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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.

National report for Portugal

Portugal has since the new Penal Code from 1982 (hereinafter PC) a strong regime on assets confiscation.

This regime was improved in 1995 (Decreto-Lei no. 48/95 from 03.03 that amended the PC) and in 2002 (Law no. 5/2002 from 01.11 that created an unexplained wealth confiscation regime). So, apart from small changes introduced in 2010 (Law no. 32/2020, from 09.02) and, especially, in 2017 (Law no. 30/2017 from 05.30 that transposed the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union) and the existence of another pieces of legislation outside the criminal code (for instance, Decreto-Lei no. 15/93, from 1.22 that fights against drogues dealing or Decreto-Lei no. 28/84, from 01.20 that sets out anti-economic and public health crimes) the system has been almost the same form for more than two decades.

The CP contains general rules (articles 109 to 112-A) that are applicable to all the offences enshrined in the Code and have also subsidiary applicability to other penal legislation (article 8): only when this special legislation foresees a different solution (which isn't normal), the PC will be unapplicable. Hence, one can say, that the PC, directly or indirectly contains the classical Portuguese confiscation mechanism. All the substantive solutions are in those 5 articles.

The law no. 5/2002 contains a new mechanism that extends confiscation beyond the assets (or its value), directly or indirectly, connected with an offence and so allows the confiscation without proof of the relationship between them and the crime.

In the Criminal Procedural Code (hereinafter CPP) there are too several rules concerning the enforcement of this criminal policy: the identification, the location, the seizure, the way to take the confiscation decision (for instance the rights of defense, the rights

of third parties, the right of appeal) and the enforcement of such decision is regulated there. As in general, the substantive law will be nothing without these procedural rules.

Also important is the Law no. 45/2011 from 06.24 that created the Assets Recovery office and the Assets Management office. Both are key tools to make assets recovery possible.

From the legal point of view, even if some improvements are needed, namely at procedural level, Portugal has an almost complete and strong confiscation regime. The Portuguese problem isn't the law but the daily praxis. Like in other systems there is a cultural problem that hinders the exhaustion of all legal opportunities (confiscation still has a very negative meaning so we use the name «loss») and so sometimes crime still pays.

In this dark context, no wonder that the legislator has been considered the confiscation as a priority of criminal policy (article 12.º Law 72/2015, from 2015.07.20; article 16.º Law 96/2017, from 2017.08.23 and article 19 Law 55/2020, from 2020.08.27). It means that the identification, location and seizure of property or proceeds related to crimes is a priority to be carried out by the public prosecutor or the Asset Recovery Office. Since the beginning of the proceedings the Public Prosecutor should pay attention to the financial and patrimonial aspect of the crime (Directive form the General Public Prosecutor's office no. 1/2021, from 2021.01.04).

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.

The Portuguese Law provides for different models of confiscation: direct confiscation, value confiscation, unexplained wealth confiscation, non-conviction-based confiscation and third-party confiscation. All these models, covering different situations, can be applied in a single case.

Outside the criminal realm, but intimately related with him, there is also confiscation in administrative penal law or regulatory law.

Direct confiscation [articles 109 (1) and 110 (1) (a) and (b) PC]

Direct confiscation (or *in specie* confiscation) refers to a judicial decision concerning any property related to a specific crime for which the owner has been convicted. The targeted

assets are the direct the instrumentalities [article 109 (1) PC and article 2 (2) Directive 2014/42/UE], products [article 110 (1) (a) PC] and proceeds [article 110 (1) (b) PC] of a crime, following the judicial ascertainment of that crime.

It is also possible to confiscate the indirect product *ex novo* resulting from the crime, as well as the indirect proceeds from it, whatever changes they may have experienced [article 110 (3) PC]. It refers to goods of any kind and of any nature (movable or immovable) and also interest, profits and other benefits coming from the crime. Any economic advantage derived directly or indirectly from a criminal offence it is included and also any subsequent reinvestment or transformation of direct proceeds and any valuable benefits [article 2 (1) Directive 2014/42/UE].

The Portuguese concept of proceeds also encompasses every reward given or promised to agents of a crime, already committed or to commit, to them or others [article 110 (2) PC].

Therefore, in general terms, Portuguese legislation enables confiscation for all intentional and reckless crimes. However, direct confiscation of instrumentalities only includes the goods utilized as an instrument to commit the offence (or, as we are going to see, its value). The substitute property cannot be confiscated in this case. Even so, in the case of equivalent value confiscation, like all other assets, the substitute property may be frozen to guarantee the enforcement of the penal decision and in the end, if the defendant doesn't pay that value, confiscated.

Confiscation of the value [articles 109 (3) and 110 (4) PC]

Value confiscation refers to a confiscation measure targeting assets of equivalent value to the proceeds, products or instrumentality of an offense (even if they are of legitimate origin). It is applicable in cases where the proceeds are just a utility (for example, the value equivalent to the free use of a house, a car or another good; the expenses spared by the offender), in cases where the assets are destroyed, devalued or consumed, in cases where criminals transform proceeds of crime into other non-traceable property, in cases where the assets are transferred for *bona fides* third-parties, or in cases where they hide its localization in order to difficult freezing and confiscation measures.

In any case of impossibility of direct or indirect confiscation (because it is just a utility, is not possible to trace them, they are out of reach of the official authorities, they have been destroyed, their value has decreased or for any other circumstance) assets are confiscated in

an amount that corresponds to the original proceeds of crime value. Instead of *in specie* confiscation, value confiscation.

Value confiscation is also allowed during the execution phase [articles 109 (3) and 110 (4) PC] whenever by the nature of the assets, situation, or any other circumstances, it had not been possible to carry out the confiscation *in specie*. In short, Portuguese legislation allows value confiscation because, *ab initio*, for several reasons, it is impossible to confiscate the asset itself or because latter (no matter when) it becomes impossible.

There is a difference between value confiscation of instrumentalities [article 109 (3) PC] and value confiscation of products and proceeds and [article 110 (4) PC]. In the first case the judge may confiscate the equivalent value but in the second he/she has to confiscate the equivalent value.

Extended confiscation (article 7.º Law no. 5/2002)

The Portuguese law doesn't allow extended confiscation as a way to reach assets (*in specie*) whose direct or indirect link with an offense is not proven. Our system is different from the system set out in article 5 Directive 2014/42/EU where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct. The roots of our system aren't the German, which name (at the time *erweiterte Verfall* and now *erweiterte Einziehung*) and model are the origin of this kind of solutions.

In fact, pursuant to article 7 (1) of the Law no. 5/2002, in case of conviction for certain serious and lucrative crimes [listed in article 1 (1)], the judge can confiscate the difference between the value of all of the assets owned by the convicted person and that value which would be congruent with his legal income. This means that, the Portuguese «extended confiscation» regime is not an *in specie* confiscation system, but a value-based system.

The solution was influenced by the English law (Drug Trafficking Offences Act 1986) and also by article 12 *sexis* of the Italian law no. 356 from 1992 (that at the beginning foresaw an offence of unexplained wealth possession, but after the constitutional censorship turned only into a new confiscation regime) and has now some similarities with the article 240 *bis* of the Italian Penal Code: in fact, in both cases what is at stake is the disproportionality between the assets and the income. Nevertheless, the Portuguese regime goes further than

the Italian law. Instead of confiscate the assets (*in specie* confiscation) it confiscates (as we have already said) the value of the assets disproportionate with his/her income, which is more efficient but also more aggressive for the property right.

This mechanism is (taking in consideration Carin network typologies) more similar with the unexplained wealth confiscation than with the extended confiscation. The biggest difference with an offence of unexplained wealth (like they tried to do in Portugal but were refused by the Constitutional Court: decisions no. 179/2012 and 377/2015) is (as the Constitutional Court pointed out in its decision no. 392/2015) that it isn't a mechanism *in persona* (there is no penalty) but a mechanism that target the assets (if the defendant doesn't pay the disproportionate value, the court may confiscate all assets available, regardless is origin). The simple comparison between the law no. 5/2002 and those two Portuguese projects demonstrates the similarities they have.

Even if the Portuguese regime is much stronger than the mechanism foreseen in the Directive 2014/42/UE, the truth is that it doesn't solve the cases where the property in question is proportionate to the lawful income of the convicted person, but nevertheless the court on the basis of the circumstances of the case, is satisfied that the assets are derived from criminal conduct.

Non-conviction-based confiscation [articles 109 (2) and 110 (5) PC]

The Portuguese law allows for non-conviction-based confiscation since 1982 [former article 108 (2) PC].

Articles 109 (2) and 110 (5) PC allow for the confiscation of instrumentalities, products and proceeds from crime even if no determined person may be punished for the fact, including in case of death of the agent or when the agent has been declared contumacious. So, the Portuguese law is broader than the cases set out in article 4 (2) Directive 2014/42/EU. It is a general clause that allows confiscation without a conviction in cases where the perpetrator has died, is absconding or fleeing, the prosecution is time barred, and there is immunity or an amnesty or other cases of exemption from liability or extinction of criminal liability.

Apart from these general rules, in certain cases, the Public Prosecutor can dismiss the case, with the consent of the pretrial judge, imposing certain obligations to the defendant, namely the confiscation of instrumentalities, products and proceeds from crime (articles 280 and 291 CPC). Those situations are seen as manifestations of the opportunity principle, are

applicable only to petty and medium crime and always implies the agreement of the defendant.

Even if the substantive law is strong there is a lack of procedural law. In practice, as the scholars already pointed out, nobody knows very well how to do it.

Third-party confiscation [articles 111 PC]

Third-party confiscation concerns to a confiscation measure made to deprive third parties of criminal assets, where they are in possession of property utilized by the offender to commit the offense or transferred to them by him or her [article 111 (2) PC].

Third-party is someone (individuals or legal persons) who doesn't participate, whatever form, in the commitment of the fact (he/her hasn't criminal liability).

This strict concept doesn't include the so-called beneficiaries: people who doesn't participate in the commitment of the fact but receives directly, without intermediaries, the proceeds of the crime (for instance in a corruption case he or she receives the bribe). In this case they don't deserve any kind of protection.

Third-party confiscation is possible when:

a) their owners have concurred in a blameful way in their use or production, or have taken advantage of the fact;

b) The instruments, products or proceeds have been acquired, for whatever reason, after the practice of the fact, knowing or should have known the acquirer of their origin; and

c) The instruments, products and proceeds or the value corresponding to them, have, for whatever reason, been transferred to avoid their confiscation, being or should such purpose be known by him.

The confiscation of third-parties, corresponds to article 6 of the Directive 2014/42/UE and so only the rights of *bona fides* third parties are preserved. If it is not the case the assets should be confiscated.

It is the case when an individual «knew or ought to have known (or at least a diligent person would have had reasons for this knowledge) that the purpose of the transfer or acquisition was to avoid confiscation». This is:

a) regarding to instrumentalities, products and profits: whenever they have been acquired with knowledge (or reasons for this knowledge) of the illegal origin of the possession; and

b) regarding to other assets: whenever they have been acquired with knowledge (or reasons for this knowledge) that its confiscation is being hindered.

It is also the case when a legal person is controlled by the offender.

Confiscation in administrative penal law

Portugal has also confiscation in administrative penal law or regulatory law (for example Decreto-Lei no. 433/82, from 10.27) that is similar to the German *Gesetz über Ordenungswidrigkeiten* or the Italian *Diritto penanle ammninistrativo*.

The Portuguese doctrine has debated the administrative or criminal nature (in a broad sense) of this regime [for instance, opinion of the General Public Prosecutor's office Council no. 29/2020, from 2020.02.18].

Regardless of this debate (article 32 of Decree-Law no. 433/82 itself states that criminal law is subsidiary applicable) the truth is that administrative criminal law qualifies confiscation as an accessory sanction [article 21 (1) (a)] and provides for the possibility of confiscation of instruments and dangerous products (article 22), and the confiscation of their equivalent value (article 23). Confiscation is also possible without a conviction (article 25) and against third parties (article 26).

However, the confiscation of proceeds (i.e. the economic benefit obtained from the commission of the administrative offence) should be considered in the measure of the economic sanction that is applicable, which may be aggravated for this purpose [article 18 (2)].

The decision is taken by the competent administrative authority and if there is an appeal by the judge in criminal court (general rule) or in administrative court (for instance environmental administrative penal law).

2. For each model of confiscation:

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

The object of a direct confiscation is the following:

– Instrumentalities used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences [article 109 (1) PC; for example, weapons or the means utilized to counterfeit currency, computer files];

– Assets, of any kind, ex novo, directly produced by the crime [article 110 (1) (a) PC; counterfeit currency, handmade firearm);

– Proceeds of crime whatever are the changes they may have undergone [article 110 (1) (b) (2) and (3) PC; the bribe, the money received by selling drugs; the money earned in a casino by gambling the stolen goods).

The object of value confiscation is the following:

– The value equivalent to instrumentalities used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences [article 109 (3) PC];

– The value equivalent to assets *ex novo*, directly produced by the crime [articles 110 (4) and 11 (3) PC];

– The value equivalent to proceeds of crime [article 110 (4) PC]; and

– The value equivalent to the licit assets transferred to a third party to avoid value confiscation [article 111 (2) (a) (3) PC].

Thus, all the property of the offender, the beneficiary and the third party, equivalent to instrumentalities, products and proceeds, regardless of its origin, may be confiscated. If the instrumentalities and the direct or indirect product and proceeds from crime can't *ab initio* or latter be confiscated *in specie,* there will be value confiscation.

The object of extended confiscation (unexplained wealth) is the following

The object of unexplained wealth confiscation is the difference between the value of all of the assets owned by the convicted person and that value which would be congruent with his legal income (it is a value-based confiscation).

Thus, all the property of the offender, regardless of its origin, may be confiscated [article 7 (1) and (2) Law 5/2002).

The object of non-conviction-based confiscation is the following:

– Instrumentalities used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences [article 109 (2) PC];

– Assets, of any kind, *ex novo,* directly produced by the crime or their equivalent value [article 110 (5) PC]; and

– Proceeds of crime whatever are the changes they may have undergone or their equivalent value [article 110 (5) PC].

The object of third-party confiscation is the following [article 111 (2) and (3) PC]:

– Instrumentalities belonging to the third-party used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences or when the third-parties have taken advantage of the fact [article 11 (2) (a) PC];

– Assets, of any kind, belonging to the third-party, ex novo, directly produced by the crime or their equivalent value [article 11 (2) (b) PC];

– Proceeds of crime belonging to the third-party whatever are the changes they may have undergone or their equivalent value [article 111 (3) PC];

– Assets transferred to the third-party by the defendant to avoid the confiscation of equivalent value [article 111 (2) (c) PC];

– Assets, whose origin is totally legal, equivalent to the aforementioned goods [article 111 (3) PC].

Administrative confiscation

The object of administrative confiscation is:

– Instrumentalities used or intended to be used, in any manner, wholly or in part, to commit an administrative offence, when such objects represent, by their nature or the circumstances of the case, serious danger to the community or there is a serious risk of their use for the commission of a crime or other administrative offense [article 22 (1) Decreto-Lei no. 433/82];

– Assets, of any kind, *ex novo,* directly produced by the administrative offence when such objects represent, by their nature or the circumstances of the case, serious danger to the community or there is a serious risk of their use for the commission of a crime or other administrative offense [article 22 (1) Decreto-Lei no. 433/82];

– The economic benefit resulting from the practice of the administrative offence [article 18 (2) Decreto-Lei no. 433/82]; and

The value equivalent to the above mentioned assets [article 23 Decreto-Lei no. 433/82].

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

There are three different goals behind the introduction of the above-mentioned rules.

The confiscation of instrumentalities is usually considered analogous to a preventive measure. As we are going to see, normally confiscation of instrumentalities is only possible when for its nature or the circumstances of the case, they may turn to be perilous for the safety of the people, the morals and public order, or there may be a serious risk of being used to commit new typical illicit facts [article 109 (1) PC]. So the confiscation of instrumentalities is not related with assets recovery: the rational is another one. The goal of instrumentalities confiscation is normally risk prevention.

The confiscation of instrumentalities can also be a penalty (article 12-B Law no. 5/2002) having in this case all the normal objectives of the criminal law.

Confiscation of product and proceeds from crime aims to prove that crime doesn't pay: the convict must be placed in the patrimonial situation prior to the commission of the crime, thus demonstrating that the crime does not pay and contributing to a patrimonial order in accordance with the law. To do that the law allows in specie and also value based confiscation.

Confiscation of unexplained wealth is part of the fight against organized crime, money laundering, corruption, terrorism, etc. Such kind of criminality is immune to penalties, but very sensitive to the confiscation of assets generated by the crime or used to commit the crime (terrorism).

Confiscation of unexplained wealth also testifies the application of the principle that crime doesn't pay and so that crime is not a lawful means of acquiring property. Confiscation demonstrates that crime should not pay and, at the same time, seeks to achieve a patrimonial order in accordance with the law (Decision from the Constitutional Court no. 392/2015, from 2015.08.12).

The goals of administrative confiscation are also risk prevention, punishment and demonstrating that administrative offences don't pay either.

c) Which are the elements to be realized 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.

Direct confiscation.

Direct confiscation presupposes the judicial ascertainment that the offender has committed an unlawful act described by the criminal law (*un fatto tipico ed antigiuridico*) and a direct link between this act and the instrumentalities, the products and the proceeds. It is not a crime since guilt and awareness of the wrongdoing aren't needed.

Usually, this ascertainment and link is proven in a conviction sentence for an intentional or reckless crime but it may be also the consequence of an acquittal sentence. So, the focus is, as we are going to see, more in the conduct and its patrimonial consequences than in the quality of the decision.

In the case of instrumentalities, the prosecution has also to prove that for its nature or the circumstances of the case, they may turn to be perilous for the safety of the people, the morals and public order, or there may be a serious risk of being used to commit new typical illicit facts. Only exceptionally, if the offender is convicted of an offense listed in article 1 (1) Law no. 5/2002, it won't be necessary to prove such kind of danger [article 12-b Law no. 5/2002].

The jurisprudence, almost unanimously, also requires the essentiality of the instrument: if without the instrumentality the offense would be impossible the confiscation is admissible otherwise there will be a violation of the proportionality principle [Constitutional Court decision no. 202/2000; Supreme Court Decision, 16.11.2009 (Oliveira Mendes); Évora Court of Appeal Decision, 2021.06.08 (Fátima Bernardes).

Confiscation of equivalent value

The confiscation of equivalent value presupposes the judicial ascertainment that:

- the offender has committed an unlawful act described by the criminal law (*un fatto tipico ed antigiuridico*);

- a link between this act and the instruments, the products or the proceeds *in specie*; and

- the impossibility to confiscate either of them in species (the free use of an house or a car), or because it is not possible to locate them, they are out of the reach of courts (in the possession of a *bona fides* third-party) or have been destroyed.

Value confiscation will also take place whenever there is any kind of depreciation of the asset from the moment of its acquisition to the moment in which the seizure takes place (the defendant changed the asset to a less valuable one). In that case there will be *in specie* confiscation and confiscation of equivalent value.

Confiscation of the value implies the estimation of the goods. Sometimes this is not an easy task, namely when the good is not available anymore or it would entail some difficult expertise. In any case a flexible generic estimation could be admissible.

Confiscation of the value would be executed even if the convicted person died in the enforcement phase [articles 109 (3), 110 (4) and 111 (3) PC].

The proportionality principle doesn't pay here any important role: all the advantages of the crime, no matter their value, should be removed. However, if, taking into account the socio-economic situation of the convict, the execution of the confiscation of value proves to be unfair or too severe, the court may equitably mitigate its amount [article 112 (2) PC].

Extended (unexplained wealth) confiscation.

Unexplained wealth confiscation reaches assets whose link with a former crime is not proved: they do not come from the crime that is prosecuted, but from a criminal activity presumed by the legislator. Therefore, the judicial ascertainment of a cause-effect relationship between the prosecuted crime and the asset is not needed.

So, it is necessary:

a) A conviction sentence related to any of the crimes listed in article 1 (1) and (2) Law no. 5/2002.

b) The judicial ascertainment of the defendant's patrimony, understood as the set of assets:

– Which de defendant owns or which he has domain over or benefits from, at the time of the assignment of his quality of defendant or after that;

– Which were transferred by the defendant to third parties for free or for an insignificant value in the five years prior to the assignment of his quality of defendant;

– Received by the defendant in the five years prior to the assignment of his quality of defendant, even if their location cannot be known.

This is a very broad definition that includes assets which the defendant no longer detains. In fact, at the time of the prosecution, the defendant may be absolutely devoid of assets and, nonetheless, the value of the disproportional value can be very high.

The definition of the accused's patrimony also implies a temporal connection with the crime since only the assets that he owns or owned in the prior five years are relevant.

c) The judicial ascertainment of the legal income of the defendant. Legal income isn't defined by law. However, the jurisprudence and some scholars defend that legal income is the income declared for income tax, with some corrections. There are some incomes that are not legally declared and the tax declaration of proceeds from crime doesn't legitimize them. If that is the case, the offense that generated the declared income should be prosecuted and the assets should be confiscated.

Most of the Portuguese jurisprudence considers that the three aforementioned requirements suffice to trigger the presumption that the incongruent property has its origin in criminal activities, related or not with the crime the defendant has been convicted with and triggers the mechanism. The prosecution therefore would not be required to prove any link between the disproportional value (unexplained wealth) of the defendant and any prior criminal activity.

Non-conviction-based confiscation

The Portuguese non-conviction-based confiscation regime [articles 109 (2) and 110 (5) PC] presupposes the ascertainment of a cause-effect relationship between the prosecuted crime (*un fatto tipico ed antigiuridico*) and the asset or their equivalent value. In this regard there is no difference between non-conviction-based confiscation and direct or value-based confiscation.

So, the big difference is that this relationship isn't necessarily proved in a conviction sentence. If the owner of the assets has died, suffers from a chronic illness that prevent his/her prosecution, there is a risk of prescription of the facts, an absconding situation of

the investigated person which prevents prosecution of the facts or whenever he/she is exempted from criminal responsibility or it has been extinguished the judge may confiscate the assets in question.

Third-party confiscation

In Portugal third-parties confiscation presupposes that is impossible to confiscate the assets belonging to someone who has committed an offense or has beneficiated from it because they aren't their property (or they aren't anymore). If the assets hadn't been property of the third-party, they would have been confiscated, because they belong to the offender or the beneficiary.

Thus, to confiscate third-parties property the following criteria should be met [article 111 PC]:

– The judicial ascertainment that the offender has committed an unlawful act described by the criminal law (*un fatto tipico ed antigiuridico*);

– The judicial ascertainment of a cause-effect relationship between the prosecuted crime and the asset or his equivalent value;

– The judicial ascertainment that the third-parties have concurred in a blameful way in the use of an instrumentality or production of a product or have taken advantage of the fact;

– The judicial ascertainment that the instruments, products or proceeds had been acquired, for whatever reason, after the practice of the fact, knowing or should have known the acquirer of their origin; and

– The judicial ascertainment that the instruments, products and proceeds or the value corresponding to them, have, for whatever reason, been transferred to the third-party to prevent their confiscation, being or should such purpose be known by him.

Administrative confiscation

The requirements of administrative confiscation aren´t so different from the requirements of criminal confiscation.

– The administrative or even judicial ascertainment that the offender has committed an unlawful act described by the administrative law; and

– The ascertainment of a cause-effect relationship between the administrative offence and the asset or his equivalent value.

If we are speaking about third parties confiscation it will be also necessary :

– The ascertainment that the third-parties have concurred in a blameful way in the use of an instrumentality or production of a product or have taken advantage of the fact; ant

– The judicial ascertainment that the instruments, products or proceeds had been acquired, for whatever reason, after the practice of the fact, knowing or should have known the acquirer of their origin.

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

All the Portuguese confiscation mechanisms, except for the confiscation of unexplained wealth, can be applied when the convicted person is dead (even if he or she dies after the conviction). The law expressly foresees the case of death as a case of non-conviction-based confiscation [articles 109 (2), 110 (5), 127 (3) and 128 (1) PC]. The same will happen with the owner, no matter if it is a beneficiary or a third-party. In both cases the heirs will be in the same position of the death person and confiscation will be possible as if they were still alive.

In Portugal companies are criminally liable but there is no rule about the confiscation after their extinction.

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?

Unexplained-wealth's confiscation (the so called Portuguese extended confiscation) depends on the offender's conviction from one or more crimes listed in article 1 (1) Law no. 5/2002. In this case it is not possible to confiscate without that prior conviction. Even if the crime is time barred, there is immunity or an amnesty (of course, if the defendant dies after conviction, there will be no problem at all. The decision will be enforced in his patrimony). Without the conviction, that can have nothing to do with the illicit enrichment, the

mechanism doesn't work anymore. We have to bear in mind that some scholars also required a prison sentence. For them not all the convictions will be enough.

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

The Portuguese confiscation law has different features, different objectives and even different nature. One cannot speak only about a single regime but (even if in the same law, chapter or article) different regimes. In every case the judge should interpret the law and decided what is at stake and which are their legal requirements.

Traditionally the confiscation of instrumentalities and products was considered as something analogous to a security measure (*misuere di sicurezza*). At issue was the prevention of certain dangers: the instrument or the product, for its nature or the circumstances of the case, had to be perilous for the safety of the people, the morals and public order, or there had to be a serious risk of being used to commit new typical illicit facts [article 1109 (1) PC].

Nowadays (since the amendments made by the Law no. 30/2017) in the case of the crimes listed in article 1 Law 5/2002 [article 12-B of law no. 5/2002] isn't necessary to prove such kind of danger anymore: the confiscation of instrumentalities is a simple consequence of the criminal action. Hence, since confiscation is not dependent of that circumstances and can now be done by equivalent value [article 109 (3)], the objective isn't prevent the danger anymore but an additional penalty (*pena accessoria*).

In the cases of confiscation of the products and proceeds the most part of Portuguese scholars and jurisprudence agree that confiscation is a measure taken to restore the convict to the patrimonial situation he had prior to the commission of the crime (*commodum ex injuria sua non habere debet*) and thus ensure a patrimonial order in accordance with the law. Taken the product and the proceeds back has nothing to do with punishment. It is a civil measure related with a criminal conduct but not punishment. Nobody doubts that there is no punishment if the judge returns the stolen watch. The same happens when there is no victim (for example with the bribe).

Despite not being a penalty, the truth is that sometimes the Portuguese legislator denominates confiscation as an accessory penalty [for instance, article 8 (a) Decreto-Lei no. 28/84]. So in these cases, to be a penalty the judge schould go futuher and reach the legitime property of the offender. Only then there will be punisment.

Since confiscation isn't a penalty in cases of value confiscation it is only possible to confiscate the value equivalent to net advantage. One cannot confiscate the gross advantage without falling into a penalty. If the offender spends some money to commit the crime, this money schould be taken in accout when determining the equivalent value [Court of appeal Porto, 2022.12.13 (Manuel Soares); Cour of appeal Guimarães, 2023.01.23 (António Teixeira); but against, Cout Appeal Coimbra, 2019.03.20 (Maria José Nogueira)].

Also, the unexplained wealth confiscation (article 7 Law 5/2002) is considered by the vast majority of doctrine and jurisprudence to be a civil measure included in the criminal proceedings (Constitutional Court Decisions no. 101/2015, 392/2015, 476/2015, 498/2019 and 595/2020). What is at issue is not imputing to the defendant the commission of any crime and the consequent sanction, but rather depriving him of the disproportional value, as it has been concluded that it was acquired illegally, thus restoring the patrimonial order according to the right.

«Hence, whether the determination of the value of this incongruity, or the possible loss of assets arising therefrom, does not merge into a concrete judgment of censorship or culpability in ethical-legal terms, nor into a judgment of concrete danger that those gains serve for the practice of future crimes, but in a finding of a situation in which the value of the convict's assets, compared to the value of the lawful income earned by him, presumes his illicit origin, and it is important to prevent the maintenance and consolidation of illegitimate gains» (Constitutional Court decision no. 392/2015; in the same sense, decisions 476/2015 and 498/2019).

Non-conviction-based confiscation is possible when confiscation is not a penalty. This is the reason why in Portugal isn't possible to confiscate the value of the instrumentalities without a conviction [article 109 (3) PC].

The third-party confiscation regime, like all the others, is civil in nature: it isn't a case of criminal liability transmission. The sale or donation is void (articles 892 and 956 Civil Code; hereinafter CC). Only in cases where the instrumentalities were owned by the third

parties before the commitment of the crime will the explanation be different. They should have had contributed to offence commitment.

The guarantees established for the exercise of *ius puniendi* don't govern the process in which it is carried out. So, once again, its goal is to avoid illicit enrichment.

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

In 1982, the Portuguese legislator enshrined a general clause allowing the confiscation of instruments and proceeds of crime. In 1995 the same became possible for some cases of the proceeds arising from the commission of the crime. In 2017 the legislator also enshrined a general clause for the proceeds that is the same as the one that was already valid for instruments and products. The solution is nowadays the same to instrumentalities, products and proceeds. So confiscation without conviction is possible for all in cases of death (prior or after the trial), illness, absconding, prescription, amnesty, etc. [articles 109 (2) and 110 (5)PC].

4. For each model of confiscation:

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

Almost all the Portuguese confiscation mechanisms are carried out in the criminal proceedings. In fact, apart from the administrative penal law (for example Decreto-Lei no. 433/82, from 10.27), there is no confiscation outside the criminal procedure.

The judicial authority responsible for carrying out the criminal investigations in its first stages is, like in Italy, the Public Prosecutor.

The criminal investigation is done by the Public Prosecutor and the Police. They can trace, and in some circumstances, they can freeze the instrumentalities, the product and the proceeds from the crime. The judge of freedoms only acts in some specific cases, authorizing or practising some acts where the fundamental rights of the concerned person are in question.

In the most complicated cases (where the instrumentalities, property or proceeds are related to crimes punishable with a custodial penalty of three years or more and their estimated value is higher than € 102.000 or whenever authorised by the Prosecutor General of the Republic or upon delegation, by the district deputy prosecutors-general, taking due account of the economic, scientific, artistic or historical estimated value of the property to be recovered and of the complexity of the investigation) the Asset Recovery Office carries out the financial or patrimonial investigation, identifying, tracing and seizing property or proceeds related to crimes, both at internal and international level. This delegation hasn't to be notified to the deffendant (Constitutional Court no. 73/2023).

The victims have the right to intervene in the proceedings exercising both criminal and civil actions (articles 71 and following CPC). Usually, the civil actions are filed together with the criminal action. The same happens with the third parties. They also have the right to be heard [article 374-A CPC) and the right to appeal the final decision (article 401 (1) (d)].

In the event of concurrence between confiscation and the rights of victims, there is a big discussion in the jurisprudence. Some argue that victims' rights prevail but only in the enforcement phase will be considered (article 130 PC). Others argue that it is impossible to confiscate whenever there are victims. Due to the opposition of decisions the Supreme Court has to decide which stream is to follow.

In order to secure the assets, preventing their destruction, transformation, removal, transfer or disposal and so guarantying the enforcement of the final confiscation order the Portuguese legislation allows the issuing of a freezing in the pre-trial stage (article 7 of the directive 2014/42/UE).

If the property is an instrument, a product or a direct or indirect proceed from the crime the judge of liberties, and, in some cases, the public prosecutor or even the police may freeze the assets [article 178 criminal procedural code (hereinafter CPC and Decisions form the Constitutional Court no. 294/2008 and 387/2019].

If the property isn't liked with an offense (licit property), and is useful to guarantee the enforcement of a value confiscation decision, only judge of liberties may freeze the assets. For that, usually the public prosecutor has to prove the so called *fumus comissi delicti* (it means, the probability of being convicted) and *periculun in mora* (the need of urgent measures to guarantee the enforcement of the decision). Exceptionally, if there is already an indictment of the disproportional value, the Public Prosecutor only has to prove the existence of the *fumus comissi delicti.*

The defendant should be heard before or sometimes after the freezing (articles 192 and 194 CPC).

The Assets Management Office has competence to manage the frozen assets, including to sell them in advance and to give them to social reuse before the final decision [articles 185 (1) CPC and article 14 Law 45/2011 from 2021.24.06]. After the final decision, the assets belong to the state, which decides their destination.

The unexplained wealth confiscation reaches assets that (in the meaning afore mentioned) belong to the accused. So in this case, is not possible to confiscate assets belonging to third parties. They only be affected if the assets the defendant owns indirectly are frozen or (in the cases where e doesn't pay the incongruent value) confiscated. In both these cases they can defend their rights (article 343-A CPC).

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

The Portuguese Law no. 5/2002 assumes that the value of the defendant's assets incongruent with his legal income are the proceeds from criminal activity. So, the burden of the prove shifts and the defendant can prove that the assets in question are proceeds of a lawful activity unknow to the prosecution; that he owned them at least 5 years prior he officially became a defendant in the procedure or that the assets were acquired with income obtained also 5 years before that moment [article 9 (3)].

CPC doesn't provide any rule concerning the standard of the proof in the other cases.

Even so it is possible to say that when it is not a criminal action, the standard of proof will be lower. In fact, according to article 268 (1) (e) CPC, the pretrial judge has competence to forfeit the seized assets when the Public Prosecutor dismiss the case (articles 277, 280 and 282 CPC) and that is done based on simple signs and probabilities (article 283 (2) CPC) not on evidence. Apart from that, there is also another case where the standard of proof can be different: in the civil claims made inside the criminal proceedings (articles 71 and following CPC) the judge has not necessarily to take a decision beyond reasonable doubt. So both examples contribute to the argument that the standard of proof may be lower.

So far there are no decisions about this.

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

Despite being done in criminal proceedings, confiscation isn't usually a criminal action. So, like happens with civil claims made in criminal proceedings (articles 71 CPC and the following) the safeguards aren't the same [for instance, article 7 (2) Law no. 5/2002 sets up a presumption that would be incompatible with criminal law): only when it is a criminal sanction will all the criminal safeguards be applicable. However, the Portuguese law doesn't regulate carefully those proceedings. So which safeguards will be applicable isn't clear.

The hybrid nature of the confiscation (can be a penalty or a restitutive measure) has consequences on the proportionality principle. As we have already seen the proportionality clause applies when confiscation is a penalty. If isn't the case, all the proceeds should be confiscated in order to restore a patrimonial order in accordance with the law. Only after the final decision, when the execution of the confiscation (taking into account the socio-economic situation of the convict) of value proves to be unfair or too severe the court may equitably mitigate its amount [article 112 (2) PC].

No matter if it is a penalty or a civil measure the relevant decisions (freezing, confiscation) can be appealed. There is only one degree of appeal [there is no appeal from de court of appeal decision, to the Supreme Court (Constitutional Court no. 76/2023; Supreme Court decision from 2022.07.14 (Helena Moniz), but the decision can be challenged in the Constitutional Court].

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

Trial *in absentia* is possible when the defendant has been summoned personally, or at his/her address or in the designated person (as mentioned in article 333 CPC) and the Court considers that there his presence is not indispensable for the finding of the facts (in case he appears during the trial he has always the right to speak).

Trial *in absentia* is also possible where the accused person can' t stand trial because of his age, serious illness, residence abroad or other similar cases he may ask or consent in being tried [article 334 (2)].

In both these cases, we will be judged, eventually convicted, and the instrumentalities, products and proceeds can be confiscated.

In the cases where is not possible to summons the accused person, he can be declared contumacious and the instrumentalities, products and proceeds can be confiscated without

his conviction [articles 109 (2) and 110 (5) PC and 335 (5) CPC]. This a non-conviction-based case expressly set up in the Portuguese law. The proceedings will proceed *in absentia* of the accused only to take the confiscation decision.

Those rules aren't applicable in cases of unexplained wealth confiscation because, as mentioned above, there will be necessary a conviction.

The unjustified absence of the duly summoned third party will not by itself cause postponement of the trial.

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

The Portuguese law allows the confiscation of instrumentalities, products and proceeds even if the accused person is acquitted. It only depends on the grounds of the acquittal.

If the accused person is acquitted because there is no evidence on the facts (*fatto tipico ed antigiuridico*) it will be impossible to confiscate the supposed instrumentalities, products and proceeds and also the disproportionate value. In this case it isn't possible to begin a new investigation and process.

If the accused person is acquitted for other reasons (for example, because of the rules on the statute of limitations for criminal proceedings) there can be a confiscation sentence. It is a case of non- conviction-based-confiscation.

5) For each model of confiscation:

a) Does it comply with the principle of legality?

Even in cases where it isn't a penalty the Portuguese confiscation system fully complies with the principle of legality. In the current situation it isn't possible to confiscate if the prosecution doesn't prove an unlawful act described by the criminal law (*fatto tipico ed antigiuridico*); or the disproportional value of the assets. In both cases the confiscation requirements must be laid down in a prior law as follows.

Direct confiscation/Confiscation of the value /Non-conviction-based confiscation/Third-party confiscation/Administrative confiscation

Portuguese law allows third-party confiscation for all profitable offences set out in PC and other pieces of penal legislation (all crimes approach).

Extended (unexplained wealth) confiscation

The unexplained wealth in only applicable in cases where the subject of the confiscation order has been convicted for, at least, one of the following crimes:

(a) illicit drug trafficking pursuant to articles 21 to 23 and 28 of the Decree-Law no. 15/93 of 22 January 1993;

(b) terrorism, terrorist organizations, international terrorism and financing of terrorism;

(c) illicit trafficking in weapons;

(d) trading in influence;

(e) undue receiving of advantage;

(f) active corruption (offering/granting) and passive corruption (soliciting/accepting);

(g) embezzlement;

(h) unlawful economic advantage in a transaction;

(i) money laundering;

(j) criminal association;

l) child pornography and incitement to child prostitution;

m) damage regarding computer programs or other computer data and computer sabotage pursuant to articles 4 and 5 of Law 109/2009 of 15 September 2009, as well as unlawful access to a computer system, where one of the results provided for in article 6 (4) of the said Law has been produced or is attained with recourse to one of the said instruments or constitutes one of the conducts typified by paragraph 2 of the said article;

n) trafficking in persons;

o) counterfeiting of currency and of titles equivalent thereto;

p) incitement to prostitution;

q) smuggling;

r) trafficking in, and tampering with, stolen vehicles.

In the cases falling within subparagraphs (p) to (r) it is necessary that the criminal offence is committed in an organised manner [article 1 (1) and (2) Law 5/2002].

Hence, in line with the Confiscation Directive [article 5 (2)] this solution is only applicable to some more serious and listed offences.

b) Does it comply with the principles of legal specificity of a statute?

The Portuguese regime complies with the principles of legal specificity of the statute. Nobody discuss, even in cases where the proceeds correspond to the spared expenses (for example environmental crimes) or the fruition of goods (like they do in Italy), if the statute is or isn't enough clear and specific.

The assets that can be confiscated are also precisely identified in the PC. Even in the case of equivalent value confiscation, the value confiscated is precisely the one corresponding to the instruments or proceeds that have been identified and which it was not possible to confiscate in specie.

c) Does it comply with the principles of: non-retroactivity of the /more severe/statute?

The non-retroactivity principle is enshrined in the Portuguese constitution (article 29). When confiscation is a penalty, there is no doubt that the law should be applicable only for the future. However, the prohibition of non-retroactivity only covers penalties, not including confiscation when configured as a simple measure of restitution of the convict's assets to the patrimonial situation prior to the practice of crime. As a result of the commission of a typical illicit act or because it is involved in its commission, this heritage is ab initio unprotected (art. 280.º CC), not deserving any legal protection (Dassa Foundation e others v. Liechtenstein, no. 696/05, 2007.07.10; Todorov and others v. Bulgaria, no. 50705/11, §§ 301 e ss, 2021.07.13 and the important decision form the BVerfG, 10.02.2021 – 2 BvL 8/19).

As far as we know there isn't such kind of cases in the Portuguese courts.

d) Does it comply with the principles of: the right to private property?

The Portuguese confiscation law fully complies with right to private property.

First of all we have to bear in mind that crime isn't a legitimate acquisition title. Even form the civil point of view there is no protection for business contrary to the law (purchase

and sale of narcotics), public order or good customs (article 280 CC) and so, in this case, the confiscation is the mere implementation of a patrimonial order in accordance with the law.

Even in cases where the property right can be hit the Constitutional has already said that « the constitutional right to private property is sacrificed in honor of the values of personal security, morals, or public order that form the foundation of a democratic rule of law. The right to private property, although a fundamental right, is not an absolute right (…). It has immanent limits between which those that are necessary to guarantee the aforementioned values (…). [T]he norm of (…) article 108 (now 109) proves to be adequate to the performance of its guaranteeing function of the aforesaid security values; it is not considered disproportionate for obtaining this scope» (decision no. 340/1987, from 1989.07.10).

e) Does it comply with the principles of the proportionality?

As we already said the Portuguese regime can be a penalty and in these cases should fully comply with proportionality principles. The Constitutional Court has decided «that, a rule that provides that the instruments of the offense must in any case be declared forfeited in favour of the State, regardless of the concrete consideration, either of the seriousness of the offense and the fault of the agent, or of the danger and risk of the instruments for future crimes, or even the very nature (and value) of the object in question, it certainly cannot, in the abstract indetermination of the ablatory reaction of the property right that it imposes, be considered respectful of the constitutional requirements of proportionality» (Decision no. 202/2000, from 2000.04.04; see also decisions no. 327/99, from 1999, 05.27; no. 87/2000, from 2000.02.10; no. 380/2001, from 2001.09.21 or no. 405/2001, from 09.26).

If confiscation is not a penalty the proportionality principle is applicable after the decision, reducing the equivalent value, and only in cases where execution may be considered unfair or too severe [article 112 (2) PC].

f) Does it comply with the principles the right to a fair trial?

The Portuguese system is considered compatible with the right to a fair trial. Recently the Constitutional Court stated: «the non-notification of the Public Prosecutor's decision that determined the intervention of the ARO, considering the nature of this act and the procedural phase in which it was issued, combined with the complexity of non-interference

with the rights of the defendants or with their procedural position, doesn't imply any limitation of the right of defence, since it doesn't deprive the defendant of the exercise of any essential procedural right. Indeed, such rights of defence remain intact, with the defendant being able to legalize or contradict the steps taken by the ARO, under the guidance of the Public Prosecutor's Office, whether in preventive freezing or in liquidation incidents, all rights were assured who assist him, primarily in the seat of judgment» (Decision no. 73/2023, from 03.14).

g) Does it comply with the right to defence?

In all the Portuguese confiscation mechanisms the defendant, the beneficiary and the third-party have the right to defence, including a lawyer (and if they don't have enough means for it, they will have legal aid).

They will also have the opportunity to appeal the most important decisions (freezing and confiscation orders).

h) Does it comply with the presumption of innocence?

The Portuguese system complies with the presumption of innocence.

Usually is necessary to prove the relationship between the crime and the assets (or the equivalent value).

In cases of unexplained wealth, the Constitutional Court decided that: «the presumption of illicit origin of certain assets and their possible confiscation in favor of the State is not a reaction to the fact that the defendant has committed any criminal act. It is, rather, a measure associated with the verification of an incongruous patrimonial situation, whose lawful origin has not been determined, and in which the conviction for the commission of one of the crimes foreseen in article 1 of Law 5/2002 of 11 January has only the effect of serving as a trigger for the investigation of an illicit acquisition of goods.

Taking into account the above, in this procedure grafted onto criminal proceedings, the constitutional norms of the presumption of innocence and the defendant's right to silence, invoked by the Appellant, do not operate» (decision no. 392/2015, from 2015.08.12).

i) Does it comply with the principles of the *ne bis in idem* principle?

The Portuguese legislation fully respects the *ne bis in idem* principle. So far there are no cases in the jurisprudence.

j) Does it comply with other relevant rights – what sort of?

8) 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?

Direct confiscation

The Directive 2014/42/EU was transposed in Portugal by the law **no.** 30/2017 from 2017.05.30 that, apart from other pieces of legislation, amended the PC and the Law no. 5/2002.

In the PC the effects weren't so big since the previous redaction already complied with almost all the requirements imposed by the Directive. As was said at the beginning, the Portuguese regime was, since 2002, a very robust one.

Traditionally in the Portuguese Law the confiscation of instrumentalities only was possible if by its nature or the circumstances of the case, they may turn to be perilous for the safety of the people, the morals and public order, or there may be a serious risk of being used to commit new typical illicit facts. So to transpose the Directive [article 4 (1)] the legislator prescribed in article 12-B Law no. 5/2002 that, in the case of crimes listed in article 1 of that law, confiscation happens directly, without the demonstration of the aforementioned dangers, like it is in the Directive.

The same happened traditionally with the products of crime. However, in this case, the Portuguese legislator chose to equate products to proceeds, thus transposing the directive. They too, nowadays, no longer depend on the proof of those dangers.

Extended confiscation

Almost all the doctrine claim that the Portuguese legislator didn't transpose properly article 5 of the Directive (extended confiscation). In fact the mechanism foreseen in the

Portuguese Law no. 5/2002 is not the mechanism set out in the Directive and the legislator limited itself to designating the mechanism provided for in law no. 5/2002 as extended confiscation. However, the naming of things does not change their nature.

Non-conviction-based confiscation

The transposition law clarified the former version, turning clear that also the confiscation of proceeds can happen even without a conviction. Before, only in very few cases (for instance, lack of awareness of wrongdoing or guilt) was the confiscation possible. Now, since there is a general clause (like it was already with the instrumentalities and the products), it is possible in all imaginable cases, regardless of the reason for the defendant's non conviction

Third-party confiscation

The transposition law extended the third-party confiscation to cases where the instruments, products and proceeds or the value corresponding to them, have, for whatever reason, been transferred to avoid their confiscation, being or should such purpose be known by him. Before the confiscation was only possible in cases where their owners had concurred in a blameful way in their use or production, or had taken advantage of the fact; or when the instruments, products or proceeds had been acquired, for whatever reason, after the practice of the fact, knowing or should had known the acquirer of their origin.

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?

All the Portuguese confiscation mechanisms are done by a criminal judge.

Direct, value, non-conviction-based confiscation and third-party confiscation presupposes the judicial ascertainment of an unlawful act described by the criminal law and a link between this act and an instrument, a product or a proceed or their equivalent value. In that case one can say that, even if it is not a penalty, confiscation is still a consequence of a criminal conduct.

In unexplained wealth confiscation the legislator presumes that the difference between the value of all of the assets owned by the convicted person and that value which would be congruent with his legal income are derived from a criminal activity: it may be the criminal activity for which the defendant has been convicted, but it can be also another criminal activity. Nobody can be sure about that.

In both case we are still in the realm of criminal proceedings.

If we take in consideration the broad concept coined by the ECJ and the ECtHR, even the administrative penal law or regulatory law can be included in the concept of "proceedings in criminal matters".

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?