

* The interviews with the following non-partners MS and extra-EU countries' national experts have been postponed after November due to their working schedule or have being still arranged:

- Prof. Kathrin Stiebellehner (Austria/Professor);
- Dr Judith Hernfeld (Austria/Prosecutor);
- Michael Fernandez Bertier (Belgium/Senior expert in ethics, compliance and white-collar crime - member of the New York bar and former attorney-at-law at the Brussels bar - University lecturer - board member of Transparency International Belgium);
- Momiana Guneva (Bulgaria/ Professor)
- Prof. Lucia Sokanovic (Croatia/Professor);
- Prof. Tomas Grivna (Czech Republic/Professor);
- Henning Fuglsang, Sørensen (Denmark/Practician)
- Dr Heleri Randma (Estonia/Prosecutor);
- Prof. Gyory Csaba (Hungary/Professor);
- G. Kárman, Senior researchers national institute of criminology (Hungary/Professor)
- P. Deres, Senior researcher national institute of criminology (Hungary/Professor)
- Colin King (Ireland/Professor)
- K. Strada-Rozenberga (Latvia)
- Prof. Katalin Ligeti (Luxembourg/Professor);
- S. Filletti (Malta/Professor)
- B. Farrugia (Malta(Practician)
- Joahn Boucht (Norway/Professor)
- Michael Hopemeier (UK/Judge)
- Gretta Fenner (Switzerland/Professor)

*In order to increase the number of interviewed experts, Unict is looking for national experts of non partners MS in ECLAN and EUCRIM networks

*The interviews have been carried out by UNICT and TRANSCRIME on the following topics: 1) national confiscation models covered by the REG.; 2) first praxis in its implementation; 3) application of the REG. to legal persons and enterprises

* The transcripts either the reports of the interviews as well as the other main results of the 3rd workpackage are being uploaded in the RECOVER database at <http://recover.lex.unict.it/documents/recover-database/>

From December 2023 to March 2024 the following the following interviews of non partners MS national experts and extra EU States national experts have been realized:

1. Written answers to the questionnaire of professor Kathrin Stiebellehner (Austria/Professor)
2. Written answers to the questionnaire of professor Lucia Sokanovic (Croatia/Professor)
3. Brief report of the interview of professor Joahn Boucht (Norway/Professor)

1. Written answers to the questionnaire of professor Kathrin Stiebellehner (Austria/Professor)

RECOVER **I RESEARCH QUESTIONNAIRE - II WORKPACKAGE**

“ESTABLISHING THE SUBJECT MATTER OF THE REGULATION”:

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

The application of the Regulation no. 1805/2018 – Draft questions for the interview

1. Can you provide us with a short list of the forms of forfeiture and seizure (as well as the related legislative provisions) which fall under the scope of the Regulation and within the concept of proceeding in criminal matter (Art. 1 REG)?

- o **Confiscation** (“*Konfiskation*”, sec 19a Austrian Criminal Code [“*Strafgesetzbuch*“])

An item used or intended to be used in the commission of an intentional offence and any item produced from such an offence is to be confiscated if it belongs to the perpetrator at the time of the judgement at first instance. The legal nature as penalty (secondary penalty to imprisonment or a fine) explains the requirement of sole possession of the item by the accused. The confiscation also extends to the replacement values of these objects owned by the offender at the time of the decision of the first instance. Confiscation shall be refrained from if it is disproportionate to the significance of the offence or to the accusation against the offender.

- o **Forfeiture** (“*Verfall*”, sec 20 ACC)

The court declares assets that were obtained for or through the commission of an offence to be forfeited. The forfeiture also extends to benefits and replacement values of the assets to be declared forfeited. The court must declare an amount of money forfeited that corresponds to the assets obtained insofar as the assets subject to forfeiture are not seized or confiscated. If the extent of the assets to be declared forfeited cannot be determined or can only be determined with disproportionate effort, the court shall determine it in its judgement.

Section 20a ACC enumerates a few grounds that exclude the forfeiture of assets. Forfeiture of benefits and replacement values to a third party is excluded if the third party acquired the assets in ignorance of the offence punishable by law. Furthermore, forfeiture is excluded: vis-à-vis a third party if the third party acquired the assets in return for payment in ignorance of the offence punishable by law; if the person concerned has satisfied civil law claims arising from the offence or provided security for them, or if its effect is achieved by other legal measures. Forfeiture is to be waived if the asset to be declared forfeited or the prospect of its recovery is disproportionate to the expense of the proceedings that the forfeiture or recovery would require.

○ **Extended forfeiture** (“*erweiterter Verfall*”, sec 20b ACC)

Assets that are subject to the power of disposal of a criminal organisation (sec 278a ACC) or a terrorist group (sec 278b ACC) or were provided or collected as a means of financing terrorism (sec 278d ACC) must be declared forfeited (sec 20b para 1 ACC).

If an unlawful offence pursuant to sections 278 or 278c acc, for the commission of which or through which assets were obtained, or such a crime has been committed, those assets that were obtained in a temporal connection with this offence are also be declared forfeited if there is reason to assume that they originate from an unlawful offence and their lawful origin cannot be substantiated (sec 20b para 2 ACC).

In addition, assets that originate from an offence punishable by law and are involved in proceedings for an offence under Sections 104, 104a, 165, 207a, 215a para. 1 or 2, 216, 217, 246, 277 to 280, 302, 304 to 309 ACC or under the twenty-fifth section of the ACC, under Section 28a of the Narcotic Substances Act, pursuant to Sections 39 or 40 of the Financial Crimes Act, or pursuant to Section 114 of the Foreign Police Act, are to be declared forfeited if the person concerned cannot be prosecuted or convicted for this offence. When deciding on forfeiture, the court may base its conviction that the asset originates from an offence punishable by law in particular on a striking contradiction between the asset and the lawful income of the person concerned, whereby in particular the circumstances of the discovery of the asset, the other personal and economic circumstances of the person concerned and the results of the investigation into the offence that gave rise to the proceedings may also be taken into account (sec 20b para 3 ACC).

Extended forfeiture also extends to benefits and replacement values of the assets to be declared forfeited. The court must declare an amount of money forfeited that corresponds to the assets obtained insofar as the assets subject to forfeiture are not seized or confiscated. If the extent of the assets to be declared forfeited cannot be determined or can only be determined with disproportionate effort, the court shall determine it in its judgement (sec 20b para 2 ACC).

Extended forfeiture pursuant to Section 20b para 1 ACC is excluded if there are legal claims to the assets concerned by persons who are not involved in the criminal organisation or terrorist group or terrorist financing (sec 20c para 1 ACC). Moreover, reference is made to the forfeiture with regard to the reasons for exclusion (sec 20c para 2 ACC).

○ **Seizure** („*Einziehung*“, sec 26 ACC)

Objects which the offender has used to commit the offence punishable by law, which were intended by him to be used in the commission of that offence or which were produced by that offence are to be confiscated if this appears necessary in view of the special nature of the objects in order to counteract the commission of offences punishable by law.

Confiscation shall not be carried out if the person entitled removes the special nature of the objects, in particular by removing or rendering unusable devices or markings that facilitate the commission of punishable offences. Objects to which a person not involved in the criminal offence has a legal claim may only be confiscated if the person concerned offers no guarantee that the objects will not be used to commit criminal offences.

If the conditions for confiscation are met, the objects are to be confiscated even if no specific person can be prosecuted or convicted for the offence punishable by law.

2. Can you give some **statistical data** about the application of the Regulation (e.g.: how many cases, which models of confiscation)?

Unfortunately, there are no publicly available data and the Federal Ministry of Justice has not yet responded to my enquiries in this regard. I hope to get some data (soon) and will submit them as soon as I receive them.

3. Which are the **problems** encountered in applying the Regulation (both in executing requests from foreign authorities in your country and in obtaining the execution of your requests abroad)? And which are the **grounds for refusal** applied in the praxis?

There are no publications concerning the application of the regulation in Austria. Therefore, it is difficult to identify any problems or make valid statements about the grounds for refusal. Unfortunately, enquiries to the Federal Ministry of Justice in this regard have so far remained unanswered.

4. Within your national legal system, is there any need to reform the confiscation models to comply with the guarantees required by the Reg. 1805/2018?

In my opinion, there is room for improvement in several aspects of the confiscation regulation in Austria. However, the guarantees of the regulation have been granted.

5. Do you believe the guarantees provided for in the Reg. 1805/2018 to be sufficient? If not, why?

Yes, I believe them to be sufficient.

7. How was the Directive 2014/42/EU transposed in your national legal order and how did this affect national law?

In Austria, there was no transposition process into national law because the obligations arising from the Directive were already fulfilled by the legal situation applicable at the time, according to the government. So, the Directive did not affect national law.

However, in 2021, extended forfeiture was enlarged by an unexplained wealth type of confiscation. This type does not focus on an individual person but targets unlawful asset allocation to ensure that crime does not pay. According to the government this is no punishment but a preventive measure pro futuro. The extension was necessary because Austria had not brought the Directive into full force. Extended

confiscation was solely possible if the court was able to establish a **temporal connection** between the alleged criminal act and the obtaining of the assets. Art 5 of the Directive does not know of such temporal conditions.

8. Do you have **any proposals of harmonization of MS legislation, also in consideration of the new proposal of a directive (May 2022) on freezing and confiscation orders?**

I am not aware of the reasons why confiscation may be waived in detail in the criminal law systems of all member states, but I could imagine that there might be a need for harmonisation there.

In Austria, confiscation shall be refrained from if it is disproportionate to the significance of the offence or to the accusation against the offender. I assume that this clause of proportionality can be found in some way in most of the criminal law systems but that there are differences – if not in the text of the law, then at least in the interpretation.

Section 20a ACC enumerates a few grounds that exclude the forfeiture of assets – exemptions the Directive does not provide.

9. Could you give your inputs about **possible guidelines** on the practical implementation of the Regulation?

As I have no insight into the practical implementation of the Regulation in Austria, it is hard to speak about guidelines. It would be more rewarding to ask a practitioner in this field.

10. Do you have any further **reform proposals**, at a national or international level? Do you have any further **policy recommendations**, at a national or international level?

According to the unanimous opinion in literature and case law, confiscation (sec 19a ACC) is to be qualified as a penalty. Therefore, it must always be pronounced in the judgement after the determination of the guilt of the accused. This changed with the Criminal Law Amendment Act 2015 for certain cases. Since then, it is possible to impose a sentence without a judgement and guilty verdict. This is probably incompatible with the requirements of the presumption of innocence, the principle of guilt and the fair trial under Art 6 of the ECHR.

Another policy recommendation also concerns the confiscation (sec 19a ACC): In Austria, only objects, i.e. physical items, can be confiscated. This gap must be closed by applying confiscation to tangible and intangible property, i.e. rights, in accordance with the provisions of Directive 2014/42/EU. This can be done either by changing the interpretation of the term "object" or by using a new term. I would favour the latter solution by also using the term "assets" for Section 19a ACC.

In order to honor the principle of guilt, Section 20 ACC must be teleologically reduced to the effect that in the case of offenders who are not culpable, only the profit from the criminal activities, i.e. after deduction of their expenses, is declared forfeited. In this way, Section 20 ACC has the effect of purely skimming off profits with regard to this group, while it has the character of a penalty-like sanction in the case of a fully-fledged criminal offence.

11. **Which models of confiscation can be applied against legal persons and which are their constituent elements?**

It should be noted in advance that a legal person is responsible for an offence under the following conditions (sec 3 Association Responsibility Act [”Verbandsverantwortlichkeitsgesetz”]): A legal person is responsible for a criminal offence if the offence was committed for its benefit or if the offence violated obligations that apply to the legal person. The association is responsible for offences committed by a decision-maker if the decision-maker as such has committed the offence unlawfully and culpably. The legal person is responsible for criminal offences committed by employees if employees have unlawfully committed the facts corresponding to the statutory offence; the legal person is only responsible for a criminal offence that requires intentional action if an employee has acted intentionally; for a criminal offence that requires negligent action, only if employees have failed to exercise the due care required in the circumstances; and the commission of the offence was made possible or significantly facilitated by the fact that decision-makers disregarded the due and reasonable care required in the circumstances, in particular by failing to take essential technical, organisational or personnel measures to prevent such offences.

Forfeiture (sec 20 ACC) is possible both for legal persons not responsible for the offence and for legal persons responsible for the offence. In those cases in which the association is responsible for the offence (sec 3 Association Responsibility Act), which is therefore not only in bad faith (i.e. not unaware of the punishable offence), but to which the offence itself is attributed, forfeiture is directly applicable to the legal person without the restrictions against third parties provided for in Section 20a ACC. Section 20a ACC remains applicable to cases in which an uninvolved association has acquired assets.

The **confiscation** (sec 19a ACC) of association-owned objects from the responsible association is also permissible, as well as the **seizure** of dangerous objects (sec 26 ACC). All the general elements apply.

O Could you give your inputs about **possible guidelines** on the implementation of the Regulation against **legal persons**? Do you have any **reform proposals** for your country in this regard?

First of all, it is important to apply confiscation orders to legal persons as well as natural persons. Secondly, the confiscation rules relating to legal persons should fit into the general confiscation regime and be congruent with the criminal liability of legal persons. In my opinion, these requirements were quite well observed by the Austrian legislator so that I do not see any reform need in this regard at the moment. As for the implementation of the regulation I would advise to stick as much as possible to the existing system. In Austria at least, it can be observed that the implementation of international guidelines often leads to systemic breaks in the national criminal law system.

2. Written answers to the questionnaire of professor Lucia Sokanovic (Croatia/Professor)

RECOVER

I RESEARCH QUESTIONNAIRE - II WORKPACKAGE

“ESTABLISHING THE SUBJECT MATTER OF THE REGULATION”:

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1805/2018. TYPES, FEATURES AND SAFEGUARDS.

The application of the Regulation no. 1805/2018 – Draft questions for the interview

CROATIA

1. Can You provide us with a short list of the forms of forfeiture and seizure (as well as the related legislative provisions) which fall under the scope of the Regulation and within the concept of proceeding in criminal matter (Art. 1 REG)?

Conditions for and manner of confiscation of proceeds of crime are set out in Article 77 of the Croatian Criminal Code.¹ Proceeds of crime shall be confiscated on the basis of a court decision establishing the commission of an unlawful act. Proceeds of crime shall also be confiscated from the person to whom it was transferred if it was not acquired in good faith. If the injured party has been awarded a material claim which by its nature and contents corresponds to the acquired proceeds of crime, the part of proceeds of crime exceeding the awarded material claim shall be confiscated. The court shall confiscate the proceeds of crime also in cases where it has instructed the injured party to assert his or her material claim in a civil action. Where it has been established that confiscation in full or in part of objects or rights acquired as proceeds of crime is impossible, the court shall order the perpetrator to pay the corresponding money equivalent. It may be ordered that payment be made in instalments. The confiscated proceeds of crime shall not be reduced by the value of resources invested in the criminal activity. The court may decide against the confiscation of proceeds of crime if its value is negligible.

Extended confiscation is regulated with Article 78 of the Croatian Criminal Code in following: If the perpetrator of a criminal offence under jurisdiction of the Office for the Suppression of Corruption and Organised Crime, as well as criminal offences of sexual abuse and sexual exploitation of children (Title XVII) and criminal offences against computer systems, programmes and data (Title XXV) owns or owned property that is disproportionate with his or her legitimate income and unless he or she makes it probable that the property is of legitimate origin, it is presumed that such property constitutes a proceeds of crime (Article 78 Para 2).

¹ Criminal Code, OG 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, 114/23 (available in Croatian at: <https://www.zakon.hr/z/98/Kazneni-zakon>).

If the proceeds from a criminal offence have been merged into legitimately acquired property, the entire property shall be subject to confiscation up to the estimated value of the proceeds of crime. The material gain acquired from property in which the legitimately acquired property was merged with the proceeds of crime shall also be confiscated in the same manner and in the same ratio (Article 78 Para 3).

The proceeds of crime referred to in paragraphs 2 and 3 of Article 78 shall be confiscated from a family member irrespective of the legal basis on which he or she possesses it and regardless of whether he or she lives in a shared household with the perpetrator. The proceeds of crime referred to in paragraphs 2 and 3 of Article 78 shall be confiscated from another person irrespective of the legal basis on which it was acquired unless this person makes it probable that he or she acquired the advantage in good faith and at a reasonable price. If a person against whom criminal proceedings have been instituted dies, the proceeds of unlawful conduct may be confiscated from his or her successors in proceedings prescribed by a special act (Article 78 Para 4-6).

So, there are three varieties of confiscation in Croatia provided in CCC: **conviction-based confiscation**, **non-conviction-based confiscation** (if accused was found mental incapable at the time of commission of the offence; or is permanently incompetent to stand trial, or is unavailable to the bodies of the criminal procedure when it is likely that the proceeds of crime amount to the least 7.963,37 EUR) and finally, **confiscation from the third party**.

In addition, Article 117 of the Croatian General Tax Act provides that the tax supervision can be performed in the procedures of determining the difference between the acquired property and the proven funds for the acquisition of that property according to the regulations on income tax. Income tax on other income² shall be calculated by the Tax Administration at the rate of 30%. The previously calculated income tax shall be increased by 100%.³

There is one type of extended confiscation but proceeds may be confiscated from different persons (perpetrator of specific offences, a family member or another person, successors of the person against whom criminal proceedings have been instituted (and who died)) and may concern legitimately acquired property.

² Other income is considered to be the income determined as the difference between the value of acquired property and significant expenditures made especially for luxury, entertainment and leisure on the one hand (hereinafter: acquired property) and the proven amount of funds for its acquisition and acquisition of these expenses on the other according to Article 76 of the Income Tax Act, OG 115/16, 106/18, 121/19, 32/20, 138/20, 151/22, 114/23 (available in Croatian at: <https://www.zakon.hr/z/85/Zakon-o-porezu-na-dohodak>).

³ Article 78 of the Income Tax Act.

Conviction is not precondition for extended confiscation. Namely, it can be concluded from Article 77 prescribing that proceeds of crime shall be confiscated on the basis of a court decision establishing the commission of an unlawful act. Additional qualification of conviction is not required. Proceeds acquired by criminal offence shall be confiscated from the perpetrator who has been convicted by a court decision of committing a criminal offence, or who has been found to have committed an unlawful act which is the subject of the charge, or certain third parties who have acquired such proceeds. But, if the accused perpetrator or perpetrators are acquitted, or the offence is statute – barred, no extended confiscation can be imposed.

Procedure for confiscation is prescribed in Art. 557-563. of the Criminal Procedure Code.⁴

The area of judicial cooperation in criminal matters between the member states of the European Union is regulated in Croatia with the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union⁵ which was adopted by the Croatian Parliament in 2010 and entered into force on the date of the accession of the Republic of Croatia to the European Union on July 1, 2013. This Act regulates the forms of judicial cooperation prescribed by the legislation of the European Union: European arrest warrant and surrender procedure, European investigation warrant, freezing orders, recognition and enforcement of orders for confiscation of property or objects, recognition and enforcement of decisions on fines, recognition and enforcement of judgments a prison sentence or a measure that includes deprivation of liberty, recognition and enforcement of judgments and decisions imposing probation measures and alternative sanctions, recognition and enforcement of decisions on precautionary measures and a European protection order has been imposed. The Law has been amended seven times since its adoption. In 2020, the Act was amended by incorporating implementing provisions in relation to Regulation (EU) 2018/1805 of the European Parliament and the Council of November 14, 2018 on the recognition of freezing orders and confiscation orders, which has been applied in member states since November 19, 2018.

2. Can You give some statistical data about the application of the Regulation (e.g.: how many cases, which models of confiscation)?

In the Report of the State Attorney General on the work of State Attorneys for 2022 there are data on judicial cooperation from 2019 to 2022.

⁴ Criminal Procedure Code, OG 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 130/20, 80/22 (available in Croatian at: <https://www.zakon.hr/z/174/Zakon-o-kaznenom-postupku>).

⁵ Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union, OG 91/10, 81/13, 124/13, 26/15, 102/17, 68/18, 70 /19, 141/20 (available in Croatian at: <https://www.zakon.hr/z/345/Zakon-o-pravosudnoj-suradnji-u-kaznenim-stvarima-s-dr%C5%BEavama-%C4%8Dlanicama-Europske-unije>).

Table 1: Data on judicial cooperation from 2019 to 2022.⁶

	2019		2020		2021		2022	
	Croatia as the country of issuance	Croatia as the country of execution	Croatia as the country of issuance	Croatia as the country of execution	Croatia as the country of issuance	Croatia as the country of execution	Croatia as the country of issuance	Croatia as the country of execution
European Arrest Order	51	154	43	114	101	105	88	155
European Investigation Order	222	361	216	432	270	411	286	472
Other	9	15	11	107	0	151	8	102
TOTAL	282	530	270	653	371	667	382	729

Under the term "other", cases of judicial cooperation refer to the recognition and execution of freezing orders, property confiscation orders, and foreign judgments that impose prison sentences or other measures of deprivation of liberty. The trend of an increase in the number of cases in which temporary freezing orders for confiscation of proceeds were issued in the process of recognition and execution of foreign freezing orders continued. Thus, for example, the County State Attorney's Office in Pula received freezing order issued by the judicial authorities of the Republic of Slovenia, and in the process of its recognition and execution, a temporary freezing order was set for confiscation of proceeds by prohibiting the disposal of real estate worth EUR 40,000.00. In three cases, the Municipal State Attorney's Office in Čakovec issued freezing orders in accordance with Regulation 2018/1805, which requested the insurance of funds in the amount of EUR 25,842.76.

The member states of the European Union, with whose judicial bodies the cooperation has been achieved to the greatest extent, are the Federal Republic of Germany, the Republic of Austria, the Republic of Slovenia, Hungary and the Italian Republic.

The structure of criminality in criminal cases of judicial cooperation achieved with the member states of the European Union refers to the largest extent to criminal offences committed within the framework of a criminal association, criminal offences of drug abuse, money laundering, tax or customs evasion, abuse of trust in business operations, forgery of documents, criminal offences against property, cybercrime and illegal investment, movement and residence in the Republic of Croatia.

The general data on the number of imposed freezing order, the number of confiscation and the value of freezed or confiscated property in Croatia from 2018 to 2022 are provided in Table 2. The only (publicly available) specified data concerning the application of the Regulation concern data on requests of

⁶ Report of the State Attorney General on the work of State Attorneys for 2022, p. 233. Available at: <https://dorh.hr/hr/izvjesca-o-radu/izvjesce-o-radu-drzavnih-odvjetnistava-u-2022-godini>.

confiscation in 2022.⁷ In 2022, the State Attorney's Office of the Republic of Croatia received 17 requests for confiscation of proceeds from convicts residing in European Union member states and submitted them to county courts for competent processing.⁸

Table 2: The number of imposed freezing orders, the number of confiscation and the value of property⁹

Year	The number of request	Value in Euro	The number of Freezing orders	Value in Euro	The number of confiscation	Value in Euro
2018	14	2.966.666,6	14	2.966.666,6	138	11.923.062
2019	48	5.137.842,4	48	5.137.842,4	121	2.755.069
2020	41	6.875.997,0	41	6.875.997,0	81	10.260.205
2021	28	6.195.080,0	28	6.195.080,0	140	11.754.143
2022	20	115.629.168,9	20	115.629.168,9	155	8.508.313

3. Which are the problems encountered in applying the Regulation (both in executing requests from foreign authorities in Your country and in obtaining the execution of Your requests abroad)? And which are the grounds for refusal applied in the praxis?

In applying the Regulation, a question of interpretation of Art. 30. Para 7 arose whether the decision on transferring of the 50% of the amount more than EUR 10 000 should be issued by the court recognizing the confiscation order or should this decision be issued during execution of confiscation order. In the first case, especially contentious cases would be those in which it is not yet known what amount will be acquired by selling securities or some other property.

The provision of Article 29 of the Regulation is applied in practice even though the Croatian CPC does not prescribe the possibility of returning the property to the victim when temporary freezing order has been issued in relation to it. This provision is most often applied in relation to cars that were acquired by evasion/fraud, and then resold to a third party who acquired the car in good faith and found out during registration that it was wanted in the Schengen system. In these cases, when an object was acquired in good faith by a third party, the frozen property will not be returned to the victim in accordance with Art.

⁷ The Regulation entered into force on 19 December 2020. In the Report of the State Attorney General on the work of State Attorneys for 2021, it is only stated that the number of received requests for confiscation of property is “huge”. See Report of the State Attorney General on the work of State Attorneys for 2021, p. 213. Available at: <https://dorh.hr/hr/izvjesca-o-radui/izvjesce-o-radui-drzavnih-odvjetnistava-u-2021-godini>.

⁸ Report of the State Attorney General on the work of State Attorneys for 2022, p. 220.

⁹ Report of the State Attorney General on the work of State Attorneys for 2022, p. 177. Available at: <https://dorh.hr/hr/izvjesca-o-radui/izvjesce-o-radui-drzavnih-odvjetnistava-u-2022-godini>.

29. Para 3 of the Regulation. Regardless of this decision of Croatian court, the search for the vehicle still remains in the SIS system in other Schengen countries, and the third person who acquired the vehicle in good faith cannot leave the territory of the Republic of Croatia without the risk of the same vehicle being confiscated again based on the search in the SIS. In such cases, the injured party should initiate a lawsuit against a third person who acquired the thing in good faith.

In the implementation of the Regulation, Croatia failed to prescribe a provision that would correspond in content to Article 44. Para 4 of the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (“Delivery of the freezing order to the opponent of the freezing may be postponed only exceptionally at the proposal of the state attorney if this is necessary in order not to jeopardize the purpose of confiscation of property. The delivery of the order can be postponed for a maximum of 30 days from its issuance.”), which would prevent the disposal of property abroad by the freezing opponent until the procedure of recognition and execution of the freezing order is carried out. Provision of Article 44 Para 4 continues to apply, but only in relation to the Kingdom of Denmark and the Republic of Ireland. Namely, in practice, the deadlines from Article 9 of the Regulation are not respected, so that the freezing opponent has time to thwart the implementation of the freezing order by disposing of assets abroad, while the procedure for recognition and execution of the freezing order is carried out abroad (this procedure takes several weeks). The deadlines from Article 9 of the Regulation are only instructional deadlines. So such behavior of the executing state is not surprising.

The existing instruments regulate judicial cooperation in the field of conducting investigative measures before the judgment is rendered (EIO Directive) or recognition and execution of freezing and confiscation order (Regulation 2018/1805). The tracing of proceeds of crime is regulated by Council Framework Decision 2005/212/JHA, the asset recovery offices Council Decision, and the Confiscation Directive, establishing common standards for asset tracing and identification. In practice the competences of the ARO Office prescribed by mentioned Framework Decision are used in the investigative phase of the proceedings. It is necessary to emphasize that after the transposition of the EIO Directive, European Investigation Order is usually issued for the purpose of tracing and identification of the proceeds of crime instead of by Council Framework Decision 2005/212/JHA. There is no legal instrument on the EU level or on the level of the Council of Europe that prescribes the financial investigations for the purpose of execution of the confiscation order in the national proceedings, as well as in the cases where the international cooperation is needed. In practice we noticed that some EU MS refuse to execute the confiscation order issued pursuant to the Regulation 2018/1805 if the issuing authority did not established that a person against whom the confiscation order was issued has concrete property or income in the executing State or has established that specific items of property are located in the executing State and the certificate does not contain the information on concrete

property/income/ items of property (for example Germany, Italy). This information can be obtained in the framework of the investigation. In that case usually the freezing order would be issued in the framework of investigation. But if this information has not been obtained during the investigation and property was already frozen, after the conviction there is no legal basis for conducting financial investigation, especially on the foreign territory. In practice we overcome this lacuna by using the competences of ARO Office. In the Republic of Croatia the execution of the confiscation order is in the competence of the Civil - Administrative Department of the State Attorney's Office of the Republic of Croatia and the procedure is being conducted in accordance with the Enforcement law.

4. Within your national legal system, is there any need to reform the confiscation models to comply with the guarantees required by the Reg. 1805/2018?

See previous answer.

5. Do you believe the guarantees provided for in the Reg. 1805/2018 to be sufficient? If not, why?

Provisions on investigative measures during the execution phase (once the judgement is final and enforceable) with the aim of tracing proceeds of crime in order to execute a final confiscation order or a financial penalty are needed (Article 17 of the Proposal of the Directive of the European Parliament and of the Council on asset recovery and confiscation).

6. Could you give your inputs about possible guidelines on the practical implementation of the Regulation?

Answered previously.

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

Directive 2014/42/EU was implemented in the Croatian legislation by the Law on Amendments to the Criminal Procedure Act of July 13, 2017. There was an obligation to introduce provisions in Criminal Procedure Act from 2011 that better and more thoroughly regulate the confiscation of proceeds based on a conviction and without convictions under Art. 4. of the Directive, freezing measures according to Art. 7. and protective measures to ensure the protection of the rights of the defendant and other persons and their active participation in the proceedings according to Art. 8. Within the transposition almost all procedural provisions concerning the confiscation united in one legal act (CPA). However, the duration of criminal proceedings, especially those in complex cases under the jurisdiction of the Office for the Suppression of Corruption and Organized Crime, along with the prescribed duration of freezing orders,

do not contribute to the realization of the principle that no one can keep the material benefit they have acquired illegally, as well as the message that crime does not pay.

8. Do you have any proposals of harmonization of MS legislation, also in consideration of the new proposal of a directive (May 2022) on freezing and confiscation orders?

Answered previously.

9. Do you have any further reform proposals, at a national or international level?

-

10. Do you have any further policy recommendations, at a national or international level?

-

11. Which models of confiscation can be applied against legal persons and which are their constituent elements?

In Croatia the basis of the liability of a legal person for criminal offences is the guilt of the responsible person. The responsible person is only a natural person. There is no special regulation concerning confiscation against legal persons.

o Could you give your inputs about possible guidelines on the implementation of the Regulation against legal persons? -

o Do you have any reform proposals for your country in this regard? -

3. Brief report of the interview of professor Joahn Boucht (Norway/Professor)

RECOVER
III WORKPACKAGE

Draft questionnaire for national experts of Member States which are not bound by the Regulation no. 1805/2018 nor subject to its application (Denmark, Ireland, cf. Recitals no. 56, 57 of the Regulation) and Non-EU States (United Kingdom, Switzerland, Norway)

1. Which are the different models of forfeiture/confiscation in Your system of law (direct confiscation, confiscation of the value, extended confiscation, non-conviction based

confiscation, confiscation against third parties, etc.)? Please, explain which are the different models in general, then focus specifically on extended confiscation and non-conviction based confiscation

In the Norwegian legal system, the first important distinction to be made is between confiscation of proceeds of the crime (sections 67-68 Penal Code) and forfeiture of instrumentalities of the crime (section 69 Penal Code).

In relation to the confiscation of proceeds of the crime, Norwegian law does not provide any form of NCBC *stricto sensu* (currently a group of experts led by Prof. Boucht is working on proposals), but to apply the measure it suffices that the actus reus/objective side of the offence is proved BARD (and a link between proceeds and the crime is established. Finding of mens rea or criminal capacity (subjective elements) is not a requirement. Confiscation can be applied also when the offense is time barred.

The first type of confiscation of proceeds of the crime is “ordinary” criminal confiscation (section 67 Penal Code), which corresponds to the model under Art. 4 of the EU Directive 2014/42 (which is mandatory under Norwegian law).

In 1999 was introduced the second type of confiscation, which is extended confiscation EC (section 68 Penal Code) (similar to the model of art. 5 Directive). There has to be a formal conviction for a s.c. trigger offence, then courts can confiscate assets which are not linked to the trigger offence. This is a conviction based confiscation, as it requires a formal conviction. Reversal of the burden of proof applies, as the defendant has to prove on balance of probability that the origin of his assets is lawful. Differently from ordinary confiscation, this form confiscation is discretionary (i.e. courts can assess the magnitude of the confiscation order, also in order to mitigate the potential far-reaching effect of the reversal of the burden of proof).

In order to apply extended confiscation, prosecutors must first present a good arguable case that the assets have unlawful origin (i.e. prima facie showing that assets are unlawful on balance of probability/more likely than not), in that case the burden shifts to the defendant to show that the assets have lawful origin.

EC is available when the person is convicted of trigger offenses. A presumption of unlawful origin of assets and criminal lifestyle apply.

There are two options under the law for trigger offenses (section 68 Penal Code):

- 1) offense punished with minimum 6 years prison term or more;
- 2) offenses with punishment minimum 2 years prison term, but only with multiple convictions for similar offenses in the previous 5 years.

Both provisions require a preliminary assessment in abstract of the nature of the crime, according to which it can produce or generate economic gain or benefit.

There are therefore important limitations under the law.

It has to be pointed out that the proceeding to order the confiscation of proceeds of crime can be initiated also after the person is dead and execution is also possible (e.g. against the heirs of the defendant). To the contrary, forfeiture of instrumentalities cannot be applied in case of death of the defendant.

Under a specific provision (section 74[3] Penal Code), in Norway a proceeding can be initiated if it is established a link between assets and a crime, but the defendant is unknown.

Section 70 Penal Code provides for preventive confiscation, which can be applied if there is a considerable risk that property will be used to commit an offence and no conviction is required, as the measure is forward looking and preventive in nature.

Concerning the proportionality of the measure, under Norwegian law, there is an unreasonableness rule/reasonableness clause, which is typical of all Nordic legal systems, under which the court has wide discretion not to apply or to reduce the confiscation according to the circumstances/the facts of the specific case. It is far-reaching, for example it is often applied for deduction of the legal expenses, health, social, humanitarian reasons.

- 2. How was the Directive 2014/42/EU transposed in Your national legal order and how did this affect national law? (please answer only if Your country is bound by the Directive and subject to its application, cf. Recitals no. 42, 43, 44 of the Directive)**

- 3. Which models of confiscation can be applied against legal persons in Your system of law and which are their constituent elements? Do you have any reform proposals for your country in this regard?**

In Norway direct/ordinary confiscation and EC can be applied to companies and corporations. There is corporate criminal liability in the criminal code (sections 27-28 Penal Code), which is applied when offenses are committed by physical persons on behalf or in the interests of the corporation.

- 4. Relating to the different models of forfeiture/confiscation in Your system of law (see no. 1 *supra*), and especially but not exclusively with regard to extended confiscation and non-conviction based confiscation, have in the national praxis arisen issues of compliance with fundamental rights? (such as legality; non-retroactivity of the more severe statute; the right to private property; the proportionality; the right to a fair trial; the right to defence; the presumption of innocence; the *ne bis in idem* principle; and other relevant rights). Please provide details and practical examples**

Norway is a small country, there is not much case law. Most of Supreme Court cases relate to specific and technical aspects of the provision, not issues related to fundamental safeguards.

In 2003 there was a challenge on presumption of innocence grounds against extended confiscation (reversal of burden of proof, presumption of unlawful origin of assets).

The Court said that EC is punishment according to the Convention, art. 6. 2 ECHR apply, but it found no violation of the presumption of innocence.

GIEM v. Italy judgment seems to require that guilt is required (some discussion about it in Norway following the decision). Prof. Maugeri distinguishes GIEM case from EC.

EC is limited to assets in possession of the defendant at the time of the decision applying the measure.

Norwegian law does not provide any “chronological/temporal reasonableness” requirement for the application of extended confiscation, but the judge exercises wide discretion in considering the likelihood of the unlawful origin of assets, and remoteness in time can weigh heavily against confiscation. This aspect is strictly related to the exercise of the right of defense, and well settled ECHR case law seems to require temporal limitation/reasonableness, but Norway law has no such an explicit requirement on the books (and it is criticized in this regard).

With regard to the nature of confiscation, the Supreme Court in most cases has ruled that EC has compensatory nature (restoring the status quo ante before unjust enrichment). In relation to forfeiture

of instrumentalities of the crime (instrumentalities as such, objects, products), courts have ruled that these measures have a preventive purpose. It can be criticized that Norwegian courts apply to liberally value forfeiture, which is clearly punitive in nature, as it is based on general deterrence.

- 5. Is Your country party of any non-EU treaty/convention (e. g. adopted within the UN or CoE framework) on the mutual legal assistance/judicial cooperation for the recognition and execution of forfeiture/confiscation orders? If yes, please mention and briefly illustrate such judicial cooperation tools and how they are applied in the praxis, highlighting the most recurring grounds of refusal and difficulties in implementation, especially those related to the safeguard of fundamental rights (see no. 4 *supra*), both in executing requests from foreign authorities in Your country and in obtaining the execution of Your requests abroad**

The 1990 Strasbourg Convention is the main tool of cross border cooperation for Norwegian judicial authorities. Many Norwegian prosecutors issue requests in the field of money laundering, but there are not many incoming requests. 2003 UNCAC is also relevant, even if precise data on its application are not available. Cooperation with the U.S. is based on bilateral agreements which are in force between the countries. Norway is not much affected by organized crime (differently from Sweden, where organized crime is a current national emergency).

- 6. Can You provide with some statistical data on the application of the abovementioned treaties/conventions of which Your country is party?**
- 7. Do you have any reform proposals and/or policy recommendations, at a national or international level?**

Norwegian law does not provide any specific rule regarding the management of frozen/confiscated assets. They become disposable assets of the State (no power to sell goods, no specific destination, no incentivization schemes, no social reuse).

The lack of a specific provision can be a problem which causes depreciation (a problem with big assets, e.g. harbor, winter parks).

If there is a compensation claim put forth by the victim, the confiscation can be reduced accordingly.

ANNEX 1: NATIONAL LEGISLATION/NORWEGIAN PENAL CODE

Chapter 4. Enterprise penalties

Section 27. *Penalties for enterprises*

When a penal provision is violated by a person who has acted on behalf of an enterprise, the enterprise is liable to punishment. This applies even if no single person meets the culpability or the accountability requirement, see section 20.

«Enterprise» means a company, co-operative society, association or other organisation, sole proprietorship, foundation, estate or public body.

The penalty is a fine. The enterprise may also be sentenced to lose the right to operate, or may be prohibited from operating in certain forms, see section 56, and be subject to confiscation, see chapter 13.

Section 28. *Factors in determining whether a penalty shall be imposed on an enterprise*

In determining whether an enterprise shall be penalised pursuant to section 27, and in assessing the penalty, considerations shall include

- a. the preventive effect of the penalty,
- b. the severity of the offence, and whether a person acting on behalf of the enterprise has acted culpably,
- c. whether the enterprise could have prevented the offence by use of guidelines, instruction, training, checks or other measures,
- d. whether the offence has been committed in order to promote the interests of the enterprise,
- e. whether the enterprise has had or could have obtained any advantage by the offence,
- f. the financial capacity of the enterprise,
- g. whether other sanctions arising from the offence are imposed on the enterprise or a person who has acted on its behalf, including whether a penalty is imposed on any individual person, and
- h. whether agreements with foreign states prescribe the use of enterprise penalties.

Chapter 13. Confiscation

Section 66. *Combination of confiscation with penalties and other criminal sanctions*

Confiscation pursuant to this chapter may be imposed alone or together with penalties or other criminal sanctions.

Section 67. *Confiscation of proceeds*

Any proceeds of a criminal act shall be confiscated. Instead of the proceeds, all or part of the value of the proceeds may be confiscated. Confiscation shall take place even though the offender was unaccountable, see section 20, or was not culpable. Liability pursuant to this provision may be reduced or waived if confiscation would clearly be unreasonable.

Any asset that represents proceeds, profit and other advantages of the proceeds shall be regarded as proceeds. Expenses incurred shall not be deducted. If the amount of the proceeds cannot be established, the amount shall be determined approximately.

The court – or the prosecuting authority in an optional penalty writ of confiscation – may determine that the amount to be confiscated shall be reduced by an amount which corresponds to compensation the offender or someone who is liable for the harm done has paid to the injured person, and which wholly or partially corresponds to the proceeds. The same applies when the offender has met an obligation which relates to the criminal prosecution.

In the event of confiscation of value, see the second sentence of the first paragraph, it may be stipulated that the asset shall serve as security for the amount to be confiscated.

Section 68. *Extended confiscation*

Extended confiscation may be effected when the offender is found guilty of a criminal act of such a nature that the proceeds thereof may be considerable, and the offender has committed

- a. one or more criminal acts that collectively are punishable by imprisonment for a term of six years or more,
- b. at least one criminal act which is punishable by imprisonment for a term of two years or more, and the offender during the five years immediately preceding the commission of the act has had a penalty imposed for an act of such a nature that the proceeds thereof may be considerable, or
- c. an attempt at an act specified in a) or b).

There shall be no increase of the penalty pursuant to section 79 b) and c).

In the event of extended confiscation all assets belonging to the offender may be confiscated unless the offender proves on a balance of probabilities that the said assets have been lawfully acquired. Section 67, first paragraph, second sentence, and fourth paragraph, apply correspondingly.

In the event of extended confiscation from the offender the value of all assets belonging to the offender's present or previous spouse may also be confiscated unless

- a. they were acquired before the marriage was entered into or after the marriage was dissolved,
- b. they were acquired at least five years before the criminal act that provides a basis for extended confiscation, or
- c. the offender proves on a balance of probabilities that the assets were acquired by means other than criminal acts the offender has committed personally.

When two persons are living together permanently in a marriage-like relationship, this is deemed equivalent to marriage.

Section 69. Confiscation of the product, subject or tools of a criminal act

Property which

- a. is the product of,
- b. has been the subject of, or
- c. has been used or intended for use in

a criminal act, may be confiscated. Instead of the property, all or part of the value of the property may be confiscated. Section 67, first paragraph, third sentence, and fourth paragraph, apply correspondingly.

Rights, receivables and electronically stored information are also considered property.

In determining whether confiscation shall be effected, and the scope of the confiscation, particular weight shall be given to whether confiscation is necessary for the purposes of effective enforcement of the penal provision, and whether it is proportionate. In assessing proportionality, weight shall among other things be given to other sanctions that are imposed, and the consequences for the person against whom the confiscation is effected.

Section 70. *Preventive confiscation*

Property may be confiscated when, due to the nature of the property and other circumstances, there is an obvious risk that it will be used in a criminal act. If the property is suited for use in physical assault, it is sufficient that there is a risk of such use. Confiscation of an information carrier, see section 76, may only be effected when there is a risk of irreparable harm.

Instead of confiscating the object, measures may be imposed to prevent the use of the property in offences.

Section 69, second paragraph, applies correspondingly.

Confiscation pursuant to the first paragraph may be effected regardless of who is the owner.

Section 71. *Whom confiscation may be effected against*

Confiscation of proceeds pursuant to section 67 shall be effected against the person to whom the proceeds have directly accrued as a result of the act. It shall be assumed that the proceeds have accrued to the offender, unless the offender proves on a balance of probabilities that they have accrued to another person.

Extended confiscation pursuant to section 68 shall be effected against the offender.

Confiscation pursuant to section 69 shall be effected against the offender or the person the offender acted on behalf of. Confiscation as specified in section 69, first paragraph, c), or of an amount that wholly or partially corresponds to its value, may alternatively be effected against an owner who realized or ought to have realized that the property was to be used in a criminal act.

Confiscation pursuant to section 70 shall be effected against the person who is in possession of or owns the property.

Section 72. *The relationship to receivers*

If proceeds, see section 67, or property as specified in section 69 have been transferred after the time of the act from a person who may be subject to confiscation, confiscation of the transferred property or its value may be effected against the receiver if the transfer has occurred as a gift or the receiver realized or ought to have realized the connection between the criminal act and what has been transferred.

If extended confiscation may be effected pursuant to section 68, and the offender has transferred an asset to one of his/her next-of-kin, the asset or its value may be confiscated from the receiver if the prosecuting authority proves on a balance of probabilities that it has been acquired by the offender's commission of an offence. This shall nevertheless not apply to assets transferred more than five years before commission of the act that forms the basis for confiscation, or assets received by way of ordinary maintenance from a person who is obligated to provide such maintenance.

If, in the event of confiscation from the offender, the assets of any person specified in section 68, third paragraph, are wholly or partly taken into account and the person meets his or her liability pursuant to

this section, the offender's liability shall be correspondingly reduced. If the offender has met his or her liability pursuant to section 68, second paragraph, any further confiscation from the offender shall lead to a corresponding reduction of the liability of the receiver.

The second paragraph applies correspondingly to transfer to an enterprise if the offender

- a. alone or together with any person specified in the second paragraph owns a substantial part of the enterprise,
- b. receives a considerable part of the income of the enterprise, or
- c. by virtue of his or her management position has substantial influence over it.

The same shall apply to any right which after the time of the act is established in the property by any person against whom confiscation may be effected unless the right has been established by attachment lien, freezing order or statutory lien.

Section 73. *Relationship to rights holders*

A right that is legally secured on an asset which is confiscated may wholly or partially be determined to have lapsed in relation to a rights holder

- a. who has personally committed the criminal act,
- b. on whose behalf the offender has acted, or
- c. who, when the right was legally secured by other means than by attachment lien, freezing order or statutory lien, realized or ought to have realized that the property was to be used in a criminal act, or that it could be confiscated.

Section 67, first paragraph, third sentence, applies correspondingly.

Section 74. *General rules on confiscation of proceeds and property which do not belong to the offender*

When confiscation of seized proceeds, see sections 67 and 68, or property, see sections 69 and 70, which do not belong to the offender is claimed, the claim is directed at the owner or rights holder. The same applies when confiscation is claimed of the value of property which has been seized, or which has been exempted from seizure on provision of security.

When the owner or rights holder is unknown or his whereabouts in Norway are unknown, confiscation may be effected in proceedings against the offender or the person who was in possession at the time of seizure, provided this is deemed reasonable in view of the owner's circumstances. The same applies when confiscation is claimed of the value of property which has been seized, or which has been exempted from seizure on provision of security. The owner shall as far as possible be notified about the matter.

If the whereabouts in Norway of the offender and the possessor are unknown, the district court may order confiscation on the terms specified in the second paragraph, without any person being sued.

These rules apply correspondingly to confiscation of rights pursuant to section 72, fifth paragraph, and section 73.

Section 75. *Beneficiaries of confiscation*

Confiscation shall be effected in favour of the State unless otherwise provided.

In the judgment or in a subsequent order issued by the district court that decided the issue of confiscation, the court may determine that the proceeds of confiscation be applied to cover any claim for compensation made by the injured person.

The Ministry may decide that the proceeds of any confiscation shall be divided between the Norwegian State and one or more other states. In the decision, importance shall be attached to, inter alia, what expenses have been incurred in such states and in which countries harmful effects have occurred and proceeds have been acquired. Any division pursuant to this paragraph may not result in any reduction of the covering of the aggrieved person's claim for compensation pursuant to the second paragraph.

Section 76. *Special rules for confiscation of an information carrier*

In this provision, «information carrier» means printed text matter or anything else that conveys written, visual, auditory or electronically stored information.

When confiscating an information carrier, it must be stated which parts of the contents warrant the confiscation. The person who is subjected to the confiscation may, in return for covering the costs, demand a copy of the portion of the contents not covered by the confiscation.

If the offender does not hold the title to an information carrier on a computer system that is the subject of a claim for confiscation, the claim shall be directed at the provider of the data processing system. The provider may be required to block the offender's access to the information carrier and delete content belonging to the offender. If the offender holds the rights to the information carrier, the provider may be required to block access to the information carrier and delete the contents.