

RECOVER PROYECT
“ESTABLISHING THE SUBJECT MATTER OF THE REGULATION”:

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

NATIONAL REPORT FOR SPAIN

1.- Spanish Legal Confiscation System at a glance.

Spain did notify the Commission the timely transposition of the Directive 2014/42/EU into its national legal system by mean of the Organic Law n° 1/2015 amending the Spanish Criminal Code (hereinafter SCC). This implementation triggered relevant changes at national level in relation to several legal concepts. Namely as regards to non-conviction-based confiscation (hereinafter NCBC); extended confiscation and its scope of application; third-party confiscation; safeguards, etc.

The Spanish substantive legal framework on confiscation is currently regulated in Articles 127 to 127 octies of the SCC within Title VI of Book I (General Part), under the heading "Of the accessory consequences". In addition, Confiscation is also specifically provided in the Special Part of the SCC (Book III) for the following crimes:

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

As regards the Spanish procedural legal framework is concerned, the Spanish Code of Criminal Procedure (hereinafter SCCP) confiscation regulation is twofold and foreseen in Title III ter: “On the intervention of third parties affected by the confiscation and the procedure of autonomous confiscation” (Chapters I -Articles 803 ter a to 803 ter d- and Capter II -Articles 803 ter e to 803 ter u-, respectively) and in the relevant regulation on interlocutory selling and provisional using of seized items (Articles 367 bis to 367 septies of the SCCP)¹.

In general terms, the Spanish legal regime of confiscation can be summarized as follows:

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

Ordinary confiscation refers to a judicial order concerning property linked to a specific crime for which the owner has been convicted. The targeted assets are the direct proceeds or the instrumentalities of a crime, following a criminal conviction for that crime. The relevant offences are twofold:

- As regards to intentional crimes (art. 127.1 SCC), in general terms, Spanish legislation follows the so-called “all-crimes” approach. Thus, this particular provision allows judges and courts to order the confiscation of goods, instrumentalities and proceeds of crime. Confiscation requires a criminal conviction sentence for any intentional crime.

¹ An informal translation of the relevant piece of substantive and procedural Spanish legislation on confiscation is attached to this Report.

It is mandatory to confiscate both effects and direct or indirect proceeds of crime as well as goods, means or instruments with which it was committed, “whatever changes it may have experienced”. It refers to goods of any kind and of any nature (furniture, real estate, expendable, non-expendable, etc.) Therefore, it does not refer exclusively to the material object of the crime, neither to patrimonial but profitable crimes. Therefore, as previously mentioned, Spanish legislation enables freezing and confiscation of all intentional crimes.

- As regards reckless or negligent crimes (art. 127.2 SCC), for which a custodial sentence over the threshold of one year imprisonment is foreseen, confiscation is a possibility (optional), under the discretionary criteria of the competent Court by mean of a motivated decision assessing proportionality in accordance with Art. 128 SCC.

1.b.- Value-based confiscation (Articles 127 (3) as well as Arts. 127 quater (1) and 127 septies SCC)

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

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

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

In addition, Article 127 septies SCC foreseen value-based confiscation during the execution phase (so-called *Ejecutoria* under the Spanish Legal system) whenever by the nature, situation, or any other circumstances of the goods, it had not been possible to carry out the confiscation. In this case value-based confiscation is optional.

Both legal provisions foreseen the same solution to make the confiscation effective in the assumptions of impossibility, although each of them will be applicable in different procedural moments: when the confiscation is decided by the Court sentence (art. 127.3 SCC) and in the moment of making it effective through its execution (art. 127 septies SCC), in line with the so-called *wertersatz* under the German Law (Art. § 74.c) of the German CC). Value-based confiscation could be used when the seizure of an asset becomes the seizure of an amount of money that, in turn, can also become other different property, which can be done directly in the sentence or later in its execution phase. So, the common value-based confiscation is mandatory and should be applied when the confiscation is decided within a sentence and the second is optional and comes up afterwards, when the sentence must be enforced later on during the execution phase in a different reasoned decision based on the wording of the sentence.

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

However, in the vast majority of cases value confiscation could be redundant, taking into account that filing a civil action under the umbrella of criminal proceedings in Spain is not only possible but mandatory for the prosecutor unless the relevant victim expressly renounces to it. Consequently, for the confiscation of property, the value of which corresponds to such instrumentalities and proceeds, the Spanish legislation provides the possibility to confiscate other assets of equivalent value to the instrumentalities and proceeds of crime based on a final conviction sentence in the frame of the so-called “responsibilities pecuniarias”, a broad legal concept including compensation, costs and fines.

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

Non-conviction-based confiscation refers to a confiscation measure taken in the absence of a criminal conviction. Directive 2014/42/EU covers cases where a criminal conviction is not possible because the suspect has become ill or fled the jurisdiction, but the court is nevertheless convinced that the assets are of criminal origin, and a conviction would have been delivered had it not been for the illness or the absconding of the defendant. So, confiscation is also possible in cases where the initiated criminal proceedings could not move forward, and no conviction can be handed down. Under the Spanish legal system NCBC is provided in Art. 127 ter SCC where the exemption³ or extinction⁴ of the criminal responsibility coexists in the frame of the criminal procedure initially opened against an investigated/accused person. However, we must consider the adversarial principle within a criminal proceedings. In this regard, it should be noted that the SCPC allows the joint exercise of civil and criminal actions, unlike *common law* systems that admits separate civil confiscation orders issued by civil courts within civil procedures indirectly linked with criminal offences.⁵

So, in Spain NCBC is possible due to the following enabling circumstances:

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

Spanish legal framework goes beyond the provisions of the 2014/42/EU Directive enabling confiscation when the conviction of the accused or suspected person is not possible due to the ending of his/her criminal liability (e.g. expiry of the statute of limitations or if the criminal proceedings ceased or were declared inadmissible) In those cases, an indictment against the person to whom the given assets are intended to be confiscated must be delivered by the Public Prosecutor when the illicit patrimonial situation can be proved. (We will elaborate this legal issue in a later paragraph)

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

² Article 127 ter 1. The Court order the confiscation outlined in the preceding Articles even if no sentence has been handed down, when the unlawful financial position has been demonstrated in adversarial proceedings and in any of the following cases:

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

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

³ Article 20 SCC.

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

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

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

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

This is the most powerful type of confiscation and was initially introduced in the Spanish legal framework in 2010 and later developed in 2015 in line with 2014 EU Directive. Extended confiscation concerns orders which go beyond the direct proceeds of a given investigated offence. The order follows a criminal conviction, targeting property “beyond the direct (and concrete) proceeds of the crime for which the offender was convicted, where the property seized is derived from criminal conduct.” A direct link between the property and the offence, such as in the case of standard confiscation measures, is not needed if the court assesses that the offender’s property was derived from another unlawful conduct. Therefore, extended confiscation enables deprivation of property belonging to a convicted person when: (i) the crime is likely to give rise to an economic benefit; and (ii) the concurrent circumstances of the case indicate that the property is derived from criminal conduct.

Under the Spanish legal system, the court must ‘decide, based on well-founded objective evidence’ that the property derives from illegal activities.

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

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

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

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

In a nutshell, extended confiscation is based on the enlargement of its consequences to groundless assets and profits whose connection with the given offence cannot be determined with certainty. In Spain the background landmark judgement in relation to extended confiscation is the judgement issued by the Supreme Court the 5th October 1998 in a drug trafficking case clarifying the scope of Article 374 SCC setting up the following agreement: “*Confiscation of proceeds of crime referred to in article 374 must be extended to profits from operations prior to the specific investigated and prosecuted criminal act, provided that said origin is proved and the accusatory principle is respected.*”.

There are two different extended confiscation modalities:

1st.- **Ordinary extended confiscation.** The above-mentioned extended confiscation of assets, effects, and profits from a criminal activity. This modality implies the seizure by the Court of any goods, effects and proceeds of crime that belong to the person convicted of any of the crimes of art. 127 bis.1 SCC. This confiscation is mandatory for the Judge as long as the above-mentioned circumstances concur and

there are “reasonable evidence” of its criminal origin and the defense “does not prove their lawful origin” (arts. 127 bis and quinquies SCC)

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

The essential note that differentiates both modalities of extended confiscation lie in the ultimate criterion established to delimit the assets subject to confiscation. While the extended confiscation itself (provided in Art. 127 bis SCC) will reach all assets that, by virtue of existing evidence, can be linked to previous criminal activities of the subject, the extended confiscation by criminal reiteration (Arts 127 quinquies and 127 sexies SCC) will be extended to all the goods acquired and to all the expenses incurred in a certain period of time, provided that the legal requirements are met. To ease that objective, a special role is attributed to certain additional legal presumptions with certain specific requirements.

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

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

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

Under this subtype of extended confiscation by criminal reiteration, it would be considered as proceeds of crime, unless the specific circumstances of the case reveal this approach to be disproportionate, all assets acquired by the convicted person within an specific period of time, namely during the last six years as of the date of the opening of the criminal proceedings whenever they were acquired free of charge and/or when the generated expenses were paid with ill-gotten gains. For these purposes, the date of acquisition is understood to be the earliest in which, such assets were at the disposal of the accused person (art. 127 sexies CP)

The main difference between both types of extended confiscation is its mandatory or optional nature. Under Art. 127 bis CP the ordinary extended confiscation is mandatory for the Court, being the adoption of the later extended confiscation optional for the Court.

On the other hand, extended value-based confiscation or extended confiscation of equivalent assets is provided under Art. 127 septies SCC⁶ and is possible whenever, for any circumstance, direct or extended

⁶ Article 127 septies

If it were not possible to proceed with the confiscation, in whole or in part, due to the nature or status of the goods, assets, or gains in question, or for any other reason, the Court may, via a ruling, order the confiscation of other goods, even those of lawful origin, owned by

confiscation of the assets, effects or profits related to the crime or to the previous criminal activity is not an option or when they no longer have the value they had at the time of their acquisition. In these cases, the confiscation of assets owned by the investigated person, even if they have a lawful origin, for equivalent value to the part that could not be effectively executed is also possible.

There is a possibility of compensation with new confiscation orders issued in relation to criminal acts previously committed. Extended confiscation does not apply when the criminal activities which the assets or effects derive from, have prescribed or have been acquitted or definitively dismissed.

Extended confiscation is limited to crimes listed in Art. 127 bis SCC.⁷

1.e.- Third-party Confiscation (Art. 127 quáter SCC)⁸

Third-party confiscation refers to a confiscation measure made to deprive someone other than the offender – the third party – of criminal property, where that third party is in possession of property transferred to him or her by the offender. It is used most often when criminals transfer property to a knowing third party to maintain its enjoyment without being the legal owner, thus attempting to avoid the confiscation of such property in case of conviction. Spain put in place specific provisions on third-party confiscation reflecting the so-called *mental (intentional) requirement* that the third person

the individuals criminally liable for the criminal offence, with a value equal to that of the part of the confiscation initially decreed and not carried out.

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

⁷ Article 127 bis

1. The Court shall also order the confiscation of the goods, assets and gains pertaining to a person convicted of any of the following criminal offences when it is determined, based on well-founded objective evidence, that the goods or assets were obtained from a criminal activity, and their legal origin cannot be accredited:

- a) offences involving trafficking in human beings;
- b) offences related to prostitution and the sexual exploitation and corruption of minors and criminal offences of sexual abuse and aggression against minors under the age of sixteen;
- c) Computer-related criminal offences set forth in Sections 2 and 3 of Article 197 and Article 264;
- d) offences against property and against the socio-economic order of a reiterated nature and in case of recidivism;
- e) offences related to punishable insolvency;
- f) offences against intellectual or industrial property;
- g) private or business corruption;
- h) offences of receiving stolen goods set forth in Section 2 of Article 298;
- i) offences of money laundering;
- j) offences against the Inland Revenue and the Social Security;
- k) offences against workers' rights set forth in Articles 311 to 313;
- l) offences against the rights of foreign citizens;
- m) offences against public health set forth in Articles 368 to 373;
- n) offences of counterfeiting of currency;
- o) bribery;
- p) misappropriation;
- q) terrorism;
- r) participation in a criminal organisation or group.

⁸ Article 127 quáter SCC

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

- a) In the case of assets and gains, when they were acquired with full knowledge that they were obtained from a criminal activity or when a diligent individual would have had reasons to suspect their unlawful origin, given the circumstances of the case.
- b) In the case of other goods, when they were acquired with full knowledge that such an acquisition would hinder their confiscation or when a diligent individual would have had reasons to suspect that such an acquisition would hinder their confiscation, given the circumstances of the case.

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

'knew or ought to have known [...] that the purpose of the transfer or acquisition was to avoid confiscation'. SCC implemented this provision from the 2014/42/EU Directive ensuring the rights of *bona fide* third parties are preserved. This type of confiscation is optional and not mandatory when ill-gotten assets, effects and profits of the above-mentioned confiscation models have been transferred to third parties.

In these cases we have to distinguish between:

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

Third party good faith excludes the application of this type of confiscation, provided that, with reversal of the burden of proof, the basis for the questioned free/gratuitous or low-priced acquisition is explained. Said knowledge is presumed, as Art. 127 quáter (2) SCC points out, based on the reference purchase price (free of charge or considerably less than the market value)

1.f.- Pre-trial precautionary measures: freezing of assets.

To prevent the destruction, transformation, removal, transfer, or disposal of property with a view to its eventual confiscation, a freezing order can be issued in the pre-trial stage. This is urgent when the proceeds of crime are just money, as occurs on numerous occasions in economic crimes, frauds and, of course, in money laundering cases. As money is totally fungible and easily transferable, even from one country to another, without the need to be physically transported, thanks to the telematic and electronic means currently available, in these cases, the seizure in the investigative phase is crucial to avoid an evident *periculum in mora*.

The Spanish legislator, implemented Article 7 of FD 2014/42/JHA to guarantee the effectiveness of confiscation authorizes the Investigating Judge to freeze assets, means, instruments and proceeds of crime from the very beginning of the criminal proceedings (art. 127 octies SCC) If its nature or characteristics prevent its conservation in its original form, the Judge could also decide on the best form of conservation and managements of the frozen goods including the possibility of an interlocutory selling (Articles 367 quáter and sexties SCCP) and destruction (Art. 367 ter SCCP), as well as judicial authorization for its provisional use (Article 367 sexties SCCP)

2.- For each model of confiscation, which is the object of the confiscation and its meaning/interpretation?

2.a.- Direct confiscation is mandatory in relation to the following categories of properties, whose also apply to NCBC (Art. 127 ter SCC):

- 1) Goods/property of any type derived directly from a criminal offence (*productum sceleris/ Verfall*)
- 2) Goods, means, or instrumentalities intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences (*objetum sceleris & instrumentum sceleris/ Einziehung*)
- 3) Proceeds of crime whatever are the changes they may have experienced, (*fructus scaeleris*)

2.b.- Confiscation of the value (Art. 127.3 SCC) and third-party confiscation (art. 127 quáter SCC) only refers to properties and proceeds. This means, instrumentalities are excluded.

2.c.- Pre-trial Freezing (Art. 127 octies SCC) the art. refers to goods, means, instruments and profits in its first section, goods, and effects in the second section and goods, instruments and profits in the third one.

3.- Which is the (material) scope of its introduction?

3.a.- Ordinary confiscation.

Since Spain follows the ‘all crimes’-approach, enabling standard conviction-based confiscation to a larger number of crime areas than the euro-crimes foreseen under the 2014 Directive, direct confiscation is the most widely used confiscation tool. It covers confiscation related to criminal offences covered by Directive 2014/42/EU, as well as confiscation related to other criminal offences. The criminal offences covered by this SCC provision should therefore not be limited to particularly serious crimes that have a cross-border dimension (Article 82 of the TFEU) Apart from the general provisions in Book I of the SCC, confiscation is specifically provided in scattered provisions in the Special Part of the SCC (Book III) for the following offences:

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

Also, confiscation is provided in a Special Criminal Law on Smuggling (Article 5 of Law 12/1995)

This also apply to third-party confiscation and pre-trial freezing.

3.b.- Value-based confiscation.

Legally speaking the scope of value confiscation is the same as direct confiscation. This wide scope is the interpretation assumed by General Prosecutor’s (hereinafter GP) Circulars n°. 1/2005 and 4/2010, confirmed by Law 1/2015 in line with Directive 2014/42/UE.

3.c.- Extended confiscation.

In line with the Confiscation Directive based on Article 83 (1), is applicable to listed ‘eurocrimes’. Furthermore, in 2015 and under Article 127 bis SCC the scope was enlarged from organized crime groups and terrorism offences (as it was since 2010) to other 18th offences, namely:

- a) trafficking in human beings.
- b) prostitution and the sexual exploitation and corruption of minors and sexual abuse and aggression against minors under the age of sixteen.
- c) Computer-related crimes.
- d) Organized property crimes.
- e) bankruptcy or crimes related to punishable insolvency.
- f) intellectual or industrial property.
- g) corruption related crimes.
- h) receiving stolen goods.
- i) money laundering.
- j) Fraud of Inland Revenue and the Social Security.
- k) offences against workers’ rights.

- l) offences against the rights of foreign citizens.
- m) offences against public health.
- n) counterfeiting currency, including the euro.
- o) bribery.
- p) misappropriation.
- q) terrorism.
- r) offences committed within a criminal organization or group.

4.- Which are the elements to be realized and/or to be assessed for its application?

4.a.- Direct confiscation.

According to Art. 127 (1) and (2), two elements should be met:

1st Direct confiscation is a conviction-based confiscation. Namely, a conviction sentence for an intentional crime, or reckless crime sentenced to at least one year prison. Exceptionally there are cases where an acquittal also leave room for a direct confiscation of illicit trade goods (Supreme Court sentence n° 272/2007, of 18 April). These cases of confiscation with acquittal sentences are a sort of case-law intermediate category between "direct" and "NCBC" derived from civil nature of the domain expropriation action in which really consist of the confiscation of the ill-gotten gains.

In reckless crimes cases (art. 127.2 CP) a custodial sentence of more than one year is foreseen. However, confiscation is not mandatory, as in intentional crimes, but optional and the Court could decide in a motivated decision assessing the proportionality of this measure.

Among these reckless crime's cases, so-called crimes against traffic or road safety stand out. In these sort of crimes Article 385 bis SCC considers the car/bike as instrumentality for the purposes provided in Articles 127 and 128 SCC and General Prosecutor's Circular n° 10/2011 encourages Public Prosecutors to assess the opportunity of requesting the Court the confiscation of the car with a flexible approach: whenever the seriousness of the offence and the specific circumstances of the act, as well as the economic and personal situation of the perpetrator are in line with the proportionality criteria

2nd a direct link between the crime and the proceeds/ instrumentalities / products, etc. not referred in general terms but to be specifically analyzed in the judicial decision (Supreme Court judgements n° 442/2013, of 23rd Mayo). However, even for direct confiscation the standard of proof for the illicit origin of the good is lower than that of criminal behavior (Supreme Court judgement n° 969/2013, of 18 December)

Direct confiscation is to be adopted in a conviction sentence and would be executed even if the convicted person died after the trial.

Paragraph 5 of Art. 127 bis SCC excludes extended confiscation in certain cases in which the criminal responsibility has been extinguished, specifically, when the crime is statute barred after the prescription or the subject has been exonerated from his/her criminal liability by and acquittal judgment or a previous decision discontinuing the criminal proceedings with res judicata effects.

4.b.- Value-based confiscation.

The requirements for the application of the confiscation of the value are:

1st Impossibility to confiscate the assets referred to in art. 127.1 CP, that is, the impossibility of seizing the property and assign it to the State. The causes of this impossibility may differ. Art 127 septies SCC expressly refers to the nature or situation of the goods but subsequently also mentions "any other

circumstances” (not meaning circumstances of the investigated person. Among the reasons that could make confiscation impossible, the Preamble of the LO 1/2015 refers to the fact that it is not possible to find out the assets, which are out of the reach of courts, have been destroyed or their value has diminished compares to that they had when they were incorporated into the patrimony of the perpetrator, concluding with an open formula that admits any other circumstance (such as its fortuitous loss or intentional profitable transfer, bearing in mind bona fide third parties or when the investigated person wasted, spends or squandered the ill-gotten gains)

2nd In addition, value confiscation will also take place whenever there is a depreciation of the asset from the moment of its acquisition to the moment in which the seizure takes place. Depreciation is an objective data that must remain duly proved through the timely valuation of the property. Both in the case of loss of assets and in the case of their depreciation, confiscation of equivalent value will be mandatory for the Court, unless the judicial authority considers in a motivated decision that confiscation is disproportionate, in accordance with the provisions of art. 128 SCC. However, in case of value confiscation during the execution phase (art. 127 septies SCC), confiscation should be optional for the Court.

Finally, confiscation of the value implies the need of an estimation of the goods. Sometimes this is not easy, namely when the good is not available or it would entail large or exceptional costs. In those cases, an early estimation is recommended to assure a later value confiscation decision (GPO Circular nº 10/2011). In any case a flexible generic estimation could be admissible.

Confiscation of the value, adopted in a conviction sentence, would be executed even if the convicted person has died after the trial.

4.c.- Non conviction-based confiscation (NCBC).

It requires, necessarily, the concurrence of three successive requirements:

- a) the unlawful patrimonial situation of the goods must be proved in an adversarial proceeding, in line with the right to a fair trial (Article 6 (1) ECHR).
- b) when the owner of the assets has died, suffers from a chronic illness that prevent his/her prosecution, there is a risk of prescription of the facts, an absconding situation of the investigated person (in absentia), which prevents prosecution of the facts within a reasonable period, or whenever he/she is exempted from criminal responsibility, or it has been extinguished.
- c) that the owner of the assets referred to in the previous requirement has been formally accused, existing rational indications of criminality against him.

The person should have been accused or be suspect of committing a crime. This means a formal indictment or any judicial decision addressing a pre-trial proceeding against a person being investigated based on evidence of criminality, such as an arrest warrant, an intervention of telecommunications, a house search order or any other precautionary measure must have been adopted. In the case of deceased persons, not only charges prior to death would suffice, but post-death resolutions could be valid in which the rational evidence of criminality linking the person to the illegal origin of the assets was assessed.

The second of the requirements provides meaning to this modality of confiscation: the impossibility of prosecuting the owner of the assets, in the assumptions included in letters a and b of art. 127 ter.1 SCC, or the impossibility of imposing a penalty, in the case provided for in art. 127 ter.1.c SCC. The SCC goes beyond the scope foreseen in art. 4 Directive 2014/42/UE, which limited it to the illness or flight of the suspect. It is a *numerus clausus* list of assumptions that does not admit its extensive interpretation to others.

Is worth mentioning that the Spanish legislator did not include the dissolution of the legal entity as an equivalent case to the death of the natural person. In his case, the principle of legality and the prohibition of analogical application of criminal provisions (art. 4.1 SCC) would prevent extending NCBC to assets hold by ended up legal persons. On the contrary, the actual closure of a legal person (not covert or merely

apparent) does operate as a cause for extinction of criminal liability, in accordance with Art. 130.2 SCC, so NCBC could be redirected through art. 127.1.c) SCC.

4.d.- Extended confiscation.

The note that truly characterizes this modality of confiscation is that the affected goods do not come from the crime that is prosecuted, but from the criminal activity of the investigated person. Therefore, the accreditation of a cause-effect relationship between the prosecuted crime and the good is not needed. However, as pointed out in GP's Circular n° 4/2010, it will be necessary to prove that the accused person has been carrying out illegal activities and that the value of the seized assets is disproportionate in relation to the income that the prosecuted person could legally obtain.

So, we need:

- a) A conviction sentence related to any of the art. 127 bis SCC listed crimes.
- b) Confiscation based on well-founded objective evidence, proving that the goods or assets were obtained through criminal activity, and their legal origin cannot be accredited.

Additionally, the following aspects shall be evaluated, among others:

- The disproportion between the goods and assets in question and the lawful income of the convicted individual.
- The concealment of the ownership or any power of disposal over the goods or effects by using natural or legal persons or bodies without legal personality, or tax havens or territories without taxation (off-shore territories) that hide or hinder the identification of the true ownership of the assets (UBO).
- The transfer of the goods or assets via transactions that hinder or prevent ascertaining their location or destination and that have no valid legal or economic justification.

Extended confiscation of goods, instrumentalities, means or properties, adopted in a conviction sentence, will be executed even if the convicted person died after the trial.

4.e.- Extended confiscation from a previous continued criminal activity.

To agree on the extended confiscation, it is necessary that the subject has been convicted of one of the crimes of art. 127 bis SCC. It is also required that the crime has been committed in the context of a previous continuous criminal activity (a sort of criminal lifestyle), there being "reasonable indications" that a relevant part of the subject's assets comes from it, as long as the defense "does not prove its lawful origin" (arts. 127 bis and quinquies SCC) Likewise, to facilitate the Court, the accreditation of the illicit origin of the assets, effects, or profits of which the confiscation is intended, the same presumptions are applicable as for the ordinary extended confiscation. However, due to the proportionality principle, a *de minimis criteria* is set up and confiscation will be carried out provided that such activities generated a profit greater than 6,000 euros.

Additionally, there is continuous criminal activity in cases where the subject had been convicted in the same criminal proceeding for at least three crimes or for a so-called continuous crime. However, when the conviction is delivered within the six years prior to the start of the procedure for one of the crimes listed in Art. 127 bis SCC, the minimum number of offenses decreases from three to two.

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

4.f.- Third-party confiscation.

Following criteria should be met:

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

It shall be assumed, unless evidence to the contrary is produced, that the third party knew or had reasons to suspect that the goods in question were obtained from a criminal activity or that they were transferred to avoid confiscation, when the goods or assets were transferred for free or for a price below real market value. Art. 127 quater.

Third party confiscation, adopted in a conviction sentence, would be executed even if the convicted person died after the trial phase.

5.- Which is the legal nature of the different confiscation measures?

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

5.a.- Direct confiscation and confiscation of the value.

Direct confiscation of goods, properties, means, effects, or instrumentalities is an accessory consequence of a criminal penalty. Confiscation does not appear in the catalogue of penalties within Art. 33 SCC - though it has a clear punitive component- nor within security measures provided under Art. 96 SCC, spite of it is sometimes based on the danger of recidivism. In addition, it is not civil liability either, because it is possible to confiscate assets whose value does not serve to compensate the victim. So, SCC regulates confiscation as a so-called accessory consequence, though in certain cases it does not require a conviction or link of the confiscated effects with any crime. Thus, Spanish Supreme Court case-law has considered the confiscation as an "accessory consequence", a sort of third category together with penalties and security measures, shaping confiscation as a type of sanction of patrimonial nature. However, the Spanish Constitutional Court judgement n° 220/2006, of July 3, states that the confiscation of assets is outside the right to the presumption of innocence that "implies that no one can be declared criminally responsible for a crime without valid proof of charge" and that "operates "as the right of the defendant not to suffer a sentence unless the guilt has been established beyond all reasonable doubt" and that, therefore, "once the existence of evidence based on which the Tribunal reasonably consider the guilt of the accused to be proven, the right to the presumption of innocence is no longer in question". Likewise, Supreme Court judgement No. 338/2015, of June 2, specifies: "the same canon of certainty is not required, when it comes to verifying respect for the right to the presumption of innocence, as when it comes to determining the factual assumption that allows for the imposition of confiscation" (in line with ECHR judgement of 05.07.2001 in case Philips v. UK)

5.b.- NCBC.

NCBC cannot be considered as an accessory consequence of the criminal penalty since any penalty is being imposed on the owner of the assets. a crime, though they have different notions. Furthermore, the Spanish Legislator in the Preamble of Law 1/2015 made a reference to ECHR case-law on NCBC pointing out that "it is not based on the imposition of a sanction attuned to the guilt for the act, but " it is more comparable to the restitution of unjustified enrichment than to a fine imposed under criminal law" because "since the confiscation is limited to the real (illicit) enrichment of the beneficiary for the commission of a crime, this does not show that it is a sanction regime". Therefore, considering the above-mentioned authentic interpretation included by the Spanish legislator in the Preamble of LO 1/2015 in line with the Spanish Civil Code, the civil nature of NCBC leads us into the assumption that they are not conditioned by the criminal principles of guilt, legality, or presumption of innocence. Thus, the legal nature of NCBC is mainly a civil nature, as the vast majority of the Spanish Academia rightly points out.

Additionally, the Supreme Court in a recent Judgment n° 400/2022 passed on last 9th February, states NCBC's rule of proof is based on preponderance of the evidence. Not on the conviction beyond reasonable doubt.

5.c.- Extended confiscation.

In this model the compliance with the criminal principles of guilt, criminal legality and presumption of innocence will be needed, although not referring to the confiscation decision but to the commission of the criminal offence by the perpetrator. So, there is a need for a crime and a penalty to be individualized in a conviction sentence and a conviction-based confiscation though the confiscates assets could not directly come from that crime nor are related to the penalty imposed, as confiscation is based on the unlawful cause of acquisition (civil nature). Both aspects, criminal and civil, that make up its nature, are inextricably linked as, the unlawfulness of the cause of acquiring the assets is presumed due to the existence of the criminal activity. Therefore, we can speak of a mixed legal nature while its effectiveness will no longer appear conditioned by the right to the presumption of innocence. It is possible to affirm that the right to the presumption of innocence is not applicable to the decision on the extended confiscation of assets since it is not about deciding on the guilt of a person and the imposition of a penalty. Nor does the principle of guilt apply because confiscation is not a penalty, even if it is imposed in a criminal proceeding. In short, the same guarantees cannot be required to declare guilt and enforce a sentence, as to decide on the extended confiscation of assets.

As regards to extended confiscation and given the difficulty of proving the illegal origin of the assets and effects derived from the crime, especially when they have been transformed or converted, the Spanish legislator provided a series of measures in 2015 SCC amendment. Namely the following:

- On the one hand, article 127 bis SCC reverses the burden of proof, which now lies on the alleged perpetrator, who must prove, to avoid the adoption of such measures, the lawful origin of his/her assets and income

On the other hand, Art. 127 bis provides a sequence of *iuris tantum* indicators or presumptions of illegality. Namely:

- The disproportion between the value of the given goods and assets with the lawful income of the convicted person.
- The concealment of the ownership or any power of disposal over the goods or effects via the use of natural or legal persons or bodies without legal personality, or tax havens or off-shore territories aimed to hide or obstruct the identification of the real beneficial ownership (UBO).
- The transfer of the goods or assets via transactions that hinder or prevent finding out their location or destination and that have no valid legal or economic justification.

As mentioned before Art. 127 bis SCC, the Court shall decide the confiscation of the goods, assets, and gains when it is determined, based on well-founded objective evidence, that they were obtained from a criminal activity.

In any case, the Supreme Court case-law had already encouraged the use of circumstantial evidence both for the criminal offense and for confiscation, in money laundering offences. Reversal of the burden of proof it is also compatible with the ECHR, as stated by the ECtHR case-law (see judgements in case Raymond vs. Italy, 22.02.1994, regarding the restriction of fundamental rights, for being a "necessary weapon" to fight against the Italian mafia; case Walsh v. Director of the UK Asset Recovery Agency, dated 15.09.2005, considering compatible with the ECHR the civil forfeiture of Anglo-Saxon law or in case Grayson and Barnham v. UK, of 23 September 2008: "While the Convention does not regard such presumptions with indifference, they are not prohibited in principle, as long as States remain within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence» -paragraph 141-)

5.d.- Third-party confiscation. The confiscation action against the third party is civil in nature and the guarantees established for the exercise of *ius puniendi* do not govern the process in which it is carried out. Its foundation is to avoid illicit enrichment as stated in the decision issued by the Audiencia Nacional Appeal Chamber the 1st of September 2020 -Appeal n° 6/2020-.

6.- For each model of confiscation, which is the procedure for its application?

6.a.- Direct confiscation, confiscation of value and extended confiscation.

The judicial authority responsible for carrying out the criminal investigations in its first stages is not the Public Prosecutor, but the investigating judge, being the investigative powers of prosecutors during this phase of the proceedings very limited. Some precautionary measures, such as seizure or freezing of assets, are not under the remit of competences of the prosecutors and can only be allowed by the Investigating Judge as provided in our XIX Century SCPC.

In the criminal proceedings both the criminal and the civil actions are filed together, and the victims have the right to intervene in the proceedings exercising both criminal and civil actions. In any case, even if the victims do not file the civil action, Public Prosecutor is obliged to do so on their behalf unless they expressly renounce.

Some consequences of these peculiarities are the following:

- a) Investigating judges must trace and seize assets of the suspect person “ex officio” at the beginning of the criminal proceedings. No specific request either from the victim or the Public Prosecutor is needed.
- b) Moreover, to be seized by the investigating judge, the assets owned by the suspects do not need to be proceeds of crime strictly speaking, pursuant to the common rule of Civil Law, according to which debtors are responsible throughout all their properties.
- c) Additionally, all instruments and proceeds of crime must be confiscated whenever there is a final conviction, even if there are not any direct victims and consequently there is no possibility of filing the civil action (e.g., most drug trafficking cases). Also in this case, investigating judges must search and seize the instruments and proceeds of crime from the beginning of the criminal procedure, as expressly provided for in our Criminal Code regarding drug trafficking offences (article 374), and in general in our Criminal Procedure Act (article 338)

6.b.- NCBC.

As regards to NCBC we have in place a special civil procedure that was set up in 2015 within the SCPC (so-called autonomous confiscation procedure). The Public Prosecutor put forward this procedure before a criminal Court as long as the requirements established in art. 803 ter.e and followings of the SCPC and in art. 127 ter SCC are met.

As Art. 4.2 of Directive 2014/42/UE does not foresee a purely civil action, since it is addressed against the accused person (*in personam*) and not against goods of illegal origin, moving away, therefore, from the common law model (or of some Latin American countries), in which the action is in rem in nature, the Spanish legislator set up a proceedings halfway between civil and criminal nature, since although the requirements for opening, competence and legitimacy are, in any case, criminal, the procedure follows, on many occasions, the form of a civil process.

According to the regulation provided for in art. 803ter.e to 803. ter.u of the SCPC, the so-called procedure for autonomous confiscation must be carried out in accordance with the civil provisions of the verbal trial, beginning with the writ of demand submitted by the Public Prosecutor. It is provided that the Public Prosecutor must list the properties to be confiscated as one of the requirements of the lawsuit, for which there must have been a prior financial investigation of the defendant's assets carried out by the Public Prosecutor.

In this task the Public Prosecutor can request the support from the Spanish ARO, the Judicial Police or from the Tax authorities or the Ministry of Finance. The collaboration of such authorities or officials is mandatory. Likewise Public Prosecutor can collect information from other entities such as "financial entities, public bodies and registries and any natural or legal person".

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

6.c.- Third-party confiscation.

A special proceedings is provided in relation to third-parties affected by confiscation is in place in Art. 803 ter.a to 803 ter.c of the SCPC.

6.d.- Freezing.

It is provided in Art. 127 octies SCC, together with the interlocutory sale or provisional use of the frozen assets (Art. 367 bis and followings and article 803 ter and followings of the SCPC) Frozen assets may also be allocated to the Spanish ARO without prejudice to the provisions on the Fund of confiscated assets due to illegal drug trafficking and other related crimes. Provisional use of frozen assets as a precautionary measure may be authorized by the Investigating Judge on the basis provided for in art. Article 367 e. SCPC.

7.- Safeguards.

7.a.- Direct and extended confiscation.

Proportionality clause (Art. 128 SCC) allows the relevant judicial authority to decide on the proportionality of the confiscation of assets and instrumentalities of legal trade considering the nature or seriousness of the criminal offense at stake or whether the civil compensation owed to the victim has been fully satisfied.

The confiscation order adopted in the conviction sentence may be subject of legal remedies on the legal basis provided for in the SCPC under Art. 790 and following.

7.b.- NCBC and third-party confiscation. In these cases, the law provides for specific safeguards:

The rules regulating the accused's right to the assistance of a lawyer, provided for in this Act, will be applicable to all persons whose assets or rights may be affected by confiscation.

The individuals against whom the action is directed due to their connection to the assets to be confiscated will be summoned to court as defendants.

The accused in default will be summoned by a notification addressed to their court representative in the stayed proceedings and by placing an edict on the court bulletin board.

The third party affected by the confiscation will be summoned.

If the defendant declared in default in stayed proceedings does not appear in the autonomous confiscation (NCBC) proceedings, a solicitor and a defence lawyer will be appointed *ex officio* and will represent and defend him/her.

The appearance of the accused with modified legal capacity to appear in the stayed criminal proceedings in the autonomous confiscation proceedings will be governed by the rules in the Civil Procedure Act.

The trial will be carried out in accordance with the provisions of article 433 of the Civil Procedure Act and the judge or court will pass judgment within 20 days of its conclusion, with one of the following rulings:

- Uphold the claim for confiscation and order definitive confiscation of the assets.
- Partially uphold the claim for confiscation and order definitive confiscation for the relevant amount. In this case, such precautionary measures as may have been ordered with respect to the remainder of the assets will become null and void.
- Dismiss the claim for confiscation and declare that it is inappropriate as one of the grounds for objection occurs. In this case, all the precautionary measures which may have been ordered will become null and void.

Where the judgment upholds the claim for confiscation, in whole or in part, it will identify those suffering damages and set the appropriate compensation.

The rules regulating appeals applicable in fast-track criminal proceedings are applicable to autonomous confiscation (NCBC) proceedings.

The rules regulating review of final judgments are applicable to separate confiscation proceedings.

7.c.- Third-party confiscation.

As regards to Third-party confiscation the SCPC establishes specific safeguards:

The person who may be affected by the confiscation may take part in the criminal proceedings once their intervention is ordered, although this intervention will be limited to such aspects as directly affect their assets, rights or legal position and should not be extended to matters relating to the criminal liability of the accused.

The person affected by the confiscation will be summoned to court in accordance with the provisions of this Act. The summons will indicate that the trial may be held in their absence and that it may, at any event, decide on the confiscation pursued.

The person affected by the confiscation may act through their legal representative at the trial, without it being necessary for them to be physically present at it.

Non-appearance of the person affected by the confiscation will not prevent the trial from continuing.

The appeals provided for in this law may be lodged against the judgment.

8.- Is the trial *in absentia* possible in your legal system to apply the confiscation?

8.a.- Direct confiscation and confiscation of value.

Trial in absentia is possible whereas the unjustified absence of the defendant, who had been summoned personally, or at his/her address or in the designated person (as mentioned in article 775 SCPC), will not be cause for the adjournment of the trial if the Court considers that there are sufficient elements for prosecution and the requested penalty does not exceed two years of imprisonment or, being of a different nature, when its duration does not exceed six years. Consequently, as for extended confiscation, being the listed crimes under art. 127 bis SCC mostly serious crimes, the trial in absentia would not be typically possible.

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

8.b.- NCBC.

With regards to trial in absentia, under Article 803 b. xi. SCPC if the defendant absconding is judicially declared and he/she does not appear in the separate/autonomous confiscation proceedings, a procurator and lawyer will be appointed ex officio and will represent and defend him/her.

8.c.- Third-party confiscation.

According to the Spanish Criminal Procedural Code, art. 803 ter a to 803 ter d SCPC, non-appearance of the third party affected by the confiscation who was summoned in accordance with the provisions of this law will have the effect of them being absconding declared and does not prevent the trial from continuing.

9.- Constitutional and human-rights principles for each model of confiscation and main judgments passed regarding them.

9.a.- Non-retroactivity principle.

According to the Supreme Court Judgment 400/2022 passed on 9th February, the non-retroactivity principle is applicable to the NCBC. However, it distinguishes between the penalty and the procedural aspect. It is not possible to apply the confiscation retroactively, but according to the Supreme Court (citing ECHR case-law to support its thesis) the NCBC can be enforced if another kind of confiscation was applicable to the person targeted when the crime was committed.

9.b.- Right to a fair trial.

ECHR's Judgment *Sardón Elvira* against Spain was passed on 24th December 2013. In this case the applicant was sentenced by the Audiencia Nacional to seven years' imprisonment and to a fine of EUR 100 per day for fourteen months for continuous misappropriation and to two years' imprisonment and a fine of EUR 100 per day for ten months for the continuous making of false statements in commercial documents.

The Supreme Court accepted his cassation appeal and acquitted him but maintained the NCBC. The Supreme Court stated that the Audiencia Nacional had violated the applicant's right to the presumption of innocence. It found that there was no evidence for a conclusion that the applicant had managed the funds invested in a company through which the misappropriation took place. However, the Supreme Court ordered the applicant to reimburse the amount of EUR 88,671.78

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

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

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

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

9.c.- Presumption of innocence.

The Spanish Constitutional Court case-law on this particular issue (judgement n° 219 and 220/2006, of 3 July) set up clearly the limits of the right to the presumption of innocence in relation to seizure and confiscation, justifying the confiscation of property dealt on regular basis (a fortiori applicable to extended confiscation) does not refer to the principle of presumption of innocence, since this rule means that no one can be held criminally responsible for an offense without valid prosecution evidence, which must be referred to the essential elements of the offense and be evaluated by the courts under the rules of logic and experience (...). The presumption of innocence operates "as the defendant's right not to be convicted unless the culpability has been established beyond reasonable doubt" (JCC 81/1998, of April 2nd, LC 3; 124/2001 of June 4th; 17/2002, of January 28th). Having noted the existence of evidence from which the courts considered reasonably proven the guilt of the accused is no longer in question the right to presumption of innocence. " As for the presumption of innocence, the Constitutional Court judgement n° 125/2014 passed on 19th April rejected an application on the base that the right to the presumption of innocence includes the right to be convicted with valid evidence obtained with respect to the fundamental rights, administered in trial and stated by the Court beyond reasonable doubt. As this was a case where the confiscation order was based on the ownership of the asset by the convicted individual and having the judgment respected his presumption of innocence, the allegations of bona fide possession of the company were irrelevant because we are not dealing with a third-party confiscation but a direct one. The convicted person was also proven to own the asset through evidence beyond reasonable doubt. Consequently, the Constitutional Court states that there had not been a reversal of the burden of the proof.

As in the majority of European legal systems, in Spain, assets recovery legal instruments are necessarily integrated in criminal proceedings and therefore forfeiture injunctions and confiscations orders must be issued in the framework of a criminal *in personam* procedure, although it is not necessarily linked to the presumption of innocence and the principle of culpability, considering likewise the proportionality principle and its nature as an "incidental consequence" of the punishment or penalty.

9.d.- *Ne bis in idem* principle.

Judgment 400/2022 issued by the Spanish Supreme Court the 9th February considers the confiscation as a criminal sanction on the sense of the art. 4 of the 7th protocol to the ECHR and consequently establishes that the case law of the ECHR about the *ne bis in idem* principle would be applicable. However, as we have seen in the earlier point regarding the non-retroactivity principle, Supreme Court rejects that it could be applicable in that specific case.

Madrid, 20 April 2023.

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