

# the “clear and convincing evidence” standard

- Article 5 could be interpreted like the “clear and convincing evidence” standard, a reinforced civil standard which ensures that the unlawful origin of the proceeds *is certainly more probable than not*.
- **The civil standard of the proof, even if strengthened, will cause an inevitable weakening of the safeguards of “criminal matter”, firstly of the presumption of innocence and the right to defense.**
- The civil standard of the proof is acceptable only in civil cases because “the society has a minimum interest in the outcomes of these private cases”.
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# ECHR

- the European CourtHR held that
- **the right to be presumed innocent under Article 6 § 2 doesn't arise in confiscation proceedings,**
- **which adopt the civil standard of the proof** (British and Dutch *confiscation*),
- because they don't involve being charged with a criminal offence, ex art. 6, c. 2 CEDU or
- a *new charge* within the autonomous Convention meaning;
- only the principle of the fair trial ex art. 6, c. 1 is applied,
- provided that **the presumptions aren't absolute and remain within reasonable limits,**
- and maintain the **rights of the defence.**

# Art. 5 and recital n. 21: Disproportionality

- *“the value of the property is disproportionate to the lawful income of the convicted person”*
- The recital n. 21 also suggests considering
- **“the fact that the property of the person is disproportionate to his lawful income”** “among those facts giving rise to a conclusion of the court that the property derives from criminal conduct”.

# This element is requested by

- art. 240 bis c.p. (extended confiscation after conviction) of the Italian system of law (and also for the confiscation preventive measure)
- and by the Art. 127 bis Código Penal (*L.O. 1/2015*), comiso ampliado
- Art. 437 StPO (special rules for the independent recovery procedure) gross disproportion (2017 reform)

# Temporal limitation of the presumption of the illegal origin

- The recital n. 21 contains another important element to limit the application of the extended confiscation:
- “Member States could also determine a requirement for **a certain period of time** during which the property could be deemed to have originated from criminal conduct”.

# Temporal limit: proportionality

- In some systems of law **the presumption of the illegal origin** of the convicted person's assets
- **is temporally limited**
- **in order to respect the principle of proportionality and not demanding a probatio diabolica**

(to demonstrate the lawful origin of the whole estate without temporal limit);  
for example in the British system for 6 years (Proceeds of Crime Act 2002 allow the courts, save for proof to the contrary, to deem that all property acquired by the convicted individual in the six years prior to the conviction, and also thereafter, constitutes the proceeds of unlawful activities).

# “up to the assessed value of the intermingled proceeds”

- Another important limit to the extension of this model of confiscation derives from the definition of the concept of proceeds offered by the directive’s **recital n. 11**:
- “Thus proceeds can include any property ...that which has been intermingled with property acquired from legitimate sources, **up to the assessed value of the intermingled proceeds**”.

# Impresa mafiosa

- This specification – “up to the assessed value of the intermingled proceeds” – is very important

- **against**

- **the temptation of the Italian Supreme Court to apply the extended confiscation or the preventive measure to entire companies (impresa mafiosa)**
- 
- **when the illicit proceeds were invested in the business, because it would be impossible to separate licit from illicit property;**
- **in this way the extended confiscation becomes a kind of general confiscation, a disproportionate punishment in violation of the legality principle and of the constitutional protection of the private property, as well as of the principle of proportionality**
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# recital n. 17 and 18: clause of proportionality

- the Directive (recital n. 17 and 18) provides for the introduction of the
- **clause to ensure compliance with the principle of proportionality**, established in some legal systems (before 2017 *Härtevorschrift*, § 73 c StGB, *Grundsatz der Verhältnismäßigkeit* § 74 b StGB)
- (17) For the **confiscation of property the value of which corresponds to instrumentalities**
- (18) in exceptional circumstances, **when confiscation represent undue hardship for the affected person**,
- in cases where it would put the person concerned in a situation in which **it would be very difficult for him to survive.**

# NON-CONVICTION BASED CONFISCATION

- **ACTIO IN REM**
- **A kind of confiscation which can be applied in the absence of any conviction for the crime, from which the profits derive.**
- **Confiscation is ordered in an independent proceeding against the proceeds or the instruments of the crime (*actio in rem*).**

- *civil forfeiture* of the United States
- Confisca di prevenzione (art. 24 Antimafia code, dlgs. n. 159/2011)
- UK, [Proceeds of Crime Act 2002](#) (**Drug Trafficking Act 1994**) cash forfeiture proceedings and [civil recovery](#)
- **Civil forfeiture** in Ireland (Proceeds of Crime Act 1996, as amended by the 2005 Act, and Social Welfare and Revenue legislation)
- **Decomiso sin sentencia** art. 127 ter CP (Ley organica 1/2015)
- § 76 a StGB **Selbständige Einziehung** and § 437 comma 2 StPO-E : “*Verfahren gegen die Sache*”  
Reg-E, S. 108 (§ 422 ss. StPO- Abtrennung der Einziehung, 436 StPO, § 76 a I StGB)

## Harmonisation: Art. 4 of the Directive

### Non conviction based confiscation.

- The Art. 4 of the Directive (art. 5 of the proposal) introduces a
- *non-conviction based confiscation* in limited circumstances, with a view to addressing cases where criminal prosecution cannot be exercised because
- the suspect is permanently ill or
- when his flight or illness prevents **effective prosecution** within a reasonable time and poses the risk that it could be barred by statutory limitation.

# It mirrors the provisions of the

- United Nations Convention against Corruption [Art. 54, (1)(c)]
- OECD Financial Action Task Force (FATF),
- Camden Asset Recovery Inter-Agency Network and the Asset Recovery Offices' Platform
- European Resolution 2011

# The case of the suspect's death

- In the Proposal it was included also the case of the suspect's death (art. 5);
- the Italian and British system of law provide for this case, considered very important in the fight against the organised crime

# only the confiscation of the property

- It seems possible to apply without conviction only the confiscation of the property provided by art. 2 of the Directive
- and not also the extended confiscation by art. 5, as it has been already established in several legal systems

# Article 4, § 2, and the recital n. 15:

- Article. 4, § 2, or the recital n. 15 does not exclude the possibility that a Member State may introduce forms of confiscation without conviction in other situations;
- both specify that the non-conviction based confiscation has to be guaranteed
- “at least in the cases of illness or absconding of the suspected or accused person”



## the nature of the confiscation

- **The Directive, in fact, allows the MS to choose the nature of the confiscation;**
- **this is established in the recital n. 13:** “Freezing and confiscation under this Directive are autonomous concepts, which should not prevent Member States from implementing this Directive using instruments which, in accordance with national law, would be considered as sanctions or other types of measures”
- **or in the recital n. 10 :**“Member States are free to bring confiscation proceedings which are linked to a criminal case before any competent court”.

# Procedural safeguards: art. 8 of the directive n. 42/2014

- art. 8 of the directive imposes the safeguards of the proceeding, ensuring to the persons affected by the measures the right to an
- **effective remedy and**
- **a fair trial in order to uphold their rights;**
- **adversarial judicial proceeding**

The directive has been implemented by as many as 25 countries:

- *extending* the scope of the mandatory confiscation of profit and the instruments of the crime, also in light of the broad notion of profit envisaged by the Directive (as happened in the Austrian law which extended the confiscation pursuant to § 19 to StGB also from surrogates);

- with forms of extended confiscation

(already introduced in various legal systems, such as the **Spanish decomiso ampliado** pursuant to art.127 bis CP, introduced by organic law 5/2010,

art.12 sexies d.l. 306 / '92 in the Italian system - now **240 bis** of the Criminal Code (Leg. Decree no. 21/ 2018)

-, or the **German Erweiterter Verfall ex § 73 d StGB** now

**Erweiterter Einziehung ex § 73 StGB** (Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung vom 13.04.2017, BGBl. I S. 872, precisely in implementation of the Directive)

- or, as happened in France, for example, by **extending the scope of the general confiscation of assets,**

a form of confiscation not provided for by the Directive, but known in this legal system in the context of the fight against serious criminal phenomena such as, lastly, the arms trafficking (Article 222-66 introduced by art.26 of LOI n.2016-731 du 3 juin 2016); o

**also introducing confiscation without conviction,** at least in the case of flight and illness as occurred in the Austrian legal system (§ 445), or

beyond the hypotheses provided for in the directive, - in the case of the death of the offender, extinction of the crime, lack of responsibility -, as occurred in the Spanish legal system (el decomiso sin sentencia, art. 127 ter CP, Ley organica 1/2015)

# Revision of the directive

- In 2019, following a joint statement by the Parliament and Council, a dedicated staff working document on non-conviction based confiscation measures in the EU was prepared by the Commission, followed in June 2020 by
- a report, **Asset recovery and confiscation: ensuring crime does not pay, assessing the opportunity to introduce new rules.**
- In its 2021 work programme, the Commission announced its intention to revise the 2014 Directive, as well as Council Decision 2007/845/JHA on asset recovery offices, both being closely interlinked.
- This implementation appraisal looks at the practical implementation of the directive in light of the expected Commission proposal for its revision. The Commission work programme had planned the proposal for the fourth quarter of 2021; it was postponed to the second quarter of 2022.

# The main challenges

- **The scope of the directive is too narrow and leaves aside certain criminal offences.**
- **The confiscation regimes are not far-reaching enough; extended confiscation and NCBC are allowed for a limited number of criminal offences or situations.**
- There is full harmonisation; Member States adopted rules that go beyond minimum standards such as freezing, extended confiscation and NCBC.
- The lack of obligation to reuse confiscated property for public or social interests did not enable a model that supports victims' compensation or social interests.
- There is limited capacity in AROs to execute their tasks at national and at EU level.
- There are concerns regarding the lack of systematic access to databases and information (including SIENA),
- insufficient operational powers, lack of financial, human and technical resources, and weak interinstitutional cooperation.
- The lack of comparable data and a centralised data base of assets that have been frozen and confiscated hamper cross-border cooperation.
- The poor management of frozen and confiscated assets does not allow for compensation of victims and reuse for social purposes.
- The non-alignment of AROs' data with GDPR needs to be addressed.

# Art. 3, new proposal

- (1) 'proceeds' means any economic advantage derived directly or indirectly from a criminal offence
- consisting of any form of property, and including any **subsequent reinvestment** or
- **transformation of direct proceeds and any valuable benefits;**

- 2) 'property' means property of any description,
- whether corporeal or incorporeal,
- movable or immovable, and
- legal documents or instruments evidencing title or interest in such property;



# Art. 13. Confiscation from a third party

- 1. Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person. The confiscation of these proceeds or other property shall be enabled where it has been established that those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.
- 2. Paragraph 1 shall not affect the rights of bona fide third parties.

## *Article 14*

### **Extended confiscation (new proposal)**

- 1. Member States shall take the necessary measures to enable the confiscation, either wholly or in part, of property belonging to a person convicted of a criminal offence where this offence is liable to give rise, directly or indirectly, to economic benefit, and where the national court is satisfied that the property is derived from criminal conduct.
- 2. In determining whether the property in question is derived from criminal conduct, account shall be taken of all the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person

## *Article 15*

### **Non-conviction based confiscation (proposal)**

- 1. Member States shall take the necessary measures to enable, under the conditions set out in paragraph 2, the confiscation of instrumentalities and proceeds, or property as referred to in Article 12, or which was transferred to third parties as referred to in Article 13, in cases where criminal proceedings have been initiated but the proceedings could not be continued because of the following circumstances:
  - (a) illness of the suspected or accused person;
  - (b) absconding of the suspected or accused person;
  - (c) death of the suspected or accused person;
  - (d) immunity from prosecution of the suspected or accused person, as provided for under national law;
  - (e) amnesty granted to the suspected or accused person, as provided for under national law;
  - (f) the time limits prescribed by national law have expired, where such limits are not sufficiently long to allow for the effective investigation and prosecution of the relevant criminal offences.

- 2. Confiscation without a prior conviction shall be limited to criminal offences liable to give rise, directly or indirectly, to substantial economic benefit and only insofar as the national court is satisfied that all the elements of the offence are present.
- 3. Before a confiscation order within the meaning of paragraphs 1 and 2 is issued by the court, Member States shall ensure that the affected person's rights of defence are respected including by awarding access to the file and the right to be heard on issues of law and fact.
- 4. For the purposes of this Article, the notion of 'criminal offence' shall include offences listed in Article 2 when punishable by deprivation of liberty of a maximum of at least four years.

# Article 16 Confiscation of unexplained wealth linked to criminal activities

- 1. Member States shall take the necessary measures to enable the confiscation of property, where confiscation is not possible pursuant to Articles 12 to 15 and the following conditions are fulfilled:
  - (a) the property is frozen in the context of an investigation into criminal offences committed in the framework of a criminal organisation;
  - (b) the criminal offence pursuant to point (a) is liable to give rise, directly or indirectly, to substantial economic benefit;
  - (c) the national court is satisfied that the frozen property is derived from criminal offences committed in the framework of a criminal organisation.
- 2. When determining whether the frozen property is derived from criminal offences, account shall be taken of all the circumstances of the case, **including the specific facts and available evidence, such as that the value of the property is substantially disproportionate to the lawful income of the owner of the property.**
- 3. For the purposes of this Article, **the notion of ‘criminal offence’ shall include offences referred to in Article 2 when punishable by deprivation of liberty of a maximum of at least four years.**
- 4. Before a confiscation order within the meaning of paragraphs 1 and 2 is issued by the court, Member States shall ensure that the affected person’s rights of defence are respected including by awarding access to the file and the right to be heard on issues of law and fact.

# The proposal of the LIBE Committee

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

LIBE Committee, Report European Parliament resolution of 25 October 2011 on organised crime in the European Union ([2010/2309\(INI\)](#)),

## Non-conviction based confiscation: criminal sanction

- Libe Committee proposed to consider this model of confiscation a “criminal sanction” **in the autonomous meaning of the European Court HR**, in compliance with the art. 6 and 7 ECHR;
- so this involves the application of the
- **presumption of innocence** and of the
- **principle of legality** and of **no retroactivity of the law.**

# Limit of the scope

- The Commission limits the application of this kind of confiscation to the sector of the **fight against the organised crime.**



# model of “*actio in rem*”

- further effort is necessary to determine if it is possible to elaborate a broader model of “*actio in rem*” reflecting
- the proposals of the Recommendation of the European Parliament (2011) and the FATF Recommendations, and
- complying with the highest standards of safeguards and judicial control, as proposed by the LIBE Committee

Thank you for your attention