

"DIRECTIVE 2024/1260/EU".

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Art. 14 **Extended confiscation**

- 1. Member States shall take the necessary measures to enable the confiscation, either wholly or in part, of property belonging to a person **convicted** of a criminal offence where the offence committed is liable to give rise, directly or indirectly, to economic benefit, and where a national court is **satisfied** that the property is derived from criminal conduct.
- 2. In determining whether the property in question is derived from criminal conduct, account shall be taken of **all the circumstances of the case, including the specific facts and available evidence** such as that the value of the property is **disproportionate** to the lawful income of the convicted person.
- 3. For the purposes of this Article, the notion of ‘criminal offence’ shall include **at least** the offences listed in Article 2, paragraphs 1 to 3, where such offences are punishable by deprivation of liberty of a maximum of at least **four years**.

Directive No 42/2014

Art. 5: extended confiscation

- 'Member *States* shall adopt the necessary measures to enable the *confiscation*, either in whole or in part, *of* property belonging to a person **convicted of** a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, *such as that **the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct***'

- **Erweiterter Einziehung (Verfall) § 73 a StGB (73d)**
- **Decomiso ampliado (Art. 127 - Ley organica 2010 - Spain)**
- **Art. 240 bis Italiano c.p. (Art. 12 sexies d.l. 306/'92)**
- **British confiscation (Proceeds of Crime Act 2002 as amended)**
- **Erweiterter Verfall § 20b (2) ÖStGB**
- **comiso ampliado, § 7 Portuguese Law no. 5/2002,**

Scope of application

- In the Directive, the scope of extended confiscation (Article 14) is extended to all offences referred to in Article 2 represented by the so-called Eurocrimes, which today includes
- also the violation of EU restrictive measures,
- as well as other offences committed through a criminal organisation and
- harmonised offences - 'any other offence defined in other legal acts of the Union where these specifically provide for such application to those offences' -.

«At least»

- The Council specifies that the rule must be applicable 'at least' to all the offences covered by Article 2(1) to (4) of the proposal for a directive where they may be punishable by a custodial sentence of a maximum of at least four years
- the intention is thus **not so much to limit the scope of the presumption of unlawful enrichment**, on which this form of confiscation is based, **to the most serious offences**
- but rather **to impose an obligation to introduce this measure at least for the most serious offences punished with a maximum of at least 4 years.**
- This, as pointed out in the doctrine, **should facilitate mutual recognition without verifying the double criminality of the conduct.**
- In the absence of other indications, **this sanction threshold should refer to national law**, unlike Article 5(2) of Directive 2014/42, which refers to the European regulatory instruments indicated in Article 3, or under national law 'if the instrument in question does not specify a punishment threshold

Recital 29 of the proposal justifies the introduction of this model

- 'with the aim of **effectively combating the activities of organised crime**',
- but it being understood that **the scope of the confiscation is not limited to this area**;
- in fact, it is precisely in the area of combating organised crime that the need arises to introduce forms of extended confiscation capable of removing assets of illicit origin that have accumulated over time,
- in respect of which it is difficult to prove a causal link with specific crimes, so that forms of relief from the burden of proof are allowed.

Standard of proof

- **Art. 14 "where a national court is satisfied that the property is derived from criminal conduct".**
- In determining whether the property in question is derived from criminal conduct, account shall be taken **of all the circumstances of the case, including the specific facts and available evidence**

- *Art. 5 "a court, on the basis of the circumstances of the case, including the specific facts and available evidence,....."*
- ***is satisfied that the property in question is derived from criminal conduct*** :

the expression "***is satisfied***" requires a lower **evidentiary standard** than the "convinced" used in the Italian translation and,

in any case, the judge **does not have to be** "fully convinced", as provided for in Article 3 of Framework Decision 212/2005

In the new Directive there is no recital corresponding to recital 21 of the Directive which required: "*is substantially more probable*, that the property in question" ("*nettement plus probable*")

- Recital 25 in the Council version reiterated this formula.
- Extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct.
- **Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume**
- **that it *is substantially more probable***, that the property in question has been obtained from criminal conduct than from other activities.
- In this context, the court has to consider the specific circumstances of the case, including the facts and available evidence based on which a decision on extended confiscation could be issued'.

(recital 21) the adjective '*substantially*' more likely: the 'clear and convincing evidence' standard, a reinforced intermediate/civil standard

- should express a **strengthening of the safeguards** in the sense of **demanding something more than the 51% proper to the mere civil law standard**, i.e. it could be the
- *intermediate* standard of proof known in common law jurisdictions, the "clear and evident proof".
- a '**more probable than not**' in relation to criminal origin.
- The doctrine speaks of "70-80 per cent probability" requiring the court, "based on a complete picture of the circumstances of the case, to find it clearly more probable that the property in question constitutes or represents the benefit of unlawful conduct".
- This seems to be the preferable interpretation from a guarantor's point of view.

The detailed explanation of the individual provisions of the proposal in No. 5 uses another expression to clarify the standard of proof required to apply extended confiscation under Art. 14

- "when the national court of a Member State is convinced that the property derives from a criminal activity
- (nella versione italiana “quando l'autorità giurisdizionale nazionale di uno Stato membro è **convinta** che i beni derivino da una condotta criminosa);
- even in the English version, the national judge must be
- *convinced*, not just satisfied

Standard of proof: from the common law 'clear and convincing evidence' to the criminal law standard

- The European legislator does not use the expression 'on the basis of a weighting of probabilities' as in recital 21 of Directive 42/2014, which refers to the civil law standard of proof, and instead uses the verb '**to be convinced**' in the explanatory memorandum.
- These novelties suggest or, at least, **can be interpreted as an expression of the European legislator's desire to confirm that**
- **the civil standard is not sufficient and**
- **to demand a higher standard of proof.**
- Furthermore, if **the use of the term 'satisfied' suggests a lower standard,**

Recital 46, noting the invasive if not afflictive nature of confiscation ('it has a significant impact on the rights of suspects and defendants, and in specific cases of third parties not involved in criminal proceedings'), requires respect for the **presumption of innocence** enshrined in Article 48 of the Charter

Recital 51 reads '**this Directive should be implemented without prejudice to... Directive (EU) 2016/343/EU**' on the presumption of innocence.

no reversal of the burden of proof

- And , therefore, it is confirmed that **there is no reversal of the burden of proof** and
- that the prosecutor **must prove the criminal origin of the assets to be confiscated to a higher standard than civil law,**
- which may range **from the common law "clear and convincing evidence" to the criminal law standard,**
- enhancing the Italian translation of Article 14 ("convinced") and the explanatory report requiring that "the national court ...is convinced", all in the light of recitals 33 and 36 requiring respect for the presumption of innocence

EDU COURT

- The Edu Court holds that **the right to the presumption of innocence** under Article 6(2) ECHR **does not apply to confiscation proceedings** (even without conviction) that adopt a civil law standard of proof
- Because they do not involve a criminal charge under Art. 6(2) ECHR or a new indictment under the autonomous meaning of the Convention
- Only the **principle of due process** under Art. 6(1) is applied,
- provided that **presumptions are not absolute** and
- **remain within reasonable limits**, and preserve the right of defence.

Silence of the accused = evidence

- The problem that remains is that the silence of the accused takes on **evidential value**: silence supports the presumption of the illicit origin of the assets;
- As the Italian Supreme Court states, in order to rebut the presumption, the owner must prove **how he has economically formed his assets (Montella , S,U, 2004)**.

The verification of the link with the crime (Edu Court *Todorov and others v. Bulgaria*, no. 50705/11, 2021)

- When examining forms of extended confiscation, also in the light of Article 5 of Directive 42/2014 and Recital 21,
- the European Court of Human Rights recognises the correctness of the procedure to ascertain the illicit origin of assets (per all *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".**
- For the European Court of Human Rights it is, therefore, important that the link between the proceeds and the criminal activity is proven, even with presumptions, in order to consider extended confiscation a proportionate sacrifice of the right of ownership

For the rest, recital 29 states that

- Such extended confiscation should be possible when **a court is convinced that the property in question derives from criminal conduct,**
- without the need for a conviction for such conduct.
- The criminal conduct in question could consist of any type of offence.
- Individual offences need not be proven, but the court must be **certain that the property in question derives from such criminal conduct.**
- In this context, the court must consider **the specific circumstances of the case, including the available facts and evidence on the basis of which an extended confiscation order can be made.**
- A disproportion between the assets of the person concerned and his legitimate income may be among the facts that may lead the court to conclude that the assets derive from criminal conduct.
- Member States may also set a time period within which assets may be considered to be derived from criminal conduct.

Disproportion

- Also in the new Directive
- the **disproportionate value** of the goods (Art. 14 (2) and Recital 29 «The fact that the property of the person is disproportionate to that person's lawful income could be among the facts giving rise to a conclusion by the court that the property derives from criminal conduct. “)

is only a **clue** and

- cannot be **the only proof of illicit origin**
- As **provided for in Spain** (Articles *127-bis*, *127-quinquies* and *127-sexies* of the Criminal Code), and in **Germany**, as 'gross disproportionality' in § 437 Absatz 1 Satz 2 StPO. *Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung BReg418/16*, 01.07.2017
- unlike in Article 240 bis of the Criminal Code, as also emphasised by the Constitutional Court in Decision No. 33/2018
- The choice of the European legislator seems preferable in view of the fact that doubts have been raised in doctrine as to **the adequacy of this parameter to prove the illicit origin of assets**,
- to constitute **sufficient evidence, i.e. reliable indirect proof of such provenance** ,
- since it is an **insufficient indication in itself** that acquires **probative value** by virtue of the *convicted status* of the person to whom it refers

Strict interpretation provided by the Italian Supreme Court in relation to this element,

- It would be desirable, in any event, to adopt the strict interpretation provided by the Italian Supreme Court in relation to this element,
- in the sense that **the disproportionality must be ascertained by the prosecution between the value of the defendant's assets and his income or economic activity**
- **in relation to each asset**
- **at the time of purchase** Cass., sez. VI, 31 March 2016, no. 16111; Cass., sez. 2, 17 June 2015, no. 29554, rv. 264147.

Time limitation: Member States could also determine a requirement for a certain period of time during which it is possible for the property to be deemed to have originated from criminal conduct (recital 29)

- In the Italian legal system, for the purposes of the application of the extended confiscation, firstly the Supreme Court and most recently also the Constitutional Court (nos. 33/2018 and 24/2019) demand:
- *temporal reasonableness* (confiscation 'must necessarily be circumscribed within a sphere of ***temporal reasonableness*** that allows a connection to be made between the assets and the criminal act;
- "the moment of acquisition of the asset should not be, that is, **so distant from the time when the 'spy crime' was committed**
- as to render *ictu oculi* **unreasonable the presumption of derivation of the asset** itself from an illicit activity, even if different and complementary to that for which the conviction was made").

This element is required in several jurisdictions

- (such as the Spanish or Austrian system - § 20b StGB -, also in a strict form allowing the presumption of illicit origin of assets to be applied only to those acquired in the 5/6 years preceding the conviction, as in the Macedonian or British and Irish systems respectively),
- but above all, **it allows for**
- **the delimitation of the presumption of illicit asset accumulation**
- in accordance with the **principle of proportionality** and
- with the **presumption of innocence**
- **(the presumption of the illicit origin will be more reasonable and well-founded: the closer the acquisition of the property (especially if disproportionate) to the time of the commission of the offence under conviction, the more well-founded the presumption of the unlawful origin of the goods)**

follows

- both as a **rule of the dignity of evidence** (supporting from an circumstantial profile the presumption in question, as stated in the Constitutional Court's judgment 24/2019 and in the Spinelli judgment of the Sezioni Unite)
- **as well as as the rule of the exclusivity of ascertaining guilt at trial, which requires that the convicted person can only suffer the consequences of facts proven at trial in the context of a regular trial** (the fact of striking only the unjustified enrichment temporally connected with the criminal activity ascertained allows, in fact, to alleviate the risk of responding, at least in the minimum form of confiscation, even for facts not proven at trial).

Right of defence

- Such **temporal delimitation** also **lightens the defence's burden of proof**.
 - This requirement makes the form of confiscation in question more compatible with the right of defence, since its ascertainment makes the prosecutor's burden of proof **more pregnant** and
 - **the interested party's counter-proof of the lawful origin of assets less onerous**.
 - This criterion **avoids a sort of '*probatio diabolica*'** on the interested party about the lawful origin of all assets at any time acquired: «the identification of a precise chronological context, within which the power of ablation can be exercised, makes the exercise of the right of defence much easier» (Cass., Unit. Sect., [26 June 2014](#), Spinelli, No. 4880 for the preventive measure).

Harmonisation: Art. 4 of Directive 42/2014

Non-conviction based confiscation.

- Art. 4 of the Directive provides for a
- *non-conviction based confiscation in limited cases, such as*
- **illness or absconding of the suspected or accused person,**
- "where **criminal proceedings have been initiated** regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit,
- and **such proceedings could have led to a criminal conviction**
- if the suspected or accused person **had been able to stand trial**".

ART. 15 NON-CONVICTION-BASED CONFISCATION

- Member States shall take the necessary measures to enable, under the conditions set out in paragraph 2 of this Article, **the confiscation of instrumentalities, proceeds or property** as referred to in Article 12, or **proceeds or property transferred to third parties** as referred to in Article 13, **where criminal proceedings have been initiated but could not be continued because of one or more of the following circumstances:**
 - A) **illness** of the suspected or accused person
 - B) **absconding** of the suspected or accused person
 - C) **death** of the suspected or accused person
 - D) the **limitation period** for the relevant criminal offence prescribed by national law **is below 15 years and has expired after the initiation of criminal proceedings**

- 2. Confiscation without a prior conviction under this Article **shall be limited to cases where,**
- **in the absence of the circumstances set out in paragraph 1,**
- **it would have been possible for the relevant criminal proceedings to lead to a criminal conviction** for, at least,
- offences liable to give rise, directly or indirectly, to substantial economic benefit, and
- where **the national court is satisfied** that the instrumentalities, proceeds or property to be confiscated **are derived from, or directly or indirectly linked to, the criminal offence in question.**

NCBC in the new Directive

- The first rule on the subject is that contained in Article 15, which absorbs the provisions of the current Article 4(2).
- This provision applies "to the confiscation of instrumentalities, proceeds or property as referred to in Article 12, or proceeds or property transferred to third parties as referred to in Article 13", thus
- both confiscation of **proceeds**
- and confiscation of the **instrumentalities of the offence**, and
- also confiscation of **proceeds against third parties**, but
- **does not apply to extended confiscation under Article 14**, in line with Article 4 (2) of Directive 42/2014

In the Commission version: maximum sentence of at least 4 years imprisonment

- The scope of this provision was limited to offences punishable by a **maximum sentence of at least four years' imprisonment;**
-
- The **Council** proposed the **abolition of** this limitation, making Article 15 the **general rule,**
- whereas it admits the inclusion of such a limit for extended confiscation under Art. 14 («shall include at least the offences») because extended confiscation
- And for the **Confiscation of unexplained wealth linked to criminal conduct** («shall include offences»)

the model of confiscation without conviction proposed by Art. 15 does not represent a true actio in rem

- - as the previous model provided for by Art. 4, c. 2 Directive 2014/42/EU did not represent it,
- but is intended to ensure the application of confiscation **«where criminal proceedings have been initiated but could not be continued because of one or more of the following circumstances»:**
- illness, absconding, death, expiry of time limits under national law.

This is not an autonomous in rem procedure against assets,

- but this model of NCBC (Non-Conviction Based Confiscation) only allows the court to continue for the purposes of confiscation,
- **proceedings that 'have been' already 'initiated' and cannot be continued** for the purposes of establishing criminal liability and conviction;
- It does not provide for a procedure exclusively aimed at verifying the criminal origin of the assets to be confiscated, even if there is no legal justification for the origin of the assets;
- rather, it is a case in which the procedure for confiscation without conviction is **ancillary** to a criminal trial, from which it becomes **autonomous** if "it could not be continued".

Confiscation without conviction also in relation to the instrumentalities of the offence.

- If no doubt arises as to the appropriateness of confiscating the proceeds of crime even where the situations provided for in Article 15 arise that prevent a conviction,
- because the offender has no right to hold the proceeds of crime,
- the crime not being a legitimate title to acquire property
- - thus ensuring that the crime does not pay in general-preventive terms -,
- some perplexity arises as to the criminal-political appropriateness of applying confiscation without conviction also in relation to the instrumentalities of the crime.
- The rationale for applying confiscation of the instrumentalities of crime in the absence of a final conviction should be
- to remove from the owner's disposal property instrumental to the possible re-offence even if there is no conviction for the reasons stated,
- and, therefore, should only be justified with respect to **assets actually needed for the commission of the offence**
- pursuing **the preventive/interdictive purpose** of this form of confiscation,
- **otherwise, a mere afflictive/punitive character would prevail**, which is hardly reconcilable with the lack of a conviction

A limitation period of 15 years has been inserted for the statute of limitations

- avoiding the criticism of the Commission version
- "where such time limits are not sufficiently long to allow effective investigation and prosecution of relevant offences".

Immunity and amnesty

- **In the final version, as amended by the Council, the assumption of immunity and amnesty is removed,**
- The Council version specified (in the final version NO) that Member States must adopt this confiscation model 'at least' in the following cases
- (the adoption of confiscation without conviction will be **mandatory** in the case of illness, flight, death and prescription, it being understood that Member States **may, indeed should, provide for it in other cases as well**).
- In fact, **considering the particularity of this hypothesis, which makes it possible to ensure that the crime does not pay, once the crime and the illicit nature of the proceeds have been established, its application would also be appropriate in the case of immunity and amnesty;**
- The latter hypothesis is, moreover, **expressly provided for in recital 30: «It is important to recall that international bodies have indicated the potential of confiscation in the absence of a conviction to address the obstacles to confiscation of illicit gains due to immunity and amnesty».**
- Recital 26 of the Council version stated more **explicitly** that 'Member States are encouraged to allow confiscation also when a final conviction is not possible because the suspected or accused person cannot be held liable by virtue of an amnesty granted prior to the final conviction as provided for under national law'.

" at least, offences liable to give rise, directly or indirectly, to substantial economic benefit,..."

- This clarification not contained in Article 4 (2) of Directive 42/2014.
- It is no longer a mandatory, but an **optional 'at least'** requirement: minimum scope of application
- This clarification seems rather **superfluous** in relation to the **confiscation of proceeds** because that
- the crimes must be **capable** of producing an economic advantage is a **prerequisite** for generating the proceeds subject to confiscation, on the one hand
- the '**substantial**' character of the 'economic advantage' should be an **additional requirement, capable of further delimiting the scope of application of this form of confiscation**, but it is
- a **quantitative criterion completely lacking in accuracy/legality that can be discretionarily interpreted by the Member States to the detriment of harmonisation**,
- so much so that the Council removed the requirement of *considerable* character.
- This requirement could delimit the scope of application of **instrument** confiscation: with respect to confiscation for preventive/interdictive purposes, the rationale of this delimitation would, however, not be entirely **understandable**

"Confiscation without a prior conviction under this Article shall be limited to cases where, in the absence of the circumstances set out in paragraph 1, it would have been possible for the relevant criminal proceedings to lead to a criminal conviction".

- The final version (of the Council) requires,
- partly taking over the wording of the current Article 4(2) of Directive 42, that this form of confiscation applies «where .. **it would have been possible for the relevant criminal proceedings to lead to a criminal conviction**”.
- (in the Commission version, in order to apply this form of confiscation, the national judicial authority must be 'convinced that all the elements of the offence are present');
- Therefore, **an ascertainment of the fact and of the defendant's responsibility with a criminal standard of proof** is required
- Article 578 bis of the Italian Procedural Criminal Code requires in order to apply confiscation in the case of statute limitation and amnesty a **conviction at first instance**, a preferable solution in terms of guarantee.
- it is merely an **accessory procedure** to criminal proceedings

" where the national court is **satisfied** that the instrumentalities, proceeds or property to be confiscated **are derived from, or directly or indirectly linked to, the criminal offence in question.** " .

- With respect to the illicit origin of the goods, the **rule does not introduce presumptions or forms of reversal of the burden of proof**
- **the burden of proof is first and foremost on the prosecution,**
- **albeit to a lower standard than the strictly criminal standard** if one points out that the English version uses the verb '**satisfied**';
- In any case, not only does the Italian version use the verb '**convinced**', but the references to the obligation to respect the **presumption of innocence** in recitals 46 and 51 remain **valid**.

- In any case, it is important to emphasize that this model of NCBC allows the court to continue a trial and apply the confiscation even if the conviction is not yet final; this limitation is provided for by Art. 578 bis of the Criminal Code in order to apply the Italian extended confiscation after the amnesty and after the time limits have expired
- The procedure for the application of confiscation must respect the right to defence of the person concerned, "including the right of access to the file and the right to be heard on matters of law and fact".

Article 16 Confiscation of unjustified assets related to[...]
criminal conducts

- 1. Member States shall take the necessary measures to enable,
- where, in accordance with national law, the confiscation measures of Articles 12 to 15 **may not be applied**,
- the confiscation of property **identified in the context of an investigation** in relation to a criminal offence,
- provided that a **national court is satisfied** that
- the identified property is **derived from criminal conduct**
- committed **within the framework of a criminal organisation**
- and that **conduct is liable to give rise, directly or indirectly, to substantial economic benefit.**

2. When determining whether the property referred to in paragraph 1 should be confiscated, account shall be taken of all the circumstances of the case, including the available evidence and specific facts, which **may include:**

- a) that the value of the property is substantially disproportionate to the lawful income of the affected person
- b) that there is no plausible licit source of the property,
- c) that the affected person is connected to people linked to a criminal organisation.

3. Paragraph 1 shall not prejudice the rights of bona fide third parties.

4. For the purposes of this Article, the notion of ‘criminal offence’ shall include offences referred to in Article 2(1) to (3), where such offences are punishable by deprivation of liberty of a maximum of at least four years.

5. Member States may provide that the confiscation of unexplained wealth in accordance with this Article shall be pursued only where the property to be confiscated has been previously frozen in the context of an investigation in relation to a criminal offence committed within the framework of a criminal organisation.

Proceeds or products of crime

- This form of confiscation applies only to the *proceeds or products of crime*, because
- the rule requires a derivative link between the object of confiscation and the offence,
- "a national court is satisfied that the **identified property is derived from criminal conduct**
- " (Art. 16(1)(a)).

"where, in accordance with national law, the confiscation measures of Articles 12 to 15 **may not be applied**,"

- this model of confiscation is to be **applied on a *residual way***, i.e. in cases where confiscation is not possible under Articles 12 to 15 and, therefore,
- it is assumed that
- **a criminal trial took place and**
- **direct or value-based confiscation under Art. 12 could not be applied,**
- even **without a conviction** (art. 15)
- Or, it could be interpreted to mean that **it is not possible to start a criminal trial because the conditions are not met** (already dead, already prescribed, not enough evidence...*)
- In the first case, it will not be possible to start **proceedings in rem independently of the criminal trial**,
- It will not be possible, as is the case in the Italian legal system, to proceed **simultaneously and in parallel both in criminal proceedings and in preventive proceedings** (with seizure and confiscation pursuant to Articles 20 and 24 of Legislative Decree 159/2011).
- In the Italian legal system, in particular, the autonomy of the preventive proceedings from the criminal trial is enshrined in Article 29 of Legislative Decree 159/2011.

But

- **Recital 34** "Member States should be able to decide to allow confiscation of unjustified assets if criminal proceedings are **discontinued** or that such confiscation is ordered **separately** from the criminal proceedings relating to the offence".
- Member States may allow this only in case of **interruption of criminal proceedings** or
- Separately, even on the basis of **parallel proceedings**
- or in any case where **no criminal proceedings have begun**

Optional delimitation in the Council version

recital 28(b) in the Council version clearly states in this direction

"Confiscation of unjustified assets should be possible when proceedings are **discontinued**, irrespective of the reason, as well as when the proceedings **end in a judgment**.

In the event of a conviction, **extended confiscation or confiscation of unjustified assets** would in principle be possible. **The directive does not indicate which form of confiscation should prevail, but Member States may do so.**

It should be noted that **when the criminal offence is prosecuted, the confiscation order should not necessarily be tried in conjunction with the criminal offence and Member States could also allow the confiscation order to be issued separately from the criminal charges and be the subject of **separate court proceedings****".

- In short, on the basis of recital 34 the model of the Italian preventive confiscation,
- which also presuppose, under the subjective profile, the ascertainment of the past social dangerousness and do not represent a pure actio in rem (under penalty of unconstitutionality, it is affirmed in the Spinelli S.U. sentence),
- 'The prevention judge is not bound by the existence of a criminal trial'.
- **is legitimated**, as are the models of **comiso sin condena** or **civil forfeiture**,

Art. 16(5)

- Member States may provide that the confiscation of unexplained wealth in accordance with this Article shall be pursued only where the property to be confiscated has been previously frozen in the context of
- **an investigation in relation to a criminal offence committed within the framework of a criminal organisation.**

-

This model of confiscation presupposes 'an investigation related to a crime'.

- "Member States shall take the necessary measures to be able to proceed, ... to the confiscation of property, ...if the following conditions are met: assets are **IDENTIFIED in the context of an investigation into a crime'**),
- **Mere investigation** is mentioned and, therefore, it would seem that a **criminal trial is not expected to be initiated, ***

" For the purposes of this Article, the notion of 'criminal offence' shall include **offences referred to in Article 2(1) to (3)**, where such offences are **punishable** by deprivation of liberty of **a maximum of at least four years** ".

- Article 16, like Article 14, provides for such delimitation
- the need to **delimit the most intrusive forms of confiscation**, such as the extended **confiscation** based on the presumption of unlawful enrichment and this real actio in rem, is emphasised

In this case it is not specified '**at least**', as in relation to extended confiscation under Art. 14,

- and, therefore, in this case **it is really intended to limit** its application to offences «punishable by deprivation of liberty of a maximum of at least four years».
- The different approach is clearly justified by the fact that confiscation under Art. 14 presupposes a conviction, unlike confiscation under Art. 16,
- the need to delimit its scope emerges more stringently
- Recital 32: «That condition ensures that the possibility of confiscation of unexplained wealth arises in criminal investigations into criminal offences that meet a certain threshold of seriousness».

This form of confiscation applies in the fight against organised crime

- "provided that the national court is **satisfied** that
- the identified property is **derived from criminal conduct**
- committed **within the framework of a criminal organisation**
- and that **conduct is liable to give rise, directly or indirectly, to substantial economic benefit**"
- The European legislator, therefore, wishes to adopt this NCBC model to tackle **organised crime**,
- The same reason that inspired the introduction of preventive confiscation in Italy in 1982 with the Rognoni La Torre law,
- although, particularly after the reforms introduced by Decree-Law No. 92/2008 and Law No. 94/2009, in recent years it has become a tool **for combating all forms of revenue-generating crime**.
- Even in the UK, civil recovery has been presented as a key strategy in the fight against organised crime

- Recital 34 also states
- "The criminal conduct in question could consist of
- **any type of offence committed within the framework of a criminal organisation and**
- **likely to produce a considerable economic advantage, and thus be of a serious nature".**

- **In the Council's version**, Art. 16 c. 1, it is required that the assets to be confiscated 'derive from criminal conduct, **at least** where such conduct is likely to produce, directly or indirectly, a substantial economic advantage and has been carried out in the context of a criminal organisation':
- "**At the very least**",
- the Council demanded a **broader scope of application**: also where assets are derived from **other criminal conduct**,
- **minimum scope**: criminal conduct 'in the context of a criminal organisation' and 'may produce ... a substantial economic advantage'

Recital 35: for other offences

- This Directive **does not prevent Member States from adopting measures**
- that enable the confiscation of unexplained wealth **for other crimes or circumstances.**
- The subject matter of this Directive **is limited to proceedings in criminal matters,** and therefore
- this Directive does not apply to confiscation measures **in proceedings in civil matters** that Member States might have implemented.

the offence must be capable of 'producing, directly or indirectly, a considerable economic advantage'

The European legislator thus suggests **yet another criminal policy directive to delimit the scope of application of this form of confiscation,** although the perplexities raised with regard to this requirement and, in particular, **to its actual delimiting capacity** remain.

Recital 32 states that

" When determining whether criminal conduct is liable to give rise to substantial economic benefit,

Member States can take into account all relevant circumstances, including the **modus operandi**,

for example if a condition of the offence is that it was committed in the context of organised crime or

with the **intention of generating regular profits from criminal offences**.

Is the second hypothesis an **alternative, opening up the scope of the case?**

CJEU, Okrazhna prokuratura - Varna, C-845/19 and C-863/19, cited above, § 65 ff.

- Court of Justice thus interprets the identical expression used in recital 20 of Directive 42/2014, to determine 'whether an offence is capable of producing, directly or indirectly, such an advantage':
- "Accordingly, in the present case, *it will be for the referring court to assess* whether the offence at issue in the main proceedings consisting in the possession of highly dangerous drugs with a view to their distribution is capable of producing, directly or indirectly, an economic advantage, **taking into consideration**, where appropriate, **the manner in which the offence was committed, including, in particular, whether it was committed in the context of organised crime or with the intention of deriving regular profits from crime**".
- Even if, as the Court points out, 'the second sentence of that recital states, however, that **taking account of that modus operandi "should not, in general, prejudice the possibility of recourse to extended confiscation"**'.

Principle of Proportionality: Recital 33

- "When applying the national rules implementing this Directive, national competent authorities may choose to
- **not order or execute the confiscation of unjustified assets** if, in the case at hand,
- **the application of the rules laid down in this Directive is manifestly unreasonable or disproportionate.**
- The **judge's discretion** is entrusted with the assessment of the proportionality and reasonableness in the case (**which would become a sort of limit** to the possible compulsory nature of the measure): **the parameters of assessment do not emerge, the consequences of the application of confiscation should be assessed**

- In relation to extended confiscation (art. 240 bis c.p.), the Italian Constitutional Court, no. 33/2018, recalls the need to **"verify whether, in relation to the circumstances of the concrete case and the personality of its author**
- **the presumption of unlawful accumulation of wealth by the convicted person is well-founded,**
- it is a matter of **professional or in any event habitual criminal activity such as to be a source of unlawful wealth accumulated over time,**

Temporal delimitation (recital 33)

- Member States can also determine **a requirement for a certain period of time during which the property could be deemed to have originated from such criminal conduct.**
- For the confiscation preventive measure: the ***temporal correlation between the moment of the acquisition of the assets to be confiscated and the social dangerousness***, - understood first of all in **a diagnostic-cognitive sense** (addressed to the past) and that is, as the subsistence of circumstantial evidence of belonging to the criminal association or of carrying out the assumed criminal activities-
;

No reversal of the burden of proof

- Paragraph 1 «provided that a **national court is satisfied** that
- the identified property is **derived from criminal conduct»»»**
- Paragraph 2: "2. In determining whether frozen assets are derived from criminal offences, all **the circumstances of the case** shall be taken into account,
- including **available evidence and specific facts** that may include
- As also stated in the preamble of the proposal in relation to Art. 16,
- under the heading "**Detailed explanation of the individual provisions of the proposal**".
- "Such a finding [as to the unlawful origin of the goods] **must be based on an overall assessment of all the circumstances of the case**".
- **Reversal of the burden of proof in the UK case of unexplained wealth orders**

Recital 34

- While it should not be a precondition for the confiscation of unexplained wealth that individual offences be proven,
- **there must be sufficient facts and circumstances for the court to be satisfied** that the property in question is derived from criminal offences.

Standard of the proof of the illicit origin

- Even in relation to this form of confiscation, the draft directive is, then, rather ambiguous with respect to the standard of proof demanded.
- Property is confiscated «provided that a national court is **satisfied** that the identified property is derived from criminal conduct committed within the framework of a criminal organisation and that conduct is liable to give rise, directly or indirectly, to substantial economic benefit».
- the standard of proof demanded appears, then, to be **lower than the criminal standard**, as the judge must be *satisfied* in the English version, and **not convinced or fully convinced**;
- ('fully convinced', as recalled, was the standard adopted for extended post-conviction confiscation in Framework Decision 212/2005, Art. 3).

follows

- The verb '**convinced**' is used in the Italian version and
- also used in the 'Detailed explanation of the individual provisions of the proposal' ('It should allow for the confiscation of assets only where the national court is convinced that the assets in question derive from criminal activities'),
- in the direction of raising the standard of proof, **recital 46** must be applied, which requires respect for the presumption of innocence under Article 48 of the Charter,
- as well as **recital 51**, which reiterates the need to ensure compliance with Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence
- Recital no. 28 wanted by the Council with the reference to the reinforced civil law standard was deleted

the court must be convinced of the illicit origin of the assets to be confiscated in relation to specific offences

- Article 16 requires the court
- not only to be satisfied «that the identified property is derived from criminal conduct committed within the framework of a criminal organization»
- but also that they derive from **specific criminal acts**
- **"the notion of 'criminal offence' shall include offences referred to in Article 2(1) to (3), where such offences are punishable by deprivation of liberty of a maximum of at least four years."**
- This means that the judge must be **convinced of the illicit origin of the assets to be confiscated with respect to specific crimes** and,
- consequently, must make **a more serious and significant effort to prove the criminal origin of the assets to be confiscated,**
- even if in some cases it is really difficult to provide evidence of specific crimes and the available evidence rather consists of a **lack of proof of legal origin.**
- (So much so that the Council adds the absence of "plausible lawful resources" to the criteria necessary to verify criminal origin (in paragraph 2))

Article 16(2): When determining whether the property referred to in paragraph 1 should be confiscated, **account shall be taken of all the circumstances of the case, including the available evidence and specific facts, which may include**

- including the available evidence and the specific facts, which may include:
 - a) that the value of the property is **substantially disproportionate** to the lawful income of the affected person
 - b) that there is **no plausible licit source of the property,**
 - c) that **the affected person is connected to people linked to a criminal organisation.**

- 1) **disproportionality** is a circumstantial element among other 'specific facts' and 'available evidence', as already provided for in Art. 14, and is not the sole basis of proof of criminal origin,
- 2) **absence of lawful sources**: Compared to the difficulty of proving the origin from specific crimes, **it is easier to prove the absence of lawful sources** of income that can justify the asset accumulation,

as demonstrated by case law practice in Italy (it being understood that one should require the ascertainment, even if circumstantial, of the commission of crimes punishable by deprivation of liberty for a maximum of at least four years).

- Cass., sec. II, 28 September 2023, no. 41157: "the absence of other legitimate income".

3) that the affected person is connected to people linked to a criminal organisation

- rather indirect character of such a clue to the criminal origin of the assets
- **indirect character even with regard to the subject's involvement in a criminal organisation,**
- requiring not the connection of the subject with the organisation tout court,
- **but the mere connection with someone involved in the organisation**

- **Recital 34** «The person's connection to activities of a criminal organisation could also be of **relevance**, as might circumstances such as **the situation in which the property was found or indications of participation in criminal activities**»»»

follows

- claiming **direct connection** to the criminal organisation **could lead to a charge for participation in the criminal association and a criminal trial,**
- that could allow access to extended confiscation under Art. 14
- or possibly confiscation under Article 15 where a conviction cannot be achieved

Compared to such a confiscation model, according to a part of the doctrine

- in German law **the evidentiary standard** of criminal origin of assets for the application of "independent confiscation" (§ 76a, § 4) is always the **criminal standard**
- i.e. the judge's "full conviction" within the meaning of § 261 StPO, and the discipline under review would not have introduced any form of inversion of the standard of proof within the meaning of Art. 437 StPO, 437 CCP (although it is a matter of actio in rem and not in personam, it is a criminal proceeding before a criminal court);
- In the Italian legal system, **the United Sections continue to deny that *the intensity of the evidentiary contribution required of the prosecution* in relation to the illicit origin of the assets has changed in any way,**
- following the different wording introduced by Law Decree No. 92/2008 - "**result to be the fruit**", instead of the previous wording that required the existence of "sufficient evidence" of illicit origin (originally, expressly provided only for the seizure) -
- the doctrine, in the aftermath of the reform, has proposed to interpret '**risultino**' in the sense of **demanding the criminal standard of proof through circumstantial evidence under Article 192 of the Code of Criminal Procedure of the illicit origin**
- This criminalistic standard, moreover, has been accepted by a more guarantor (and minority) orientation of jurisprudence and is expressly provided for in a recent reform project no. 2234, presented in December 2022 to the Senate (Trib. di Palermo, Sez. Mis. di Prev., 25 October 2010, Zummo; 25 September 2013, Sapienza, unpublished. See Cass., 22 April 2009, Buscema and others, no. 20906, Rv. 244878; Cass., sez. 5, 21 April 2011, no. 27228; Cass., sez. VI, 24 February 2011, no. 25341, Meluzio).

Criminal standard preferred, albeit in circumstantial form

- In conclusion, even in relation to this NCBC model, it would be better to require a **higher standard of proof** of the illicit origin of the assets to be confiscated, criminalised even if in circumstantial form,
- using the verb 'convinced' - as in the LIBE Committee proposal - instead of 'satisfied',
- also because it is doubtful whether a lower standard than the criminal standard is compatible with the Regulation's requirements in terms of guarantees (recital 18).
- **A more determined effort by the European legislator would be needed to harmonise safeguards and, thus, to foster mutual trust and mutual recognition of seizure and confiscation orders.**

Article 24 Remedies (Recital 33)

- Member States shall ensure that persons covered by freezing orders referred to in Article 11 and confiscation orders referred to in Articles 12 to 16
- **have the right to an effective remedy and to an impartial judge to safeguard their rights.**
- In relation to the corresponding provision of Article 8 of Directive 42/2014
- the Court of Justice pointed out that this rule
- "This provision thus **reaffirms**, in the area covered by the same directive, **the fundamental rights set out in Article 47 of the Charter**,
- which provides, in particular, that everyone whose rights and freedoms guaranteed by Union law have been infringed is entitled to **an effective remedy before a court or tribunal** in accordance with the conditions laid down in that Article, and in particular that **his or her case be heard fairly'** (CJEU, RR, JG, C-505/20, cited above, § 24; CJEU, Okrazhna prokuratura - Varna, C-845/19 and C-863/19, cited above, § 75.

Article 24 Legal remedies

- 1. Member States shall ensure that persons affected by freezing orders pursuant to Article 11 and confiscation orders pursuant to Articles 12 to 16 have the right to an effective remedy and to a fair trial in order to uphold their rights.
- 2. Member States shall ensure that rights of defence, including the right of access to the file, the right to be heard on issues of law and fact and, where relevant, the right to interpretation and translation, are guaranteed to affected persons that are suspects or accused persons or to persons affected by confiscation pursuant to Article 16.
- Member States may provide that other affected persons also have the rights referred to in the first subparagraph. Member States shall provide that such other affected persons have the right of access to the file and the right to be heard on issues of law and fact, as well as any other procedural rights which are necessary to effectively exercise their right to an effective remedy. The right of access to the file may be limited to the documents related to the freezing or confiscation measure provided that the affected persons have access to the documents necessary to exercise their right to an effective remedy.
- 3. Member States shall provide for the effective possibility for the person whose property is affected to challenge the freezing order pursuant to Article 11 before a court, in accordance with procedures provided for in national law. Where the freezing order has been issued by a competent authority other than a judicial authority, national law may provide that such an order is first to be submitted for validation or review to a judicial authority before it can be challenged before a court.
- 4. Where the suspected or accused person has absconded, Member States shall take all reasonable steps to ensure an effective possibility to exercise the right to challenge the confiscation order and shall require that the person concerned be summoned to the confiscation proceedings or that reasonable efforts be made to make that person aware of such proceedings.
- 5. Member States shall provide for the effective possibility for the person whose property is affected to challenge the confiscation order pursuant to Articles 12 to 16, including the relevant circumstances of the case and available evidence on which the findings are based, before a court, in accordance with procedures provided for in national law.
- 6. Member States shall provide for the effective possibility for an affected person to challenge an order for an interlocutory sale pursuant to Article 21 and shall grant the affected person all procedural rights necessary to exercise the right to an effective remedy. Member States shall provide for the possibility that a court can suspend the execution of such sales order, if otherwise there would be irreparable harm to the affected person.
- 7. Third parties shall be entitled to claim title of ownership or other property rights, including in the cases referred to in Article 13.
- 8. Persons affected by the measures provided for in this Directive shall have the right of access to a lawyer throughout the freezing and confiscation proceedings. The persons concerned shall be informed of that right.

Recital 46: Presumption of innocence

- Freezing and confiscation orders substantially affect the rights of suspected and accused persons, and in certain cases the rights of third parties or other persons who are not being prosecuted.
- This Directive should provide for **specific safeguards and judicial remedies**
- in order to guarantee **the protection of the fundamental rights of such persons** in the implementation of this Directive in line with
- **the right to a fair trial,**
- **the right to an effective remedy and**
- **the presumption of innocence as enshrined in Articles 47 and 48 of the Charter.**

a blatant violation of a fundamental Charter right

- The importance of these rights emerges from the wording of **Articles 8(1)(f) and 19(1)(h) of Regulation 1805/2018** which in providing for the first time that
- "**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"**
- may represent
- **a reason for refusing mutual recognition**, On the subject with reference to Framework Decision 212/2005 see CJEU, 14.1.2021, C-393/19 (*Okrazhna prokuratura - Haskovo and Apelativna prokuratura*).

Art. 24, § 5

- 5. 5. Member States shall provide for the **effective possibility** for the person whose property is affected
- to **challenge the confiscation order** pursuant to Articles 12 to 16,
- including **the relevant circumstances of the case and available evidence on which the findings are based,**
- **before a court,**
- in accordance with procedures provided for in national law.

follow

- This provision applies to **each form of confiscation** and
- should cover
- not only **the right of defence on appeal** (possibility «to challenge the confiscation order»)
- But, first of all,
- the right to defend oneself in the context of a ***proper adversarial procedure*** in the proceedings leading to the adoption of the confiscation order, be it the criminal trial or the proceedings in criminal matters (in rem).

- As the Italian Supreme Court has made clear, this is not a reversal of the burden of proof,
- the culpable inability on the part of the proponent to allege the points relevant to the investigation assumes, in turn, **circumstantial value in the charge**,
- consolidating the confirmatory effect of the overall picture that had emerged and that had already induced and supported the seizure .
- (Cass., Sec. VI, 3 April 1995, no. 1265, Annunziata, in *CED Cass.*, 202310 or in *Cass. pen.*, 1996, p. 2358).
- .

Recital 48)

- The affected person should have the **effective possibility to challenge freezing, confiscation and interlocutory sales orders.**
- In the case of confiscation orders where **all elements of the criminal offence are present but a criminal conviction is impossible,**
- the defendant should have **a possibility to be heard before the order is issued, where possible.**
- In the case of confiscation orders pursuant to **provisions on extended confiscation and confiscation of unexplained wealth,**
- **circumstances** that could be challenged by the affected person when challenging the confiscation order before a court
- should also include **specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct.**

- The Directive, therefore, seeks to guarantee the right to defence in line with the recognition of the principles of **due process under Article 6 of the ECHR, which also applies to civil proceedings.**
- The ECHR recognises the principle of **equality of arms** in the sense of a fair balance between the parties that "applies as a rule in civil as in criminal proceedings" (ECHR, 27 October 1993, *Dombo Beheer B.V. v. Netherlands*,) and translates
- the need to guarantee **each party a reasonable opportunity to present its evidence on equal terms,**
- as well as **the obligation on the adjudicator to carry out an effective examination of the parties' means, arguments and offers of proof,** subject to verification of their relevance to the decision (ECHR, 19 April 1994, *Van de Hurk v. the Netherlands*, Series A no. 288, § 59; ECHR, *Kraska v. Switzerland*, 19 April 1993, § 30; *Dombo Beheer B.V.*) .

The right to defence and due process is violated,

- as recognised by the European Court of Human Rights where the confiscation order issued does not take into account decisive evidence provided by the defence,
- realising a **denial of justice**, a violation of the right to defend oneself by trying (ECHR, 29 January 2009, *Lenskaya v. Russia*, § 39; 12 July 2007, *Vedernikova v. Russia*, no. 25580/02, § 25; 11 December 2008, *Mirilashvili v. Russia*, no. 6293/04, §§ 222-227).
- **A violation of the right to a fair trial** occurs when "the courts had arbitrarily refused to admit important evidence collected and submitted by the defence" (EDU Court, *Khodorkovskiy and Lebedev*, cited above, § 697) .
- Even where the ECHR admits **the use of presumptions in criminal matters** and, in particular, for the purpose of applying a confiscation order also in in rem proceedings,
- requires that **they be refutable and that the rights of defence be guaranteed**,
- starting with **cross-examination**,
- This implies that where the defence has succeeded in rebutting the presumptions and proving that the facts underlying the presumptions are untrue or of no probative value in the present case,
- **the prosecution must in turn succeed in rejecting the defence's deductions** or at least in providing further indications that may justify the measure to be taken.
- (EDU Court, *Gogitide v. Georgia*, 12 May 2015, no. 36862/05; Eur. Commission, 15 April 1991, *Marandino*, no. 12386/86, in *Decisions et Rapports (DR)* 70, 78; EDU Court, 22 February 1994, *Raimondo v. Italy*, cited above, 7; EDU Court, 15 June 1999, *Prisco v. Italy*, decision on the admissibility of appeal No. 38662/97; EDU Court, 25 March 2003, *Madonia v. Italy*, no. 55927/00, § 4; EDU Court, 5 July 2001, *Arcuri and three others v. Italy*, no. 52024/99, *ibid.*, 5; EDU Court, 4 September 2001, *Riela v. Italy*, no. 52439/99, *ibid.*, 6; EDU Court, *Bocellari and Rizza v. Italy*, no. 399/02, *ibid.*, 8; ECtHR, 5 January 2010, *Bongiorno*, no. 4514/07, § 45);

- In this regard, one should also recall the significant case law of the European Court of Human Rights concerning the right of any accused person **to be able to examine or have examined witnesses against him or her**, and
- obtain **the summoning and examination of exculpatory witnesses under the same conditions as inculpatory witnesses.**

acquittal

- In this regard, it must also be remembered that there is a risk of violating the principles of due process where in rem proceedings emphasis is placed on **facts that are the subject of a full acquittal** or
- better to **a conviction at first instance, fully overturned on appeal** (Corte app. Caltanissetta, Sec. I, 18 October 2012, dep. 23 October 2012 (proceedings no. 50/08 M.P.).
- in Italian law to establish **social dangerousness**, and thus evidence of criminal activity, as a prerequisite for confiscation,
- if not the **very proof of the illicit origin** of the assets to be confiscated,
- case law continues to refer to measures in which the defendant was acquitted not only pursuant to Article 530(2) (lack of evidence) of the Code of Criminal Procedure but because the 'fact does not exist'. ,
- as well as dismissal or acquittal orders, from which the defendant has benefited over time,
- perhaps on the basis that such measures 'left "shadows of doubt and suspicion"',
- considering irrelevant the fact that the defendant
- 'had previously **been acquitted** of all the proceedings in which he was charged with the offence of unlawful interference in public procurement,
- since those were judicial proceedings different from the present proceedings,
- which **were evidently based on different and reduced evidence from that forming the evidentiary basis of the present proceedings**'.

- The Supreme Court continues to affirm that even if the defendant is acquitted in criminal proceedings,
 - **the prevention judge may maintain the confiscation of assets, and**
 - this is based on **the principle of the autonomy of prevention proceedings.**
-
- Cass., sec. II, 25 January 2023, no. 15704; Cass., sec. II, 11 January 2022, no. 4191; Cass., sec. II, 25 June 2021, no. 33533; [Cass., sec. II, 6 June 2019, no. 31549](#); [Cass., sec. II, 29 March 2019, no. 19880](#); [Cass., sec. I, 7 January 2016, no. 6636](#).

EDU Court in Geerings case (1 March 2007, *Geerings v. the Netherlands*, no. 30810/03, § 48).

- Basing the measure on the findings of a trial concluded with a full acquittal
- **is at odds with the case law of the European Court of Human Rights in the Geerings case** concerning a form of extended confiscation under Article 36 and § 2 of the Dutch Criminal Code,
- in which it is stated that **it is not possible to consider property derived from the offence for which the person has been acquitted to be of unlawful origin**, and
- in any event, requires, on pain of non-compliance with the presumption of innocence, that the **judicial verification of the criminal origin should not be based on the mere receipt of investigative findings that conflict with the outcome of the trial**

The European Court of Human Rights emphasises that

- the application of confiscation in relation to crimes for which the defendant was acquitted
- "would be tantamount to the **recognition of the defendant's guilt** without his having been 'found guilty according to law'";
- continuing to infer **suspicious** from facts subject to an acquittal also **constitutes a violation of the presumption of innocence** under Article 6(2) ECHR .
- "It amounts to a determination of the applicant's guilt without the applicant having been 'found guilty according to law'", EDU Court, *Geerings v. the Netherlands*, cited above, § 48 ff.-50; see EDU Court, 28 October 2003, *Baars v. the Netherlands*, no. 44320/98, § 31.

Application No. 29614/16 Cavallotti v. Italy

- Lastly, in admitting the appeal brought by individuals who, although acquitted on the merits in criminal proceedings of the crime of mafia association, were subsequently the recipients of a confiscation order for their personal assets, the European Court of Human Rights asked Italy a series of questions concerning various problematic profiles of anti-mafia preventive confiscation in an interlocutory order of 10 July 2023 (Application No. 29614/16 Cavallotti v. Italy),
- the European Court of Human Rights observes that **if preventive confiscation were to be recognised as having an essentially punitive nature in accordance with the conventional parameter of Article 7, 1**
- the application of the measure despite the acquittal in criminal proceedings of the charge of participation in the mafia association, in addition to conflicting with the principle of the presumption of innocence, would violate the aforementioned Article 7.
- In this direction, **a recent bill** no. 2234, presented in December 2022 to the Senate, introduces a **new ground for revocation under Article 28** of Legislative Decree 159/2011: " c-bis) when, after the decree of confiscation, there is a criminal acquittal because the fact does not exist or the person did not commit it or a criminal decree of archiving, when the factual elements assessed for the application of the measure of prevention are related to the charge in the criminal trial ".

This issue arose in the application of Regulation No. 1805/2018

- where a **reference for a preliminary ruling was made to the Court of Justice** to know.
- "whether the notion of '**proceedings for an offence which may give rise to the confiscation of property even in the absence of a conviction**'
- within the meaning of Article 2(3) of Regulation 2018/1805, also encompasses criminal proceedings concluded with an acquittal".
- Reference for a preliminary ruling, Case C-8/24, 9 January 2024, D. d.o.o. v. Županijsko državno odvjetništvo u Zagrebu (Croatia)

Constitutional Court, 20 December 2022 (24 January 2023), no. 5: an adequate judicial protection mechanism

- after Judgment 24/2019, the Constitutional Court in Judgment No. 5/2023, although with respect to a **form of confiscation of dangerous instruments** subject to a particular discipline such as weapons, ruled in general terms that
- "However, the assessment of the proportionality and reasonableness of a measure that affects the right to property in a potentially very burdensome manner cannot but also depend on the presence of **an adequate mechanism of judicial protection**,
- which ensures that the person concerned can effectively challenge the existence of the conditions of the measure.
- This follows, inter alia, from the consistent jurisprudence of the ECHR, according to which, although the text of Article 1 of the Additional Protocol to the ECHR contains no explicit procedural requirement, the legitimacy of any measure affecting the right to property - regardless of its criminal or non-criminal nature - depends, precisely,
- by the **presence of adversarial proceedings consistent with the principle of equality of arms, in which the person concerned is placed in a position to effectively challenge the measure itself (European Court of Human Rights, judgment GIEM, paragraph 302, and numerous precedents cited therein)**,
- such a requirement descending from the same principle of legality that presides over any measure restricting the right to property (EDU Court, Grand Chamber, judgment of 11 December 2018, Lekić v Slovenia, paragraph 95).

follows

- It follows that, in order to remain within the limits of **proportionality and reasonableness**
- the breach on which the presumption underlying the provision censured is based - after having been challenged to the defendant by the public prosecutor, on the basis of the findings made by the judicial police -
- **must also be established by the court applying the confiscation,**
- **in proceedings in which the defendant's reasons are heard and assessed in cross-examination with the public prosecutor".**

Recital 33: Proportionality (in the proposal in Art. 23 (5))

- When applying the national rules implementing this Directive, the national competent authorities may choose **not to order or execute the confiscation of unjustified assets** if, in the case in question,
- the application of the rules laid down in this Directive is **manifestly unreasonable or disproportionate**.
- (Recitals No. 17 and 18 Directive 42/2014)

Criminal Policy Directive

- The principle of proportionality should preside over any intervention by authority that restricts the interests/rights of citizens,
- in general terms, the imposition of its observance in relation to confiscation is, first and foremost,
- fundamental as a **directive to the legislator as to whether it is appropriate to limit the use of such measures in respect of the right to property** (Art. 1, First Protocol ECHR),
- In Italy Constitutional Court 33/2018

But the cited rule seems to demand something more,

- by requiring that the measure not be disproportionate to the offence or the charge it seems to demand that
- **the individual confiscation is in some way commensurate with**
- 'to the offence committed or the charge against the person concerned by that measure';

- It is unclear what is meant by the proportion 'to the charge' rather than to the offence;
- In fact, the provision seems to recall Art. 74f StGB *Grundsatz der Verhältnismäßigkeit* of the German legal system,
- requiring compliance with the **principle of proportionality of the optional confiscation of products**, instruments and object
- **to the crime or accusation, *Vorwurf*.**
- The notion of accusation - *Vorwurf* - is interpreted as ***reproach***, recalling the notion of **reproachability/guilt**;
- Graduation is clearly allowed as an optional measure.
-

Confiscation of proceeds

- **The principle of proportionality in the strict sense should not apply to the confiscation of proceeds,**
- **which should not take on a punitive character and**
- **the extent of which depends on the amount of the profits of the crime;**
- **the proceeds as being of unlawful origin should be confiscated because the offence is not a lawful title to assets,** and this regardless of their extent, as pointed out elsewhere.
- . For the confiscation of proceeds, the second part of the provision in the original proposal, which required that 'Member States shall provide that, in exceptional circumstances, confiscation shall not be ordered if, in accordance with national law, it would represent an **excessive deprivation for the person concerned**', took on greater significance;
- e.g. where the person has already used the proceeds of the offence in the exercise of **an economic activity** and the misappropriation of assets to an extent equivalent to the original proceeds risks jeopardising the economic viability of the company

Interpretative canon

- In any case, also in relation to the confiscation of profits, this principle should also
- **represent an interpretative canon of the regulation of such forms of extended confiscation;**
- In this direction, for instance, the **temporal delimitation of the presumption of illicit origin of the assets** allows, in accordance with the principle of proportionality in a broad sense, to delimit the measure of confiscation,

the *Härtevorschrift* (onerousness rule) (§ 73 c)

- Part of German doctrine emphasised the need to apply the *Härtevorschrift* (rule of onerousness) (§ 73 c) precisely in order to avoid the strangulation effect, in the light of **the *Übermaßverbot*** (the prohibition of excesses - the principle of proportionality in the strict sense),
- e.g. **in cases where illegal profits have been reinvested and their diversion would jeopardise the very existence of an enterprise.**
- This provision was also repealed following the introduction with the 2017 reform of the principle of moderate gross (§ 73 d) in the calculation of the value of profit, which allows legitimate expenses to be deducted from gross profit;
- but the protection against disproportionate interference in the new discipline is guaranteed by the provision of **Section 459g (5) StPO** as amended by I. 25 June 2021:
- "in the cases referred to ..., execution shall be stayed by order of the court if it is **disproportionate**. Execution shall be resumed by order of the court if circumstances arise or come to light that conflict with the order referred to in the first paragraph".

Proportionality and confiscation of instrumentalities

- Confiscation of **instrumentalities** also takes on a **punitive character**,
- **the need to take into account the principle of proportionality in the strict sense becomes more apparent**,
- the jurisprudence of the US Supreme Court concerning compliance with the Eighth Amendment - **prohibition of unusual and cruel punishment and the 'excessive fine clause'** -
- has developed not only in relation to **criminal forfeiture**, which takes on a punitive character
- but also in relation to **civil forfeiture** applied in relation to property connected with the crime, assuming a **punitive** character, and not where applied to the proceeds of crime

Recital 27: Value confiscation of instruments

- In the implementation of this Directive with regard to the confiscation of property of a value corresponding to the instrumentalities of the offence,
- the relevant provisions should be applied
- whether, in the light of the particular circumstances of the case,
- this measure is **proportionate**, in particular in view of the **value of the capital goods concerned**.
- Member States may also consider whether, and to what extent, the convicted person **is responsible for making the confiscation of instrumental property impossible**.
- recital 17 of the current Directive

an interesting model § 74 f Grundsatz der Verhältnismäßigkeit

- - of German law, which, as mentioned above, requires **the application of the principle of proportionality to the optional confiscation of instrumentalities** (of the products and object of the offence), including for equivalent,
- requiring that **the pecuniary penalty and the overall punishment be commensurate with the offence and the charge** (interpreted as culpability/guilt), or, in any case,
- to **waive its application (or intervene with less onerous sanctions) where there is a risk of violating the principle of proportionality.**
- In short, a **balancing act** must be carried out **between the main penalty and confiscation**, so that **the overall penalty is commensurate with the seriousness of the offence and culpability;**
- such assessments must be expressly stated in the judgment.
- This rule is regarded as a positive expression not only of the principle of proportionality, but also of the principle of culpability as a criterion for the commensuration of punishment.
- In similar terms § 19a StGB of the Austrian legal system provides that Konfiskation does not apply if it is deemed disproportionate to the gravity of the offence or the culpability of the offender.

Court of Human Rights in the cases Sud Fondi, Varvara and G.I.E.M.,.

- Emblematic of the punitive nature of instrument confiscation and the need to ensure compliance with the principle of proportionality in the strict sense is
- **the case law of the European Court of Human Rights in relation to urban confiscation in Italian law,**
- in matters of unlawful allotment,
- **recognised as punitive** by the European Court of Human Rights in the Sud Fondi, Varvara and G.I.E.M. cases,.

the Grand Chamber points out that

- "Article 1 of Protocol No 1 requires, for any interference, a reasonable relationship of proportionality between the means employed and the end sought" that
- is 'broken' 'if the person concerned has to bear an excessive and exaggerated burden'.
- The judgement of **proportionality**, then, must be made by assessing the following three elements:
- "[1] the possibility of **adopting less restrictive measures**, such as the demolition of works that do not comply with the relevant provisions or the cancellation of the subdivision project;
- [2] **the unlimited nature of the sanction arising from the** fact that it can indifferently include built-up and unbuilt-up areas and also areas belonging to third parties;
- [3] the **degree of fault or recklessness** of the applicants or, at least, the relationship between their conduct and the offence in question" (§ 301).

difficult compatibility with the principle of proportionality of confiscation used as a punitive instrument

- since it is a **rigid** instrument whose application is mandatory
- and **not commensurate with the culpability and gravity of the conduct**, as highlighted by the ECHR (§ 301);

the Italian Constitutional Court has recently called several times for respect of the principle of proportionality

- with reference to the confiscation of instruments or in any case to confiscations that assume a punitive character.
- The decision No. 112/2019 is emblematic, which declared the unconstitutionality of Article 187 *sexies* of Legislative Decree No. 58/1998 insofar as it provided for the mandatory confiscation, direct or by equivalent, of the product of the offence and of the assets used to commit it, and not only of the profit (Constitutional Court No. 112/2019);
- The Constitutional Court pointed out that the **sanctioning automatisms** were in contrast with **the necessary proportionality** that must characterise the punitive sanction affecting the right to property (the rigidity of the sanctioning mechanism prevents a 'graduated' response to the seriousness of the fact, 'quantitative modulation'),
- apart from **the unreasonable disproportion** brought about by the combination of the fine ('whose edictal framework is itself of exceptional severity') and, indeed, confiscation

Recital 36): reasonable time limits limiting confiscation after final conviction or Article 15 proceedings (illness, flight, death, prescription)

- The tracing and identification of assets to be frozen and confiscated **should be possible even after a final criminal conviction** or
- following **non-conviction based confiscation proceedings.**
- This does not prevent Member States from setting **reasonable deadlines**
- following the final conviction or final decision taken in proceedings concerning non-conviction based confiscation,
- **after the expiry of which retrieval and identification would no longer be possible.**

the imposition of a *reasonable time limit* responds

- the need to avoid that the continuous search for other assets to be confiscated
- hanging like a **sword of Damocles sine die** over the **freedom of economic initiative of the recipients of confiscation**
- with respect to **proceedings in rem, such as the confiscation of prevention or the comiso sin condena**, the problem of establishing a reasonable term for the subsequent identification and retrieval of assets, emerges upstream,
- because in this case **irrespective of the moment of consummation of the source crime**
- **it will be possible at a later stage and without any time limit to start the proceedings in rem aimed at proving the illicit origin of the assets and thus to confiscate them.**

For extended confiscation in Italy

- The **possibility of pronouncing extended confiscation under Art. 240-bis in enforcement proceedings** is
- given the practice whereby such proceedings are initiated years after the conclusion of the cognitive process and, therefore, the conviction,
- and allows the confiscation of assets that came into the possession of the convicted person years after the commission of the predicate offence,
- ending up turning even this form of confiscation, as well as preventive confiscation, into a sort of sword of Damocles that knows no statute of limitations.

In Italy, the Supreme Court recently ruled out the question of the constitutionality

- of [Articles 18, 29, 34-ter of legislative decree no. 159 of 6 September 2011](#) for conflict with
- Articles [3](#), [24, paragraph 2](#), [27, paragraph 2](#), [111, paragraphs 1 and 2, Const.](#) and [6, § 1, ECHR](#),
- **in so far as it does not lay down, with respect to the time when the dangerousness of the proposed person ceases**
- **a time-limit for the forfeiture of the proposing action or for the prescription of the preventive measure,**
- since **the existence of the dangerousness at the moment of the acquisition of the property constitutes an inescapable presupposition for the application of the measure of patrimonial prevention,**
- which is transferred to the latter in a permanent and tendentially indissoluble manner, since it is the fruit of the illicit acquisition by the dangerous subject".
- Cass. sec. II, 25 February 2022, no. 11351.
- Cass., sect. V, 25 November 2015, no. 155

EDU Court, 3 June 2015, *Dimitrovi v. Bulgaria*, no. 12655/09, § 46

- The European Court already in the case *Dimitrovi v. Bulgaria* contested in relation to a form of extended confiscation, without conviction, the possibility of applying confiscation also with reference to absolutely old facts (without prescription and without a judgement),
- pointing out that the measure in question is substantially outside the statute of limitations with the consequence that
- *'that individuals being investigated under it could be required to provide evidence of the income they had received and their expenditure many years earlier and without any reasonable limitation in time'*;
- *"the prosecution authorities were free to 'open, suspend, close and open again proceedings at will at any time'.*
- All this implies that such discipline does not allow for the foreseeability of the consequences of one's actions. EDU Court, 8 January 2009, *Bullen and Soneji v. the United Kingdom*, no. 3383/06, § 48; EDU Court, *Piper*, cited above, § 52.

EDU Court, 21 July 2015, *Piper v. the United Kingdom*, No. 44547/10, § 51

- Not only that, but the European Court has condemned the United Kingdom
- for violation of the right to reasonable duration of proceedings as an expression of the right to a fair trial, Article 6 § 1 ECHR,
- precisely with reference to proceedings intended to apply a form of extended confiscation - the British confiscation - following a conviction, stating that the period to be taken into account starts to run from the delivery of the conviction .

European Court of Human Rights, 13 October 2021, *Todorov and others v. Bulgaria*, no. 50705/11, 201.

- In the same vein, recently, in *Todorov v. Bulgaria*, the EDU Court highlighted the wide timeframe in which the relevant legislation is applied and, in particular, emphasised that
- "However, account will be taken of the **difficulties** that the applicants may have encountered in meeting **their burden of proof due to the long periods of time covered by the confiscation procedure and the other factors described above**".
- Among other things, in this case the Court is dealing with a retroactive application of the 2005 law on confiscation,
- legislation that also applies to assets acquired up to 25 years before the commencement of confiscation proceedings,
- imposing a heavy burden on the defence who have to provide proof of the legal income or source of their assets.
- Also Court of Human Rights, *Xhoxhaj v. Albania*, 31 May 2021, no. [15227/19](#), § 345.

- In the Todorov case (European Court of Human Rights, 13 October 2021, *Todorov and others v. Bulgaria*, no. 50705/11, 201), however
- the Court considers that **the peculiarities of the widely used auditing processes** must also be taken into account.
- According to the Court, since personal or family assets are normally **accumulated during one's working life,**
- **placing strict time limits** on the valuation of assets
- **would severely limit and impair the authorities' ability to assess the legitimacy of all assets** acquired by the person under scrutiny during his or her professional career.