

RECOVER

I RESEARCH QUESTIONNAIRE - II WORKPACKAGE

“ESTABLISHING THE SUBJECT MATTER OF THE REGULATION”:

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

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

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

Criminal Confiscation

According to the French Criminal Code, the penalty of confiscation determines the permanent transfer of property ownership to the state. Its primary objective is to penalize the perpetration of a criminal act committed by an individual or entity. It can solely be enforced through judicial ruling against an individual who is guilty of an offence.

In the French legal system, “Criminal offences are classified, according to their seriousness, into felonies, misdemeanours and contraventions”.¹ Felonies (“*crimes*”) and misdemeanours (“*délits*”) are the most serious forms of offence, while contraventions are the least serious category, where the main penalty incurred is a fine of less than or equal to 3,000 euros.

As a penalty, confiscation can be either a **complementary** or an **alternative** to imprisonment.

A. Confiscation as a complementary penalty to imprisonment

Where the law provides, natural persons who are convicted of a crime may be punished, in addition to the principal penalties, by the **confiscation of an object or animal**. As a complementary penalty, confiscation applies both to crimes (“*crimes*”) and “*délits*”) and contraventions.

Numerous criminal texts include provisions for the application of confiscation, which can be imposed on specific assets. In addition to these specific regulations, there exists a broader framework outlined in Article 131-21 of the Criminal Code. This particular provision is applicable to all offenses providing for at least 1-year prison sentence, excluding those related to the press.

For the cases falling below the one-year imprisonment threshold, the application of confiscation relies on the existence of a corresponding law, regardless of whether the offense is categorized as a misdemeanour or a contravention, and irrespective of whether it is covered by the Criminal Code or any other legal or regulatory body within the penal system.

As regards crimes (“*crimes*”) and “*délits*”), Art. 131-21 PC provides for the following confiscation models:

¹ Art. 111-1 PC.

- Confiscation of the **instrument of the offence**: as a supplementary criminal penalty incurred by natural persons, confiscation may relate to all movable or immovable property, whatever its nature, whether divided or undivided, which has been used to commit the offence or which was intended to commit the offence, and of which the convicted person is the owner or, subject to the rights of the owner in good faith, of which he or she has at their disposal.² Under the conditions of Art. 131-21-1, this confiscation also applies to animals.
- Confiscation of the **object or proceeds** of the offence: confiscation may involve all property, which is the direct or indirect object or proceeds of the offence, except for property that may be returned to the victim, in accordance with the relevant provisions of the Dir. 2014/42/EU and of the Reg. (EU) 2018/1805.³ Art. 131-21(3) also clarifies that “if the proceeds of the offence have been mixed with funds of licit origin for the acquisition of one or more items of property, the confiscation may be limited to the estimated value of the proceeds”.
- Confiscation of a **specially defined property**: additionally, confiscation may also involve any movable or immovable property defined by the law or regulation that punishes the offence.⁴

In general, and subject to the clarifications set out below, criminal confiscation may apply both to crimes and contraventions, and both to natural and to legal persons. We need to distinguish those hypotheses.

- **Crimes (“*crimes*” and “*délits*”):**
 - **Natural persons**: as regards natural persons, criminal confiscation applies to adults and to minors aged 13 to 18.⁵
 - **Legal persons**: as regards legal persons, Art. 131-39 PC states that where the law so provides, a legal person may be sanctioned with the penalty of confiscation, under the conditions and in the manner provided for in Art. 131-21 PC.⁶ Legal persons are also subject to the confiscation of the animal used to commit the offence or against which the offence was committed.⁷
- **Contraventions**
 - **Natural persons**: Art. 131-16 PC states that the regulation punishing contravention may provide one or more of the following additional penalties when the offender is a natural person:
 - I. Confiscation of one or more weapons owned or freely available to the convicted person.
 - II. Confiscation of the thing that was used or intended to be used in the commission of the offence or of the thing that is the product of the offence.
 - III. Confiscation of the animal that was used to commit the offence or against which the offence was committed.⁸

For contraventions, the confiscation of property whose origin could not be justified or that of property having no link with any offence cannot be applied.
 - **Legal persons**: Following Art. 131-43 PC, the regulation that punishes a contravention may provide, when the offender is a legal person, for the complementary penalties of

² Art. 131-21(2) PC.

³ Art. 131-21(3) PC.

⁴ Art. 131-21(4) PC.

⁵ G. GIUDICELLI-DELAGE, O. CAHN, J. TRICOT, ET AL., *France*, in A. BERNARDI, *Improving Confiscation Procedures in the European Union*, Jovene Editore, Napoli, 2019.

⁶ Art. 131-39(8) PC.

⁷ Cfr. Art. 131-39(10) PC, referring to Art. 131-21-1 PC.

⁸ Art. 131-16(3,5,8) PC.

confiscation of the instrument or of the product of the offence⁹ and confiscation of the animal.¹⁰

B. Confiscation as an alternative penalty to imprisonment

Again, we need to distinguish between crimes and contraventions:

- **Crimes (“*crimes*” and “*délits*”)**

- **Natural persons:** according to the art. 131-6 PC, where an offence is punishable by imprisonment, the court may, instead of imprisonment, impose one or more of the following custodial or restrictive sentences:

- I. Confiscation of one or more vehicles belonging to the convicted person.
- II. The confiscation of one or more weapons owned or freely available to the convicted person.
- III. The confiscation of the thing that was used or intended to be used to commit the offence or the thing that is the product of the offence. However, this confiscation cannot be pronounced in the case of press offences.¹¹

- **Contraventions**

As an alternative penalty, confiscation applies to "fifth class" administrative fines. The fifth class fines are used to punish the most serious administrative fines (e.g., driving without a licence or without insurance), and they are imposed by the courts.

According to art. 131-14 PC, for all fifth-class offences, both against natural and legal persons, one or more of the following penalties of deprivation or restriction of rights may be imposed:

- I. Confiscation of one or more weapons owned or freely available to the convicted person.
- II. The confiscation of the thing that was used or intended to be used to commit the offence or the thing that is the product of the offence. However, such confiscation may not be ordered in respect of press offences.¹²

Extended Confiscation

French criminal law encompasses two forms of extended confiscation. Firstly, it encompasses the failure to establish the lawful origin of the property, as provided for in paragraph 5 of article 131-21 of the Criminal Code. Secondly, it includes the so-called general confiscation (confiscation of patrimony), which is specified in paragraph 6 of the same article.

In the first case, the link between the property and the offense is legally presumed. The text specifies that: “In the case of a felony or misdemeanor punishable by at least five years’ imprisonment and resulting in direct or indirect profit, confiscation shall also encompass movable or immovable property, regardless of its nature, divided or undivided, belonging to the convicted person or, subject to the rights of the owner in good faith, over which they have unrestricted control, provided that neither the convicted person nor the owner, given the opportunity to explain the property subject to potential confiscation, can justify its source”.

Hence, as indicated at the end of the paragraph, confiscation does not depend on evidence proving that the property is directly or indirectly derived from the offense. Instead, it pertains to the convicted person's inability to prove its origin, specifically that it was legally acquired using funds of lawful origin. The primary consequence is that the burden of proof lies with the person prosecuted, not the prosecution.

⁹ Art. 131-16(5) PC.

¹⁰ Art. 131-16(8) PC.

¹¹ Art. 131-6(4,7,10) PC.

¹² Art. 131-14(3,6) PC.

In the second case, the link between the property and the offense is legally disregarded. Art. 131-21, paragraph 6, states that: “where the law governing the felony or misdemeanor so provides, confiscation may also cover all or part of the property belonging to the convicted person or, subject to the rights of the owner in good faith, over which they have unrestricted control, regardless of its nature, whether movable or immovable, divided or undivided”. This penalty is applicable to the most serious offenses strictly enumerated by law.

Furthermore, this felony or misdemeanor must have generated a direct or indirect profit. The assessment of the profit is conducted independently, without the law requiring its alignment with the property subject to potential confiscation. Consequently, there is no necessity to prove that the assets were acquired using illicit means.¹³ In situations where the accused fails to justify the origin of the property, confiscation can be imposed, without the prosecution being obligated to establish a connection with the committed offense. As a result, the measure can encompass property whose value significantly surpasses the profits obtained from the offense.¹⁴

Article 131-21, paragraph 5, necessitates that the individual is provided with an opportunity to explain themselves, thereby constituting both a procedural and substantive requirement. This obligation compels investigative authorities, particularly the examining magistrate, to inquire about the person's assets.

Non-conviction-based Confiscation

The French legal system allows for trials to be conducted *in absentia*, regardless of the suspect's illness or absconding, and sanctions may be imposed accordingly.¹⁵

However, if a trial cannot be held and an additional penalty of confiscation cannot be imposed due to the suspect's death, immunity, or prescription of the crime, then assets obtained through the crime cannot be confiscated.¹⁶

Apart from these circumstances, French law also has provisions for non-conviction-based confiscation, which still falls under criminal proceedings. The public prosecutor, investigating judge, or judge who presided over the case may decide to withhold seized property as “refusal to return the instrumentalities or proceeds of crime”.¹⁷ In such cases, no conviction is necessary, and the proceeds may not be returned even if there is no decision of guilt or sanction.

The prosecutor can refuse restitution if the seized property creates danger to people or property, is an instrument or proceeds of the offense, or specific provisions require its destruction.¹⁸ The investigating judge can refuse restitution if it might hinder evidence or the rights of other parties, or if it poses a danger to people or property.¹⁹ The first instance tribunal can refuse restitution if the seized assets present a danger to people or property, or if they are instruments or proceeds of the offense.²⁰

Third-party confiscation

The third-party confiscation model is provided by paragraphs 2, 5, and 6 of Article 131-21 of the Criminal Code. The convicted person's mere possession of certain assets may lead to their confiscation if the actual

¹³ G. GIUDICELLI-DELAGE, O. CAHN, J. TRICOT, ET AL., *France*, in A. BERNARDI, *Improving Confiscation Procedures in the European Union*, Jovene Editore, Napoli, 2019, p. 217.

¹⁴ *Ivi*, p. 219.

¹⁵ Article 379-2 CCP.

¹⁶ G. GIUDICELLI-DELAGE, O. CAHN, J. TRICOT, ET AL., *France*, in A. BERNARDI, *Improving Confiscation Procedures in the European Union*, Jovene Editore, Napoli, 2019, p. 230.

¹⁷ Art. 41-4 CCP.

¹⁸ Art. 41-4 CCP.

¹⁹ Art. 99 CCP.

²⁰ Art. 481 CCP.

owner cannot claim good faith ownership. Third-party confiscation can be ordered in cases where the assets are used to commit or attempt to commit an offence that is punishable by at least one year of imprisonment, or in cases of extended confiscation for crimes punishable by a minimum of five years' imprisonment, which has resulted in direct or indirect profit, or when required by the law.

Third-party assets can also be subject to confiscation in value.²¹ To establish that an owner is aware of an asset's connection to criminal activities, the prosecution must prove that the asset was the instrument or proceeds of the crime.²² Paragraphs 3 and 7 do not protect the good faith of third-party owners when confiscation involves assets that are objects or direct or indirect proceeds of the crime, or when they involve dangerous or illegal items.²³

Confiscation of objects classified as dangerous or harmful by law or regulation, or which possession is unlawful

Finally, confiscation must be ordered in respect of objects classified as dangerous or harmful by law or regulation, or the possession of which is unlawful, regardless of whether such property belongs to the convicted person.²⁴

For each model of confiscation:

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

The French penal system provides the following possibilities regarding the object of confiscation:

- **The good as the "instrument" of the offence:** confiscation concerns the property "used to commit the offence" (instrument of the offence committed) or the property "intended to commit the offence" (instrument of the attempted offence), which is in line with the definition of the notion of instrument of the offence in European Union law.²⁵
- **The good as the "product" of the offence:** the notion of "direct or indirect proceeds of the offence" has not been defined in law, nor has it been defined in the abstract by the Criminal Chamber. Thus, it has only been held that the amount of proceeds of the offence is assessed by trial judges on their own initiative,²⁶ the latter must give reasons for their decision without insufficiency or contradiction,²⁷ and this amount may be made up of the total losses declared by the victims.²⁸
- **The good as the "object" of the offence:** the object of the offence could be understood as property the possession of which is illegitimate, either because it is the result of the criminally prohibited conduct necessary for the commission of the offence, or because the property the

²¹ Art. 131-21(9) PC.

²² G. GIUDICELLI-DELAGE, O. CAHN, J. TRICOT, ET AL., *France*, in A. BERNARDI, *Improving Confiscation Procedures in the European Union*, Jovene Editore, Napoli, 2019, p. 243.

²³ *Ibid.*

²⁴ Art. 131-21(7) PC.

²⁵ Framework Decision 2005/212/JHA, Council, 24 Feb. 2005 on the Confiscation of Crime-Related Proceeds, Instrumentalities and Property; Art. 1 - Dir. 2014/42/EU, Parliament and Council, 3 Apr. 2014, on the freezing and confiscation of instrumentalities and the proceeds of crime in the European Union, JOUEL 127, April 29, Art. 2.

²⁶ Crim. 12 July 2016, n° 15-83.355 to 15-83.390, NP; Crim. 23 Oct. 2019, n° 18-85.618, NP; Crim. 1 Apr. 2020, n° 19-82.898, NP.

²⁷ Crim. June 27, 2018, n° 17-83.216, NP.

²⁸ Crim. 23 Nov. 2016, n° 16-82.510, NP.

possession of which is necessary for the commission of the offence renders its possession illegitimate by its very nature.²⁹

- **Presumption of connection with illegal activities:** art. 131-21(5) PC provides for “the confiscation of property which, without having any connection with the offence prosecuted, is presumed, because of the nature of the offence, to be the product of the offender's criminal activity”, on condition that it concerns “a crime or offence punishable by at least five years' imprisonment and which has yielded a direct or indirect profit”. Confiscation can only be ordered, based on the fifth paragraph of Article 131-21 of the Criminal Code, if the convicted person and the owner of the property in question have been given the opportunity to explain the property to be confiscated, and neither of them has been able to justify its origin. Thus, the new text reverses the burden of the proof.
- **No connection with the offence:** the law does not always require the existence of any link with the offence, or even with presumed criminal activity, for property to be confiscable. This will be the case for the confiscation of assets, the confiscation of objects described as dangerous or harmful by law or regulation, whose possession is unlawful, or the confiscation of movable or immovable property specifically defined by the law or regulation that punishes the offence:
 - **Confiscation of property:** art. 131-21(6) PC states that when the law which punishes the crime or offence so provides, confiscation may also involve all or part of the property belonging to the convicted person or, subject to the rights of the owner in good faith, of which he or she has free disposal, whatever its nature, whether movable or immovable, divided or undivided.
 - **Confiscation of objects classified as dangerous or harmful by law or regulation or whose possession is unlawful:** according to Art. 131-21(7) PC, “Confiscation is compulsory for objects qualified as dangerous or harmful by law or regulation, or the possession of which is unlawful, whether or not such property is the property of the convicted person”. Under these general criminal law provisions, no link whatsoever is required between the property liable to confiscation and the offence prosecuted or even any offence.
 - **Confiscation of property specially designated by the offence:** Confiscation of certain property is sometimes incurred even though it is not connected in any way to the offence prosecuted, but on the grounds that it is specially designated by the text punishing the offence.³⁰

With regard to criminal confiscation, further distinctions must be made depending on whether the property is confiscated as a complementary or an additional penalty.

Indeed, if the assets are confiscated as a complementary penalty, it follows from the provisions of Art. 131-21 PC that all types of property are liable to be subject to the complementary penalty of confiscation, with animals being subject to the specific provisions of Article 131-21-1 of the Criminal Code. In keeping with these two fundamental distinctions that structure the civil law of property, all properties are confiscable whether they are movable or immovable, tangible, or intangible.

Article 131-21 provides that the confiscation of the instrument of the offence may relate to “all movable or immovable property, whatever its nature, whether divided or undivided”, this expression also being used in relation to the confiscation of property the origin of which could not be justified (Art. 131-21(5) PC) and the confiscation of assets (131-21(6) PC). The same applies to confiscation of the object or

²⁹ L. ASCENSI, *Droit et pratique des saisies et confiscations pénales*, Dalloz Référence, 2021, p. 89.

³⁰ See Art. 131-21(4) PC.

proceeds of the offence (131-21(3) PC) and confiscation of property specially designated by the law or regulation which punishes the offence (131-21(4) PC).

Therefore, as a complementary penalty, confiscation may apply to property, which is all the movable or immovable elements that make up the patrimony of the convicted person; that is to say, the material things (tangible property) that belong to him or her and the rights (other than ownership) that he or she holds (intangible property), including minor rights in rem (e.g., the usufruct) and personal rights (e.g., the right of claim). Even the bare ownership of a property may be subject to forfeiture.³¹

As regards assets confiscated as an alternative penalty, the determination of the property that may be subject to confiscation is more uncertain. In fact, in criminal cases, Article 131-6 of the Criminal Code provides that the criminal court may order, instead of imprisonment, the confiscation of one or more vehicles belonging to the convicted person (131-6(4)), the confiscation of one or more weapons of which the convicted person is the owner or of which he or she has free disposal (131-6(7)), or confiscation of the “thing” that was used or intended to be used to commit the offence or the “thing” that is the product of the offence, except in the case of press offences (131-6(10)), with Article 131-7 extending the application of these provisions to offences punishable by a single fine.

The legislator's use of the word “things” rather than “goods” may lead one to think that the extension of confiscation to intangible rights concerned only the complementary penalties for confiscation. However, part of the doctrine considers that the words “things” and “goods” are used by the legislator in a fungible manner, and that therefore the regime envisaged in the case of confiscation as an alternative penalty is the same as for confiscation as a complementary penalty.³²

Value-based confiscation

Value confiscation is established under Art. 131-21(9) PC. The conditions for imposing value confiscation were significantly revised by Act No. 2012-409 on March 27, 2012.

Previously, two alternative conditions had to be fulfilled: the property hadn't been previously seized or couldn't be represented. However, these requirements no longer determine the imposition of value confiscation. The trial court now possesses real discretion. It can choose to order confiscation in tangible assets, meaning it applies to property eligible for confiscation, regardless of prior seizure, or in monetary value, referring to a sum or other assets owned or freely disposable by the convicted person. The only limitation is that both penalties cannot be applied to the same asset. However, a single decision may include both tangible and value confiscations, as long as they relate to separate assets.³³

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

The current French framework on confiscation derives from numerous legislative interventions mainly driven by the need to adapt national legislation to the European standards and requirements, and to develop new and more effective tools in the fight against organised crime.³⁴ The very title of legislative interventions often reveals their intent. Here are a few examples:

³¹ L. ASCENSI, *Droit et pratique des saisies et confiscations pénales*, Dalloz Référence, 2021, p. 83.

³² For further details, see L. ASCENSI, *Droit et pratique des saisies et confiscations pénales*, Dalloz Référence, 2021, p. 88.

³³ Cass. crim., 22nd March 2017, n° 16-83.576.

³⁴ G. GIUDICELLI-DELAGE, O. CAHN, J. TRICOT, ET AL., *France*, in A. BERNARDI, *Improving Confiscation Procedures in the European Union*, Jovene Editore, Napoli, 2019.

- Act No. 2004-204 of 9 March 2004, on “*Adapting the justice system to changes in crime*”.³⁵
- Act No. 2010-768 of 9 July 2010, on “*Facilitating seizure and confiscation in criminal matters*”.³⁶
- Act No. 2013-1117 of 6 December 2013 on “*The fight against tax fraud and serious economic and financial crime*”.³⁷
- Act No. 2016-731 of 3 June 2016 on “*Strengthening the fight against organized crime, terrorism and their financing and improving the efficiency and guarantees of criminal procedure*”.³⁸

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

e.g., conviction for a crime,

property or availability of the confiscation object,

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

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

illegal origin (suspects/presumption of illegal origin),

temporal connection with the crime,

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

See above with reference to specific confiscation models.

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

See below answer to Q3.

e) For the model of confiscation which demands the conviction for a crime:

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

The ordinary rules on the prescription of penalties also apply to confiscation. The Criminal Chamber has clearly stated in this respect that “the confiscation of the thing, which is the product of the offence, provided for by Article 131-21, paragraph 3 of the Criminal Code, constitutes an additional penalty subject to the provisions of Article 133-3 of the said Code relating to the prescription of penalties”.³⁹

As regards the application of confiscation models in the absence of conviction, see above.

f) **Which is the legal nature?** (a criminal sanction - accessory or principal criminal penalty -, a preventive measure - *ante delictum* criminal prevention measure -, security measure in a broad

³⁵ “Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité”.

³⁶ “Loi n° 2010-768, 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale”.

³⁷ “Loi n° 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière”.

³⁸ “Loi n° 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement et améliorant l’efficacité et les garanties de la procédure pénale”.

³⁹ Crim. 26 June 2007, n° 06-87.935, P, n° 175; D. 2007. 2165.

sense, administrative measure, civil measure *in rem*, a civil consequence of committing an offense - provided for by criminal law -, another type of autonomous - *sui generis* - instrument, etc.)

See above with reference to specific confiscation models.

A. In particular, in Your national legal order is confiscation without conviction possible in cases of death, illness, absconding, prescription, amnesty, etc. and which are the relevant legal bases?

In situations involving the death of an individual, immunity, prescription, cases where the perpetrator of an offense cannot be identified, and other instances where a criminal court has determined that an asset is derived from criminal activities, the property cannot be confiscated if the additional penalty of confiscation is not applicable or has not been imposed.

However, a novel legal mechanism known as “refusal to return the instrumentalities or the proceeds of crime”, introduced by the Law No. 2016-731, allows for the recovery of unlawfully acquired assets (see above the non-conviction-based model).

For each model of confiscation:

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

Within the French system, two bodies deal with the execution of confiscation orders. The first is the Public Prosecutor, while the second is the AGRASC (“*Agence de gestion et de recouvrement des avoirs saisis et confisqués*”).

According to the French Ministry of Justice, the AGRASC is “a public administrative institution under the joint supervision of the Minister of Justice and the Minister of Public Accounts. The Chairman of the Board of Directors and the Director General of AGRASC are magistrates of the judiciary, the Secretary General is from the Ministry of Finance. The Agency, which is responsible for enforcing the confiscation penalty on behalf of the public prosecutor, also aims to meet the essential need to manage seized assets when these require administrative acts (vehicles, buildings, businesses, boats, etc.). To this end, the Agency was conceived as a structure for legal and practical assistance to the courts and as a service provider. In addition to its general role of assisting, advising and guiding magistrates and investigators in matters of seizure and confiscation, the Agency's mission is to improve the judicial processing of seizures and confiscations in criminal matters, and in particular to:

- Ensure the centralised management of all sums seized in the context of criminal proceedings in France.
- Carry out all pre-trial sales of seized movable property (Articles 41-5 and 99-2 of the Code of Criminal Procedure), decided by magistrates when such movable property is no longer useful for the determination of the truth and is likely to be depreciated.
- Carry out all publications, with the land registration services for seizures and confiscations of property under criminal law (Articles 706-151 and 707-1 of the Code of Criminal Procedure) and with the commercial courts, for seizures of businesses.
- Manage, under a court order, all complex assets entrusted to it which require administrative acts for their preservation or enhancement.

- Manage seized assets, selling them and distributing the proceeds in accordance with any request for international assistance or cooperation from a foreign judicial authority.
- Ensure, where applicable, that public creditors are informed in advance of the execution of any judicial restitution decision and that civil parties are compensated in priority for the property confiscated from the convicted person, in order to ensure the payment of their claims, in particular tax, customs, social security or compensation claims.
- To carry out any information or training activities designed to publicise its work and promote good practice in the area of seizures and confiscations, both with national and international partners”.⁴⁰

In general, the enforcement of confiscation does not derogate from the principle set out in Article 707-1, paragraph 1, of the Code of Criminal Procedure: the prosecution of the enforcement of the criminal sentence falls within the remit of the public prosecutor. Thus, even if the execution of the confiscation sentence will sometimes be pursued by the competent public accountant or by AGRASC, this pursuit will always take place, as the second and third paragraphs of Article 707-1 expressly state, “on behalf of the public prosecutor”.

Regarding competent authorities responsible for requesting or imposing a confiscation order, in the case of a criminal conviction, the trial court has the power to impose confiscation on all assets subjected to seizure orders. Moreover, article 373-1 CCP states that the “*Cour d’assises*” (Court of Assize, responsible for felonies) can order the immediate seizure of an asset to ensure enforcement of the confiscation and its transfer to the AGRASC for disposal. Appeals against such orders do not have a suspensory effect. The correctional tribunal (competent for misdemeanours) is granted the same authority under article 484-1 CCP.

As concerns value-based confiscation, Art. 707-1(2) CCP states that “proceedings for the recovery of fines and the execution of value confiscations are carried out in the name of the public prosecutor by the competent public accountant or, in cases where the value confiscation is carried out on previously seized goods, by the Agency for the Management and Recovery of Seized and Confiscated Assets”.

As concerns the other forms of confiscation, according to Art. 707-1(3) CCP, “the execution of other confiscations is carried out on behalf of the public prosecutor by the Agency for the Management and Recovery of Seized and Confiscated Assets when they concern movable or immovable property mentioned in 1° and 2° of Article 706-160, even if they have not been previously entrusted to it. Except in the case of assignment, the Agency for the Management and Recovery of Seized and Confiscated Assets shall proceed with the sale of these assets, if applicable, with the publication formalities and, in all cases, until their sale, with the administrative acts necessary for their conservation and enhancement”.

Consequently, AGRASC will be competent to pursue the execution of confiscation sentences which concern, on the one hand, “all property, whatever its nature, seized, confiscated or subject to a protective measure in the course of criminal proceedings, which is entrusted to it and which requires, for its preservation or its enhancement, acts of administration”⁴¹.

On the other hand, it will be also competent as regards “sums seized during criminal proceedings” for which the AGRASC has a monopoly of management.⁴² This is the case even if these assets have not been previously entrusted to it during the investigation or judicial inquiry. It follows that the agency's jurisdiction will extend to property that has either been entrusted to it during the investigation or judicial

⁴⁰ See Ministère de la Justice, *Présentation de l’AGRASC* (link: <http://www.justice.gouv.fr/justice-penale-11330/agrasc-12207/>).

⁴¹ Art. 706-160(1, 1°) CCP.

⁴² Art. 706-160(1, 2°) CCP.

inquiry following its seizure, or which, without having been the subject of such a prior measure, has been entrusted to it by the public prosecutor following the confiscation order for the purpose of enforcing it.

In all other cases, however, enforcement will be the sole responsibility of the public prosecutor, with the assistance of the property department. Moreover, when the confiscation relates to property that has not been seized beforehand, it is up to the public prosecutor to physically seize the property, if necessary with the assistance of the police, according to Art. 709 CCP.

Moving on to the standard of proof for imposing a confiscation order, the French CCP does not contain specific provisions. Therefore, it can be inferred that the ordinary standard of proof applies. Article 427 CCP states, “unless otherwise provided by law, offenses may be proven by any form of evidence, and the judge decides based on their innermost conviction. The judge can only base their decision on evidence presented and discussed contradictorily during the hearing”.

Consequently, prosecutors primarily need to prove that confiscation is necessary and proportionate to effectively punish the offender, taking into account the rights of third parties and victims.

The following guarantees apply to the process of confiscation:

- **Need for a final decision:** in accordance with the ordinary law provisions of the first paragraph of Article 708 of the Code of Criminal Procedure, only confiscation sentences contained in a final decision can be enforced. This will only be the case where the decision has been provisionally enforced, but enforcing such a penalty will give rise to difficulties if the decision is overturned by the court of appeal.
- **Statute of limitations:** the ordinary rules on the prescription of penalties also apply to confiscation. The Criminal Chamber has clearly stated in this respect that “the confiscation of the thing which is the product of the offence, provided for by Article 131-21, paragraph [3] of the Criminal Code, constitutes an additional penalty subject to the provisions of Article 133-3 of the said Code relating to the prescription of penalties”.⁴³

Finally, the death of the convicted person, as well as the dissolution of the legal person, which constitutes a kind of civil death, in principle prevents or halts the execution of the sentence. However, there is an exception to this principle in the case of confiscations. According to Article 133-1 of the Criminal Code, “the fine and legal costs may be recovered, and the confiscation executed after the death of the convicted person or after the dissolution of the legal person until the liquidation operations are completed”.

b) which is the standard of the proof/is the reversal of the burden of the proof admitted?

See above.

c) Which are the safeguards (limitations e.g. proportionality clauses, relevant legal remedies)?⁴⁴

Confiscation as a penalty must adhere to several fundamental principles concerning individual rights. It is essential to respect the principle of legality, pronounce sentences on an individual basis, and provide adequate motivation. Furthermore, it must not be retroactive and is subject to prescription. Importantly, it should not infringe upon the rights of the victim, and there must exist the possibility to appeal a confiscation order.

⁴³ Cass., 14 January 2004, *Pas.*, n° 20.

⁴⁴ Cfr. L. ASCENSI, *Droit et pratique des saisies et confiscations pénales*, Dalloz Référence, 2021, p. 98.

More in details, the penalty must be a legally established sanction. In line with the constitutional principles of criminal legality found in Articles 12 and 14, confiscation as a penalty must be grounded in law. Consequently, judges have an obligation to uphold the legal requirements and impose a sentence of confiscation only when the specified conditions are met.⁴⁵ If it cannot be established that the objects are owned by the convict, as required by the condition, a decision is deemed illegal.

Additionally, the judicial decision must unambiguously identify the convicted individuals⁴⁶ as well as the confiscated items. Insufficient identification of the confiscated item has led the Court of Cassation to consider the confiscation sentence illegal in multiple instances.⁴⁷

Furthermore, the sentence imposing confiscation must be properly motivated. Given that the sentence can only be imposed when the legal conditions are met, the judge must justify their decision regarding confiscation, thereby providing motivation.⁴⁸ The obligation to offer reasoning for the choice of sentence is imposed by Article 195(2) CCP. However, this requirement applies solely to the optional accessory penalty of confiscation. The judge is obligated to provide motivation only when they have the discretion to choose a sentence that they are not obliged to impose.⁴⁹

Also, the punishment is individually determined. Each sentence must be pronounced separately and individually for each convicted person, and collective or separate sentencing for multiple convicts in the same case is prohibited.⁵⁰

Besides, the retroactivity of a sentence is prohibited. In line with the principle applied to all sentences, any modifications related to confiscation rules cannot be retroactive if they are disadvantageous to the defendant.⁵¹

Finally, the sentence is susceptible to prescription. Confiscation is subject to prescription as outlined in Article 94 PC, adhering to the specified time limits for the offenses for which it is imposed.

It is essential that the sentence of confiscation does not unjustly infringe upon the rights of the victim of the offense. As stipulated in Article 43-*bis* (3) PC, the judge is obligated to order the restitution of the confiscated items belonging to the victim. The same article specifies that the confiscated items will be assigned to the victim “when the judge has imposed confiscation on the basis that they represent property or values substituted by the convict in place of items belonging to the injured party or because they represent an equivalent thereof”.

Article 44 PC asserts that “the sentence prescribed by law must always be pronounced without prejudice to restitution and compensation that may be due to the parties”. Consequently, the judge can direct the defendant to forfeit financial privileges while also instructing them to compensate the injured party with damages equivalent to said financial benefits.

As regards the remedies, sentences of confiscation are susceptible to challenge through ordinary means, including appeal and opposition, as well as extraordinary means, such as cassation.

⁴⁵ Cass., 27 March 1990, *Pas.*, 1990, 879.

⁴⁶ Cass., 14 January 2004, *Pas.*, n° 20.

⁴⁷ Cass., 15 January 1990, *Pas.*, 1990, 580; Cass., 24 June 1998, *Pas.*, 1998, 798.

⁴⁸ Cass., 27 March 1990, *Pas.*, 1990, 879; Cass., 1st April 2008, *Pas.*, 2008, n° 199.

⁴⁹ Cass., 1 March 2000, *Pas.*, 2000, 498.

⁵⁰ Cass., 27 May 2009, *Revue de droit pénal et de criminologie*, 2010, 1, 71.

⁵¹ See Art. 2(2) PC.

The appeal judge's jurisdiction is confined to the limits specified in the notice of appeal. Consequently, it is within the appellate judge's purview, based solely on the accused's appeal, to impose a confiscation that the initial judge erroneously omitted to pronounce.⁵²

If confiscation was not imposed in the first instance and the prosecutor files an appeal, the appellate court may only order confiscation if a unanimous decision is reached.⁵³

d) Is the trial *in absentia* possible in your legal system in order to apply the confiscation?

See above.

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

Yes, see above.

B. For each model of confiscation:

**Does it comply with the principles of:
legality?**

The Criminal Chamber has stated with remarkable consistency that only confiscations provided for by law may be ordered by the criminal court.⁵⁴

This jurisprudential affirmation of the principle of legality has found a relay in the new Penal Code. It should be recalled that Article 131-21 of the Criminal Code provides that the additional penalty of confiscation is only incurred “in the cases provided for by the law or the regulations”, although this rule is in fact only the direct consequence of the principle of legality set out in Article 111-3 of the Criminal Code: “No one may be punished by a penalty which is not provided for by the law, if the offence is a crime, or by a regulation, if the offence is a contravention”.

Moreover, this solution could also be based on a number of provisions of supra-legislative value. It follows that the criminal court will also have to ensure the application of the principle of non-retroactivity of the more severe criminal law, since this principle is the corollary of the previous one.⁵⁵

**legal specificity of a statute?
non-retroactivity of the /more severe/statute?
the right to private property?**

See above.

the proportionality?

The criminal court is not obliged to review the proportionality of all confiscation sentences: a distinction must be made.

- **Confiscation of the property:** there is no doubt that the criminal court must control the proportionality of the infringement of the right to property by the confiscation of assets that

⁵² Liège, 20 October 1938, *Pas.*, 1939, 78.

⁵³ Cass., 10 October 1972, *Pas.*, 1973, 150.

⁵⁴ Crim. 12 March 1990, no. 89-82.674, P, no. 115; Crim. 17 Nov. 1993, no. 92-82.659, P, no. 344; Crim. 17 Oct. 2000, n° 99-86.916, P, n° 299.

⁵⁵ Crim. 25 Nov. 2015, n° 14-84.985, P, n° 269.

it pronounces⁵⁶, according to two criteria: the gravity of the offence and the personal situation of the persons concerned. The criteria according to which the proportionality check must be carried out seem to be relatively fixed in the case law of the Criminal Chamber. Thus, as early as the judgment of 30 March 2016, the Criminal Chamber stated that the proportionality of the infringement of the fundamental rights invoked had to be assessed “in the light of the seriousness of the facts and the personal situation”⁵⁷ of the person concerned, before specifying that this review had to be carried out “in the light of the concrete seriousness of the facts and the personal situation”⁵⁸. The fact that judges have not justified the proportionate nature of a penalty of confiscation of assets in the light of these criteria or have refrained from explaining the personal situation of the convicted person, could also constitute grounds for cassation.⁵⁹

- **Confiscation of the object or product of the offence:** the Criminal Chamber has expressly excluded the application of the proportionality test to the infringement of the right to property where confiscation is incurred on the grounds that the property liable to be confiscated is, in its entirety, the object or product of the offence: “the principle of proportionality cannot be applied to the confiscation of property which, in its entirety, is the product or object of the offences of which the defendant has been found guilty”⁶⁰, and this principle remains valid also in case of confiscation of value.⁶¹ It was logical for the Criminal Chamber to rule in this sense since this type of confiscation is only one modality of the confiscation of the object or proceeds of the offence, so that both penalties must share the same legal regime.
- **Confiscation of the instrument of the offence:** by a judgment of 13 November 2018, the Criminal Chamber stated that the criminal judge must control the proportionality of the infringement of the right to property by confiscating the instrument of the offence.⁶²
- **Confiscation of assets whose origin cannot be justified:** in a judgment of 12 June 2019, the Criminal Chamber affirmed the application of the principle of proportionality to the confiscation of property ordered under Article 131-21(5) PC.⁶³

the right to a fair trial?

the right to defence?

the presumption of innocence?

the *ne bis in idem* principle?

and other relevant rights – what sort of?

See above.

7) For each model of confiscation:

⁵⁶ Crim. 30 March 2016, n° 15-81.550, P, n° 104.

⁵⁷ Crim. 30 March 2016, n° 15-81.550, P, n° 104.

⁵⁸ Crim. 7 Dec. 2016, n° 15-85.136, P, n° 330.

⁵⁹ *Ibid.*

⁶⁰ Crim. 7 Dec. 2016, n° 16-80.879, P, n° 331.

⁶¹ Cfr. Crim. 5 May 2021, n° 20-86.529, NP and Crim. 3 May 2018, n° 17-82.098, P, n° 79.

⁶² Crim. 13 Nov. 2018, n° 18-80.027, NP.

⁶³ Crim. 12 June 2019, n° 18-83.396, P, n° 105

a) Are there constitutionality issues which have been detected in the legal doctrine and is there any relevant jurisprudence ruling on the constitutionality (or not) of the confiscation measure?

There have been numerous decisions of the French Constitutional Court regarding confiscation.

In a 2010 ruling, the Constitutional Council has declared the constitutionality of Art. 131-21, after having made the following observations:

- “Considering, in the first place, that article 131-21 of the Penal Code provides for the existence of an additional penalty applicable, by virtue of the law, to certain crimes and misdemeanours and, by virtue of the decree, to certain contraventions; that the existence of such a penalty does not, in itself, disregard the principle of the necessity of penalties; that, with regard to the punishment of contraventions, it is up to the regulatory power, in the exercise of the competence that it holds from Article 37 of the Constitution and under the control of the competent jurisdictions, to define, in compliance with the requirements of Article 8 of the Declaration of 1789, the penalties applicable to the contraventions that it defines; that Article 131-21 of the Criminal Code does not exempt the regulatory power from compliance with these requirements; that the Constitutional Council does not have the competence to assess the conformity of Article R. 413-14-1 of the Highway Code to these requirements;
- Considering, secondly, that the second sentence of the first paragraph of Article 131-21 of the Criminal Code provides that the penalty of confiscation of the property which was used to commit the offence or which is the direct or indirect product of the offence is incurred as of right in the case of a felony or misdemeanour punishable by a prison sentence of more than one year, with the exception of press offences; that its fifth paragraph provides that the penalty of confiscation of property whose origin the convicted person has not been able to justify is also incurred in the case of a crime or offence having procured a direct or indirect profit and punishable by at least five years' imprisonment; that its seventh paragraph provides for the compulsory confiscation of objects qualified as dangerous or harmful by the law or the regulations or whose possession is illegal; that having regard to the seriousness of the offences for which they are applicable and the property which may be subject to them, the confiscation penalties thus instituted are not manifestly disproportionate;
- Considering that Article 131-21 of the Criminal Code, which preserves the property rights of third parties acting in good faith, is not contrary to any other right or freedom guaranteed by the Constitution”.⁶⁴

In 2014, the court affirmed the constitutionality of the confiscation of property, based on the following observations “The question raised is clearly not a serious one, since confiscation, which concerns property belonging to or available to the perpetrators of particularly serious offences, is therefore, in the absence of any manifest disproportionality or disregard, in itself, of the principle of the necessity of penalties, exclusive of an unjustified infringement of the right to property; that it has no automatic or mandatory character, its pronouncement falling, in cases restrictively enumerated by the law, within the competence of the judge, which makes it possible to rule out the risk of arbitrariness; that the provisions of Article 131-21 of the Criminal Code instituting the additional penalty of confiscation were declared to be in conformity with the Constitution by the Constitutional Council in the grounds and operative part of its decision No. 2010-66 DC of 26 November 2010, which has the effect of rendering the present

⁶⁴ Cons. const., 26 nov. 2010, n° 2010-66 QPC.

question of constitutionality inoperative for the remainder since the provisions of Article 225-25 of the Criminal Code constitute a special application, in particular to the offence of procuring, of the confiscation defined in identical terms by Article 131-21 of the same Code”.⁶⁵

Finally, the court upheld the constitutionality of the value confiscation of the product of the crime, provided for in Article 131-21(9) PC:

- “The questions raised, insofar as they challenge the constitutionality of the interpretation of Article 131-21(9) of the Criminal Code, according to which there is no need for the criminal court to review the necessity and proportionality of the infringement of the right to property by measures of confiscation of the value of the direct or indirect proceeds of the offence, nor to individualise this additional penalty, are not serious.
- On the one hand, when the judge orders a measure of confiscation of the value of the direct or indirect proceeds of the offence, he or she must first ensure that the value of the confiscated property does not exceed the amount of the proceeds of the offence, so that the infringement of the convicted person's right of ownership cannot exceed the economic advantage derived from the criminal offence and which constitutes the financial consequence of its commission, as well as to justify it with sufficient reasons, free of contradiction, and responding to the peremptory pleas of the parties, from which it can be deduced that neither the principle of necessity of the penalties, nor the principles of individualisation and motivation of the penalties are disregarded.
- On the other hand, if certain offences are liable to make their perpetrator liable, in addition to the confiscation of the value of the direct or indirect proceeds of the offence, to the confiscation of all or part of his property as defined by Article 131-21, paragraph 6, of the Criminal Code, and if the criminal court which orders such a measure is required to check, if necessary *ex officio*, the proportionality of the infringement of the convicted person's property rights, the option thus taken does not infringe the principles of equality before the law and justice, since this difference in treatment is justified by the fact that the confiscation incurred on the basis of the aforementioned text, unlike that which is incurred on the basis of the text whose constitutionality is being challenged, is likely to relate, in an unlimited manner, to all of the property making up the convicted person's assets”.⁶⁶

b) Are there European Court of Human Rights cases in relation to “Your” model of confiscation?

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

- **Contrary to Article 8 of the Convention of the confiscation of family housing:** Confiscations ordered by the criminal court may infringe the right to respect for private and family life protected by Article 8 of the European Convention on Human Rights when these measures concern certain property. This is the case, for example, when the family home is confiscated. Thus, in a decision on the admissibility of *Aboufadda v. France* of 4 November 2014, the European Court of Human Rights, after noting that the French criminal court had ordered the confiscation of real estate constituting the applicants’ family home, stated that this measure, which had forced them to move, amounted to

⁶⁵ Crim. 12 févr. 2014, n° 13-83.760, NP.

⁶⁶ Crim. 5 mai 2021, n° 20-86.529, NP

interference by a public authority in the exercise of their right to respect for their private and family life and their home.⁶⁷

- **No excessive burden or fundamental impairment of the financial situation:** the European Court of Human Rights is concerned with verifying that “the measure does not impose an excessive burden on the person to whom it applies or fundamentally affect his financial situation”⁶⁸, by checking that the national courts have endeavoured to apply the confiscation measure appropriately to the financial situation of the person concerned. Thus, in the *Lorie v. France* decision of 21 September 2010, the Court noted that “the appeal judges made a limited application of the penalty insofar as, unlike the judges of first instance, they expressly excluded its application to property acquired by the applicant before the period of commission of the offences for which he was convicted. This exclusion, which was intended, in the words of the Court of Appeal's judgment, “to preserve the fruits of a lifetime's work”, concerned, inter alia, a building belonging to the applicant, but also business interests.⁶⁹ However, the Court clarified the meaning of this criterion for assessing proportionality in the *Monedero v. France* decision of 2 February 2010. In that decision, it explained that, “while a penalty must not impose an excessive burden on the person to whom it is applied or fundamentally affect his financial situation, it is with regard to the breach committed, and not to the assets as alleged by the applicants, that its disproportionate nature must be established [...]. The Court therefore focuses, in this type of case, on the applicant's conduct”.⁷⁰ Thus, the harm to the financial interests of the person concerned by the confiscation measure is not examined per se, but only in view of the seriousness of the acts committed by the person concerned.
- Finally, France was condemned by the European Court of Human Rights in *the Bowler International Unit v. France* judgment of 23 July 2009, in a customs case in which the applicant's goods that had been used to conceal the fraud of transporting narcotics had been confiscated, on the grounds that under the law applicable at the time, the confiscated goods could not be claimed by their bona fide owner. The Court considered that the applicant had been deprived of “the possibility of exercising an effective remedy to remedy this interference, even though the domestic courts had recognised his good faith”.⁷¹

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

None that I am aware of.

9) For each model of confiscation:

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

⁶⁷ CEDH 4 nov. 2014, *Aboufadda c/France*, n° 28457/10, §38.

⁶⁸ CEDH 2 févr. 2010, *Monedero c/France* (décis.), req. n° 32798/06- CEDH 21 sept. 2010, *Lorie/ c/France* (décis.), req. n° 63846/09.

⁶⁹ CEDH 21 sept. 2010, *Lorie/ c/France* (décis.), req. n° 63846/09.

⁷⁰ CEDH 2 févr. 2010, *Monedero c/France* (décis.), req. n° 32798/06.

⁷¹ CEDH 23 juill. 2009, *Bowler International Unit c/France*, n° 1946/06.

Directive 2014/42/EU, enacted on 3rd April 2014 by the European Parliament and the Council, addresses the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. This directive has been incorporated into French Law through two distinct legislations. However, it is important to note that the majority of this transposition had already occurred before the directive, as a result of the transposition of previous European instruments.

The first legislation is the Loi n° 2016-731, enacted on 3rd June 2016, which strengthens the fight against organized crime, terrorism, and their financing, while enhancing the efficiency and guarantees of the criminal procedure.

Regarding administrative freezing, Article 118 of this law grants the government the authority to intervene through an ordonnance. Specifically, the fifth paragraph of Article 118 urges the government to take legislative measures via ordonnance to enhance the coherence and effectiveness of the national asset freezing system, aiming to combat terrorism financing or comply with asset freezing measures imposed by the United Nations Security Council or the Council of the European Union.

The second legislation is the Ordonnance n° 2016-1575, passed on 24th November 2016, which reforms the system of asset freezing. While it does not strictly transpose Directive 2014/42, it strengthens the legal framework concerning asset freezing in the fight against terrorism. It allows for the seizure of all assets connected to terrorist acts, including those used to commit offenses and any assets derived from these offenses. Furthermore, the ordonnance establishes an administrative procedure, overseen by the administrative judge, to combat the financing of terrorist activities. The décret n° 2018-264 contains implementation measures, complemented by the décret n° 2016-1455, enacted on 28th October 2016, which ensures the effectiveness of criminal procedures and the enforcement of sentences related to terrorism.

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

Yes.

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

The confiscation models of the French system appear to comply with the requirements and guarantees imposed by European legislation.