter procedure we don't need to prove a direct or indirect link between the item and the criminal offense. Next to that, there is a non-conviction-based confiscation procedure and in this procedure a person of interest has safeguards as in criminal one. I think that it's important to comprehend other national disciplines because we must help national judges to assess the nature of the decision they are called to recognize.
Janne Lise de Boer - I agree with my colleague. It's important to comprehend how the cooperation between States can work in this matter. I also agree with Filippo on the lack of clarity of the concept "proceedings in criminal matter".

Anna Sakellaraki - The German criminal procedural code sets a standard in between criminal and civil standard of prove. In relation to non-conviction-based confiscations, the Constitutional Court also stated that the principle of non-retroactivity is not applicable, because these measures have the purpose to reinstate the *status quo ante*.

Vanya Ilieva - As a practitioner I'm more familiar with the criminal procedure. I think that in this procedure, of course, should be applied the safeguards provided for criminal issues. The problem is when we are talking about more generical "proceedings in criminal matters", i.e. other types of proceedings that are linked to a crime: we cannot fully understand what this link is. We need a strict definition of this concept in order to establish which safeguards we should recognize.

Michele Fini - I think that the concept we have in the regulation of "criminal proceedings" is not enough. As Filippo said, we have many types of confiscation throughout the Member States: we have got non-conviction-based confiscation carried out within civil proceedings, administrative proceedings etc. So, all the problems related to confiscation cannot be solved by a single definition. We should start re-considering the matter from the principles and the guarantees: for example, the presumption of innocence.

Francisco Jiménez-Villarejo Fernández - On this topic I would like to remind that we are dealing with the right of property, which is not a fundamental right. The other thing to remember is that, because we are talking

to mutual recognition, we must not reevaluate the merits of the case and, therefore, the approach should be limited. The safeguards on which rely the mutual recognition are indicated in the article 8 and 19.

Anna Maria Maugeri - I would like to point out that, as the European Court of Human Rights suggested, fundamental rights we must guarantee in these proceedings are the right of defense and the principle of adversary hearings.

Witold Jakimko - I believe that the goal of this project is to determine how far we can go with this recognizing procedure. Coming back to the matter of central courts specialized in this kind of procedures, I don't think that it is possible to admit specialized judges: the Poland Constitution does not allow that.