THE NEW DIRECTIVE 2024/1260 AND CONFISCATION MODELS IN THE FIGHT AGAINST FRAUD AFFECTING EU'S FINANCIAL INTERESTS AND CORRUPTION IN COMPARATIVE LAW *

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La direttiva PIF (UE) 2017/1371 sottolinea la necessità di congelare e confiscare i mezzi e i proventi dei reati che incidono sul bilancio dell'UE. La direttiva 2024/1260 sul recupero e la confisca dei beni costituisce uno strumento fondamentale in tale direzione. Il presente articolo analizza i modelli di confisca previsti dalla direttiva 2024/1260 e la loro importanza per gli Stati membri al fine di garantire la tutela degli interessi finanziari dell'UE, valutando al contempo la necessità di riforme della legislazione nazionale per attuare più efficacemente la nuova direttiva e rafforzare la lotta contro la frode e la corruzione. In particolare, la nuova direttiva sceglie di affrontare l'arricchimento illecito da parte della criminalità organizzata attraverso lo strumento della confisca senza condanna, discostandosi dall'approccio adottato nel Regolamento 1805/2018, che privilegiava in materia il mutuo riconoscimento rispetto all'armonizzazione, e riconoscendo il fatto che il riconoscimento reciproco presuppone l'armonizzazione.

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1. Introduction.

In a recent report by Transparency International, entitled "Guide to strengthening the EU's asset recovery framework", it is stressed, that «the EU is a safe haven for dirty money. Illegal activities generate 110 billion euros annually according to some estimates, which is around 1% of the bloc's GDP. Even when investigations are started against criminals, only 2.2% of the proceeds of crime are ever frozen or seized, and even less, just 1.1%, is confiscated, according to Europol. Consequently, criminals keep 98% of their illegally acquired gains. The current revision of the asset recovery directive provides a good opportunity to ensure crime does not pay and criminals, kleptocrats and members of organised crime will not be able to hide their ill-gotten wealth in the EU».

Fraud and corruption result in the dispersion and squandering of EU finances that should, instead, be allocated to the development of the European Union and to the economic and social growth of the Member States. «The protection of the Union's financial interests concerns not only the management of budget appropriations, but extends to all measures which negatively affect or which threaten to negatively affect its assets and those of the Member States, to the extent that those measures are of relevance to Union policies» (recital 1 Directive PIF 2017).

Directive PIF 2017 also stresses, in Recital 8, that «corruption constitutes a particularly serious threat to the Union's financial interests, which can in many cases also be linked to fraudulent conduct. Since all public officials have a duty to exercise judgment or discretion impartially, the giving of bribes in order to influence a public official's judgment or discretion and the taking of such bribes should be included in the definition of corruption, irrespective of the law or regulations applicable in the particular official's country or to the international organisation concerned».

In order to address this situation, among the recommendations of Transparency International EU – which cover all stages of asset recovery: including tracing, seizing, confiscating and returning the proceeds of crimes – the importance of Non Conviction Based Confiscation in the fight against corruption is emphasised: «When coupled with necessary human rights and rule of law safeguards, non-conviction based confiscation can be a useful tool in the fight against grand corruption. Many corrupt foreign (former or serving) politicians and their cronies hide their stolen wealth in Europe: they invest in real estate, expensive cars and luxury goods, and store millions of euros in EU banks – in the knowledge they are unlikely be investigated while in (or associated with) power. Even after being toppled from power, it can take over a decade to secure a conviction and return the assets, as we have seen in the case of Tunisia's Ben Ali».

The European legislator has long been aware of the importance of confiscation as a tool in the fight against fraud and corruption to the detriment of the financial interests of the European Union. The second Protocol to the Convention on the protection of the European Communities' financial interests (PIF) of 1997 imposed, in art. 5, the seizure and «confiscation or removal of the instruments and proceeds of fraud, active and

passive corruption and money laundering, or property the value of which corresponds to such proceeds», «without prejudice to the rights of bona fide third parties»[1].

Article 10 (Freezing and confiscation) of PIF Directive 2017 states that «Member States shall take the necessary measures to enable the freezing and confiscation of instrumentalities and proceeds from the criminal offences referred to in Articles 3, 4 and 5. Member States bound by Directive 2014/42/EU of the European Parliament and of the Council shall do so in accordance with that Directive».

The Directive 2024/1260 on recover and confiscation includes within its scope fraud against the financial interests of the Union, emphasising, in recital 9, the connection between this crime and organised criminal groups: «Due to the poly-criminal nature of, and the systemic and profit-oriented cooperation among, criminal organisations involved in a wide range of illicit activities in different markets, an effective fight against organised crime requires that freezing and confiscation measures are available to cover the profits from all criminal offences in which organised criminal groups are active. Such offences include the areas of crime listed in Article 83(1) of the Treaty of the Functioning of the European Union (TFEU). In addition to the crimes listed in Article 83(1) TFEU, the scope of this Directive should also cover all crimes that are harmonised at Union level, including fraud against the financial interests of the Union in light of the increasing involvement of organised criminal groups in such crimes».

The implementation of asset recovery instruments in case of bribery and corruption offences has been encouraged by a number of international instruments. Examples include the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention), signed on 17 December 1997, which entered into force on 15 February 1999, and the United Nations Convention against Corruption (UNCAC), adopted on 31 October 2003, which entered into force on 14 December 2005. Both Article 3(3) of the OECD Anti-Bribery Convention and Article 31 of the UNCAC require State Parties to take such measures as may be necessary to enable confiscation of the proceeds of corruption crime. At the regional level, the implementation of asset confiscation regimes is also recommended by Article XV(1) of the InterAmerican Convention Against Corruption (IACAC), Article 19(3) of the Criminal Law Convention on Corruption of the Council of Europe, and Article 16(1) of the African Union Convention on Preventing and Combating Corruption (AUCC).

The proposed Directive on corruption highlights, first, how the Directive 2014/42, which established rules on the freezing and confiscation of instrumentalities and proceeds of crime in order to effectively deprive criminals of their illegal assets, included in its scope offences covered by the Convention on the fight against corruption involving

[1] Art. 5: «Each Member State shall take the necessary measures to enable the seizure and, without prejudice to the rights of bona fide third parties, the confiscation or removal of the instruments and proceeds of fraud, active and passive corruption and money laundering, or property the value of which corresponds to such proceeds. Any instruments, proceeds or other property seized or confiscated shall be dealt with by the Member State in accordance with its national law».

officials,[2] as well as Council Framework Decision 2003/568/JHA on combating corruption in the private sector[3]. Second, it emphasises that the proposal for a new Directive on Asset Recovery and Confiscation, «building upon the previous legislation», «provides for a new and strengthened asset recovery framework to ensure that crime does not pay. It would give authorities better tools to deprive organised crime groups of the financial means to carry out further criminal activities, including corruption». In this direction, recital 28 of the new Directive 2024/1260 stresses that «Furthermore, Member States should allocate sufficient training, in close coordination with the European Union Agency for Law Enforcement Training (CEPOL), also on the use investigative tools to successfully carry out proceedings and the identification and quantification of proceeds of corruption in the context of freezing and confiscation. In addition, this Directive facilitates the gathering of information and evidence by setting out mitigating circumstances for offenders that help the authorities».

This article analyses the models of confiscation provided for in Directive 2024/1260 and their importance for the Member States in order to ensure the protection of the EU's financial interests, while also assessing the need for reforms in national legislation to implement the new Directive more effectively and to strengthen the fight against fraud and corruption.

2. Directive (EU) 2024/1260 on asset recovery and confiscation.

In May 2024, Directive 1260 on asset recovery and confiscation was adopted[4], which replaces Directive 42/2014 and is aimed, as stated in the Explanatory Memorandum of the proposed directive (hereinafter the Memorandum), at «strengthen[ing] the capabilities of competent authorities to identify, freeze and manage assets, and reinforce and extend confiscation capabilities so as to cover all relevant criminal activities carried out by organised crime groups, thereby enabling confiscation for all relevant assets. Lastly, the Directive shall improve the cooperation between all authorities involved in asset recovery and promote a more strategic approach to asset recovery through a greater commitment from these authorities to the achievement of common goals in this area»[5].

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[2] Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union (OJ C 195, 25.6.1997).

[3] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003).

[4] Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on the recovery and confiscation of property PE/3/2024/REV/1GU *L, 2024/1260, 2.5.2024, ELI:* http://data.europa.eu/eli/dir/2024/1260/oj ;Brussels, 25.5.2022 COM(2022) 245 final 2022/0167 (COD) Proposal for a Directive of the European Parliament and of the Council on the recovery and confiscation of property {SEC(2022) 245 final} – {SWD(2022) 245 final} – {SWD(2022) 246 final}; see FINOCCHIARO (2023).

[5] GARRIDO CARRILLO (2023); FARTO PIAY (2023); FINOCCHIARO (2023); SAKELLARAKI (2022); AGUADO (2024).

Following Directive 42/2014, which aimed at the harmonisation of seizure and confiscation instruments, and Regulation 1805/2018[6], which, through a directly binding instrument, imposes the mutual recognition of seizure and confiscation orders, regardless of their type (direct, value-based, against third parties, extended, or without conviction), provided that they are issued in the context of proceedings in criminal matters, the need for a higher degree of harmonisation in this field has emerged. Such harmonisation is required in order to genuinely guarantee mutual recognition, by eliminating, at an early stage, the obstacles that could lead to the refusal of the application of the Regulation on the basis of one of the envisaged grounds for refusal, starting with the violation of a fundamental right, as provided for in Articles 8(1)(f) and 19(1)(h)[7]. For the reasons that prompted the European legislator to adopt this new harmonisation instrument, reference is made to the analysis contained in the commentary on the proposed Directive[8].

The new directive seeks to pursue harmonisation in this area not only by providing for confiscation models, replacing Framework Decision 2005/212/JHA and Directive 42/2014[9], but also with regard to the phase of asset tracing, identification and management, by introducing provisions concerning asset recovery offices, which were previously governed by Framework Decision 2007/845/JHA. Bringing together, within a single act, obligations that were previously distributed across a plurality of instruments would ensure a more coherent and strategic approach to asset recovery, as well as

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[6] On 6 January, 2024, Legislative Decree No. 203 of Dec. 7 2023, published in the Official Gazette on Dec. 22, 2023, on "*Provisions for the full adaptation of national legislation to the provisions of Regulation (EU) 2018/1805 of the European Parliament and of the Council of Nov. 14, 2018, on the mutual recognition of freezing and confiscation orders*", entered into force. Among the innovations introduced, in the field of criminal procedure, are the amendments to Articles 419, 429 and 552 of the Code of Criminal Procedure. In particular, Article 4 of the aforementioned decree now provides that the notice of setting of the preliminary hearing, the decree ordering the trial and the decree of direct summons to trial must also contain a warning that «the sanctions and measures, including confiscation, *provided for by law in relation to the crime for which the proceedings are being conducted may be ordered, if the conditions are met*». Pursuant to the transitional rule set forth in Article 7 of Legislative Decree 203/2023, «*The provisions of Article 4 shall not apply in proceedings in which, on the date of entry into force of this decree* (6 January, 2023*), notices of preliminary hearing and decrees ordering trial or summoning the defendant to trial have already been issued*». Since, however, these are notices provided under penalty of nullity, it will be necessary to promptly update the templates in use, see *Confiscation: the new notices introduced by Legislative Decree 203/2023*, in *Sistema penale*, January 9, 2024.

[7] «In exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the freezing order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence», see SILVA (2022), p. 206 f.

[8] See MAUGERI (2024a), p. 1 ff.

[9] The ultimate purpose of the directive-which is, in fact, based on Art. 82(2) as well as Art. 83(1) TFEU-is to pursue «the adoption of minimum rules» in order to approximate «the Member States' freezing and confiscation regimes, thus facilitating mutual trust and effective cross-border cooperation» (recital no. 5). In the intentions of the Directive, *harmonisation is intended to promote the mutual recognition of confiscation orders*, which was already regulated by Framework Decision No. 783/2006. The Directive, as stipulated in Article 14, then replaces Joint Action 98/699/JHA and partially Framework Decisions 2001/500 and 2005/212; Articles 2, 4 and 5 of Framework Decision 2005/212/JHA remain in force for offenses not covered by the Directive, which provide for a prison sentence of more than one year.

enhanced cooperation among all relevant actors in the asset recovery system. Specifically, Article 36, provides that the Directive replaces (with the exception of Denmark) Joint Action 98/699/JHA, Framework Decisions 2001/500/JHA and 2005/212/JHA, Decision 2007/845/JHA, and Directive 2014/42/EU.

The decision to replace the previous instruments in this area appears entirely positive, as it avoids the criticism that has been levelled at Directive 42/2014 itself, which, as stated in Art. 14, only partially replaced Framework Decisions 2001/500 and 2005/212 (as well as Joint Action 98/699/JHA)[10], whose provisions remained in force in order to maintain a certain level of harmonisation with regard to criminal activities not covered by the Directive (Articles 2, 4 and 5 of Framework Decision 2005/212/JHA concerning offences not covered by the Directive and punishable by a prison sentence of more than one year. This technique of partially replacing an earlier instrument that otherwise remains in force has been criticised as a source of a lack of precision and of poor recognition of the legislative intent[11]. Following the entry into force of the Lisbon Treaty and the European Charter of Fundamental Rights, the adoption of an entirely new instrument, as required by Article 9 of Protocol 36 to the Lisbon Treaty, therefore appears to be a positive development, given that the provision refers to legislative acts and not to "rules" (specific provisions) («The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union»)[12].

According to Article 2, the scope of application of the asset recovery and confiscation measures laid down in Directive 2024 covers the following crimes: organised crime (offences committed within the framework of a criminal organisation), terrorism, human trafficking, sexual abuse and sexual exploitation of children and child pornography, drug trafficking, corruption in private sector, money laundering, fraud and counterfeiting of non-cash means of payment and counterfeiting of euro and other currencies, cybercrime, illicit manufacturing of and trafficking in firearms, fraud to the Union's financial interests, environmental crime and ship-source pollutions, market abuse and crimes concerning information accompanying transfers of funds and certain crypto-assets, unauthorised entry, transit and residence and last but not least criminal offences for the violation of Union restrictive measures (Art. 2 (1)). It should be emphasised that the new Directive 2024, compared to the previous Directive 2024/42/EU, adds new offences to the list of crimes to be taken into account during the transposition process into national law, such as illicit manufacturing of and trafficking in firearms, fraud against the financial interests of the EU, environmental crimes, facilitation of

[10] «Joint Action 98/699/JHA, point (a) of Article 1 and Articles 3 and 4 of Framework Decision 2001/500/JHA, and the first four indents of Article 1 and Article 3 of Framework Decision 2005/212/JHA, are replaced by this Directive for the Member States bound by this Directive».

[11] ARCIFA (2014), no. 64.

[12] *Idem.*

unauthorised entry and residence, and violation of EU restrictive measures against Russian oligarchs – the which are the subject of Directive (EU) 2024/1226 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673.

In the process of transposing Directive 2024 into the national legal order, a cross-check should therefore be carried out not only with the list of crimes explicitly mentioned in Article 2(1), but also with other EU legal acts that regulate criminal offences and may themselves provide for the application of Directive 2024 to those offences (Article 2(2)). As regards the first stage of asset recovery, namely the tracing and identification of illegal assets, these measures should apply to all criminal offences that are punishable under national law by deprivation of liberty or a detention order of at least one year[13].

3. Proceedings in criminal matters.

Article 1(1) of Directive 2024/1260, in line with Article 1(1) of Regulation (EU) 2018/1805, states that the Directive establishes minimum rules on the tracing and identification, freezing, confiscation and management of property «within the framework of proceedings in criminal matters»; its scope of application therefore corresponds to the broader notion of "criminal matters", as compared to criminal law in the strict sense.

Corresponding to recital 13 of the Regulation, recital 7 of the Directive specifies that «In this context, proceedings in criminal matters is an autonomous concept of Union law interpreted by the Court of Justice of the European Union, notwithstanding the case-law of the European Court of Human Rights. This Directive is without prejudice to the procedures that Member States can use to freeze and confiscate property. It is necessary to reinforce the capacity of competent authorities to deprive criminals of the proceeds from criminal activities».

The European legislator uses the expression «*notwithstanding* the case law of the European Court of Human Rights»; *notwithstanding* has an adversative meaning (although, in the Italian translation, the expression used – without prejudice – assumes an inclusive meaning)[14]. The European legislator appears to be aware that it is not possible to refer to the notion of criminal matter developed by the European Court of Human Rights (ECtHR) and to the related Engel criteria[15] for establishing the criminal nature of a confiscation proceeding and measure, since proceedings for the application of non-conviction-based confiscation (NCBC) have consistently been excluded from its scope and safeguards, ranging from Italian preventive confiscation to British civil

[13] SAKELLARAKI (2022), p. 478.
[14] GRANDI (2023), p. 200 (note 151).
[15] *Idem.*

recovery, as well as other forms of civil forfeiture (as in the Georgian, Romanian or Bulgarian legal systems),[16] to which a preventive or restorative nature is attributed[17].

Recital 5 of the proposed Directive specified, again in terms corresponding to recital 13 of the Regulation, that «This term covers all types of freezing and confiscation orders issued as a result of proceedings related to a criminal offence», and further clarified that «It also covers other types of orders issued in the absence of a final conviction». In the final version of the Directive, however, following a proposal by the Council, recital 7 no longer contains these specifications but, after establishing that the concept of criminal proceedings is an autonomous one, merely states that «This Directive is without prejudice to the procedures that Member States may use to freeze and confiscate property» (while Recital 21 further specifies that «Freezing and confiscation under this Directive are autonomous concepts, which should not prevent Member States from implementing this Directive using instruments which, under national law, would be considered sanctions or other types of measures»).

This wording suggests that, irrespective of the qualification of the proceedings adopted in the Member States for the seizure and confiscation of property, such proceedings fall within the scope of the new Directive provided that they constitute "proceedings in criminal matters". In the absence of even the minimal positive definition of "proceedings *related to a crime*" contained in the original version of the proposal, this notion must therefore be interpreted as an autonomous EU concept, in the light of the definition provided in recital 13 of Regulation 1805, which is intended to ensure the mutual recognition applicable to seizure and confiscation orders. Recital 13 clarifies that «The term therefore covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence»; the expression "proceedings in relation to a criminal offence" is repeated in Article 2 in the definition of confiscation as «a final deprivation of property ordered by a court *in relation to a criminal offence*» (in the original proposal, "proceeding for a crime"). In the light of recital 13 and Article 2, in order to establish whether proceedings are "in criminal matters", it is both necessary and sufficient to verify the existence of this 'relation to a criminal offence', namely the presence of a *link* between the assets to be confiscated and a crime. It is therefore sufficient that the proceedings before a judicial authority concern the proceeds and/or instrumentalities of the crime[18]. In similar terms, Article 3(6) of the Directive defines 'confiscation' as «the final deprivation of property ordered by a court in connection with a crime», once again highlighting the central importance of the connection to a criminal offence.

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[16] MAUGERI (2019), p. 52.

[17] MAUGERI (2019), p. 52; Lastly, ECtHR, 21 January 2025, Claudia Garofalo against Italy and 3 other, no. 47269/18.

[18] Directive 2011/99/EU on the European protection order, Recitals 9 and 10, also extends the concept of a "European protection order" to any measure aimed at protecting an individual from acts of others with criminal relevance, even where such measures are adopted outside of criminal proceedings *stricto sensu*. See SILVA (2022), p. 205.

Additionally, Art. 1(4) expressly states that «This Regulation does not apply to freezing orders and confiscation orders issued within the framework of proceedings in civil or administrative matters»; a category that certainly includes measures involving the expropriation of property not connected to crimes. These are (should be) proceedings that do not concern the proceeds or instrumentalities of crime.

In any event, *confiscation* must be ordered by a "court" as defined in Article 3(6) of the Directive, or by a "judicial authority" as defined in Article 2(4) of Directive 2014/42. Most recently, the Court of Justice of the European Union (CJEU) excluded from the notion of judicial authority – «as required by Article 2(4) of Directive 2014/42» – Bulgarian customs authorities competent to order a form of confiscation that was not imposed as a result of, or in connection with, a crime, [19] and clarified that confiscation under Article 4 of Directive 42/2014 presupposes the existence of a *criminal offence*[20]. Of particular interest, therefore, will be any future decision of the Court of Justice concerning emblematic cases of confiscation following punitive administrative offences, which may fall within the broad notion of criminal matters adopted by the ECtHR but do not fall within the notion of offence presupposed by Directive 2014/42, Regulation 2018/1805 and the new Directive[21]. This issue becomes even more significant if it is

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[19] CJEU, 7 March 2022, JP Eood v. Otdel "Mitnichesko razsledvane i razuznavane"/MRR/ v TD "Mitnitsa Burgas", C-752/21, 45.

[20] Finally, the CJEU (Eighth Chamber), on 9 March 2023, in Case C-752/21, JP EOOD v Otdel "Mitnichesko razsledvane i razuznavane"/MRR/ v TD "Mitnitsa Burgas", clarified that (§ 48) «In the light of all those reasons, the answer to the third question is that Article 4 of Framework Decision 2005/212 must be interpreted as not applying to a decision concerning an act which does not constitute a criminal offence", also considering that (§ 47)». In so far as the material scope of that framework decision is clearly defined and it was adopted with a view to establishing common minimum rules in a clearly defined area, which, moreover, concerns cooperation in criminal matters, it also cannot be materially applicable by analogy to a situation such as that at issue in the main proceedings. In defining (§ 42 ss.) «the concept of 'confiscation', it is appropriate to refer not to the definition in the fourth indent of Article 1 of Framework Decision 2005/212, but to the definition in Article 2(4) of Directive 2014/42, since that directive, pursuant to Article 14(1) thereof, replaced, inter alia, the first four indents of Article 1 of that framework decision (judgment of 10 November 2022, *DELTA STROY 2003*, C-203/21, EU:C:2022:865, paragraph 30)». At § 43 «Under Article 2(4) of that directive, confiscation means 'a final deprivation of property ordered by a court in relation to a criminal offence'».

[21] Reference for a preliminary ruling brought by Rayonen sad Svilengrad (Bulgaria) on 23 November 2022 – "SISTEM LUX" OOD v Teritorialna direktsia "Mitnitsa Burgas", C-717-22, Referring Judge Rayonen sad Svilengrad Parties *Applicant:* "SISTEM LUX" OOD, *Administrative Offences Authority:* Teritorialna direktsia "Mitnitsa Burgas": «3) Are the provisions of Article 2(1) of Framework Decision 2005/212, read in conjunction with Article 17(1) of the Charter and regard being had to the judgment of the Court of Justice of the European Union of 14 [January] 2021 in Case C-393/19, to be interpreted by way of *argumentum a fortiori* as meaning that they also apply in cases where the act constitutes not a criminal offence but an administrative offence, whereas the difference between the two lies solely in the criterion of 'large quantities' in terms of the value of the smuggled items as assumed by the courts? Are the fourth indent of Article 1 of Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property and Article 2(4) 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 proceeds of crime in the European Union to be interpreted in this case as meaning that the term 'confiscation' refers specifically to a penalty or measure that must be issued by a court and cannot be ordered by an administrative authority,

recalled that the Court of Justice itself has included *an independent administrative authority*, acting as an appeal body in matters of administrative offences[22], within the notion of competent judicial authority in criminal matters, again on the basis of «an autonomous and uniform interpretation to be made taking into account the context of the provision in which it is inserted and the purpose pursued by that Framework Decision» (in this case Framework Decision 2005/214/JHA on the mutual recognition of financial penalties); the Court held that «the competent judicial authority… applies a procedure that has the essential characteristics of criminal proceedings, without, however, requiring that this judicial authority have exclusively criminal jurisdiction»[23]; all this after clarifying that «in order to ensure the useful effect of the Framework Decision, it is necessary to resort to an interpretation of the expression 'competent, in particular, in criminal matters' in which the qualification of the offenses by the member states is not decisive»[24].

The Regulation not only adopts an autonomous and extended concept of «proceedings in criminal matters» in order to ensure the effectiveness of EU law, but also requires respect for the guarantees applicable to criminal matters, as provided not only in Article 1(2) but also in recital 18. The latter requires, on the one hand, compliance with the procedural rights set out in Directives 2010/64, 2012/13, 2013/48, 2016/343, 2016/800 and 2016/1919 and, on the other hand, that «[t]he essential guarantees applicable to criminal proceedings provided for in the Charter should apply to the prosecution covered by this Regulation, which does not correspond to criminal proceedings». The Directive, even prior to the Regulation, should therefore pursue the harmonisation not only of the different models of confiscation, in order to ensure the effectiveness of EU law and the fight against serious criminal phenomena, but also of safeguards, at least the essential ones enshrined in the European Charter of Fundamental Rights, referred to in recital 18 of the Regulation, thereby strengthening mutual trust and cooperation.

In this perspective, Article 24 of the new Directive, concerning the right of defence, will be examined.

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and is a national provision such as that of Article 233(6) of the Customs Law, read in conjunction with Article 231 thereof, in that sense unlawful?».

[22]CJEU, Grand Chamber, 14 November 2013, Baláž, C-60/12, § 39: «As is clear, moreover, from the information provided by the Austrian government in its written and oral submissions, although the Unabhängiger Verwaltungssenat is formally established as an independent administrative authority within the meaning of Article 51(1) of the VStG, it nevertheless has jurisdiction as an appellate body in, among other things, administrative offenses, including, in particular, traffic offenses. Under this remedy, which has a suspensive effect, it has jurisdiction extended to the merits and applies criminal proceedings that are subject to compliance with the necessary procedural guarantees in criminal matters».

[23] § 36.

[24] § 35.

4. The first model of confiscation: direct confiscation and the notion of proceeds of crime.

Article 12 requires Member States to allow the confiscation, «either wholly or in part, of instrumentalities and proceeds stemming from a criminal offence subject to a final conviction» and also «the confiscation of property the value of which corresponds to instrumentalities or proceeds stemming from a criminal offence subject to a final conviction»[25] . In both cases, it is specified that these forms of confiscation can be ordered after a *final* conviction, which can also be pronounced *in absentia*. These rules have not been changed in any way from what was provided in Directive 42/2014.

This is the basic model of compulsory confiscation of proceeds, which presupposes, by express provision, a final conviction, except, however, for what is later provided by Article 15, which extends, compared to the previous discipline of Article 4 c. 2, the cases in which it is possible to apply confiscation in the absence of a conviction Forfeiture of proceeds is mandatory[26].

In the Italian legal system, where the confiscation of the proceeds of crime is not mandatory (art. 240 of the Criminal Code), law No. 300/2000 introduced Art. 322 ter of the Criminal Code, a special form of mandatory confiscation of proceeds or price (or of the equivalent value) in the event of conviction or plea bargaining for one of the offences provided for in Articles 314 to 320 (corruption, bribery, embezzlement, as well as misappropriation and fraud against EU economic interests – Art. 316-bis and Art. 316-ter – even if committed by members of the European Community bodies and officials of the European Community and of the Member States of the Union, Article *322-bis*, paragraph 1). The provision in question also provides for the confiscation of profits in the event of conviction or plea bargaining for the corruptor *pursuant* to Article 321 (even if the money or other benefits are given or promised to officials of foreign States or international organisations). Article *335-bis*, introduced by Article 6 of Law No. 97 of 27 March 2001, also intervened in this matter and, except as provided for in Article *322-ter*, established mandatory confiscation in the event of conviction for the offences referred to in Chapter I, Title II of Book II of the Criminal Code (all offences committed by public officials against the public administration), mandatory confiscation is also provided for in the cases referred to in Article 240 of the Criminal Code.

Article 3(1) of the Directive defines the term 'proceeds' as «any economic advantage derived directly or indirectly from a criminal offence consisting of any form

[25] Article 12 Confiscation. «1. Member States shall take the necessary measures to enable the confiscation, either wholly or in part, of instrumentalities and proceeds stemming from a criminal offence subject to a final conviction, which may also result from proceedings in absentia. 2. Member States shall take the necessary measures to enable the confiscation of property the value of which corresponds to instrumentalities or proceeds stemming from a criminal offence subject to a final conviction, which may also result from proceedings in absentia. Such confiscation may be subsidiary or alternative to confiscation pursuant to paragraph 1».

[26] Reconfirming the obsolete nature of the regime under Article 240 of the Criminal Code, which still provides for the optional nature of this form of confiscation.

of property, and including any subsequent reinvestment or transformation of direct proceeds and any valuable benefits».

This broad definition, corresponding to the one contained in Directive 42/2014 (art. 2) confirms the possibility of including the surrogates of the original profit, as well as the additional benefits, as also specified in recital 13: «a broad definition of proceeds of crime should be provided for, to include the direct proceeds from criminal activities and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds, in line with the definitions in Regulation (EU) 2018/1805 OF THE European Parliament and of the Council. Proceeds should therefore include any property, including property that has been transformed or converted, fully or in part, into other property, and property that has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds. it should also include the income or other benefits derived from proceeds of crime, or from property into or with which such proceeds have been transformed, converted or intermingled».

This broad definition is confirmed by the jurisprudence of the Court of Justice in relation to Article 2 of Directive 4/2014, which refers to para. 2.6 of the explanatory memorandum to the Proposal for a Directive that gave rise to Directive 2014/42 , which points out that «the definition of the concept of 'proceeds', within the meaning of that directive, was extended in relation to the definition of that concept set out in Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ 2005 L 68, p. 49), in order to include the possibility of confiscating all valuable benefits resulting from the proceeds of crime, including indirect proceeds»[27] .

In light of this definition, the Italian legal system must adopt – also in light of Art. 11 and 117 of the Italian Constitution, which require interpretation in conformity with EU law[28] – an interpretative approach that accepts a broad notion of proceeds, starting with the Supreme Court Miragliotta decision[29]; the Italian Supreme Court includes utilities in the notion of confiscable proceeds, provided that the prosecution offers circumstantial proof of the of the link of pertinence that connect, even through subsequent passages, the assets to be confiscated to the crime, thus preventing to an excessive expansion of the notion of indirect profit. The Court holds, in a case of bribery,

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[27] CJEU, 21 October 2021, Okrazhna prokuratura – Varna, C-845/19 and C-863/19, EU:C:2021:864, § 38 ff. «In that regard, it must be noted that the concept of 'economic advantage derived … indirectly from a criminal offence' comes within the definition of the concept of 'proceeds' set out in Article 2(1) of Directive 2014/42, according to which 'proceeds' are 'any economic advantage derived directly or indirectly from a criminal offence', which 'may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits'»; «40 Furthermore, as the Advocate General observed in point 49 of his Opinion, by referring expressly, in Article 2(1) of Directive 2014/42, to direct or indirect advantages, the EU legislature did not intend to establish two distinct concepts that are independent of each other. As is apparent from recital 11 of that directive, the concept of 'proceeds' was clarified by that directive, to include not only the property arising directly from the criminal offence concerned, but also all conversions of that property and the other valuable benefits generated by it».

[28] Cass. 6 November 2008 No. 45389, Perino, in *Cass. Pen.* 2010, 2714; Cass., 19 March 2013, no. 13061.

[29] Cass., S.U., 6 March 2008, No. 10280, Miragliotta, rv. 23870.

that «the asset constituting a profit can be confiscated pursuant to articles 240 and 322-*ter*, paragraph I, first part of the Criminal Code whenever it can be causally linked in a precise way to the criminal activity carried out by the agent. Therefore, it is necessary to clearly indicate the circumstantial elements on the basis of which to determine how the seized assets can be considered, in whole or in part, the immediate product of a criminally relevant conduct or the indirect profit thereof, as the result of reuse by the offender of the money or other utilities directly obtained from the accused». This interpretation was later confirmed by the rulings of the Joint Sections Gubert[30] and Thyssen[31] , and has been taken up verbatim in subsequent jurisprudence[32] . Not in line with such a broad notion of proceeds, however, appears to be the older orientation – emblematic is the ruling of the Joint Sections Caruso in 2009 –, confirmed by the Joint Sections in the Lucci ruling[33], according to which «the principle that profit is only the advantage of immediate and direct causal derivation from the crime" is affirmed; a position that has also been taken up by the Supreme Court's jurisprudence more recently»[34].

A problematic aspect remains, the difficulty in delimiting this notion of "evaluable utilities" where the proceeds are invested in lawful activities. In the German legal system – In which the term "*etwas*" (something), introduced with the 1992 reform to define proceeds (instead of *Vermogenvorteil*), is intended to include any increase in the economic value of the assets accruing to the perpetrator or accomplice –, there is express provision not only for the confiscation *of Originalobjekte* (§ 73 StGB[35] , c. 1), but also for the mandatory confiscation of *Nutzungen* (benefits c. 2) and the optional confiscation of *Surrogaten* (c. 3); however, according to doctrine and jurisprudence, indirect proceeds cannot be confiscated where they are also related to the case or derive from a further lawful activity of the offender, such as winning the lottery or proceeds from business investments or stock market speculation. It is considered that where the offender has used direct proceeds to create or expand a business, the indirect profits made generated by this economic activity do not fall under the notion of *Nutzungen* (utilities), because this money was obtained through personal effort and therefore constitutes lawful profit, not obtained illegitimately for the purposes of confiscation. Their assessment, moreover, would impose insoluble problems on the judge.

The advantage must be "economically assessable" and, therefore, as stated by the Italian Supreme Court, a merely *financial* and *non patrimonial* advantage should not fall within this definition[36]. Art. 3 specifies that proceeds are «any economic advantage

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[30] Cass., S.U., 5 March 2014, No. 10561, Gubert.

[31] Cass., S.U., 24 April 2014, Thyssen, No. 38343, *CEDCass,* 261117.

[32] Per all Cass. 12 June 2018, no. 38917, in *FI* 2018, II, 715.

[33] Cass., Joint Chambers, 26 June 2015, Lucci, No. 31617, Rv. 264436; Cass., Sec. 614 July 2015, Greenfarm Farm of Guido Leopardi, No. 33226, *CEDCass,* 264941; Cass., Sec. 2, 5 October 2016, Maiorano, No. 53650, *CEDCass,* 268854.

[34] Cass. 21 October 2020, no. 6607.

[35] Section 73 StGB governs *the confiscation of profits, "Einziehung von Taterträgen bei Tätern und Teilnehmern"* after the 2017 reform, formerly *"Voraussetzungen des Verfalls"*.

[36] Court of App. Milan, 25 January 2012, Banca Italease S.p.A., in *Dir. pen. cont.*, 11 April 2012; Cass., 29

derived directly or indirectly from a criminal offence» and therefore must already be *derived* and achieved and, as clarified by the Italian Supreme Court, actual and not merely potential and future, by virtue of the"'principle of causality" and the requirements of materiality and actuality[37]; This is required in order to comply with the principle of legality, because a merely potential and future profit has not yet come into existence and therefore does not exist, by definition, as an object of confiscation; it would not be "derived". The illicit enrichment that confiscation is intended to remove in order to perform its economic rebalancing and restorative function would not yet subsist. In this direction, the Italian Supreme Court[38] has specified that «the profit of the crime is only that constituted by a material, actual, and positive change in the patrimonial situation of the beneficiary, engendered by the crime through the creation, transformation or acquisition of things susceptible to economic evaluation. It follows that a future advantage – eventual, hoped-for, intangible or not yet materialised in economic-patrimonial terms – does not constitute profit of the crime, nor does the mere expectation of fact, so-called "chance," unless this, insofar as it is based on specific circumstances, presents such characteristics of concreteness and effectiveness as to constitute itself a separate, autonomous patrimonial entity legally and economically susceptible to evaluation in relation to its projection on the patrimonial sphere of the subject»[39].

A different discussion arises where the profit is represented by an economic advantage actually achieved, but not in the form of money or a tangible good, rather in the form of a benefit or an economically assessable service, such as the free use of an apartment or a car, it being understood that such a form of profit must be "estimated" in economic terms. Clearly, as pointed out by German doctrine[40], such a form of profit, falling within the notion of an intangible advantage, will not be directly confiscable but must be confiscated by equivalent value.

The broad definition of proceeds in Art. 3 of the Directive confirms the adoption of a notion of *gross* profit, in line with the previous Directive 42/2014 (Art. 2). Under the principle of gross proceeds, no account is taken, in calculating the value of the proceeds of the crime, of the expenses incurred by the offender for its commission. More recently, in this direction, in the German legal system, the 2017 reform introduced an *ad hoc* rule, § 73d StGB, which allows for the deduction from gross profit of lawful expenses (the principle of moderate gross), providing that «in determining the value of what is obtained, expenses incurred by the perpetrator, accomplice or other person shall be deducted», while specifying that «no account shall be taken of what was spent or used

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November 2013 (4 March 2014), no. 10265.

[37] Cass., Chamber 5, 28 December 2013, Banca Italease s.p.a, No. 10265, *CEDCass*, 258577; Cass., Joint Chambers, 2 July 2008, No. 26654, Fisia Italimpianti; cf. Cass., 23 February 2021 No. 7021.

[38] Cass., 16 January 2018, no. 1754.

[39] See Cass., Joint Chambers, 2 July 2008, No. 26654, Fisia Italimpianti; Cass., Joint Chambers, 5 March 2014 No. 10561; Cass., Joint Chambers, 18 September 2014 No. 38343 and Cass., Joint Chambers, 21 July 2015, Lucci, No. 31617; Cass., 26 February, 2020 No. 19091, § 3.1; Cass., 21 October 2020 No. 6607. More ambiguous Cass., 3 April 2014 (dep. 13 June 2014) No. 25450.

[40] JOECKS-MEIßNER (2020), Rn. 35.

in committing or preparing the crime, unless such expenses constitute payments to fulfil an obligation to the person harmed by the crime» (in calculating expenses, the judge is granted the power to estimate[41]); such discipline, without prejudice to the fact that the protection of property under Art. 14 GG concerns to legitimately possessed property, whereas crime does not constitute a legitimate title for the acquisition of property, allows the *Bruttoprinzip* to be applied in accordance with the principle of proportionality, in conformity with both Article 14 GG and Article 2 GG (right to the free development of one's personality, provided it does not infringe on the rights of others)[42].

In reality, the two positions – gross profit and net profit (taking expenses into account), tend to converge, as the former does not take into account illicit expenses (for committing the crime) while the latter takes into account lawful expenses relating to performances rendered in favour of the victim. In fact, the problem arises concretely in relation to forms of economic crime connected to a lawful business activity, in which conduct constituting an offence intrudes, such as fraud or corruption aimed at the award of a contract or at obtaining from the public official a consideration higher than that due within the framework of a synallagmatic relationship stipulated between a private company and a public body[43]. Where the illegal activity does not involve the performance of any lawful counter-performance, the confiscable profit can only be identified with the entire value of the business, as it is wholly the result of illegal activity, lacking any separable cost, because it is intrinsically illicit or, in any event, related to instrumental and/or correlative activities with respect to the predicate offence.

The problematic interpretation offered by the Italian Supreme Court, which accepts the principle of gross profit, mitigated by the consideration that the confiscable profit of crimes "in contract" is «concretely determined of the effective benefit possibly achieved by the injured party, in the ambit of the synallagmatic relationship with the entity»[44], does not appear acceptable, as it introduces a notion of "effective utility" that is difficult to calculate[45] and of «reduced practical functionality, being based on uncertain parameters and of inconvenient procedural management»[46].

In supranational law, it should be noted that the 1988 Vienna Convention against Narcotics, the 2000 Palermo Convention against organize organized Crime and the 2003 New York Convention against Corruption also use the term "proceeds" – proceeds, not

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[41] «(2) The amount and value of what is received, including expenses to be deducted, can be estimated.»

[42] The doctrine interprets the reform as an expression of a *moderate gross* principle, because while at first glance the rule would seem to enshrine a return to the net principle, by allowing for the exceptions considered, it ultimately results in a moderate gross, RÖNNAU-BEGEMEIER (2017), 6 ff., Rn. 3.

[43] SCARCELLA (2016), p. 253 ss.; BORSARI (2019), p. 16 ff.

[44] Cass., Joint Chambers, 2 July 2008, No. 26654, *Fisia Italimpianti*, § 7; conf. 2016, n. 23013; Chamber. VI, 8 April 2013, No. 24277; Chamber. 6, No. 33226 of 14/07/2015, *Azienda Agraria Geenfarm di Guido Leopardi*, in the same proceeding and Chamber. 2, No. 20506 del 16/04/2009, Società Impregilo Spa, Rv. 243198; Cass., Joint Chambers, 26 June 2015, Lucci, No. 31617; 2008, No. 42300; Chamber. 2, del 16/04/2009, No. 20506; Chamber. 02, del 12/11/2013, No. 8339.

[45] LORENZETTO (2008), p. 1795; TRINCHERA (2020), p. 398; MONGILLO (2018); FINOCCHIARO (2020), p. 333.

[46] SCARCELLA, (2016), p. 262; see MAUGERI (2023), p. 56 ff.; MONGILLO (2018); BONTEMPELLI (2012), p. 149; LORENZETTO (2008), p. 1795; TRINCHERA (2020), p. 398.

profits – to refer to the object of confiscation. According to these Conventions, proceeds constitute property obtained or derived, directly or indirectly, from the commission of a crime. It appears, as argued by some North American Supreme Court Justices[47], that the UN Conventions deliberately confer a very broad meaning on the concept of proceeds, clearly aimed at adopting the gross profit principle. As noted in the Fisia Joint Sections judgment[48] (Italian Supreme Court), the international instruments that delegated Law No. 300 of 2000 was intended to implement (Convention 26/7/1995; Convention 26/5/1997; OECD Convention 17/12/1997) also require State Parties to adopt appropriate measures for the confiscation or other "diversion" of the "proceeds" of the crimes concerned. In the Council of Europe's 1990 Strasbourg Convention on Money Laundering and Confiscation-which consistently uses the term "proceeds" and in «art. 1(a) states that "proceeds" means any economic advantage from criminal offences» – it is specified, particularly in the explanatory report, that costs should not be taken into account in defining the notion of "economic advantage", while acknowledging the variety of national solutions.

Recital 13 of the Directive specifies that «proceeds should therefore include any property, including property that has been transformed or converted, fully or in part, into other property, and property that has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds». Already in Directive 42/2014, when defining the concept of proceeds of crime in recital 11, it is specified that, in the case of intermingling of proceeds of crime with assets of lawful origin, it is possible to confiscate «up to the assessed value of the intermingled proceeds». In French law, Article 131-21(3) likewise 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». In the Italian legal system, it would be desirable to introduce a similar provision, in order to counter the tendency of Italian jurisprudence to apply confiscation, in particular extended confiscation *under* Article *240-bis* of the Criminal Code (of assets of disproportionate value with respect to income or economic activity) or confiscation as a preventive measure (Article 24 of Legislative Decree No. 159/2011), to entire business compendia where illicit proceeds have been invested in an enterprise. In such cases, it is argued that it is no longer possible to distinguish licit from illicit assets, thereby transforming extended confiscation into a form of general confiscation of property, a sort of disproportionate wealth penalty, in blatant violation of the principle of legality, the constitutional protection of private property, and the principle of proportionality itself. Such an approach applies not only to the proceeds of crimes related to organised crime, the so-called mafia enterprise, but also to the proceeds of economic crimes, such as tax evasion (e.g. the Repaci Joint Sections ruling)[49].

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[47] United States v. Santos, 128 S. Ct. 2020 (2008).

[48] Cass., Joint Chambers, July 2, 2008, No. 26654, Fisia Italimpianti.

[49] MAUGERI (2022), p. 122 ff. Cass., Joint Chambers, 29 May 2014 (dep. 29.7.2014) No. 33451, Repaci; Cass. 9/15/2020 No. 27228; Cass. 4 July 2019, No. 49750; Cass. 15 September 2020, No. 27228; Cass. 24 November 2020, No. 9102.

5. Value confiscation.

Article 12(2), as mentioned above, includes a requirement to introduce confiscation of property of equivalent value to instrumentalities and proceeds of crime «2. Member States shall take the necessary measures to enable the confiscation of property the value of which corresponds to instrumentalities or proceeds stemming from a criminal offence subject to a final conviction, which may also result from proceedings in absentia. Such confiscation may be subsidiary or alternative to confiscation pursuant to paragraph 1».

In this regard, not only did Article 4 of Directive 42/2014 provide for the mandatory nature of confiscation for equivalent value for so-called Eurocrimes, but such mandatory character had already been established by Framework Decision 2001/500/JHA and by Article 2 of Framework Decision 2005/212/JHA, which remained in force even after the entry into force of the Directive, for all offences punishable by imprisonment of more than one year. In the Italian legal system, Legislative Decree No. 202/2016 extended the application of value confiscation (as well as extended confiscation *pursuant to* Article *12-sexies* of Decree-Law No. 306/1992, now Article *240-bis* of the Criminal Code) to the cases covered by Directive 42, at least where such confiscation was not already provided for[50], and introduced into Article 240 of the Criminal Code compulsory confiscation of proceeds and products, including in equivalent form, exclusively in relation to the so-called computer crimes expressly falling within the scope of the Directive. The result is the incomprehensible anomaly whereby, within a provision containing the general discipline of confiscation (Art. 240 of the Criminal Code), a special form of value confiscation is inserted.

Article 12(2) specifies that «such confiscation may be subsidiary or alternative to confiscation pursuant to paragraph 1», and recital 26 likewise reiterates, in terms similar to those used in recital 14 of Directive 2014/42/EU, that «Member States are free to define the confiscation of property of equivalent value as subsidiary or alternative to confiscation of instrumentalities and proceeds, as appropriate in accordance with national law».

Equivalent confiscation may therefore be conceived either as an accessory measure to direct confiscation, and thus applicable only in cases where, although the existence of the proceeds and their amount have been established, it is no longer possible to seize them directly, or as an alternative measure, in the form of a kind of autonomous confiscation, which may also allow the removal of forms of proceeds that cannot be subject to direct confiscation, such as intangible proceeds or savings.

Otherwise, the Directive does not take a position on the legal nature of this form of confiscation, in particular confiscation for the equivalent value of the proceeds of crime, which nevertheless constitutes a fundamental tool for ensuring the effectiveness

[50] TRINCHERA (2016); MAUGERI (2018), pp. 237 ff.

of confiscation and has been provided for in all supranational instruments since the 1988 Vienna Convention against Narcotics and the 1990 Strasbourg Convention on Confiscation and Money Laundering.

This issue is not merely theoretical, as it affects the determination of the safeguards to be applied, and some degree of harmonisation in this respect would be desirable. On this point, reference may be made to what has been argued elsewhere[51], save for reiterating that confiscation for equivalent value does not assume a punitive character where it merely removes, albeit in an equivalent form, what has been unlawfully obtained through the offence and therefore something to which one was never entitled, since the offence does not constitute a legitimate title for the acquisition of property[52] – without prejudice to the desirability of guaranteeing the non-retroactivity of the relevant rules – and, in any event, it should share the same legal nature as direct confiscation, albeit applied in equivalent form.

By contrast, the Directive (Article 12(2)), as already the case under Directive 2014/42, also provides for value confiscation of the instrumentalities of the offence, which takes on a clearly punitive character. Indeed, confiscation of instrumentalities retains a preventive or interdictory function only where it consists in removing the instruments necessary or indispensable for the commission of the offence; otherwise, it acquires a purely punitive nature, since it affects property that is lawfully possessed (with the exception of goods whose possession is prohibited or subject to authorisations or licences). The confiscation of their value, in turn, certainly does not retain any preventive character, but rather results in the imposition of a kind of patrimonial penalty commensurate with the value of the instrumentalities of the offence.

This is confirmed by recital 27, which expressly requires the application of the principle of proportionality to this form of confiscation («the confiscation of property the value of which corresponds to instrumentalities»), providing that it should be applied only «where, in view of the particular circumstances of the case, such a measure is proportionate, having regard in particular to the value of the instrumentalities concerned». Moreover, the punitive character of this measure is further emphasised by the requirement that Member States may also take into account «whether and to what extent the convicted person is responsible for making the confiscation of the instrumentalities impossible». This indicates that confiscation for equivalent value of instrumentalities is conceived as a form of sanction compensating for culpability, namely for the blameworthiness inherent in conduct aimed at preventing the confiscation of the instrumentalities.

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[51] MAUGERI (2022), p. 23.

[52] In this regard Cass., Joint Chambers, 2 July 2008, No. 26654, Fisia Italimpianti. The confiscation of the proceeds under German criminal law is seen as a third category, together with penalties and security measures, thus shaping confiscation as a type of criminal sanction *sui generis*, aimed at avoiding unjustified enrichment of the offenders (crime does not pay), HEGER – SAKELLARAKI (2025), p. 153 ss.

5.1. The confiscation of value in comparative law.

In the Italian legal system, in the view of the Constitutional Court[53] and the Supreme Court[54], confiscation of value constitutes a punitive sanction. The lack of dangerousness of the assets subject to it, together with the absence of a "pertinent relationship" (meaning a direct, current and instrumental link) between the offence and the assets, reveals a predominantly afflictive connotation and therefore an "eminently sanctioning" nature, such as to preclude the applicability of the general principle of retroactivity of security measures referred to in Article 200 of the Criminal Code. This interpretation is confirmed by the Cartabia reform (Legislative Decree No. 150/2022), which provides for the enforcement of confiscation for equivalent value in the manner of a pecuniary penalty (allowing its conversion into public utility work and home detention).

By considering confiscation of value as a punishment, the Italian Supreme Court has applied it as a real penalty, for example against each abettor (accessory or accomplice), thereby transforming confiscation into a genuine pecuniary penalty in blatant disregard of the principles of legality, culpability, and proportionality[55], and by holding that confiscation for equivalent value in relation to the offence of corruption (art. 322 ter, § 2 of the Criminal Code) does not necessarily presuppose the achievement, by the briber, of a profit, given the sanctioning nature of the measure[56]. Similarly, in the German legal system, if one participant initially obtains the entire amount and subsequently intends to divide it among the accomplices, the full amount may be confiscated from that person[57]. However, signs of inconsistency remain in the system where, notwithstanding the allegedly punitive nature of value confiscation, the legislator provides for its application even against a person subject to preventive measures (who has not been convicted) pursuant to Article 25 of Legislative Decree No. 159/2011, or allows its application where the offence is time-barred, by extending, through Law No. 3/2019, the scope of Article 578-bis of the Code of Criminal Procedure to value confiscation under art. 322-ter, para. 2, of the Criminal Code[58]. This latter reform runs counter to the long-standing position of the Supreme Court, which had consistently excluded the application of value confiscation in cases where the offence is statute-

[53] Constitutional Court 02/04/2009, No. 97 and 20 November 2009 No. 30.

[54] For all Cass., Joint Chambers, 26 Jene 2015, Lucci, No. 31617; Const. Court, 2 April 2009, No. 97; Const. Court,20 Nov. 2009, No. 301; Const. Court, 7 April 2017, No. 68; Const. Court, 5 Dec. 2018, No. 223; Const. Court, 10 May 2019, No. 112; Cass., S.U., 5 March 2014, No. 10561, Gubert; Cass, 16 Oct. 2018, No. 46973, in *Cass. pen.* 2018; Cass., 19 Feb. 2020, No. 16103; Cass., 26 May 2010, No. 29724; Cass., 28 Feb. 2012, No. 11768, B., in *Riv. pen.* 2012 (7-8), 754; Cass., 23 Oct. 2013, No. 45951; Cass. 4 July 2013, No. 36927.

[55] Supreme Court of Cassation, 28 July 2009, No. 33409, *Alloum*; (2010/21027), *contra* Supreme Court of Cassation, Chamber. VI, 20 January 2021, No. 4727.

[56] Supreme Court of Cassation, 13 May 2010, No. 21027; *contra* Sixth Chamber, 21/01/2016, No. 8044.

[57] 6th Guideline – Germany in Recover (2025), p. 689.

[58] The Constitutional Court allows the application, even in case of statute of limitations, of urban confiscation, which was considered a penalty by the ECtHRin the Sud Fondi case provided that a conviction is pronounced at first instance and the assessment of liability is confirmed, for confiscation purposes only, in subsequent degrees.

barred, precisely because of its punitive nature (see, *inter alia*, Joint Sections Lucci, 2015)[59]. To such an extent that, in order to justify value confiscation even in cases of limitation under Article 578-bis of the Code of Criminal Procedure, the Supreme Court began to refer to the «only 'partially punitive' nature of value confiscation, insofar as it is rather characterised by a 'restorative function aimed at redressing the imbalances in assets created by the offence'». This situation was further aggravated by the retroactive application of Article 578-bis of the Code of Criminal Procedure, which was considered to be a «rule of a procedural nature, as such subject to the principle 'tempus regit actum'»[60]; Subsequently, the Joint sections of the Supreme Court intervened, recognising that Article 578-bis of the Code of Criminal Procedure cannot be applied retroactively in cases of confiscation for equivalent value, «since it is also a substantive provision subject to the prohibition of retroactivity of the norm "in malam partem" under ex Article 25 Cost.»[61]. Finally, the Joint sections recognised the non-punitive nature of this form of confiscation, holding that confiscation of the equivalent value of the proceeds of crime fulfils, like direct confiscation, a recovery function, while assuming a sanctioning character insofar as it concerns assets not derived from the offence, and may acquire a punitive nature only where it deprives the recipient of assets whose value exceeds the economic advantage actually derived from the offence[62].

In this decision, the Joint sections correctly affirmed that confiscation of sums of money qualifies as *direct confiscation* only where there is proof of a causal link between the asset and the offence, whereas, in the absence of such a link, it must be regarded as confiscation for equivalent value, since the classification of the measure cannot be derived solely from the nature of the asset subject to confiscation[63]. Prior to this judgment, prevailing Italian jurisprudence had consistently considered confiscation of money to be *direct*, thereby limiting the application of confiscation for equivalent value to non-fungible assets. According to that approach, «if the price or the so-called accretive profit deriving from the offence consists of money, the confiscation of sums deposited in a bank current account, over which the person has availability, must be qualified as direct confiscation and, given the nature of the asset, does not require proof of a direct derivation link between the sum materially subject to ablation and the offence»[64]. This position was criticised in legal scholarship for failing to take into account the need to

[59] Cass., Joint Chambers, June 26, 2015, Lucci, No. 31617; conform Cass., Sec. VI, Jan. 25, 2013, No. 21192; Cass. sec. VI, Dec. 6, 2012, No. 18799.

[60] Cass. sec. II, 2 April 2021, no. 19645.

[61] Cass., SS.UU., hearing of 29 September 2022, Interim Information No. 15/2022. Notwithstanding the fact that the issue is resolved at its root, subject to the absence of future counter-reforms, by the reform *in peius* of prescriptive terms introduced in Article 159 of the Criminal Code by Law No. 3/2019, also in light ofthe introduction of the discipline of regime of improcedibilityand the new Article 578 *ter* c.p.p. – introduced by L.D. No. 150 of 17 Oct. 2022, Art. 33, c) – whichh does not allow the application of confiscation, – except for the case referred to in Art. 240, 2 paragraph no. 2, as emerges from the explanatoryreport –, but instead refers to the discipline of preventive confiscation.

[62] Joint ChambersMassini (Joint Chambers, n. 13783 of 26/09/2024, filed 2025, Massini, Rv. 287756 – 02).

[63] *Idem*.

[64] Supreme Court of Cassation, No. 10561 of 2014, *Gubert*; Cass., Joint Chambers, 26 June 2015, Lucci, No. 31617; Sixth Chamber, 18 February 2016, No. 10708; 4 February 2021, No. 6391.

ascertain the 'pertinent relationship' between the profit and the offence in order to apply direct confiscation, as ultimately recognised by the Joint Sections of the Supreme Court.

In the French legal system, value confiscation is provided for under Article 131-21(9) Code pénal; the conditions for its imposition were significantly revised by Act No. 2012-409 of 27 March 2012. Under the previous regime, two alternative conditions had to be met, namely that the property had not been previously seized or could not be represented; these requirements no longer determine the application of value confiscation. Trial courts now enjoy genuine discretion and may order confiscation either in kind, meaning confiscation of property eligible for confiscation regardless of prior seizure, or in value, referring to a sum of money or other assets owned by, or freely available to, the convicted person. A limitation is that both measures cannot be applied to the same asset; however, a single decision may combine confiscation in kind and value confiscation, provided that they concern different assets. A further limitation is that the total amount of value-based confiscation may not exceed the value of the property eligible for confiscation[65].

In the Polish legal system, Article 44, para. 4, allows confiscation of value not only of the proceeds of the offence[66], but also of the «items used or intended to be used to commit the offence».

Similarly, in the German legal system, it is possible to order confiscation of instrumentalities (Section 74 *StGB*) and of their value (Section 74c(1) *StGB*), provided that the perpetrator or participant code pénal culpably committed an intentional offence, since this form of confiscation is considered a penalty and its application is discretionary. By contrast, confiscation of proceeds requires only an unlawful act and is mandatory. Where the object obtained can still be confiscated, but its value is lower than the originally obtained increase in assets, compensation for the value of the object may be confiscated in addition to the object itself. The value to be confiscated may be estimated by the court (Sections 73d(2) and 74c(3) *StGB*; Section 29a(4) *OWiG*).

In the Spanish legal system, value confiscation is mandatory also 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 where they are of lawful origin (Art. CP 127.3 SCC). In addition, Article 127-septies of the Criminal Code provides for value-based confiscation during the enforcement phase (the so-called *Ejectutoria* in the Spanish legal system) where, due to the nature, situation or other circumstances of the assets, it has not been possible to carry out confiscation in kind. In this case, value confiscation is optional. Both provisions pursue the same objective of ensuring the effectiveness of

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[65] ANASTASIO-BLESSON (2025), p. 137.

[66] Art. 44. 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».

Art. 45. Forfeiture of 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».

confiscation in cases of impossibility, although they apply at different procedural stages: when confiscation is ordered by the judgment (art. 127.3 SCC) and when it is enforced through execution (art. 127 septies SCC), in line with the so-called *wertersatz* under the German Law (Art. § 74.c) of the German CC). This possibility also applies 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 may prove redundant, given that the bringing of a civil action within criminal proceedings in Spain is not merely permitted but mandatory for the public prosecutor, unless the victim expressly waives it. Accordingly, for the confiscation of property whose value corresponds to instrumentalities or proceeds, Spanish legislation allows the confiscation of other assets of equivalent value on the basis of a final conviction, within the framework of the so-called *responsabilidades pecuniarias*, a broad legal concept encompassing compensation, costs and fines.

Both in cases of loss of assets and in cases of their depreciation, confiscation for equivalent value is mandatory for the Spanish courts, unless the judicial authority considers, in a reasoned decision, that confiscation would be disproportionate, pursuant to Article 128 of the Criminal Code. By contrast, where value confiscation is ordered during the enforcement phase (Article 127-septies SCC), it is discretionary. Finally, value confiscation requires an estimation of the assets concerned. This may prove complex, particularly where the assets are unavailable or where valuation would entail excessive or exceptional costs. In such cases, early valuation is recommended in order to ensure the effectiveness of subsequent value confiscation decisions (GPO Circular No. 10/2011). In any event, a flexible and approximate valuation may be admissible. Confiscation of value ordered by a conviction judgment is enforceable even where the convicted person dies after the trial.

6. Confiscation against third parties.

Article 13[67] (and recital 28) requires Member States to allow the confiscation of proceeds of crime, or other property of a value corresponding to such proceeds,

[67] Article 13 Confiscation against third parties. «1. Member States shall take the necessary measures to enable the 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, or which were acquired by third parties from a suspected or accused person.
The confiscation of proceeds or other property as referred to in the first subparagraph shall be possible where a national court has established, based on the concrete facts and circumstances of a case, that the relevant third parties knew or ought to have known that the purpose of the transfer or *acquis*ition was to avoid confiscation. Such facts and circumstances include:
(a) the transfer or *acquis*ition was carried out free of charge or in exchange for an amount which is clearly disproportionate to the market value of the property; or
(b) the property was transferred to closely related parties while remaining under the effective control of the suspected or accused person.

transferred by the accused or suspected person to a third party in order to avoid confiscation ("third-party confiscation"), with a provision fully corresponding to Article 6 of the previous Directive 42/2014. Such confiscation is justified only if it is established, on the basis of concrete facts and circumstances, that the third party knew or should have known that the transfer of assets was made for this purpose and, therefore, was not acting in good faith.

It is, therefore, incumbent on the prosecution to prove the third party's lack of good faith in terms of awareness ("that they knew"), or at least some form of fault ("should have known"). The fact that the transfer or acquisition was made free of charge, or against payment of an amount significantly lower than the market value, is considered relevant in proving such knowledge or, at least, negligence. This discipline is consistent with the jurisprudence of the Court of Justice and the ECtHR, which have repeatedly ruled against forms of confiscation affecting innocent third parties[68], as will be examined below. In this context, account should also be taken of Article 17(1) of the Charter of Fundamental Rights of the European Union, which provides, *inter alia*, that everyone has the right to own, use, dispose of and bequeath their lawfully acquired possessions.

Confiscation is also provided for in Article 13 of Directive 2024/1260 with regard to third parties where the assets are not directly the proceeds of crime, but *other assets of equivalent value* have been transferred in order to avoid value confiscation. The confiscation, from third parties, of assets of lawful origin but of a value corresponding to the illicit profit is permissible to the extent that it is regarded as a surrogate form of direct confiscation of the profit, serving merely a restorative purpose and not constituting a punitive sanction; only on this basis can it be considered consistent with requirements of justice and civil law principles. If, however, value confiscation is regarded as a penalty, as the jurisprudence of the Joint Sections of the Supreme Court and the Italian Constitutional Court, as well as the Italian legislature (Cartabia reform)[69], considers, it should not be applied against third parties, unless they are merely fictitious nominees and the assets are in fact available to the offender. Some authors have long maintained the restorative aim of value confiscation of proceeds, and a recent judgment of the Joint Sections of the Supreme Court has adopted this interpretation[70].

In the Italian legal system, in any event, Article 512-bis (formerly Article 12-quinquies of Decree-Law No. 306/1992) criminalises the fraudulent transfer of values – the fictitious attribution to others of ownership or availability of money, goods or other utilities in order to evade the statutory provisions on patrimonial preventive measures or anti-smuggling measures – as well as self-laundering under Article 648-ter.1 of the Criminal Code.

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

[68] EU Court of Justice, Sec. I, 14 Jan. 2021, Case C-393/19.

[69] MAUGERI (2023), p. 18 ff.

[70] MAUGERI (2023), p. 18 ff. and quoted authors; Joint Chambers Massini (Joint Chambers, n. 13783 of 26/09/2024, filed 2025, Massini, Rv. 287756 – 02).

Article 13, moreover, is without prejudice to the "rights of *bona fide* third parties", as provided in Article 6 of the previous Directive. As regards the protection of third-party rights, supranational instruments, from the 1988 Vienna Convention on Drug Trafficking (Article 5) and the 1990 Strasbourg Convention up to Directive 2014/42 (Article 6), require the protection of the rights of bona fide third parties.

The Directive specifies in recital 28, in terms corresponding to recital 24 of Directive 42/2014, that the third party from whom to recover the profit transferred by a suspected or accused person may also be an *entity*, in the event that the offence was committed for the benefit of a legal person. In that case, too, it is a matter of recovering unjust enrichment in the hands of the legal person, in whose name and on whose behalf the individual, as its organ, committed the offence[71]. The assets of the natural person, by contrast, should be immune from the confiscatory claims of the State; above all, confiscation against the natural person should not be permitted, because the profit has not accrued to them (except, for example, where the natural person has retained money intended for the payment of tax claims). Any confiscation against that person, in an amount corresponding to the economic benefits of the offence obtained by the legal person, would therefore assume the meaning and content of a *patrimonial penalty*.

The Court of Justice clarified that Directive 2014/42 does not provide for confiscation of instrumentalities of the offence from third parties, but only for confiscation of proceeds under Article 6, and that confiscation under Article 4(1) can affect only the property of suspects and defendants[72]; and, in any event, even where it does not exclude that confiscation of instrumentalities may be applied to a third party[73], it reiterates that confiscation cannot be applied against bona fide third parties. In particular, it has most recently held that the protection of third parties' rights against confiscation, as defined by Article 2 of Directive 42/2014[74], must be guaranteed in the light of "Article 17(1) of the Charter", even though the right to property «does not constitute an absolute prerogative», since, «in accordance with Article 52(1) of the

[71] SALCUNI (2010), p. 493; PERINI (2008), p. 943 ff; POTETTI (2013), p. 314; GIOVANNIELLO (2011), p. 2505 ff.

[72] «The confiscation of property belonging to third parties is only envisaged in the situations referred to in Article 6 of Directive 2014/42, the confiscation of property under Article 4(1) of that directive can only relate to the property of suspected or accused persons. The fact, raised by the referring court, that the accused person had permanent use of the property is not such as to allow that property to be confiscated pursuant to Article 4(1) of Directive 2014/42 when it belongs to a bona fide third party. In any case, to the extent that the national law does not allow the property of a bona fide third party to be confiscated in a situation such as that in the main proceedings, it is settled case-law of the Court that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against that individual before a national court (judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 65 and the case-law cited). In view of the foregoing […] Article 4(1) of Directive 2014/42 must be interpreted as not precluding a national law which does not permit the confiscation of property belonging to a bona fide third party and used as an instrumentality, including where that property has been made available by that third party to the accused for the latter's permanent use», CJEU, May 12, 2022, C-505/20, RR, JG, §§ 39 ff.

[73] CJEU (First Chamber), 14 January 2021, C-393/19, OM, with the intervention of: Okrazhna prokuratura – Haskovo, Apelativna prokuratura – Plovdiv: «50. In that regard, it is true that that provision does not expressly designate a person whose goods may be confiscated. It refers merely to the 'instrumentalities' associated with an offence, without it being necessary to specify who holds or owns them».

[74] Although Framework Decision 212/2005 applies in this case.

Charter, limitations may be placed on the exercise of the rights and freedoms enshrined therein, provided that such limitations actually meet objectives of general interest pursued by the Union and do not constitute, in relation to their intended purpose, a disproportionate and unacceptable intervention, such as to impair the very substance of the right so guaranteed»[75] . That being said, «in view of the appreciable injury to the rights of individuals resulting from the confiscation of property, i.e., from the definitive divestment of the right of ownership over it, it should be noted that, since this is a bona fide third party who did not know and could not have known that his property had been used to commit a crime, such a confiscation constitutes, with respect to the intended purpose, a disproportionate and unacceptable intervention that undermines the very substance of the latter's right of ownership»[76].

Some foreign legal systems expressly regulate the possibility of recovering proceeds from *third parties*, provided that their good faith is respected; first of all, the *Einziehung* or *Erweiterte Einziehung* in German law under the *Vertreterklausel* (§ 73b).

The Italian legal system lacks an ad hoc rule in this regard, notwithstanding the more recent proposals of the Palazzo Commission and the Marasca Commission (prior to the Grosso project, Article 114, no. 5), and notwithstanding the fact that such a provision appears essential to ensure greater effectiveness of the measures under consideration, subject to the protection of the rights acquired in good faith by third parties. Inractice, however, the proceeds of crime are confiscated from third parties on the basis of jurisprudence that considers such persons not *extraneous* to the offence – a hypothesis which, under the general rules of Article 240 of the Criminal Code, would exclude the application of confiscation against them (the items subject to optional confiscation must not belong "to persons *extraneous* to the crime") –, as *beneficiaries* not entitled to retain the proceeds, since the offence is not a legitimate title for the acquisition of property. The concept of *extraneousness* is not limited to the *absence of participation* in the commission of the offence, but also extends to the *absence of benefits* derived from it, so that a person who has nevertheless benefited cannot be regarded as "extraneous"[77]; it is important to prove the good faith in the hypothesis of the instruments confiscation, «not being able to know – with the use of the diligence required by the concrete situation – the use of the asset for illicit purposes»[78] . The principle of protection of *bona fide* third

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[75] «See, to this effect, Judgment of July 16, 2020, Adusbef and Federconsumatori, C-686/18, EU:C:2020:567, para. 85 and case law cited»; CJEU (First Chamber), 14 January 2021, C-393/19, OM, cited above, § 52 ff.

[76] CJEU (First Chamber), 14 January 2021, C-393/19, OM, cited above, § 55.

[77] Const. court., 19 Jan. 1987, No. 2; see Cass.,19 Sept. 2012, 1256, *Dir. pen. cont.* 13, 464, note D'AVIRRO; the Supreme Court also considers "not outsider to the crime" «a person who has received a benefit from the same for acquiring property despite knowing its illicit origin» (C 22/42008); «one who has derived advantages or benefits from it cannot be considered a stranger to the crime, by which is to be understood *any condition of favor*, even non-material, resulting from the act constituting the crime», Cass. sec. III, 10 Dec. 2019 (dep. Apr. 2, 2020), no. 11269.

[78] Is a "person extraneous to the crime" «the person who did not derive benefits and utilities from the crime and who is in good faith, not being able to know – with the use of the diligence required by the concrete situation – the use of the asset for illicit purposes», Cass. Oct. 2022, No. 42008, Ricci, Rv. 283713 – 01; complying Cass, sec. III, 16 May 2023, no. 20675; Cass. 17 Feb. 2017 (dep. 06/14/2017), no. 29586; Cass., 26 May 2017, no. 42778, Consoli, Rv. 271441; Cass., sec. 1, 17 June 2011, no. 29197, (Omissis) Spa, Rv. 250804-

parties remains inescapable also in the light of the principle of blameless reliance that characterises the legal system as a whole[79]. In this legal system, proceeds may also be confiscated from a legal entity that cannot be regarded as extraneous where it is a beneficiary and has derived benefits and utilities from the offence.

It is important to stress that, in the Italian legal system, a logic of suspicion often prevails *vis-à-vis* third parties, through a reversal of the burden of proof in this field, as an exception to the civil law principle that "possession is worth title". On the basis of established case law, in preventive proceedings the burden of proving title, extraneousness to the offence, and good faith lies with the third party, insofar as third-party ownership constitutes an element preventing confiscation (it being understood that it remains for the prosecution to establish ownership or availability of the property in the hands of the convicted person).[80]

In the Dutch legal system, where the object to be confiscated does not belong to the offender but to a third party, the requirements of Article 32a(2) P.C. must be established, and confiscation is possible only if that person was aware of its illicit origin or intended use, or could reasonably have suspected this. Thus, the law requires that the third party acted in bad faith, which is the case where the person knew that the objects were acquired through criminal conduct. Similarly, bad faith may be presumed where the third party could reasonably have suspected that the objects were acquired in that wayIn the Spanish legal system, following the removal in 2015 of the exception for assets,

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[79] Cass., Joint Chambers, 28 April 1999, Bacherotti, *R. pen*. 99, 633.

[80] Cass. Joint Chambers., 28 April 1999, no. 9, Bacherotti, by imposing the reversal of the burden of proof, defines good faith as «non cognizability, with the use of the diligence required by the concrete situation, of the derivation relationship of one's subjective position from the crime committed»; Cass. Joint Chambers., 25 Sept., 2014, Uniland, no. 11170; by contrast, taking into account the extension of the rules on third party protection of Legislative Decree 231/2001 to other areas as well, Cass, sec. I, 4 June 2021, no. 22048: «The protection of the subjective legal position of the extraneous third party holder of a real right of guarantee affected by the confiscation is to be granted not only in the only hypotheses of recognized applicability of the specific discipline introduced by the legislator in the prevention confiscation (Article 52 et seq. of Legislative Decree September 6, 2011 no. 159), but rather to all hypotheses of confiscation provided for in the criminal sphere, responding to a general need for rationality of the system and to general principles also recognized in the EU sphere; and this even before the formal entry into force (September 1, 2021) of Article 373 of Legislative Decree No. 14 of January 12, 2019 (Business Crisis Code), which expressly extended the discipline provided for in the prevention sphere to all hypotheses of criminal seizure and confiscation. To the effect, due to these principles, it is up to the judge of criminal execution, in the face of the third party's petition assuming its position as a third party blameless outsider, to appreciate the recurren or not of the subjective condition of good faith and blameless reliance of the third party creditor (at the genetic moment and at the moment of the eventual assignment of the original credit position): a condition that would always make the credit "opposable" to any form of confiscation»; see Cass., sez. VI, 14 Nov. 2023, no. 48761. On the subject of confiscation for the protection of cultural property, the Supreme Court specified (with reference to former Art. 174, c. 3, Code of Cultural Heritage and Landscape) that, where there is a connection between the right of a third party and another person's offence, that party bears the burden of proving his or her own blameless reliance, arising from a situation of appearance as to the lawfulness of the origin of the property, such as to render excusable ignorance or lack of diligence excusable (Cass., Sez . 3, no. 11269 of 10.12.2019, in Ced, rv . 278764; Criminal Cassation Sec. III, 24/01/2023, no.9101; Criminal Cassation, Sec. III, 10 Dec. 2019, no. 11269, The Pierpont Morgan Library; Cass., Sec. 3, no. 22, 30/11/2018, filed. 2019 (Getty Museum case).

goods, means or instrumentalities belonging «to a third party in good faith who is not responsible for the felony, who has acquired them legally» (contained in the last sentence of the former Article 127.1 of the Criminal Code), the only provision applicable to third-party confiscation is now Article 127-quater of the Criminal Code. Spain has introduced specific provisions 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». The Spanish Criminal Code implemented this requirement from Directive 2014/42/EU, while ensuring that the rights of *bona fide* third parties are preserved. This type of confiscation is optional, not mandatory, where ill-gotten assets, effects and profits falling within the above models have been transferred to third parties. In these cases, it is necessary to distinguish between: (i) items/effects and profits, where they have been acquired with full knowledge (or at least with reasons for such knowledge on the part of a diligent person) of the illegal origin of the possession; and (ii) other assets, where they have been acquired with full knowledge (or at least with reasons for such knowledge on the part of a diligent person) that confiscation is being hindered. Good faith excludes the application of this type of confiscation, provided that, with a reversal of the burden of proof, the basis for the contested free/gratuitous or low-priced acquisition is explained. Such knowledge is presumed, as Article 127-quater(2) points out, on the basis of the purchase price (free of charge or considerably lower than the market value)[81].

In the Bulgarian legal system, within criminal proceedings, the measure of "deprivation in favour of the State" under Article 53 of the Criminal Code applies against third parties other than the guilty person where it concerns benefits from criminal activity or unlawful possession of the subject-matter of the offence. Under Article 53, para. 2, benefits from criminal activity may be confiscated where they are held or owned by third parties. The subject-matter of an offence under Article 53, para. 2(b)(a), where it concerns items prohibited for possession, is also subject to confiscation even where it is in the possession of third parties. Instrumentalities of the offence may be confiscated under Article 53 only where they belong to the perpetrator, and therefore this measure does not apply to third parties. In addition, certain specific measures in the Special Part of the Criminal Code also provide for confiscation of the subject-matter or means of the offence, even where they are owned by third parties. For example, the provisions concerning TF and ML* (Article 108a, para. 8 of the CC; Article 253, para. 6 and Article 253a, para. 3 of the CC) are not limited to property belonging to the perpetrator, and confiscation in such cases also applies to third parties. Proceeds of crime from any offence under Article 53(2) of the CC may be confiscated when held or possessed by third parties. Article 53 applies irrespective of criminal liability to all offences. If the perpetrator of the offence is deceased, the measure may be applied provided that the other requirements are met. Confiscation of the subject-matter of an offence will be possible, in the event of the perpetrator's death in TF or ML cases, only if

[81] JIMENÉZ-VILLAREJO and the TEAM OF THE INTERNATIONAL COOPERATION UNIT (UCIF) (2025), pp. 485-486.

it belonged to them; that is, it is not possible against a third party in the event of the perpetrator's death.

6.1. The right of defence of third parties.

Article 24(7) expressly provides that «Third parties shall be entitled to claim title of ownership or other property rights, including in the cases referred to in Article 13», clearly suggesting that third parties may assert their rights of defence in cases of direct confiscation against third parties under Article 13, but may also do so, as a rule, in relation to any form of confiscation affecting their rights.

Article 24, in fact, first stipulates in paragraph 1 that all persons affected by a freezing order, and, *a fortiori*, by a confiscation order, must enjoy the fundamental rights to an effective remedy and to an impartial tribunal: «1.1. Member States shall ensure that persons affected by freezing orders pursuant to Article 11 and confiscation orders pursuant to Articles 12 to 16 have the right to an effective remedy and to a fair trial in order to uphold their rights». It then specifies in No. 2, paragraph 2 that «Member States may provide that other data subjects shall also have the rights referred to in the first subparagraph. Member States shall ensure that such other persons have the right of access to the file and the right to be heard on questions of law and fact as well as any other procedural rights necessary for them to exercise effectively their right to an effective remedy. The right of access to the file may be limited to documents related to the freezing or confiscation measure as long as the persons concerned have access to the documents necessary to exercise their right to an effective remedy». In paragraph 3, in particular, as already noted, the right of defence against the freezing order under Article 11 is provided for. Finally, paragraph 8 specifies «the right of access to a lawyer throughout the freezing and confiscation proceedings» and the right to be informed of that right.

With regard to third parties, as already specified in the original version of the proposal (Commission version, paragraph 3), the right of defence should include «the effective possibility of contesting this measure and the relevant circumstances of the case in court in accordance with the procedures of national law». Such relevant circumstances «include the facts and circumstances on which the conclusion is based that the third party knew or should have known that the transfer or acquisition of the property was intended to avoid confiscation». As indicated above, it should be for the prosecution to prove this subjective element, if the presumption of innocence is not to be infringed, it being understood that the third party is guaranteed the right to challenge the evidence presented by the prosecution and to assert their legitimate rights. With reference to confiscation under Article 6 of Directive 42/2014, the Court of Justice has clarified that «the confiscation […] presupposes that the existence of a transfer of proceeds to a third party or an acquisition of such proceeds by a third party has been established and that third party was aware of the fact that the purpose of that transfer or acquisition was, for the suspected or accused person, to avoid confiscation…».

In line with this framework, Regulation (EU) 1805/2018 also provides for the protection of bona fide third parties, starting with the obligation to inform the parties involved in the execution of a freezing order and to state the reasons for the measure, as already provided for in Article 8 of Directive 42/2014, as well as the remedies available (Article 21). It also imposes an obligation on Member States to provide remedies in the executing State (Article 33) to all interested parties, including bona fide third parties, and an obligation on the issuing authority to inform the executing authority of the existence of bona fide third-party interests (Article 14).

In relation to freezing and confiscation measures affecting the assets of third parties under Articles 6 and 7 of Directive 42/2014, several preliminary references under Article 267 TFEU have been submitted concerning the guarantee of third parties' rights of defence. In this respect, the Court of Justice has clarified that Article 8(1) of Directive 2014/42/EU «must be interpreted as precluding a national law pursuant to which a bona fide third party whose property is frozen as an alleged instrumentality or as alleged proceeds of a criminal offence is not entitled to apply to the competent court during the trial stage of the criminal proceedings for the return of that property…»[82]. The Court has further specified, «on account of the general nature of the wording of that provision», that «the persons for whom the Member States must guarantee effective remedies and a fair trial are not only those convicted of an offence but also third parties whose property is affected by the freezing order», clarifying that «that interpretation also follows from recital 33 of Directive 2014/42, which states, in essence, that the directive substantially affects the rights of persons, not only of suspected or accused persons, but also of third parties who are not being prosecuted but are claiming that they are the owner of the property concerned. It is therefore necessary, according to that recital, to provide for specific safeguards and judicial remedies in order to ensure the preservation of their fundamental rights in the implementation of that directive»[83]. Accordingly, «Article 8(1), (7) and (9) of Directive 2014/42, read in conjunction with Article 47 of the Charter, must be interpreted as precluding national legislation which allows for the confiscation, in favour of the State, of property which is claimed to belong to a person other than the perpetrator of the criminal offence, without that person having the right to appear as a party in the confiscation proceedings»[84]. The third party «must be informed of his or her right to appear as a party in those proceedings and his or her right to be heard, and must be placed in a position to exercise those rights and claim title of ownership before a confiscation order as regards that property is made»[85]. «In addition, the right of access to a lawyer throughout the confiscation proceedings clearly entails the right of that third party to be heard in the context of those proceedings, which, according to the Court's

[82] CJEU, RR, JG, C-505/20, cited above.
[83] CJEU, RR, JG, C-505/20, cited above, § 35; CJEU, Okrazhna prokuratura – Varna, C-845/19 and C-863/19, cited above, § 77.
[84] CJEU, Okrazhna prokuratura – Varna, C-845/19 and C-863/19, cited above, § 81; CJEU, July 26, 2017, *Sacko*, C-348/16, § 85.
[85] CJEU, Okrazhna prokuratura – Varna, C-845/19 and C-863/19, cited above, § 81; CJEU, July 26, 2017, *Sacko*, C-348/16, § 82.

case-law, guarantees the holder of that right the opportunity to make known his or her views effectively (2017, *Sacko*, C-348/16, EU:C:2017:591, paragraph 34), which is confirmed by recital (see, to that effect, judgment of 26 July 33 of Directive 2014/42, according to which the specific safeguards and judicial remedies in order to guarantee the preservation of the fundamental rights of third parties, in the implementation of that directive, includes the right to be heard for third parties who claim that they are the owner of the property concerned)». The third party thus has the right to «assert that right in order to prevent the actual adoption of such an order (§ 84)»[86].

Finally, the Court of Justice has recently clarified, in guaranteeing the third party's right of defence against a confiscation order of excessive duration, that «a *bona fide* third-party owner of property that has been frozen may ask the competent court, even if judicial proceedings are still ongoing, to review whether the conditions for the freezing continue to be met», with the consequence that national legislation which does not provide for such a safeguard is contrary to Article 8(1) of Directive 2014/42[87].

The ECtHR has likewise recently stressed, in the Isaia case, that domestic authorities enjoy a margin of appreciation under the Convention to apply confiscation measures not only to persons directly accused of offences, but also to their family members and other close relatives who are presumed to possess and manage "ill-gotten" property informally on behalf of suspected offenders, or who otherwise lack bona fide status (see *Gogitidze and Others*, cited above, § 107, and *Telbis and Viziteu*, cited above, § 68, with further references). The Court found it reasonable that applicants presumed to have benefited unduly from the proceeds of crimes committed by family members be required to discharge their share of the burden of proof by refuting the prosecutor's substantiated suspicions concerning the unlawful origin of their assets (see *Balsamo*, § 91, and *Telbis and Viziteu*, § 77, both cited above)[88].

7. Extended confiscation: scope.

In Article 14, the description of this form of confiscation remains unchanged compared to Directive 2014/42, Article 5. What was previously contained in a single paragraph of Article 5(1) of the 2014 Directive is now set out in two separate paragraphs: «1. Member States shall take the necessary measures to enable the confiscation, either wholly or in part, of property belonging to a person convicted of a criminal offence where the offence committed is liable to give rise, directly or indirectly, to economic benefit, and where a national court is satisfied that the property is derived from criminal conduct. 2. In determining whether the property in question is derived from criminal conduct, account shall be taken of all the circumstances of the case, including the specific facts and available evidence such as that the value of the property is disproportionate to

[86] The claim action, governed by Article 108 of the Zakon za sobstvenostta (Property Act, DV No. 92, 16Nov., 1951.
[87] CJEU, RR, JG, C-505/20, cited above, § 37.
[88] ECHR, 25 September 2025, *Isaia and Others v. Italy*, nos. 36551/22, 36926/22 and 37907/22, § 77.

the lawful income of the convicted person». In the Directive, the scope of extended confiscation is broadened (Article 14) to include all offences referred to in Article 2 represented by the so-called Eurocrimes – which include corruption, money laundering and fraud affecting the EU's financial interests[89] – as well as other offences committed through a criminal organisation and harmonised offences, namely «any criminal offences set out in other Union legal acts where such acts provide that this Directive applies to those criminal offences». It is specified in paragraph 3 that the rule should apply "at least" to all offences listed in Article 2(1) to (3) of the Directive «where such offences are punishable by deprivation of liberty of a maximum of at least four years». The intention is therefore not so much to limit the scope of application of the presumption of unlawful enrichment, on which this form of confiscation is based, to the most serious crimes, but rather to impose an obligation to introduce this measure *at least* for offences punishable by a maximum sentence of at least four years. This, as pointed out in the literature, should facilitate mutual recognition without requiring verification of double criminality[90]. In the absence of other indications, such a penalty threshold should refer to national law, in contrast to Article 5(2) of Directive 2014/42, which refers to the European legislative instruments listed in Article 3, or to national law «in the event that the instrument in question does not contain a penalty threshold»[91]. Recital 29 of the Directive, in any event, justifies the introduction of this model «in order to effectively tackle organised criminal activities», on the understanding that its scope is not limited to that field. Indeed, the need to introduce forms of extended confiscation capable of removing assets of illicit origin accumulated over time, with respect to which it is difficult to prove a causal link with specific crimes, arises precisely in the context of combating organised crime, for which forms of easing the burden of proof are traditionally accepted.

Even under Directive 2014/42, the extended confiscation provided for in Article 5(2) was applicable not only to the offences expressly mentioned in Article 5, but also to all offences covered by the relevant instruments referred to in Article 3 and punishable by a custodial sentence of at least four years. Moreover, Article 3 allowed the application of the Directive not only to listed offences (Eurocrimes) but also to offences contained in

[89] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003, p. 54); Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (OJ L 284, 12.11.2018, p. 22); Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ L 198, 28.7.2017, p. 29).

[90] AGUADO (2023), p. 26. In Article 3 of Regulation (EU) 2018/1805, it is stipulated that in order to execute a seizure or confiscation order without verification of the double criminality of the facts that gave rise to it, these facts must be punishable in the issuing state «by a custodial sentence of a maximum of at least three years» and must constitute one or more of the thirty-two listed offenses, modeled on the European Arrest Warrant Directive; many of those offenses fall within the scope of the future Directive.

[91] AGUADO (2023), p. 26.

«other legal instruments if those instruments provide specifically that this Directive applies to the criminal offences harmonised therein»[92] .

In implementation of Directive 2014/42 (and earlier, in implementation of Framework Decision 2005/212/JHA), 25 Member States have introduced this model of confiscation. In Italy, Article 1, paragraph 220, of the 2007 Finance Act (Law No. 296/2006) extended the application of extended confiscation *under* Article *12-sexies* of Decree-Law No. 306/1992 (converted into Law No. 356/1992) to offences committed by public officials against the public administration (Articles 314, 316, *316-bis*, *316-ter*, 317, 318, 319, *319-ter*, 320, 32, *322-bis* and 325). An initial draft of the Finance Act also included the offence of "abuse of office", but this was excluded in the final version and remained excluded in subsequent reforms of extended confiscation, including its incorporation into Article *240-bis* of the Criminal Code by Legislative Decree No. 21/2018 (the offence of "abuse of office" has since been repealed by Article 1, paragraph 1(b), of Law No. 114 of 9 August 2024).

Some authors have criticised this extension of the scope of extended confiscation, arguing that the presumption of illicit origin is less convincing where it is based on convictions for offences not connected with "mafia-type" criminality. In this regard, it may be recalled that the Constitutional Court (judgment No. 33/2018), while rejecting the constitutional challenge, acknowledged that although the objective of extended confiscation was originally identified as *countering the accumulation of assets by organised crime, and mafia organisations* in particular, and their massive infiltration into the economic system, the selection of "predicate offences" was not rigorously consistent from the outset with that declared aim. Alongside offences that presuppose an organisation and a structured activity aimed at the achievement of illicit profits, such as mafia-type associations or associations aimed at illicit drug trafficking, the contested provision from the beginning also referred to a series of other offences, including extortion, kidnapping for the purpose of extortion, usury, laundering, reuse, fictitious registration of assets, illicit drug trafficking and aggravated smuggling (inter alia, Article 648(2) of the Criminal Code), which, although often associated with organised crime (and mafia in particular), may in fact be committed in contexts entirely unrelated to it and without necessarily implying a habitual or professional criminal vocation on the part of the offender.

Having stated this, the Court emphasised that «*in the course of time, moreover, the catalogue of predicate offences has been enriched, in progressive and 'alluvial' way, from a series of novelistic interventions*» and this process of implementation «*has been inspired, in more*

[92] See CJEU, Okrazhna prokuratura – Varna, C-845/19 and C-863/19, cited above, § 71: «In the light of all the foregoing considerations, the answer to the second and third questions is that Directive 2014/42 must be interpreted as meaning that it not only provides for the confiscation of property constituting an economic benefit derived from the criminal offence in respect of which the perpetrator has been convicted, but also provides for the confiscation of property belonging to that perpetrator in respect of which the national court hearing the case is satisfied that it derives from other criminal conduct, in compliance with the safeguards provided for in Article 8(8) of that directive and on condition that the offence in respect of which its perpetrator has been convicted is among those listed in Article 5(2) of that directive and that offence is liable to give rise, directly or indirectly, to economic benefit within the meaning of the same directive».

than one case, by logics clearly extraneous to the primitive one of the figure at hand» as in the case of the «wide range of offences against the public administration» introduced by Article 1, paragraph 220, of Law No. 296/2006, which «is entirely devoid of a direct connection with organised crime and does not even denote, in the perpetrator of the single offence, a necessary 'professionalism' or dedication to criminal activity». The Constitutional Court thus warned, from a *de iure condendo* perspective, has been that «the selection of "matrix crimes" by the legislature should take place, as long as the institute retains its current physiognomy, according to criteria strictly cohesive to it and, therefore, reasonably restrictive». In Germany Erweiterter Verfall was introduced in 1992 by the Act to Fight Illegal Drug Trafficking and Other Forms of Organised Crime[93], and was initially applicable only to a limited number of offences typically attributable to organised crime (34 listed offences). Following the 2017 reform, extended confiscation was extended to all criminal offences. Also in this legal system, however, the removal of the list of offences from Section 73a *StGB*, and thus the abandonment of an explicit link to organised crime, has led scholars to observe that the presumption of the illicit origin of the convicted person's assets is no longer self-evident in practice. The mere fact that a perpetrator or participant has obtained something from a criminal offence does not necessarily mean that they have also acquired other assets through criminal activity. Therefore, particularly in cases involving established offences that do not typically fall within the sphere of organised crime (such as isolated instances of fraud or theft), courts must now assess with particular care whether the circumstances referred to in Section 437 *StPO* are sufficient to satisfy the court that the person concerned also acquired other assets through criminal conduct.

In the Netherlands, extended confiscation was regarded as a more central element of criminal justice as early as 1992, on the basis that it could fulfil an important general preventive and restorative function. In more recent reforms, however, reference has most frequently been made to the fight against organised crime and to the intention of better equipping public prosecutors and law enforcement authorities to address it[94].

7.1. The standard of proof of the illicit origin and the disproportionate value of assets.

Even under the new Article 14, some ambiguity may be identified regarding the standard of proof required to apply this form of extended confiscation, which allows for the removal not only of assets of established illicit origin (whose causal link to the offence is proven), but of all assets that, in the court's view, are derived from criminal conduct. In the English version, the court must be "satisfied" as to the illicit origin of the property, as in the 2014 Directive. The term "satisfied" suggests a lower evidentiary standard than "convinced", used in the Italian version and, in any event, the court does not have to be "fully convinced", as provided in Article 3 of Framework Decision 2005/212/JHA. In

[93] Gesetz zur Bekämpfung des illegalen Raushgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität – OrgKG, 15.07.1992, BGBI. I, 1302.

[94] Parliamentary Documents II 2009/10, 32194, nr. 3, p. 1; J. KEILER – A. KLIP (2025), p. 121.

order to be satisfied (or convinced), the court must consider «all the circumstances of the case, including the specific facts and available evidence such as that the value of the property is disproportionate to the lawful income of the convicted person».

However, there is no recital in the Directive corresponding to recital 21 of Directive 2014/42, which states that «Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities». That recital appeared to suggest the adoption of a reinforced civil-law standard of proof (i.e. "substantially more probable", "nettement plus probable"), meaning that something more than the 51 per cent threshold typical of the ordinary civil standard is required. It may therefore be read as pointing to an *intermediate* standard of proof known in common law systems, namely "clear and convincing evidence", situated between the civil standard and the criminal standard ("beyond reasonable doubt").

In addition, the detailed presentation of the individual provisions in the explanatory memorandum to the proposed Directive uses another expression to describe the standard of proof required to apply extended confiscation under Article 14: «when the national court of a Member State is convinced that the property derives from criminal conduct ('extended confiscation')». Thus, even in the English version, the national court must be *convinced*, not merely satisfied. The EU legislator does not use the phrase "on the balance of probabilities", as in recital 21 of Directive 2014/42, which referred to the civil standard, and instead uses the verb "to be convinced" in the explanatory memorandum. These elements suggest, or at least may be interpreted as indicating, an intention to confirm that the civil standard is not sufficient and to require a higher standard of proof.

Moreover, while the use of the term "satisfied" suggests a lower standard, recital 46, emphasising the invasive, if not afflictive, nature of confiscation («substantially affect the rights of suspected and accused persons, and in certain cases the rights of third parties or other persons who are not being prosecuted»), requires respect for the presumption of innocence enshrined in Article 48 of the Charter, and recital 51 states: «This Directive should be implemented without prejudice to Directives… (EU) 2016/343» on the presumption of innocence. It follows that there is no reversal of the burden of proof and that the prosecutor must prove the criminal origin of the property to be confiscated to a standard higher than the ordinary civil standard, ranging from the common law "clear and convincing evidence" to the criminal standard. This reading is supported by the Italian version of Article 14 ("convinced") and by the explanatory memorandum requiring that «the national court… is convinced», all in the light of recitals 46 and 51 requiring respect for the presumption of innocence[95].

The Council's proposal to include, in recital 25, the same content as recital 21 of Directive 2014/42, adopting the criterion of "*substantially more probable*" (a criterion

[95] OJ L 65, 11.3.2016, p. 1.

which, in any event, recalls the reinforced civil standard and should, at the very least, be read as requiring "clear and evident" evidence), was not accepted.

In interpreting the evidentiary standard set out in Article 5 of Directive 2014/42 in the light of recital 21, the Court of Justice has made it clear that «as is apparent from recital 21 of Directive 2014/42, the court must, in any event, be satisfied, on the basis of the circumstances of the case, including the specific facts and available evidence, that the property in question is derived from criminal conduct»[96]. In the same vein, the ECtHR has expressly considered even the ordinary civil standard sufficient for proof of the illicit origin of property in relation to a form of confiscation without conviction against persons suspected of corruption (accompanied by the inability of the recipients of the measure to justify the lawful origin of the property)[97]. Also in the recent Isaia case the European Court held that «as regards the procedural guarantees and specifically the standard of proof imposed on the domestic authorities, whenever a confiscation order was the result of proceedings related to the proceeds of crime derived from serious offences, the Court has not required 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, have been found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1 (see *Silickienė*, §§ 60-70; *Balsamo*, § 91; *Telbis and Viziteu*, § 68; and *Zaghini*, § 62, all cited above)»[98].

Most recently, however, the ECtHR – first and foremost in the Balsamo[99] and Todorov cases[100] (and more recently also in Isaia[101]) – has emphasised the importance of establishing a link between the assets and criminal conduct when assessing the correctness of the procedure for determining the illicit origin of assets, in relation to extended confiscation in the light of Article 5 of Directive 2014/42/EU and recital 21. The Court has stated that it is necessary to «establish a link between the proceeds and the criminal activity — understood in a broad sense and provable even by presumptions — in the absence of which confiscation represents a disproportionate sacrifice of the right to property within the meaning of Article 1 of Protocol No. 1 to the ECHR». For the ECtHR, therefore, it is important that the link between proceeds and criminal activity be

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[96] CJEU, Okrazhna prokuratura – Varna, C-845/19 and C-863/19, cited above, § 67.

[97] Edu Court, sec. IV, 12 May 2015, *Gogitidze v. Georgia*, No. 36862/05, § 107: «The Court also found it legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence which suggested that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. Indeed, whenever a confiscation order was the result of civil proceedings *in rem* which related to the proceeds of crime derived from serious offenses, the Court did 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 under Article 1 of Protocol No. 1». Critique MAUGERI, (2015), p. 316 ff.; ID (2015b), p. 964 ff. – 969 ff.

[98] ECHR, 25 September 2025, *Isaia and Others v. Italy*, nos. 36551/22, 36926/22 and 37907/22, § 76.

[99] ECHR, 8 Oct. 2019, Balsamo *v. San Marino,* App no. 20319/17 and 21414/17, 89 ff.

[100] ECHR, 13 July 2021, *Todorov and others v. Bulgaria,* App no. 50705/11, § 200.

[101] ECHR, 25September 2025, *Isaia and Others v. Italy*, nos. 36551/22, 36926/22 and 37907/22, § 73.

established, even by presumptions, in order for extended confiscation to be regarded as a proportionate interference with the right to property.

Also under the new Directive, the disproportionate value of assets (Article 14(2) and recital 29) is only an indicium and cannot constitute the sole proof of illicit origin, unlike under Article 240-bis of the Italian Criminal Code, as the Constitutional Court also points out in judgment No. 33/2018. The Constitutional Court, in fact, emphasises the role of disproportionality by noting that extended confiscation under Article 12-sexies of Decree-Law No. 306/1992 (the provision governing extended confiscation prior to its incorporation into the Criminal Code as Article 240-bis by Legislative Decree No. 21/2018) «is characterized, therefore, with respect to the model of "extended" confiscation prefigured by Dir. 2014/42/EU, by the different and *lower evidentiary standard*. Instead, the disproportion between the value of the assets and the convicted person's legitimate income – which according to Article 5 of the directive (recital no. 21) constitutes one of the "specific evidence" from which the judge may draw the conviction that the assets to be confiscated "derive from criminal conduct" – is, on the other hand, alone valid as a basis for the ablative measure under consideration, when the convicted person does not justify the provenance of the assets, without the need for any further demonstration of their criminal origin»[102]

In the Spanish and German legal systems, by contrast, in implementation of the Directive, disproportionality is treated as one element of proof of illicit origin among others, respectively in the definition of *decomiso ampliado* (Articles *127-bis*, *127-quinquies* and *127-sexies* c.p.) and of *Erweiterter Einziehung*, and as "crass disproportionality" in § 437 Absatz 1 Satz 2 StPO.[103].

The approach of the EU legislator, accepted in other jurisdictions, appears preferable, given that doubts have been raised in the literature as to whether disproportionality is an adequate parameter to prove illicit origin as a sufficient indicium, i.e. as reliable indirect evidence of such origin[104]. Taken in isolation, it is a weak indicium which acquires probative force mainly by virtue of the *convicted status* of the person concerned. There is thus a risk of grounding, on the fact of conviction and on this insufficient indicium (disproportion), a presumption that the person has committed further offences (or, in any case, is involved in them), even though they have not been the subject of criminal proceedings, and that their assets derive from such offences. This conflicts with the presumption of innocence enshrined in Article 27(2) of the Constitution.

Moreover, in proving disproportionality in the context of economic or entrepreneurial activity, the difficulties in establishing this element become apparent, and these are often addressed through expert evidence.[105] In this context, the judge must

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[102] Cf. MAUGERI, (2015), p. 319; Framework Decision No. 212/2005 on extended powers of confiscation also considers, in Article 3(*c*), disproportionality as an evidentiary element as part of broader evidence of the illicit origin of the property to be confiscated.

[103] *Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung BReg418/16*, 01.07.2017.

[104] NANULA (2009), p. 42 ff; MANGIONE (2001), p. 287; CONTRAFATTO (2010), p. 308; D'ASCOLA (2013), p. 51.

[105] MANGIONE (2009), p. 23.

exercise caution in the assessment of expert opinion[106] and ensure the rights of the defence and the fairness of cross-examination[107]. In this regard, the ECtHR has recently reiterated that «merely referring to the discrepancy between income and expenditure is insufficient to establish a link between the predicate offences and the confiscated assets (see *Todorov and Others*, cited above, § 221). Therefore, the Court holds that the domestic courts' reasoning fell short with respect to the existence of a link between the assets eligible for confiscation and the unlawful conduct»[108].

It would be desirable, in any case, to adopt the strict interpretation developed by the Italian Supreme Court in relation to this element, namely that disproportionality must be established by the prosecution between the value of each asset and the defendant's income or economic activity at the time of its acquisition. Disproportionality cannot be used as a merely circumstantial indicator of the unlawful origin of all assets, thereby transforming *extended* confiscation from a tool for removing unlawful proceeds into a general confiscation of property[109]. This rights-based interpretation is authoritatively confirmed by the Constitutional Court in judgment No. 33/2018: disproportion «does not consist in any discrepancy between earnings and possessions, but in an incongruous and significant imbalance, to be verified with reference to the time of acquisition of individual assets». Lastly, the importance of a correct procedural assessment of this element is also highlighted by the clarification that «the assessment relating to disproportion… is not censurable in the court of legitimacy, where the same is congruously motivated by the judge of merit with recourse to parameters susceptible of verification and is preceded by an adequate and rational comparison with the adverse defensive deductions»[110]. The ECtHR also held, in the recent Isaia case, that The ECtHR also held, in the recent Isaia case, that «moreover, although the Court found it legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence which suggested that the respondents' lawful incomes could not have sufficed for them to acquire the property in question (see *Gogitidze and Others*, § 107; *Telbis and Viziteu*, § 68; and *Balsamo*, § 91, all cited above), it clarified that the possibility of imposing the measures should be subjected to the need to identify "significant" discrepancies between the established legal income of a person and the assets possessed by him or her (see *Todorov and Others*, cited above, § 204)»[111].

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[106] STELLA (2003), pp. 391 ff.

[107] MAUGERI (2017), p. 580.

[108] ECHR, *Isaia*, cit., § 86; *Todorov and Others*, cit., § 221.

[109] Cass. sec. un., 19 Jan. 2004, Montella, no. 920, in Mass. Uff. no. 226490; Cass. 13 Jan. 2022, no. 8217; C 16 Oct. 2018, no. 53449: disproportion «to be assessed with reference to the time of the individual purchases and the value of the goods acquired from time to time, not already at the time of the application of the measure»; Cass., sec. V, 25 Nov. 2015 (Jan. 7, 2016), no. 155; Cass., sec. VI, Nov. 29, 2013, P.M. in proc. Balducci, no.47567, in Mass. Uff. no. 258030; Cass., sec. II, Oct. 25, 2013, Coppola, no. 43776, in Mass. Uff. No. 257305; Cass., Sec. 5, July 1, 2011, Pope, No. 26041, in Mass. Uff. No. 250922; Cass., Sec. I, May 13, 2008, Esposito, No. 213572, in Mass. Uff. No. 240091; PICCIRILLO (2012), p. 398 points out that the maxims of experience must be applied; MAUGERI (2001), p. 327; NANULA (2009), p. 43; CANTONE (2015), p. 133.

[110] Cass. sec. III, Sept. 21, 2021, no. 1555.

[111] ECHR, September 25, 2025, *Isaia and Others v. Italy*, nos. 36551/22, 36926/22 and 37907/22, § 73.

In the German legal system, the legislature explicitly rejected the introduction of a reversed burden of proo[112]; the standard of proof for the criminal origin of the asset to be confiscated is the criminal standard. The court must be convinced that the objects to be confiscated derive from crimes other than those charged; in this regard, the circumstances set out in Section 437 *StPO* for the NCBC (Section 76a(4) *StGB*) must also be given particular weight in establishing extended confiscation of the proceeds of crime. The factors to be assessed by the court include the following (see Section 437 *StPO*): the disproportion between the value of the goods and the person's financial situation and lifestyle, on the one hand, and the lawful income of the convicted person, on the other; the outcome of the investigations into the offence giving rise to the proceedings; the circumstances under which the object was found and secured; and the person concerned's other personal and economic circumstances[113]. The Federal Constitutional Court and the Supreme Court do not consider mere suspicion ("bloße Verdacht") of the illegal origin of the assets sufficient, but require the judge's conviction without limitation ("uneingeschränkte richterliche Überzeugung"), that is, a positive conviction of the illegal origin of the assets, in accordance with the rule "*in dubio pro reo*" – not considering even a high degree of probability ("ganz hohe Wahrscheinlichkeit") to be sufficient[114].

Under the Spanish legal system, the court must «decide, based on well-founded objective evidence» (which may include circumstantial evidence) that the property derives from illegal activities, namely that certain goods or effects originate from previous criminal activity where their specific lawful origin has not been established. The factors to be assessed by the court, on the basis of an *iuris tantum* presumption, include the following: the disproportion between the value of the goods and the person's financial situation and lifestyle, on the one hand, and the lawful income of the convicted person, on the other; the concealment of ownership or of any power of disposal over the goods or effects through natural or legal persons or entities, or through tax havens or offshore territories, used to hide or hinder the identification of the beneficial owner (BO); and the transfer of goods or effects through transactions that hinder or prevent their location or destination and lack a valid legal or economic justification[115].

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[112] BT. Drucks 12/989, p. 23. In the German legalsystem *Extended confiscation* (Section 73a[112] *StGB*) which follows a criminal conviction, targets 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 that required 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. Under the German legal system, the court must 'decide, based on well-founded objective evidence' that the property derives from illegal activities.

[113] HEGER – SAKELLARAKI (2025), p. 175.

[114] BVerfG, January 14, 2004; BGH, November 22, 1994 – 4 StR 516/94 – BGHSt – 62 – 4, 371-374, Rn. 8; BVerfG, decision of January 14, 2004 – 2 BvR 564/95 – BverfGE 110, 1-33, para. 86; BGH, NStZ RR2013, 207; BGH, Wistra 2014, 192 – 193; BGH, May 23, 2012 – 4 StR 76/12 (Lexetius.com/2012,2366) in which the subsidiary nature of extended confiscation with respect to direct confiscation is affirmed; in accordance with BGH 1 StR 662/15 – March 15, 2016 (LG Hof) [=HRRS 2016 No. 583].

[115] JIMENÉZ-VILLAREJO and the TEAM OF THE INTERNATIONAL COOPERATION UNIT (UCIF) (2025), p.b482.

The Constitutional Court has affirmed that the imposition of *comiso ampliado* does not compromise the right to the presumption of innocence («The presumption of innocence operates as the right of the accused not to suffer a conviction unless proof of guilt is established beyond reasonable doubt») because the determination of guilt in accordance with that principle is not called into question: once guilt has been proven, the presumption of innocence no longer applies. Rather, when imposing confiscation, particular attention must be paid to the other guarantees of the criminal trial and to the requirement of effective judicial protection (SSTC 219/2006, FJ 9 and 220/2006, FJ 8). Furthermore, the Constitutional Court considers circumstantial evidence of the criminal origin of the assets to be confiscated sufficient (STC 219/2006, FJ 9; 220/2006, FJ 8). The Supreme Court ruled in the same vein in judgment No. 338/2015, taking the view that the same standard of certainty cannot be expected when verifying compliance with the presumption of innocence and when determining the factual basis for the application of confiscation[116].

In other Member States, such as Poland, in the view of some authors, extended confiscation «is based on a modified (lowered) standard of proof compared to the standard applicable to criminal charges. An intrinsic element of the structure of extended confiscation[117] is a reversed burden of proof, which is shifted automatically from the authorities to the defendant charged with committing a predicate offence, and is based on a rebuttable presumption of illicit origin of all their asset acquired for up to five years before commission of the criminal offence until a non final sentence is passed»[118]. In order to respect the presumption of innocence, some authors propose

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[116] «However, it should be borne in mind that the same standard of certainty cannot be required, […] Whereas in the case of confiscation, with regard to the proof of its factual basis (the unlawful origin of an asset or right), it cannot be expected to be the same as that required for the discovery of the offense and the imposition of the sentence, but, on the contrary, that evidence must necessarily be of a different nature and deal generically with the activity carried out by the convicted person (or owner of the confiscated property) prior to their arrest or the criminal operation detected» (SSTS 877/2014, of December 22; 969/2013, of December 18 (RJ 2014, 1238) ; 600/2012, of July 12).

[117] Art. 45. Forfeiture of proceeds of crime.

«§ 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».

[118] HRYNIEWICZ – LACH (2025), p. 129; Statement of reasons for proposal for the amendment of the Penal Code (2017), Print No. 1186, VIII Sejm term, 6.

introducing a clause according to which the relevant assets are presumed to be of illicit origin only where «there is no other way to explain the origin of the property»[119].

7.2. The "temporal reasonableness" requirement.

The temporal limitation of the presumption of unlawful origin is provided for in recital 21 of Directive 2014/42, and the "temporal reasonableness" requirement was already set out in Article 3 of Framework Decision No. 2005/212/JHA, which requires the court to be convinced that «the assets are derived from criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case»[120]. This requirement is taken up in the version of the Directive amended by the Council and finally adopted, in recital 29, which states that «Member States could also determine a requirement for a certain period of time during which it is possible for the property to be deemed to have originated from criminal conduct».

In the Italian legal system, for the purposes of applying preventive confiscation and extended confiscation, first the most rights-protective jurisprudence both at first instance and at Supreme Court level – and, more recently, also the Constitutional Court (judgments Nos 33/2018 and 24/2019) require: as regards preventive confiscation, a *temporal correlation* between the moment of acquisition of the assets to be confiscated and social dangerousness, – understood primarily in a diagnostic–cognitive sense (directed towards the past), namely the existence of indications of belonging to a criminal association or of carrying out the alleged criminal activities[121] –; for the latter, *temporal reasonableness* (confiscation «must necessarily be circumscribed within a sphere *of temporal reasonableness* that allows a connection to be made between the assets and the criminal act;» «that is, the time of acquisition of the asset should not be so far removed

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[119] HRYNIEWICZ – LACH (2025), p. 133; SIWEK (2002); SAKOWIC (2008), p. 14.

[120] (a) Where a national court, on the basis of circumstantial facts, is fully convinced that the property in question is the proceeds of criminal activities of the convicted person committed during a period prior to the conviction for the offense referred to in paragraph 1 deemed reasonable by the court in the circumstances of the case or (b) when a national court is fully convinced on the basis of circumstantial facts that the property in question is the proceeds of similar criminal activities of the convicted person committed during a period prior to the conviction for the offense referred to in paragraph 1 deemed reasonable by the court in the circumstances of the case.

[121] Cass. sec. II, 06.06.2019, no. 31549; Cass. sec. V, 22.02.2019, no.43405; Cass. sec. II, 13.03.2018, no. 14165; Cass. sec. VI, 08.06.2017, no.48610; Cass, sec. VI, 17.05.2017, no. 31634, Lamberti and others, Rv. 270711; Cass., sec. I, 15.01.2016, no. 30219; Cass., SS.UU., 2.2.2015, no. 4880, *Spinelli;* Cass., Sec. I, 4.12.2014, no. 14817; Cass, Sec. II, Jan. 15, 2013, Castello and others, No. 3809, in *CED Cass.*, 254512; Cass., Sec. VI, Oct. 18, 2012, No. 10153; Cass., Sec. I, Dec. 11, 2012, No. 2634, C. and others; Cass., 21 Apr. 2011, No. 27228, Cuozzo, Rv. 250917; Cass., 9 Feb. 2011, No. 6977, B. and others Cass. 15 Jan. 2010, Quartararo, in *Foro it. Rep.* 2010, entry Preventive Measures, No. 39; Cass. 15 Dec. 2009, No. 2269; Cass., sec. I,4 June 2009, No. 35175; Cass. 29 May2009, No. 35466; Cass., sec. I, 11 Dec. 2008, No. 47798, C., in *Cass. pen*. 2009, 10, 3977), reiterating – echoing the Giammanco and Mineo ruling (Cass,12 Dec., 2007 (22 Jan. 2008), No. 3413; Cass., Sec. V, Mar. 23, 2007, No. 18822, in C.E.D. Cass., No. 236920; Cass., Sec. V, June 13, 2006, No. 24778, ibid., No. 234733; Cass., Sec. V, 25 Nov. , 1997, No. 5365, ibid., No. 210230.

from the time of the realization of the "spy crime" as to make ictu oculi unreasonable the presumption of derivation of the asset itself from an illegal activity, albeit diffearent and complementary to the one for which conviction occurred»[122]).

Moreover, as examined elsewhere, such a requirement is not only provided for in several jurisdictions (such as the Spanish or Austrian systems — § 20b StGB — and even in a strict form in others, by allowing the presumption of illicit origin to apply only to assets acquired within the five or six years prior to conviction, as is the case, respectively, in the Polish[123] and Macedonian[124], as well as in the British and Irish systems), but above all it allows the presumption of illicit accumulation of assets to be delimited[125] in accordance with the principle of proportionality[126]. By introducing such a requirement, the presumption of illicit accumulation of assets becomes *more reasonable and better founded*: the closer the acquisition of an asset (particularly where disproportionate) to the time of commission of the offence for which the conviction was imposed, the more well founded the presumption of its illicit origin. As a result, the measure becomes *more consistent with the principles of legality* (in particular, the requirement of precision) and with *the presumption of innocence itself*, both as a rule governing the dignity of evidence (supporting, from a circumstantial perspective, the presumption at issue, as recognised by the Constitutional Court in judgment No. 24/2019 and by the Joint Sections in the Spinelli ruling[127]), and as a rule concerning the exclusivity of the determination of guilt at trial. The latter requires that the convicted person suffer legal consequences only for facts demonstrated in the context of a regular trial; limiting confiscation to unjustified enrichment that is temporally connected with the ascertained criminal activity therefore mitigates the risk that a person may be subjected, at least in the form of confiscation, to consequences linked to facts not proven at trial.

Such temporal delimitation, moreover, alleviates, or at least renders less onerous, the burden on the owner to prove the lawful origin of their assets, in accordance with the right of defence, which would otherwise risk becoming a *probatio diabolica* if it were required to cover assets acquired throughout an individual's entire life, without any temporal limitation. In this direction, the ECtHR has emphasized, including in the recent Isaia case, that «the Court clarified that the domestic legal system should limit the period of time in which the relevant assets can be confiscated, in order not to make it excessively onerous for the individual concerned to provide proof of lawful income or lawful provenance of assets acquired many years before the opening of the confiscation

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[122] Cass.,20 Sept. 2022, no. 34800; Cass., 2 Oct. 2020, no. 27427; Cass., sec. 2, 26 Oct. 2018, no. 52626; Cass., sec. II, 14 Apr. 2017, no. 18951, in C.E.D. Cass, No. 269657; Cass., sect. I, 19 Dec. 2016, No. 51; Cass., sect. I, 16 Apr. 2014, No. 41100, Rv. 260529; Cass., sect. VI, Jan. 2010, No. 5452, in *Cass. pen.* 11, 610.

[123] HRYNIEWICZ-LACH (2025), p. 126 ss. – 127: «the five year period before the (predicate) offence was committed for retrospective confiscation should have a guarantee function, and be aligned with the five - year period of mandatory storage of tax documentation».

[124] Art. 98 a Penal Code.

[125] Thus MAUGERI (2015b), p. 956; Cass. S.U., Feb. 2, 2015, Spinelli, No. 4880, *Mass. U.S.* No. 26260 in *Riv. it. dir. proc. pen*. 2015, 922 111. See SCHULTEHINRICHS, (1991), 165.

[126] See MAUGERI (2001), pp. 625 – 695.

[127] Cass. sec. Un., June 20, 2014, No. 4880, Spinelli, cited above.

proceedings (see *Todorov and Others*, § 201-02, and *Yordanov and Others*, §§ 116-17, both cited above)»[128].

The reintroduction of this requirement in the approved version of the Directive is therefore to be welcomed, as it recognises the (reasonable) temporal delimitation as an important indicium of the illicit origin of property. One clarification nevertheless appears necessary. This requirement should not be construed as the basis for a form of pure presumption of the illicit origin of assets acquired within a certain period of time connected to the offence, without in any event requiring an evidentiary effort on the part of the prosecution as to the illicit origin of those assets. In such a hypothesis, temporal delimitation would not render the form of confiscation under consideration more consistent with the principle of proportionality and the presumption of innocence, but would instead introduce a form of pure reversal of the burden of proof with regard to the illicit origin of assets acquired during that specific period.

By way of example, under the Spanish system, Article 127-bis(1) of the Criminal Code does not establish any temporal limit, but provides that the court must decide «on the basis of well-founded objective evidence, that the assets or proceeds come from a criminal activity, and their lawful origin is not proven», assessing, *inter alia*, the circumstantial evidence listed in paragraph 2 of the same provision, including, first and foremost, «the disproportion between the property and proceeds in question and the lawful property of the convicted person». By contrast, in order to apply extended confiscation for past offences governed by Article 127-d, «it will be presumed that all assets acquired by the convicted person within the period starting six years prior to the date of the initiation of criminal proceedings came from his criminal activity»[129].

7.3. The nature of extended confiscation.

The nature of this model of confiscation is debated. The Directive allows Member States to choose the legal nature of confiscation. According to recital 21 (recital 13 in the previous Directive): «Freezing and confiscation under this Directive are autonomous concepts, which should not prevent Member States from implementing this Directive using instruments which, in accordance with national law, would be considered as sanctions or other types of measures» (recital 10 of the previous Directive stated: «Member States are free to bring confiscation proceedings which are linked to a criminal case before any competent court»).

In the Italian legal system, the legal nature of extended confiscation is not clearly defined. It could be argued that, by qualifying this measure as a "particular case of confiscation", the legislature intended to refer to the general concept of confiscation provided for in the Italian legal system, namely the security-measure confiscation under Article 240 of the Criminal Code, and that it should therefore be preventive in nature.

[128] ECHR, 25 September 2025, *Isaia and Others v. Italy*, nos. 36551/22, 36926/22 and 37907/22, § 76.
[129] Cf. AGUADO (2015), p. 1041 f. Cf. DIVA-SERRA CRUZ (2023), pp. 155 ff.

According to the Supreme Court and the Constitutional Court, extended confiscation constitutes a preventive security measure (Constitutional Court, order No. 18/1996, *Basco*; Supreme Court, Sixth Chamber, No. 1600/1996): «atypical asset security measure, replicating the characteristics of the anti-mafia preventive measure… and the same preventive purpose»[130].

It is also worth noting that the preventive function has been significantly reinforced by Law No. 161 of 17 October 2017, which, in Article 31, introduced several amendments to the rules on extended confiscation, «and, in particular, the application even in the event of prescription or amnesty»[131].

This judicial interpretation has been criticised in the scholarly literature, however, on the ground that the mandatory nature of extended confiscation excludes the possibility of making its application conditional upon an assessment of the offender's social dangerousness, which would normally constitute a prerequisite for the imposition of a security measure. Moreover, the dangerousness of the person concerned (and of the assets) has never been among the requirements of this form of confiscation[132] and, from a purely preventive perspective, it would make little sense to apply confiscation to heirs[133], as is now permitted under the most recent reforms.

Furthermore, as scholars have pointed out with reference to anti-mafia preventive confiscation, if purely preventive purposes were pursued, the requirement of the illicit origin of the assets (as inferred from disproportionality) would not be necessary, since the asset is not dangerous per se but becomes so only in relation to a dangerous subject, who might use it in the future to commit crimes[134].

Authors who deny that extended confiscation constitutes a security measure have instead characterised it as an "ancillary patrimonial penalty", with the consequent exclusion of retroactive application[135]; or as a "penalty of suspicion" or as "*sui generis* penalty"[136]; or, more generally, as a sanction in the broad sense, "detached from a specific criminal fact"[137]. According to this view, extended confiscation constitutes a "patrimonial sanction of a purely punitive nature"[138], whose actual function is that of an

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[130] Court of Cassation, United Chambers, No. 29022/2001, Derouach; Court of Cassation, United Chambers No. 33451/2014; C. V, No. 1012/2017; Court of Cassation, Chamber I, No. 19470/2018; Court of Cassation, Chamber II, No. 5378/2018; Court of Cassation, Chamber VI, No. 54447/2018.

[131] Court of Cassation, Chamber V, No. 1012/2017.

[132] See MAZZACUVA (2017), p. 177; cfr. BORGOGNO (2015), p. 30; FORNARI (1997), p. 67 which highlights that the measure applies to "goods" marked «by a characterization assumed in the past (the illegality of the acquisition), without requiring any prognostic judgement "and the crime" far from establishing... a judgement of dangerousness... discoloration in the law in question on the mere occasion».

[133] See MAUGERI (2014), 90 ff.; ID. (2018), p. 235 ss.

[134] COMUCCI (1985), p. 101 ff.; ILLUMINATI (1979), p. 202; BRICOLA (1975), p. 59 ff.

[135] MAZZA 33; FURFARO 210; LUNGHINI-MUSSO 43; FORNARI (1997), p. 66, criticizes the definition of an accessory penalty because the latter is essentially intended to prohibit legitimate activities or prerogatives that the offender has abused, while the confiscation in question is intended to prevent a form of management activity inserted in an illegitimate system of wealth reproduction.

[136] FONDAROLI (2007); FORNARI (1997), p. 79

[137] SGUBBI (1996), p. 30; SQUILLACI (2009), p. 1531.

[138] FORNARI (1997), p. 68.

instrument of wealth control aimed at procedural efficiency: «the measure assumes a serving role with respect to the aims of the proceedings, or rather of the investigations»; its purpose would be «bringing out, at least in their patrimonial dimension, what by definition remains hidden: crimes intended to integrate the dark figure» [139]. It has also been observed that extended confiscation, although connected for repressive reasons to a final conviction for a broad class of economically oriented criminal offences, represents an instrument for the neutralisation and recovery of wealth of presumed illicit origin, based on the assumption, with regard to the past, that assets derive from similar crimes not subjected to procedural scrutiny, and, with regard to the future, that they may be reused either to finance further illegal activities or to support lawful economic activities with distorting effects on the market and competition[140].

In a recent judgment (No. 24/2019), the Constitutional Court denied any punitive nature to extended confiscation(«the relative presumption of illicit origin of items, which justifies their ablation in favour of the community, does not necessarily lead – as sometimes it is argued – to recognise the substantially sanctioning-punitive nature of the measures in question»), and instead attributed to both extended confiscation and preventive confiscation – which share the same *rationale* – a merely "compensatory-restorative function". A similar approach was adopted by the ECtHR in *Gogitidze*, according to which, from a systemic perspective, the ablation of such assets does not constitute a sanction, but rather the natural consequence of their illicit acquisition. This approach is consistent with the reasoning of the Joint Sections of the Court of Cassation, which highlighted that illicit acquisition gives rise to a genetic defect in the very constitution of the property right of those who have obtained material availability of the assets, making it «self-evident that the social function of private property can be fulfilled only on the indispensable condition that its acquisition complies with the rules of the legal system. The acquisition of assets *contra legem* cannot therefore be regarded as compatible with that function, with the consequence that an acquisition tainted by illegality can never be opposed to the State legal order» (Court of Cassation, First Chamber, No. 4880/2015). This view has recently been endorsed by some authors[141] and by the ECtHR in the Garofalo case with regard to Italian preventive confiscation (a model of NCBC)[142].

Other scholars, however, argue that this position cannot be fully endorsed. While it may be accepted that direct confiscation of ascertained proceeds fulfils a compensatory–restorative function, since an offence does not constitute a lawful title for acquiring property, and confiscation merely entails the restitution of something that the

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[139] FORNARI (1997), p. 81.

[140] MAZZACUVA (2017), p. 184; AMARELLI (2018), p. 308

[141] FINOCCHIARO (2018); VIGANÒ (2018), pp. 904 ff.; *contra* DELL'OSSO (2019), p. 995; TRINCHERA (2020), believes that confiscation remains an instrument through which the legislator pursues objectivesof criminal policy and therefore that it remains a measure firmly anchored in criminal law, with a function of "completion" of the sentence in terms of general and special prevention, an argument which then also serves to justify a more robust request for safeguards (such as the principle of non-retroactivity, although not intended as an absolute right pursuant to Article 7 of the ECHR).

[142] ECtHR, 21 January 2025, Claudia Garofalo against Italy and 3 other, no. 47269/18.

person was never entitled to retain, genuine compensation in the strict sense exists only where a causal link between the profit and the crime, and therefore its illicit nature, can be established. Extended confiscation under Article 240-bis of the Criminal Code, by contrast, affects all assets of the offender whose lawful origin cannot be demonstrated, including assets for which no causal link with a specific offence has been proven. Clearly, the stricter the verification of the illicit origin of the assets by the prosecution (at least through proof of disproportionality at the time of acquisition of each individual asset), the more extended confiscation will assume a compensatory rather than a punitive nature[143]. It should also be borne in mind that this form of confiscation has an undeniable 'stigmatising' effect of a criminal nature, where it is based on the presumption of illicit origin of assets of disproportionate value and, therefore, on the presumption that the person concerned is responsible for offences other than the one for which they were convicted, from which they allegedly derived profit. Extended confiscation is thus grounded in, and ultimately attributes to the person subject to the measure, an alleged criminal career of a professional and habitual nature, characterised by the illicit accumulation of assets. In this respect, a punitive dimension emerges, both because of the significant impact of the measure (*afflittività*), which may result in the deprivation of an entire patrimony, and because of the aim pursued, which is primarily one of general prevention, and not merely special prevention, in particular through the prevention of the illicit use of wealth or economic incapacitation[144]. Extended confiscation therefore pursues both general and special preventive objectives, since «on the one hand it threatens the subtraction of the illicit profit that represents the purpose of the crime and, on the other, it subtracts that same profit by preventing the offender from enjoying the benefits of crime and, as the true preventive purpose emerges, from reinvesting the proceeds in crime or in any activity, even lawful, to the detriment of free competition and the laws of the market. This is a measure that was created, from a macro-criminal point of view, as an instrument of economic incapacitation of organised crime and of preventing its infiltration into the legitimate business, but which has taken on the aim of guaranteeing, *sine die*, the subtraction of profit... and... ends to also assume a punitive impact»[145].

In light of the intrusive nature of extended confiscation, as also recognised by the Constitutional Court in judgment No. 33/2018, which may affect the entirety of an individual's assets and compel the holder to justify their lawful origin, thereby stigmatising them as a professional offender, it should therefore be regarded as punitive, at least within the broad meaning attributed to 'criminal matters' by the ECtHR. This classification is necessary in order to ensure the application of criminal-law safeguards, ranging from the principle of non-retroactivity to the presumption of innocence and ne bis in idem. What is at stake, in fact, is not the abstract definition of the nature of the measure as such, but rather the determination of the system of guarantees (the 'statute

[143] MAUGERI (2001), p. 517 ff.
[144] FORNASARI (1994), p. 16; FORNARI (1997), p. 68; MAUGERI (2014), p. 90 ff.; EPIDENDIO (2011), p. 98 ff.
[145] MAUGERI (2015b), 955.

of guarantees') applicable to this model of confiscation, as emphasised by the Constitutional Court itself in judgment No. 24/2019[146].

In the German legal system, extended confiscation (*Erweiterter* Einziehung) is considered by the Federal Constitutional Court to be a civil measure, since, according to its seminal 1967 ruling[147], property derived from crime does not enjoy constitutional protection *ab initio*. Neither ordinary confiscation nor extended confiscation is considered punitive in nature, and therefore they do not conflict with the constitutional principle of guilt. The Court also confirmed that the lowering of the required nexus between the offence and the asset in cases of extended confiscation is compatible with the principle of legality. In its landmark 2004 decision, based on grammatical, systematic and historical interpretation, the Federal Constitutional Court had already held that the former model of extended confiscation (*erweiterter Verfall*, Section 73d *StGB* a.F.) did not possess any punitive or quasi-punitive character. The aim of this measure was not to inflict harm on the persons affected, but rather to correct irregular allocations of assets (*vermögensordnende und normstabilisierende Ziele*). The Court also considered the 'gross principle' consistent with the restitutive nature of confiscation, drawing an analogy with the civil-law doctrine of unjust enrichment (Section 817(2) *BGB*)[148]. Penal confiscation is thus civil in essence: it is classified as a *measure* (*Maßnahme*, pursuant to Sections 11(1) no. 8 and 61 *StGB*) rather than a penalty (*Strafe*)[149], and its purpose is to terminate the wrongful allocation of property resulting from criminal conduct[150].

In the Spanish legal system, the Supreme Court has emphasised that confiscation is closely connected with penalties and punitive law, is personal in nature, and is applied in criminal proceedings, to the extent that it is imposed at the request of the public prosecutor or the parties to the proceedings (SSTS 30 May 1997; 17 March 2003), following an oral hearing and by means of a reasoned decision. Notwithstanding this, extended confiscation is not classified as a penalty under domestic law. While earlier jurisprudence of the Supreme Court defined as a "penalty" a form of extended confiscation introduced for drug trafficking offences under Article 374 of the Criminal Code by Organic Law No. 15/2003, judgment No. 6/2015 of 6 February 2015 (RJ 131887) does not qualify it as an accessory penalty. According to the preamble of Organic Law No. 1/2015, extended confiscation constitutes «an institution through which the illegal financial situation resulting from criminal activity is brought to an end» (Preamble, section VIII); it is therefore regarded as being more «civil than financial» in nature, «close to institutions such as unjust enrichment» ("próxima a la de figuras como el enriquecimiento injusto"). This interpretation is supported by EU law, which allows such confiscation to be imposed on the basis of circumstantial evidence, in particular

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[146] In the matter of MASERA (2018), in particular p. 235.

[147] BVerfG12 December 1967, – 2 BvL 14/62, 2 BvL 3/64, 2 BvL 11/65, 2 BvL 15/66, 2 BvR 15/67, BverfGE 22, p. 387.

[148]BVerfGE 110, 1 – 33, Rn. 60 et seq.

[149] BVerfG, 14. 1. 2004 – 2 BvR 564/95, § 58 ss., cfr. § 70-72. On the debate on this subject, see ESSER (2015), p. 69.

[150] BVerfG, 14 January 2004, p. 2075.

disproportionality between lawful income and available assets, and even in non-criminal proceedings[151].

This view, however, is contested in the literature, which attributes a criminal nature to extended confiscation[152], emphasising its "clearly punitive objectives", the aim of neutralising an unlawful situation, and the goal of preventing future crimes, together with other indicators of its potential penal character. These include its role in the enforcement of penalties for tax fraud or in the execution phase of sentences, where it may affect the suspension of imprisonment, leading to its revocation or to the denial of parole[153]. The Supreme Court, for its part, has stated that confiscation is not an accessory consequence of the penalty applicable in criminal proceedings, but rather «administrative sanction that may be imposed in cases of violation of the law… therefore, there is nothing to prevent it from being considered a sui generis post-crime measure, affecting all assets belonging directly or indirectly to the convicted person, with the possibility of proving the legal origin of the assets, especially when their owners are third parties»[154]. At the same time, the Court has recognized that this administrative sanction performs both a special and a general preventive function, based on the objective dangerousness of the asset. On the one hand, it has a special preventive function, insofar as it affects specific persons and specific assets in order to prevent their use, directly or indirectly, in the commission of future crimes; on the other hand, it also fulfils – albeit secondarily – a function of general prevention, particularly in cases involving the confiscation of money, by sending a strong deterrent message that targets the primary motivation of organised and corporate crime (Sentencia 338/2015 of 2 June).

In line with the guidelines emerging from the Directive, the confiscation *générale* of the French legal system, conceived as a *penalty against assets*, is aimed at serious offences related to organised crime (such as the most serious cases of drug trafficking, Article 222-49(2) Code pénal, and money laundering) and in particular targets "*association de malfaiteurs*". It requires a conviction, but allows for the confiscation of all or part of the assets without the limits provided for in the Directive, as it requires neither proof of illegal origin nor proof of disproportionality or temporal correlation. In this case, the link between the property and the offence is legally disregarded. Article 131-21(6) provides that: «where the law governing the felony or misdemeanour 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 only to the most serious offences, strictly enumerated by law. Furthermore, the felony or *misdemeanour* must have generated a direct or indirect

[151] «El hecho de que la normativa de la Unión Europea se refiera expresamente a la posibilidad de que los tribunales puedan decidir el decomiso ampliado sobre la base de indicios, especialmente la desproporción entre los ingresos lícitos del sujeto y el patrimonio disponible, e, incluso, a través de procedimientos de naturaleza no penal, confirma la anterior interpretación.»

[152] AGUADO CORREA (2014), p. 29.

[153] DE LA MATA BARRANCO (2017); DÍEZ RIPOLLÉS (2020), p. 833; DÍAZ CABIALE (2016), p. 27; DE LA CUESTA (2025), p. 157 s.

[154] Trib. Supr. 2 giugno 2015, n. 33.

profit[155]. In situations where the convicted person fails to justify the origin of the property, confiscation may be imposed without the prosecution being required to establish any connection with the offence committed. As a result, the measure may encompass property whose value significantly exceeds the profits obtained from the offence[156].

This model of confiscation, although potentially effective, appears difficult to reconcile with the principles governing sentencing, since the parameters for determining the amount of the penalty are not predetermined – the only limit being the amount of assets to be confiscated – and with the principle of guilt as a criterion for determining the severity of the penalty. The asset penalty (*Vermögenstrafe*) in the German legal system was in fact declared unconstitutional by the *BVerfGE* 105, 135 ruling, for violation of the principle of legality (requirement of specificity, Article 103(2) GG). However, even this form of general confiscation of assets may fall within the broad scope of Regulation (EU) 2018/1805 on mutual recognition, as it constitutes a form of confiscation ordered in criminal matters and affects assets liable to confiscation «pursuant to other provisions relating to confiscation powers… provided for by the law of the issuing State following proceedings for a criminal offence» (Article 2(2)(3) of the Regulation). This is so even if it may be argued that such a provision does not comply with the principles of criminal law referred to in recitals 16 and 18 of the Regulation, starting with the principle of proportionality of penalties enshrined in Article 49(3) of the Charter of Fundamental Rights of the European Union, which is expressly referred to in Article 1(2), where reference is made to the obligation to respect the fundamental rights and legal principles set out in Article 6 TEU (the principle of proportionality is also expressly mentioned in recital 15).

A specific form of extended confiscation is provided for under French law for offences punishable by a custodial sentence of five years or more and capable of producing a direct or indirect profit. Following a conviction, it is possible to confiscate all assets for which the owner cannot justify the lawful origin under Article 131-21(5), as amended by Loi No. 2007-297 of 5 March 2007 (Article 66, JORF 7 March 2007). This constitutes a form of extended confiscation that partially falls within the definition set out in Article 14 of Directive No. 1260/2024, as it is applied following a conviction and on the basis of a genuine reversal of the burden of proof on the convicted person. It should be noted that in France not only is the confiscation of assets of unjustified value provided for, but even the failure to justify the origin of assets possessed is independently criminalised as the offence of "*non-justification de ressources ou de l'origine d'un bien*", introduced by Law No. 2006-64[157].

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[155] The assessment of the profit is conducted autonomously, without the law requiring its alignment with the property subject to potential confiscation. Consequently, there is no necessity to demonstrate that the assets were acquired throughillicit means, see BERNARDI (2019), 217.

[156] *Ivi*, p. 219. Article 131-21, paragraph 5, requires that the individual be given an opportunity to explain themselves, thereby constituting both a procedural and substantive requirement. This obligation requires investigative authorities, in particular the examining magistrate, to inquire about the person's assets.

[157] ANASTASIO-BLESSON (2025), p. 131: «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 punish able by at least five

In the Polish legal system, the Statement of Reasons of 2017 affirms that extended confiscation is a preventive sanction, based on the expectation that it will deprive offenders of economic resources constituting the basis for their criminal activities[158]. In the view of the Supreme Court, the primary rationale of this model of confiscation lies in the neutralisation of the consequences of criminal activity and in conveying the message that "crime does not pay", which confers on it a predominantly restorative nature[159]. It is therefore usually classified as a criminal-law sanction of its own kind (*sui generis*), and on this basis its scope of application may be broader than that of (repressive) penalties and (preventive) security measures[160]. In the scholarly literature, it is regarded as an instrument to combat organised crime by rendering criminal activity unprofitable, rather than by extending the scope of criminalisation or increasing the punitiveness of criminal law. However, according to some authors, this model of confiscation has *de facto* been extended so as to cover a new type of offence, namely, the mere possession of proceeds derived from a criminal offence, on the basis of a significantly lowered standard of proof; from the perspective of the persons affected by this application, extended confiscation therefore assumes a repressive character[161].

8. Confiscation without conviction under Article 15 of the Directive: not an *actio in rem*.

One of the areas in which the Directive introduces the most relevant novelties is that of non-conviction-based confiscation, as mentioned. Indeed, this is one of the aims of the new Directive, namely to «introduce more effective rules on non-conviction based confiscation», as set out in the Commission's 2020 Report on the matter[162], in which it is recognised that some States have effective models of non-conviction-based confiscation, *in rem* proceedings and "unexplained wealth procedures", which have proved to be very efficient; some experiences, such as the Italian and German ones, appear particularly promising. To such an extent that the Commission set itself the goal of verifying whether

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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».

[158] Statement of reasons 2017, 3, 6.

[159] Supreme Court, 21 May 2004 (I KZP 6/04, OSNKW 2004/5/49); KARAŻNIEWICZ, (2012), 253.

[160] Statement of reasons 2017, 1-3; HRYNIEWICZ-LACH, (2025), p. 128 s.

[161] SERAFIN (2019), 242-246.

[162] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, *Asset recovery and confiscation: Ensuring that crime does not pay*, Brussels, 2.6.2020 COM(2020) 217 final, 17.

these experiences could provide a good model for a potential future "non-conviction based confiscation regime", such as the one proposed in this new draft Directive. [163]

The first relevant provision is Article 15[164], which incorporates the content of the previous Article 4(2). This provision applies to "the confiscation of instrumental property, proceeds or property referred to in Article 12, or of proceeds or property transferred to third parties under Article 13", thus covering both confiscation of proceeds and confiscation of instrumentalities, and even confiscation of proceeds against third parties. It does not, however, apply to extended confiscation under Article 14, in line with Article 4(2) of Directive 2014/42.

In the original version of the proposed Directive (Commission version, paragraph 4), the scope of this provision was limited to offences punishable by a maximum sentence of at least four years' imprisonment because, as clarified in recital 26, «for reasons of proportionality, confiscation of property without prior conviction should be limited to cases of serious crimes». The Council secured the removal of this limit, making Article 15 a general rule, while allowing this threshold to be retained, as discussed, for extended confiscation under Article 14. This different choice by the Council may be explained by the consideration that extended confiscation is based on a presumption of unlawful enrichment with weakened evidentiary standards, whereas confiscation without conviction under Article 15 remains tied to limited hypotheses in which the offence, and thus the unlawful origin of the proceeds or the instrumental nexus of the assets, is established, but conviction is not possible for a number of reasons.

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[163] Idem, 14. Cf. BALSAMO-FUSCO (2023): «From the *Analysis of non-conviction based confiscation measures in the* European *Union* published on April 12, 2019 by the European Commission, a fact of undoubted importance emerges: in all the states of the European Union, non-conviction based forms of confiscation have been introduced, at least in the hypotheses in which it is impossible to reach an affirmative judgment of the criminal liability of the defendant. The model in question has also received strong support from an international political forum marked by an intense guarantor culture such as the Parliamentary Assembly of the Council of Europe, which in its Resolution No. 2218 of April 26, 2018, qualified *non-conviction based confiscation* as "the most realistic way for states to deal with the enormous, and inexorably growing, financial power of organized crime in order to defend democracy and the rule of law».

[164] Confiscation not based on conviction

«1. Member States shall take the necessary measures in order to be able to proceed, under the conditions set forth in paragraph 2 of this Article, to the confiscation of instrumental property, proceeds or property referred to in Article 12, or proceeds or property transferred to third parties under Article 13, in cases where criminal proceedings have been instituted but it has not been possible to have them continued due to one or more of the following circumstances:

(a) illness of the suspect or defendant;

(b) escape of the suspect or defendant;

(c) death of the suspect or defendant;

(d) the statute of limitations for the crime in question established by national law is less than 15 years and expired after the criminal proceedings were initiated.

2. Confiscation in the absence of a conviction under this Article shall be limited to cases in which, in the absence of the circumstances referred to in paragraph 1, the relevant criminal proceedings could have resulted in a criminal conviction at least for crimes that may directly or indirectly produce a substantial economic benefit, and if the domestic court is convinced that the instrumental property, proceeds or assets to be confiscated are derived from or directly or indirectly related to the crime in question.»

The non-conviction-based confiscation model set out in Article 15 does not, in fact, amount to a true *actio in rem*, such as the model provided by Article 4(2) of Directive 2014/42/EU for cases of «illness or flight of the suspect or defendant», but is intended to ensure the application of confiscation «where criminal proceedings have been initiated but could not be continued because of one or more of the following circumstances»: illness, flight, death, or limitation. It is not an autonomous *in rem* proceeding against property. Rather, this model of NCBC (non-conviction-based confiscation) allows the court to continue, for the purposes of confiscation, proceedings that "have" already "been" initiated and can no longer be pursued for the purposes of establishing criminal responsibility and reaching a conviction. An autonomous proceeding cannot be initiated solely for confiscation: proceedings must have been commenced in order to obtain a conviction, unless one of the indicated obstructive circumstances subsequently arises.

Moreover, Article 15 provides that confiscation without prior conviction is possible only if «it would have been possible for the relevant criminal proceedings to lead to a criminal conviction» (in the original version of the proposal, «only to the extent that the national judicial authority is convinced that all the elements of the crime are established», and «the concept of 'crime' included only the figures listed in Article 2 when punishable by a custodial sentence of not less than four years»). This means that, in order to apply this model of confiscation, both the offence (as a typical conduct) and the offender's guilt (which would have resulted in a conviction) must be established. Similarly, under Article 578-bis of the Code of Criminal Procedure in the Italian legal system, the appellate court or the Court of Cassation, when declaring the offence extinguished by limitation or amnesty, decides on the appeal for the sole purposes of confiscation after establishing the defendant's responsibility.

This model of confiscation is therefore not a true *actio in rem*, i.e. a genuine model of confiscation without conviction. It does not provide for a procedure aimed solely at establishing the criminal origin of the property to be confiscated and the absence of a valid justification for its lawful origin. Rather, it is a case in which confiscation without conviction is ancillary to the criminal trial, from which it becomes autonomous only where the proceedings "could not be continued". In any event, the court must establish that «it would have been possible for the relevant criminal proceedings to lead to a criminal conviction» (the original version of the proposal referred to the need to establish «that all the elements of the crime are established»).

The burden of proof, as will be examined below, lies with the prosecution, which must satisfy the judicial authority that all elements of the offence are established, as well as, perhaps to a less stringent evidentiary standard, the illicit origin (proceeds) or the instrumental character (in relation to the offence) of the property to be confiscated. The rule does not provide, in any way, for a reversal of the burden of proof.

8.1. Rationale and Prerequisites.

If no doubts arise as to the appropriateness of depriving an offender of the proceeds of crime even where the situations provided for in Article 15 occur and prevent

a conviction from being reached – since the offender has no right to retain the proceeds of crime, the offence not constituting a legitimate title for the acquisition of assets, thus ensuring that crime does not pay in a general-preventive sense – some perplexity arises as to the criminal-policy appropriateness of applying confiscation without conviction also to the instrumentalities of crime. The rationale for applying confiscation of the instrumentalities of the offence in the absence of a final conviction should be to remove from the owner's disposal assets that are functional to the possible reiteration of the crime even where a conviction has not been reached for the reasons provided. Accordingly, such confiscation should be justified only in respect of assets that are actually necessary for the perpetration of the offence, in pursuit of the preventive/interdictive purpose of this form of confiscation. Otherwise, a merely afflictive or punitive character would prevail, which would be difficult to reconcile with the absence of a conviction. Clearly, this problem does not arise where the assets concerned are per se unlawful to possess, as in the hypothesis envisaged by Article 240(2), no. 2, of the Italian Criminal Code, and therefore cannot be lawfully held even in the absence of a conviction for the specific offence; in such cases, the applicable legal regime of the asset simply applies.

As mentioned, this form of confiscation is provided for in cases of illness, absconding, death, and limitation.

In the approved version of the Directive, the references to immunity and amnesty were removed. However, considering the specific nature of this model of confiscation, which makes it possible to ensure that crime does not pay once the offence and the illicit nature of the proceeds have been established, its application would appear appropriate also in cases of immunity and amnesty. The latter hypothesis is, moreover, expressly referred to in recital 30, which states that «it is important to recall that international bodies have indicated the potential of confiscation in the absence of a conviction to address the obstacles to confiscation of illicit gains due to immunity and amnesty».

In the same recital 30, the Council specifies that «in cases of illness and absconding, the existence of proceedings in absentia in Member States should be sufficient to comply with the obligation to enable such confiscation». It is further stipulated in Article 24(4) that «where the suspected or accused person has absconded, Member States shall take all reasonable steps to ensure an effective possibility to exercise the right to challenge the confiscation order and shall require that the person concerned be summoned to the confiscation proceedings or that reasonable efforts be made to make that person aware of such proceedings». In legal systems such as the Italian one, which allow trials in absentia, absconding and illness will not prevent the continuation of the trial and the enforcement of the confiscation order. This is without prejudice to the importance of the reminder that every reasonable effort must be made to inform the suspect or defendant, as an appreciable attempt to ensure the right of defence notwithstanding the flight. Recital 31 specifies that «illness should be understood to mean the inability of the suspected or accused person to attend the criminal proceedings for an extended period, as a result of which there is a risk that time limits laid down in national law for criminal liability expire and those proceedings cannot continue». With regard to limitation, in the final version of the Directive as amended by the Council,

Article 15 (and recital 30) specifies that «(d) the limitation period for the relevant criminal offence prescribed by national law is below 15 years and has expired after the initiation of criminal proceedings». This amendment addressed the concerns relating to precision and taxativity raised by the wording «where such periods are not sufficiently extended»[165], which appeared in the Commission's version and conflicted with the principle of legality under Article 49 of the Charter of Fundamental Rights of the European Union. That wording would have risked complicating the choices of national legislators, who would have been required to determine whether a limitation period was sufficient and, consequently, whether it was necessary to introduce this hypothesis of confiscation without conviction[166].

The provision limits the application of confiscation without conviction («Confiscation in the absence of a conviction under this article is limited»), as already noted, «to cases where, in the absence of the circumstances set out in paragraph 1, it would have been possible for the relevant criminal proceedings to lead to a criminal conviction» (in the original version, to cases in which the national judicial authority was «convinced that all the elements of the crime are established», and in relation to a specific offence listed in Article 2 and punishable by deprivation of liberty for a maximum of at least four years). The rule does not introduce presumptions or any reversal of the burden of proof in relation to the assessment that the proceedings would have resulted in a conviction, "final", as specified in recital 30, and therefore «in relation to the existence of an offence fulfilling the requirements of legality, unlawfulness and culpability». The burden of proof lies with the prosecution, in compliance with the presumption of innocence referred to, as examined above, in recitals 46 and 51. This mechanism thus constitutes merely an ancillary procedure to criminal proceedings, allowing confiscation to be applied where, for the reasons indicated, a conviction could not be reached.[167]

Article 15(2) requires the application of this form of confiscation «at least for crimes capable of producing, directly or indirectly, considerable economic advantage», a specification that was not contained in Article 4(2) of Directive 2014/42. This specification appears rather superfluous with regard to the confiscation of proceeds, since the capacity of the offence to generate an economic advantage is already a prerequisite for the existence of confiscable proceeds. The "considerable" nature of the "economic advantage" could be interpreted as an additional requirement capable of further delimiting the scope of application of this form of confiscation; however, it is a quantitative criterion that lacks taxativity and may be interpreted discretionarily by Member States, to the detriment of harmonisation – to such an extent that the Council proposed its deletion. Such a requirement could, at most, delimit the scope of

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[165] «(f) prescription of time limits established by national law, where such time limits are not sufficiently extended to allow effective investigation and prosecution with respect to relevant crimes.»

[166] AGUADO (2023), p. 32. Parliament identifies 15 years as the statute of limitations that would ensure sufficient effectiveness of the investigation or prosecution and, therefore, would not allow for the forfeiture referred to in this article.

[167] AGUADO (2023), p. 32 believes that «a redacción del Consejo resulta, de nuevo, menos confusa y perturbadora que la expresión "todos los elementos de la infracción", propuesta por la Comisión».

confiscation of instrumentalities, in the sense that national legislators should introduce this model of confiscation without conviction of instrumentalities only for offences capable of producing a considerable economic benefit. However, with regard to confiscation pursuing preventive or interdictive purposes, the rationale for such a delimitation is not entirely clear, apart from a generic intention to limit the application of a particularly intrusive measure in accordance with the principle of proportionality.

Finally, paragraph 2 specifies that confiscation of instrumentalities and proceeds will be possible «where the national court is satisfied that the instrumentalities, proceeds or property to be confiscated are derived from, or directly or indirectly linked to, the criminal offence in question». Accordingly, with regard to the illicit origin of the property, its instrumental character in relation to the offence, or the prerequisites for confiscation against third parties (namely, the link between the property and the offence and the bad faith of the third party), the provision does not introduce presumptions or reversals of the burden of proof. The latter lies primarily with the prosecution, albeit on the basis of a lower standard than the strictly criminal one, as suggested by the use of the verb "satisfied" in the English version («where the national court is satisfied»). It should nevertheless be recalled that the Italian version also uses the verb "convinced", and that the references to the obligation to respect the presumption of innocence in recitals 46 and 51 remain fully applicable. Incidentally, it should be noted that this form of confiscation applies only to proceeds deriving from the offence under investigation, albeit in the absence of a conviction; no presumption of illicit origin applies, as is the case with extended confiscation. One should therefore require the criminal standard of proof for the illicit origin of the proceeds (their derivation from the specific offence established), or for the instrumental character of the assets (their necessity for the commission of that offence), or, at most, the *intermediate* standard of proof known in common law systems, namely "clear and convincing evidence", as discussed above. It should also be noted that, while confiscation of proceeds may be characterised as restorative in nature, confiscation of instrumentalities assumes a distinctly punitive character, as previously observed.

8.2. The implementation of Article 15 in some national legal systems.

In the Italian legal system, the application of confiscation without conviction in the cases contemplated by Article 15 is already possible in practice with respect to traditional and extended confiscation (although, as examined above, Article 15 does not include extended confiscation). This occurs, first, where trials in absentia are possible («*contumacia*»), in which case a conviction may also be reached (recital 30: «In cases of illness and absconding, the existence of proceedings *in absentia* in Member States should be sufficient to comply with the obligation to enable such confiscation»). It also occurs where the offence is time-barred or amnestied, in relation to mandatory forms of direct confiscation (Article 240 of the Criminal Code, as well as special forms provided for in the Criminal Code and in special laws), on the basis of case law (Supreme Court, Joint Sections, 26 June 2015, No. 31617, *Lucci*), and pursuant to Article 578-bis of the Code of

Criminal Procedure[168] for confiscation under Article 322-ter of the Criminal Code (including value confiscation), as well as for extended confiscation under Article 240-bis of the Criminal Code and other forms of extended confiscation provided for by law. The same applies to any form of mandatory confiscation under special criminal legislation through an extensive, and, from a methodological perspective, inadmissible analogical, application of Article 578-bis of the Code of Criminal Procedure in the jurisprudence (even though Article 578-bis, unlike Article 15, requires a non-final conviction and that the confiscation order has already been issued).

Confiscation without conviction has also been applied in cases of death occurring during the trial and after a non-final conviction, on the basis of the jurisprudence, with regard to mandatory forms of confiscation (first and foremost Article 240(2)[169] of the Criminal Code), and, following the reform introduced by Law No. 161/2017, with regard to extended confiscation after a final conviction pursuant to Article 183-quater of the Implementing Provisions of the Code of Criminal Procedure. *ter* C.P.C. applies where the prevention procedure is initiated after the criminal trial – in the context of which a conviction has already been adopted at first instance – and is *unproceedable* (concluded before the conviction becomes definitive for reasons not concerning the merits).

In any event, in the circumstances listed in Art. 15 of the new Directive, it will always be possible to initiate a prevention proceeding in order to apply preventive confiscation.

In the Italian legal system, the adoption of Article 15 would require an extension of the scope of Article 578 bis C.P.C. to all forms of mandatory confiscation of the profit and instrumentalities of the crime, starting with the mandatory confiscation of the price under Article 240 of the Criminal Code, together with a systematic legislative reform in order to cover all the hypotheses set out in Article 15; in particular, the hypotheses of illness, death, and immunity should be included.

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[168] The Art. 578 bis of the Criminal Code (introduced by Legislative Decree 18/2021, which took up c. 4-septies of Art. 12-sexies of Legislative Decree 306/'92 introduced by Law 161/17) provided for the possibility of applying the extended confiscation under Art. 240 bis c.p. and then, with the reform introduced by l. 3/2019, also confiscation pursuant to art. 322 ter c.p. – and also in the form of equivalent – following a statute of limitations or amnesty, provided that it has already been pronounced at first instance and the judgment of liability is confirmed. The paradoxical character of this discipline is determined by the fact that an ad hoc rule was introduced to allow, first of all, the application of the extended confiscation of the proceeds of the crime in case of prescription and amnesty – giving rise to many perplexities in doctrine–, a hypothesis not covered by Art. 15 of the directive, and no such discipline was introduced for the direct confiscation of the profit where it is mandatory and for the mandatory confiscation of the price pursuant to Art. 240 c.p, c. 2; both scenarios would be entirely acceptable as they are forms of confiscation that are compensatory/restorative in nature and not punitive.

[169] Court of Cassation, Chamber I, 6/5/2024, No. 17791: «The patrimonial security measure of confiscation is imposed for all offences, even felonies, concerning weapons, and is compulsory even in the event of extinction of the offence, being excluded only in the case of acquittal on the merits and in that of the weapon belonging to a person extraneous to the offence' (Sec. 1, no. 1264 of 10/11/2006, Pisciotta, Rv. 235854 – 01)»; Court of Cassation, Chamber 4, 28/03/2023, No. 17644, Rv. 284607; Court of Cassation, Chamber 1, 12/04/2016, No. 20508, Rv. 266894; Court of Cassation, Chamber 1, 09/10/2015, No. 49969, Rv. 265409.

Article 578 bis of the Criminal Code, moreover, requires a conviction at first instance, a preferable solution in terms of guarantees, whereas Article 15 of the Directive requires only that the criminal trial be commenced, and not a conviction at first instance, subject to the court's finding of all the elements of the crime functional to conviction. In the Bulgarian legal system, a measure with property consequences known as 'deprivation in favour of the state', under Art. 53 of the General Part of the CC[170], covers the instrumentalities used to commit the crime and the subject of the crime in cases specified by law or where its possession is prohibited; it also covers the proceeds of the crime. The confiscation of the subject and/or the means of the crime in favour of the state is further developed through a number of specific measures provided separately for specific offences in the Special Part of the CC[171]. These measures differ in their specific features, providing in some cases for deprivation of equivalence, in others for deprivation of the instrumentalities of the crime, or for deprivation of property from third parties.

«Deprivation in favour of the state is a measure» which, in most cases, constitutes a consequence of conviction, but which may also be imposed where the conduct does not constitute a crime, for example where the act is insignificant, was carried out by a criminally irresponsible person, or where there are prerequisites preventing the initiation of criminal proceedings, such as the statute of limitations, amnesty, death of the perpetrator, and others. According to some authors, deprivation in favour of the state does not have a retributive nature, unlike confiscation, but is purely preventive or aimed at preventing the extraction of any material benefit from the committed crime. It is a measure that does not take into account the severity of the offence and is not individualised prior to its imposition, whereas individualisation is mandatory when imposing the penalty of confiscation. For this reason, the measure often results in affecting the rights of the perpetrator or related persons to a greater extent than in the case of the imposition of a pecuniary penalty. It should be noted that such measures, hereinafter referred to as 'specific measures', are applied, for example, to crimes against intellectual property, money laundering and terrorist financing, embezzlement, fraud, bribery, and various crimes against the economy[172].

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[170] Article 53 (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; where the objects are missing or are expropriated, their equivalent shall be awarded;
b) objects belonging to the culprit, which were subject of intentional crime – in the cases expressly provided in the Special Part of this Code.
(2) Confiscated in favour of the state shall also be:
a) articles that have been subject or means of the crime, the possession of which is forbidden, and
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.»

[171] TEAM OF THE SUPREME PROSECUTOR'S OFFICE OF THE REPUBLIC OF BULGARIA (2025), p. 82 ff. The specific measures constitute a *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, and in other cases they provide for confiscation of value.

[172] See, for example, Art. 159, para. 9 CC, 172a, para. 6 CC, 172b, para. 3 of the CC, Art. 208, para. 6 of the CC, Art. 224, para. 3 of the CC, Art. 225c, para. 5 of the CC, Art. 234, para. 5 of the CC, Art. 234b, para. 2 of

The approach adopted by the legislator, according to which confiscation of such property is applied "notwithstanding the penal responsibility", means that it may be carried out both in the case of a final conviction of the guilty person and where it is impossible, for certain reasons, for such a conviction to be pronounced, provided that the circumstances of the case are such that the perpetrator would be found 'guilty' and to have committed a 'crime'[173]. The confiscation of the instrumentalities of a crime and the proceeds of crime under Art. 53 paras. (1) and (2) of the CC applies independently of criminal liability and «may therefore also be imposed if the court is unable to rule a conviction (in the case of a death of the perpetrator before the end of the trial) on the guilt of the perpetrator»[174].

The procedure does not differ from that provided for *direct confiscation*, since the decision depends on whether the elements of a crime are present, in the sense that, had the perpetrator not fled or died, they would have been found guilty. The measure is imposed by the court and, in this case (due to the impossibility of a verdict), by court ruling. Where the act does not constitute a crime or the perpetrator is not guilty, confiscation under Art. 53 of the CC may be ordered only if possession of the objects is prohibited by law. In cases of absconding or other reasons for the defendant's absence, it is possible, under certain conditions (under the CPC), to pass judgment in the absence of the accused. In such cases, the application of Article 53 of the CC takes place together with the conviction[175].

Where a final judgment imposes confiscation and/or a measure under Art. 53 of the CC, or a specific measure, the implementation of the sanction is entrusted to the National Revenue Agency (Article 416, Paragraph 3 of the CPC).

Article 53 of the CC, as well as the specific measures provided for in the Special Part of the CC, are applied by the court together with the sentence (Art. 301 of the CPC). The standard of proof is linked to proof of the crime, that is, the court must be convinced of the defendant's guilt: according to Art. 303, para. 1 of the CPC, a sentence cannot rest on assumptions, and, according to paragraph 2, the court recognises the defendant as guilty only where the accusation is proven beyond doubt. The burden of proof rests with the representative of the prosecution, namely the prosecutor. The law does not allow for a reversal of the burden of proof[176].

In the French legal system, trials may be conducted in absentia, regardless of the suspect's illness or absconding, and sanctions may be imposed accordingly. Where, however, a trial cannot be held and an additional penalty of confiscation cannot be imposed due to the suspect's death, immunity, or the offence being time-barred, assets

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the CC, Art. 235, para. 7 of the CC, Art. 237, para. 3 of the CC, Art. 238, para. 4 of the CC, Art. 240, para. 3 of the CC, Art. 240a, para. 6 of the CC, Art. 242, para. 6 of the CC, Art. 242a of the CC, Art. 260a of the CC, Art. 260c, para. 5 of the CC, Art. 278, para. 7 of the CC, Art. 278a, para. 6 of the CC, Art. 278b prim para. 5 of the CC, Art. 307a of the CC, Art. 307e of the CC, Art. 339a, para. 3 of the CC, Art. 348 of the CC, Art. 354, para. 3 of the CC, Art. 354a, para. 6 CC.

[173] TEAM OF THE SUPREME PROSECUTOR'S OFFICE OF THE REPUBLIC OF BULGARIA (2025), p. 85.

[174] *Idem*, p. 99.

[175] *Idem*, p. 104.

[176] *Idem*, p. 109.

obtained through the crime cannot be confiscated. French law nonetheless provides for non-conviction-based decisions refusing restitution, which still fall within criminal proceedings. In such cases, the property is transferred to the State, but this does not amount to confiscation proper, since confiscation may be pronounced only by a judge or a court. The public prosecutor, the investigating judge, or the judge who presided over the case may decide to retain seized property as «refusal to return the instrumentalities or proceeds of crime». The prosecutor may refuse restitution where the seized property poses a danger to persons or property, constitutes an instrument or proceeds of the offence, or where specific provisions require its destruction. The investigating judge may refuse restitution where it could hinder evidence or the rights of other parties, where it poses a danger to persons or property, or where it constitutes an instrument or proceeds of the offence.

In the Netherlands, only conviction-based confiscation is currently possible. In cases of death or serious illness of the suspected or accused person, prosecution is not possible and confiscation therefore cannot be ordered. Where the suspected or accused person has absconded, prosecution in absentia is possible; however, where neither the summons nor the judgment has been served in person, the judgment does not become irrevocable and cannot be executed. Within the framework of the national agenda on serious organised crime, a proposal for non-conviction-based confiscation (NCBC) has been introduced[177].

In the Polish legal system, forfeiture of financial gain is mandatory and may be applied, including extended confiscation, where conviction is excluded because «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 a state of diminished capacity referred to in Article 31 § 1, or where there is a circumstance preventing the offender 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 failure to identify the offender, and where proceedings are stayed because the accused cannot be apprehended or cannot participate in the proceedings due to mental illness or another serious illness» (Art. 45a). The rationale underlying its introduction lies in general prevention, without a specific objective, together with the application of the principle that crime does not pay. A further purpose is to ensure justice by depriving the perpetrator of the proceeds of crime even where the entire criminal procedure against the defendant as a natural person cannot be completed. The elements to be established and/or assessed for its application are: 1) ownership or availability of the object of confiscation; 2) a link between the crime and the proceeds/instruments/products; 3) disproportionality («the value of the property is disproportionate to the lawful income of the convicted person»); and 4) illegal origin (suspects/presumption of illegal origin). On the basis of Art. 45a, confiscation may also be applied in proceedings in absentia and in the event of acquittal.

[177] ANASTASIO-BLESSON (2025), 132.

In Romanian law, a very limited form of non-conviction-based confiscation has been introduced. Although not expressly provided for by the Criminal Code, it results from Art. 549 of the Criminal Procedure Code, which governs the procedure for confiscation or destruction of an object where the prosecutor decides to close the case, and has been recognised in the jurisprudence, particularly where the lapse of the statute of limitations prevents continuation of the proceedings with a view to delivering a conviction. This model appears consistent with Art. 15 of Directive 2024/1260.

9. The "Confiscation of unjustified assets related to criminal conduct" under Art. 16.

The introduction of the new model of confiscation without conviction under Article 16, *Confiscation of unexplained wealth linked to criminal conduct*, is justified in the text (in recital no. 32 «Such property should be confiscated where the court is satisfied that the property is derived from criminal conduct committed within the framework of a criminal organisation and where this conduct is liable to give rise, directly or indirectly, to substantial economic benefit») by the inherent difficulties in tracing assets to specific crimes where the owner is involved in organised crime activities consisting of multiple offences committed over a prolonged period. Its scope is limited to serious crimes, punishable by a minimum sentence exceeding four years and likely to generate substantial benefits (recital no. 32 «Member States should enable confiscation of such unexplained wealth when the investigation in which the property was identified concerns an offence falling within the scope of this Directive that is punishable by deprivation of liberty of a maximum of at least four years. That condition ensures that the possibility of confiscation of unexplained wealth arises in criminal investigations into criminal offences that meet a certain threshold of seriousness»).

This model is closer to actio in rem and draws inspiration from forms of confiscation without conviction found in several European legal systems.

This form of confiscation applies only to the *proceeds* or *products of* crime, since the provision requires a derivative link between the object of confiscation and criminal conduct, Art. 16, c. 1: «provided that a national court is satisfied that the identified property is derived from criminal conduct».

Paragraph 3 further specifies that the application of this form of confiscation «shall not prejudice the rights of bona fide third parties». While respect for the rights of bona fide third parties should govern the application of any form of confiscation as a general principle, this is not always the case in practice with respect to *actio in rem* models; accordingly, this clarification appropriately reinforces the need to ensure specific protection for third-party rights.

9.1. Scope and autonomy of in rem *proceedings.*

This model of confiscation presupposes «an investigation related to a criminal offence» («Member States shall take the necessary measures to enable, where, […] the

confiscation of property identified in the context of an investigation in relation to a criminal offence»). Mere investigation is mentioned and, accordingly, it would seem that a criminal trial is not expected to be initiated, so that proceedings against assets should be allowed even when «a criminal trial has never been brought, for the most varied reasons», as is the case for Italian preventive proceedings: «The prevention judge is not bound by the existence of a criminal trial»[178]; it being understood that he must ascertain the "social dangerousness" (even if in the past) of the owner. By contrast, in the Italian legal system there is an obligation to activate preventive proceedings against those subject to criminal proceedings (Art. 23-*bis* of Law 646/82)[179].

However, in the approved version – corresponding to the Commission's original proposal – it would appear that this is not possible, because this model of confiscation is to be applied on a *residual* basis, namely «where, in accordance with national law, the confiscation measures of Articles 12 to 15 may not be applied». At first glance, it could therefore be assumed that a criminal trial has taken place and that it has not been possible to apply direct or value confiscation under Article 12, or confiscation against third parties, even without conviction under Article 15, as well as extended confiscation after conviction under Article 14, with the result that it would not be possible to initiate in rem proceedings independently of the criminal trial. Nor, moreover, would it be possible, as is the case in the Italian legal system, to proceed simultaneously and in parallel in both criminal and preventive proceedings (with seizure and confiscation under Articles 20 and 24 of Legislative Decree 159/2011).

It is preferable, however, to adopt another interpretation, according to which this form of confiscation may be applied not only where criminal proceedings have begun but have been interrupted and confiscation could not be pronounced, but also where criminal proceedings cannot be initiated because the necessary conditions are not met (the perpetrator is already dead, the crime is time-barred, there is insufficient evidence…). This interpretation is supported, in particular, by Recital No. 34, which states that «It should be possible for Member States to decide to allow for confiscation of unexplained wealth where criminal proceedings are discontinued or for such

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[178] Cass., sec. II, 18/01/2022, no. 8166: «and is instead empowered, in light of the constantly affirmed principle of "autonomy" of the prevention judgment, reaffirmed also as a result of the introduction of the anti-mafia code [see Article 29 of Legislative Decree no. 159 of 2011], to reconstruct, *motu proprio* and even in the absence of related criminal proceedings, the historical episodes brought to its attention. It may, therefore, be affirmed that the person in charge can be ascribed to one of the categories of dangerousness referred to in Articles 1 and 4 of the cited legislative decree, not only on the basis of convictions that have ascertained the past commission of criminal conduct relevant for this purpose, but also where, against the recipient of the measure, criminal proceedings have never been brought, for the most varied reasons (because the notitia criminis was archived; because the evidence collected was not considered sufficient to support a criminal charge; because the criminal prosecution was already paralyzed, at the time of the knowledge of the notitia criminis, by a cause of extinction or improcedibility). In these cases, the prevention judge, after verifying – albeit incidentally – the criminal worthiness of those conducts (and, therefore, after subsuming them within precise criminal cases), must evaluate without».

[179] We refer elsewhere to the examination made of these issues cf. MAUGERI (2017), pp. 60-68 ff. Cf. CASSANO (2013), p. 173 ff.

confiscation to be ordered separately from criminal proceedings into the offence»[180] ; on this basis, Member States may allow in rem proceedings aimed at applying confiscation under Article 16 not only where criminal proceedings have been interrupted, but also as a separate procedure, whether on the basis of parallel proceedings or where no criminal proceedings have been initiated at all. The same approach emerges from recital no. 32, which specifies that «In situations where the confiscation measures in Articles 12 to 15 are not applied for legal or factual reasons determined by national law, it should still be possible to confiscate property that has been identified or, where the national legal system requires freezing, frozen in the context of an investigation in relation to a criminal offence based on indications that the property could be derived from criminal conduct»; confiscation without conviction is therefore broadly permitted where, *for reasons of fact or law, other forms of confiscation do not apply*, as provided in § 76a *StGB*[181]. The model of Italian asset preventive measures, which also subjectively presupposes the establishment of past social dangerousness and does not represent a pure actio in rem (on pain of unconstitutionality, as stated in the U.S. Spinelli judgment), is thus legitimised, as are the models of *comiso sin condena* or civil forfeiture, provided for in an increasing number of European legal systems. In the Italian system, in particular, the autonomy of preventive proceedings from the criminal trial is enshrined in Article 29 of Legislative Decree 159/2011 and has been reaffirmed by the Constitutional Court (No. 24/2019)[182].

In relation to this form of confiscation, Article 16 limits its application to the proceeds of crimes listed «in Article 2(1) to (3), where such offences are punishable by deprivation of liberty of a maximum of at least four years»; recital 32 likewise states that «Member States should enable confiscation of such unexplained wealth when the investigation in which the property was identified concerns an offence falling within the scope of this Directive that is punishable by deprivation of liberty of a maximum of at least four years». This delimitation – introduced at the Council's behest, as examined – is provided for extended confiscation under Article 14 and is not provided for confiscation under Article 15, underscoring the need to delimit more intrusive forms of confiscation, such as extended confiscation based on the presumption of unlawful enrichment and this true *actio in rem*. The European legislature, however, with regard to the confiscation of unjustified assets under Article 16, does not specify "at least", as it

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[180] This delimitation («where confiscation is not possible pursuant to Articles 12 to 15») is provided, in the version amended by the Council, only on an *optional basis*.

[181] Cf. BETTELS (2016).

[182] Constitutional Court No. 24/2019, cited above, § 11: «while moving on the assumption that "the judge of the preventive measure can totally autonomously reconstruct the historical episodes in question – even in the absence of related criminal proceedings – by virtue of the absence of prejudice and the possibility of autonomous preventive action" (Cass., no. 43826, 2018)»; conform Cass., sec. II, 25 Jan. 2023, no.15704; Cass, sec. II, 11 Jan. 2022, no. 4191; Cass., sec. II, 25 June 2021, no. 33533; Cass., sec. VI, 25 June 2020, no. 21060; Cass., sec. II, 6 June 2019, no. 31549; Cass., sec. II, 29 March 2019, no. 19880; Cass., sec. VI, 13 July 2017, no. 36216; Cass, sec. I, 15 June 2017, No. 349; Cass., sec. I, 7 Jan. 2016, No. 6636; Cass., sec. 1, 24 March 2015, No. 31209; Cass., sec. VI, 29 May 2015, No. 23294; Cass., 29 May 2015, No. 2308; Cass., sec. II, 29 May 2015, No. 23041.

does in relation to extended confiscation under Article 14 and, accordingly, appears to intend to limit its application to crimes «punishable by a custodial sentence of not less than four years». This different approach is clearly justified by the fact that confiscation under Article 14 presupposes a conviction, unlike confiscation under Article 16, thereby making more stringent the need to delimit its scope of application. In any case, Recital No. 32 specifies that «that condition ensures that the possibility of confiscation of unexplained wealth arises in criminal investigations into criminal offences that meet a certain threshold of seriousness». Recital 34 further states that «The relevant criminal conduct could consist of any type of offence committed within the framework of a criminal organisation and liable to give rise to substantial economic benefit, thus being serious in nature». This constitutes a further indication of the European legislator's intention to delimit the scope of the confiscation under consideration by reference to crimes of a "serious nature", an element lacking in taxativity, which is nevertheless combined with the requirement that such crimes be punishable by a maximum sentence of at least four years.

This form of confiscation applies only where «the identified property is derived from criminal conduct committed within the framework of a criminal organisation and that conduct is liable to give rise, directly or indirectly, to substantial economic benefit» (Art. 16(1)). The European legislator therefore appears to adopt this NCBC model primarily to address organised crime, considering that, as pointed out in recital no. 2, «The main motive for criminal organisations that operate across borders, including high-risk criminal networks, is financial gain» and that «in order to tackle the serious threat posed by organised crime, it is important that competent authorities are, therefore, given more operational capacity and the necessary means to effectively trace and identify, freeze, confiscate and manage the instrumentalities and proceeds of crime or property that stem from criminal activities». This is the same rationale that inspired the introduction of preventive confiscation in Italy in 1982 with the Rognoni–La Torre law, although, particularly after the reforms introduced by d.l. 92/2008 and l. 94/2009, in recent years it has become a tool to counter all forms of crime capable of producing proceeds. Even in the United Kingdom, civil recovery has been presented as a key strategy in the fight against organised crime[183]. Likewise, recital No. 34 reiterates that «The relevant criminal conduct could consist of any type of offence committed within the framework of a criminal organisation and…, thus being serious in nature». The provision would therefore seem to confine its scope to the area of combating organised crime by conceiving of it primarily as a means of preventing the infiltration of organised crime into the economy[184].

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[183] HENDRY-KING, (2016), p. 4: «In the preparatory work of POCA 2022 it emerges how Prime Minister Tony Blair said in September 1999: 'we want to ensure that crime doesn't pay. Seizing criminal assets deprives criminals and criminal organizations of their financial lifeblood' (Performance and Innovation Unit 2000:13). Initiated as a result of perceived inadequacies of existing criminal processes in controlling high-level and high-value organized crime, civil recovery enables the seizure of 'criminal' proceeds in the absence of a criminal conviction and on a reduced standard of proof».

[184] Clearly pointing in that direction was the original version of the proposal in the Commission text, which *purported* to limit the scope of Article 16 to offences related to organized crime: «Member States shall take

By contrast, Recital 35 specifies that «This Directive does not prevent Member States from adopting measures that enable the confiscation of unexplained wealth for other crimes or circumstances», in accordance with the Council's guidance[185] (which more explicitly calls for the application of this model of confiscation in relation to the proceeds of any crime, while requiring "at the very least" that it be applied in the area of combating organised crime). It is thus expressly acknowledged that the new NCBC model may be applied beyond the sphere of organised crime, extending to other forms of profit-driven crime.

Along the same lines, in the final paragraph approving the Council's version, the condition envisaged by the Commission that «the property to be confiscated has been previously frozen in the context of an investigation in relation to a criminal offence committed within the framework of a criminal organization» is rendered optional[186]. Recital no. 32 further clarifies that, in determining whether criminal conduct is capable of producing substantial economic advantage, as required in the first paragraph, «Member States can take into account all relevant circumstances, including the modus operandi, for example if a condition of the offence is that it was committed in the context of organised crime or with the intention of generating regular profits from criminal offences»; the possibility that crimes are committed with the intent to generate regular profits is thus envisaged as an alternative to commission within the context of organised crime, confirming that the Directive allows the introduction of the «confiscation of unjustified assets related to criminal conduct» model even for the proceeds of crimes not committed in the context of organised crime.

In light of Recital 35, the model of preventive confiscation falls within the scope of the Directive, insofar as, especially following the repeal of Art. 14 l. 55/'90 (amended by Art. 7, l. 228/2003) by d.l. No. 92/'08, the scope of application of patrimonial preventive measures has been extended to all hypotheses of so-called generic dangerousness, that is, to subjects suspected of any crime, without any delimitation, including, in particular, cases where they are «dedicated to criminal trafficking» – a hypothesis declared unconstitutional in Judgment No. 24/2019 following Italy's condemnation in the ECtHR's De Tommaso judgment[187] – or «habitually live, even in part, with the proceeds of criminal activities». Such an indiscriminate extension, as

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the necessary measures to enable them to confiscate property, if the following conditions are met: a) the property is frozen in the context of an investigation into an offense committed in the framework of a criminal organization; c) the national judicial authority is convinced that the frozen property is derived from offenses committed in the framework of a criminal organization».

[185] This is clear from the wording of the first paragraph in the Council's version («Member States shall take the necessary measures to enable them to confiscate property identified in the context of an investigation related to a crime in cases where […] the national judicial authority is convinced that the property is derived from criminal conduct, at *least* where such conduct *has been carried out in the context of a criminal organization*») [emphasis added].

[186] «5. Member states may provide that confiscation of unjustified assets in accordance with this article shall be carried out only if the assets to be confiscated have been frozen previously in the context of an investigation related to a crime committed in the framework of a criminal organization.»

[187] EDU Court, 23 February 2017, Grand Chamber, De Tommaso v. Italy, No. 43395/09.

examined elsewhere, raises serious concerns in terms of respect for the principle of proportionality, both in view of the sacrifice of guarantees entailed by the system of preventive measures – which can hardly be justified in relation to every hypothesis of generic dangerousness – and in terms of cost–benefit analysis, since not all hypotheses of generic dangerousness appear capable of legitimising such a disproportionate expansion of investigative and prosecutorial efforts, with the attendant risk of dispersing resources. Above all, this equalisation has been criticised, despite attempts at justification by the Joint Sections of the Supreme Court[188], on grounds of reasonableness, insofar as it equates the presumption of unjust enrichment underlying the two forms of qualified and generic dangerousness (the presumption of unlawful enrichment was originally grounded in the connection between criminal activity and the particularly invasive and serious criminal phenomenon represented by the mafia-type association, conceived as a permanent crime aimed at enrichment, even through the performance of economic activities that are in themselves lawful but carried out by unlawful means; with the indiscriminate extension to cases of generic dangerousness, the presumption in question risks being deprived of a rational basis, without prejudice to the need for a strict and peremptory interpretation, as required by the Constitutional Court in Judgment No. 24/2019, of the prerequisites of generic dangerousness – requiring, in particular, habituality in crime – on which the presumption of unlawful enrichment must be based)[189]. Nonetheless, the ECtHR has consistently justified such instruments within the context of the fight against serious criminal phenomena, including, first and foremost, for the Italian preventive system, the fight against the cancer of the mafia.

Turning to the requirements of Article 16, as mentioned above, the assets must derive from criminal conduct capable of «producing, directly or indirectly, a considerable economic advantage»; the European legislator thus puts forward yet another criminal policy directive aimed at delimiting the scope of application of this form of confiscation and, as such, commendable in principle, although the perplexities raised in the previous paragraph with respect to this requirement, and, in particular, to its actual capacity to delimit, remain. Recital 32 specifies, in any event, and precisely in relation to this model of confiscation, the criteria for determining whether offences are capable of producing substantial economic advantage, stating that «When determining whether criminal conduct is liable to give rise to substantial economic benefit, Member States can take into account all relevant circumstances, including the modus operandi, for example if a condition of the offence is that it was committed in the context of organised crime or with the intention of generating regular profits from criminal offences». On this basis, delimiting the scope of application of this model of confiscation

[188] Cass., Joint Chambers., Spinelli, No. 4880, cited: «Both urge ordinal responses not to facts constituting crimes, but to lifestyles and behavioral methods». «The recognition, by the United Sections, that the law and in particular punitive law (the system of prevention infringes on personal freedom and freedom of economic initiative) intervenes as a 'response' to a lifestyle and behavioral methodologies incites a certain fear in a secular and pluralistic rule of law, which should not intervene except where it is a matter of guaranteeing the protection of goods or interests deserving of protection against intolerable forms of aggression», MAUGERI (2015b), p. 945.

[189] MAUGERI (2015b), p. 946.

to crimes capable of producing considerable benefits is intended to operate as a prerequisite for confiscation, the assessment of which is entrusted to the discretion of the judge, who is called upon to determine, in the concrete case, whether, having regard to all relevant circumstances and the intent of the offender, the suspected crimes are capable of producing considerable economic benefits. Such an evaluative exercise appears more consistent with a model of optional confiscation entrusted to judicial discretion This interpretation also appears to be endorsed by the Court of Justice with respect to the identical expression used in recital 20 of Directive 42/2014 to determine «whether an offence is capable of producing, directly or indirectly, such an advantage»: «Therefore, in the present case, *it will be for the referring court to assess* whether the offence at issue in the main proceedings consisting of the possession of highly dangerous drugs for the purpose of their distribution is likely to produce, directly or indirectly, an economic advantage, taking into consideration, where appropriate, the manner in which the offence was committed, including in particular whether it was committed in the framework of organized crime or with the intention of deriving regular profits from crime». At the same time, as the Court itself points out, «the second sentence of the aforementioned recital makes it clear, however, that consideration of the aforementioned modus operandi 'should not, in general, prejudice the possibility of recourse to extended confiscation'»[190].

From a systematic perspective, recital 32 therefore appears overly demanding, and partially contradictory, insofar as it requires the intent underlying the commission of crimes to be established, while recital 34 subsequently clarifies that «it should not be a precondition for the confiscation of unexplained wealth that individual offences be proven».

The European legislator's intention to delimit the scope of application of this form of confiscation, by confining it to the area of organised crime dedicated to lucrative activities, thus emerges in an ambiguous manner. In this respect, it is worth recalling the Italian Constitutional Court's warning in Judgment No. 33/2018 to limit the scope of application of extended confiscation under Art. 240 bis, addressed not only to the legislature, in a *de iure condendo* perspective («the selection of "matrix crimes" by the legislature should take place, as long as the institute retains its current physiognomy, according to criteria strictly cohesive to it and, therefore, reasonably restrictive»), taking into account the original ratio of this measure introduced to combat organised crime, but also to the judge: «with a view to enhancing the ratio legis, it may be considered, moreover, that – when discussing crimes which, by their nature, do not imply a criminal programme extended over time (as is the case for receiving stolen goods) and which also do not turn out to have been committed, however it may be, in an organised crime context – the judge retains the possibility of verifying whether, in relation to the circumstances of the concrete case and the personality of its perpetrator – which serve, in particular, to characterise the criminal episode as entirely episodic, occasional, and productive of modest enrichment – the fact for which conviction has occurred manifestly

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

falls outside the 'pattern' capable of grounding the presumption of illicit accumulation of wealth by the convicted person». Such a reference, in the view of part of the doctrine, would amount to transforming confiscation under Article 240-bis into a form of optional, rather than mandatory[191] confiscation, thereby conflicting with the principle of legality, given that the measure is envisaged as mandatory following conviction and the establishment of the disproportionate nature of the assets. Along similar lines, recital 33 likewise seeks to limit the scope of application of this model of confiscation by requiring respect for the *principle of proportionality in the concrete case* when ordering such a measure: «When applying the national rules implementing this Directive, the national competent authorities can choose not to order or execute confiscation of unexplained wealth where, in the case in question, the application of the rules set out in this Directive would be manifestly unreasonable or disproportionate», thus entrusting the assessment of proportionality and reasonableness in the individual case to the discretion of the judge (which would operate as a functional limitation on the potentially mandatory nature of the measure). The benchmarks to be adopted by the judge in conducting this assessment remain unclear: while the Italian Constitutional Court emphasises the need to «verify whether, in relation to the circumstances of the concrete case and the personality of its author», the presumption of illicit accumulation of wealth is well founded, that is, whether it is grounded in professional or otherwise habitual criminal activity capable of generating illicit enrichment over time, the European legislator appears primarily concerned with evaluating the consequences that may result from the application of confiscation in the concrete case.

9.2. Proof of illicit origin: indicia and evidentiary standard.

In relation to proof of the unlawful origin of the property, Article 16(2) requires that «[i]n determining whether the property referred to in paragraph 1 is to be confiscated, account shall be taken of all the circumstances of the case, including the available evidence and the specific facts», as also emphasised in recital 34[192]; it follows that there is no reversal of the burden of proof, as in the British case of unexplained wealth orders since the prosecutor must prove the criminal origin of the assets (insofar as "all circumstances of the case" must be taken into account). As further clarified in the

[191] Thus AMARELLI (2018), p. 315; VARRASO (2020), p. 8; cf. MILONE (2018), p. 15 f.; FINOCCHIARO (2018), p. 135 f.; PICCARDI (2018), p. 2834. This interpretation is considered contrary to the principle of legality by other scholars, whoinstead believes that, in light of this reminder by the Constitutional Court where a conviction is present, the judge will have to assess with extreme caution whether the precondition of disproportionality exists, which, together with the conviction, grounds the presumption of illicit asset accumulation, thus constituting a symptomatic element of the illicit origin; «the prosecutor, in short, would have to provide evidence of the disproportionate and therefore unjustified nature of the acquisition, so substantial as to represent circumstantial evidence of the illicit nature of its origin ("that minimum link is re-established")» MAUGERI, (2007), p. 529; concurring Cass., sec. II, 9 Jan., 2018, no. 5378.

[192] «In determining whether the property should be confiscated, national courts should take into account all relevant circumstances of the case, including the available evidence and specific facts.»

preamble to the proposal in connection with Article 16, under the heading «Detailed explanation of the individual provisions of the proposal», «this finding [about the criminal origin of the assets] must be based on a comprehensive assessment of all the circumstances of the case»[193].

Even with regard to this form of confiscation, the Directive remains rather ambiguous as to the evidentiary standard required. Property is confiscated «provided that a national court is satisfied that the identified property is derived from criminal conduct» (Article 16(1)). The evidentiary standard thus appears to be lower than the criminal standard, since the court must be *satisfied* in the English version – as also reiterated in recital 34 («there must be sufficient facts and circumstances for the court to be satisfied that the property in question is derived from criminal offences») – and not "convinced" or "fully convinced". Moreover, although in the Italian version the court must be "convinced", this standard remains lower than the "fully convinced" threshold required by the criminal-law standard of proof beyond reasonable doubt ("fully convinced", as recalled, was the standard adopted for extended confiscation following conviction by Framework Decision 212/2005, Art. 3).

Nevertheless, not only does the "Detailed Explanation of the Individual Provisions of the Proposal" also employ the verb "convinced" in the English version («It should allow for the confiscation of assets only where the national court is convinced that the assets in question derive from criminal activities»), but support for a higher evidentiary standard may also be found in recital 46, which requires respect for the presumption of innocence under Art. 48 of the Charter, as well as in recital 51, which reiterates the need to ensure compliance with Directive (EU) 2016/343 on strengthening certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings[194].

In any event, Article 16 requires the court not only to be satisfied that «the identified property is derived from criminal conduct» (Article 16(1)), but also that it derives from specific criminal offences: «For the purposes of this Article, the notion of 'criminal offence' shall include offences referred to in Article 2(1) to (3), where such offences are punishable by deprivation of liberty of a maximum of at least four years» (Article 16(4)). This entails that the court must be convinced of the illicit origin of the property to be confiscated in relation to *identifiable criminal offences* and, consequently, must undertake a more demanding evidentiary effort to establish the criminal origin of the assets, even though, in practice, it may be particularly difficult to provide proof of

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[193] MAUGERI (2018), p. 919.

[194] OJ L 65, 11.3.2016, p. 1. Also in relation to this model of confiscation, the Council's proposal to introduce, as already examined with regard toconfiscation under Art. 15, the *reinforced civil law* standard of proof and the use of presumptions provides that «Member States may provide, for example, that it may be sufficient for the court to consider, on the basis of a weighing of probabilities, or may reasonably presume that it is much more probable that the property in question is the fruit of such criminal conduct than of other activities» («Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from such criminal conduct than from other activities.»). The common law intermediate standard, «the clear and convincing evidence», should also be recalled in this context.

specific crimes and the available evidence often consists primarily in the absence of proof of lawful origin. It is no coincidence, therefore, that – as suggested by the Council – among the criteria listed for verifying criminal origin under paragraph 2 there is also, in subparagraph (b), «the fact that there is no plausible lawful source of the assets».

What must therefore emerge are indications of prior specific criminal activity from which the assets to be confiscated derive, much as, for the purposes of applying Italian preventive confiscation, the establishment of past social dangerousness is required. This entails a *diagnostic–constative* assessment, «in which the constituent elements of the so-called "cases of dangerousness" […] are identified through an appreciation of "facts", themselves constituting "indicators" of the possibility of placing the proposed subject in one of the criminological categories provided by law»[195].

Article 16 provides examples of the evidence and specific facts from which the unlawful origin of the property to be confiscated may be inferred (Art. 16(2): «available evidence and specific facts which may include»), including, first and foremost, as already provided for extended confiscation under Art. 14, «a) that the value of the property is substantially disproportionate to the lawful income of the affected person» (Art. 16(2)(a) and recital 34). Disproportionate value constitutes an important indicator of the criminal origin of property; however, it remains only one circumstantial element among other "specific facts" and "available evidence", as already envisaged under Article 14, and does not represent the sole evidentiary basis for establishing criminal origin, as is instead the case under Article 240 bis of the Italian Criminal Code[196].

Here as well, and even more decisively given that this is a form of confiscation without conviction, a rigorous assessment of this element is required in relation to each individual asset at the time of its acquisition, as an indicator of criminal origin, in line with the best Italian case law.

In this regard, recital 33 (Council version) also calls for the introduction of a criterion aimed at the temporal *delimitation and reasonableness* of the presumption of unlawful enrichment in relation to the source criminal conduct («Member States can also determine a requirement for a certain period of time during which the property could be deemed to have originated from such criminal conduct»). As already examined with respect to extended confiscation, this criterion plays a significant role in supporting the presumption of illicit origin and in aligning the measure, at least in part, with the principles of proportionality and the presumption of innocence Recently, in the Isaia case, the ECtHR has emphasised the need to meet a more rigorous standard of proof of the criminal origin of assets where confiscation concerns «properties acquired after a considerable lapse of time from when the person in question was considered to pose a

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[195] Cass., 1 Feb. 2018 (May 31), no. 24707, Oliveri; Cass., sec. II, 4 June (22 June) 2015, no. 26235, Friolo; Cass., sec. I, 24 March (17 July) 2015, no. 31209; Cass., sec. I, 11 Feb. 2014; Cass., sec. I, 5 June 2014, *Mondini*, no. 23641, *Mass. Uff*. no. 260103.

[196] The Council's version indicated with even greater claritythat the available evidence and specific facts to be considered may include, but are not limited to the disproportionate value of the assets: «if relevant, may include but are not limited to the following […] the fact that the value of the assets is considerably disproportionate to the legitimate income of the […] person concerned».

danger to society»: «the Court notes that their assessment did not meet even the reduced standard of proof required by the Court's case-law for the imposition of similar measures». In the jurisprudence of the Court of Cassation, the confiscation of properties acquired after a considerable lapse of time from when the person in question was considered to pose a danger to society was «dependent on the presence of specific elements enabling the purchase in question to be rigorously and unequivocally traced back to the direct reinvestment of capital previously accumulated in an illicit way». The Court observes that the Advocate General of the Court of Cassation did not consider that the domestic courts' decisions contained any such reasoning[197].

Finally, the Council adds, among the possible circumstantial elements that may be relevant – though not exclusive – to verifying the criminal origin of assets under paragraph 2, the absence of a «plausible lawful source of the property» (subpara. (b)), thereby opening the door to forms of negative evidence typical of this field. Recital 34 specifies that «Another relevant factor might be the absence of a plausible licit source of the property, as the provenance of lawfully acquired property can normally be accounted for». Compared to the difficulty of proving origin from specific criminal offences, it is often easier to demonstrate the absence of lawful sources of income capable of justifying the accumulation of assets, as shown by Italian practice[198] (with it being understood that a finding – albeit circumstantial – of the commission of offences punishable by deprivation of liberty for a maximum of at least four years must nonetheless be required).

The last possible circumstantial element indicated by the Council is «that the affected person is connected to people linked to a criminal organization». This element raises significant concerns, due to the particularly indirect nature of such an indication, both with respect to the criminal origin of the assets and to the individual's involvement in a criminal organisation. Indeed, it does not require a direct connection between the affected person and the organisation *tout court*, but merely a connection with someone who is himself involved in the organisation[199]. Presumably, the European legislator considered that requiring a direct link to the criminal organisation could give rise to a charge of participation in the organisation and, consequently, to a criminal trial, which might allow recourse to extended confiscation under Art. 14 or, possibly, to confiscation under Art. 15 where a conviction cannot be achieved. Such a rationale, however, appears more convincing than the Commission's original wording of Article 16, which conceived

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[197] ECHR, *Isaia*, cit., § 88.

[198] Cass, sec. II, 28 Sept. 2023, no. 41157: «The prevention measures ordered against so-called "generic dangerous" persons who fall into the category referred to in letter b) of Article 1 of Legislative Decree Sept. 6, 2011, no. 159, require that the judge of the measure has ascertained, on the basis of specific factual circumstances, that the proposed person has been the perpetrator of crimes habitually committed over a significant period of time, from which he has derived a profit that constitutes – or has constituted at a given time – his sole income or, at least, a significant component thereof. In this case, in preventive confiscation it is not required to ascertain the strict causal derivation of the confiscable assets from individual crimes, a hypothesis attributable to confiscation as a security measure, it being sufficient instead to verify the perpetration of crimes productive over time of illicit profits and the absence of other legitimate income».

[199] He criticizes AGUADO (2023), p. 37, in this regard.

this form of confiscation as residual where other confiscation measures could not be applied, and is more coherent than a model which – in the Council's version – may be applied independently, regardless of the initiation of a criminal trial. Recital 34, in connection with this element, refers to «circumstances such as the situation in which the property was found or indications of participation in criminal activities», and further specifies that «The assessment should be made on a case-by-case basis depending on the circumstances of the case».

This requirement of a connection with a person who is, in turn, part of a criminal organisation recalls the broad notion of qualified social dangerousness adopted in Italian jurisprudence to classify the defendant as "qualified dangerous" *as belonging to a mafia-type association* according to art. 1 l. 575/'65, and today as a *participant* in the association according to art. 4 of Legislative Decree No. 159/2011, on the basis of vague forms of contiguity, including ideological contiguity, shared mafia culture, or recognised frequentation with subjects involved in the criminal sodality – conceived as a category endowed with a particularly broad semantic scope[200] . More recent, guarantee-oriented jurisprudence, by contrast, requires a stringent assessment in the diagnostic–constative phase[201] confining the category of subjects with qualified dangerousness as *participants* in the association ex art. 4 d.lgs. no. 159/2011 to «only conduct referable to the case of mafia-type association, from which it differs solely in the lower evidentiary standard required for the assessment of social dangerousness»[202], and, further, demanding «the appreciation of a situation of contiguity to the association itself that is functional to the interests of the criminal structure (in the sense that the proposed person must offer a "factual contribution" to the activities and development of the criminal association)»[203]; the notion of "membership" evokes «being part of or at least making a concrete contribution to the group»[204]; the contribution «takes the form of an action, even isolated,

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[200] Forms of contiguity «that are not reduced to mere passive acceptance – at the level of opinion – of the mafia subculture, but concretely increase it, creating around it a halo of respectability and in any case of inevitability» (Trib. Lecce, 4 Nov. 1989, Riotti, in *Cass. pen.* 1990, 690), or «any behavior that, while not integrating the extremes of the crime of participation in a mafia association, is functional to the interests of the criminal powers and at the same time denotes the specific social dangerousness that underlies the preventive treatment, constituting a kind of favorable ground permeated with mafia culture» (Cass, sec. VI, 29 Jan. 2014, no. 9747, *Mass. Uff.* no. 259074; Cass., sec. II, 21 Feb. 2012, no. 19943, *Mass. Uff.* no. 252841; Cass., sec. II, 16 Feb. 2006, no. 7616, *Mass. Uff.* No. 234745), or even «lifestyles and behavioral methods that lie outside the ordinary patterns of civil coexistence and the democratic system. And indeed, these are, […] existential choices and systematic behaviors, antithetical to the rules of civil consortium, but still oriented to the logic of profit and easy enrichment» (Cass., Joint Chambers., 2 Feb. 2015, Spinelli, cit.). These are worrisome and vague sociological categories, difficult to determine in a taxing way, which really defer to mere judicial discretion the framing of the recipients of prevention measures. For a broader critique of these definitions, see MAUGERI (2018a), pp. 341 ff.; Id. (2017b), pp. 60 ff.

[201] MAUGERI (2018a), pp. 337 ff.

[202] As affirmed by the most guaranteeing orientation, see Cass. sec. VI, 8 Jan. 2016, no. 8389.

[203] Cass. sec. VI, 29 Jan. 2016, *Gagliano and others*, no. 3941, *Mass. Uff.* no. 266541.

[204] Cass. sec. 1, 14 June (dep. 30/11) 2017, Sottile, No. 54119; Cass. sec. V, 18 Jan. 2016, *Mannina et al.* No. 1831, *Mass. Uff.* No. 265863; Cass., sec. V, 23 March 2018, No. 20826. *Contra* part of the doctrine denies the applicability of prevention measures to the external competitor as a qualified dangerous MAIELLO (2017), p. 1039 and (2015), p. 1526 who cites in support Corte Cost, no. 48/15; DE LIGUORI (1990), p. 693; GIALANELLA

functional to the associative aims, with exclusion of situations of mere contiguity or proximity to the criminal group»[205] . The Supreme Court has emphasised that this more recent orientation «*represents a significant interpretive progression from previous arrests (including Sect. 6 No. 9747, 29.1.2014, rv 259074 and others), in the context of which an atypical and elusive finding of an underlying favorable terrain permeated with* mafia *culture was valued together with the aspect of functionality of the conduct to the interests of the criminal entity*»[206] (emphasis added).

By contrast, the indirect connection referred to as an evidentiary indication by Art. 16(2)(c) for the purpose of establishing the illicit origin of assets appears to fall within a broader and more elusive notion of "*belonging*" to a criminal organisation, or even to mere "frequentations", which are sufficient for the application of an anti-mafia interdiction measure (Art. 84 of Legislative Decree No. 159/2011). It can therefore only be hoped that, for the purposes of confiscation under Art. 16, this element, when relied upon by the prosecution as an indication of the illicit origin of assets, will be interpreted in a restrictive manner.

In the German legal system with respect to this confiscation model, part of the doctrine notes that the evidentiary standard required to establish the criminal origin of property for the application of "independent confiscation" (§ 76a, para. 4) remains the criminal standard, namely the judge's "full conviction" under § 261 *StPO*, and that the relevant legislation has not introduced any reversal of the standard of proof under Art. 437 CCP; Although this is an *actio in rem* rather than an *in personam* measure, it nonetheless constitutes a criminal proceeding before a criminal court[207]. In the Italian legal system, as is well known, even following the amendment introduced by Decree-Law No. 92 of 2008, Art. 10, the Joint Sections of the Supreme Court have consistently denied that *the intensity of the evidentiary standard required of the prosecution* with regard to the illicit origin of assets has undergone any change, despite the different wording introduced by d.l. No. 92/2008 – "risultino frutto" instead of the previous formulation requiring the existence of "sufficient evidence" of illicit origin (originally provided only for seizure). Following the reform, doctrine has proposed interpreting "risultino" as requiring proof according to the criminal standard through circumstantial evidence under Article 192 of the Code of Criminal Procedure The expression "result (risultino) in the availability" is uniformly interpreted in this sense; moreover, following the separation between personal and patrimonial preventive measures and, therefore, the absence of any requirement of current social dangerousness, the only element capable of justifying confiscation in a rule-of-law system lies in proof of the illicit origin of the assets to be confiscated[208]. At the same time, the Joint Sections admit the use of presumptions in this field, «based on circumstantial elements, provided that they are

(1994), no. 4, p. 787; MAZZACUVA (2013), p. 104; PELISSERO (2017), p. 459 f.; AMARELLI (2019), § 3.

[205]Cass. Joint Chambers 4 Jan. 2018, no. 111.

[206] Cass. sec. I, 23 Oct. 2017, no. 48441; Cass. sec. VI, 29 Jan. 2016, *Gagliano and others*, no. 3941, *Mass. Uff.* No. 266541.

[207] HEGER (2016).

[208] MAUGERI (2008), p. 155 ff.; ID. (2009), p. 463 ff.

characterised by the necessary coefficients of seriousness, precision and concordance». The internal tension of such reasoning is evident: denying the applicability of Art. 192 of the Code of Criminal Procedure, while at the same time grounding presumptions on serious, precise and concordant evidence[209], to the point that scholars have inferred from these statements an implicit acceptance of the criminal standard of proof in such proceedings[210]. This criminal-law standard has moreover been embraced by a more guarantee-oriented (and minority) line of jurisprudence[211] and has been expressly provided for in a recent reform bill (No. 2234), submitted to the Senate in December 2022.

Hence, even with respect to this NCBC model, it would be preferable to require a higher standard of proof of the illicit origin of the assets to be confiscated, a *criminal standard*, even if based on circumstantial evidence, by employing the verb "convinced" rather than "satisfied". This is all the more so because, as already observed in relation to confiscation without conviction under Article 15, it is not certain that a standard lower than the criminal one is compatible with the safeguards required by Regulation 1805/2018 (Recital 18). A more determined effort on the part of the European legislator would therefore be necessary to harmonise safeguards and, consequently, to strengthen mutual trust and mutual recognition of freezing and confiscation orders.

Respect for the right of defence was expressly required in the final paragraph of Article 16 in the original version of the proposal and in Recital 28; at present, apart from Article 24 – which guarantees the right of defence also in relation to this form of confiscation, as will be examined below – Recital 33 requires that «Member States should ensure that the appropriate procedural rights of the affected person are respected».

In its opinion of 14 December 2022, the European Economic and Social Committee considered the safeguards provided in connection with this model of confiscation to be insufficient and called for additional guarantees «to exclude all possible abuses during the proceedings»; in particular, it advocated the introduction of «standards relating to the procedural rights and guarantees of the accused» and measures to ensure that «judges and courts have adequate training»[212].

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[209] Cf. MAUGERI (2015b), p. 966 f.: «The arguments of the United Sections, on the other hand, […] seem rather contradictory, because in any case they require that the presumptions, usable in the demonstrative process, be supported by circumstantial elements "provided that they are characterized by the necessary coefficients of seriousness, precision and concordance": does this not end up requiring circumstantial evidence under Article 192 of the Code of Criminal Procedure? It being understood that it is not enough to use lazy formulas in the area under consideration – requiring serious, precise and concordant clues – where a serious, coherent and logical evidentiary framework of the illicit origin of the profits to be confiscated is lacking».

[210] CAPRIOLI (2016), p. 51 ff.

[211] Trib. of Palermo, Sec. Mis. of Prev.,25 Oct. 2010, Zummo; 25 Sept. 2013, Sapienza, unpublished. See Cass., 22 Apr. 2009, Buscema and others, No. 20906, Rv. 244878; Cass., sec. 5, 21 Apr. 2011, No. 27228; Cass., sec. VI, 24 Feb. 2011, No. 25341, Meluzio.

[212] See AGUADO (2023), p. 41.

9.3. Models of NCBC in comparative law.

In the German legal system, confiscation – whether direct, of value, or extended – may be ordered in separate proceedings pursuant to § 76a, I Selbständige Anordnung[213]. The public acquisition or confiscation of the object or equivalent value or its unusability must or may be ordered separately when the conditions for the application of such sanctions are met, that is, first and foremost, the commission of a crime, but where, for factual reasons, no person can be prosecuted or convicted for the crime (escape, untraceability, or inability to determine the identity of the perpetrator) or, following the 2017 reform – Draft law on the reform of criminal asset seizure BReg418/16, implementing Directive 42/2014/EU[214] – also for legal reasons (statute of limitations; ne bis in idem, lack of criminal responsibility, reintroduction of §§ 422 ff. StPO – Abtrennung der Einziehung, 436 StPO-E) and the law does not provide otherwise. In this proceeding, as examined elsewhere, the criminal court must ascertain all the facts and evidence that are relevant to the final decision[215]; the proceeding remains criminal, with the relevant standard of proof. It is considered possible to apply this form of confiscation in the absence of a conviction precisely because it is conceived as the criminal removal of profits aimed at removing an unlawful allocation of assets and restoring legal order, with a preventive function[216].

In particular, an *in rem* variant of extended confiscation has been introduced in Section 76a(4) *StGB*[217]: *extended independent confiscation*. In this case, the initiation of criminal preliminary proceedings (*Ermittlungsverfahren* or *Anlassverfahren* – Section 160

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[213] § 76a I StGB, § 440 StPO Independent confiscation proceedings, § 441 *StPO* Confiscation proceedings in subsequent proceedings or independent confiscation proceedings. Translation taken from De Simone, Foffani, Fornasari, Sforzi, *Il codice penale tedesco*, Padua 1994, 109. See Fischer, Schwarz, Dreher, Trondle, § 76, *Selbstandige Anordnung*, in *Strafgesetzbuch und Nebengesetze*, latest edition, 715. Nos. I and II. See A. Eser, § 76a, in Strafgesetzbuch Kommentar, edited by Schönke-Schröder, op. cit., 25th ed., 905, § 2.

[214] Referentenentwurf, (Entwurf eines Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung BReg418/16), p. 2.

[215] § 244 II *StPO*; see H. Gramckow, *Einziehung bei Drogendelikten in den USA*, Cologne 1994, 244.

[216] ESSER (2015), p. 79.

[217] Cf. BETTELS (2016), 1: «a non-conviction-based confiscation, which is declaratively inspired as much by Anglo-American civil forfeitures as by Italian preventive confiscation. Such a measure may be ordered against assets already seized in the course of criminal proceedings opened against persons suspected of having committed certain serious offenses attributable, in particular, to organized crime and terrorism, where the criminal prosecution is not exercised or it is not possible to reach a conviction, when the judge nevertheless reaches the conviction that the assets in question "derive" from any crime (even different, therefore, from the one for which the criminal proceedings in the context of which the seizure was ordered were opened). This conviction may be based, by explicit indication of the legislator, on a plurality of indicators, among which stands out the "crass disproportion between the value of the property and the legal income of the person concerned". Competent to pronounce the measure will be the same prosecuting judge or, in case of failure to prosecute, the (criminal) judge who would have had jurisdiction if the action had been exercised. Finally, according to the accompanying report, such a measure is not to be attributed the nature of a criminal sanction, but merely a measure restoring the economic order disturbed by the unjust enrichment represented by the crime from which the asset originates; with the consequent inapplicability of the constitutional and conventional principles and guarantees proper to criminal matters».

StPO) under *suspicion* of the commission of one of the listed serious crimes under Art. 76a para. 4 sent. 3 *StGB*, which derive from the broad area of terrorism and organised crime and are in essence profit-oriented (also money laundering, serious tax offences, and a considerable number of offences regulated in ancillary laws such as the Foreign Trade and Payment Act), is required. This is the so-called "linking offence" (*Anknüpfungstat*) and, in contrast to the extended confiscation of Art. 73a *StGB*, does not need to be proven *in concreto*. No conviction for a crime is therefore obligatory. Instead, an initial suspicion (*Anfangsverdacht*) under Section 152(2) *StPO* for one of the listed crimes is sufficient; the lowest initial degree of suspicion of a reference offence, that is, the threshold that allows provisional seizure, is sufficient. The suspicion is the basis for asset seizure (*Sicherstellung* – Section 111b *StPO*) for one of the listed linking offences. The prosecution or conviction of the suspect/the person affected through the seizure is not possible (seized assets can be confiscated if the defendant cannot be charged or prosecuted due to lack of evidence of a reference offence[218]) and therefore the termination of the subjective criminal preliminary proceedings follows. This is followed by the opening of independent NCBC proceedings. The prosecution should submit a request stating its suspicion as to the illegal origin of the assets; such a suspicion can be based on any, not further identifiable, so-called 'origin offence' (*Erwerbstat*). The main novelty, in comparison with all other new confiscation forms, is that neither the linking offence nor the origin offence needs to be established to the criminal standard of proof (that is, there is no need to prove the concrete offences). No overstretched proof requirements are needed (*keine überspannte Anforderungen*), hence the term 'genuine NCBC'. A causal link (*herrühren*), however, between the assets and the origin offence must exist in order to establish illegal origin. This link can also be established with the help of various indicators (Section 437 *StPO*)[219]; the following aspects shall be evaluated, among others: the disproportion between the value of the goods/the financial situation and lifestyle and 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; and the person concerned's other personal and economic circumstances.

While the catalogue of crimes may appear quite limited at first glance, doctrine claims that suspicion of *money laundering* can be instrumentalised in the course of an investigation as a kind of "amplifier tool" that opens the way for the exercise of the entire set of special investigation and prosecution powers – including seizure – in all cases involving an offence that generated proceeds [220].

The court, in order to issue an NCBC order, should be *fully convinced* of the illegal origin of the assets, namely that the assets originate from a criminal offence (origin offence). In order to facilitate the judge, the German legislator has already set out criteria/indicators supporting the illegal origin of the assets. These criteria were not an innovation of the German legislator, but derive from prior jurisprudence on extended

[218] KILCHLING (2025), p. 54.
[219] HEGER-SAKELLARAKI (2025), p. 171.
[220] KILCHLING (2025), p. 55; KILCHLING (2014); VOGEL (2020).

confiscation and Directive 2014/42/EU. The standard of proof should be "beyond reasonable doubt", and the court judgment should be based on an overall evaluation of the circumstances of the case with the help of the indicators[221].

According to some authors, «the Court must be convinced of the illicit origin of the assets based on a preponderance of the evidence, but the (alleged) acquisitive offences do not have to be specified with regard to their type or any other details»; «the Anglo-Saxon inappropriate lifestyle test, as provided by Art. 5 of Directive 2014/42, applies»; «this comes close to a de facto shift of the burden of proof: while in a regular penal trial the evidence is collected and weighed in order to determine the guilt of a defendant, in rem procedures are centred around the rebuttal of the – implicit – presumption of the illicit origin of the relevant assets. In such a situation, affected persons can no longer rely on the right to remain silent. They bear the *de facto* burden of presenting facts that are sufficient to convince the Court of the lawful origin of their property»[222].

The German NCBC should, moreover, not be time-barred under Section 76b StGB. An autonomous 30-year limitation period was also inserted with the 2017 Reform Act, and the new law also covers cases predating its entry into force (applies retroactively), provided that proceedings have already been started and there is not yet a final decision of the Court on the issue[223]; it may therefore result in asset confiscation also in cases that were finally adjudicated in the past, as the ne bis in idem rule does not apply in independent proceedings[224].

This new general limit of 30 years was explained as an act of harmonisation with limitation periods in civil enrichment law, but there was no discussion of the different functions of limitation rules in private and penal law.

The German legislator, in the explanatory memorandum to the 2017 Reform Act, gives a common answer as to the legal nature of all kinds of criminal asset confiscation regulated in Section 73 et seq. *StGB*. It repeatedly refers to the non-criminal but restitutive nature of the measure (*quasi-kondiktioneller (bereicherungsrechtlicher) Charakter der Vermögensabschöpfung*). Its exclusive function is the restoration of the *status quo ante*, the reallocation of assets within the legal sphere, and restitution to either the State or the victim. It is, after all, a criminal-law institute similar to the civil-law instrument of 'unjust enrichment' *(ungerechtfertigte Bereicherung* – Section 812 et seq. *BGB*)[225].

In the scholarly literature, opinions differ, and the issue of the legal nature of German NCBC is not considered definitively resolved. Some authors argue, following the logic of the German legislator, that German NCBC has no criminal character, as it is a procedure against the assets (*ad rem*) and not against a person. It is therefore considered not a penalty, but a criminal measure *sui generis* with a character similar to unjust enrichment (*Bereicherungsrecht*); a (penal) variant of the civil *condictio sine causa* or *ex*

[221] HEGER – SAKELLARAKI (2025), p. 171.
[222] KILCHLING (2025), p. 54.
[223] HEGER – SAKELLARAKI (2025), p. 171.
[224] KILCHLING (2025), p. 55.
[225] HEGER – SAKELLARAKI (2025), p. 173.

iniusta causa action[226]. Other authors support the criminal character of the measure: the new in rem confiscation may produce a confiscatory surplus that exceeds what could be attained through regular in personam variants of confiscation; this variant may therefore appear as a punitive or quasi-punitive tool[227], seeing in the 2017 Reform Act a 'strengthening' of the 'gross principle' (*Bruttoprinzip*) applicable since 1992. A pure gross principle would mean that all assets, without deduction of expenses incurred in generating illegal profits, fall under confiscation, which would reasonably attribute to confiscation a punitive surplus. Following the 2017 Reform Act, however, a new method of calculating the assets subject to confiscation applies, namely a two-stage control under Section 73 *StGB* in conjunction with Section 73d *StGB*. In the first stage, all assets obtained are taken into account while, in the second stage, the deduction of the costs of acquisition follows, excluding all consciously illegal expenses, namely those incurred for the preparation or commission of a crime. A 'concretisation and mitigation' of the gross principle thus takes place under the new confiscation regime and therefore no longer supports the previous reasoning about the criminal nature of criminal asset confiscation.In the German jurisprudence both the Federal Court of Justice (*Bundesgerichtshof – BGH*)[228] and the *BVerfG* (Federal Constitutional Court) share the view of the legislator that criminal asset confiscation has a restitutive, rather than punitive, nature, as examined with regard to the *Erweiterter Einziehung*; this makes penal confiscation a concept civil in essence, and its purpose is to terminate the wrongful allocation of property caused by the criminal conduct in question[229]. The fact that confiscation is carried out by prosecution authorities on the basis of Penal Code provisions is not considered relevant for the purpose of establishing the legal nature of confiscation[230].

Even after the 2017 reform, the FCC confirmed this approach and admitted the retroactive application of the reform because this had not altered the confiscation regime as a whole[231]; citizens' trust in the continuity of legal entitlements that were acquired dishonestly is, in principle, not worthy of protection[232]. In its 2021 decision[233], the *BVerfG* confirmed, by way of *obiter dictum*, that criminal asset confiscation is not an additional punishment (*Nebenstrafe*) subject to the principle of individual culpability, but a measure (Section 11(1) No. 8 StGB) *sui generis* with a restitution-like character (*Maßnahme eigener Art mit kondiktionsähnlichem Charakter*). «Confiscation aims to reaffirm the validity of the legal order by demonstrating to both perpetrators and society that possession of profits

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[226] See JESCHECK & WEIGEND (1996), p. 792.
[227] RONNAU & BEGEMEIER (2021); HEUER (2021), p. 182 ss.; HEUCHENER (2023), p. 20; KILCHLING (2025), p. 59.
[228] BGH, NJW 2019, 1891, 1892, Rn. 42 considers Art. 103 para. 2 GG not applicable because of the non-criminal character of the criminal asset confiscation under Art. 73 et seq. *StGB*.
[229] BVerfG, 14.01.2004 – 2 BvR 564/95, BVerfG 110, p. 1, NJW 2004, 2073 – 2075.
[230] KILCHLING (2025), p. 58.
[231] BVerfG, 10.02.2021 – 2 BvL 8/19, § 111 – 113; BVerfG, 7.04.2022 – 2 BvR 2194/21; KILCHLING (2025), p. 59.
[232] BVerfG, 10.02.2021 – 2 BvL 8/19, § 161.
[233] BVerfG, Beschluss des Zweiten Senats vom 10. Februar 2021 – 2 BvL 8/19 – BVerfGE 156, 354-415, Rn. 1-163. See also Press Release No. 20/2021 of 05 March 2021 available in English.

derived from crime will not be accepted and cannot continue to exist»[234]. The purpose and intended effect of confiscation were found to be future-oriented and in clear contrast to the core substance of punitive concepts, as they do not focus on past illicit conduct[235]; the aims of prevention (*präventiv-ordnenden Charakter*) and restoration (*Opferentschädigung*) support this underlying function[236].

Some authors have strongly criticised these judgements of the Federal Constitutional Court. The Court's concrete balancing exercise was considered to be one-sided and over-simplified[237]; the ruling appear based on a quasi-penal "socio-ethical-condemnation" which comes very close to a genuine attribution of guilt[238]; the Court is said to have crossed a distinct red line[239] and the rulings represents "enemy law-like" tendencies[240]. «There is one significant distinction, which is while a civil condictio is always an action involving private parties who are in dispute about rightful ownership of property, litigated upon the autonomous initiative of at least one of these private actors exclusively, penal confiscation is an act of state intervention carried pout ex officio with coercive power»[241].

In the Bulgarian legal system, the term 'forfeiture' is used to refer to the procedure under the Law for Combating Corruption and Illegal Assets Forfeiture (LCCIAF); it concerns the forfeiture of unlawfully acquired assets and is conducted without prejudice to the criminal proceedings against the person under examination and the persons related thereto. The basis of civil confiscation under the LCCIAF is the confiscation in favour of the State of so-called inexplicably acquired property by persons charged with committing a crime within the scope of Art. 108 of the LCCIAF. It should be emphasised that this procedure has been declared to lie outside the scope of Directive 2014/42/EU (Judgement of the CJEU of 19 March 2020, Case C-234/18). At the same time, however, the Bulgarian government officially announced, in 2016, the transposition of the Directive into national legislation through several laws, one of which is the LCCIAF.

The forfeiture of illegally acquired property under the LCCIAF, or the so-called 'civil forfeiture', can be recognised as non-conviction-based and as allowing forfeiture by value (unlawfully acquired assets forfeiture also covers equivalent property, if specific property cannot be confiscated – Art. 142 of the LCCIAF), as well as forfeiture from third parties. The civil forfeiture procedure is a separate proceeding, outside the criminal case for the offence, but it is related to it because it begins after notification that a certain person is accused of committing a crime. It can be defined as extended confiscation, as it is based on proving that the property in possession has no lawful source. 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

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[234] BVerfG, 10.02.2021 – 2 BvL 8/19, § 151, with not literal translation of KILCHLING (2025), p. 63.
[235] BVerfG, 10.02.2021 – 2 BvL 8/19, § 111 – 113; BVerfG, 7.04.2022 – 2 BvR 2194/21; KILCHLING (2025), p. 59.
[236] HEGER – SAKELLARAKI (2025), p. 174.
[237] REICHLING ET AL. (2021), p. 418; MACIEJEWSKI (2020), p. 448.
[238] BÜLTE (2022), p. 204.
[239] HEUCHEMER (2023), p. 20: »The end justified the means».
[240] BÜLTE (2022), p. 205.
[241] KILCHLING (2025), p. 59.

a crime of a certain scope as outlined by the LCCIAF. 'Civil forfeiture' is applied by the court where there is a disproportionality between the property and the lawful income of the person charged with a crime. Civil confiscation may also take place after the death of the person being examined for illegally acquired property and continues in respect of property acquired by the heirs. The procedure under the LCCIAF is directed not against the person, but against the property, regardless of the criminal process. It is also applied where an amnesty has been granted for the crime itself, where the statutory limitation period has expired, where after the commission of the crime the perpetrator has fallen into a long-term disorder of consciousness excluding sanity, where the perpetrator has died, or where, in relation to the person concerned, the transfer of criminal proceedings to another country is permitted (see Art. 108, para. 2, item 2 of the LCCIAF). The autonomous mechanism under the LCCIAF also applies to third parties. The proceedings are conducted under the CvPC and are based on verification of whether the person concerned or members of his/her family own property for the acquisition of which there is no lawful source[242].

In the Dutch legal system, there are some forms of confiscation in which the court is not involved: 1) *Relinquishing seized objects for forfeiture or for withdrawal from circulation* (O); 2)*Conditional dismissal with special conditions* (including relinquishing seized objects for forfeiture or for withdrawal from circulation (O); full or partial compensation for

[242] Please see 1. Direct confiscation, Article 53 of the CC

«The civil forfeiture mechanism is completely separate from criminal proceedings, and the procedure combines elements of civil, administrative and criminal proceedings. The CCIAAFC, 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 family's property. If the owned property exceeds the amount of legal income, the Commission may file 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 court decision to confiscate property does not depend on whether the accused has been convicted of the crime. The proceedings are under the LCCIAF and 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.

Decision CJEU on 19 of March 2020 on law suit C 234/18: […] The subject of proceeding by request of LCCIAF, the national proceeding doesn't fall in the material scope of Directive 2014/42. […] After its opening this proceeding is focused only on property, for which is claimed, it was acquired illegally and it is conduct no matter the eventually illegal proceeding against the alleged perpetrator of the crimes and so is from the end point of such a proceeding and especially from the possible sentence for the perpetrator. […] Under these circumstances it should be stated that the decision which the referring court should rule in the main proceedings shall not be issued in or after proceedings which relate to one or more offences. Therefore, it does not fall within the scope of the Framework decision 2005/212. […] In view of the above considerations, the questions asked should be answered that the Framework Decision 2005/212 must be interpreted in the sense that it allows the legislation of a member state, under which national jurisdiction orders the confiscation of illegally acquired property after proceedings which are not dependent neither from establishing a crime, nor on a greater ground from convicting the alleged perpetrators of that crime.

1.2. Judgement of the court 28 October 2021 in case C-319/19 – Directive 2014/42 must be interpreted as not applying to legislation of a Member State which provides that confiscation of illegally obtained assets is to be ordered by a national court in the context of or following proceedings which do not relate to a finding of one or more criminal offences.»

damage caused by the criminal offence (W)); 3) *Out-of-court settlement to avoid prosecution, subject to the conditions* (including relinquishing seized objects for forfeiture or for withdrawal from circulation (O); surrender or payment to the State of the estimated value of objects eligible for forfeiture (O/W); payment to the State of an amount of money or transfer of seized objects for the purpose of full or partial confiscation of unlawfully obtained gains (O/W); full or partial compensation for the damage caused by the criminal offence (W)); 4) *Punishment order with the following measure or instruction* (the obligation to pay the State a sum of money for the benefit of the victim (W); relinquishing objects that have been seized and are eligible for forfeiture or withdrawal from circulation (O); surrender or payment to the State of the estimated value of objects eligible for forfeiture (O/W); payment to the State of an amount of money or transfer of seized objects for the purpose of full or partial confiscation of unlawfully obtained gains (which are eligible for confiscation) (O/W)); 5) *Written settlement* (payment of an amount of money (W); transfer of objects to the State (O/W)). For an examination of these different models of NCBC, please refer to the analysis provided elsewhere[243].

In the opinion of authors in the Netherlands, despite all existing possibilities, it appears that confiscation is not always feasible with the current range of instruments. The current legal framework for seizing illegal assets no longer complies with the requirements that should be met with a view to an effective fight against organised crime that undermines society. In the context of the national agenda on serious organised crime, a proposal for non-conviction-based confiscation has been brought forward. The new NCBC law would make confiscation possible in situations in which, whether within or outside the context of a criminal investigation, objects are found in respect of which it is plausible that they constitute unlawfully obtained gains, without the need to prove that a suspect has committed a specific criminal offence from the proceeds of which the object was obtained. These goods may either have an apparent criminal origin or be the result of reinvestment of the proceeds of crimes. This NCBC procedure would also make it possible to confiscate unlawfully obtained gains in cases of death, illness, or absconding of the suspected or accused person. This new NCBC procedure was positioned outside criminal law. The proposed law was designed to tie in with legislative regulations in other Member States, adapted to the framework of the Dutch legal system. The proposed NCBC procedure was considered capable of constituting an important addition to the range of instruments under criminal law in the fight against organised crime that undermines society. This legislative proposal for the introduction of a civil NCBC procedure has been withdrawn and will be replaced by a proposal for the introduction of an NCBC procedure within criminal law.

In the Dutch system, in any case, a form of NCBC is represented by withdrawal from circulation[244], which is considered a measure to protect society against dangerous objects; it is only possible if the object is of such a nature that its uncontrolled possession is in conflict with the law or with the public interest (Section 36c Sr). These may include

[243] DE BOER-VAN DER ENDE (2025), p. 558 ff.

[244] Instruction of seizure (Section 94 Sv) https://wetten.overheid.nl/BWBR0029019/2014-07-01.

narcotics, prohibited weapons, a dangerous animal, or a knife used to make threats. Objects liable to withdrawal from circulation are those: 1) obtained entirely from, or through the means of, the proceeds of the offence; 2) in relation to which the offence was committed; 3) used to aid in committing or preparing the offence; 4) used to aid in obstructing the investigation of the offence; 5) manufactured or intended to be used to commit the offence. In principle, this measure is imposed by the final judgment in the principal action. Where this is not possible, Section 552f Sv provides the legal basis for the measure to be imposed by means of a separate judicial decision, upon the public prosecutor's request. When the defendant is not known, an object may also be withdrawn from circulation through proceedings in chambers. In the event of an acquittal, withdrawal from circulation may still be ordered as a safety measure (Section 36b subsection 1, 3° Sr). Withdrawal from circulation is therefore possible both as conviction-based confiscation and as non-conviction-based confiscation.

In Italy, the first form of non-conviction-based extended confiscation was introduced by L.D. 646/1982 (the "Rognoni-La Torre Act", named after the parliamentarians who proposed it), and its roots can be traced back even further to L.D. 575/1965 (Art. 2 ter). One of the significant turning points in the fight against organised crime in Italy was, and remains, Art. 416 bis Criminal Code which governs mafia-type association. These legal amendments radically changed the criminal justice strategy against the mafia, which now focuses on combating illicit assets. Today, following further reforms[245] preventive seizure and confiscation are regulated under Arts. 20, 24 and 34 of L.D. No. 159/2011 (the Anti-mafia Code or Preventive Measures Code). These instruments partially correspond to the model of confiscation provided for by Art. 16 of the new Directive 2024/1260Laws on preventive measures, currently regulated by the Anti-mafia Code (Ant. Code), provide for different forms of extended confiscation that may be applied to specific categories of persons *who have not been convicted*, but are considered a danger to society because they are suspected, on the basis of circumstantial evidence, of involvement in criminal activity. Proceedings concerning preventive measures differ from criminal proceedings; circumstances that would not suffice to secure a conviction for participation in a mafia association in a criminal trial may nonetheless be sufficient to justify the application of preventive measures[246]. These measures, however, are not truly preventive in the sense of instruments applied *ante delictum* in order to prevent the commission of crimes, but are rather regarded as *praeter probationem delicti* measures.[247]

In the past, they were applied together with preventive measures directed at individuals (such as special police surveillance or residence restrictions) imposed on persons considered currently dangerous. Since the 2008/2009 reforms, it has been possible to apply preventive confiscation without imposing preventive measures on individuals (which require proof that the affected person is currently dangerous), and

[245] Inter alia, L.D. ni. 125/2008 and L.D. no. 94/2009.
[246] MAUGERI 2024, p. 1 f.; ID. (2024a), p. 164 s.; HEIN et al. (2000), p. 95.
[247] MAUGERI (2021), p. 366.

even in cases where the owner died during the proceedings or died up to five years before the initiation of the procedure (Art. 18 Ant. Code).

There are two types of preventive confiscation. The first relates to the confiscation of assets that the affected person *has at their disposal*. It is required that the value of such assets be *disproportionate* to the declared income or economic activity of that person, or that *the assets be derived* from illicit activity (including those used for reinvestment), or that the defendant has not demonstrated their legitimate origin (Art. 24 Ant. Code). The second concerns assets used in economic activity and considered to be objectively useful for persons subject to preventive measures or for defendants accused of committing crimes linked to organised crime, where *there is reason to believe* that the assets in question derive from illicit activities or from the reinvestment of such assets, and where their owner has not demonstrated their legitimate origin (Art. 34 Ant. Code)[248].

Even after the separation of patrimonial measures from preventive measures directed at individuals, preventive confiscation is not truly an *actio in rem*[249], because, in any case, the law (Art. 6 Ant. Code), the Constitutional Court, and the Supreme Court require the existence of "*pericolosità sociale*" (danger to society), even if this is not a current danger. Being a *danger to society* in the past, on the basis of circumstantial evidence of criminal activity or some form of involvement in criminal activities or proximity to organised crime, is considered sufficient[250]. Such persons include those who pose a "*special danger*" (according to Art. 16 Ant. Code), on the basis of objectively verifiable facts, due to being suspected (under investigation) of *affiliation with the Mafia* or other criminal groups, of the *commission of the crimes described in Art. 51, § 3 bis* Criminal Procedural Code (C.P.P.) (crimes connected to criminal organisations), or of *acts of terrorism*. In addition, posing an "*ordinary danger*" may be sufficient where, on the basis of factual evidence, individuals may be regarded as *habitually living, even in part, from the proceeds of crime* (Art. 4.1(b) Ant. Code), whereas the category of *habitual offenders* included in Art. 4.1(a) was declared unconstitutional in Constitutional Court Judgment No. 24/2019, issued after the ECtHR *De Tommaso* judgment[251]. The availability and the disproportionality of the relevant assets must be proven in the same way as in other extended confiscation cases. Since the 2008 reform, preventive confiscation may be applied only where the relevant assets *result* from illicit activity (including those used for reinvestment), and no longer merely where *there is reason to believe* that they do. This may entail that the prosecutor must *prove* the illicit origin of the assets on the basis of the criminal standard of proof, even through circumstantial evidence ("serious, precise and concordant", Art. 192 C.P.P.)[252], as examined above (notwithstanding the resistance of the Supreme Court). Nevertheless, the confiscation provided for in Art. 34 can clearly be applied where "*there is reason to believe*" that the standard is met[253].

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[248] Introduced by Art. 24 L.D. no. 306/1992, now Art. 34 § 7 Anti-mafia Code.
[249] Cf. Constitutional Court judgment of 9.02.2012 (no. 21).
[250] Constitutional Court judgment of 9.02.2012 (no. 21).
[251] VIGANÒ (2017); MAUGERI (2017); MAGI (2017); MENDITTO (2017), p. 129.
[252] MAUGERI (2008), p. 156 f.
[253] MAUGERI (2008), p. 156 f.

In the Spanish system of law the confiscation without conviction (Article 127 *ter*, Organic Law 1/2015)[254] has been introduced in a much broader form than the model provided for in Directive No. 42/2014 (which, in fact, provides only for "minimum" confiscation powers, allowing Member States to adopt broader ones), namely in the event of the death of the offender, the extinction of the offence, or the lack of criminal responsibility of the perpetrator; this model is broadly in line with that provided for in Article 16 of Directive 1260/2024. The application of this form of confiscation requires the criminal court to ascertain the existence of illegal assets in adversarial proceedings brought against those who have been formally charged or against the accused (a concept that also includes persons under investigation, "acusado o contra el imputado"[255]) in relation to whom there is reasonable evidence of criminal activity, where the situations listed would have prevented the continuation of criminal proceedings[256]. Not only that, but extended confiscation may also be applied without conviction (except in the case provided for in Article 127 *quinquies* of the Criminal Code, *decomiso ampliado en caso de actividad delictiva previa continuada*[257]), unlike the provisions of both the former and the new Directive. It being understood that part of the doctrine denies the application of *decomiso ampliado* without conviction, because the conditions for this form of confiscation under Article 127 bis of the Criminal Code, starting from conviction for one of the listed crimes, could not be met; it follows that confiscation without conviction would apply only to proceeds that derive directly and in a proven manner from the crime[258]. It is also considered that this form of confiscation cannot be applied in the event of acquittal for the predicate offenses (TS 17/12/14, EDJ 2014/255414)[259].

In the Spanish legal system, again in implementation of Directive No. 42/2014, and in order to ensure the effective application of confiscation, the legislator has also

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[254] This regulation was introduced by Organic Law 1/2015 of 30 March, which amended LO 10/1995 and reformed the Criminal Code. Law 41/2015 of 5 October amended the law on criminal procedure with a view to speeding upcriminal justice and strengthening the process; and finally, Royal Decree 948/2015 of 23 October regulated the Office for the Recovery and Management of Confiscated Assets (Asset Management). These reforms aim to «give financial investigation and confiscation the prominence they deserve in the fight against the economic aspect of serious crime, carried out by criminal organizations and groups, thus ensuring their financial strangulation» (Preamble II).

[255] With regard to the term "imputado" (defendant), it should be noted that through LO 13/2015 of 5 October, amending the Criminal Procedure Act in order tostrengthen procedural guarantees and regulate technological investigation measures, the term 'imputado' in the LECr has been replaced by "investigado o encausado" (investigated or prosecuted) depending on the stage of the proceedings (See Preamble, section V, and Sole Article, section 20). The term "investigated" «shall be used to identify the person under investigation for their connection to a crime, while the term 'prosecuted' shall "generally refer to the person whom the judicial authority, once the investigation of the case has been concluded, formally accuses of having participated in the commission of a specific criminal act» (Preamble, section V).

[256] «2. The confiscation referred to in this article may only be directed against a person who has been formally charged or against a defendant in relation to whom there is reasonable evidence of criminality when the situations referred to in the previous section have prevented the criminal proceedings from continuing»

[257] Because Article 127 ter refers to the forms of confiscation provided for in the preceding articles and not in the following articles, according to AGUADO (2023).

[258] BACIGALUPO (2019).

[259] *Ibid*.

intervened with Law 41/2015 in procedural matters, regulating the intervention in criminal proceedings of third parties whose rights are affected by a confiscation order and, above all, introducing a new autonomous confiscation procedure, which allows confiscation to be applied without conviction (Articles 803 *ter* e) to 803 *ter* u) LECr). To this end, the new Title III ter of Book IV of the LECr (*Ley de Enjuiciamiento Criminal para la agilización de la justicia penal y el fortalecimiento de las garantías procesales – 'B.O.E.' 6 October*) was introduced, under the heading «On the intervention of third parties affected by confiscation and the autonomous confiscation procedure». The autonomous procedure under Article 803 ter e) 2 LECr may be carried out where the public prosecutor limits the charge to requesting confiscation, expressly reserving its application to such autonomous proceedings and, therefore, normally only following a final conviction; such proceedings may also be initiated by the public prosecutor where, even though a punishable offence has been committed, the perpetrator has died or cannot be prosecuted because they are in contempt of court or not criminally responsible. This independent proceeding is also of a hybrid nature, in that, on the one hand, Article 803 *ter* g (*Procedimiento*) provides that the rules governing oral proceedings laid down in Title III of Book II of the *Ley de Enjuiciamiento Civil* (Civil Procedure Act) shall apply, provided that they do not conflict with the rules established in this chapter, while, on the other hand, Article 803 *ter* h (*Exclusividad del Ministerio Fiscal en el ejercicio de la acción*) confers exclusive standing on the public prosecutor to bring proceedings in this matter, and *Article 803* ter f et seq. establishes the jurisdiction of the judge or court that handed down the conviction, or that initiated the suspended proceedings, or that would have been competent had the criminal trial not been possible due to the circumstances examined above, as provided for in Article 803.Therefore, reference is made to the criminal court. Furthermore, pursuant to Article 803 *ter* r (*Recursos y revisión de la sentencia firme*), the procedural rules applicable to summary criminal proceedings apply to the *decomiso autónomo procedure, and the system therefore reverts to criminal procedural rules; as regards the destination of the assets pursuant to* Article 803 *ter* p, the rules of the criminal law and the Criminal Code shall apply. The proceedings are conducted against those involved by virtue of their relationship with the assets to be confiscated (with summons also served on third parties with an interest in the case, Article 803 *ter* j *Legitimación pasiva y citación a juicio*). Article 803 *ter* m (*Escrito de contestación a la demanda de decomiso*) essentially provides that the adversarial process is only activated following the lodging of an objection by the parties concerned against the request for confiscation, submitted by the public prosecutor and communicated to them; otherwise, in the absence of any challenge, the competent judge may issue a final confiscation order. Article 803 ter p (Effects of the confiscation order) specifies that the outcome of the autonomous confiscation procedure shall not be regarded as binding in any subsequent legal proceedings against the defendant, nor shall any autonomous confiscation order be capable of being challenged in any subsequent criminal proceedings against the defendant[260].

[260] JIMENÉZ-VILLAREJO and the TEAM OF THE INTERNATIONAL COOPERATION UNIT (UCIF) (2025).

French law broadly aligns with the requirements of Directive 2024/1260, but reforms would be necessary to permit non-conviction-based confiscation (currently available only in specific circumstances) and the broader confiscation of assets linked to a criminal lifestyle without the need to trace them to a specific offence.

In the Romanian legislation, the implementation of Directive 2024/1260 will likewise require significant reforms. Among others, non-conviction-based confiscation measures provided for by Articles 15 and 16 will need to be introduced. Article 16 is particularly problematic, not least because it requires the regulation of in rem forfeiture of unjustified criminal assets while avoiding infringement of the constitutional principle laid down in Article 44(8) concerning the right to private property, which states that «Lawfully acquired property cannot be confiscated. The licit nature of the acquisition is presumed».

10. The right of defence.

The extreme importance of guaranteeing the rights of the defence in the area under consideration emerges especially where the ascertainment of the illicit origin of assets is delegated to separate proceedings within the same criminal trial, as in the case of confiscation under Article 240 bis of the Italian Criminal Code, which allows for such an ascertainment even at the execution stage[261], as mentioned, or where hybrid in rem proceedings are involved (e.g. the German extended independent confiscation under § 76a *StGB*, the Italian preventive confiscation, the Spanish *comiso sin condena*, etc.). Derogations from criminal guarantees are often admitted in all systems, even from a procedural point of view, because personal liberty is not at stake, but only property.

For example, in the German legal system, the position of defendants and other parties to confiscation proceedings is weakened to some extent by the fact that the courts have more options for in camera decisions on confiscation than in ordinary penal matters. This is particularly visible in separate confiscation proceedings as well as in subsequent review proceedings, with the result that ordinary remedies against written decisions are automatically precluded (Sec. 423 para. 3 & 434 para. 2 C.C.P.)[262].

In the Italian system, the shift to the enforcement phase of the application of confiscation under Article 240 bis means that the powers of the execution judge are merely residual, and against the decisions of the execution judge there is no possibility

[261] The practice of postponing the application of mandatory confiscation *under* Article *12-sexies* to the enforcement stage (Article 676 of the Code of Criminal Procedure) (Cass., sec. I, 18 May , 2015, Caponera, No. 20507, in Mass. Uff. No. 263479) was initially a practice recognized by the U.S. with the Deourach ruling (Cass. S.U., 17 July 2001, Derouach, No. 29022, in Mass. Uff. No. 219221) and then by the Constitutional Court in Judgment No. 33/2018; this solution was subsequently normalized in c. 4-sexies of Art. *12-sexies* by l. 161/2017, a paragraph repealed by Legislative Decree No. 21/2018 and transposed into c. 1 of Art. *183-quater* of Legislative Decree 271/1989.

[262] KILCHLING (2025), p. 63, who emphasised that «in both cases, however, a regular trial including an oral hearing and oral judgment have to be conducted upon request of the affected persons, or of the prosecutor, the ruling is then appealable according to the general rules».

of appeal, but only recourse to the Supreme Court. Moreover, the execution judge can decide de plano on the basis of the request and elements proposed by the prosecutor (or ex officio)[263]; only following an opposition is a full adversarial hearing scheduled *pursuant to* Article 666 of the Code of Criminal Procedure[264], even though the absence of such an adversarial hearing entails a violation of the principle of legality, insofar as it allows the application of extended confiscation in the absence of one of the prerequisites expressly provided for by law, namely the lack of justification by the convicted person.

Likewise, in the Italian system, the recognition, in the context of preventive proceedings, of the judge's right to impartiality is the result only of a recent jurisprudential development of the Joint Sections of the Supreme Court[265]. The doctrine, in any case, criticises this procedure for the lack of safeguards typical of the criminal trial: there would be only an "apparent" jurisdictional guarantee, and the principle of adversarial debate – whose respect is also required by the ECtHR under Art. 6(1) – would be violated where this procedure does not guarantee the taking of evidence in the adversarial phase (at least where such evidence is repeatable) and the evidence has already been formed in the pre-trial phase without cross-examination[266]. The procedure appears excessively inclined towards an inquisitorial set-up, starting with the lack of a real separation between the preliminary investigative phase and the phase dedicated to the trial and the evaluation of evidentiary issues. The Union of Criminal Chambers also disputes unacceptable procedural limitations, such as remote hearings, or the lack of minimum procedural adjustments suitable to make the defence effective, such as, by way of example, the granting of time limits to appear that are congruous and respectful of constitutional norms, and the elimination of the limitation to violations of the law alone among the defects that can be challenged before the Supreme Court[267]. Finally, the

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[263] Cass. sec. I, 5 Mar. 2018, no. 9984; Cass. S.U., 17 July 2001, Derouach, no. 29022, in Mass. Uff. no. 219221; Cass., sec. VI,4 July 2008, Ciancimino, no. 27343, in Mass. Uff. No. 240585; Cass., sec. I, 11 June 2007, Billeci, No. 22752, in Mass. Uff. no. 236876.

[264] The judge may directly schedule the chamber hearing, as is deemed preferable where the elements advanced by the prosecutor are complex and it is deemed appropriate to acquire the convicted person's reasons for any justifications from the outset. In the matter under consideration, the "in camera procedure" should be the rule, otherwise the confiscation *under* Article *240-bis* would be pronounced in the absence of the prerequisite of the "lack of justifications" regarding the proportionate nature of the assets on the part of the convicted person, which presupposes an adversarial hearing in which to put forward one's reasons (C 17/40855).

[265] Cass. Joint Chamber., c.c. 24 Feb. 2022, Lapelosa, no. 25951 recognized the applicability of the ground for recusal provided for in Art. 37, para. 1, Code of Criminal Procedure, «in the event that the judge has, previously, made substantive evaluations on the same fact against the same person in other prevention proceedings or in a criminal trial». On this matter, see extensivelyMAUGERI (2017 a), p. 53 ff.

[266] In the preventive procedure, the taking of declaratory evidence between the parties is not required, it being sufficient that the affected person has, through the examination of the documents, the possibility of full knowledge of their content and the right to submit counterarguments. Moreover, cross-examination is imposed by the principle of jurisdiction affirmed by the Constitutional Court itself and presupposes adequate rules of evidence and judgment inherent to the strictly procedural stage.

[267] As pointed out in the work of the States General for the fight against the Mafia (Report of Table XV, Mafias and Europe, edited by Maugeri, 8056-tavolo-xv-mafie-europa.pdf (dirittopenaleuomo.org), in fact,

Constitutional Court, in confirming the constitutional legitimacy of the preventive procedure, stressed, as already established in its previous rulings Nos. 21 and 216 of 2012, that «the forms of exercise of the right of defense may be differently modulated in relation to the characteristics of each procedure»[268]; this while expressly recognising, in the well-known ruling No. 24/2019 – in response to the ECtHR De Tommaso judgment [269] – that, within the scope of the guarantees to be recognised for patrimonial preventive measures, in view of their afflictive nature despite their non-punitive character[270], fall the principle of due process (Articles 111, first, second and sixth paragraphs, Const.), as provided for by Article 6 ECtHR also in civil matters, as well as the right of defence (Article 24 Const.)[271].

Of particular importance, therefore, is the provision in Article 24 of the Directive, under the heading "Remedies," which imposes on Member States the obligation to guarantee to the recipients of confiscation, in the relevant proceedings, the «right to *an effective remedy* and to a *fair trial* in order to safeguard their rights» (italics added), rights already provided for in Article 8 of Directive 42/2014, entitled "Safeguards". The ECJ pointed out that this provision «stipulates, in paragraph 1, that Member States must ensure that the persons affected by the measures provided for under the directive have the right to an effective remedy and a fair trial in order to uphold their rights. That provision therefore confirms, in the sphere of that directive, the fundamental rights referred to in Article 47 of the Charter, which states inter alia that everyone whose rights and freedoms guaranteed under EU law are violated has the right to an effective remedy

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«the reform text does not address some issues – such as those relating to the exercise of the right to trial, the way in which preliminary investigations are carried out, the system of knowability of the acts formed by the public prosecution – that appear most relevant for the accomplished realization of a "fair trial of prevention"». Another important proposal is that the legal framework of the proposal for the application of the measure be filled with content: only by defining the contours of the introductory act of the public subject will it be possible to allow a full illustration of the right of defense even in prevention proceedings, in accordance with Art. 22 of the Directive.

[268] And, in particular, it pointed out that even in relation to the confiscation *under* Article *12-sexies* (now *240-bis*) limitations are placed on the right of defense in that «while in prevention proceedings there is provision for "appeal to the Court of Appeal, also on the merits" […] in execution proceedings there is only provision for appeal by cassation», Constitutional Court. 15/106. This limitation is considered to be in compliance with Article 24 Const.; in the same direction Cass., sec. I, 15 Dec. 2014, Bimbola, no. 52058, in Mass. Uff. no. 261604; Cass. S.U., 17.7.2001, Derouach, no. 29022, in Mass. Uff. no. 219221; Cass. sec. IV, 11 Feb. 2002, D'Amelio, no. 5397, in Mass. Uff. No. 221336; Cass., sec. I, 11 June, 2007, Billeci, No. 22752, in Mass. Uff. no. 236876.

[269] ECtHR, 23 February 2017, Grand Chamber, De Tommaso v. Italy, No. 43395/09.

[270] «However, there remain measures that severely affect the rights of property and economic initiative, which are constitutionally (Articles 41 and 42 Const.) and conventionally (Art. 1 Additional Prot. ECHR) protected.»

[271] ECtHR, 22 Feb. 1994, *Raimondo v. Italy*, in *Pubblications de la Cour Européenne des Droits de l'Homme*, 1994, Série A, vol. 281, 7 ff. and in *European Human Rights Reports*, 1994, vol. 18, III, 237, § 30; ECtHR, sec. I, 15 Jan. 2015, *Veits v. Estonia*, no. 12951/11, § 71; ECtHR, *Silickienė v. Lithuania*, 10 Apr. 2012, no. 20496/02, § 65. In this direction conforms CONSULICH (2019), p. 30 «the law of prevention is a discipline in itself enclosed, in which guarantees cannot be aseptically imported from criminal law, but must be automatically forged from the rights that are affected».

before a tribunal in compliance with the conditions laid down in that article and, in particular, is entitled to a fair hearing»[272].

In the same vein, as examined, Recital 46 of the Directive, in addition to reaffirming respect for the presumption of innocence, reiterates respect for "the right to a fair trial" and "the right to an effective remedy" under Article 47 of the Charter[273], after emphasising, alongside the invasive nature of seizure and confiscation measures, the need for the Directive to provide specific safeguards and remedies to protect fundamental rights («This Directive should provide for specific safeguards and judicial remedies in order to guarantee the protection of the fundamental rights of such persons»). The importance of these rights emerges from the wording of Articles 8(1)(f) and 19(1)(h) of Regulation 1805/2018, which, by providing for the first time that «a manifest breach of a relevant fundamental right as set out in the Charter» may constitute a ground for refusal of mutual recognition, identifies as fundamental rights precisely «the right to an effective remedy, the right to a fair trial, and the rights of the defense»[274].

The obligation under Article 23 to promptly inform the affected persons of the measures (freezing order, confiscation and sale of property) and to ensure that such measures are reasoned is therefore functional precisely to guaranteeing the right of defence under Article 24.

With respect to the guarantee of the right of defence in relation to freezing orders, Article 24(3) requires Member States to ensure «the effective possibility for the person whose property is affected to challenge the freezing order pursuant to Article 11 before a court, in accordance with procedures provided for in national law». In this context, it appears that requirements of efficiency – namely, the need to prevent the removal of property from confiscation – tend to prevail over the protection of the right of defence; a freezing order, in fact, may be adopted not only by a non-judicial body, as examined, but also *inaudita altera parte*, since Article 8 of the previous Directive 42/2014 imposed a duty to inform the person concerned only after the execution of the measure ("after its execution"), and Article 23 of the new Directive refers to the need to communicate the measure directly to the person concerned. Nevertheless, the need to guarantee the right of defence even against seizure orders has been repeatedly reaffirmed by the ECtHR under Article 6 ECtHR. In this regard, reference may be made to the recent condemnation of Romania for failing to adequately guarantee the right of defence against a seizure (and, in particular, against its disproportionate duration—ten years, as reviewed above); the failure to provide a remedy to challenge the measure constitutes a violation of Article 6(1) ECtHR and Article 1 of Protocol 1: «On the basis of the above-

[272] CJEU, RR, JG, C-505/20, cited above, § 24; CJEU, Okrazhna prokuratura – Varna, C-845/19 and C-863/19, cited above, § 75.

[273] On the subject with reference to Framework Decision 212/2005 see CJEU, 14.1.2021, C-393/19 (*Okrazhna prokuratura – Haskovo and Apelativna prokuratura*).

[274] Art. 8 «in exceptional situations there are serious grounds for believing, on the basis of specific and objective elements, that the execution of the freezing order involves, in the particular circumstances of the case, a clear violation of a relevant fundamental right under the Charter, in particular the right to an effective remedy, the right to an impartial tribunal and the rights of the defense»; in corresponding terms for confiscation in Art. 19(h).

mentioned considerations, and taking into account, notably, the duration of the seizure of the assets belonging to the applicant, their value, the lack of opportunity to challenge effectively the measure imposed in criminal proceedings and the lack of evidence that he could have obtained compensation in separate civil proceedings, the Court finds that a fair balance has not been struck in the instant case between the general interest of society and the applicant's interests, as he has been obliged to bear an excessive burden»[275]. Similarly, the ECJ also requires a guarantee of the right of defence against a freezing order (again, disproportionate in its duration), holding that the affected person must be guaranteed «to ask the competent court, even if judicial proceedings are still ongoing, to review whether the conditions for the freezing continue to be met. Consequently, a national law that does not provide for such a possibility is contrary to Article 8(1) of Directive 2014/42»[276].

Article 24(5) guarantees, in particular, the right of defence in relation to confiscation orders by specifying that «Member States shall provide for the effective possibility for the person whose property is affected to challenge the confiscation order pursuant to Articles 12 to 16, including the relevant circumstances of the case and available evidence on which the findings are based, before a court, in accordance with procedures provided for in national law». This provision applies to all forms of confiscation and should cover not only the right of defence on appeal ("possibility to challenge such a measure"), but, more fundamentally, the right to defend oneself within a *proper adversarial* process in the proceedings intended for the adoption of the confiscation measure, whether in the criminal trial or in criminal proceedings of an in rem nature.

This provision confirms that, first and foremost, *the prosecution* bears the burden of proving the illicit origin of the assets by alleging «the relevant circumstances of the case and the available evidence», which can then be challenged by the defence; the Directive does not provide for any form of reversal of the burden of proof either for extended confiscation of the proceeds of crime following conviction or for confiscation of the proceeds without conviction. The defence is not required to prove *tout court* the lawful origin of the property, but rather to challenge, where appropriate, «the relevant circumstances of the case and the available evidence on which the findings are based, before a court in accordance with the procedures of national law». Consistently, with regard to extended confiscation under Article 14 and confiscation of unjustified assets under Article 16, Recital 48 specifies that «circumstances that could be challenged by the affected person when challenging the confiscation order before a court should also include specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct».

This approach also applies to confiscation under Article 15, although the provision no longer specifies that «In the case of confiscation orders under Article 15, such circumstances shall include the acts and evidence on the basis of which the national

[275] ECtHR, Sec. IV, 5 April 2022, Pres. Y. Grozev – CĂlin v. Romania, No. 54491/14, § 84.
[276] CJEU, RR, JG, C-505/20, cited above, § 37.

judicial authority has concluded that all the elements of the crime are established». In the case falling under Article 15, as examined, even where proceedings are not continued to conviction, the prosecution must establish all the elements (typicality, unlawfulness and culpability) that could have led to a criminal conviction (Article 15(2): «the relevant criminal proceedings could have led to a criminal conviction»), as well as the necessary prerequisites for the different forms of confiscation. Accordingly, in order to avoid confiscation, the defence may, first and foremost, contest that the crime has been committed; in this respect, Recital 48 specifies that «In the case of confiscation orders where all elements of the criminal offence are present but a criminal conviction is impossible, the defendant should have a possibility to be heard before the order is issued, where possible». In the Italian system, for the purposes of applying confiscation in the event of the extinction of the crime pursuant to Article 578 bis of the Code of Criminal Procedure, it is required, in a more guaranteeing manner, that «*the judge of appeal or the Court of Cassation must first ascertain the 'responsibility of the defendant'*». In particular, where forms of confiscation assume a punitive character, one should require the establishment of the culpability of the offender, as provided for in Article 578 bis of the Criminal Code and as sanctioned by the ECtHR in the G.I.E.M. judgment[277], , which, while accepting the Italian jurisprudential practice allowing the application of urban confiscation – a form of confiscation considered punitive by the same ECtHR in the earlier Sud Fondi and Varvara judgments[278] – even in cases of statutory limitation, nevertheless requires the ascertainment of guilt, even in the absence of a final conviction, in line with the orientation affirmed by the Italian Constitutional Court [279] and the Joint Sections of the Supreme Court[280].

It should be recalled that, as highlighted by the Italian Supreme Court, this does not amount to an inversion of the burden of proof; rather, the culpable inability on the part of the affected person to allege on the points relevant to the investigation may itself assume circumstantial value against them, consolidating the confirmatory effect of the overall evidentiary picture that had already led to, and supported, the seizure[281]. As has

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[277] ECtHR, Grand Chamber, 28 June 2018, *G.I.E.M. v. Italy*, 301: concurring ECtHR, 26 Nov. 2019, Yasar v. Romania, § 50-51.

[278] ECtHR, 20 Jan. 2009, Sud Fondi Srl and Altre 2 v. Italy, No. 75909/01, §125-129; ECtHR, Sec. II, 29 Oct. 2013, *Varvara v. Italy*.

[279] Constitutional Court 14 January 2015 (26 March), No. 49/2015, which rejected the indications of the ECtHR's *Varvara* judgment in relation to the need for a conviction in order to apply confiscation of a punitive nature, holding on the point that regard should be had not so much to the form of the court's pronouncement, but to the substance, namely the establishment of liability, a rule already imposed in the national legal system (Constitutional Court No. 239/2009).

[280] The United Sections (30 January 2020 (dep. 30 April 2020), No. 13539, rec. *Perroni*), on the one hand, consider Article 578-bis c.p.p. applicable to this form of confiscation through a questionable analogical application resulting in a blatant violation of the principle of legality; on the other hand, in an appreciable manner, they put a brake on the imposition of this form of confiscation following the statute of limitations by demanding a conviction at first instance and reaffirming the obligation of the immediate declaration of the cause of extinction of the crime laid down by Art. 129 c.p.p., para. 1; see also, concurring, Cass., 21 October 2022, No. 39832.

[281] Cass. sec. VI, 3 April 1995, No. 1265, Annunziata, *in CED Cass.*, 202310 or in *Cass. pen*., 1996, p. 2358.

often been pointed out, however, perplexities remain regarding respect for the right to silence, which is expressly recognised by Directive 2016/343 on the presumption of innocence (which, while admitting the use of presumptions, requires that «the exercise of the right to remain silent or the right not to incriminate oneself should not be used against a suspect or accused person and should not, in itself, be considered to be evidence that the person concerned has committed the criminal offence concerned» (Recital 28)). This is especially so given that, more recently – as highlighted in the academic literature[282] – in Consob v. Italy[283] case the Court of Justice not only recognised that the right to silence (as a corollary of the fair trial guarantees under Articles 47-48 of the Charter of Fundamental Rights and Article 6 ECHR) also applies to proceedings aimed at imposing punitive administrative sanctions[284], but also held that this right precludes the use of «evidence obtained in the course of such proceedings […] in criminal proceedings brought against that same person, in order to prove the commission of a criminal offence». This issue is particularly relevant in light of the practice, widely recognised in the Italian legal system, of evidentiary osmosis between criminal proceedings and preventive proceedings, not only from the former to the latter (where elements emerging from pending criminal proceedings are deemed sufficient[285]), but also from preventive proceedings to criminal proceedings[286]; similar concerns have long been addressed in the North American legal system, resulting in the recognition of the Fifth Amendment prohibition of self-incrimination in "civil proceedings" aimed at the application of civil forfeiture, as well as in the British legal system[287].

Article 24, moreover, in addition to guaranteeing at the procedural level the right of third parties to assert their rights (No. 7), as examined, finally establishes the right to a lawyer (No. 8), which should also imply the right to legal aid; otherwise, it would amount to a merely declaratory provision («8. Persons affected by the measures provided for in this Directive shall have the right of access to a lawyer throughout the freezing and confiscation proceedings. The persons concerned shall be informed of that right»).

The Directive therefore seeks to guarantee the right of defence in line with the recognition of the principles of due process under Article 6 ECtHR, which also applies to civil proceedings. The ECtHR recognises the principle of equality of arms, understood as a fair balance between the parties, which «applies as a rule in civil as in criminal»[288] proceedings, and which translates into the need to guarantee each party a reasonable opportunity to present its evidence under conditions that do not place it at a substantial disadvantage, as well as the obligation for the judge to carry out an effective examination

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[282] PINCELLI (2024), p. 31 ff. and doctrine and case law cited therein.

[283] Court of Justice. EU, Grand Chamber, 2 Feb. 2021, C-481/19, Consob v. Italy; Const. Court, 30 Apr. 2021, no. 84, which consequently declared the unconstitutionality of the administrative offense set forth in Article 187-quinquiesdecies of Legislative Decree No. 58/1998.

[284] See MAUGERI (2021), p. 807 ff. and case law and doctrine cited therein.

[285] Cass. sec. VI, 13 July 2017, no. 36216; Cass. sec. VI, 25 June 2020, no. 21060.

[286] MARAFIOTI (2016), p. 8.

[287] See MAUGERI (2021), p. 843 ff.

[288] ECtHR, 27 October 1993, *Dombo Beheer B.V. v. Netherlands*, Series A no. 274, § 32-33.

of the parties' submissions, arguments and offers of proof, subject to an assessment of their relevance to the decision[289].

The right of defence and due process are violated, as the ECourtHR has recognised, where a confiscation order disregards decisive evidence submitted by the defence, thereby resulting in a denial of justice[290] and a violation of the right to defend oneself by adducing proof[291]. A violation of the right to due process also occurs where «the courts had arbitrarily refused to admit important evidence collected and submitted by the defense»[292].

Even where the ECtHR, as mentioned, admits the use of presumptions in criminal matters, and, in particular, for the purposes of applying confiscation orders, including in rem proceedings, it requires that such presumptions be rebuttable and that the rights of the defence be guaranteed, starting with cross-examination[293].

This implies that, where the defence has succeeded in rebutting the presumptions and in demonstrating that the facts underlying them are untrue or lack probative value in the case at hand, the prosecution must in turn succeed either in countering the defence's arguments or in providing additional evidence capable of substantiating the measure to be adopted.

In this regard, it is also worth recalling the significant jurisprudence of the ECtHR concerning the right of every defendant to examine or have examined witnesses against them and to obtain the summons and examination of witnesses in their favour under the same conditions as witnesses against them[294].

One must also be mindful of the risk of violating due process where, in in rem proceedings, emphasis is placed on facts that were the subject of a full acquittal, or of a conviction at first instance subsequently fully overturned on appeal. In the Italian legal system, in order to establish social dangerousness – and thus indications of criminal activity as a prerequisite for confiscation, if not actual proof of the illicit origin of the assets – jurisprudence continues to rely on proceedings in which the defendant was acquitted not only under Article 530(2) of the Code of Criminal Procedure (where the

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[289] ECtHR, 19 April 1994, *Van de Hurk v. Netherlands*, Series A No. 288, § 59; ECtHR, *Kraska v. Switzerland*, 19 April 1993, § 30; *Dombo Beheer B.V.*, cited above, § 35.

[290] ECtHR 29 Jan. 2009, *Lenskaya v. Russia*, § 39; ECtHR, 12 July 2007, *Vedernikova v. Russia*, No. 25580/02, § 25.

[291] ECtHR, 11 Dec. 2008, *Mirilashvili v. Russia*, No. 6293/04, §§ 222-227.

[292] ECtHR, *Khodorkovskiy and Lebedev*, cited above, § 697.

[293] See ECtHR, *Gogitide v. Georgia*, 12 May 2015, No. 36862/05; European Commission, 15 April 1991, *Marandino*, No. 12386/86, in *Decisions et Rapports* (DR) 70, p. 78; ECtHR, 22 February 1994, *Raimondo v. Italy*, cited above, para. 7; ECtHR, 15 June 1999, *Prisco v. Italy*, decision on the admissibility of the appeal, No. 38662/97; ECtHR, 25 March 2003, *Madonia v. Italy*, No. 55927/00, § 4; ECtHR, 5 July 2001, *Arcuri and three others v. Italy*, No. 52024/99, ibid., § 5; ECtHR, 4 September 2001, *Riela v. Italy*, No. 52439/99, ibid., § 6; ECtHR, *Bocellari and Rizza v. Italy*, No. 399/02, ibid., § 8; ECtHR, 5 January 2010, *Bongiorno*, No. 4514/07, § 45. The FRA Opinion (Opinion of the European Union Agency for Fundamental Rights on the confiscation of proceeds of crime), https://fra.europa.eu/it/publication/2012/fra-opinion-confiscation-proceeds-crime, calls for provision to be made for the court to have discretion to waive confiscation where a «serious risk of injustice» arises.

[294] May I refer to MAUGERI (2017), p. 60 ff.

evidence is absent, insufficient or contradictory)[295], but also because the «fact does not exist»[296], but also because «the fact does not exist», as well as on dismissal orders or acquittals from which the defendant benefited over time, sometimes on the ground that such decisions «left shadows of doubt and suspicion». It has been considered irrelevant that the defendant «had previously been acquitted in all proceedings concerning unlawful interference in public procurement, since these were judicial events different from the present proceedings, evidently based on different and more limited evidence than that forming the evidentiary basis of the present proceedings»[297] . The Supreme Court continues to hold that, even in the face of a criminal acquittal, the preventive judge may maintain the confiscation of assets[298], on the basis of the principle of the autonomy of preventive proceedings[299]. Basing confiscation measures on the findings of

[295] Cass. sec. II ,25 Jan. 2023, no.15704: «On the subject of prevention measures, the judge, given the autonomy between criminal trial and prevention proceedings, may independently assess the facts ascertained in criminal proceedings, in order to arrive at an affirmation of generic dangerousness of the proposed ex art. 1, paragraph 1, lett. b), Legislative Decree No. 159 of September 6, 2011, not only in the event of an intervening declaratory extinction of the crime or pronouncement of non-prosecution, but also following a ruling of acquittal under art. 530, paragraph 2, Code of Criminal Procedure, where those facts are outlined, with sufficient clarity and objectivity, which, although considered insufficient – on the merits or due to procedural preclusions – for a criminal conviction, can, however, be placed at the basis of a judgment of dangerousness. (In its reasoning, the Court stated that, in light of constitutional jurisprudence, the need for a high standard of legality is reflected, not so much on the methods of assessment, but on the object of the generic dangerousness test, which must focus on the existence of factual elements that can be identified with adequate precision and punctuality)»; Cass, sec. II, 11 Jan. , 2022, no. 4191; Cass., sec. II, 25 June 2021, no. 33533; Cass., sec. II, 6 June 2019, no. 31549; Cass., sec. II, 29 March 2019, no. 19880; Cass., sec. I, Jan. 7, 2016, no. 6636.

[296] Court of App. Rome, Sec. I, 1 April 2008, no. 2350.

[297] Court of App. Caltanissetta, Sec. I, 18 Oct. 2012, dep. 23 Oct. 2012 (Case No. 50/08 M.P.). Criminal Cassation Sec. II, 11/01/2022, No. 4191: «Preventive measures: the judge may independently evaluate the facts established in the criminal court to affirm the generic dangerousness of the proposed. On the subject of prevention measures, the judge, given the autonomy between criminal proceedings and prevention proceedings, may independently assess the facts ascertained in criminal proceedings, in order to reach an affirmation of generic dangerousness of the proposed ex art. 1, paragraph 1, lett. b), legislative decree September 6, 2011, no. 159, not only in the event of an intervening declaratory extinction of the crime or pronouncement of non-prosecution, but also following a ruling of acquittal under art 530, paragraph 2, c.p.p., .where those facts are outlined with sufficient clarity and objectivity that, although considered insufficient – on the merits or due to procedural preclusions – for a criminal conviction, may well be placed at the basis of a judgment of dangerousness (Case law on confiscation)»; concurring Cass., sec. II, 25 Jan. 2023, no.15704; Cass., sec. II, 25 June , 2021, no.33533; Cass., sec. V, 30 Nov. 2020, no.182.

[298] Cass. Pen. sec. I, 17 May (dep. 6.9) 2023 no. 36878.

[299] «The prevention procedure is autonomous from the criminal one, because in the former one judges overall conducts, but significant of social dangerousness, in the latter one judges single facts to be related to typical patterns of anti-juridicality» (Cass. Pen. Sec. II, 25.1.2023 no. 15704); Cass., Sec. I, 1.2.2018 no. 24707; Cass. Pen., Sec. I, 26 Oct. 2022, no. 4489; Cass., sec. VI, 5 April 2023, no. 19997. *Contra* Cass., sec. V, 15 Jan. 2013, no. 11979, G.P. «On the subject of preventive measures against suspects of belonging to mafia associations, it is unlawful, for the reasoning to be merely apparent, for the decree by which the judge of appeal confirms the measure of special surveillance against the person in charge, in the wake of a first-degree conviction for the crime referred to in art. *416-bis* of the Criminal Code, to be unlawful, without taking any account whatsoever of the acquittal ruling made on appeal»; interesting Cass., Sect. VI, 10 Jan. 2013, no. 6588, F.; Or, again, it is stated that «without a specific motivation, the completely apodictic

proceedings that ended in a full acquittal runs counter to the ECtHR's judgment in Geerings[300], concerning a form of extended confiscation under Article 36 § 2 of the Dutch Criminal Code. In that judgment, the Court held that assets derived from offences for which the person was acquitted cannot be regarded as being of criminal origin[301] origin and, in any event, required that judicial verification of criminal origin not be based on the mere transposition of investigative findings that conflict with the outcome of the criminal verdict[302]. The ECtHR further stressed that applying confiscation in relation to offences for which the defendant has been acquitted «would be tantamount to recognising the defendant's guilt without it having been 'established in accordance with the law'»[303]; continuing to infer suspicions from facts that were the subject of an acquittal also constitutes a violation of the presumption of innocence under Article 6 § 2 ECtHR[304]. Finally, in admitting the application brought by individuals who, although acquitted on the merits of the offence of mafia association, were subsequently subjected to confiscation of personal assets, the ECtHR addressed a series of questions to Italy concerning several problematic aspects of anti-mafia preventive confiscation in its interlocutory decision of 10 July 2023 (Cavallotti v. Italy, Application No. 29614/16). In particular, at point 2, the ECtHR notes that, should preventive confiscation be recognised as substantially punitive in nature according to the conventional parameter set out in Article 7, the application of the measure despite an acquittal on the charge of participation in a mafia-type association would, in addition to conflicting with the principle of the presumption of innocence, also entail a violation of Article 7 itself. In this direction, a recent bill No. 2234, submitted in December 2022 to the Senate, introduces a new ground for revocation under Article 28 of Legislative Decree 159/2011: «(c-bis) when, subsequent to the confiscation decree, there is a criminal judgment of acquittal because the fact does not exist or the person did not commit it, or a criminal decree of dismissal, where the factual elements assessed for the application of the preventive measure are related to the charge in the criminal trial».

This issue has also arisen in the application of Regulation 1805/2018, where a preliminary reference was made to the Court of Justice as to «whether the notion of 'proceedings for an offence that may give rise to the confiscation of property even in the absence of a conviction', within the meaning of Article 2(3) of Regulation 2018/1805, also includes criminal proceedings concluded by a judgment of acquittal»[305]. In his opinion

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use, as the contested decree does, of the conviction at first instance implies that the motivation is based on a nonexistent element» (Cass., Sect. VI, 10 Jan. 2013, no. 6588).

[300] ECtHR, 1 March 2007, *Geerings v. the Netherlands*, No. 30810/03, § 48.

[301] ECtHR, 1 March 2007, *Geerings v. the Netherlands*, No. 30810/03, § 48.

[302] Thus BALSAMO, (2007), p. 3936, commenting on ECtHR, *Geerings v. the Netherlands*, cit.

[303] «It amounts to a determination of the applicant's guilt without the applicant having been found guilty according to law», EDU Cou ECtHR rt, *Geerings v. the Netherlands*, cited above, § 48 ff.-50; see ECtHR, 28 Oct. 2003, *Baars v. the Netherlands*, No. 44320/98, § 31.

[304] ECtHR 21 March 2000, *Asan Rushiti v. Austria*, No. 28389/95, § 31 ECtHR, 1 March 2007, *Geerings v. the Netherlands*, No. 30810/03, § 49.

[305] Reference for a preliminary ruling, Case C-8/24, 9 January 2024, D. d.o.o. v. Županijsko državno odvjetništvo u Zagrebu (Croatia): «II. Does the notion of "proceedings for an offence which may give rise to

the Advocate General Richard De La Tour[306] has affirmed that «Article 1(1) and (4) and Article 2(2) and (3)(d) of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, read in conjunction with recital 13 thereof, must be interpreted as meaning that that regulation applies to a confiscation order issued within the framework of proceedings in criminal matters concluded with an acquittal, in relation to a criminal offence other than the offence of which the defendants were acquitted and involving a person other than the defendants, against whom no indictment was issued. Article 19(1)(h) of Regulation 2018/1805, must be interpreted as meaning that the recognition and execution of a confiscation order may not be refused by the executing authority under that provision in a situation where the person affected by that order, which was duly served on that person, did not avail him or herself of an effective remedy which was available in the issuing Member State, although by pursuing that remedy, that person could have had a court of that Member State review the observance of his or her fundamental rights, in particular those guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, by alleging before that court, first, that he or she did not participate in all the stages of the criminal proceedings which led to the issuing of that order, second, that he or she was not advised of the right of access to a lawyer and, third, that he or she was not served the full text of the judgment containing the confiscation order in a language he or she understood».

11. The principle of proportionality.

The proposed Directive expressly provided, in Article 23(5), that the regulation of confiscation is limited by compliance with the principle of proportionality in the strict sense, stating that «When implementing this Directive, Member States shall provide that confiscation shall not be ordered if it is disproportionate to the offence committed or the charge against the person concerned by that measure. When implementing this Directive, Member States shall provide that, in exceptional circumstances, confiscation shall not be ordered if, in accordance with national law, it would constitute an excessive deprivation for the person concerned».

The proposal, notwithstanding certain perplexities regarding the content of the rule, represented a step forward in terms of respect for the principle of proportionality, by expressly imposing an obligation to comply with it in the application of confiscation, previously provided for only in recitals in Directive 2014/42/EU, and by allowing

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the confiscation of property even in the absence of a conviction", within the meaning of Article 2(3) of Regulation 2018/1805, also encompass criminal proceedings concluded with a judgment of acquittal accompanied by an order to confiscate property as illicit proceeds from an offence other than the offence for which the acquittal was pronounced, and in which the defendants did not take part, but persons against whom no indictment was made?»

[306] Opinion of the Advocate General Richard de La Tour, 12 June 2025, Case C-8/24, D. d.o.o., Županijsko državno odvjetništvo u Zagrebu Criminal proceedings.

confiscation to be avoided where it would be disproportionate or constitute an excessive deprivation for the person concerned (although, as noted in the scholarly literature, the principle would have deserved an autonomous provision, rather than being included within the scope of the right of defence under Article 23 of the proposal)[307].

In the approved version, however, the principle of proportionality is addressed only in Recital 27, with regard to the confiscation of instrumentalities and value, and in Recital 33 in relation to confiscation under Article 16, which specifies that «when applying national rules implementing this Directive, the competent national authorities may choose not to order or execute the confiscation of unjustified assets if, in the case in question, the application of the rules laid down in this Directive would be manifestly unreasonable or disproportionate».

In the previous Directive, compliance with the principle of proportionality was provided for in Recitals 17 and 18, and in those provisions the distinction between confiscation of proceeds and confiscation of instrumentalities, with respect to proportionality, appeared more clearly articulated.

11.1. The principle of proportionality and confiscation of proceeds.

In this regard, it should be recalled that the principle of proportionality in the strict sense should not apply to the confiscation of proceeds, which should not assume a punitive character and whose extent depends solely on the amount of the proceeds of the crime. Proceeds, insofar as they are of illicit origin, should be confiscated because the commission of a crime does not constitute a legitimate title for the acquisition of assets, regardless of their amount, as noted elsewhere[308].

This is clearly true where the notion of proceeds is correctly interpreted and neither *analogical* interpretations nor arbitrary constructions are allowed that would ultimately confer a punitive nature on this form of confiscation, thereby triggering a more pressing need to assess proportionality in relation to the gravity of the offence. In such a case, however, a violation of the principle of legality would already arise upstream, since confiscation would be applied beyond the limits established by the legal framework.

This does not detract from the fact that, with regard to forms of extended confiscation, potentially applicable without conviction and even *sine die*, which may entail a significant stigmatising effect and a substantial restriction on freedom of economic initiative, such as the model envisaged by Article 16 of the new Directive, the need to comply with the principle of proportionality emerges in broader terms and should operate as a key interpretative canon governing such measures. In this

[307] AGUADO (2023), p. 42.

[308] MAUGERI (2020), p. 1 ff.; ID. (2020 a), p. 425 ff.; cf. VIGANÒ (2021), p. 203: «The proportionality of such an ablation is *in re ipsa*, the system being limited here to restoring in the head of the agent the patrimonial situation that existed before the crime»; FINOCCHIARO (2018), p. 362; TRINCHERA (2020), p. 419 f.; MONGILLO (2019), p. 3350; AMATI (2013), p. 151.

perspective, instruments such as the temporal delimitation of the presumption of illicit origin of assets, or the requirement of so-called temporal reasonableness, make it possible, in accordance with the principle of proportionality in a broad sense, both to delimit the scope of confiscation and to render the prosecution's burden of proof more stringent, while correspondingly reducing the burden placed on the defence. This, in turn, contributes to confining the measure within its merely restorative function, aimed at economic rebalancing rather than punishment, since the stronger the evidentiary basis demonstrating the illicit origin of the assets, the more clearly the confiscation retains a non-punitive character.

The previous Directive, in Recital 18, extensively called for respect for the principle of proportionality also with regard to the confiscation of proceeds of crime, providing for the introduction of an onerousness clause, already advocated by Amendment 10 proposed by the LIBE Committee, where «the measure represents a disproportionate burden on the person concerned or results in his or her economic ruin», in view of what the explanatory statement describes as a situation of "manifest unfairness". The *"Opinion of the European Union Agency for Fundamental Rights on the Confiscation of Proceeds of Crime"* (hereafter FRA Opinion)[309] likewise calls for courts to be granted discretion to waive confiscation where a "*serious risk* of injustice" would otherwise arise [310].

Part of the German doctrine has emphasised the need to apply *the Härtevorschrift* (*Onerousness Rule*) under § 73c StGB precisely in order to avoid a strangulation effect, in light of the *Übermaßverbot* (the prohibition of excess, corresponding to the principle of proportionality in the strict sense), for instance where illegally obtained profits have been reinvested and their confiscation would jeopardise the very existence of an undertaking[311] . This provision was subsequently repealed following the introduction, by the 2017 reform, of the principle of the moderated gross calculation under § 73d *StGB*, which, as discussed above, allows lawful expenses to be deducted from gross profits and thus enables the application of the *Bruttoprinzip* in a manner consistent with the principle of proportionality[312]. Moreover, protection against disproportionate interference under the new framework is ensured by § 459g(5) *StPO*, as amended by the Act of 25 June 2021, which provides that «in the cases referred to […], execution shall be omitted by order of the court if it is disproportionate. Execution shall be resumed by order of the court where

[309] The European Union Agency for Fundamental Rights (Fra), Opinion – 03/2012, *Confiscation of proceeds of crime*, Vienna, December 4, 2012.

[310] FRA Opinion, cited above, § 1.3 (18).

[311] For further consideration may we refer to MAUGERI (2013), p. 292. See DREHER – TRÖNDLE (1995), p. 546; FISCHER-SCHWARZ-DREHER-TRÖNDLE, (2011); LACKNER – KÜHL (2011), § 1-3; ESER (2010), § 2, p. 1130. See BGH, June 17, 2010 – 4 StR 126/10 (in http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung); BGH, 10 June 2009, 2 StR 76/09, *NJW* 2009, 2755 and in http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung; BGH, 28 June 2000 – 2 StR 213/00 (LG Aachen), in *NStZ* 2000, p. 590. On this subject see also BGH, 5 April 2000 – 2 StR 500/99 (LG Kassel), in *NStZ* 2000, p. 480.

[312] RÖNNAU-BEGEMEIER (2017), p. 6 ff.

circumstances emerge or arise that conflict with the order referred to in the first paragraph»[313].

In the Polish legal system, Article 44a allows the forfeiture of an undertaking not only when it is used to commit the offence but also «to conceal the proceeds derived therefrom»; confiscation is therefore not limited to the proceeds of the crime, as the undertaking owned by the offender itself may be subject to a forfeiture order[314]. This form of confiscation also assumes a punitive nature, since the undertaking is confiscated independently of the value of the illicit proceeds.

The Polish legislator is aware of this punitive potential and, accordingly, the same provision expressly requires compliance with the principle of proportionality. Article 44a therefore provides that: «§ 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 proceeds is not significant

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[313] For further discussion, see MAUGERI (2023), p. 38 ff.

[314] PRZEMYSŁAW (2025) «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. 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 perpetrators 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.
Art. 44, a § 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».

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

11.2. The principle of proportionality and confiscation of the instruments.

In relation to the confiscation of instrumentalities, which is traditionally conceived as having a merely preventive or interdictory purpose, insofar as it is intended to remove only assets strictly functional to the commission of the offence, issues of prospective, rather than retroactive, proportionality may arise[315]. Confiscation of tools, however, as noted above, may also assume a punitive character, insofar as it restricts the right to property by depriving individuals of legitimately possessed assets. Consequently, with respect to this form of confiscation, regardless of the preventive aim pursued, the need to take account of the principle of proportionality in the strict sense becomes particularly pressing. This principle requires limiting or even excluding the application of confiscation where it would be disproportionate to the seriousness of the offence, taking into account also the overall penalty imposed.

This is reflected in the case law of the U.S. Supreme Court concerning compliance with the Eighth Amendment – prohibiting cruel and unusual punishment and enshrining the "excessive fines clause" – which has developed not only in relation to criminal forfeiture, clearly punitive in nature, but also with regard to civil forfeiture applied to crime-related property, where such measures likewise take on a punitive character, as opposed to confiscation of the proceeds of crime[316].

The afflictive nature of confiscation emerges even more clearly in the case of value confiscation of instrumentalities, which, as analysed above, lacks any genuinely preventive dimension. In such cases, strict compliance with the principle of proportionality becomes indispensable.

As mentioned, Recital 27 of the Directive reveals the European legislator's awareness of the afflictive nature of value confiscation of instrumentalities, requiring that such a measure not be applied where it would be disproportionate: «When implementing this Directive with regard to the confiscation of property the value of which corresponds to instrumentalities, the relevant provisions should be applicable where, in view of the particular circumstances of the case, such a measure is proportionate, having regard in particular to the value of the instrumentalities concerned. Member States can also take into account whether and to what extent the convicted person is responsible for making the confiscation of the instrumentalities impossible». Within this framework, proportionality is assessed, *inter alia*, by reference to the degree of *responsibility* attributable to the convicted person for rendering the direct confiscation of the instrumentalities unenforceable.

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[315] Cf. VIGANÒ (2021), p. 116 ff.

[316] Widely MAUGERI (2001), p. 710 ff.

A particularly significant model in this respect is provided by § 74f *Grundsatz der Verhältnismäßigkeit* of the German legal system, which, as noted above, requires compliance with the principle of proportionality in relation to the optional confiscation of instrumentalities (as well as of the products and objects of the offence), including value confiscation. The provision mandates that the property penalty, together with the overall punishment, be commensurate with the offence and the charge, interpreted in terms of culpability, and allows for the waiver of confiscation, or the application of less onerous measures, where there is a risk of disproportion[317].

Accordingly, a balancing exercise must be carried out between the principal penalty and confiscation, so that the overall punitive response remains proportionate to the seriousness of the offence and the degree of culpability. Such an assessment must be expressly reflected in the reasoning of the judgment[318]. This rule is widely regarded as a positive expression not only of the principle of proportionality[319], but also of the principle of culpability as a criterion for the commensuration of punishment[320].

In similar terms § 19a *StGB*[321] of Austrian law, which provides that Konfiskation shall not be applied where it is deemed disproportionate to the gravity of the act or to the culpability of the offender.

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[317] See Maugeri (2001), pp. 80-81 ff.; Lackner (2014), Rn. 1-5.

[318] See Herzog (2023), p. 2615, § 13; Id. (2023 a), p. 2631, § 3. In cases where proportionality is lacking, the judge may decide to decrease the principal penalty if it is not possible to intervene by way of confiscation, or to decrease the amount of the property to be confiscated, or to apply the measure only to a part of the property; in borderline cases where such intervention is not possible, inter alia because of the difficulty of balancing different magnitudes such as the prison sentence and the property penalty, confiscation will not be applied. However, the judge must show in their judgment that they have made the necessary efforts, even if in vain, to apply confiscation. In making this assessment, the judge must take into account the consequences of the application of confiscation on the offender's future life (a commensuration criterion enshrined in § 46(1)(2) StGB); indeed, there may be cases in which confiscation could produce greater desocialising effects than imprisonment, see Horn (2007), pp. 37–38; Schultehinrichs (1991), p. 97. Most recently, GH, *Beschluss vom* 24 October 2023 – 2 StR 321/23, *openJur* 2023, 12145: «According to the principle of proportionality (Article 74f paragraph 1 sentence 1 StGB), non-compulsory confiscation may not be ordered if it is disproportionate to the crime committed and the charge against the person affected by the confiscation (see BGH, resolution of January 11, 2022 – 3 StR 415/21, juris paragraph 6). In particular, the economic and other consequences of the confiscation must be taken into account, on the one hand, the injustice of the act and the reproach of guilt against the persons involved (see NK-StGB/Saliger, 6th ed., § 74f Rn. 4), without the court limiting itself to these circumstances when assessing proportionality (see BGH, Judgment of November 10, 2021 – 2 StR 185/20, NZWiSt 2022, pp. 482, 488). If the forfeiture involves objects of multiple offenses with varying degrees of guilt, the principle of proportionality may provide grounds for considering partial forfeiture (see on value forfeiture in the case of multiple objects involved: Eser/Schuster (2019))».

[319] This rule constitutes one of the concretization of the prohibition of abuse (Ubermaßverbot – BVerfGE 16, 194, 202), see Eser (2010a), p. 816.

[320] See Horn (2007), p. 38; Schultehinrichs (1991), p. 97.

[321] (1) Gegenstände, die der Täter zur Begehung einer vorsätzlichen Straftat verwendet hat, die von ihm dazu bestimmt worden waren, bei der Begehung dieser Straftat verwendet zu werden, oder die durch diese Handlung hervorgebracht worden sind, sind zu konfiszieren, wenn sie zur Zeit der Entscheidung im Eigentum des Täters stehen.

The punitive character assumed by the confiscation of instrumentalities, and the consequent need to ensure compliance with the principle of proportionality in the strict sense, is particularly evident in the jurisprudence of the ECtHR concerning urban confiscation in the Italian legal system in relation to unlawful subdivision. In Sud Fondi, Varvara and G.I.E.M., the Court recognised the punitive nature of such measures[322], condemned their disproportionate application and reaffirmed the necessity of compliance with the principle of proportionality. In G.I.E.M., the Grand Chamber, echoing the reasoning developed in Sud Fondi and Varvara, reiterated that the confiscation at issue constitutes an interference with the peaceful enjoyment of possessions (§ 288) under Article 1 of Protocol No. 1[323], which must be provided for by law and proportionate to the legitimate aim pursued. This requires the existence of a "public interest" capable of justifying the punitive intervention and a reasonable relationship of proportionality between the means employed and the aim pursued, a relationship that is broken where "the person concerned has to bear an excessive and exaggerated burden". The proportionality assessment must therefore be articulated by taking into account the following three elements: «[1] the possibility of adopting less restrictive measures, such as the demolition of works that do not comply with the relevant provisions or the cancellation of the subdivision project; [2] the unlimited nature of the penalty, resulting from the fact that it may indiscriminately include built and unbuilt areas, and even areas belonging to third parties; [3] the degree of fault or recklessness of the plaintiffs or, at the very least, the relationship between their conduct and the offence in question» (§ 301). In addition, the Court requires, as it has repeatedly emphasised, the protection of procedural safeguards under Article 1 of Protocol 1, even where not expressly provided for, and in particular the existence of adversarial proceedings that respect the principle of equality of arms (§ 302).

Compliance with these substantive and procedural limits was not possible in the cases under consideration, due to the mandatory nature of the confiscation at issue, which does not allow the judicial authority to assess the appropriateness of imposing the measure, nor, where appropriate, to modulate it so as to render it less invasive. This rigidity was compounded by the lack of participation of the entities targeted by the ablative measure in the criminal proceedings and, consequently, by the absence of an adversarial process, notwithstanding the clearly punitive nature of the confiscation.

As noted elsewhere, an examination of the ECtHR's reasoning reveals the problematic compatibility, with the principle of proportionality, of confiscation employed as a punitive instrument. Such confiscation operates as a rigid mechanism, characterised by obligation and automaticity, and is not commensurate with either the culpability of the offender or the seriousness of the conduct, as expressly highlighted by the Court (§ 301). It is a punitive response that prevents the judge from either excluding its application in favour of other sanctions better suited to embody a re-educative or

[322] See MAUGERI (2020).

[323] Not deeming it necessary to specify whether the hypothesis of the first or second paragraph of the provision under consideration materializes, § 291.

reparatory logic, in line with the principle of subsidiarity or extrema ratio, or from calibrating the measure to the specific circumstances of the case.

Within the Italian legal system, the Constitutional Court has repeatedly reaffirmed the need to respect the principle of proportionality in relation to the confiscation of instrumentalities, or more generally to forms of confiscation that assume a punitive character. Particularly emblematic in this regard is judgment no. 112/2019, which declared the unconstitutionality of Article 187-*sexies* of Legislative Decree 58/1998[324] as originally introduced by Article 9, para. 2, lett. *a)*, of Law no. 62/2005, insofar as it provided for mandatory confiscation, either directly or by equivalent, not only of the profit of the offence but also of its product and of the assets used to commit it (Constitutional Court no. 112/2019)[325].

While the confiscation of profit, namely, the capital gain obtained through the unlawful conduct, retains a character of economic rebalancing, *the confiscation of the product*, by contrast, entailed the deprivation of the financial instruments acquired (that is, the entire amount obtained from their disposal). This resulted in the confiscation both of the profit and of the assets invested in the purchase, which were themselves subject to confiscation, including by equivalent, *as instrumentalities of the offence* (which may also consist of the financial instruments alienated by the perpetrator). In both cases, confiscation assumed a distinctly *punitive* character – having, as the Constitutional Court stated, «a worsening effect with respect to the offender's patrimonial situation», by imposing a limitation on the right to property of a scope greater, and often significantly greater, than that resulting from the mere removal of the unfair economic advantage derived from the offence. These measures thus amounted to genuine property penalties.

The Constitutional Court further emphasised that such measures were characterised by sanctioning automatisms incompatible with the proportionality required of punitive sanctions affecting the right to property. The rigidity of the sanctioning mechanism precluded any "graduated" response to the seriousness of the offence or any meaningful quantitative modulation, and resulted in an unreasonable disproportion, particularly when combined with the pecuniary sanction, whose statutory framework was itself of exceptional severity[326].

In the Italian legal system, the introduction of a so-called onerousness clause, allowing for the non-application of the confiscation of instrumentalities, or for the mitigation of its effects where disproportionate, had already been envisaged in Article 114, no. 3, of the draft reform of the Criminal Code prepared by the Grosso Commission in 2000, in the "Outline for the drafting of principles and guiding criteria for legislative delegation on the reform of the penalty system" drawn up by the Ministerial

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324 See SEMINARA (2006), p. 12; FONDAROLI (2007), p. 131; MUCCIARELLI (2012), p. 2421; FRATINI (2013), 2, p. 151 ff.

325 And consequently declared the unconstitutionality, pursuant to Article 27 of L. 87/1953, of the same rule as amended by Article 4, para. 14 of Legislative Decree No. 107/2018, insofar as it provides for mandatory confiscation, direct or by equivalent, of the product of the offence, and not just the profit; ACQUAROLI (2020), p. 197.

326 ACQUAROLI (2020), p. 202; MANES (2019), p. 374 ff.

Commission chaired by Professor Palazzo[327], as well as in the proposals on confiscation advanced by the Marasca Commission[328].

In the Dutch legal system, forfeiture, constituting a form of direct confiscation of the instrumentalities of the offence and expressly regarded as a punishment[329], must likewise comply with the principle of proportionality. The value of the forfeited objects must be proportionate to the gravity of the offence and, accordingly, to the expected penalty to be imposed (Section 33 in conjunction with Section 24 Sr). Where the defendant or another affected party suffers a disproportionate impact, the court may order reimbursement of the excess (Section 33c Sr).

12. Deferred execution (recital 36).

The European legislator also urges, in Recital 36, the adoption of rules providing that: «Tracing and identification of property to be frozen and confiscated should be possible even after a final conviction for a criminal offence, or following proceedings involving non-conviction-based confiscation».

This recital does not appear entirely clear, as it does not specify whether confiscation has already been ordered in the proceedings concluded with the conviction or in proceedings aimed at enforcing confiscation. The latter seems, however, to be the correct interpretation, since the same recital further clarifies that: «That does not prevent Member States from establishing reasonable time limits after a final conviction or final decision in proceedings involving non-conviction-based confiscation, following expiration of which tracing and identification would no longer be possible». Read in this

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[327] In *Dir. Pen. Cont.* 2014, 10 February 2014.

[328] Established by decree of 3 May 2016 by the Minister of Justice, Hon. Andrea Orlando, for the preparation of the draft legislative decree for the reorganization of the special part of the Criminal Code, implementing the provision of the delegated law on the so-called principle of «the tendential reservation of the code in criminal matters», contained in the draft delegated law approved by the Chamber of Deputies on 23 September 2015 and then under consideration by the Senate (A.S. No. 2067) at the time of the Commission's establishment.

[329] «Forfeiture (Section 33 et seq. Sr) is a form of direct confiscation. In the Dutch system, 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.»

light, and in continuity with the scheme laid down in former Article 9 of Directive 2014/42/EU, the provision appears to address situations in which, although the existence of proceeds or instrumentalities of the offence subject to confiscation has been established, it has not been possible to deprive the offender of them, even by equivalent, thus allowing investigations aimed at their tracing and identification to continue. The previous Directive, in Recital 30 and Article 9, already required Member States to ensure the execution of confiscation orders even after a final conviction or after proceedings under Article 4(2), where during the trial the proceeds of crime could not be identified, or were insufficiently identified, and the confiscation order could therefore not be enforced. To this end, the confiscation order was required to determine the extent of the property to be confiscated («It is therefore necessary to allow the definition of the exact extent of the property to be confiscated»). The rationale was to ensure the deprivation of illicit proceeds notwithstanding evasive strategies by the offender, who might otherwise hope to enjoy them after serving the sentence. From this perspective, the introduction of such a provision appears appropriate in order to ensure the effectiveness of the confiscation regime. The prior determination of the exact amount to be confiscated, however, can realistically operate only in relation to the confiscation of proven proceeds, and not in the case of extended confiscation, which applies to all assets of disproportionate value in the offender's possession whose lawful origin cannot be justified. In this direction, certain legal systems allow only the deferral of the confiscation ruling with respect to the conviction, including extended confiscation, in order to conduct further investigations within ancillary proceedings connected to the criminal trial. This is the case, for example, with English *confiscation*, with the German *Erweiterter Einziehung*, and with confiscation under Article 240-*bis* of the Italian Criminal Code, where it may be applied at the execution stage pursuant to Article 676 of the Code of Criminal Procedure. This practice was initially based on the jurisprudence, recognised by the Joint Sections of the Supreme Court[330] and by the Constitutional Court in Judgment No. 33/2018[331] and was subsequently codified by Article 183-*quater*, para. 1, of Legislative Decree No. 271/1989[332].

Outside the European Union, a comparable result is achieved in the United Kingdom, where Section 22 of the Proceeds of Crime Act 2002 allows the amount of a

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[330] Cass. Joint Chamber, 17 July 2001, *Derouach*, No. 29022, in Mass. Uff. No. 219221; see also, concurring, Cass., 18 May 2015, *Caponera*, No. 20507, in Mass. Uff. No. 263479, which specifies that Article 24 para. 2 of the Constitution is not violated, because the right of defence should not be understood in an absolute sense but should be modulated according to the object (one thing is the ascertainment of guilt, another is the application of a measure of patrimonial security). The phenomenon of deferred cross-examination, moreover, is present in the system (see, with regard to the application of precautionary measures, proceedings by decree), without the double degree of jurisdiction on the merits being a general postulate (arg. *ex* art. 111 of the Constitution, 593 para. 3 and, specifically, 666 para. 6 c.p.p., as well as see Constitutional Court judgments Nos. 236/84 and 116/74).

[331] Constitutional Court, 8 Nov. 2017 (21 Feb. 2018), No. 33.

[332] First paragraph *4-sexies* of art. 12 *sexies* decree law no. 306 of 1992, introduced by law no. 161, /2017, a paragraph repealed by legislative decree no. 21/2018 and its content transposed in paragraph 1 of art. 183 quater, c. 1 decr. leg. 271/1989.

confiscation order to be recalculated after the conclusion of proceedings, since the order is initially based on the proceeds actually in the possession of the convicted person (Section 7), which may be lower than the proceeds obtained from the offence because they have already been consumed, dispersed or concealed.

Particularly instructive, however, are the issues raised in *R v Padda* (*Gurpreet Singh*)[333] concerning the risk that such recalculation may lead to the confiscation of property subsequently acquired through lawful labour, thereby undermining the offender's prospects of rehabilitation. These considerations may render the subsequent enforcement of confiscation of proceeds inappropriate, even where it remains within the limits of the actual profit obtained and originally determined in the confiscation order. In such cases, the court may be required to assess compliance with the principle of proportionality, as examined above.

Finally, within the Italian legal system, the Joint Sections of the Supreme Court were asked to rule on whether an ablative decision concerning extended confiscation under Article 240-bis of the Criminal Code, issued at the execution stage, could extend to all assets acquired up to the point at which the conviction becomes final, or whether it should instead be limited to assets forming part of the estate at the time the relevant judgment was delivered[334] The Joint Sections opted for the latter solution, specifying that «the execution judge, […] exercising the same powers that, with regard to this atypical security measure, are vested in the trial judge, may order it, subject to the criterion of 'temporal reasonableness', with regard to assets that entered the convicted person's sphere of availability up to the time of the pronouncement of the judgment for the so-called 'indicator' offence, without prejudice, however, to the possibility of confiscating property acquired after the judgment where it was purchased using financial resources already possessed beforehand»[335].

Returning to Recital 36, the hypothesis that confiscation has not been ordered at all should arguably not have been considered, since, following a conviction, nothing would prevent the activation of an *in rem* procedure – on the model of Article 16 of the Directive – aimed at depriving the offender of illicit proceeds or instrumentalities. This is the case, for instance, in the Italian system through preventive confiscation, in the Spanish system through *comiso sin condena*, or through the various models of civil recovery or forfeiture, and, outside the European Union, in Switzerland, through confiscation under Article 72 of the Swiss Criminal Code in relation to assets belonging to a criminal organisation.

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[333] [2013] EWCA Crim 2330, in *JCrim.Law* 2014, 2, 110; see DOIG (2014), p. 110 ff.

[334] Cass, 18 Sept. 2020, Order No. 31209, Rel. Magi. In the first direction Cass., 17 May 2019, Iannò, No. 35856, Rv. 276717; Cass., sec. 1, 6 June 2018, Quattrone and others, No. 36499, Rv. 273612; Cass., sec. 1, 19 Dec. 2016, (dep. 2017) No. 51, Cecere, Rv. 269293; in the second direction Cass, sec. 1, 12 Apr. 2019, Panfili, No. 22820, Rv. 276192; Cass., sec. 1, 23 Jan. 2018, Ousmane, No. 9984; Cass., sec. 1, 28 Mar. 2017, Barresi, No. 36592; Cass., sec. 1, 21 Oct. 2016 (dep. 2017), Council, No. 17539, Rv. 269866. See GATTO (2021), 2, p. 99 ff.

[335] Cass., Joint Chamber., 25 Feb. 2021, no. 27421.

12.1. Reasonable time for subsequent retrieval or identification. Confiscation without a statute of limitations: a sword of Damocles sine die.

Recital 36 also provides, as mentioned, that «this does not prevent Member States from establishing reasonable time limits following the final conviction or final decision taken in the proceedings concerning non-conviction-based confiscation, upon the expiration of which retrieval and identification would no longer be possible»; the imposition of a reasonable time limit responds to the need to prevent the continued search for other property to be confiscated from hanging, like a sword of Damocles sine die, over the freedom of economic initiative of the confiscation recipients.

In this vein, the ECtHR has condemned the United Kingdom for violation of the right to the *reasonable duration of proceedings* as an expression of the right to a fair trial, Art. 6, § 1, ECHR[336] , with reference to proceedings intended to apply a form of extended confiscation – the British confiscation – following conviction, specifying that the period to be taken into account begins to run from the delivery of the conviction[337].

In the Italian legal system, an effect of the possibility of ordering confiscation *under* Art. 240-bis in enforcement proceedings is reflected in the practice whereby such proceedings are initiated years after the conclusion of the cognitive process and, therefore, of the conviction, and allow the confiscation of property that entered the disposition of the convicted person years after the commission of the predicate offence[338], ultimately transforming even this form of confiscation, as well as preventive confiscation, into a sort of sword of Damocles that knows no statute of limitations (clearly on the understanding that jurisprudence requires, as examined, temporal reasonableness and that, in any event, the assets must be of disproportionate value, even if later retrieval may also be functional to the value confiscation of extended confiscation). This effect is further exacerbated by the fact that l. 161/2017 allowed extended confiscation to be applied even following the statute of limitations subsequent to a conviction at first instance (Art. 578-*bis* c.p.p.) or following death subsequent to a final conviction (Art. 183-*quater*, c. 2, Legislative Decree 271/1989), as examined.

Recital 36 also refers to the need to establish reasonable time limits following «the final decision taken in the proceedings concerning non-conviction-based confiscation, after the expiration of which retrieval and identification would no longer be possible».

In fact, with respect to in rem proceedings, such as Italian preventive confiscation, the problem of establishing a reasonable time limit for the subsequent identification and retrieval of assets arises upstream, because in this case, regardless of the moment of the commission of the source crime, it is possible, subsequently and without any time limit, to initiate in rem proceedings aimed at proving the illicit origin of the assets and, therefore, at confiscating them. This issue has emerged more clearly in the Italian legal system following the separation of personal and patrimonial preventive

[336] ECtHR, 21 July 2015, *Piper v. the United Kingdom*, No. 44547/10, § 51.
[337] ECtHR, 8 Jan. 2009, *Bullen and Soneji v. the United Kingdom*, No. 3383/06, § 48; ECtHR, *Piper*, cited above, § 52.
[338] Court of Rome, 17 April 2008.

measures and, in particular, following the reform that allowed the application of patrimonial measures regardless of the actuality of social dangerousness – it being sufficient that such dangerousness existed in the past, at the time of acquisition of the assets – thus making it possible to apply preventive confiscation at times absolutely distant from the original illicit activity (to which the indications of social dangerousness, no longer current, refer).

Thus, not only is it possible to confiscate the direct reuse of the original illicit profit (the house or land purchased with the proceeds), but also the additional proceeds derived from the investment of the original profit in lawful activities; above all, however, confiscation has been transformed into a kind of sword of Damocles that hangs *sine die* over the freedom of economic initiative. The possibility of pursuing illicit enrichment *sine die* appears to represent precisely the criminal policy *rationale* underlying the separation of patrimonial from personal preventive measures; the objective has been to remove illicit enrichment from the statute of limitations, an objective that *in rem* proceedings normally pursue tout court by requiring neither a conviction nor a finding of social dangerousness, but only proof of the illicit origin of the assets. However distant the source crime may be, and regardless of whether the illicit proceeds are lawfully used or of the offender's own re-education, the prevention system in the Italian legal order, as well as in rem proceedings in other systems, will always allow proceeds of presumed illicit origin to be confiscated: an undoubted *Nebeneffekt* of an afflictive nature thus emerges.

The issue has arisen in the jurisprudence. The Supreme Court has recently ruled out the question of constitutional legitimacy of Articles 18, 29, and 34-ter of Legislative Decree No. 159 of 6 September 2011, for conflict with Articles 3, 24, paragraph 2, 27, paragraph 2, and 111, paragraphs 1 and 2, Const., and Art. 6, § 1, ECHR, insofar as «there is no provision, with respect to the time of the cessation of the dangerousness of the proposed person, for a time limitation of the propositional action or prescription of the preventive measure, given that the existence of dangerousness at the time of the acquisition of the property, which is transferred to the latter on a permanent and tendentially indissoluble basis, since it is the fruit of the illicit acquisition by the dangerous person, constitutes an inescapable prerequisite for the application of the measure of asset prevention»[339].

In the same vein, the Supreme Court had already rejected the question of constitutional legitimacy raised on account of the absence of a deadline for submitting the application for the measure, allegedly in violation of Articles 3, 27, and 42 of the Constitution: «The constitutional principles and those contained in the European Convention on Human Rights do not require that a time limit be imposed on the possibility of applying for confiscation, nor does the absence of such a limit appear unreasonable (given the particular nature and purpose of prevention proceedings) or such as to result in an impairment of the right of defense in providing evidence of the legitimate origin of the assets. Indeed, the defense may resort to any means of evidence,

[339] Cass. sec. II, 25 Feb. 2022, no. 11351.

not only documentary evidence, which many years later may not be easy to find, but also oral evidence, and the judge, in evaluating the same, must take into account the difficulties of providing precise evidence in relation to income received or expenses incurred in very old years»[340].

In fact, in contrast and contrary to what the Supreme Court maintains, it should be pointed out that the ECtHR had already, in *Dimitrovi v. Bulgaria*, challenged, in relation to a form of extended confiscation without conviction, the possibility of applying confiscation even with reference to absolutely outdated facts (without prescription and without res judicata), noting that the measure in question is substantially exempt from prescription, with the consequence «that individuals being investigated under it could be required to provide evidence of the income they had received and their expenditure many years earlier and without any reasonable limitation in time«; moreover, »the prosecution authorities were free to 'open, suspend, close and open again proceedings at will at any time'». All of this implies that such a legal framework does not allow for predictability of the consequences of one's actions[341].

In the same vein, more recently, in *Todorov v. Bulgaria*, the ECtHR highlighted the wide temporal framework within which the relevant legislation is applied and, in particular, emphasised that «However, consideration will be given to the difficulties that the plaintiffs may have encountered in meeting their burden of proof due to the long periods of time covered by the confiscation procedure and the other factors described above». Incidentally, in that case the Court was dealing with a retroactive application of the 2005 confiscation law, legislation that also applies to assets acquired up to 25 years prior to the opening of confiscation proceedings, thereby imposing a heavy burden on the defence, which must provide proof of the lawful income or lawful provenance of the assets[342]. In similar terms in *Xhoxhaj v. Albania*[343], the Court likewise pointed out how disproportionate the burden on the defence may become with respect to a form of confiscation that essentially knows no statute of limitations, as is the case with preventive confiscation or other forms of *actio in rem*; the authorities examined «transactions that took place in the very distant past, leading to an unreasonable shift in the burden of proof […] The broad temporal scope of the evaluation process had put the plaintiff in an impossible position for objective reasons».The Court thus emphasised the importance, in guarantee terms, of statutes of limitations, while at the same time highlighting the peculiarity of in rem proceedings aimed at depriving individuals of proceeds accumulated over a lifetime[344].

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[340] Cass. sec. V, 25 Nov. 2015, no. 155.

[341] ECtHR, 3 June 2015, *Dimitrovi v. Bulgaria*, No. 12655/09, § 46.

[342] ECtHR, 13Oct. 2021, *Todorov and others v. Bulgaria*, No. 50705/11, 201.

[343] ECtHR, *Xhoxhaj v. Albania*, 31 May 2021, no. 15227/19, § 345.

[344] However, the Court believes that the peculiarities of commonly used asset review processes should also be taken into consideration. According to the Court, since personal or family assets are normally accumulated over the course of a person's working life, placing strict time limits on the valuation of assets would greatly limit and impair the ability of the authorities to assess the legitimacy of the entire wealth acquired by the person under scrutiny during their professional career.

Moreover, the lack of a statute of limitations in preventive confiscation is accompanied in practice by the non-recognition of the applicability of the principle of *ne bis in idem* in this field or, at least, even where the application of this principle is affirmed, by the clarification that it operates *rebus sic stantibus*; the result is greater efficiency in the system of prosecution of illicit enrichment, but at the cost of the risk of *overcriminalisation* or the establishment of a sort of endless sanctioning circuit. As already noted, and as foreign doctrine also highlights with regard to forms of *actio in rem*[345], the same persons, for the same facts, may be subjected to in rem proceedings after or concurrently with the criminal trial, possibly even following an acquittal, as is widely acknowledged. Indeed, the Italian legislator, in order to prevent the possible accumulation of criminal and preventive sanctions, which, in addition to being highly afflictive, could also be discriminatory, has provided, as mentioned above, for the obligation to initiate preventive proceedings against persons subjected to criminal proceedings (Art. 23-*bis* of Law 646/82), and Art. 29 of the preventive measures code has established their independence from the criminal trial[346].

13. Conclusion.

In the "36th Annual Report on the protection of the European Union's financial interests and the fight against fraud – 2024" from the Commission to the Council and the European Parliament, it is stated that «a total of 13 589 fraudulent and non-fraudulent irregularities, amounting to EUR 1.84 billion, were reported in 2024. There was a slight decrease in the number of reported irregularities compared to 2023 (–2.6%), while the related irregular amounts increased (+19.5%) (68). Irregularities reported in 2024 were 3.6% higher than the average for the last five years, while their related financial amounts were 12% higher»[347].

The importance of recovering the amounts concerned, including those relating to the EU budget, is evident, and hence the strong need to improve confiscation tools; Directive (EU) 2017/1371 emphasises the necessity of freezing and confiscating the means and proceeds of criminal offences affecting the EU budget.

Directive 2024/1260 on asset recovery and confiscation constitutes a fundamental instrument in this direction.

The new Directive undoubtedly has the merit of providing a comprehensive framework for harmonising the instruments intended for the confiscation of the proceeds or instrumentalities of crime, from the investigation stage to the final

[345] HENDRY-KING (2016), § 4.1: «under such proceedings the parties are the same (i.e. the State against the individual), the allegations will often concern the same conduct, and the evidence can even be the same as that relied upon the unsuccessful criminal prosecution».

[346] We refer to the examination made elsewhere of these issues cf. MAUGERI (2017), pp. 60-68 ff. Cf. CASSANO (2013), p. 173 ff.

[347] Brussels, 25.7.2025 COM(2025) 426 final, in 35th Annual Report on the protection of the EU financial interests and the fight against fraud

confiscation stage. Nevertheless, there are aspects of the Directive that could be improved, such as greater harmonisation in determining the notion of victim for the purposes of applying the relevant regulations, and the introduction of rules ensuring proportionate compensation for all victims where assets are insufficient fully to guarantee the right to restitution[348].

In particular, the new Directive chooses to address illicit enrichment by organised crime through the instrument of NCBC, departing from the approach adopted in Regulation 1805/2018, which favoured mutual recognition over harmonisation in this field, and acknowledging the fact that mutual recognition presupposes harmonisation. Considering that the success of the Regulation in improving the effectiveness of asset freezing and confiscation «depends not only on its direct applicability, but also on the way it is applied in practice by the competent national authorities"»[349], it should also be noted that strengthening harmonisation will be important because the Luxembourg courts themselves have recognised, in line with the German Constitutional Court, that national fundamental rights norms regain importance as an obstacle to mutual recognition obligations in areas where the level of harmonisation achieved at EU level is limited[350].

In order to increase the application of Regulation (EU) 2018/1805, therefore, the expansion of harmonisation through the new Directive will be significant.

The emergence of ever new forms of confiscation without conviction also stems from the questions that the Court of Justice is increasingly called upon to address; for example, whether national legislation falls within the model of confiscation without conviction provided for in Article 4, c. 2 of Directive 42/2014 – limited to cases of flight and sickness – where «a national court rules on the confiscation of the proceeds of crime in a separate proceeding concerning illicitly acquired property, which is separated from the main criminal proceeding before the commission of a crime has been established and a person has been declared responsible for it, and which also provides for confiscation on the basis of documentation extracted from the investigation file of the criminal proceeding»[351]. The spread of this model of confiscation had already been attested by the jurisprudence of the Court of Justice, which recognised that the instruments aimed at pursuing harmonisation functional to mutual recognition in this area constitute only

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[348] It is proposed, for example by Eurojust to specify in Regulation 1805/2018, «In the REG Advance restitution of frozen property to the victim when the title to the property is not contested (Art. 29 REG); preferent and direct compensation of victims before the disposal between issuing/executing States (Arts. 29 & 30 REG recognize the victims rights as provided in Arts. 15 & 16 Directive 2012/19)». See MAUGERI (2025), p. 1012.

[349] OCHNIO, *op. cit.*, 444.

[350] GRANDI (2023), p. 306 citing Case C-168/13 PPU, *Jeremy* (30.5.2013); LENAERTS-GUTIÉRREZ-FONS (2016) , p. 7 ff.; MITSILEGAS (2021), p. 97.

[351] Reference for a preliminary ruling brought by Satversmes tiesa (Latvia) on 1 Feb., 2023 – AZ, 1Dream OÜ, Produktech Engineering AG, BBP, Polaris Consulting Ltd v Latvijas Republikas Saeima, Case C-49/23, 1Dream and Others, *Referring* Judge Satversmes tiesa, *Applicants:* AZ, 1Dream OÜ, Produktech Engineering AG, BBP, Polaris Consulting Ltd *Respondent:* Latvijas Republikas Saeima; in the same terms Summary of Reference for a preliminary ruling, 16 March 2023, Vl *Zs Lireva Investments Limited* Vi *Fortress Finance Inc.* v. Latvijas Republikas Saeima (Parliament of the Republic of Latvia), § 1.1.

minimum standards and do not preclude «a Member State's legislation that provides for the confiscation of illicitly acquired property to be ordered by a national court at the end of proceedings that are not conditional on the establishment of a crime, nor, a fortiori, on the conviction of the alleged perpetrators of that crime»[352].

Certainly, a clearer position on the notion of "proceedings in criminal matters" within the meaning of Article 1 of the Directive, as an autonomous concept of EU law, as specified in recital 7, would be desirable. In this respect, the broad notion adopted in the Regulation ("proceedings related to a criminal offence") – accepted in the Commission's version of the Directive but not retained in the text amended by the Council – could represent a useful model, combining a broad notion with the imposition of the essential guarantees of criminal matters provided for in the EU Charter of Fundamental Rights, as well as all the guarantees laid down in the relevant Directives referred to in recital 18 of the Regulation and recital 51 of the Directive under consideration.

With regard to the different models of confiscation, a clearer and unequivocal stance in favour of a higher standard of proof as to the illicit origin of the proceeds would likewise be desirable, particularly in light of the presumption of innocence under Art. 48 of the EU Charter of Fundamental Rights, recalled in recitals 46 and 51. This applies, first and foremost, to the extended confiscation model set out in Article 14, even if considerations of expediency likely prevail in leaving room for manoeuvre to the Member States, between a reinforced civil law standard and the criminal law standard. In any event, no forms of reversal of the burden of proof are envisaged, as is also apparent from the rules on the right of defence under Art. 24 – as examined – and, indeed, where the application of this form of confiscation is limited at least to offences punishable by a maximum sentence of more than four years, such a limitation entails the imposition on the prosecution of a precise and stringent burden of proof as to the provenance of the assets from specific crimes, proof of illicit origin in the negative (based solely on the lack of a valid positive justification of lawful origin) being insufficient.

A stricter and clearer position regarding the standard of proof would also be required in relation to the actio in rem provided for in Article 16, which represents the true model of confiscation without conviction in an autonomous proceeding "in criminal matters" and is intended to allow the proceeds of crime to be confiscated even in the absence of a conviction in criminal proceedings. In a state governed by the rule of law, the confiscation of entire assets, even where no conviction for specific source offences exists, should be grounded in criminal-law circumstantial evidence, on the model of Italian Art. 192 of the Code of Criminal Procedure (serious, precise, and concordant evidence), and the right of defence, as provided for in Art. 24, should be fully guaranteed, allowing the defence to challenge the prosecution's arguments and to prove the lawful origin of its assets in proceedings that respect the adversarial principle. .In comparison with this model, the position adopted by the LIBE Committee during the

[352] CJEU, 19 March 2020, C-234/18, Komisia v. BP and others, in connection with Framework Decision 212/2005 (embezzlement case), related to Decision 783/2006 on mutual recognition; CJEU, 19 March 2020, "Agro In 2001", C-234/18, EU:C:2020:221, § 62.

drafting of Directive 42/2014 was certainly more courageous, as it brought this form of confiscation, defined as a sanction, within the notion of "criminal matter" for the purposes of applying the guarantees provided by the ECHR, starting with the principle of non-retroactivity, the presumption of innocence, the principle of proportionality, and ne bis in idem. More recently, the issue has been raised before the Court of Justice concerning the compatibility with the presumption of innocence of a form of confiscation without conviction (in Latvia) which, although it does not require a criminal conviction, is based on the presumption of the owner's involvement in criminal activity and thus ultimately expresses a finding of guilt[353]: «Therefore, there are doubts as to whether, in the event that the disputed provisions fall within the scope of the regulatory instruments of the European Union, a national legislation which, in proceedings concerning illicitly acquired property , establishes a legal presumption as to the fact as to the criminal origin of the property and places the burden of proving the lawfulness of the origin of the property on the person connected with the property, is in conformity with the right to an effective remedy enshrined in Article 47 of the Charter, the principle of the presumption of innocence enshrined in Article 48 of the Charter and the guarantees set out in Article 8(1) of Directive 2014/42».

In the case at hand, this is a form of confiscation that is based on establishing the criminal origin of the property according to the civil standard of proof («Article 124, § 6, of the Code of Criminal Procedure introduces a reduced standard of proof in relation to illicitly acquired property – the 'preponderance of probabilities'»)[354].

In this regard, as examined elsewhere, it can only be recalled that, while recognising that extended confiscation without conviction does not tout court pursue a punitive purpose in relation to criminal conduct that cannot be ascertained, but rather aims at removing wealth of illicit origin from crime – especially organised crime – whichh constitutes a factor in the pollution of the market and the lawful economy, nevertheless, in view of the stigmatising impact on the owner that such confiscation models entail (assets are confiscated as illicit and, therefore, insofar as the owner is held responsible for crimes from which the assets accumulated over time originate) and the

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[353] Vl Zs *Lireva Investments Limited* Vi *Fortress Finance Inc. v.* Latvijas Republikas Saeima, cited above, § 21: «Although it is true that, according to Latvian legislation, the purpose of the proceedings concerning illicitly acquired assets is not to ascertain a person's guilt, it is equally true that presumption of innocence is violated not only by a specific statement about the person's guilt, but also by an assessment of whether the person is guilty of a crime. The assessment of the possible criminal origin of the assets is thus closely related to the question of whether money laundering operations were carried out with the assets in question. The conclusion reached by the prosecutor or the judge is likely to be considered as an assessment of the person's guilt with regard to the commission of a crime. Thus, it could be concluded that the disputed provisions impose an obligation on the person connected with the assets to rebut the presumption of involvement in money laundering activities. Such a situation would be contrary to the principle of the presumption of innocence».

[354] Idem, § 19: «so that in proceedings concerning illicitly acquired property, the prosecutor is not required to prove the criminal origin of the property beyond a reasonable doubt. From the moment the prosecutor informs the person connected with the property that the property is presumed to have been unlawfully acquired, it is incumbent on the latter, if he believes that there is no reason to believe that the property was unlawfully acquired, to prove the lawful origin of the property».

associated limitations of rights (first and foremost in terms of freedom of economic initiative, as evidenced, in the Italian legal system, by the requirements imposed by Articles 66 and 67 of Legislative Decree 159/2011), such measures should fall within the broad notion of "criminal matters" envisaged by the ECHR. In any event, it should be required that, in the absence of a conviction, in a state governed by the rule of law, the ablation of profits be justified only insofar as their criminal origin is established according to a criminal standard of proof. Only in this way, paradoxically, will it be possible to bring to the fore, despite the stigmatising punitive effect of such a sanction, the economic and remedial balancing function referred to by the ECtHR (inter alia, in the Gogitidze judgment[355]) and the Italian Constitutional Court in judgment No. 24/2019.

Greater specification of the list of guarantees granted to the recipients of freezing and confiscation orders is therefore desirable. Articles 23 and 24 of the Directive, which provide for the right to inform the person concerned, to an effective remedy, to a defence, and to an impartial judge, broadly echo Article 8 of the previous Directive; however, a richer set of procedural guarantees would be required, starting with the principle against self-incrimination and the right to silence. It is understood that Recital 51, modelled on Recital 18 of Regulation 1805/2018, calls for compliance with Directives 2010/64/EU on the right to interpretation and translation in criminal proceedings, 2012/13/EU on the right to information in criminal proceedings, 2012/29/EU establishing minimum standards on the rights, support, and protection of victims of crime, 2013/48/EU[356] 2016/343 on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings, 2016/800 on procedural safeguards for juveniles suspected or accused in criminal proceedings, and 2016/1919 on legal aid; in addition, as examined, protection of personal data must be ensured in accordance with Directive (EU) 2016/680.

It should also be recalled that, under Article 8(1)(f) concerning freezing orders and Article 19(1)(h) concerning confiscation orders, the violation of a fundamental right constitutes a ground for refusal of mutual recognition under Regulation 1805/2018, and that Recital 18 of the Regulation, as already noted, requires for the purposes of mutual recognition that «the guarantees provided for in the Charter should apply to all proceedings governed by this Regulation. In particular, the essential guarantees for criminal proceedings provided for in the Charter should apply to proceedings in criminal matters which are not criminal proceedings but which are governed by this Regulation». Greater clarity would nevertheless be desirable as regards what is referred to in the same Recital 18 as "the essential safeguards for criminal proceedings set out in

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[355] Constitutional Court 24 Jan. 2023, no. 5, § 6.3.1, which specifies that «6.3.That being said, it should be noted, however, that when – as in the case that gave rise to the proceedings a quo – confiscation is imposed by the judge with the ruling declaring the extinction due to the intervening oblation of the contravention referred to in the combined provisions of Art. 17 and 38, seventh paragraph, TULPS, a constitutionally oriented interpretation of the rules censured requires that such a measure can be pronounced only as a result of the ascertainment of the legal prerequisites justifying the application of the measure».

[356] Related to the right to avail oneself of a lawyer in criminal proceedings and proceedings for the execution of the European Arrest Warrant, the right to inform a third party upon deprivation of liberty, and the right of persons deprived of their liberty to communicate with third parties and consular authorities.

the Charter", which "should also apply to proceedings on criminal matters which are not criminal proceedings", namely those covered by the Regulation. The hope is that the Directive may serve as a tool for the construction of a "fair trial of assets", prompting the necessary legislative reforms in all Member States, which are called upon effectively to implement «all the procedural guarantees provided for by Article 6, § 3, of the ECHR in relation to criminal matters: this is a step that assumes a decisive value both to ensure respect for constitutional and conventional principles and to internationalize strategies to combat the economic bases of criminal organizations»[357].

In each Member State, a fair trial of assets must form part of the national strategy to combat fraud and corruption affecting the EU's financial interests.

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[357] Così BALSAMO-FUSCO (2023), § 2.

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