

The subject matter of the Regulation (EU) 2018/1805. National confiscation models

Guidelines on the interpretation of the subject matter of the Regulation (EU)

2018/1805

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1st Guidelines – Italy

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

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

a) Mutual recognition of the Italian traditional confiscation model.

The traditional model of confiscation pursuant art. 240 criminal code as well as the special forms of mandatory confiscation provided for in the Criminal Code or in special laws, and the special form of value-based confiscation in the Italian legal system, **fall within the confiscation model of art. 12 of the Directive 2024/1260/EU** (and before of art. 4, § 1 of the Directive 2014/42/EU).

These form of confiscation can certainly be subject to **mutual recognition as they are included in the definition of art. 2 Regulation n. 1805/2018** (“confiscation order’ means a final penalty or measure, imposed by a court following proceedings in relation to a criminal offence, resulting in the final deprivation of property of a natural or legal person”) **and are**

applied in a “proceeding in criminal matters” (art. 1 REG), indeed criminal in the strict sense. However, the application of the safeguards of criminal matters, pursuant to Recital No. 18 of the Regulation, demands respect for the principle of non-retroactivity (which does not apply to direct confiscation, considered a security measure, Article 200 of the Criminal Code).

b) Mutual recognition of the Italian extended confiscation order.

Confiscation pursuant to Article 240 bis of the Criminal Code should fall within the scope of the Regulation, considering that it is included in the model of extended confiscation in Article 14 of Directive 2024/1260 (formerly Article 5 of Directive 2014/42). This type of confiscation is typically applied in a criminal trial by a judge of cognition.

This possibility is confirmed* also when the Italian form of extended confiscation is applied in the enforcement procedure – as previously envisaged in case law (see Article 676 Code of Criminal Procedure; this was a praxis recognised by the Supreme Court’s United Chambers in the *Deourach* case and by the Constitutional Court in judgement No. 33 /2018) and at present provided for in art. 183-quarter § 1 Legislative Decree 271/1989 (‘Execution of confiscation in special cases’) introduced via Legislative Decree No. 21/2018. In any case, it constitutes a ‘proceeding in criminal matters’ based on the autonomous interpretation adopted by the European Union, which, as specified in Recital No. 13, refers to «proceedings in relation to a criminal offense».

In clarifying the scope of the Regulation, Recital 13 specifies that ‘proceedings in criminal matters’ is an autonomous concept under Union law. It clarifies that «the term therefore covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offense». This expression is reiterated in Article 2, which defines confiscation as «a final deprivation of property ordered by a court in relation to a criminal offense» (in the original proposal, «proceeding for a crime»). Thus, it is sufficient that the proceeding before a judicial authority concerns the proceeds and/or instruments of the crime. Moreover, Directive 2011/99/EU extends the concept of the ‘European protection

order' to any measure aimed at protecting an individual from acts with criminal relevance, even where such measures are adopted outside of criminal proceedings in the strict sense⁶³⁴.

Furthermore, Article 3, letter d), of Legislative Decree 7 August 2015, No. 137 (implementing Framework Decision 2006/783/JHA), includes the procedure for the adoption of extended confiscation under Article 240 bis of the Criminal Code within the context of decisions taken in criminal proceedings: «d) confiscation order: a measure issued by a judicial authority in the context of criminal proceedings, which consists of definitively depriving a person of an asset, including confiscation orders pursuant to Article 12-sexies of the decree-law of 8 June 1992, No. 306, converted, with modifications, by law 7 August 1992, No. 356»⁶³⁵.

This inclusion exists despite concerns about the compliance of this hybrid procedure with criminal law guarantees, as the powers of the execution judge are residual, and it is allowed to pronounce the confiscation *inaudita altera parte* (the chamber hearing can only take place following an objection). In any case the affected person can challenge the application of mutual recognition by proving that the fundamental guarantees of criminal matters have been violated in the concrete case and, therefore, claiming the application of the ground for refusal provided for by art. 8, F) («the execution of the freezing order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence») and 19, h) («in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the confiscation order would, in the particular circumstances of the case, entail a manifest breach of a relevant

⁶³⁴ Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order, recitals No. 9 and 10. On this point, see S. OLIVEIRA E SILVA, *Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders*, p. 205.

⁶³⁵ (15G00152) GU Serie Generale No. 203 of the 02-09-2015).

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»):

Additionally, it is true that, as emphasized in the Explanatory Memorandum of the proposed regulation, the ECtHR has repeatedly deemed forms of confiscation – without conviction and based on presumptions – compliant with Article 6 of the ECHR and the right to property under Article 1 of the Additional Protocol of the ECHR, provided the presumptions are refutable and ‘effective procedural safeguards are respected’. This is in line with Directive 2016/343 on the presumption of innocence, which in Recital No. 22 permits the use of presumptions. However, the same Directive 2016/343 mandates respect for the right to silence as an essential aspect of the presumption of innocence (Recital No. 24). Therefore, it is not permissible to base proof of the illicit origin of assets on the silence of the defendant or to attribute probative value to it, as typically occurs in the application of extended confiscation measures, including those under Article 240 bis of the Criminal Code. In such cases, jurisprudence requires the affected party to provide an exhaustive explanation of how the assets were acquired (Supreme Court of Cassation, United Chambers, No. 920/2004, *Montella*; C., No. 2761/1994; Supreme Court of Cassation, Second Chamber, No. 32563/2011).

Thus, to improve the mutual recognition of this form of extended confiscation, the application of the Regulation should encourage the adoption of a trial model that complies with criminal law guarantees, starting with the standard of proof required for the illicit origin of assets.

c) The application of the Regulation n. 1805/2018 to the preventive confiscation.

Italian preventive confiscation can be included within the scope of the Regulation, under the notion of a confiscation order issued "within the framework of proceedings in criminal matters" (Article 1 of the Regulation) for several reasons⁶³⁶.

⁶³⁶ This Regulation lays down the rules under which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State within the framework of proceedings in criminal matters.

Firstly, as analysed above, the autonomous EU concept of ‘proceeding in criminal matters’ requires *only a link with a crime*. Additionally, with specific reference to confiscations without conviction, the EU Commission has recently emphasized that, for the purposes of the Regulation, such provisions can be considered part of a ‘procedure in criminal matters’ as long as a connection with a crime is present⁶³⁷.

Given this autonomous concept of a criminal proceeding, preventive confiscation is included because it is applied in a proceeding ‘in relation to an offence’ (Recital 13 of the Regulation). It requires that the recipient be considered ‘a social danger’ due to suspected criminal activity, and the assets are confiscated because they are the proceeds of crime (the disproportionate value of the assets serves as circumstantial evidence of criminal origin, or the assets are derived from illicit activity or used for reinvestment, and, in any case, the ‘dangerous’ owner has not demonstrated a legitimate origin).

Furthermore, the procedure for applying preventive confiscation essentially assumes the characteristics of an *enforcement proceeding* and *takes place before a criminal court*. This remains true even after the reform of the judicial system introduced by Law No. 161/2017, which mandates that the court have interdisciplinary skills (civil, bankruptcy, criminal, etc.).

The Italian lawmakers also considered the prevention procedure to be criminal in nature, as reflected in Article 3, letter d) of Legislative Decree 7 August 2015, No. 137 (implementing Framework Decision 2006/783/JHA). This provision includes confiscation pursuant to Articles 24 and 34 of Legislative Decree No. 159/2011, and the procedure for the adoption

⁶³⁷ European Commission, *Commission Staff Working Document: Analysis of non-conviction-based confiscation measures in the European Union*, Brussels, 15 April 2019 (OR. en) 8627/19 JAI 413 COPEN 172 DROIPEN 62, SWD (2019)1050 final, 11.04.2019, 55: “The Regulation extends the scope of freezing and confiscation orders compared to the former mutual recognition framework. It applies to all freezing and confiscation orders issued within the framework of proceedings in criminal matters. For confiscation orders, a link to a criminal offence (by means of a final penalty or measure imposed by a court following proceedings) is required. Thus, the Regulation covers classic conviction-based confiscation as well as extended confiscation and non-conviction-based confiscation if these are issued within the framework of proceedings in criminal matters. It will, however, not apply to freezing or confiscation orders issued within the framework of proceedings in civil or administrative matters. The confiscation Regulation closes an important lacuna and has the potential to vastly improve cross border cooperation by providing law enforcement authorities with an efficient tool to confiscate the proceeds of organised crime even when they are laundered or hidden in other EU Member States”.

of extended confiscation under Article 240 bis of the Criminal Code, within the context of decisions taken in criminal proceedings: «d) confiscation order: a measure issued by a judicial authority in the context of criminal proceedings, which consists of definitively depriving a person of an asset, including confiscation orders... and those arranged pursuant to Articles 24 and 34 of the Code of Anti-Mafia Laws and Preventive Measures, pursuant to Legislative Decree 6 September 2011, No. 159, and subsequent amendments»⁶³⁸.

Additionally, the change of the expression «criminal proceeding» used in the proposal of Regulation with «proceeding in criminal matter» – as stressed in the «Council of the European Union Interinstitutional File: 2016/0412 (COD)2016/0412 (COD), doc. No. 12685/17 of 2.10.2017» – has been the result of the pressure of the Italian delegation, which - supported by some other delegations – observed that the proposed wording of the scope of the Regulation as defined in Art. 1(1), with the words «criminal proceedings», posed a problem, since its system of so-called ‘preventive confiscation’ would be excluded (see **).

In the context of a debate on the matter by the EU ministries of Justice (EU, Council JAI, 12/13 October 2017), it was specified also that certain preventive confiscation systems are included in the Regulation scope. Provided that the choice to confiscate *«soit clairement en rapport avec des activités criminelles et que des garanties procédurales appropriées s’appliquent»*.

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

Moreover, the Italian Desk of Eurojust also recognizes that prevention proceedings are included in the concept of ‘proceeding in criminal matters’ under Article 1 of the Regulation:

⁶³⁸ (15G00152) GU Serie Generale No. 203 of the 02-09-2015).

«During negotiations, Italy obtained that Regulation 1805 apply to any freezing and confiscation order issued “in the context of proceedings in the field of criminal proceedings» (and not only to proceedings aimed at the judicial ascertainment of criminal liability for specific criminal acts). It follows that measures adopted in the framework of prevention proceedings can be enforced under Regulation’s provisions. In order to make resorting to such a fundamental tool easier, both the Italian Desk (note of 2 December 2020) and the Ministry of Justice (DAG circular of 18 February 2021 0035566.U) provided colleagues with information and practical suggestions.

Besides, on 12 March 2021, the Italian Desk and the Ministry of Justice signed an operational agreement aimed at coordinating their respective areas of competence on the matter. That following designation of the Ministry of Justice as the entity entitled to receive passive requests and convey active ones (see notification and declaration of Italy of 17.12.2020).

In particular, in order to take into account Eurojust’s specific area of competence, it was agreed that the Italian Desk of Eurojust must be involved whenever the execution of seizure measures has to be coordinated with execution of personal precautionary measures or investigation activities (searches, witness hearings, technical activities) to be carried out simultaneously with seizures in different countries».

In the end, the preventive confiscation has to be included in the Regulation’s scope, but it would be important

not only to adopt a criminal standard of the proof of the criminal asset origin,

but also *to improve the respect of the procedural safeguards* according to the recital No. 18 of the Regulation,

which demands the respect of the procedural rights set out in Directives 2010/64/EU ⁽⁶⁾, 2012/13/EU ⁽⁷⁾, 2013/48/EU ⁽⁸⁾, (EU) 2016/343 ⁽⁹⁾, (EU) 2016/800 ⁽¹⁰⁾ and (EU) 2016/1919 ⁽¹¹⁾, and which imposes, above all, that “the safeguards under the Charter should apply to all proceedings covered by this Regulation. In particular,

the essential safeguards for criminal proceedings set out in the Charter should apply to proceedings in criminal matters that are not criminal proceedings, but which are covered by this Regulation (see Italian Report WP2, p. *).

In any case, also in relation to this form of confiscation, the affected person can challenge the application of mutual recognition by proving that the fundamental guarantees of criminal matters have been violated in the concrete case (a specific violation of fundamental rights) and, therefore, claiming the application of the ground for refusal provided for by art. 8, F) and 19, h).

In order to improve the application of the Regulation No. 1805/2018, in conclusion, the improvement of the harmonisation through the new Directive 2024/1260 is paramount, because – in line with what established by the German Constitutional Court – the Luxembourg judges themselves recognised that national standards on fundamental rights regain depth – also as a function of impeding mutual recognition obligations – in areas where the level of harmonisation achieved on a European scale is limited⁶³⁹.

2nd Guideline – Poland

For Poland the forms of freezing and confiscation orders covered by the REG are:

- Direct Confiscation (art. 44 CC).
- Confiscation of the value.
- Extended Confiscation.
- Non-Conviction-based Confiscation

The aforementioned forms of freezing and confiscation orders can be described as follows.

⁶³⁹ C.GRANDI, *op. cit.*, 314 who quoted Court of Justice UE, 30 May 2013, C-168/13 PPU, *Jeremy*; K. LENAERTS, J. A. GUTIÉRREZ-FONS, *The European Court of Justice and Fundamental Rights in the Field of Criminal Law*, in AA. VV., *Research Handbook on European Criminal Law*, cit., 7 ss.; V. MITSILEGAS, *EU Criminal Law*² (Modern Studies in European Law), Oxford (Hart Publishing), 2022, 215; A. WILLEMS, *The Principle of Mutual Trust*, cit., 97.

Direct Confiscation Forfeiture of Items (Art. 44 CC)

Art. 44 CC – Forfeiture of Items

§ 1. *The court shall order forfeiture of items derived directly from an offence.*

§ 2. *The court may, and in the cases prescribed by law shall, order forfeiture of the items that were used or intended to be used to commit the offence.*

(...)

§ 5. *No forfeiture shall be ordered with regard to the items specified in §§ 1 or 2 if these can be returned to the aggrieved party or to any other authorised entity.*

The object of this form of confiscation are the items derived directly from the crime. Items used or intended to be used to commit crime.

The scope of its introduction is General prevention without a specific objective plus the application of the principle that crime doesn't pay.

The elements to be assessed or established to apply it are:

- The link between the crime and the proceeds/instruments/products.
- The illegal origin (suspects/presumption of illegal origin).

Furthermore, we also have to bear in mind that:

- It is applicable within the criminal case trial and in the court proceedings.
- It has a basic standard of proof.
- As regards safeguards, the appeal against the judgment applies
- Trial *in absentia* is not considered if the defendant does not answer the summons or the summoned person does not appear.

- It is not possible in case of acquittal.

Confiscation of the Value Forfeiture of Items (Art. 44(4) CC)

Art. 44 CC – Forfeiture of Items

§ 4. *If the items specified in §§ 1 or 2 cannot be forfeited, the court may order forfeiture of items with a monetary value equivalent to the items derived directly from the offence, or items used or intended to be used to commit the offence.*

Forfeiture of the proceeds of crime (Art. 45 CC)

Art. 45 – Forfeiture of the proceeds of crime

§ 1. *If the offender has obtained, even indirectly, financial proceeds of crime as a result of the offence, which is not forfeitable as mentioned in Article 44 § 1 or § 6, the court shall order forfeiture of the proceed of crime or its equivalent -in - value. The forfeiture shall not be ordered, either in part or in full, if the proceed of crime or its equivalent -in -value is repaid to the aggrieved party or another person.*

§ 1a. *A financial proceed derived from the commission of a criminal offence shall also be deemed profits derived from things or rights constituting that proceed.*

§ 2. *When sentencing for an offence whereby the offender has even indirectly obtained a substantial financial proceed of crime, or from which a proceed of crime has been or could have been derived, even indirectly, which offence is punishable by imprisonment for a term of 5 years or more, or committed in an organised group or association aimed at committing an offence, the assets that the offender took possession of, or to which any title was acquired, within 5 years prior to committing the same until a sentence, even a non appealable one, is passed, shall be considered as a proceed derived from the offence, unless the offender or another interested party tenders evidence to the contrary.*

§ 3. *If the assets constituting a proceed derived from the offence referred to in § 2, are transferred to an individual, a company or an organisational entity without legal personality, whether in fact or under any legal title, it is considered that the assets in the sole possession of the person, company or entity and the ownership rights thereto, accrue to the offender, unless on the basis of the circumstances surrounding their acquisition, it could not be assumed that the assets derive, even indirectly, from a prohibited act.*

§ 4. *(repealed)*

§ 5. *In the event of co-ownership, a forfeiture order concerns the offender's share or the monetary equivalent.*

Extended Confiscation

Provision 44a of the Criminal Code clearly indicates that the commission or concealment of the proceeds of crime can lead to confiscation. This means that law enforcement authorities can only apply this measure to an intentional offence. In contrast, it is not possible to apply extended confiscation in the absence of guilt of the direct perpetrator.

Pursuant to Article 551 of the Act of 23 April 1964. - Civil Code (hereinafter referred to as the Civil Code), an enterprise is an organised group of intangible and tangible components designed to conduct business activity. It includes in particular:

- a) A designation individualising the enterprise or its separated parts (the name of the enterprise).
- b) Ownership of immovable or movable property, including equipment, materials, goods and products, as well as other rights in rem to immovable or movable property.
- c) Rights arising from agreements for the lease of immovable or movable property and rights to use immovable or movable property arising from other legal relationships.
- d) Receivables, rights in securities and cash.
- e) Concessions, licences and permits patents and other industrial property rights;
- f) Proprietary copyrights and property related rights; business secrets;
- g) Books and documents relating to the conduct of business activities.

Considering the above, confiscation of the company or its components will not only concern movable property (e.g., office equipment, production machinery), real estate (e.g. the building of the company's headquarters) or funds in company bank accounts. If possible, in addition to the above, receivables, securities, patents or copyrights may also be confiscated or secured.

The provision of § 1 of Article 44a of the Criminal Code indicates that confiscation is only possible with regard to an enterprise owned by the offender. On the other hand, § 2 of this provision broadens this group and states that confiscation may also be applied to an

enterprise that is not owned by the perpetrator. A prerequisite for ruling on confiscation is to prove that the owner of the business, directly or indirectly, allowed the perpetrator s to use his/her business. Therefore, it should be considered that forfeiture of a business is only possible if the business is owned by a natural person.

The provision of Article 45 § 2 of the Criminal Code regulates that the institution of extended confiscation shall be applied to property which the perpetrator has taken possession of or obtained any title to in the period of 5 years prior to the commission of the offence up to the moment of even a nonfinal judgment. The period of 5 years prior to the commission of the offence is therefore the limit for controlling the lawfulness of the origin of the offender's property. This means that in the situation of a conviction of the offender for a serious property crime, law enforcement authorities will have the right to control the legality of the property acquired by the offender in the last 5 years.

Relevant Legislation

Art. 44. Forfeiture of items.

§ 6. When sentencing for an offence of violating a prohibition from producing, possessing, distributing or transporting specific items, the court may, and in the cases prescribed by law shall, order forfeiture with regard to such items.

Art. 44a. Forfeiture of an undertaking.

§ 1. When sentencing for an offence from which the offender has obtained, even indirectly, a substantial financial proceed of crime, the court may order forfeiture of an undertaking owned by the offender, or its equivalent -in - value, if the undertaking was used to commit the offence or to conceal the proceed derived therefrom.

§ 2. When sentencing for an offence from which the offender has obtained, even indirectly, a substantial financial proceed of crime, the court may order forfeiture of the undertaking of a natural person not owned by the offender or its equivalent -in - value, if the undertaking was used to commit the offence or to conceal the proceed derived therefrom and the owner of the undertaking wanted the undertaking to be used to commit the offence or to conceal the proceed of crime derived therefrom or, foresaw such possibility yet accepted same.

§ 3. *In the case of jointly – owned property, the forfeiture referred to in §§ 1 and 2 shall be ordered taking into account the will and awareness of each of the co-owners and within their limits.*

§ 4. *The forfeiture referred to in §§ 1 and 2 shall not be ordered if it would be disproportionate to the seriousness of the offence committed, the degree of culpability of the accused or the motivation and conduct of the owner of the undertaking.*

§ 5. *The forfeiture referred to in §§ 1 and 2 shall not be ordered if the damage caused by the offence or the value of the concealed proceed is not significant in relation to the size of the undertaking.*

§ 6. *The court may decide not to order forfeiture referred to in § 2 also in other, particularly justified cases where it would be disproportionately onerous for the owner of the undertaking.*

Art. 45 – Forfeiture of a proceed of crime.

(...)

§ 1a. *A financial proceed derived from the commission of a criminal offence shall also be deemed profits derived from things or rights constituting that proceed. § 2. When sentencing for an offence whereby the offender has even indirectly obtained a substantial financial proceed of crime, or from which a financial proceed has been or could have been derived, even indirectly, which offence is punishable by imprisonment for a term of 5 years or more, or committed in an organised group or association aimed at committing an offence, the assets that the offender took possession of, or to which any title was acquired, within 5 years prior to committing the same until a sentence, even a non-appealable one, is passed, shall be considered as a proceed derived from the offence, unless the offender or another interested party tenders evidence to the contrary. § 3. If the assets constituting a proceed derived from the offence referred to in § 2, are transferred to an individual, a company or an organizational entity without legal personality, whether in fact or under any legal title, it is considered that the assets in the sole possession of the person, company or entity and the ownership rights thereto, accrue to the offender, unless on the basis of the circumstances surrounding their acquisition, it could not be assumed that the assets derive, even indirectly, from a prohibited act.*

Non-Conviction-Based Confiscation

Art. 45 CC – Forfeiture

§ 1. *The court may order forfeiture if the social harmfulness of the act is negligible, as well as in the event of conditional discontinuance of proceedings or a finding that the offender has committed a prohibited act in the state of diminished capacity referred to in Article 31 § 1, or if there is a circumstance preventing the offender of the prohibited act from being punished. § 2. If the evidence gathered indicates that in the event of a conviction a forfeiture order would be issued, the court may also order forfeiture in the event of the offender's death, discontinuance of the proceedings due to the failure to identify the offender, and in the event of the proceedings being stayed where the accused cannot be apprehended or cannot participate in the proceedings because of mental illness or another serious illness.*

Confiscation against third parties

Art. 44 – Forfeiture of items

§ 7. *If the items referred to in §§ 2 or 6 are not the offender's property, the court may only order their forfeiture in the cases provided for in law; if the items are jointly owned, the forfeiture shall only apply to the share held by the offender or to its equivalent -in - value.*

Art. 45 – Forfeiture of a proceed of crime

§ 3. *If the assets constituting a proceed derived from the offence referred to in § 2, are transferred to an individual, a company or an organizational entity without legal personality, whether in fact or under any legal title, it is considered that the assets in the sole possession of the person, company or entity and the ownership rights thereto, accrue to the offender, unless on the basis of the circumstances surrounding their acquisition, it could not be assumed that the assets derive, even indirectly, from a prohibited act. -----*

3rd Guideline – Lithuania

For Lithuania the forms of freezing and confiscation orders covered by the REG are:

- Confiscation (Art. 72 CC).
- Extended Confiscation (Art. 72-3 CC).
- Confiscation of the value (Art. 72 and 72-3 CC).
- Confiscation against third parties (Art. 72 and 72-3 CC).
- Non-conviction-based confiscation (Art. 72 and 72-3 CC).

- Civil confiscation (law on the Civil Confiscation of property, No. XIII-2825 of 2020)

The aforementioned forms of freezing and confiscation orders can be described as follows.

Confiscation (Art.72 of CC)

The object of confiscation is an instrument or a means used to commit an act prohibited by this Code or the result of such an act. Where the property which is subject to confiscation has been concealed, consumed, belongs to third parties or cannot be taken for other reasons or confiscation of this property would not be appropriate, the court shall recover from the offender or other persons indicated in paragraph 4 (see below under explanation of 2c) a sum of money equivalent to the value of the property subject to confiscation (CC Art.72 Para 5).

The scope of confiscation are all criminal offences: the property of any form directly or indirectly obtained/derived from the act prohibited by CC shall be considered as the result of the act. We agree that the nature of confiscation is also the application of the principle “crime does not pay”.

Confiscation of property is the compulsory uncompensated taking into the ownership of a state of any form of property subject to confiscation and held by the offender or other persons. An instrument or a means used to commit an act prohibited by this Code or the result of such an act shall be considered as property subject to confiscation.

The property of any form directly or indirectly obtained/derived from the act prohibited by the Criminal Code shall be considered as the result of the act. The property held by the offender and being subject to confiscation must be confiscated in all cases. The property held by another natural or legal person and being subject to confiscation shall be confiscated irrespective of whether the person has been convicted of the commission of an act prohibited by this Code, where: when transferring the property to the offender or other persons, he was, or ought to have been, aware that this property would be used for the commission of the act prohibited by this Code; the property has been transferred thereto

under a fake transaction; the property has been transferred thereto as to a family member or close relative of the offender; the property has been transferred to him as to a legal person, and the offender, his family members or close relatives is/are the legal person's manager, a member of its management body or participants holding at least fifty percent of the legal person's shares (member shares, contributions, etc.); when acquiring the property, he or the persons holding executive positions in the legal person and being entitled to represent it, to make decisions on behalf of the legal person or to control the activities of the legal person was/were, or ought and could have been, aware that the property is an instrument or a means used to commit an act prohibited by this Code or the result of such an act.

Relevant Legislation

Art. 72 CC

(1). Confiscation of property shall be the compulsory uncompensated taking into the ownership of a state of any form of property subject to confiscation and held by the offender or other persons.

(2). An instrument or a means used to commit an act prohibited by this Code or the result of such an act shall be considered as property subject to confiscation. The property of any form directly or indirectly obtained/ derived from the act prohibited by this Code shall be considered as the result of the act.

(3). The property held by the offender and being subject to confiscation must be confiscated in all cases.

(4). The property held by another natural or legal person and being subject to confiscation shall be confiscated irrespective of whether the person has been convicted of the commission of an act prohibited by this Code, where:

a) when transferring the property to the offender or other persons, he was, or ought to have been, aware that this property would be used for the commission of the act prohibited by this Code;

b) the property has been transferred thereto under a fake transaction;

c) the property has been transferred thereto as to a family member or close relative of the offender;

d) the property has been transferred to him as to a legal person, and the offender, his family members or close relatives is/are the legal person's manager, a member of its management body or participants holding at least fifty percent of the legal person's shares (member shares, contributions, etc.);

e) when acquiring the property, he or the persons holding executive positions in the legal person and being entitled to represent it, to make decisions on behalf of the legal person or to control the activities of the legal person was/were, or ought and could have been, aware that the property is an instrument or a means used to commit an act prohibited by this Code or the result of such an act.

The nature of the confiscation is a penal sanction. The list of penal sanctions are foreseen in the Art. 67 of CC: prohibition to exercise a special right, deprivation of public rights, deprivation of the right to be employed in a certain position or to engage in a certain type of activities, compensation for or elimination of property damage; unpaid work; payment of a contribution to the fund of crime victims; confiscation of property; the obligation to reside separately from the victim and/or prohibition to approach the victim closer than a prescribed distance; participation in the programmes correcting violent behaviour; extended confiscation of property; etc. Penal sanctions must assist in implementing the purpose of a penalty.

Extended Confiscation (Art. 72-3 CC)

The object of the extended confiscation is the property of the offender or part thereof disproportionate to the legitimate income of the offender, where there are grounds for believing that the property has been obtained by criminal means. Where the property, or part thereof, which is subject to confiscation has been concealed, consumed, belongs to third parties or cannot be taken for other reasons or confiscation of this property would not be appropriate, the court shall recover from the offender or other persons where are specific the grounds, a sum of money equivalent to the value of the property subject to confiscation (CC Art 72-3 Para 5).

The scope of extended confiscation is when the offender has been convicted of a less serious (premeditated crime punishable by a custodial sentence of the maximum duration in

excess of three years, but not exceeding six years in prison), serious (a premeditated crime punishable by a custodial sentence of the duration in excess of six years, but not exceeding ten years in prison) or grave crime (premeditated crime punishable by a custodial sentence of the maximum duration in excess of ten years) from which he obtained, or could have obtained, material gain. We agree that the nature of extended confiscation is also the application of the principle “crime does not pay”.

Extended confiscation of property shall be imposed provided that all of the following conditions are met: the offender has been convicted of a less serious, serious or grave premeditated crime from which he obtained, or could have obtained, material gain; the offender holds the property acquired during the commission of an act prohibited by Criminal Code, after the commission thereof or within the period of five years prior to the commission thereof, whose value does not correspond to the offender’s legitimate income, and the difference is greater than 250 minimum standards of living (MSLs, 1 MSL is 50 EUR) or transfers such property to other persons within the period specified in this point; the offender fails, in the course of criminal proceedings, to provide proof of the legitimacy of acquisition of the property. The property referred to in paragraph and being subject to confiscation, if it has been transferred to another natural or legal person, shall be confiscated from this person, where at least one of the following grounds exists: the property has been transferred under a fake transaction; the property has been transferred to the offender's family members or close relatives; the property has been transferred to to a legal person, and the offender, his family members or close relatives is/are the legal person’s manager, a member of its management body or participants holding at least fifty percent of the legal person’s shares (member shares, contributions, etc.); the person whereto the property has been transferred or the persons holding executive positions in the legal person and being entitled to represent it, to make decisions on behalf of the legal person or to control the activities of the legal person was/were, or ought and could have been, aware that the property has been obtained by criminal means or with illicit funds of the offender.

When deciding on extended confiscation, courts are guided not only by the provisions of Article 72-3 of the Criminal Code, but also by the principles of proportionality, balance of interests, and other principles formulated in international normative documents and clarified in the case law of the European Court of Human Rights. It is noted that money derived from activities which cannot in any circumstances be regarded as lawful (e.g. distribution of narcotic drugs or psychotropic substances, trafficking in human beings, bribery, etc.) must be confiscated without exception, as such a conclusion is in line with the provisions of the principle of proportionality, as laid down in the case law of the Constitutional Court of the Republic of Lithuania.

Relevant Legislation

Art. 72-3 CC

(2). Extended confiscation of property shall be imposed provided that all of the following conditions are met:

a) the offender has been convicted of a less serious, serious or grave premeditated crime from which he obtained, or could have obtained, material gain;

b) the offender holds the property acquired during the commission of an act prohibited by Criminal Code, after the commission thereof or within the period of five years prior to the commission thereof, whose value does not correspond to the offender's legitimate income, and the difference is greater than 250 minimum standards of living (MSLs, 1 MSL is 50 EUR) or transfers such property to other persons within the period specified in this point; (3). the offender fails, in the course of criminal proceedings, to provide proof of the legitimacy of acquisition of the property.” Art. 72(3) Para 3: The property referred to in paragraph 2 of this Article and being subject to confiscation, if it has been transferred to another natural or legal person, shall be confiscated from this person, where at least one of the following grounds exists:

a) the property has been transferred under a fake transaction;

b) the property has been transferred to the offender's family members or close relatives;

c) the property has been transferred to a legal person, and the offender, his family members or close relatives is/are the legal person's manager, a member of its management body or participants holding at least fifty percent of the legal person's shares (member shares, contributions, etc.);

d) the person whereto the property has been transferred or the persons holding executive positions in the legal person and being entitled to represent it, to make decisions on behalf of the legal person or to control the activities of the legal person was/were, or ought and could have been, aware that the property has been obtained by criminal means or with illicit funds of the offender.

Non-Conviction-Based Confiscation

Criminal Procedure Code of the Republic of Lithuania (hereinafter CPC) Article 94, Para 1 sets out: At the time of sentencing or termination of the proceedings, the issue of objects relevant to the investigation and examination of the offense shall be resolved as follows: the property referred to in Articles 72 and 72-3 of the Criminal Code of the Republic of Lithuania shall be confiscated).

The Supreme Court of Lithuania in "The Review of Court Practice in the Application of Confiscation of Property (Article 72 of the Criminal Code)" No. AB-32-1: (Published: "Court Practice. 2010, 32") set out: *"It should be noted that, in the cases in question, the provisions of Article 72 of the CC must be considered in a systematic manner in conjunction with Article 94(1)(1) of the CPC, which provides that, at the time of sentencing or termination of the proceedings, the instruments, means and results of the criminal offense, which correspond to the features provided for in Article 72 of the CC, shall be confiscated. In certain cases, this provision has been interpreted in case-law as allowing for the confiscation of assets on condition that the assets (but not the conditions for their confiscation) meet the requirements of Article 72 CC. The reason for this is that the end of the proceedings cannot be the basis for keeping in circulation property whose criminal origin has been objectively established or which has been used in the commission of an offense. The possibility to confiscate assets without prosecuting the perpetrator is in line with the purpose of the confiscation of assets. The case law of the Supreme Court of Lithuania has stated that confiscation of property derived from a criminal offense is similar in nature to civil measures, as only the illegally obtained property is confiscated. On the other hand, confiscation of assets differs from civil measures*

The subject matter of the Regulation (EU) 2018/1805. National confiscation models

in that, in the case of confiscation of assets, the State receives the assets, whereas in the case of civil liability measures, the victim receives the assets (Cassation case No 2K-270/2004). It is generally accepted in legal doctrine that law cannot be derived from wrongfulness, and that therefore, given this legal status of the property, it must be confiscated irrespective of whether or not the perpetrator and the other persons to whom it has been transferred have been held criminally liable for prosecution. Otherwise, it would create an incentive for those persons to dispose of the illegally acquired property. Consequently, when criminal proceedings are terminated by a court decision on the grounds referred to in Article 3 Para 1 (2), (4) and (7) of the CPC, the property may be confiscated pursuant to Article 94(1)(1) of the CPC if it meets the criteria set out in Article 72 of the CPC’.

Article 3 Para 1 CPC providing provisions about circumstances preventing criminal proceedings establishes that criminal proceedings may not be instituted and must be discontinued: “(2) *if the period of limitation of criminal liability has expired; 4) (after 28/11/2017 amendments No XIII-805 changed to (3)) in the case of a person who, at the time of the commission of the offence, was under the age of criminal responsibility; 7) (after 28/11/2017 amendments No XIII805 changed to (5)) a deceased person, except where the case is necessary for the rehabilitation of the deceased person or for the reopening of the case of other persons on the grounds of newly discovered circumstances.”*

Burden of the proof

In cases of Confiscation under Article 72 CC the burden of proof is on the prosecution. What regards Extended Confiscation under Article 72-3, the burden of proof is also laid on prosecution, but it is also to be mentioned that Article 72-3 sets out provision if the offender fails, in the course of criminal proceedings, to provide proof of the legitimacy of acquisition of the property. The Supreme Court of the Republic of Lithuania concluded (cassation decision No 2K-195-976/2022): “The CPC does not provide for special methods of proof specifically for establishing the grounds and conditions for confiscation of property, so all the grounds and conditions necessary for extended confiscation of property are determined in accordance with the general rules of evidence. The burden of proving that the value of the property acquired or transferred by the perpetrator does not correspond to the

perpetrator's legitimate income and that this difference exceeds the amount of the MGL 250 is on the prosecution in the case (Cassation ruling in criminal case No 2K-72-511/2021). At the same time, it should be noted that decisions on confiscation of the proceeds of drug trafficking, money laundering, corruption or other serious crimes do not necessarily have to be based on full proof of the illicit origin of such assets, i.e. in accordance with the principle of "beyond reasonable doubt". Where there is evidence of such criminal activity, proof of the illicit origin of the property may also be based on the principle of a high degree of probability, combined with the owner's inability to prove otherwise (e.g., judgment of 12 May 2015 in *Gogitidze and Others v. Georgia*, petition No. 36862/05, para. 107; Judgment of 26 June 2018, *Telbis and Viziteu v. Romania*, Petition No. 47911/15, para. 68). This is also the practice of the Court of

Cassation (e.g. Cassation decisions in criminal cases No 2K-51- 788/2021, 2K-72511/2021, 2K-62-495/2022)".

Lithuanian jurisprudence follows the principles of proportionality, balance of interests set out by the European Court of Human Rights. Court does not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, was found to suffice for the purposes of the proportionality test.

Relevant Safeguards

Practice of the Supreme Court of Lithuania pays attention to the principle of proportionality. For example, Cassation decision No 2K-201-303/2022 lays down that the Court draws attention to the fact that in order to have a preventive effect, i.e. to ensure that the relevant measure will not be used in the future, the possibility of confiscating the confiscated property (instrument) itself into the ownership of the State should be considered first (cassation rulings in criminal cases No 2K-107-976/2021, 2K-91303/2021). Therefore, in cases where confiscated property is identified in a case, the court must first assess the

possibility of confiscating such property on the basis of Article 72(1) to (4) of the CC, and only in the absence of such a possibility, or where for certain reasons it is not appropriate, should it decide on the recovery of the value of the property to be confiscated, in accordance with Article 72(5) of the CC. In such cases, reasons must be given, inter alia, as to why the case does not establish the possibility of confiscating the instrument itself and why confiscation of the value of the instrument (or part of it) is more appropriate. When applying the provisions of Article 72(5) of the CC, i.e. confiscating the monetary value of the instrument of commission of the offence rather than the instrument itself, it is also necessary to consider whether such a measure of criminal sanction is in line with the objectives of confiscation of property, and to assess the proportionality of such recovery (Cassation decisions in Criminal Cases No 2K-17-788/2019, 2K-195-788/2019, 2K-107-976/2021, 2K91-303/2021).

4th Guideline – the Netherlands

For the Netherlands the forms of freezing and confiscation orders covered by the REG are:

- Forfeiture with seizure (O)
- Forfeiture without seizure (O/W)
- Withdrawal from circulation (O)
- Value confiscation order (W)

The aforementioned forms of freezing and confiscation orders can be described as follows.

Forfeiture with Seizure

Forfeiture (Section 33 et seq. Sr) is a form of direct confiscation. In the Dutch system, the forfeiture is an additional punishment. Its imposition seeks to impact the convicted person's assets. This is without prejudice to the fact that an object of little value may also be forfeited. In order for an object or an amount of money to be forfeited, there must be a specific relationship between the object or the money and the criminal offence (see the cases referred to in Section 33a Sr). This may include tools used to commit a burglary, the vehicle from which was dealt, but also money or goods in laundering. Section 33a Sr phrases which objects may be forfeited:

The following shall be liable to forfeiture:

- a) objects belonging to the convicted person or objects he can use in whole or in part for his own benefit and that have been obtained entirely or largely by means of the proceeds of the criminal offence;
- b) objects in relation to which the offence was committed;
- c) objects used to commit or prepare the offence;
- d) objects used to obstruct the investigation of the serious offence;

- e) objects manufactured or intended for committing the serious offence;
- f) rights in rem and rights in personam pertaining to objects specified in a through e.

As a result of forfeiture, the State becomes the owner of the object (Section 6:1:12 (2) Sv). The imposition of a forfeiture, does not require the objects to be seized. An object that has not been seized may also be subjected to a forfeiture order by the criminal court if that object still belongs to the defendant (see below: forfeiture without seizure, Section 34 Sr). An object or amount of money not owned by the party whose assets were seized may also be subjected to forfeiture. This is one of the forms of third-party seizure in the Dutch system. Such confiscation should be possible if the entitled party knew or reasonably should have known that there was a relationship between the object and a criminal offence, and if it cannot be established who the object or the amount of money belongs to (Section 33a, subsection 2 Sr). The phrase 'belongs to' indicates a legal relationship according to which an object (a good) belongs to the assets of a person. As the entitled party, the person the object belongs to may exercise rights to the object. Belonging to also comprises the cases in which the party in question:

- effectively has such control over and interest in the object and
- where, to that extent, said party's relation to that object may be considered equivalent to that of the owner (Supreme Court of the Netherlands 20 January 1998, Dutch Case Law in Business Legislation 1999, 46 and Supreme Court of the Netherlands 28 September 1999, Dutch Law Reports 1999, 803).

The forfeiture must be proportional: the value of the forfeited objects must be in proportion to the gravity of the offence and as such in proportion to the expected punishment to be imposed (Section 33 in conjunction with Section 24 Sr). If the defendant or another party are impacted disproportionately, the court may order the reimbursement of the difference (Section 33c Sr). Forfeiture may only be pronounced upon conviction pertaining to a criminal offence and therefore not in case of an acquittal or in case of a

dismissal of all criminal charges. Forfeiture may be imposed both separately and in combination with the principal judgment and other additional punishments (Section 9 subsection 5 Sr). Objects that have not been subjected to freezing, but only to prejudgment seizure may also be subjected to forfeiture. (ECLI:NL:Supreme Court of the Netherlands:2015:3689).

Forfeiture without Seizure

Seizure is not a requirement for forfeiture. Upon forfeiture, the court may impose the surrender of objects that were not seized. In principle, Section 34 Sr provides grounds to that effect. This legal provision offers the defendant the option to surrender forfeited objects or to pay the value estimated by the court in its judgment, after which the Section 24c, 25, 6:4:2 and 6:4:7 Sr shall apply *mutatis mutandis*: the court shall order the enforcement of detention as a substitute penalty in the event that neither surrender nor full recovery of the amount outstanding follows. The imposition of an order to forfeit an object that has not been seized requires the convicted person to have control over that object to the extent that under criminal law, the object still belongs to said convicted person. Direct confiscation still applies when the convicted person surrenders the forfeited object. The phrase value confiscation applies when the convicted person, rather than surrendering the object, pays its estimated value.

Withdrawal from Circulation

Withdrawal from circulation is a measure to protect society against dangerous objects. Withdrawal from circulation is only possible if the object is of such a nature that its uncontrolled possession is in conflict with the law or with public interest (Section 36c Sr). These may concern narcotics, prohibited weapons, a dangerous animal, a knife that was used to make threats. Liable to withdrawal from circulation are all objects:

- A) Obtained entirely from or through the means of proceeds from the offence;
- B) Pertaining to which the offence was committed;

- C) Used to aid in committing or preparing the offence;
- D) Used to aid in the obstruction of the investigation of the offence;
- E) Manufactured or intended to commit the offence.

In principle, this measure is imposed at the final judgment in the principal action. In the event that this is not possible, Section 552f Sv provides the basis for the measure to be imposed by means of a separate judicial decision, on the public prosecutor's demand. When the defendant is not known, an object may also be withdrawn from circulation through proceedings in chambers. In case the defendant is acquitted, a withdrawal from circulation may still be ordered as a safety measure (Section 36b subsection 1, 3° Sr). The withdrawal from circulation is therefore both possible as conviction-based confiscation and as non-conviction-based confiscation.

Value Confiscation Order

During the investigation, sufficient clues may emerge that the defendant, from offences he is suspected of / convicted of or from any other criminal offence, obtained gains of a considerable interest that can be expressed in monetary terms. For this reason, following from the criminal case, proceedings may also be launched against the aforementioned defendant in order to confiscate unlawfully obtained gains. This (value) confiscation procedure is a separate part of the criminal investigation in which the party convicted of a criminal offence may be ordered by means of a separate judicial decision to pay a monetary amount to the State for the purpose of confiscating unlawfully obtained gains. These proceedings seek to confiscate unlawful gains obtained from criminal offences or by committing same. With these proceedings, a perpetrator of a criminal offence will be placed back in the position he would have been in if he had not committed the criminal offence. A condition for imposing a value confiscation order is that the defendant is (ultimately) irrevocably convicted by the criminal court. With a view to the recovery in the confiscation procedure, a freezing for the purpose of value confiscation (see appendix 1) may be imposed

based on Section 94a Sv. Since prejudgment seizure may also be imposed on subjects of a third party under a third-party seizure or freezing for the purpose of value confiscation, there may be an extended confiscation (E) within the scope of the confiscation procedure. Extended confiscation will be addressed hereinafter (2.a.IV). Subject to conditions, it is also possible to confiscate objects that belong to another party. This form of confiscation from a third party (third-party seizure) is addressed in appendix 1 (seizure pertaining to criminal procedure, prejudgement seizure on objects of a third party (third-party seizure) from p. 48).

5th Guideline – Spain

For Spain the forms of freezing and confiscation orders covered by the REG are:

- Direct confiscation (art. 127 (1) and (2) SCC).
- Confiscation of the value (Articles 127 (3) as well as Arts. 127 quater (1) and 127 septies SCC).
- Non conviction-based confiscation -NCBC- or “autonomous confiscation” (Art. 127 ter SCC).
- Extended confiscation (Article 127 bis as well as Articles 127 quinquies and sexies SCC).
- Third-party Confiscation (Art. 127 quárter SCC)

The aforementioned forms of freezing and confiscation orders can be described as follows.

Ordinary Confiscation

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

- As regards to intentional crimes (art. 127.1 SCC), in general terms, Spanish legislation follows the so-called “all-crimes” approach. Thus, this particular provision allows judges and

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

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

Value-based Confiscation

Value confiscation refers to a confiscation measure targeting property of equivalent value to the proceeds or instrumentality of a crime. It is applicable most often in cases where criminals transform proceeds of crime into other property in order to hide its illicit origin and camouflage any audit trail. In case of impossibility of direct confiscation, when it is not possible to trace them, they are out of reach of the courts, they have been destroyed, their value has decreased or for any other circumstances. Assets are confiscated in an amount that corresponds to their value, adding the profits obtained with them. Value confiscation is also provided for in cases where the value of the confiscated property is lower than the value of the goods, effects, or profits at the time of acquisition. Even if they are of legitimate origin. Art. CP 127.3 SCC provides that, if for any reason direct confiscation is not possible, “other assets corresponding to the equivalent value thereof, and to the gains that may have been obtained, shall (mandatory) be confiscated”, extending this provision also to the cases in which the value of the goods is lower than that of their acquisition. In addition, Article 127 septies SCC foreseen value-based confiscation during the execution phase (socalled

Ejecutoria under the Spanish Legal system) whenever by the nature, situation, or any other circumstances of the goods, it had not been possible to carry out the confiscation. In this case valuebased confiscation is optional. Both legal provisions foreseen the same solution to make the confiscation effective in the assumptions of impossibility, although each of them will be applicable in different procedural moments: when the confiscation is decided by the Court sentence (art. 127.3 SCC) and in the moment of making it effective through its execution (art. 127 septies SCC), in line with the so-called *wertersatz* under the German Law (Art. § 74.c) of the German CC). Valuebased confiscation could be used when the seizure of an asset becomes the seizure of an amount of money that, in turn, can also become other different property, which can be done directly in the sentence or later in its execution phase. So, the common value-based confiscation is mandatory and should be applied when the confiscation is decided within a sentence and the second is optional and comes up afterwards, when the sentence must be enforced later on during the execution phase in a different reasoned decision based on the wording of the sentence. This possibility is also applicable to cases of confiscation of third-party assets (art. 127 quater 1 SCC) and extended confiscation (art. 127 septies SCC) However, in the vast majority of cases value confiscation could be redundant, taking into account that filing a civil action under the umbrella of criminal proceedings in Spain is not only possible but mandatory for the prosecutor unless the relevant victim expressly renounces to it. Consequently, for the confiscation of property, the value of which corresponds to such instrumentalities and proceeds, the Spanish legislation provides the possibility to confiscate other assets of equivalent value to the instrumentalities and proceeds of crime based on a final conviction sentence in the frame of the so-called “responsibilities pecuniarias”, a broad legal concept including compensation, costs and fines.

Non-Conviction-Based Confiscation

Non-conviction-based confiscation refers to a confiscation measure taken in the absence of a criminal conviction. Directive 2014/42/EU covers cases where a criminal conviction is

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

- The persistent illness or death of the perpetrator
- Absconding or fleeing of the investigated person with impossibility of prosecution within a reasonable time,
- When there is a risk of statute of limitations and - Any other exemption or extinction of criminal liability.

Spanish legal framework goes beyond the provisions of the 2014/42/EU Directive enabling confiscation when the conviction of the accused or suspected person is not possible due to the ending of his/her criminal liability (e.g. expiry of the statute of limitations or if the criminal proceedings ceased or were declared inadmissible) In those cases, an indictment against the person to whom the given assets are intended to be confiscated must be delivered by the Public Prosecutor when the illicit patrimonial situation can be proved. (We will elaborate this legal issue in a later paragraph) Spanish NCBC procedural framework is provided in the so-called new autonomous confiscation procedure set up in Articles 803 ter

e and followings for the NCBC (See ANNEX I) of the SCPC, guaranteeing the adversarial principle.

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

Extended Confiscation

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

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

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

- The disproportion between the value of the given goods/financial situation and lifestyle with the lawful income of the convicted person.

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

To avoid any infringement of ne bis in idem principle, extended confiscation is not applicable to prescribed crimes or whenever acquittal or dismissal has been decided with effects of res judicata (Art. 127 bis.5 CP) On the other hand, prior extended confiscation should be considered at the time of issuing a sentence by the competent Court, based on similar criminal acts in ongoing criminal proceedings (art. 127 bis.4 CP) In a nutshell, extended confiscation is based on the enlargement of its consequences to groundless assets and profits whose connection with the given offence cannot be determined with certainty. In Spain the background landmark judgement in relation to extended confiscation is the judgement issued by the Supreme Court the 5th October 1998 in a drug trafficking case clarifying the scope of Article 374 SCC setting up the following agreement: “ Confiscation of proceeds of crime referred to in article 374 must be extended to profits from operations prior to the specific investigated and prosecuted criminal act, provided that said origin is proved and the accusatory principle is respected.”.

There are two different extended confiscation modalities:

- **Ordinary extended confiscation.** The above-mentioned extended confiscation of assets, effects, and profits from a criminal activity. This modality implies the seizure by the Court of any goods, effects and proceeds of crime that belong to the person convicted of any of the crimes of art. 127 bis.1 SCC. This confiscation is mandatory for the Judge as long as the above-mentioned circumstances concur and there are “reasonable evidence” of its criminal origin and the defense “does not prove their lawful origin” (arts. 127 bis and quinquies SCC).

- **Extended confiscation by criminal reiteration**, based on a previous continued criminal activity or persistent criminal activity. In this case, the Court can seize the assets, effects and gains related to the continued activity of the convicted person, prior and different from that for which he/she is sentenced (arts. 127 quinquies and sexies SCC). This subtype of extended confiscation is based on the verification of the existence of other criminal activities, different from those for which the accused person is convicted whose have made up their illegitimately obtained patrimony. The essential note that differentiates both modalities of extended confiscation lie in the ultimate criterion established to delimit the assets subject to confiscation. While the extended confiscation itself (provided in Art. 127 bis SCC) will reach all assets that, by virtue of existing evidence, can be linked to previous criminal activities of the subject, the extended confiscation by criminal reiteration (Arts 127 quinquies and 127 sexies SCC) will be extended to all the goods acquired and to all the expenses incurred in a certain period of time, provided that the legal requirements are met. To ease that objective, a special role is attributed to certain additional legal presumptions with certain specific requirements. In order to decide on the extended confiscation, the Court has to verify that the subject has been convicted of one of the crimes of art. CP 127 bis. It is also required that the crime has been committed in the context of a previous continuous criminal activity (a sort of criminal lifestyle), there being "reasonable indications" that a relevant part of the subject's assets comes from it, as long as the defense "does not prove its lawful origin" (arts. 127 bis and quinquies CP) To facilitate the Court task, the accreditation of the illicit origin of the assets, effects, or profits of which the confiscation is intended, the same presumptions are applicable as for the previous extended case. However, due to the proportionality principle, a de minimis criteria is set up and confiscation will be carried out, provided that such activities generated a profit greater than 6,000 euros. Additionally, a continuous criminal activity is considered proved in cases where the perpetrator had been convicted in the same criminal proceeding for at least three crimes or for a so-called continuous crime (which includes three or more criminal offences, provided that a direct or

indirect economic benefit has been derived from them). However, when the conviction is delivered within the six years prior to the start of the procedure for one of the crimes listed in Art. 127 bis SCC, the minimum number of offenses or criminal offenses within a continuous offense decreases from three to two. Under this subtype of extended confiscation by criminal reiteration, it would be considered as proceeds of crime, unless the specific circumstances of the case reveal this approach to be disproportionate, all assets acquired by the convicted person within an specific period of time, namely during the last six years as of the date of the opening of the criminal proceedings whenever they were acquired free of charge and/or when the generated expenses were paid with ill-gotten gains. For these purposes, the date of acquisition is understood to be the earliest in which, such assets were at the disposal of the accused person (art. 127 sexies CP) The main difference between both types of extended confiscation is its mandatory or optional nature. Under Art. 127 bis CP the ordinary extended confiscation is mandatory for the Court, being the adoption of the later extended confiscation optional for the Court. On the other hand, extended value-based confiscation or extended confiscation of equivalent assets is provided under Art. 127 septies SCC⁶ and is possible whenever, for any circumstance, direct or extended confiscation of the assets, effects or profits related to the crime or to the previous criminal activity is not an option or when they no longer have the value they had at the time of their acquisition. In these cases, the confiscation of assets owned by the investigated person, even if they have a lawful origin, for equivalent value to the part that could not be effectively executed is also possible. There is a possibility of compensation with new confiscation orders issued in relation to criminal acts previously committed. Extended confiscation does not apply when the criminal activities which the assets or effects derive from, have prescribed or have been acquitted or definitively dismissed. Extended confiscation is limited to crimes listed in Art. 127 bis SCC.

Third-party Confiscation

Third-party confiscation refers to a confiscation measure made to deprive someone other than the offender – the third party – of criminal property, where that third party is in possession of property transferred to him or her by the offender. It is used most often when criminals transfer property to a knowing third party to maintain its enjoyment without being the legal owner, thus attempting to avoid the confiscation of such property in case of conviction. Spain put in place specific provisions on third-party confiscation reflecting the so-called mental (intentional) requirement that the third person ‘knew or ought to have known [...] that the purpose of the transfer or acquisition was to avoid confiscation’. SCC implemented this provision from the 2014/42/EU Directive ensuring the rights of bona fide third parties are preserved. This type of confiscation is optional and not mandatory when ill-gotten assets, effects and profits of the above-mentioned confiscation models have been transferred to third parties. In these cases we have to distinguish between:

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

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

Pre-trial precautionary measures: freezing of assets

To prevent the destruction, transformation, removal, transfer, or disposal of property with a view to its eventual confiscation, a freezing order can be issued in the pre-trial stage. This is urgent when the proceeds of crime are just money, as occurs on numerous occasions in economic crimes, frauds and, of course, in money laundering cases. As money is totally

fungible and easily transferable, even from one country to another, without the need to be physically transported, thanks to the telematic and electronic means currently available, in these cases, the seizure in the investigative phase is crucial to avoid an evident periculum in mora.

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

6th Guideline – Germany

For Germany the forms of freezing and confiscation orders covered by the REG are:

- Direct confiscation - Section 73 StGB (confiscation of proceeds of crime) and 74 StGB (confiscation of products, instrumentalities, objects of crime)
- Confiscation of the value (Section 73c , 73d , 74c StGB; Section 29a OWiG)
- Non-conviction-based confiscation -NCBC- or “autonomous/independent confiscation” (Section 76a StGB) > 76a (1-3) StGB (confiscation without conviction in cases of death, illness, absconding, time-barring etc.); 76a (4) StGB (confiscation of assets of uncertain origin)
 - Extended confiscation (Section 73a StGB)
 - Third-party Confiscation (Section 73b StGB , Section 29a (2) OWiG)
 - Pre-trial precautionary measures: freezing of assets (Section 111b - 111q StPO)

The aforementioned forms of freezing and confiscation orders can be described as follows.

1.a.- Direct confiscation (Section 73²⁰ and 74²¹ StGB)

Direct confiscation refers to a judicial order concerning property or other values related to a specific crime. It is not necessary, that the perpetrator or the participants have been convicted for that crime. Rather, it is sufficient that they have committed an unlawful act, even if this was not culpable and therefore a guilty verdict must be ruled out. There is no

²⁰ Section 73: Confiscation of proceeds of crime from offenders and participants

(1) If the offender or participant has obtained anything by or for an unlawful act, the court orders the confiscation of that which was obtained.

(2) If the offender or participant has derived any benefits from the proceeds, the court also orders the confiscation of the benefits.

(3) The court may also order confiscation of objects which the offender or participant has obtained

1. by way of sale of the object obtained or as compensation for its destruction, damage or confiscation or

2. on the basis of a right obtained.

²¹ Section 74: Confiscation of products of crime, means of crime or objects of crime from offenders and participants

(1) Objects arising from the commission of an intentional offence (products of crime) or used in its commission or preparation or designated for such commission or preparation (means of crime) may be confiscated.

(2) Objects relating to an offence (objects of crime) are subject to confiscation pursuant to specific provisions.

(3) The confiscation is admissible only if, at the time of the decision, the offender or participant owns the object or is entitled to it. This also applies to confiscation which is prescribed or available under a specific provision beyond subsection (1).

restriction of confiscation to certain criminal offences. It is therefore possible in the case of both intent and negligence if the offender has obtained something from the act.

Until 2017, the confiscation of crime proceeds from offenders and participants was not restricted by a catalog of underlying crimes, but it was precisely subordinate to the claims of victims of the crime, so that confiscation often did not take place. Today, confiscation of the proceeds of crime is mandatory for all offences under the Criminal Code and outside of it. Theoretically, it must therefore be examined in every criminal case whether the perpetrator or pure participant has obtained an asset from the charged crime. This must then be confiscated. This does not mean that in every criminal case the confiscation of assets is actually ordered. However, if the court is convinced that the offender has obtained something from the criminal act, this must be confiscated.

Something obtained is any increase in the economic value of property that has accrued to the perpetrator or participant. This does not necessarily have to be a thing or a right. A de facto, economically beneficial position of possession is also sufficient. In view of the aforementioned bread and butter principle, expenses incurred by the perpetrator in obtaining this asset may not be deducted. If the offender or participant has derived any benefits from the proceeds, the court also orders the confiscation of the benefits (Section 73(2) StGB). Furthermore, as part of the direct confiscation of the proceeds of a crime, the criminal court may also order confiscation of objects which the offender or participant has obtained by way of sale of the object obtained or as compensation for its destruction, damage or confiscation or on the basis of a right obtained (Section 73(3) StGB).

The scope of the assets to be confiscated was expanded somewhat in 2017. Until then, only assets obtained "aus der Tat" were subject to confiscation. Today, assets obtained "durch die Tat" are sufficient. This is also intended to implement Art. 2 No. 1 and Art. 4(1) of the Directive 2014/42/EU. Accordingly, cash withdrawn with a checking card is also obtained if the checking card was previously obtained by deception. Finally, what the perpetrator or a participant has obtained "for the act" is also confiscated, i.e. any remuneration. If a participant initially obtains everything and then wants to divide it among the accomplices, the full amount can be confiscated from him.

If the conditions of Section 74 StGB are met, the products of crime (*productum sceleris*), the means of crime (*instrument sceleris*) or the objects of crime (*obiectum sceleris*) may be confiscated. Unlike confiscation of proceeds under Section 73 StGB, this confiscation is not mandatory; thus, the court has discretion. In addition, confiscation under Section 74 StGB is limited to intentional crimes, which must also be culpable. Therefore, case law affirms a punitive character with regard to this confiscation of products of crime, means of crime or objects of crime. In some cases, the same object may be subject to confiscation of both the proceeds of an offence under Section 73 StGB and the product of the offence under Section 74(1) StGB. In such a case, the court must consider in each case whether the requirements of one or the other provision can be fully affirmed. If the conditions for confiscation under Section 73 StGB are also affirmed, the confiscation of the object in question must be ordered, even if this is left to the discretion of the court for the confiscation of the product of the offence under Section 74(1) StGB.

1.b.- Confiscation of the value (Section 73c²², 73d²³, 74c²⁴ StGB; Section 29a OWiG²⁵)

Value confiscation refers to a confiscation measure targeting property of equivalent value to the proceeds or instrumentality of a crime. It is applicable most often in cases where criminals transform proceeds of crime into other property in order to hide its illicit origin and camouflage any audit trail. In case of impossibility of direct confiscation (because it is not possible to trace them, they are out of reach of the courts, they have been destroyed,

their value has decreased or for any other circumstance) assets are confiscated in an amount that corresponds to their value, adding the profits obtained with them.

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

If an initially obtained thing is no longer in the offender's property, the value of the thing is confiscated (Section 73c StGB). If the thing obtained can still be confiscated, but its value falls short of the originally obtained increase in property value, compensation for

²² Section 73c: Confiscation of value of proceeds of crime

If the confiscation of a particular object is impossible due to the nature of that which was obtained or for some other reason or because confiscation of a surrogate object has not been ordered as required by section 73 (3) or section 73b (3), the court orders the confiscation of a sum of money equal to the value of that which was obtained. The court also makes such an order in addition to confiscating an object to the extent that its value falls short of the value of that which was originally obtained.

²³ Section 73d: Calculation of value of obtained object; estimate

(1) When calculating the value of an object obtained, any expenditure on the part of the offender, participant or the other person is to be deducted. An amount spent or used in the commission or preparation of the unlawful act is not deducted, however, unless it was used to comply with an obligation against the injured party.

(2) The scope and value of that which was obtained and the amount which is to be deducted may be estimated.

²⁴ Section 74c: Confiscation of value of products of crime, means and resources used, and objects of crime from offenders and participants

(1) If it is impossible to confiscate a particular object because the offender or participant has sold or used up the object or frustrated its confiscation in some other way, the court may

order the confiscation of an amount of money from the offender or participant which is equivalent to the value of the object.

(2) The court may also issue such an order in addition to or instead of the confiscation of an object if the offender or participant has encumbered said object, prior to the decision as to the confiscation having been handed down, with the right of a third party, the expiry of which cannot be ordered or cannot be ordered without compensation being made (section 74b (2) and (3) and section 75 (2)). If the court issues such an order in addition to the confiscation, the amount of the equivalent sum of money is determined based on the value of the encumbrance on the object.

(3) The value of the object and of the encumbrance may be estimated.

²⁵ Section 29a: Confiscation of the Value of the Proceeds of an Offence

(1) If the perpetrator has gained something by means of or for an act which may be sanctioned by a regulatory fine, and if a regulatory fine has not been assessed against him for the act, the confiscation of a sum up to the amount of the pecuniary advantage gained may be ordered.

(2) The ordering of the confiscation of a sum up to the amount stated in subsection 1 may be directed against another party who is not the offender if

1. he has obtained something by means of an act which may be sanctioned by a regulatory fine and the offender acted for him,

2. what has been acquired

a) was transferred to him free of charge or without lawful reason, or

b) was transferred, and he recognised or should have recognised that what has been acquired originates from an act which may be sanctioned by a regulatory fine, or

3. what has been acquired

a) has passed to him as an inheritance, or

b) was transferred to him as a person entitled to a compulsory portion or a legatee.

The first sentence numbers 2 and 3 shall not apply if what has been acquired was previously transferred to a third party who did not recognise or could not be expected to recognise that what has been acquired originates from an act which may be sanctioned by a regulatory fine, for a fee and with a lawful reason.

(3) The expenditure of the offender or of the third party shall be deducted when determining the value of what has been acquired. What was expended or used for the commission of the offence or its preparation shall however not be allowed.

(4) The extent and value of what has been acquired, including the deductible expenditure, may be estimated. Section 18 shall apply *mutatis mutandis*.

(5) If no regulatory fining proceedings are initiated against the perpetrator, or if they are discontinued, confiscation may be ordered in its own right.

the value of the thing can be confiscated in addition to the thing. The value to be confiscated may be estimated by the court (Section 73d(2) and 74c(3) StGB; Section 29a(4) OWiG).

The value confiscation is mandatory as a consequence of the unjustified wrongdoing of the perpetrator or the participant, which fulfilled the requirements of a criminal offence.

If the unjustified wrongdoing is a regulatory offence only, the value confiscation is not mandatory. If the perpetrator has gained something by means of or for an act which may be sanctioned by a regulatory fine, and if a regulatory fine has not been assessed against him for the act, the confiscation of a sum up to the amount of the pecuniary advantage gained may be ordered (Section 29a(1) OWiG).

If the confiscation of products of crime, means and resources used, and objects of crime from offenders and participants on the basis of Section 74 StGB is impossible, because the offender or participant has sold or used up the object or frustrated its confiscation in some other way, the court may order the confiscation of an amount of money from the offender or participant which is equivalent to the value of the object (Section 74c(1) StGB). The court may also issue such an order in addition to or instead of the confiscation of an object if the

offender or participant has encumbered said object, prior to the decision as to the confiscation having been handed down, with the right of a third party, the expiry of which cannot be ordered or cannot be ordered without compensation being made (Section 74c(2)). The requirements for confiscation under Section 74 StGB (see 1.a) must also be met here, i.e. the perpetrator or participant must have culpably committed an intentional criminal act. As under Section 29a(1) OWiG, these two decisions are also left to the discretion of the court.

1.c.- Non-conviction-based confiscation -NCBC- or “autonomous/independent confiscation” (Section 76a StGB)²⁶

²⁶ Section 76a: Independent confiscation

(1) If it is impossible to prosecute or convict a specific person for a criminal offence, the court independently orders that the object be confiscated or rendered unusable, provided that, in all other respects, the conditions under which the measure is prescribed by law are met. If confiscation is permissible, the court may independently order it subject to the conditions of sentence 1. Confiscation is not ordered if there is no request to prosecute, authorisation to prosecute or request to prosecute from a foreign state, or if a decision with regard to said confiscation has already been taken and become final.

(2) Under the conditions of Sections 73, 73b and 73c, it is even permissible for the court to independently order the confiscation of the proceeds of crime and to independently confiscate the value of the proceeds of crime in those cases in which the prosecution of the offence has become barred by the statute of limitations. Under the conditions of Sections 74b and 74d, the same applies to instances in which the court independently orders confiscation of a dangerous object, confiscation of materialised content or rendering unusable.

(3) Subsection (1) is also to be applied if the court dispenses with imposing a penalty or if the proceedings are terminated based on a legal provision which allows this to be done at the discretion of the public prosecution office or of the court, or as they may decide by mutual consent.

(4) An object seized on suspicion that one of the offences referred to in sentence 3 has been committed, and any uses made thereof, are, as a rule, to be separately confiscated even in those cases in which the object derives from an unlawful act and it is impossible to prosecute or convict the person affected by the confiscation for the underlying offence. If the confiscation of an object is ordered, ownership of the property or the right to it devolves to the state once the order becomes final; section 75 (3) applies accordingly.

Offences for the purposes of sentence 1 are 1. under this Code:

- a) preparing a serious violent offence endangering the state under section 89a and financing terrorism under section 89c (1) to (4),
- b) forming criminal organisations under section 129 (1) and forming terrorist organisations under section 129a (1), (2), (4) and (5), in each case also in conjunction with section 129b (1),
- c) pimping under section 181a (1), also in conjunction with (3),
- d) dissemination, procurement and possession of child pornographic content in the cases under section 184b (2),

Non-conviction-based confiscation refers to a confiscation measure taken in the absence of a criminal conviction. Directive 2014/42/EU covers cases where a criminal conviction is not possible because the suspect has become ill or fled the jurisdiction, but the court is nevertheless convinced in a criminal procedure that the assets are of criminal origin, and a conviction would have been reached had it not been for the illness or the absconding of the defendant. So, confiscation is also possible in cases where the initiated criminal proceedings could not move forward, and no conviction can be handed down. Under the German legal system NCBC is provided in Section 76a(1)-(3) StGB when the prosecution or conviction of a particular person is not possible.

In addition, pursuant to Section 76a(4) StGB, since 2017 it has also been possible to confiscate an item seized on suspicion of an underlying criminal offence. In this respect, these are not criminal proceedings in the true sense of the term, but rather proceedings against the item ("in rem"), which are, however, conducted before a criminal court on the

basis of criminal law in accordance with the rules of criminal procedure law; thus, these are precisely not confiscation proceedings under civil law. However, this only applies if the suspicion related to one of the crimes explicitly listed in the list of offences in Section 76a(4) of the Criminal Code. These are typically serious organized crime offences.

So, in Germany NCBC is possible for the confiscation of the proceeds of all criminal offences due to:

- ✓ the persistent illness or death of the perpetrator
- ✓ absconding or fleeing of the investigated person (Section 76a(1) StGB),
- ✓ when the prosecution has become barred by statute of limitations (Section 76a(2)

StGB) and

- ✓ any other exemption from liability or extinction of criminal liability.

e) human trafficking, forced prostitution and forced labour on a commercial basis and by a gang under sections 232 to 232b as well as human trafficking organised by a gang for the purpose of exploitation of labour and exploitation involving deprivation of liberty under sections 233 and 233a,

f) money laundering under section 261 (1) and (2); 2. under the Fiscal Code (*Abgabenordnung*):

a) tax evasion subject to the conditions of section 370 (3) no. 5,

b) smuggling on a commercial basis, with the use of violence or as a gang under section 373,

c) receiving, holding or selling goods obtained by tax evasion in the case under section 374 (2); 3.

under the Asylum Act (*Asylgesetz*):

a) incitement to submit fraudulent applications for asylum under section 84 (3),

b) incitement, on a commercial basis or by a gang, to submit fraudulent applications for asylum

under section 84a; 4. under the Residence Act (*Aufenthaltsgesetz*):

a) smuggling of foreigners into the federal territory under section 96 (2),

b) smuggling of foreigners into the federal territory resulting in death as well as smuggling on a commercial basis and by a gang under section 97;

5. under the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*):

intentional offences under sections 17 and 18; 6. under the Narcotics Act:

a) offences as defined by a provision included by reference in section 29 (3) sentence 2 no. 1, subject to the conditions set out therein, b) offences under section 29a, section 30 (1) nos. 1, 2 and 4 as well as sections 30a and 30b; 7. under the War Weapons Control Act (*Gesetz über die Kontrolle von Kriegswaffen*):

a) offences under section 19 (1) to (3) and section 20 (1) and (2) as well as section 20a (1) to (3), in each case also in conjunction with section 21,

b) offences under section 22a (1) to (3); 8. under the Weapons Act (*Waffengesetz*):

a) offences under section 51 (1) to (3),

b) offences under section 52 (1) no. 1 and no. 2 (c) and (d) as well as (5) and (6).

Furthermore, after the death of the accused person, their heir can be subject of a thirdparty confiscation (Section 73b(1) No. 3 StGB).

The procedural framework is mainly covered by the special provisions governing independent confiscation proceedings, as they are laid down in the Section 437 of the German Code of Criminal Procedure (Strafprozeßordnung – StPO).²⁷ It is necessary to clarify that the indications of illegal acquisition of an object mentioned therein are not rules of evidence, the existence of which would require an NCBC to be ordered. They are only intended to provide the court with a guideline. If the judge is not convinced of the illegal origin of an object despite the presence of all three explicitly mentioned aspects, he must refuse its NCBC. If, on the other hand, he is convinced of it, although none of the three explicitly mentioned situations are present, he must, of course, justify the NCBC particularly well. However, he may also order it in this case. The principle of free judicial assessment of evidence (*Grundsatz der freien richterlichen Beweiswürdigung* – Section 261 StPO) is respected.

The German law enables confiscation without a prior conviction in those given cases and it is noteworthy that NCBC is mandatory under the German legal system.

1.d.- Extended confiscation (Section 73a²⁸ StGB)

Extended confiscation concerns orders which go beyond the direct proceeds of a given investigated offence. The order follows a criminal conviction, targeting property “beyond the direct (and concrete) proceeds of the crime for which the offender was convicted, where the property seized is derived from criminal conduct.” A direct link between the property and the offence, such as in the case of standard confiscation measures, is not needed if the court assesses that the offender’s property was derived from another unlawful conduct. Therefore, extended confiscation enables deprivation of property belonging to a convicted person when the circumstances of the case indicate that the property is derived from criminal conduct.

Until 2017, extended confiscation was only possible in relation to certain crimes typically attributable to organized crime. In the meantime, extended confiscation must be considered for all criminal offences. If the court is convinced that the requirements are met, the order is mandatory.

Under the German legal system, the court must ‘decide, based on well-founded objective evidence’ that the property derives from illegal activities. After taking evidence, the court must be convinced of the origin of the objects to be confiscated from other crimes than

²⁷ Section 437: Special provisions governing independent confiscation proceedings

When giving its decision on independent confiscation pursuant to section 76a (4) of the Criminal Code, the court may, in particular, base its conviction as to whether the object was derived from an unlawful act on the gross imbalance between the value of the object and the legitimate income of the person concerned. It may also take the following into account when reaching its decision:

1. the outcome of the investigations into the offence giving rise to the proceedings, 2. the circumstances under which the object was found and secured, and
3. the person concerned’s other personal and economic circumstances.

²⁸ Section 73a: Extended confiscation of proceeds of crime from offenders and participants

(1) If an unlawful act has been committed, the court orders the confiscation of objects belonging to the offender or participant even in those cases in which the objects were obtained by other unlawful acts or for such acts.

(2) If the offender or participant participated in some other unlawful act prior to the confiscation having been ordered in accordance with subsection (1) and if a new decision is to be taken regarding the confiscation of objects belonging to the offender or participant, the court takes account of the order which has already been issued.

those charged. In this regard, the circumstances set forth in Section 437 StPO for the NCBC (Section 76a(4) StGB) shall also be given particular weight for the affirmation of an extended confiscation of proceeds of crime.

This powerful type of confiscation is intended to cover cases in which, based on wellfounded objective evidence, it is determined that certain goods or effects come from a previous criminal activity, but their specific legal origin is not determined. The factors to be particularly assessed by the court are the following (see Section 437 StPO):

- The disproportion between the value of the given goods/financial situation and lifestyle with the lawful income of the convicted person.
- The outcome of the investigations into the offence giving rise to the proceedings.
- The circumstances under which the object was found and secured.
- The person concerned's other personal and economic circumstances.

1.e.- Third-party Confiscation (Section 73b StGB²⁹, Section 29a(2) OWiG³⁰)

Third-party confiscation refers to a confiscation measure made to deprive someone other than the offender – the third party – of criminal property, where that third party is in possession of property transferred to him or her by the offender. It is used most often when criminals transfer property to a knowing third party to maintain its enjoyment without being the legal owner, thus attempting to avoid the confiscation of such property in case of conviction.

It should be noted for Germany that legal entities cannot be charged with a criminal offence. If a natural person has obtained something for a company as the perpetrator of

²⁹ Section 73b: Confiscation of proceeds of crime from other persons

(1) The order of confiscation referred to in sections 73 and 73a is made against another person who is not the offender or participant if

1. that person has obtained something by committing the offence and the offender or participant acted on said person's behalf,

2. the object so obtained

a) was transferred to that person free of charge or without legal reason or

b) was transferred to that person and said person recognised, or ought to have recognised, that the object obtained was derived from an unlawful act or

3. the object so obtained

a) has devolved to that person in the capacity as heir or

b) has been transferred to that person in the capacity as a party entitled to the compulsory portion in an estate or as a beneficiary under a will.

Sentence 1 nos. 2 and 3 has no application if the object obtained was previously transferred, for a fee and on the basis of a legal reason, to a third party who did not recognise or did not have reason to recognise that the object obtained was derived from an unlawful act.

(2) If, subject to the conditions of subsection (1) sentence 1 no. 2 or 3, the other party obtains an object which is equivalent in value to the object obtained or benefits which have been derived from such object, the court orders their confiscation as well.

(3) Subject to the conditions of subsection (1) sentence 1 no. 2 or 3, the court may also order the confiscation of whatever was obtained

1. by way of sale of the object obtained or as compensation for its destruction, damage or confiscation or

2. on the basis of a right obtained.

³⁰ Section 29a(2): The ordering of the confiscation of a sum up to the amount stated in subsection 1 may be directed against another party who is not the offender if

1. he has obtained something by means of an act which may be sanctioned by a regulatory fine and the offender acted for him,

2. what has been acquired

a) was transferred to him free of charge or without lawful reason, or

b) was transferred, and he recognised or should have recognised that what has been acquired originates from an act which may be sanctioned by a regulatory fine, or 3. what has been acquired

a) has passed to him as an inheritance, or

b) was transferred to him as a person entitled to a compulsory portion or a legatee.

The first sentence numbers 2 and 3 shall not apply if what has been acquired was previously transferred to a third party who did not recognise or could not be expected to recognise that what has been acquired originates from an act which may be sanctioned by a regulatory fine, for a fee and with a lawful reason.

a criminal offence (e.g. corruption), a third party confiscation must be carried out against the company in order to recover the proceeds. On the other hand, companies can be the addressees of fines under the Act on Regulatory Offences (OWiG), so that the fine imposed on a company under Section 17 OWiG can be increased by the amount of money to be recovered. Similarly, direct confiscation of value may be ordered against a company pursuant to Section 29a(1) OWiG. However, Section 29a(2) OWiG also provides for third party confiscation against natural and legal persons. Since the reform of 2017, the same requirements apply in principle to this as to criminal third-party confiscation under Section 73b StGB.

In Germany, third party confiscation was already permitted before the 2017 reform. However, its prerequisites were not regulated, which is why case law established various

constellations for third party confiscation in landmark decisions. The legislator then explicitly included these constellations in Section 73b(1) No. 1-3 StGB. The same requirements apply to third party confiscation under the law on administrative fines pursuant to Section 29a(2) No. 1-3 OWiG.

The three cases are:

- The offender or participant has obtained something by committing the offence and the offender or participant acted on said person's behalf Section 73b(1) No. 1 StGB).
- The object so obtained was either transferred to that person free of charge or without legal reason or it was transferred to that person and said person recognised, or ought to have recognised, that the object obtained was derived from an unlawful act or (Section 73b(1) No. 2 StGB)
- The object so obtained has either devolved to that person in the capacity as heir or it has been transferred to that person in the capacity as a party entitled to the compulsory portion in an estate or as a beneficiary under a will (Section 73b(1) No. 3 StGB).

Confiscation of products of crime, means of crime or objects of crime from other persons is also possible under the conditions of Section 74a StGB³¹.

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

To prevent the destruction, transformation, removal, transfer, or disposal of property with a view to its eventual confiscation, a freezing order can be issued in the pre-trial stage.

³¹ Section 74a: Confiscation of products of crime, means of crime or objects of crime from other persons

Where a statute refers to this provision, objects may also be confiscated in derogation from Section 74 (3) if, at the time of the decision, the person who owns them or has a right to them

1. contributed at least recklessly to the objects being used as the means of crime or if they were the object of crime or

2. acquired the objects in a reprehensible manner in the full knowledge of the circumstances which would have allowed for their confiscation.

The procedure for this in Germany is governed by Section 111b - 111q of the Code of Criminal Procedure. The court decides on the application of the public prosecutor. In doing so, it basically has a free discretion, i.e. it does not have to seize the asset. Only if there are urgent reasons for ordering the confiscation of the asset at the end of the proceedings, the court shall confiscate the asset. This does not mean that the object must be seized under these conditions. However, as a rule, the object will be confiscated unless, exceptionally, good reasons can be given against it.

Until the 2017 reform, such a seizure of assets was possible for a maximum of one year, so that afterwards - if there were no criminal proceedings or confiscation proceedings - the asset had to be returned to the owner. Since 2017, this time limit has been dropped (Section 111b(1) StPO⁶⁴⁰), so that today it is also possible to seize assets for longer than one year. This applies even if there are no urgent reasons for assuming that the asset will subsequently be confiscated. This is very problematic because without a maximum period and without relatively strict requirements, a seizure based solely on mere suspicion can in fact last indefinitely. This clearly violates the fundamental rights of the owner to his property (Art. 17 EU Charter of Fundamental Rights; Art. 1st Additional Protocol to the European Convention on Human Rights (ECHR)), which is in fact seized from him without a legally binding confiscation order, and to a fair trial and an effective legal remedy (Art. 47 EU Charter of Fundamental Rights; Art. 6 and 13 ECHR), as it is enshrined in Art. 8(1) of the Directive 2014/42/EU.

⁶⁴⁰ Section 111b: Seizure to secure confiscation or rendering unusable of object

(1) If it is reasonable to assume that the conditions for the confiscation or rendering unusable of an object are met, the object may be seized to secure enforcement. If there are cogent reasons justifying this assumption, such seizure is, as a rule, to be ordered. Section 94 (3) remains unaffected.

(2) Sections 102 to 110 apply accordingly.

7th Guideline – Romania

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

- **Special confiscation**, which corresponds to **direct confiscation, confiscation in equivalent, confiscation against third parties and non conviction based confiscation**
- **Extended confiscation**, that can be ordered against the **convicted person and against third parties**, and also can be ordered as **confiscation in equivalent**.
- **both types of confiscation, special and extended**, are regulated in the Criminal Code - in General Part of the Criminal Code, under Title IV "Security measures" (art. 112 and 112¹)
- **Only criminal confiscation falls within the scope of the Regulation**
- **Both confiscation measures in criminal matters in Romania are ordered only by the criminal Courts, thus fulfilling the conditions set out in Article 1 para. 4 and recital 13 of the Regulation.**

In addition to the general provisions mentioned above (art. 112 and 112¹ Criminal Code), which define the different models of criminal confiscation in the Romanian legal system, confiscation is also provided for by specific provisions in the special part of the Criminal Code or in other special laws. These provisions **do not establish new forms of confiscation**, but only regulate particular applications of special confiscation and extended confiscation:

- **Corruption offences** (taking bribes art. 289 Criminal Code, giving bribes art. 290 Criminal Code, influence peddling art. 291 Criminal Code, buying influence art. 292 Criminal Code);
- **Offences of money laundering and terrorist financing** (Law 129/ 2019 on preventing and combating money laundering and terrorist financing, as well as amending and supplementing some normative acts - art. 51);

- **Offences of illicit drug trafficking and consumption** (Law No 143/2000 on preventing and combating illicit drug trafficking and consumption - Article 16);
- **Offences against the hunting and game protection regime** (Law on hunting and game protection no. 407/2006 - art. 46).

The aforementioned forms of freezing and confiscation orders can be described as follows.

Types of confiscation regulated by criminal law

National criminal law provides **two types of confiscation following the commission of a criminal offence: special confiscation**, which also includes the situation of **confiscation in equivalent, and extended confiscation**, both of which are regulated in the Criminal Code - hereinafter referred to as the CP.

Both special and extended confiscation can be applied to third parties, thus including the type of **confiscation against third parties**.

Special confiscation can also be applied even in the absence of a conviction, while extended confiscation cannot be applied in the absence of a conviction. Thus, in Romania, **confiscation without a conviction is regulated and is also a form of special confiscation**.

To sum up, in Romania **special confiscation** corresponds to **direct confiscation, confiscation in equivalent, confiscation against third parties and confiscation without conviction**, while **extended confiscation** can be ordered both against the **convicted person and against third parties**, and also can be order as **confiscation in equivalent**.

In national legislation we also find forms of confiscation of an administrative nature in the following two situations:

- a) OG 2/2001 - contravention confiscation;

b) in Law No 144/2007 on the establishment, organisation and functioning of the National Integrity Agency with subsequent amendments and additions.

Criminal confiscation differs from administrative confiscation. In both cases, confiscation is justified by the existence of a state of social danger arising from the nature of the property linked to a specific offence. What distinguishes them is that in the case of criminal confiscation the property is linked to a criminal offence, whereas in the case of administrative confiscation, the offence is either a contravention or is caused by a manifest disproportion of property.

In view of these aspects, we consider that **only criminal confiscation falls within the scope of the Regulation.**

The legal regime for **special confiscation and extended confiscation** is set out in General Part of the CP, under Title IV "Security measures". Confiscation is regulated as a **security measure**, i.e. a **preventive measure of constraint**, aimed at removing a state of danger and preventing the commission of criminal offences.

Special confiscation and extended confiscation are the only security measures of a patrimonial nature. Confiscation affects a person's property and can therefore be considered a property security measure for the benefit of society.

The CP provides that confiscation may be imposed on a person who has **committed an offence under criminal law that is unjustified** and that it may also be imposed if the offender is not punished.

In addition to the general provisions mentioned above, which define the different models of criminal confiscation in the Romanian legal system, confiscation is also provided for by specific provisions in the special part of the CP or in other special laws for the following offences:

- **Corruption offences** (taking bribes art. 289 CP, giving bribes art. 290 CP, influence peddling art. 291 CP, buying influence art. 292 CP);

- **Offences of money laundering and terrorist financing** (Law 129/ 2019 on preventing and combating money laundering and terrorist financing, as well as amending and supplementing some normative acts - art. 51);
- **Offences of illicit drug trafficking and consumption** (Law No 143/2000 on preventing and combating illicit drug trafficking and consumption - Article 16);
- **Offences against the hunting and game protection regime** (Law on hunting and game protection no. 407/2006 - art. 46).

The state of danger in the case of confiscation concerns the goods expressly mentioned in the provisions of the CP. This condition must always be linked to the dangerousness of the person of the offender who possesses the goods and is able to put them into circulation.

Although some goods are inherently dangerous (weapons, drugs, etc.), it is essential that the dangerousness be linked to the person of the offender.

It must also be taken into account that some goods, although not dangerous in themselves, are dangerous because of their illicit acquisition by the offender (e.g. money received by an official as a bribe, the offender being in danger of committing other offences in the future).

Confiscation is applied in rem, **on the property linked to the offence**. For this reason, **it is not subject to any statute of limitations and is not affected by grounds that lead to the termination of criminal proceedings or that extinguish criminal liability**.

As a rule, confiscation applies to property **belonging to the offender** and only in exceptional cases expressly provided for by law to property belonging to **other persons**.

Confiscation is a final security measure. **It cannot be revoked on the grounds that the threat has ceased to exist**. Confiscated property is returned to the State or destroyed.

In order to eliminate as quickly as possible the danger posed by the existence of the property to be confiscated, the legislator has provided for the possibility of **seizing and**

freezing it for the purpose of confiscation, both at the prosecution stage, by the public prosecutor, and at the trial stage, by the judge.

Special confiscation

According to art. 112 CP:

(1) Are subject to special confiscation:

- a) assets produced by perpetrating any offense stipulated by criminal law;*
- b) assets that were used in any way, or intended to be used to commit an offense set forth by criminal law, if they belong to the offender or to another person who knew the purpose of their use;*
- c) assets used immediately after the commission of the offense to ensure the perpetrator's escape or the retention of use or proceeds obtained, if they belong to the offender or to another person who knew the purpose of their use;*
- d) assets given to bring about the commission of an offense set forth by criminal law or to reward the perpetrator;*
- e) assets acquired by perpetrating any offense stipulated by criminal law, unless returned to the victim and to the extent they are not used to indemnify the victim;*
- f) assets the possession of which is prohibited by criminal law.*

(2) In the case referred to in par. (1) lett. b) and c), if the value of assets subject to confiscation is manifestly disproportionate to the nature and severity of the offense, confiscation will be ordered only in part, by monetary equivalent, by taking into account the result produced or that could have been produced and asset's contribution to it. If the assets were produced, modified or adapted in order to commit the offense set forth by criminal law, they shall be entirely confiscated.

(3) In cases referred to in par. (1) lett. b) and c), if the assets cannot be subject to confiscation, as they do not belong to the offender, and the person owning them was not aware of the purpose of their use, the cash equivalent thereof will be confiscated in compliance with the stipulations of par. (2).

(4) The stipulations of par. (1) lett. b) do not apply to offenses committed by using the press.

(5) If the assets subject to confiscation pursuant to par. (1) lett. b) - e) are not to be found, money and other assets shall be confiscated instead, up to the value thereof.

(6) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such, except for the assets provided for in par. (1) lett. b) and c), shall be also confiscated.

Extended confiscation

Law No. 63/2012 amended both the 1969 Criminal Code and Law No. 286/2009 on the new Criminal Code, introducing into both acts the security measure of **extended confiscation**. This legislative amendment aimed to transpose into Romanian law the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-related Proceeds, Instrumentalities and Property.

On 5 November 2020, Law No. 228/2020 entered into force, amending the Criminal Code with regard to adapt extended confiscation provisions. The amendment made by Law No. 228/2020 was necessary following the entry into force of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and the proceeds from crime committed in the European Union. Under this new regulation, extended confiscation will be ordered where a person has been convicted of an offence punishable by a custodial sentence of four years or more and has property acquired within the last five years which the Court is satisfied has been derived from criminal activity. The conviction is based on the disproportion between the legal income and the assets.

According to art. 112¹ CP:

(1) Assets other than those referred to in Article 112 are also subject to confiscation, when a person is convicted of an offence that is likely to bring him material benefit and for which the punishment prescribed by law is imprisonment for 4 years or more, the Court shall form the conviction that the assets in question derive from criminal activities. The Court's conviction may also be based on the disproportion between the lawful income and the person's wealth.

(2) Extended confiscation shall be ordered on property acquired by the convicted person within a period of 5 years before and, if applicable, after the commission of the offence, by the date of issue of the writ of summons. Extended confiscation may also be ordered on property transferred to third parties if they knew or should have known that the purpose of the transfer was to avoid confiscation.

(3) For the purposes of applying the provisions of paragraph 1, the following shall apply (2) account shall also be taken of the value of property transferred by the sentenced person or by a third party to a family member or to a legal person over which the sentenced person has control.

(4) Property within the meaning of this Article shall include money.

(5) In determining the difference between the lawful income and the value of the property acquired, the value of the property at the time of its acquisition and the expenses incurred by the sentenced person, members of his family shall be taken into account.

(6) If the property subject to confiscation is not found, money and goods shall be confiscated in its place up to the amount of their value.

(7) Property and money obtained from the exploitation or use of property subject to confiscation, as well as property produced by such property, shall also be confiscated.

(8) Confiscation may not exceed the value of the property acquired during the period referred to in paragraph

1. (2), which exceeds the level of the lawful income of the convicted person.

Procedural aspects about confiscation

For a better understanding of the situations in which criminal confiscation may be ordered, the following are **general aspects of the conduct of criminal proceedings in Romania**.

Article 16 of the Romanian Criminal Procedure Code - hereafter CPP - regulates the cases in which a criminal case is closed. If one of these cases is identified, the criminal proceedings are closed, regardless of the stage they are at - indictment or trial. The cases are the following:

a) the action in question does not exist;

The subject matter of the Regulation (EU) 2018/1805. National confiscation models

- b) the action is not covered by the criminal law or was not committed with the guilt required by law;*
- c) there is no evidence that a person committed the offense;*
- d) there is a justifying or non-imputability cause;*
- e) a prior complaint, an authorization or seizure of the body of competent jurisdiction or other requirement set by the law, required for the initiation of criminal action, is missing;*
- f) amnesty or statute of limitations, or death of a natural-person suspect or defendant occurred or de-registration of a legal-entity suspect or defendant was ordered;*
- g) a prior complaint was withdrawn, for offenses in relation to which its withdrawal removes criminal liability, reconciliation took place or a mediation agreement was concluded under the law;*
- h) there is a non-penalty clause set by the law;*
- i) double jeopardy (res judicata);*
- j) a transfer of proceedings with a different country took place under the law.*

If, in the course of the criminal proceedings, the public prosecutor finds that one of these cases applies, he shall order to close the file.

Also, during the prosecution, the prosecutor may order the discontinuance of the prosecution if he considers that, although an offence has been committed, there is no public interest in prosecuting the offence. The prosecutor will then review the appropriateness of the prosecution and this decision will be confirmed by a judge. It should be noted that the prosecution cannot be dropped if one of the cases provided for in Article 16 is established.

If any of these cases are established by the Court on trial, it will order acquittal for cases a-d and dismissal of the prosecution for the remaining cases.

If a person has been sent to criminal Court and the Court does not find any of the cases referred to in Article 16, it shall pronounce a conviction.

We shall now consider each of these situations from the point of view of the possibility of confiscation.

Confiscation during the criminal investigation

As we have already explained, if the prosecutor finds one of the cases under Article 16 during the prosecution, he will close the file. According to Art. 315 (2) c) of the CCP, the prosecutor shall refer the matter to the Preliminary Chamber Judge if he considers that the conditions for **special confiscation** are met. At the same time, the prosecutor must follow the same procedure if he decides to discontinue the criminal proceedings.

In this case, the **Preliminary Chamber Judge cannot be asked to order extended confiscation**, since one of the conditions for this type of confiscation is the existence of a conviction. If the public prosecutor orders the case to be closed, this condition is not met.

The prosecutor may also refer the case to the Preliminary Chamber Judge for special confiscation **regardless of the basis for the closure**. Although not expressly excluded, certain grounds for closure are clearly incompatible with the institution of special confiscation. However, to order the special confiscation, a judge must find that an unjustified criminal act has been committed.

When the prosecutor formulates the proposal for special confiscation, the provisions of Article 549¹ of the CPP become applicable:

(1) Where the public prosecutor has ordered the dismissal or abandonment of the prosecution [...] and the matter has been referred to the Preliminary Chamber Judge for a precautionary measure of special confiscation or the destruction of a document, the dismissal order or, where appropriate, the order ordering the abandonment of the prosecution confirmed by the Preliminary Chamber Judge, accompanied by the case file, shall be submitted to the Court which would be competent by law to hear the case at first instance [...].

(2) The Preliminary Chamber Judge shall determine the time limit for the decision, depending on the complexity and specific features of the case, which may not be shorter than 30 days.

(3) The prosecutor shall be notified of the time limit and the persons whose rights or legitimate interests may be affected shall be summoned and shall be served with a copy of the order, and shall be informed that they may submit written notes within 20 days of receipt.

(4) The Preliminary Chamber Judge shall give his decision in a public hearing, after hearing the prosecutor and the persons whose rights or legitimate interests may be affected, if they are present.

(5) The Preliminary Chamber Judge, in deciding the request, may order one of the following solutions:

(a) reject the proposal and order, as appropriate, the return of the property or the lifting of the protective measure taken for confiscation;

(b) allow the proposal and order the confiscation of the property or, where appropriate, the destruction of the document.

(6) Within 3 days of the communication of the decision, the public prosecutor and the persons referred to in paragraph 1 shall (3) may lodge a reasoned appeal.

Confiscation during the criminal trial

If, after the case has been committed for trial, the criminal Court finds that one of the cases referred to in Article 16 has occurred, it shall not pronounce a conviction, but shall acquit the accused - points a) to d) - or shall dismiss the criminal proceedings - points e) - j).

In the case of **extended confiscation**, the criminal Court must order a conviction for at least one offence. Consequently, if the criminal Court orders an acquittal or termination of the criminal proceedings, it cannot order extended confiscation.

In the case of **special confiscation**, it can be ordered **even if the criminal Court does not order a conviction**. In this case, **no further special procedure is carried out**, but after the acquittal or termination of the criminal proceedings, if it is established that the conditions for special confiscation are met, the Court will order this type of confiscation.

If, after committing the offender to trial, the criminal Court finds that the offence is a criminal offence and that the offender is guilty of the offence, it shall order a conviction. In this case, together with the conviction, it will also order special confiscation and/or extended confiscation if it finds that all the specific conditions are met.

In Romania there is no procedure for reviewing the application of extended confiscation in another criminal case after a person has been convicted. Therefore, **extended**

confiscation can only be ordered in the criminal proceedings in which the person was convicted.

Procedural aspects about freezing measures

The Code of Criminal Procedure regulates the precautionary measures in the General Part, Title V, Chapter III, Articles 249-254.

Freezing measures are **procedural measures of real coercion** which consist in the freezing of movable or immovable property belonging to persons designated by law, by imposing an attachment on such property.

As the very name of the law indicates, these procedural measures have only a precautionary and not a remedial function. At the same time, they are procedural measures of a real nature, designed to ensure the enforcement of the fine or the costs or the special/extended confiscation.

The freezing measures prevents the person against whom the measure has been applied from disposing of or encumbering the assets in question and thus also prevents the risk of insolvency.

General conditions for taking precautionary measures

Article 249. - (1) The public prosecutor, in the course of criminal proceedings, the preliminary chamber judge or the Court, ex officio or at the request of the public prosecutor, in the preliminary chamber procedure or in the course of the trial, may take precautionary measures, by order or, as the case may be, by reasoned decision, in order to prevent the concealment, destruction, disposal or evasion of assets which may be subject to special or extended confiscation or which may serve to guarantee the enforcement of the fine or legal costs or to make good the damage caused by the offence.

(2) Precautionary measures shall consist in the seizure of movable or immovable property by placing a lien on it.

(3) Precautionary measures to guarantee the execution of the fine may be taken only against the property of the suspect or accused person.

(4) Precautionary measures for special or extended confiscation may be taken against the property of the suspected or accused person or of other persons in whose property or possession the property to be confiscated is located.

(4¹) In the case of property which may be subject to special or extended confiscation, the prosecutor shall take precautionary measures to prevent the concealment, destruction, alienation or evasion of prosecution of such property.

(5) Precautionary measures to compensate for the damage caused by the offence and to guarantee the execution of legal expenses may be taken against the property of the suspect or accused and the person liable in tort up to the probable value thereof.

(6) The precautionary measures referred to in paragraph 1 shall be taken in accordance with the provisions of this Article. (5) may be taken during the criminal proceedings, the pre-trial proceedings and the trial, and at the request of the civil party. The precautionary measures taken ex officio by the judicial bodies referred to in paragraph 5 shall be taken in accordance with the procedure referred to in Article 6. (1) may also be used by the civil party.

(7) Precautionary measures taken under paragraph 1 shall be used by the judicial authorities. (1) shall be mandatory if the injured party is a person who lacks or has limited capacity to act.

(8) Property belonging to a public authority or institution or to another person governed by public law or property exempted by law may not be seized.

Precautionary measures may also be ordered with a view to special or extended confiscation, in which case they may relate to the property of the suspect, the accused or other persons in whose ownership or possession the property to be confiscated is located.

Although the wording of Art. 249 para. 4 CPP expressly states that such a measure may also be ordered in respect of the property of third parties, it is assumed in the literature that the measure of extended confiscation will ultimately be ordered not in respect of the property of third parties, but in respect of the property derived from the criminal activity of the convicted person.

European Union legislation on confiscation ratified by Romania

- Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.
- Framework Decision 2005/212/JHA on Confiscation of Crime-related Proceeds, Instrumentalities and Property.
- Framework Decision of 6 October 2006, OJ L 328/2006, on the application of the principle of mutual recognition to confiscation orders.
- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.
- Framework Decision 2007/845/JHA on cooperation between national Asset Recovery Offices of the Member States in the tracing and identification of proceeds from crime.
- Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and the proceeds of crime committed in the European Union.
- Regulation (EU) 2018/1805 on mutual recognition of freezing and confiscation orders.

8th Guideline – Portugal

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

- Direct confiscation (articles 109 (1) and 110 (1) (a) and (b) PC)
- Value confiscation (articles 109 (3) and 110 (4) PC)
- Extended confiscation (unexplained wealth confiscation) (article 7.º Law no. 5/2002)
- Non-conviction-based confiscation [articles 109 (2) and 110 (5) PC]
- Third-party confiscation [articles 111 PC]

The aforementioned forms of freezing and confiscation orders can be described as follows.

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

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

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

Direct confiscation (or *in specie* confiscation) refers to a judicial decision concerning any property related to a specific crime for which the owner has been convicted. The targeted assets are the direct instrumentalities [article 109 (1) PC and article 2 (2) Directive 2014/42/UE], products [article 110 (1) (a) PC] and proceeds [article 110 (1) (b) PC] of a crime, following the judicial ascertainment of that crime.

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

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

Therefore, in general terms, Portuguese legislation enables confiscation for all intentional and reckless crimes. However, direct confiscation of instrumentalities only includes the goods utilized as an instrument to commit the offence (or, as we are going to see, its value). The substitute property cannot be confiscated in this case. Even so, in the case of equivalent

value confiscation, like all other assets, the substitute property may be frozen to guarantee the enforcement of the penal decision and in the end, if the defendant doesn't pay that value, confiscated.

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

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

In any case of impossibility of direct or indirect confiscation (because it is just a utility, is not possible to trace them, they are out of reach of the official authorities, they have been destroyed, their value has decreased or for any other circumstance) assets are confiscated in an amount that corresponds to the original proceeds of crime value. Instead of *in specie* confiscation, value confiscation.

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

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

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

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

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

The solution was influenced by the English law (Drug Trafficking Offences Act 1986) and also by article 12 *sexis* of the Italian law no. 356 from 1992 (that at the beginning foresaw an offence of unexplained wealth possession, but after the constitutional censorship turned only into a new confiscation regime) and has now some similarities with the article 240 *bis* of the Italian Penal Code: in fact, in both cases what is at stake is the disproportionality between the assets and the income. Nevertheless, the Portuguese regime goes further than the Italian law. Instead of confiscate the assets (*in specie* confiscation) it confiscates (as we have already said) the value of the assets disproportionate with his/her income, which is more efficient but also more aggressive for the property right.

This mechanism is (taking in consideration Carin network typologies) more similar with the unexplained wealth confiscation than with the extended confiscation. The biggest difference with an offence of unexplained wealth (like they tried to do in Portugal but were refused by the Constitutional Court: decisions no. 179/2012 and 377/2015) is (as the

Constitutional Court pointed out in its decision no. 392/2015) that it isn't a mechanism *in persona* (there is no penalty) but a mechanism that target the assets (if the defendant doesn't pay the disproportionate value, the court may confiscate all assets available, regardless is origin). The simple comparison between the law no. 5/2002 and those two Portuguese projects demonstrates the similarities they have.

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

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

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

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

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

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

Third-party confiscation [articles 111 PC]

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

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

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

Third-party confiscation is possible when:

- a) their owners have concurred in a blameful way in their use or production, or have taken advantage of the fact;
- b) The instruments, products or proceeds have been acquired, for whatever reason, after the practice of the fact, knowing or should have known the acquirer of their origin; and
- c) The instruments, products and proceeds or the value corresponding to them, have, for whatever reason, been transferred to avoid their confiscation, being or should such purpose be known by him.

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

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

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

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

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

9th Guideline – Bulgaria

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

- Direct confiscation Under Article 53 of the Bulgarian Criminal Code (CC) and under specific measures provided for some of the crimes in the Special Part of the CC (ML, TF, bribery, smuggling etc.)
- Confiscation of the value under Article 53 (1)(a) of the CC, Article 53, para 2 (b) of the CC and under specific measures provided for some of the crimes in the Special Part of the CC (ML, TF, bribery, smuggling etc.)
- Extended confiscation under art.44-46 of the CC
- Confiscation without conviction under Article 53 of the CC
- Confiscation against third parties under Art. 53, para. 2 of the CC and some of the specific measures in the Special Part of the CC (TF, ML, etc.)

The aforementioned forms of freezing and confiscation orders can be described as follows.

1. direct confiscation³³:

The property *measures* provided for in Art. 53, para. 1 and para. 2 of the CC.

According to the para. 1 “Notwithstanding the penal responsibility, confiscated in favour of the state shall be: *a) objects belonging to the culprit that were intended or served for the perpetration of an intentional crime... b) objects belonging to the culprit, which were subject of intentional crime - in the cases expressly provided in the Special Part of this Code*” and para. 2 stipulates that “Confiscated in favour of the state shall also be: articles that have been subject or means of the crime, the possession of which is forbidden, and *b) direct or indirect benefit³⁴, gained through the crime, if they are not subject to return or restoration*”. The approach adopted by the legislator, that confiscation of such property is applied "notwithstanding the penal responsibility", means that it is possible to be carried out both in the case of a final

³³ According to Art. 4, para. 1 of Directive 2014/42/EC confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence.

³⁴ According to Art. 53, para. 3 „Within the meaning of Paragraph 2, letter "b":

1. a direct benefit shall be any economic gain, occurring as a direct consequence of the crime;

2. an indirect benefit shall be any economic gain, occurring as a result of disposal with the direct gain, as well as any property obtained as a result of subsequent full or partial transformation of a direct benefit, including when it was mixed with a property obtained from lawful sources; the property up to the value of the included benefit shall be subject to confiscation, including the occurring increases of the property, if they are directly linked to the disposal or transformation of the direct benefit and the inclusion of the direct benefit in the property“.

conviction of the guilty person, and in case of impossibility (for some reasons) such a sentence to be ruled.

As it has been already said, Art. 53, para. 1, item "b" of the CC indicates that the subject of an intentional crime is confiscated when this is provided for in the law, taking into account the law that applies to the corresponding crime in the Special Part of the CC. These are the **specific measures** provided for specific crimes in the Special Part of the CC, which are applied upon conviction only for this type of crime.

The specific measures constitute *lex specialis* in relation to the general rule in Article 53, para. 1, item b) of the CC. They sometimes expand the scope of deprivation of property that has been used for a crime beyond the property belonging to the perpetrator, in other cases provide for confiscation of value.

2.confiscation of the value⁶⁴¹:

On first place, this type of confiscation is provided for in Art. 53 of CC. It is stated in para. 1 that “confiscated in favour of the state shall be: a) objects belonging to the culprit that were intended or served for the perpetration of an intentional crime; **where the objects are missing or are expropriated, their equivalent shall be awarded**”, and para. 2 says “confiscated in favor of the state shall be: b) direct or indirect benefits gained through the crime, if they are not subject to return or restoration; **where the benefit is missing or is expropriated, its equivalent shall be awarded**”.

In addition, some of the special measures provided for specific crimes in the Special Part of the CC also provides for confiscation of the value. For example, for financing of terrorism Art. 108a, para. 8 of the CC provides that “where the object of the crime financing of terrorism may not be found or has been expropriated, payment of its equivalent sum shall be ruled”. The provisions related to money laundering offence (Art. 253, para. 6 of CC and Art. 253a, para. 3 of CC) also stipulate that the object of money laundering or the property

⁶⁴¹ According to Art. 4 and Art. 6 of Directive 2014/42/EC) - either in whole or in part, ...of property the value of which corresponds to such instrumentalities or proceeds subject to a final conviction for a criminal offence; confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties.

into which it has been transformed shall be forfeited to the benefit of the state, and where absent or transferred, its equivalent shall be confiscated.

Finally, unlawfully acquired assets forfeiture (“*civil forfeiture*”) also covers property equivalent, if specific property cannot be confiscated - Art. 142 of LCCIAF. Again, it should be emphasized that the civil forfeiture is considered to stay outside the scope of Directive 2014/42/EU.

3. extended confiscation⁶⁴²:

Civil forfeiture under the LCCIAF can be defined as extended confiscation, as it is based on proving that the property in possession has no legal source.

As an extended confiscation, even exceeding the standard under the Directive, is the penalty “confiscation” under Art. 44 – 46 of CC. According to Art. 44, para. 1 *Confiscation shall be compulsory appropriation without compensation of property in favour of the state, of assets belonging to the culprit or of part thereof, of specified pieces of property of the culprit, or of parts of such pieces of property.* The penalty is imposed by the court together with the sentence for the committed crime when it is provided for in the sanctioning part of the relevant text of the CC. It applies only to available property that belongs to the guilty person.

This type of confiscation is included as a penalty for certain crimes such as crimes against the Republic, human trafficking, theft and robbery, embezzlement and fraud, smuggling, for some of the heavier punishable hypotheses of the crimes of kidnapping, tax crime, transportation of illegal crossing the border, for bribery and others.

⁶⁴² According to Art. 5 of Directive 2014/42/EC - confiscation, either in whole or in part, of property belonging to a person convicted of a crime which may lead directly or indirectly to an economic benefit, when the court — based on the circumstances of the case, including the specific facts and available evidence, such as proof that the value of the property is disproportionate to the lawful income of the convicted person, is convinced that the property in question was acquired through criminal conduct.

4. confiscation without conviction⁶⁴³:

Although it was accepted by CJEU that the so-called "**civil forfeiture**" established by the LCCIAF does not fall within the scope of Directive 2014/42/EU, this procedure should be mentioned at the first when talking about confiscation without conviction. The basis of this type of confiscation is the forfeiture of unlawfully acquired assets from a person who has been charged (in the course of pre-trial proceedings) with a crime of a certain scope, outlined by the LCCIAF. The CounterCorruption and Unlawfully Acquired Assets Forfeiture Commission (CCUAAFC), as an administrative body, after being notified that a person has been charged with a crime of the relevant type, begins an inspection of his and his/her family's property. If the owned property exceeds the amount of legal income, the Commission files a claim in the civil court for confiscation of the illegally acquired property. The crimes for which this non-conviction based confiscation is provided are those that generate benefits - embezzlement, fraud, bankruptcy, money laundering, bribery, distribution of narcotics and others.

The civil forfeiture mechanism is completely separate from criminal proceedings, and the procedure combines elements of civil, administrative and criminal proceedings. The court decision to confiscate property does not depend on whether the accused has been convicted of the crime. The proceedings are under the Civil Procedural Code (CvPC) and are based on the verification of whether the person or members of his/her family owns property, for the acquisition of which there is no legal source.

Within **the criminal proceedings**, here should be included Art. 53 of the CC, which is applied "notwithstanding the penal responsibility". It means that the deprivation in favour

⁶⁴³ According to Art. 4, para. 2 of Directive 2014/42/EC –where, on the basis of paragraph 1, confiscation is not possible, at least in cases where this impossibility is due to the illness or escape of a suspect or accused person, Member States shall take the necessary measures to enable confiscation of benefits and of means of the crime in cases where the criminal proceedings are initiated for a crime that leads directly or indirectly to economic benefits, and the proceedings could have ended with a conviction if the suspect or the accused had been present at the proceedings.

of the state of such property is possible both in the case of a final conviction against the guilty person, and in the case of impossibility (for some reason) to rule a sentence, but only if the circumstances of the case were such that the perpetrator would be found "guilty" and having committed a "crime". In other words, art. 53 of the CC applies only if the reason for the termination of the criminal proceedings is non-rehabilitative. If the act is not a crime or the perpetrator is not guilty, confiscation under Art. 53 of the CC may be enacted only if the possession of the objects is forbidden by the law.

5. confiscation from a third party⁶⁴⁴:

The autonomous mechanism of under the LCCIAAF applies to third parties. The proceedings are under the CvPC and are based on the verification of whether the person or members of his/her family own property, for the acquisition of which there is no legal source.

Within *the criminal proceedings*, the measure deprivation in favour of the state under Art. 53 of the CC applies against third parties, other than the guilty person, when it comes to benefits from criminal activity or illegal possession of the subject of the crime. According to Art. 53, para. 2 of the CC, the benefits of criminal activity can be confiscated when they are held or owned by third parties. The subject of a crime under Art. 53, para. 2, b. "a" of the CC, when it represents items prohibited for possession, is also subject to confiscation, even if it is in the possession of third parties. The means (tools) of the crime can be confiscated under Art. 53 of the CC only if they belong to the perpetrator and therefore this measure does not apply to third parties.

⁶⁴⁴ According to Art. 6 of Directive 2014/42/EC - the confiscation of proceeds or of other property, the value of which corresponds to the proceeds which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.

In addition, some of the *specific measures* in the Special Part of the CC also provide for confiscation of the subject or means of the crime, even if they are owned by third parties. For example, the provisions regarding TF and ML (Art. 108a, para. 8 of the C , Art. 253, para. 6 and Art. 253a, para. 3 of the CC) are not limited to property that belongs to the perpetrator and the confiscation in these cases also applies to third parties.

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10th Guideline – France

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

- Standard Conviction-based Confiscation (Art. 131-21 PC; Art. 131-39 PC; Art. 1316 PC; Art. 131-14 PC; Art. 131-16 PC).
- Extended Confiscation (Art. 131-21(5) PC).
- Value-based Confiscation (Art. 131-21(9) PC).
- Non-conviction-based Confiscation (Art. 41-4 CCP; Art. 99 CCP; Art. 481 CCP).
- Third-party Confiscation (Art. 131-21(2,5,6) PC).

The aforementioned forms of freezing and confiscation orders can be described as follows.

Criminal Confiscation

According to the French Criminal Code, the penalty of confiscation determines the permanent transfer of property ownership to the state. Its primary objective is to penalize the perpetration of a criminal act committed by an individual or entity. It can solely be enforced through judicial ruling against an individual who is guilty of an offence.

In the French legal system, “Criminal offences are classified, according to their seriousness, into felonies, misdemeanours and contraventions”.⁶⁴⁵ Felonies (“*crimes*”) and

⁶⁴⁵ Art. 111-1 PC.

misdemeanours (“*délits*”) are the most serious forms of offence, while contraventions are the least serious category, where the main penalty incurred is a fine of less than or equal to 3,000 euros.

As a penalty, confiscation can be either a **complementary** or an **alternative** to imprisonment.

A. Confiscation as a complementary penalty to imprisonment

Where the law provides, natural persons who are convicted of a crime may be punished, in addition to the principal penalties, by the **confiscation of an object or animal**. As a complementary penalty, confiscation applies both to crimes (“*crimes*” and “*délits*”) and contraventions.

Numerous criminal texts include provisions for the application of confiscation, which can be imposed on specific assets. In addition to these specific regulations, there exists a broader framework outlined in Article 131-21 of the Criminal Code. This particular provision is applicable to all offenses providing for at least 1-year prison sentence, excluding those related to the press.

For the cases falling below the one-year imprisonment threshold, the application of confiscation relies on the existence of a corresponding law, regardless of whether the offense is categorized as a misdemeanour or a contravention, and irrespective of whether it is covered by the Criminal Code or any other legal or regulatory body within the penal system.

As regards crimes (“*crimes*” and “*délits*”), Art. 131-21 PC provides for the following confiscation models:

- Confiscation of the **instrument of the offence**: as a supplementary criminal penalty incurred by natural persons, confiscation may relate to all movable or immovable property, whatever its nature, whether divided or undivided, which has been used to commit the offence or which was intended to commit the offence, and of which the convicted person is

the owner or, subject to the rights of the owner in good faith, of which he or she has at their disposal.⁶⁴⁶ Under the conditions of Art. 131-21-1, this confiscation also applies to animals.

- Confiscation of the **object or proceeds** of the offence: confiscation may involve all property, which is the direct or indirect object or proceeds of the offence, except for property that may be returned to the victim, in accordance with the relevant provisions of the Dir. 2014/42/EU and of the Reg. (EU) 2018/1805.⁶⁴⁷ Art. 13121(3) also clarifies that “if the proceeds of the offence have been mixed with funds of licit origin for the acquisition of one or more items of property, the confiscation may be limited to the estimated value of the proceeds”.

- Confiscation of a **specially defined property**: additionally, confiscation may also involve any movable or immovable property defined by the law or regulation that punishes the offence.⁴²

In general, and subject to the clarifications set out below, criminal confiscation may apply both to crimes and contraventions, and both to natural and to legal persons. We need to distinguish those hypotheses.

- **Crimes (“crimes” and “délits”):**

- **Natural persons:** as regards natural persons, criminal confiscation applies to adults and to minors aged 13 to 18.⁶⁴⁸

⁶⁴⁶ Art. 131-21(2) PC.

⁶⁴⁷ Art.

131-

21(3)

PC. ⁴²

Art.

131-

21(4)

PC.

⁶⁴⁸ G. GIUDICELLI-DELAGE, O. CAHN, J. TRICOT, ET AL., *France*, in A. BERNARDI, *Improving Confiscation Procedures in the European Union*, Jovene Editore, Napoli, 2019.

➤ **Legal persons:** as regards legal persons, Art. 131-39 PC states that where the law so provides, a legal person may be sanctioned with the penalty of confiscation, under the conditions and in the manner provided for in Art. 131-21 PC.⁶⁴⁹ Legal persons are also subject to the confiscation of the animal used to commit the offence or against which the offence was committed.⁶⁵⁰

• **Contraventions**

➤ **Natural persons:** Art. 131-16 PC states that the regulation punishing contravention may provide one or more of the following additional penalties when the offender is a natural person:

I. Confiscation of one or more weapons owned or freely available to the convicted person.

II. Confiscation of the thing that was used or intended to be used in the commission of the offence or of the thing that is the product of the offence.

III. Confiscation of the animal that was used to commit the offence or against which the offence was committed.⁶⁵¹

For contraventions, the confiscation of property whose origin could not be justified or that of property having no link with any offence cannot be applied.

➤ **Legal persons:** Following Art. 131-43 PC, the regulation that punishes a contravention may provide, when the offender is a legal person, for the complementary penalties of confiscation of the instrument or of the product of the offence⁶⁵² and confiscation of the animal.⁶⁵³

⁶⁴⁹ Art. 131-39(8) PC.

⁶⁵⁰ Cfr. Art. 131-39(10) PC, referring to Art. 131-21-1 PC.

⁶⁵¹ Art. 131-16(3,5,8) PC.

⁶⁵² Art. 131-16(5) PC.

⁶⁵³ Art. 131-16(8) PC.

B. Confiscation as an alternative penalty to imprisonment Again, we need to distinguish between crimes and contraventions:

• **Crimes** (“crimes” and “délits”)

□□ **Natural persons:** according to the art. 131-6 PC, where an offence is punishable by imprisonment, the court may, instead of imprisonment, impose one or more of the following custodial or restrictive sentences:

I. Confiscation of one or more vehicles belonging to the convicted person.

II. The confiscation of one or more weapons owned or freely available to the convicted person.

III. The confiscation of the thing that was used or intended to be used to commit the offence or the thing that is the product of the offence.

However, this confiscation cannot be pronounced in the case of press offences.⁶⁵⁴

• **Contraventions**

As an alternative penalty, confiscation applies to "fifth class" administrative fines. The fifth class fines are used to punish the most serious administrative fines (e.g., driving without a licence or without insurance), and they are imposed by the courts.

According to art. 131-14 PC, for all fifth-class offences, both against natural and legal persons, one or more of the following penalties of deprivation or restriction of rights may be imposed:

I. Confiscation of one or more weapons owned or freely available to the convicted person.

⁶⁵⁴ Art. 131-6(4,7,10) PC. ⁵⁰ Art. 131-14(3,6) PC.

II. The confiscation of the thing that was used or intended to be used to commit the offence or the thing that is the product of the offence. However, such confiscation may not be ordered in respect of press offences.⁵⁰

Extended Confiscation

French criminal law encompasses two forms of extended confiscation. Firstly, it encompasses the failure to establish the lawful origin of the property, as provided for in paragraph 5 of article 131-21 of the Criminal Code. Secondly, it includes the so-called general confiscation (confiscation of patrimony), which is specified in paragraph 6 of the same article.

In the first case, the link between the property and the offense is legally presumed. The text specifies that: “In the case of a felony or misdemeanor punishable by at least five years’ imprisonment and resulting in direct or indirect profit, confiscation shall also encompass movable or immovable property, regardless of its nature, divided or undivided, belonging to the convicted person or, subject to the rights of the owner in good faith, over which they have unrestricted control, provided that neither the convicted person nor the owner, given the opportunity to explain the property subject to potential confiscation, can justify its source”.

Hence, as indicated at the end of the paragraph, confiscation does not depend on evidence proving that the property is directly or indirectly derived from the offense. Instead, it pertains to the convicted person's inability to prove its origin, specifically that it was legally acquired using funds of lawful origin. The primary consequence is that the burden of proof lies with the person prosecuted, not the prosecution.

In the second case, the link between the property and the offense is legally disregarded. Art. 131-21, paragraph 6, states that: “where the law governing the felony or misdemeanor so provides, confiscation may also cover all or part of the property belonging to the convicted person or, subject to the rights of the owner in good faith, over which they have unrestricted control, regardless of its nature, whether movable or immovable, divided or

undivided”. This penalty is applicable to the most serious offenses strictly enumerated by law.

Furthermore, this felony or misdemeanor must have generated a direct or indirect profit. The assessment of the profit is conducted independently, without the law requiring its alignment with the property subject to potential confiscation. Consequently, there is no necessity to prove that the assets were acquired using illicit means.⁶⁵⁵ In situations where the accused fails to justify the origin of the property, confiscation can be imposed, without the prosecution being obligated to establish a connection with the committed offense. As a result, the measure can encompass property whose value significantly surpasses the profits obtained from the offense.⁶⁵⁶

Article 131-21, paragraph 5, necessitates that the individual is provided with an opportunity to explain themselves, thereby constituting both a procedural and substantive requirement. This obligation compels investigative authorities, particularly the examining magistrate, to inquire about the person's assets. **Non-conviction-based Confiscation**

The French legal system allows for trials to be conducted *in absentia*, regardless of the suspect's illness or absconding, and sanctions may be imposed accordingly.⁶⁵⁷

However, if a trial cannot be held and an additional penalty of confiscation cannot be imposed due to the suspect's death, immunity, or prescription of the crime, then assets obtained through the crime cannot be confiscated.⁶⁵⁸

Apart from these circumstances, French law also has provisions for non-conviction-based confiscation, which still falls under criminal proceedings. The public prosecutor, investigating judge, or judge who presided over the case may decide to withhold seized

⁶⁵⁵ G. GIUDICELLI-DELAGE, O. CAHN, J. TRICOT, ET AL., *France*, in A. BERNARDI, *Improving Confiscation Procedures in the European Union*, Jovene Editore, Napoli, 2019, p. 217.

⁶⁵⁶ *Ivi*, p. 219.

⁶⁵⁷ Article 379-2 CCP.

⁶⁵⁸ G. GIUDICELLI-DELAGE, O. CAHN, J. TRICOT, ET AL., *France*, in A. BERNARDI, *Improving Confiscation Procedures in the European Union*, Jovene Editore, Napoli, 2019, p. 230.

property as “refusal to return the instrumentalities or proceeds of crime”.⁶⁵⁹ In such cases, no conviction is necessary, and the proceeds may not be returned even if there is no decision of guilt or sanction.

The prosecutor can refuse restitution if the seized property creates danger to people or property, is an instrument or proceeds of the offense, or specific provisions require its destruction.⁶⁶⁰ The investigating judge can refuse restitution if it might hinder evidence or the rights of other parties, or if it poses a danger to people or property.⁶⁶¹ The first instance tribunal can refuse restitution if the seized assets present a danger to people or property, or if they are instruments or proceeds of the offense.⁶⁶²

Third-party confiscation

The third-party confiscation model is provided by paragraphs 2, 5, and 6 of Article 13121 of the Criminal Code. The convicted person's mere possession of certain assets may lead to their confiscation if the actual owner cannot claim good faith ownership. Thirdparty confiscation can be ordered in cases where the assets are used to commit or attempt to commit an offence that is punishable by at least one year of imprisonment, or in cases of extended confiscation for crimes punishable by a minimum of five years' imprisonment, which has resulted in direct or indirect profit, or when required by the law.

Third-party assets can also be subject to confiscation in value.⁶⁶³ To establish that an owner is aware of an asset's connection to criminal activities, the prosecution must prove that the asset was the instrument or proceeds of the crime.⁶⁶⁴ Paragraphs 3 and 7 do not protect the good faith of third-party owners when confiscation involves assets that are

⁶⁵⁹ Art. 41-4 CCP.

⁶⁶⁰ Art. 41-4 CCP.

⁶⁶¹ Art. 99 CCP.

⁶⁶² Art. 481 CCP.

⁶⁶³ Art. 131-21(9) PC.

⁶⁶⁴ G. GIUDICELLI-DELAGE, O. CAHN, J. TRICOT, ET AL., *France*, in A. BERNARDI, *Improving Confiscation Procedures in the European Union*, Jovene Editore, Napoli, 2019, p. 243.

objects or direct or indirect proceeds of the crime, or when they involve dangerous or illegal items.⁶⁶⁵

Confiscation of objects classified as dangerous or harmful by law or regulation, or which possession is unlawful

Finally, confiscation must be ordered in respect of objects classified as dangerous or harmful by law or regulation, or the possession of which is unlawful, regardless of whether such property belongs to the convicted person.⁶⁶⁶

⁶⁶⁵ *Ibid.*

⁶⁶⁶ Art. 131-21(7) PC.

Policy recommendations: remarks from the Advisory Board

- The main flaw of the discipline provided by the Regulation is that its concrete applicability still depends on the decision of national judges, in line with the legal features of their national systems. Because the latter remain quite disharmonized, the implementation of the not conviction based confiscation remain a challenged at EU level although there is an attempt to broaden to scope of the action in the matter in the Regulation 1805/2018
- There isn't a clear concept yet, which can justify the application of the principle of mutual recognition proceedings in EU Member States in the specific matter (preventive confiscation). When we talk about measures that might restrict the right of property, we need clear definitions and clear legal basis this is not the case.