The concept of “proceeding in criminal matters”

RECOVER

project on “Mutual recognition of freezing and confiscation orders between efficiency and the rule of law”- Regulation (EU) 2018/1805

Grant Agreement No. 101091375

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Co-funded by the European Union

Regulation of the European Parliament and of the Council

“on the mutual recognition of freezing and confiscation order ” 2018

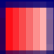
(19 December 2020)

Aim of the introduction

- 1. To improve the mutual recognition of freezing and confiscation orders in cross-border cases by extending the scope of the mutual recognition instrument;
- 2. To provide simpler and faster procedures and certificates;
- 3. To increase the number of victims receiving cross-border compensation.

Article 39: **Replacement**

- This Regulation **replaces** the provisions of **Framework Decision 2003/577/JHA as regards the freezing of property** between the Member States.
- This Regulation replaces **Framework Decision 2006/783/JHA** for the Member States bound by this Regulation as from 19 December 2020.



The adoption of this Regulation represents a doubly significant event

- first of all, because the principle of mutual recognition is affirmed in this delicate sector in the wake of the framework decision n. 783/2006,
- and also because
- mutual recognition is imposed with a **directly applicable legislative measure** such as a **regulation**, adopted with the **ordinary legislative procedure on the basis of art. 82, par. 1, of the Treaty** on the functioning of the European Union.

Recital 11

- In order to ensure the effective mutual recognition of freezing orders and confiscation orders,
- the rules on the recognition and execution of those orders should be established **by a legally binding and directly applicable act of the Union**

REGULATION, art. 82, c. 1 TFUE

- The choice of a regulation ex art. 288 TFEU on the basis of art. 82, § 1 TFUE is **appreciable in terms of effectiveness, because**
- It is directly applicable in the Member States.

but it is also a bit problematic because,

- this approach ends up attributing **direct competence in criminal procedure matters to the European legislator,** even if only for the purposes of vertical cooperation, **in the absence of a more explicit and clear legislative will of the Member States** themselves in this direction: it is a choice that assumes a **strong political value**.
- even if involves only the cooperation and not the harmonisation, which demands a directive as established in art. 82 § 2 -,
- the mutual recognition, apparently unrelated to **substantive issues**, however,
- **ends to exercise a drag effect on the same**

Recital 13

- **While such orders might not exist in the legal system of a Member State**
- the Member State concerned **should be able to recognise and execute such an order issued by another Member State.**

Recital 53: The legal form of this act should not constitute a precedent

- for future legal acts of the Union in the field of mutual recognition of judgments and judicial decisions in criminal matters.
- The choice of the legal form for future legal acts of the Union should be carefully assessed on a case-by-case basis taking into account, among other factors, the effectiveness of the legal act and the principles of proportionality and subsidiarity.

Scope: all crimes

- The Regulation should cover all crimes,
- otherwise, it is expressly stated in recital no. 14, from Directive 42/2014 which refers only to
- serious transnational crimes, the so-called 'Eurocrimes' (the ten serious crimes indicated in art. 83, c. 1) as based on art. 83 TFEU
- (even if the Directive is also based on art. 82, § 2, as well as on art. 83, § 1, and art. 3 extends the definition of crime to the criminal offense provided for "by other instruments legal if the latter specifically provide that this Directive applies to the offenses harmonized there").

Scope: recital 14

This Regulation should cover freezing orders and confiscation orders related to criminal offences covered by Directive 2014/42/EU, **as well as freezing orders and confiscation orders related to other criminal offences**.

The criminal offences covered by this Regulation should therefore not be limited to particularly serious crimes that have a cross-border dimension,

as Article 82 of the Treaty on the Functioning of the European Union (TFEU) does not require such a limitation for measures laying down rules and procedures for ensuring the mutual recognition of judgments in criminal matters.

Art. 3 of the Regulation contains the list of serious crimes punished with a prison sentence of at least three years

- for which verification of the **double criminality** of the facts is not required,
- borrowing a choice for the first time adopted by the European legislator with art. 2, § 2, of the **Framework Decision** n. 2002/584 / JHA on the **European arrest warrant** e
- this list is the same as provided for in other instruments on mutual recognition (thirty-two types of offense),
- to which is added the **offense** provided for in point (y) of the list, included following the introduction of the
- **framework decision** 2001/413 / JHA **for the fight against fraud and counterfeiting of non-cash means of payment** ().

In the case of offenses not included in the list,

- recognition can be refused
- **if the predicate crime is not a criminal offense in the State that has to execute the measure** (Article 3, paragraph 2)
- based on the principle of double criminality (while the framework decision 783/2006 presupposes the so-called "double confiscability").

Mutual recognition of seizure

- Regulation, while admitting - as provided for in Directive 42/2014, art. 8 (4) - that the **seizure order (freezing) can be ordered by a non-judicial authority,**
- and in particular "by an authority, designated by the issuing State, which is competent in criminal matters to issue or execute the freezing order in accordance with national law, and which is not a judge, court or public prosecutor"
- in any case it claims that "In such cases, **the freezing order should be validated by a judge, court or public prosecutor**, before it is transmitted to the executing authority. " (recital no. 22 of the Regulation).
- **However**, it is not required, as would have been desirable in terms of guarantees, **that any seizure pronounced by the public prosecutor is validated by the judge**.

All types of confiscation orders within the framework of criminal proceedings

- in order to impose the mutual recognition of all types of orders covered by Directive 2014/42/EU

- **direct confiscation** ex art. 4
- **confiscation of the value** ex art. 4,
- **extended confiscation** ex art. 5, and
- confiscation of assets **in the possession of third parties ex art. 6**,
- Non conviction based confiscation (absconding and illness)
- as well as other types of **orders issued without final conviction (recital 13)**

not only orders covered by Directive 2014/42/EU (recital 13)

- The term therefore covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence, not only orders covered by Directive 2014/42/EU.
- It also covers **other types of order issued without a final conviction**.

Non-conviction based confiscation

- the cases of death of a person,
- immunity,
- Prescription ,
- cases where the perpetrator of an offence cannot be identified,
- or other cases where a criminal court can confiscate an asset without conviction when **the court has decided that such asset is the proceeds of crime**
- **(Explanatory memorandum)**

Actio in rem pure

- Provided that the confiscation is (art. 2) a "a final deprivation of property ordered by a court in relation to a criminal offence"
- Regulation doesn't demand – as the Directive – that a criminal trial has begun but the sentence cannot be pronounced,
- but precisely as a hypothesis of a real actio in rem,
- of an autonomous proceeding against assets related to a crime

ART. 1 **Subject matter:**

- 1. This Regulation lays down the rules under which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State
- **within the framework of proceedings in criminal matters**
- (as opposed to “within the framework of criminal proceedings”)

within the framework of criminal proceedings IN THE ORIGINAL VERSION 2016

- In order to be included in the scope of the Regulation,
- these types of confiscation orders had to be issued within the framework of criminal proceedings,
- and therefore **all safeguards applicable to such proceedings had to be fulfilled in the issuing State**

The change of the expression

- “criminal proceeding” used in the proposal of Regulation with “proceedings in criminal matters”

 - as stressed always in the **“Council of the European Union Interinstitutional File: 2016/0412 (COD)2016/0412 (COD), doc. n. 12685/17 of 2.10.2017” -**

- has been the result of **the pressure of the Italian delegation**, which - supported by some other delegations - observed that the proposed wording of the scope of the Regulation as defined in Art. 1(1),
- with **the words "criminal proceedings", posed a problem, since its system of so-called "preventive confiscation" would be excluded.**

During the meetings of the Working Party on Judicial Cooperation in Criminal Matters (COPEN), on 28 September 2017

- a number of Member States indicated that they could support or at least accept this modification .
- the Presidency invited the Council Legal Service to give its opinion on this issue. The opinion of the Legal Service is set out in doc. 12708/17.
- The Presidency considers that the decision on the extension of the scope to include the systems of preventive confiscation, such as the Italian system, **is a political one and therefore guidance by the Ministers is required.**
- In the end **the more extended expression has been adopted, in order to include also the Italian preventive confiscation**

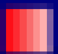
UE, Cons. JAI, 12/13 october 2017

- In the context of a debate on the matter by the EU ministries of justice, it was specified
- also **certain preventive confiscation systems are included in the Regulation scope**
- Provided that the choice to confiscate «soit clairement en rapport avec des activités criminelles et que des garanties procédurales appropriées ’appliquent».

Proceedings in criminal matters' is an autonomous concept of Union law

- interpreted by the **Court of Justice** of the European Union, notwithstanding the case law of the European Court of Human Rights (recital 13).
- **This reference to the Court of Justice seems appropriate because the adoption of a regulation in a more direct and immediate manner call into question the Court of Justice pursuant to Art. 267 TFEU** as
- **an interpreter in its original capacity**, intended to resolve the interpretative doubts of Member States in its application

“PROCEEDINGS IN RELATION TO A CRIMINAL OFFENCE”

- Recital 13. “The term therefore covers
- all types of freezing orders and confiscation orders issued following
- **proceedings in relation to a criminal offence**,
- Art. 2 in the definition of confiscation: “a final deprivation of property ordered by a court **in relation to a criminal offence**” (in the original proposal “prooceding for a crime”)
-  .

Proceeding with a “link to a crime”

- With this modification, then, as emerges in Recital (13) and
- as emerges **in the press release of 8 December 2017 on the orientation reached by the Council on the proposed Regulation,**
- it is proposed, among other things, to ensure that **mutual recognition covers a broad spectrum of confiscations,**
- including **those adopted without conviction** and
- **including certain preventive confiscation systems**,
- provided **there is a link to a crime**,
- **proceedings relate to the profits or instruments of offense,**

Proceedings in criminal matters may also include **criminal investigations by the police and other law enforcement authorities** (recital 13).

- It is not acceptable **in a rule of law** that the Regulation can refer to forms of freezing and confiscation not adopted in a judicial proceeding but in the investigation phase,
- representing already the seizure, and the more confiscation,

form of limitation of a citizen's right, such as the **right of property** guaranteed by Art. 1 of ECHR Protocol 1 and Art. 17 of the Charter of Fundamental Rights of the European Union

- Also the definition of **confiscation** contained in Art. 2, n. 2 of Regulation refers to a **measure taken by a judicial authority**
- also the **freezing** pursuant to Art. 2, n. 8, at least, **must be validated by a a court or a public prosecutor** in the issuing state

No civil or administrative proceedings (recital 13)

- Freezing orders and confiscation orders that are issued within the framework of
- **proceedings in civil or administrative matters**
- **should be excluded** from the scope of this Regulation.

proceeding in criminal matter

- Some concern regards also the concept of proceedings in criminal matter,
- as in this sector there are different kinds of proceedings which are possible to define **hybrids,**
- **they are held before the criminal court, but without the safeguards of the criminal matter**.

- Within the category of hybrid measures that characterise the adoption of extended forms of confiscation and without conviction,
- Included in civil and or administrative matters, but
- **which fall perfectly in the definition of «proceedings in relation to a criminal offence”**
- **as they relate to the proceeds or instruments of offense,**
- such as the proceeding to apply some forms of civil recovery or civil forfeiture

model adopted by the Regulation: German confiscation without conviction

(Explanatory Report to the original proposal)

- in the sector of the fight against organised crime and terrorism adopted in the law of reform of confiscation 13.4.2017, BGBI.I S. 872 (implementation of the Directive 42/2014) in the German system of law § 76, § 4
- “if, based on all circumstances of the case, the court is convinced that an object is the proceeds of a crime, even if the person affected by the confiscation cannot be prosecuted or convicted for this crime” (Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung).

- German criminal order provided also before some forms of forfeiture applied independently of the determination of guilt (§ 76a I StGB, §§ 440 - 441 StPO; § 74, Abs. 2 n. 2, Abs. 3 - 74d StGB)
- With the recent reform the possibility to apply confiscation without conviction is extended

1990 Strasbourg Convention

- This notion of proceeding in criminal matters, as connected with a crime, accepted in a Regulation
- recalls the notion of **procedure also in re** accepted by the **Explanatory Report of the 1990 Strasbourg Convention** that includes
- **any proceeding carried out by a judicial authority** and whith criminal nature,
- in the sense **of covering instruments or proceeds of crime**

with the safeguards of criminal matter in the Member State

- But the Regulation demands that the confiscation is applied not only in a proceeding in criminal matter, but with
- **the safeguards of criminal matter in the Member State**

Safeguards (follows) Art. 1 Regulation

- 2. This Regulation shall not have the effect of modifying the obligation

- to respect **the fundamental rights and legal principles enshrined in Article 6 TEU.**

As specified in recital no. 17, the Regulation also respects the fundamental rights provided for

- in the ECHR and
- in the European Charter of Fundamental Rights.
- This means, first of all,
- Artt. 49 and 50 of the European Charter of Fundamental Rights.
- And artt. 6 e 7 ECHR as interpreted by European Court HR;

And (recital 18)

- The procedural rights set out in Directives 2010/64/EU (6),
- 2012/13/EU (7),
- 2013/48/EU (8),
- (EU) 2016/343 (9), **presumption of innocence**
- (EU) 2016/800 (10) and
- (EU) 2016/1919 (11) of the European Parliament and of the Council
- **should apply**, within the scope of those Directives, **to criminal proceedings covered by this Regulation** as regards the Member States bound by those Directives.

Not only, but above all the safeguards of the criminal matter (recital 18)

- “In any case, the **safeguards under the Charter** should apply to
- **all proceedings covered by this Regulation**.
- In particular, the **essential safeguards for criminal proceedings set out in the Charter** should apply to
- proceedings in criminal matters
- that **are not criminal proceedings but**
- **which are covered** by this Regulation”.

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

- In this direction it will be very important to implement the application of the art. 8 of the directive in relation to the safeguards of the proceeding, ensuring to the persons affected by the measures the right to an
- **effective remedy** and
- **a fair trial** in order to uphold their rights;
- **adversarial judicial proceeding**

the guarantee of means of appeal against the recognition and execution of a confiscation decision is fundamental

and art. **33 REG provides that the substantive reasons may be asserted only before the judicial authority of the issuing State**;

while **before the judicial authority of the executing State** each interested party, including third parties of good faith, **must have appropriate means of appeal to protect their rights,** according to the rules applicable in the legislation of that State (which may also provide, if necessary, suspensive effects of the action).

Art. 8(8) of the Directive specifies also that

- “the affected person shall have an effective possibility **to challenge the circumstances of the case**,
- including **specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct”;**

this means, that notwithstanding the Directive allows

- the use of **presumptions** or **lower standards of proof** of the criminal origin of the proceeds (Article 5(1)) and
- it “does not [even] prevent Member States from providing **more extensive powers in their national law,** including, for example, in relation to their rules on evidence”,
- “however, there is an **unbreakable limit**:
- **confiscation cannot be based on absolute or irrebuttable presumptions which prevent the defendant from proving the non-criminal origin of property”.**

In recital no. 15 it is pointed out that cooperation between Member States,

- based on the principle of mutual recognition and immediate execution of judicial decisions,

demands **mutual trust that decisions will be recognized and executed**

- in compliance with the **principles of legality**,
- **subsidiarity** and
- **proportionality** (the same is foreseen in recital 9 of Framework Decision 783/2006), and that
- **the rights of third parties in good faith will be guaranteed**.

It also provides for the **protection of third parties in good faith** by establishing, first of all,

- the **obligation to inform the parties involved in the execution of a seizure order**, and
- to **specify the reasons** behind the measure, as indeed provided for in art. 8 of the Directive n. 42/2014, and the **available remedies** (Article 21), and
- the obligation of Member States to **provide legal remedies in the executing State** (Article 33) is also imposed **for all interested parties**,
- including **third parties in good faith** (as well as the obligation of the requesting State for the seizure to inform the requested State of the existence of third party interests in good faith, Article 14).

Ground for refusal ex art. 8 and 19 Reg. (recital 34)

- executing the freezing order would be contrary to the principle of ne bis in idem;
- in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the freezing order would, in the particular circumstances of the case, entail **a manifest breach of a relevant fundamental right as set out in the Charter**, in particular
- the **right to an effective remedy**,
- the right to a **fair trial** or
- the right of **defence**.

Art. 8 f) and 19 h)

- art. 8, f) “the execution of the freezing order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence”
- 19, h)(„in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the confiscation order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence”

Article 8 and 19: An exhaustive list of g***rounds for non-recognition and non-execution of confiscation orders***

- **The list differs significantly from the list contained in the 2006 Framework Decision.**

- Some grounds for refusal remain the same, e.g. the ground based on the principle ‘ne bis in idem’ or the ground based on immunity or privilege.
- However,
- **the grounds for refusal linked to the type of the confiscation order** (e.g. extended confiscation)
- **have not been included in the proposal thus considerably broadening and strengthening the mutual recognition framework**.

Issue:

- The hybrid confiscation proceedings of the MS
- have to respect the safeguards of the criminal matter
- In order to apply the Regulation, it is important to verify if the confiscation is adopted in a
- proceeding in criminal matter with the connected safeguards

complete jurisdictionalization

- The Regulation could moreover represent
- **a challenge to provide for a complete jurisdictionalization** within the criminal law
- of proceedings seeking to enforce forms of non-conviction based confiscation,
- in order to guarantee mutual recognition

In Italy the forms of freezing and confiscations orders which are covered by the REG are:

- • the traditional model of confiscation (art. 240 of the criminal code)
- • the special forms of mandatory confiscation, provided for in criminal code or in special laws and connected seizure order (articles 321-323 of the code of criminal procedure)
- • extended confiscation pursuant to art. 240 bis c.p. and connected seizure orders (articles 321-323 of the code of criminal procedure)
- • preventive confiscation (art. 24 and 34 d.lgs. 159/2011) and connected seizure orders (art. 20)

These form of confiscation can certainly be the object of mutual recognition

- **as they are included in the definition of art. 2 Regulation n. 1805/2018 (“**confiscation order’ means a final penalty or measure, imposed by a court following proceedings in relation to a criminal offence, resulting in the final deprivation of property of a natural or legal person”) **and**
- **are applied in a “proceeding in criminal matters” (art. 1 REG), indeed criminal in the strict sense.**
- However, the application of the safeguards of criminal matters pursuant to **recital n. 18 Reg demands** the **respect of the principle of non-retroactivity**,

Art. 240 bis c.p. Italian Extended confiscation

- Mesure of security with preventive nature
- (C. cost., ord. n. 18/1996, Basco; Supreme Court, VI, n. 1600/1996)
- "atypical asset security measure, replicating the characteristics of the anti-mafia preventive measure ..and the same preventive purpose " (Cass. **S.U**., n. 29022/2001, Derouach; Cass. **S.U**., n. 33451/2014; C. V, n. 1012/2017; Cass. I, n. 19470/2018; Cass. II, n. 5378/2018; Cass. VI, n. 54447/2018;
- **no punishment, non- retroactivity principle, no safeguards of criminal matter**

Italian solution of extended confiscation (art. 240 bis c.p. –previous 12 *sexies* of law decree no. 306/1992)

- is based on a **rebuttable presumption;**
- **such presumption concerns the unlawful origin of the confiscatable assets**
- when **the property of the convicted is not commensurate with their declared income or economic activity**
- (i.e., there is such a **considerable discrepancy** between lifestyle and his apparent or declared income, that **the property is presumed to be the proceeds of unlawful activities or their reinvestment**)

Art. 240 bis c.p. Italian Extended confiscation

- it should fall within the scope of application of the Regulation considering that
- **it is included in the model of extended confiscation of art. 5 Directive 4/2014** and that
- this kind of confiscation **is normally applied in a criminal trial by the judge of the cognition.**

Also in the enforcement procedure (Article 676 Code of Criminal Procedure)

- This possibility is confirmed also even when the Italian extended confiscation is applied in the enforcement procedure pursuant to art. 183-quater Leg. Decree 271/1989, § 1 (introduced by Legislative Decree no. 21/2018), because in any case
- it is a "proceeding in criminal matters" based on the autonomous meaning adopted by the European Union and
- that is, as specified in recital no. 13, a "proceedings in relation to a criminal offence”

when applied by the judge of the execution?

- the powers of the enforcement judge are **residual**

powers and

the **confiscation is allowed to be pronounced inaudita altera parte** (the judge can decide de plano on the basis of the request and the elements proposed by the public prosecutor or ex officio; the Chamber hearing can only take place following an objection by 30 days) and

- against the decisions of the execution judge **it is not possible to appeal,**

but only **to recourse to the** Supreme Court - (a practice

considered constitutional by Constitutional Court in

sentence no. 106/2015).

Art. 578 bis c.p.p.: it is possible to apply after prescription or amnesty

- When the confiscation in particular cases provided for in the first paragraph of article 240 bis of the criminal code …has been ordered, the appellate judge or the court of cassation, in declaring the crime extinguished by prescription or amnesty, they decide on the appeal solely for the purposes of confiscation, after ascertaining the accused’s responsibility

Italian confiscation preventive measure (non conviction based), art. 24 leg. decree 159/2011 (code of preventive measures)

- **It is applied in a proceeding «in relation to a offence» (recital 13) because**
- **it demands that the recipient is consideres «a social danger» because he/she is suspected of criminal activity**
- confiscation of **assets of criminal origin**
  the value of assets is **disproportionate to declared income or economic activity**, or when ***it transpires*** **that they are derived from illicit activity** or **used for reinvestment**, and,
- at any rate, are assets for which **the "dangerous" owner has not demonstrated a legitimate origin**

Also in the opinion of the Italian desk of Eurojust

- DAG circular of 18 February 2021 0035566.U provided colleagues with information and practical suggestions.
- Moreover, on 12 March 2021, the Italian Desk and the Ministry of Justice signed an operational agreement aimed at coordinating their respective areas of competence on the matter. That following designation of the Ministry of Justice as the entity entitled to receive passive requests and convey active ones (see notification and declaration of Italy of 17.12.2020).

the circular of the Italian Ministry of Justice (18.2.2021) on the implementation of the Regulation

- it is affirmed that a correct interpretation of the REG allows to extend its scope to the Italian preventive measures also because pursuant to art. 67, par. 3 of the TFEU, one of the objectives of the Union is "to ensure a high level of security through measures to prevent and combat crime,..".
- "the substantial and procedural characteristics of the preventive measures now fully justify their reduction to the autonomous EU concept of criminal matters (jurisdiction in the hands of a specialized judicial authority with jurisdiction in criminal matters;
- ascertainment of dangerousness based on the connection to specific offences and destined to hesitate in the "circumstantial" assessment, typical of criminal matters;
- operation of the rules of evidentiary exclusion in a way typical of criminal proceedings and recognition of all the essential safeguards and specific remedies)". .

circular of the Ministry of the Interior

- In the end, the Italian preventive confiscation has to be included in the Regulation’s scope, as affirmed also in the circular of the Ministry of the Interior (the Central Anti-Crime Directorate of the State Police) (12.1.2021) in order to invite the Anti-Crime Division to adopt the appropriate provisions to implement the Regulation.

notion of criminal matter of ECtHR?

- It does not seem possible to refer to the notion of criminal matter of ECtHR and
- to the relative **Engel (v. Netherlands, 1976) criteria** for **establishing the criminal nature** of a procedure and a measure, because

Engel criteria

- the official formal qualification or the determination of the legal system of belonging;
- the "very nature" of the infringement with particular reference to its forms of typification and the procedure adopted;
- the nature of sanction and degree of sanction severity

- the sub-criteria adopted to establish the nature of the procedure are not so significant because the Court merely requires that
- the procedure be applied by a public authority on the basis of
- enforcement powers conferred by law and
- on the basis of an infringement (nature of the infringement) based on a precept of a general nature addressed to all citizens

- - apart from the not always completely consistent and unequivocal use of these criteria in the same ECtHR case law -,
- **the Court has substantially excluded the inclusion in the notion of «criminal matter» of the proceedings for the application of form of confiscation without condemnation**,
- from the Italian preventive confiscation to the British civil recovery or other forms of civil forfeiture

“*notwithstanding* the case law of the European Court of Human Rights”:

- in recital 13 of REG it is established that “Proceedings in criminal matters’ is an autonomous concept of Union law
- *notwithstanding* the case law of the European Court of Human Rights”:
- notwithstanding has an **adversative meaning** (although in the Italian translation the expression used – without prejudice – assumes an inclusive meaning).

- **The European legislator seems aware that**

in ECHR’s case law the different forms of extended and non-conviction based confiscations **are not inclued in this concept.**

Positive attitude of ECHR towards forms of confiscation without conviction

- not only because it always confirms the substantial compatibility of these measure with the principles of ECHR,
- subtracting them to the principles of criminal law, but
- it approves a more general supranational position which **supports the use of civil forfeiture as a criminal policy strategy against serious criminal phenomena**

it is a broad notion of "criminal matter"which includes

- all measures of an afflictive nature, which pursue general and special prevention purposes;
- the punitive administrative offense falls within this,
- as has been expressly stated in relation to the Ordnungswidrigkeiten of the German legal system or in relation to the Verwaltungsstrafverfahren of the Austrian legal system,
- or disciplinary sanctions when such sanctions "merit the guarantees inherent in the criminal procedure", or, again,
- "proceedings for recovery of an unpaid community charge", considered by the English law "civil in nature"
- or the German detention security measure - the Sicherungsverwahnung (§ 66 StGB).

ECHR in ***Gogitidze*** case: Having regard to **such international legal mechanisms** as

- the 2005 United Nations Convention against Corruption,
- the Financial Action Task Force's (FATF)
- Recommendations and the two relevant Council of Europe Conventions of 1990 and 2005 concerning confiscation of the proceeds of crime (ETS No. 141 and ETS No. 198) (..),
- the Court observes that **common European and even universal legal standards can be said to exist which encourage, firstly, the confiscation of property linked to serious criminal offences** such as corruption, money laundering, drug offences and so on, **without the prior existence of a criminal conviction**".

ECHR: **"is not of a punitive but of a preventive and/or compensatory nature"**

- In the ***Gogitidze* case** (*v. Georgia*, 12 maggio 2015, no. 36862/05) the ECourt HR has confirmed its opinion in relation to the civil forfeiture (*civil proceeding in rem*):
- «the forfeiture of property ordered as a result of civil proceedings *in rem*, without involving determination of a criminal charge, **is not of a punitive but of a preventive and/or compensatory nature**».
- *Civil recovery Butler* case, recently *Todorov v. Bulgaria*

ECHR: Italian preventive confiscation

- measure of prevention has a distinct function and nature from that of criminal sanction.
- does not presuppose a crime and a conviction,
- it seeks to prevent the commission from people who are considered dangerous
- ECTHR, 25 March 2003, *Madonia c. Italia*, n. 55927/00, § 4; Id., 20 June 2002, *Andersson v, Italy*, n. 55504/00, § 4; Id., 5 July 2001, *Arcuri e tre altri c. Italia*, n. 52024/99, § 5; Id., 4 September 2001, *Riela c. Italia*, n. 52439/99, § 6; Id., *Bocellari e Rizza c. Italia*, n. 399/02, § 8.

ECHR, *Butler c. Royaume-Uni*, 26 June 2002, n 41661/98,

- “the forfeiture order was a preventive measure and cannot be compared to a criminal sanction,
- since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs.
- It follows that the proceedings which led to the making of the order did not involve “the determination ... of a criminal charge”

Consistency with ECHR

- From the recognition of the preventive or compensative nature of the anti-mafia confiscation or other forms of civil forfeiture
- derive the consistency of these measure with the right to property (Article 1 of the 1st Additional Protocol to the ECHR)
- and the principle of legality (Article 7) (retroactive application is permitted)
- the presumption of innocence (Article 6 § 2)

no violation of Article 1 of Protocol No. 1 right to property

- the **interference** suffered by the applicant with the peaceful enjoyment of his possessions is **proportionate** to the aim pursued with the weapon of the confiscation, i.e. the fight against the scourge of **drug trafficking**” (*Butler v. Royaume – Uni; Philips)*
- the fight against **Mafia** (Marandino, Madonia,..)
- the fight against **corruption** (*Gogitidze,* Telbis and Vizeteu 2018)
- or,in any ase, the fight against the crime (Todorov 2021, Telbis and Vizeteu 2018)

Fight against Mafia

- the fight against organised crime like the Mafia, “ an aim that was in the general interest…..The Court is fully aware of the difficulties encountered by the Italian State in the fight against the Mafia. As a result of its unlawful activities, in particular drug-trafficking, and its international connections,
- this "organization" has an enormous turnover that is subsequently invested, inter alia, in the real property sector.
- Confiscation, which is designed to block these movements of suspect capital, is an effective and necessary weapon in the combat against this cancer. It therefore appears proportionate to the aim pursued, ..»

reversal of the burden of the proof:

“the Court reiterates there can be nothing arbitrary, for the purposes of the “civil” limb of Article 6 § 1 of the Convention,

in the reversal of the burden of proof onto the respondents in the forfeiture proceedings *in rem”*.

Gogitidze, cit., 107; *Balsamo* v. San Marino App no. 20319/17 and 21414/17 (ECHR 8 October 2019), 91; *Silickienė*, cit., §§ 60-70.

civil standard “or a high probability of illicit origins”

- “found it legitimate for the relevant domestic authorities to issue confiscation orders on the basis of **a preponderance of evidence** which suggested that the respondents’ lawful incomes could not have sufficed for them to acquire the property in question.
- “**proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary,** was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1”.

The verification of the link with the crime (Todorov)

- in examining many forms of extended confiscation, also in the light of art. 5 of Directive 42/2014 and its recital no. 21,
- the Court **recognizes the correctness of the procedure that led to the assessment of the unlawful origin of the assets** (for all the case Balsamo v. San Marino,),
- to **ascertain a link between proceeds and criminal activity** - understood in a broad sense and **demonstrable even with presumptions** -,
- **in the absence of which the confiscation represents a disproportionate sacrifice of the right of ownership pursuant to art. 1 I Pr. ECHR.**

difficulties for applicants (Todorovand Others)

- In the recent Todorov case the Court noted that **the wide scope of the governing Act in this case**, both
- **in terms of the offences that could engage its powers, and**
- **the length of time that could pass before proceedings being brought** - two elements which are present in many cases and legislation, e.g. for the Italian preventive confiscation -, **could present difficulties for applicants;**
- so **this advantage for the State has to be counterbalanced by**, in particular**, an obligation to show *some links* to actual criminality in the provenance of the assets to be forfeit.**

- The Court stated that it would defer to the domestic courts if such counterbalancing had taken place,
- unless it could be shown that **the courts' reasoning had been arbitrary or manifestly unreasonable.**

there had not been enough guarantees

- In the cases of Todorov and Others (application no. 50705/11), Gaich (no. 11340/12), Barov (no. 26221/12), and Zhekovi (no. 71694/12)
- the Court found that there had not been enough guarantees to achieve the **requisite fair balance to secure the applicants' rights under Article 1 of Protocol No. 1,**
- including no effort being made to examine the link between the property and alleged criminal activity, nor the establishment by the courts as to whether the assets forfeited had equalled the difference between the applicants' expenditure and income.
- **The forfeiture of their property had been disproportionate, leading to a violation of the Convention.**

the right of the defence

- in proceedings conducted in an “adversarial manner” in accordance with Article 6(1).
- According to the Court, the respondents in the civil proceedings for confiscation
- **must be afforded “a reasonable opportunity to put their arguments before the domestic courts”.**

- *Gogitidze*, cit., 111. Idem; *Balsamo*, cit., 93; *Piras v San. Marino* App no. 27803/16 (ECHR, 27 June 2017) 59, and Jokela v. Finland App no. 28856/95 ECHR 2002-IV, 45.

PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE in

ECHR, Varvara v. Italy, *no. 17475/09,*29 March 2014.

- “Accordingly, beyond the contradictions in the various cases concerning measures which are substantially analogous,
- **the Court affords weaker safeguards for more serious, indeed more intrusive, confiscation measures,**
- **and stronger guarantees for less serious confiscation measures**.
- **Some “civil-law” measures and some “crime prevention” measures which disguise what is in effect action to annihilate the suspect’s economic capacities, sometimes on threat of imprisonment should they fail to pay the sum due,**
- **are subject to weak, vague supervision, or indeed escape the Court’s control,** while other intrinsically administrative measures are sometimes treated as equivalent to penalties and made subject to the stricter safeguards of Articles 6 and 7 of the Convention”.

- “The repercussions of the Court’s case-law can be considerable in cases of enlarged confiscation as a measure to attach property in general (e.g. Article 43a of the German Criminal Code and Article 229-49 of the French Penal Code),
- property having an unlawful purpose (e.g. § 72 of the Swiss Criminal Code and § 20b of the Austrian Criminal Code)
- and property suspected of having an unlawful origin (e.g. § 73d of the German Criminal Code, section 20b (2) of the Austrian Code and section 7 of the Portuguese Law no. 5/2002)”.

Punitive nature of confiscation without conviction in the autonomous meaning of the ECHR

- Limit the right property or permits to forfeit the whole property
- Limit the freedom of economic activity
- stigmatise the person affected, without a demonstration of guilt and a conviction

Criminal standard

- It would be more respectful of the safeguards to adopt the **criminal standard of the proof** in order to apply a kind of confiscation which,
- without the conviction and the demonstration of guilty,
- allows to forfeit the whole property of the subject because **the property is considered of criminal origin,**
- **with the connected stigma for the owner:**
- **The assets are confiscated because the owner is involved in criminal activities**
- **The proof of the illegal origin of the assets is the only element that can justify the confiscation in a State based on the rule of law**

“to square the circle”

- The LIBE Committee model is perhaps too ambitious because it attempts “to square the circle”:
- to consider a “criminal sanction” a kind of confiscation without conviction and to apply the safeguards of the criminal matter, but
- it is an interesting model of actio in rem in order to improve the respect of the safeguards.

Freedom finds a tangible expression in property

- as United States Supreme Court observed in *United States v. James Daniel Good Real Property*, freedom finds a tangible expression in property, there is an insoluble bond between right of freedom and property rights
- if a government has an uncontrollable power on property rights of a citizen, all other rights become without value.
- The explanatory report of Article I of ECHR Protocol I affirms that: "property rights are a condition for personal and family independence".

[1]) *United States v. James Daniel Good Real Property,* 114 Supreme Court 492 (1993).

Thank you for your attention