

Mutual Recognition of Restraint & Confiscation Orders in Europe

Anna Maria Maugeri

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MUTUAL RECOGNITION

- **This principle has to be the cornerstone of judicial co-operation in both civil and criminal matters within the Union (§ 33) (conclusion Tampere European Council (1999));**
- **it should apply both to judgements and to other decisions of judicial authorities: (§ 36) “The principle of mutual recognition should also apply to **pre-trial orders**, in particular to those which would enable competent authorities ... to seize assets which are easily movable”.**

harmonisation - mutual trust

- Mutual recognition has to be built
- on the **harmonisation** of the confiscation models and, first of all,
- on the **mutual trust**, which demands the **respect for the safeguards of the rule of law**.

- This presentation is focused on analysing these two connected aspects, in particular in relation to the two types of confiscation which are considered more efficient in order to facilitate the demonstration of the illegal origin of the assets to forfeit:
- the **extended confiscation** and the **non-conviction based confiscation**

key aspects

- 1) the model of extended confiscation
- 2) Harmonisation extended confiscation:
Directive 42/2014, implemented in 19 MS
- 3) Mutual recognition:
 - Framework decision 783/2006
 - Proposal of regulation December 2016
- 4) ECHR case law
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Extended
confiscation

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graph TD; A[Extended confiscation] --> B[CONFISCATION Penalty]; A --> C[Confiscation: presumption of illicit destination]; A --> D[Confiscation: presumption of illicit origin]; A --> E[No conviction based confiscation: actio in rem];
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CONFISCATION
Penalty

Confiscation:
presumption of
illicit destination

Confiscation:
presumption of
illicit origin

No conviction
based
confiscation:
actio in rem

Comparative survey: four models of confiscation (extended)

- In the comparative survey of current law systems it is possible to identify four models of confiscation intended to fight organised crime:
- the criminal penalty;
- confiscation based on the presumption of the illegal destination of the assets;
- confiscation of the suspected illicit proceeds, based on the presumption of the illegal source of the proceeds,
- and the *actio in rem*.

I: The confiscation penalties

- These penalties allow confiscation of all or part of the property of a convicted person, irrespective of whether the assets are procured illegally or legally.
- the *Vermögensstrafe* (patrimonial sanction) in Germany, § 43a StGB
- the *confiscation générale* in France, which affects also the legal persons (Article 229-49 French Penal Code)
- Criminal forfeiture, United States

II : confiscation based on the presumption of the criminal destination of the assets

- belonging to the convicted person
- it is therefore possible to confiscate all the assets of the defendant **because of the suspicion of their availability for the criminal organization.**
- § 72 swStGB, - *Vermögenseinziehung*
- § 20b öStGB (*Erweiterter Verfall*)
- § 13 of the **British *Prevention of Terrorism (Temporary provisions) Act 1989*** (replaced by [Terrorism Act 2000](#), the [Prevention of Terrorism Act 2005](#) and the [Terrorism Act 2006](#); see also [Terrorism \(Northern Ireland\) Act 2006](#))

The **third** model of confiscation: presumption of the illegal origin

- it is not necessary to ascertain the link between the crime and the proceeds, **the origin of the money from the crime.**
 - The **presumption of the illegal origin** of the assets follows the conviction for some crimes;
 - the **owner must give evidence of the legal origin of his assets.**
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- **Erweiterter Einziehung (§ 73aStGB)**
 - **Decomiso ampliado (art. 127 - Ley organica 2010)**
 - **Art. 12 sexies d.l. 306/'92 (law 356/'92)**
 - **British confiscation (Proceeds of Crime Act 2002 as amended)**
 - **Erweiterter Verfall § 20b (2) ÖStGB**
 - **comiso ampliado, § 7 Portuguese Law no. 5/2002,**

ACTIO IN REM

CONFISCATION NO-CONVICTION BASED

- Confiscation is ordered in an independent proceeding against the proceeds or the instruments of the crime (*actio in rem*).
- Civil forfeiture (British, Irish)
- Confisca di prevenzione (art. 24 d.lgs. 159/2011 antimafia code, ex art. 2 ter l. 575/'65, introduced with the law 456/'82)
- el decomiso sin sentencia, art. 127 ter CP, Ley organica 1/2015

Italian confiscation – preventive measure

- confiscation of assets which a subject has at his disposal,
- when the value of said assets is **disproportionate** to declared income or economic activity,
- or when *it results* that they are **derived from illicit activity or used for reinvestment**,
- and are assets for which **the defendant has not demonstrated a legitimate origin**

Follows: recipient (art. 16 Antimafia Code)

- specific categories of persons who have not been attributed criminal responsibility through sentencing, but they are considered a **danger for society** because are suspected, based on objectively verifiable facts, of crimes (first of all, to be a member or close to Mafia)
- individuals who, on the basis of factual evidence, may be regarded as **habitual offenders (also tax evader)**;
- individuals who, on account of their behaviour and lifestyle and on the basis of factual evidence, may be regarded as **habitually living, even in part, on the proceeds of crime**;

Preventive measure after acquittal

- preventive measures were applied under the 1956 Act against persons suspected of crimes before their conviction and in the event of their acquittal or of a *sentenza di proscioglimento* pronounced in accordance with Article 530 § 2 of the Code of Criminal Procedure for insufficient or contradictory evidence.

Risk: instrumentalisation of preventive measures for the purposes of “punishing”

- Despite the formal separation between criminal proceedings, governed by the Code of Criminal Procedure, and proceedings for the application of preventive measures, governed by the antimafia code (l.d. 159/2011), **evidence collected in the former proceedings could be used in the latter proceedings as indicative of the need for preventive measures.**
- This obviously provided scope for the instrumentalisation of preventive measures for the purposes of “punishing” those who had been cleared of accusation in criminal proceedings. In these circumstances, preventive measures were nothing but a “second-class” criminal punishment, **“penalties based on suspicion”** .

Sine die: the dangerousness is non-current,
against ECourHR, 3 June 2015, *Dimitrovi v. Bulgaria*, no.
12655/09, § 46

- : “In that regard, the Court notes that in the case at hand the CPA provided that the State’s claims under its Chapter Three **could not lapse through prescription** (see paragraph 25 above), which meant that **individuals being investigated under it could be required to provide evidence of the income they had received and their expenditure many years earlier and without any reasonable limitation in time**”;
- “the prosecution authorities were free to **“open, suspend, close and open again proceedings at will at any time”**”.
- All this, coupled with the fact that the procedure under Chapter Three of the CPA was very rarely resorted to after 1989 (see paragraph 28 above), means that the CPA did not meet the foreseeability requirement set out in the paragraph above, which entails that a person should be able – if need be with appropriate advice – **to reasonably foresee the consequences which a given action may cause** (see, *mutatis mutandis*, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 41, ECHR 2007-IV)”.
- Risk for the rehabilitation: *R v Padda (Gurpreet Singh)*, [2013] EWCA Crim 2330

The "Report on the consistency, destination and use of the frozen and confiscated goods" by the House of Representatives of February 2016 (updated to September 30, 2015),

- takes into account the data for the last five years (2011-2015).
- In total, the assets seized and confiscated in the national database are 148,056, of which 17,856 are seized (12% of the total and 13,418 in the last five years), most of which (7,437) in Sicily. Confiscated, temporary or definitive assets in Banca Dati are 50,176.
- In the first place, the southern regions accounted for 72.9%, with Sicily at 25.4% (12.755 on 36.566 cases in the South). Palermo has the priority, with 5,874 confiscations in the last five years
- In the years 2011 – 2015 the companies involved are 912 in 2011, 1.054 in 2012, 1.549 in 2013, 1.874 in 2014, 2.514 in 2015; the trend is growing.

Harmonisation - Extended confiscation: Council Framework Decision 2005/212/JHA.

- The Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property is intended:
- “to ensure that all Member States have effective rules governing the confiscation of proceeds from crime, inter alia, in relation to the onus of proof regarding the source of assets held by a person convicted of an offense related to organized crime”.

Directive n. 42/2014 - maximal legislative option: minimum rules

- Among the several policy options representing different degrees of EU level intervention, Member States preferred the maximal legislative option, which would considerably enhance:
- the harmonisation of national rules on confiscation and enforcement,
- in this direction the recital n. 5 insists that the Directive's aim is “the adoption of minimum rules”, which “will approximate the Member States' freezing and confiscation regimes, thus facilitating mutual trust and effective cross-border cooperation”.

These common minimum rules concern:

- the confiscation of proceeds and instrumentalities of crime,
- including in cases of illness or absconding of the suspect or accused person, where criminal proceedings have already been initiated;
- Confiscation of the value
- extended confiscation;
- third party confiscation.

Directive n. 42/2014

Art. 5: extended confiscation

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

The scope of the extended confiscation

- **the crimes listed in art. 3, corresponding to the crimes listed in Article 83(1) TFEU as set out in existing Union legislation**
- **other criminal activities not specifically listed in Article 83(1), where those activities are committed by participating in a criminal organization as defined in Framework Decision 2008/841/JHA on the fight against organised crime (art. 3, I)).**

art. 3 of the Directive, last §

- The last paragraph of art. 3 of the Directive, amended by LIBE Commission (amendment n. 28), spreads out the definition of criminal offences covered by the Directive:

“as well as other legal instruments if those instruments provide specifically that this Directive applies to the criminal offences harmonised therein” (art. 83, § 2 TFUE)

The scope: recital n. 20

- Moreover in the recital n. 20 the scope of the directive is extended not only to the
- offences committed in the context of organised crime (recitals n. 1 and 19), but also
- “with the intention of generating regular profits from criminal offences” (“habitually committed serious offences aimed at creating gain”).
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Reinforced civil standard

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

the expression ***“is satisfied”*** demands a **lower standard of the proof than the *“fully convinced”***, used in the Framework decision n. 212/2005, art. 3.

recital n. 21 requires: “*is substantially more probable*, that the property in question”

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

the “clear and convincing evidence” standard

- Article 5 could be interpreted like the “clear and convincing evidence” standard, a reinforced civil standard which ensures that the unlawful origin of the proceeds *is certainly more probable than not*.
- **The civil standard of the proof, even if strengthened, will cause an inevitable weakening of the safeguards of “criminal matter”, firstly of the presumption of innocence and the right to defense.**
- The civil standard of the proof is acceptable only in civil cases because “the society has a minimum interest in the outcomes of these private cases”.
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- The directive adopts the opinion, expressed in some Italian Supreme Court's judgments, which admits the mitigation of the constitutional guarantees in respect of property right;
- **the presumption of innocence, art. 27 paragraph 2 of the Constitution, concerns only the protection of the personal freedom, art. 13 Cost.;**
- **the right to silence regards only the demonstration of the liability of the accused, and after the conviction, it isn't relevant (art. 12 *sexies* doesn't "presume" the guilt of the accused but only the unlawful source of the assets).**

ECHR

- the European CourtHR held that **the right to be presumed innocent under Article 6 § 2 doesn't arise in confiscation proceedings, which adopt the civil standard of the proof (British and Dutch *confiscation*), because they don't involve being charged with a criminal offence, ex art. 6, c. 2 CEDU or a *new charge* within the autonomous Convention meaning;**
- only the principle of the fair trial ex art. 6, c. 1 is applied, provided that the presumptions aren't absolute and remain within reasonable limits, and maintain the rights of the defence.



Silence of the defendant = evidence

- The problem is that the silence of the accused becomes evidence: **the silence supports the presumption of the illicit origin of the assets;**
- as the Italian Supreme Court affirms, in order to refute the presumption, **the owner has to fully demonstrate how he has economically accumulated the assets** (but it is not considered a reversal of the burden of the proof, but a **onus of allegation**)

Art. 5 and recital n. 21: Disproportionality

- *“the value of the property is disproportionate to the lawful income of the convicted person”*
- The recital n. 21 also suggests considering **“the fact that the property of the person is disproportionate to his lawful income”** “among those facts giving rise to a conclusion of the court that the property derives from criminal conduct”.
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This element is requested by

- art. 12 sexies law decree 306/92 (extended confiscation after conviction) of the Italian system of law (and also for the confiscation preventive measure)
- and by the Art. 127 bis Código Penal (*L.O. 1/2015*), comiso ampliado
- Art. 437 StPO (special rules for the independent recovery procedure) gross disproportion (2017 reform)

Italian Supreme Court Interpretation

- Italian Supreme Court imposes on the prosecutor to demonstrate that
- **the value of each good is disproportionate to the lawful income of the convicted person at the moment of the acquisition;**
- the generic proof of the disproportionate character of the estate isn't enough, but the prosecutor must show specific evidence about the disproportionate character of each acquisition.
- **In this way the defendant is burdened only to prove the legal origin of the goods whose disproportionate character was established and limited to the moment of the acquisition.**

Temporal limit of the presumption of the illegal origin

- The recital n. 21 contains another important element to limit the application of the extended confiscation: “Member States could also determine a requirement for a **certain period of time** during which the property could be deemed to have originated from criminal conduct”.

Temporal limit: proportionality

- **In some systems of law the presumption of the illegal origin of the convicted person's assets is temporally limited in order to respect the principle of proportionality and not demand a probatio diabolica**

(to demonstrate the lawful origin of the whole estate without temporal limit);

for example in the British system for 6 years (Proceeds of Crime Act 2002 allow the courts, save for proof to the contrary, to deem that all property acquired by the convicted individual in the six years prior to the conviction, and also thereafter, constitutes the proceeds of unlawful activities).

“up to the assessed value of the intermingled proceeds”

- Another important limit to the extension of this model of confiscation derives from the definition of the concept of proceeds offered by the directive’s **recital n. 11**:
- “Thus proceeds can include any property ...that which has been intermingled with property acquired from legitimate sources, **up to the assessed value of the intermingled proceeds**”.

Impresa mafiosa

Mafiosa company/firm

- This specification – “up to the assessed value of the intermingled proceeds” – is very important
- against the temptation of Italian Supreme Court to apply the extended confiscation (art. 12 *sexies* d.l. 306/92) or the preventive measure (art. 2 *ter* l. 575/65 – art. 24 cod. mis. di prev.)
- to entire companies (impresa mafiosa)
- when the illicit proceeds were invested in the business, because it would be impossible to separate licit from illicit property;
- in this way the extended confiscation becomes a **kind of general confiscation**, a disproportionate punishment in violation of the legality principle and of the constitutional protection of the private property, as well as of the principle of proportionality
-

recital n. 17 and 18: clause of proportionality

- the Directive (recital n. 17 and 18) provides for the introduction of the **clause to ensure compliance with the principle of proportionality**, established in some legal systems (*Härtevorschrift*, § 73 c StGB, *Grundsatz der Verhältnismäßigkeit* § 74 b StGB)
- (17) For the **confiscation of property the value of which corresponds to instrumentalities**
- (18) in exceptional circumstances, when confiscation represent **undue hardship** for the affected person,
- in cases where it would put the person concerned in a situation in which **it would be very difficult for him to survive.**

Harmonisation: Art. 4 of the Directive

Non conviction based confiscation.

- The Art. 4 of the Directive (art. 5 of the proposal) introduces a
- *non-conviction based confiscation* in limited circumstances, with a view to addressing cases where criminal prosecution cannot be exercised because
- **the suspect is permanently ill or when his flight or illness prevents effective prosecution** within a reasonable time and poses the risk that it could be barred by statutory limitation.

The case of the suspect's death

- In the Proposal it was included also the case of the suspect's death (art. 5); the Italian and British system of law provide for this case, considered very important in the fight against the organised crime

only the confiscation of the property

- It seems possible to apply without conviction only the confiscation of the property provided by art. 2 of the Directive
- and not also the extended confiscation by art. 5, as it has been already established in several legal systems

**implementation of the directive:
two different approach in relation to non-
conviction based confiscation**

- Only in the case of illness and absconding:
in Austrian § 445 öStGB
- Also in the case of the death of the offender, the
extinction of the crime, lack of responsibility of
the author, and in relation to every crime and not
only against the Eurocrimes, indicated in the art.
83, c. 1: in Spain, **el decomiso sin sentencia,**
art. 127 ter CP, Ley organica 1/2015

Third party confiscation

- is allowed only under specific conditions, i.e.
- **where the acquiring third party paid an amount lower than market value and**
- **should have suspected that the assets are proceeds of crime,** and after an assessment showing that confiscation of assets directly from the person who transferred them is unlikely to succeed

the rights of third party

- This rule introduces **two well-balanced and appreciable criteria to protect the rights of third party:**
- **bona fide and**
- **the payment of the market value (an appropriate price);**
- (such criteria are already used within some legal systems and have been introduced by CAFRA 2000)

Article 4, § 2, and the recital n. 15:

- **Article. 4, § 2, or the recital n. 15 does not exclude the possibility that a Member State may introduce forms of confiscation without conviction in other situations;**
- **both specify that the non-conviction based confiscation has to be guaranteed**
- **“at least in the cases of illness or absconding of the suspected or accused person”**

the recital n. 22

- affirms that
- “This Directive lays down minimum rules” and “it does not prevent Member States from providing more extensive powers in their national law, including, for example, in relation to their rules on evidence”.

minimalist approach

- Also in this case the minimalist approach is adopted: **the directive takes no position on the essential safeguards that must accompany the regulations on confiscation.**
- This means that the Italian confiscation preventive measure and the British civil recovery or Irish civil forfeiture are not inconsistent with the Directive, but the mutual recognition isn't mandatory for them

the nature of the confiscation

- **The Directive, in fact, allows the MS to choose the nature of the confiscation;**
- **this is established in the recital n. 13:** “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”
- **or in the recital n. 10 :**“Member States are free to bring confiscation proceedings which are linked to a criminal case before any competent court”.

Mutual recognition of confiscation: Framework Decision 2006/783/JHA

- The Council has adopted Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, **in particular to implement extended confiscations under Article 3 of the Framework Decision 2005/212/JHA, now replaced by the art. 5 of the Directive n. 42/2014**

Dual criminality checks: abolished in relation to 32 categories of offences

- This Framework Decision applies the principle of mutual recognition to confiscation orders issued by a court competent in criminal matters for the purpose of facilitating enforcement of such confiscation orders in a Member State other than the one in which the confiscation order was issued. It applies to all offences in relation to which confiscation orders can be issued.
- Dual criminality checks were abolished in relation to 32 categories of offences listed in the Framework Decision.

Art. 7

- According to Article 7, a confiscation order must be recognised without any further formality and all the necessary measures for its execution must be taken immediately

Article 8: grounds for refusal

- Article 8 provides for a number of grounds that can constitute a basis for refusing recognition or execution.
- All grounds set out in this Article are optional for the Member States, who may choose to implement them or otherwise, and may also make their implementing laws subject to more stringent conditions than those laid down in this provision (ECJ (Grand Chamber) Case C-123/08, *Dominic Wolzenburg*, (2009) ECR I-09621).
- If implemented, grounds of refusal should be written into domestic law as optional for the competent authority ("The competent authority of the executing Member State *may* refuse...").
- Since they constitute a derogation from the general principle of mutual recognition, **the list of grounds is exhaustive, so the Member States cannot include any additional grounds for refusal in implementing legislation.**
-

Framework Decision 2006/783/JHA

Opinion of some authors

- Although Framework Decision 2006/783/JHA is the leading legal instrument on mutual recognition of judicial decisions on confiscation **the mutual recognition of confiscation issued by a non-criminal court is confronted with significant difficulties, because:**
- **Article 1 (Objective) demands a court competent in criminal matters**
- **art. 2 defines 'confiscation order' as final penalty or measure imposed by a court following proceedings in relation to a criminal offence or offences**, resulting in the definitive deprivation of property; so demanding a judicial proceeding connected with one or more crimes

conviction

- **Not only that, but the Framework Decision refers to confiscation orders against the convicted individual, insisting that it concerns forms of criminal confiscation, issued as a result of a criminal trial in the strict sense.**



Contra

- **The framework decision, however, allows the mutual recognition of confiscation orders taken with additional powers of confiscation, - permitted by the f.d. 212/2005 (now by directive n. 42/2014)**
- **regardless of the safeguards recognized and the powers implemented, which can conflict with the fundamental principles such as the presumption of innocence.**

THE OPPOSITION OF THE GROUNDS FOR REFUSAL

- In this way, the Framework Decision has **chosen not to establish a minimum standard of essential safeguards**, on which the principle of mutual recognition should be based,
- but, while **admitting the application of this principle in relation to forms of confiscation applied without the safeguards laid down in Decision 212**, allowing the opposition of the grounds for refusal

GROUND FOR REFUSAL : ART. 8 N. 2, G) AND N. 3



n. 2, g): “the confiscation order, in the view of that authority, was issued in circumstances where confiscation of the property was ordered under the extended powers of confiscation referred to in Article 2(d)(iv)”

Art. 7, n. 5 MS declaration

- Each Member State, in fact, may deposit at the Secretary-General a declaration that its competent authorities will not recognize confiscation orders based on the extended powers of confiscation referred to in Article 2, letter d), iv), ie, extended powers of confiscation under the law of the issuing State.
- Such a declaration may be withdrawn at any time.

Actio in rem: the recognition isn't mandatory

- In conclusion the Framework decision n. 783/2006 doesn't impede the mutual recognition of confiscation orders issued in an actio in rem, but in this case the recognition isn't mandatory

the mutual recognition of confiscation orders is an instrument that is not widely used

- as shown in the reports of 2008 and 2010, respectively, on the state of implementation of the previous Framework Decisions 2003/577 / JHA, - on the mutual recognition of seizure and freezing orders - and on the Framework Decision 2006/783 / GIA,
- as well as the "2012 Impact Assessment" report, which accompanied the proposal for Directive 2014/42 / EU
- and the Impact study carried out by the Commission (Inception Impact Assessment 7-11- 2016)

Mutual recognition - cooperation non-conviction based confiscation

- **Until now the 1990 Council of Europe Strasbourg Convention,**
- ratified by all EU MS, remains the cornerstone of judicial cooperation in relation to confiscation without conviction,
- **because the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism hasn't been ratified by many MS.**

“penalty” or “measure”

- However, at the same time, the Convention requires that the confiscation has been ordered by a court “following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property”: **also proceedings *in rem* are considered**

explanatory report

- **each type of procedure**, regardless of its connection with criminal proceedings and the procedural rules applicable, **can be the basis for the application of a confiscation order**,
- **as long as it is conducted by a judicial authority and has criminal nature because it concerns the instruments and the proceeds of crime**: proceedings in rem, it is specified in the report, fall into this category (art. 13)

Crisafulli-Friolo case

- Is an interesting case of judicial cooperation relating to a Italian confiscation preventive measure.
- The French Supreme Court upheld the decision of the Appeal Court of Aix en Provence (19 December 2002), which authorized the implementation in France of a confiscation pronounced by the Milan Criminal Court against a property, which is considered the product of money laundering from drug trafficking.

- The Court based its decision on the fact that, pursuant to art. 12 and 14 of the Strasbourg Convention of 1990, mutual assistance was required;
- the confiscation order was final and enforceable;
- the French law provided for the confiscation of the proceeds of drug trafficking and subsequent money laundering activities.
- **the French legislation does not require the same legislation (with the risk of hindering any cooperation),**

Swiss Federal Criminal Court's Appeals Chamber 1.12.2010

- The denomination of the procedure is not crucial and the case shall be decided based on the law of the requested state.
- The European Court HR has already confirmed the legitimacy of Italian preventive measure proceeding (and UK civil recovery proceeding). The purpose of the preventive seizure and confiscation set by the Italian law is ***“to prevent the illicit use, in a way dangerous to society, of possessions whose lawful origin has not been established”***.
- The Italian patrimonial preventive proceeding has the features of a penal proceeding

Report of Italian Antimafia National Prosecutor - 2016 (p. 241)

- In recent years, there has been a **progressive increase in requests for execution of seizure and / or preventive confiscation orders abroad**, which was followed by an **increasingly important number of positive outcomes.**
- “the European countries affected by requests of judicial assistance for the execution of seizure or confiscation issued by the Italian judicial authority in preventive proceedings .. are, among others, **France, Holland, Spain, Luxembourg, Ireland, Austria and the United Kingdom.**”

Statement of the European Parliament and the Council “on an analysis to be carried out by the Commission”

- In approving the directive the European Parliament and the Council have issued a statement which **urges the Commission to undertake further analysis in order to identify a model of actio in rem in respect of shared common legal traditions:**
- "The European Parliament and the Council call on the Commission to analyse, at the earliest possible opportunity and taking into account the differences between the legal traditions and the systems of the Member States, the feasibility and possible benefits of introducing further common rules on the confiscation of property deriving from activities of a criminal nature, also in the absence of a conviction of a specific person or persons for these activities".
- **The European legislator is aware of the need for further reflection on whether to valorise the *actio in rem*.**

- the European Parliament and the Council called on the Commission to present a legislative proposal on mutual recognition of freezing orders and confiscation orders.

Proposal for a Regulation of the European Parliament and of the Council

**on the mutual recognition of freezing
and confiscation order ” 2016**

New version 1 December 2017

Recital n. 37

- Provisions of Framework Decision 2003/577/JHA should be replaced by this Regulation between Member States bound by it as regards freezing with a view to the subsequent confiscation of property.
- This Regulation should also replace Framework Decision 2006/783/JHA as between Member States bound by it.

aim

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

REGULATION, art. 82, c. 1 TFUE

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

Effect on substantive issues

- **but it is also a bit problematic** because,
 - even if involves only the cooperation and not the harmonisation, which demands a directive as established in art. 82 § 2 -, the mutual recognition, apparently unrelated to **substantive issues**, however, **ends to exercise a drag effect on the same**

Recital n. 37a)

- **The legal form of this instrument should not constitute a precedent for future legislative instruments of the Union in the field of mutual recognition of judgments and judicial decisions in criminal matters.**
- **The choice of the legal form for future instruments should be carefully assessed on a case-by-case basis taking into account amongst others the effectiveness of the instrument and the principles of proportionality and subsidiarity.**

Without double cecking

- participation in a criminal organisation,
- (2) terrorism,
- (3) trafficking in human beings,
- (4) sexual exploitation of children and child pornography,
- (5) illicit trafficking in narcotic drugs and psychotropic substances,
- (6) illicit trafficking in weapons, munitions and explosives,
- (7) corruption,
- (8) fraud and other criminal offences as defined in Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law,
- **16** Directive 2017/1371/EU 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).
- 15104/17 SC/mvk 23 ANNEX DG D 2B EN
- (9) fraud, including that affecting the financial interests of the European Union within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- **17** Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995, p. 49).
- (10) laundering of the proceeds of crime,
- (11) counterfeiting currency, including the euro,
- (12) computer-related crime,
- (13) environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- (14) facilitation of unauthorised entry and residence,
- (15) murder, or grievous bodily injury,
- (16) illicit trade in human organs and tissue,
- (17) kidnapping, illegal restraint or hostage-taking,
- (18) racism and xenophobia,

- (19) organised or armed robbery,
- (20) illicit trafficking in cultural goods, including antiques and works of art,
- (21) swindling,
- 15104/17 SC/mvk 24 ANNEX DG D 2B EN
- (22) racketeering and extortion,
- (23) counterfeiting and piracy of products,
- (24) forgery of administrative documents and trafficking therein,
- (25) fraud and counterfeiting of non-cash means of payment,
- (26) illicit trafficking in hormonal substances and other growth promoters,
- (27) illicit trafficking in nuclear or radioactive materials,
- (28) trafficking in stolen vehicles,
- (29) rape,
- (30) arson,
- (31) crimes within the jurisdiction of the International Criminal Court,
- (32) unlawful seizure of aircraft or ships,
- (33) sabotage.
- 2. For offences other than those referred to in paragraph 1, the executing State may make the recognition and execution of a freezing order or a confiscation order subject to the condition that the acts giving rise to the freezing order or the confiscation order constitute an offence under the law of the executing State, whatever its constituent elements or however it is described under the law of the issuing State.

All types of confiscation orders within the framework of criminal proceedings

- in order to impose the mutual recognition of all types of orders covered by Directive 2014/42/EU
- **direct confiscation ex art. 4**
- **confiscation of the value ex art. 4,**
- **extended confiscation ex art. 5, and**
- **confiscation of assets in the possession of third parties ex art. 6),**
- **as well as other types of orders issued without final conviction**

Non-conviction based confiscation

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

within the framework of criminal proceedings

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

Art. 2

■ Definitions

■ For the purpose of this Regulation, the following definitions apply:

- 'confiscation order' means a final penalty or measure imposed by a court following proceedings in relation to a criminal offence, resulting in the final deprivation of property from a natural or legal person;

Recital 18: procedural rights

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

Recital 18

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

No civil or administrative proceedings

- this Regulation should not apply to freezing and confiscation orders issued within the framework of civil or administrative proceedings

Criminal proceeding

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

- In the British system: civil standard in order to apply confiscation (with conviction)
- In Italy: preventive proceeding (preventive confiscation)
- and the possibility to apply the extended confiscation (after conviction, art. 12 d.l. 306/92) in the executive proceeding (application *inaudita altera parte*, limited right to appeal, Constitutional Court admitt this limited right to appeal 106/2015: "The forms of exercise of the right of defense can be differently modulated according to the characteristics of each procedure")

ECourtHR *Paraponiaris v. Greece*, 2008

- affirms the illegitimacy pursuant to art. 6 of the ECHR and, therefore, of the principles of fair trial and presumption of innocence (Article 6, paragraph 2),
- of confiscations imposed in procedural stages that do not allow an **adequate exercise of the right of defense**

model adopted by the Regulation: German confiscation without conviction

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

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

German autonomous confiscation: nature and standard of the proof in the opinion of Constitutional and Supreme Court

- *Nature*: a form of confiscation (with or without conviction), even extended, which is not defined as "punishment" (Strafe) but as a **measure** (Maßnahme),
- having a compensatory purpose,
- a sort of penalistic equivalent of the institution of unjustified enrichment
- BVerfG, 14. 1. 2004
BGH, 22 November 1994, 4 StR 516/94 (LG Bochum)
BGH, 10 February 1998 — 4 StR 4/98 (LG Bochum)

Criminal standard and irretroactivity principle: interpretation of Constitutional Court and Supreme Court

- Criminal standard: “**it isn’t enough a high degree of likelihood**” (“*ganz hohe Wahrscheinlichkeit*”) of the unlawful origin of the forfeitable assets, but
- the court must be **fully convinced, due to exhaustive evidence**, that the property in question has been derived from criminal activities of the convicted person.
- If there are doubts it will not be possible to confiscate.
- The Court affirmed that a high degree of likelihood can’t replace the fully belief of the judge, although it doesn’t need to prove the unlawful origin of the specific property, the nexus between specific crimes and specific goods.

Regulation admits the use of presumptions (explanatory report)

- Directive n. 2016/343, recital 22: «the use of presumptions of fact or law concerning the criminal liability of a suspect or accused person. Such presumptions should be confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence, and the means employed should be reasonably proportionate to the legitimate aim pursued. **Such presumptions should be rebuttable** and in any event, should be used only where **the rights of the defence are respected**.

ECourtHR allows presumptions in criminal matter

“the right to the presumption of innocence is not absolute, since **presumptions of fact or of law operate in every criminal-law system**. While the Convention does not regard such presumptions with indifference, they are not prohibited in principle, as long as States remain within reasonable limits, taking into account the importance of what is at stake and maintaining **the rights of the defence**”

- *Salabiaku v. France*, 1988; *Phillips c.p. Royaume-Uni*, cit., § 40; *Grayson & Barnham*, cit., § 40; see *Salabiaku v. France*, 7 October 1988, Series A no. 141-A, § 28.

" Statement for the minutes by

Germany on its rejection of the general approach of the proposal for a Regulation on the mutual recognition of freezing and confiscation orders

- Although the text is otherwise successful in creating a good and practicable legal basis for effective cross-border asset recovery, unfortunately **a majority could not be found for anchoring fundamental rights in the text**. We will not do justice to the great importance of fundamental rights **if we do not clearly and unequivocally emphasise their importance**, as we have done in the Directive on the European Investigation Order.
- Although Germany, like the other Member States, sees the need to improve cross-border cooperation in the area of asset recovery, in light of the above Germany is not in a position to agree to the general approach contained in the current text of the Regulation

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

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

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

Positive attitude of ECourtHR towards forms of confiscation without conviction

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

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

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



ECourtHR: “is not of a punitive but of a preventive and/or compensatory nature”

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

ECHR: Italian preventive confiscation

- measure of prevention has a distinct function and nature from that of criminal sanction.
- does not presuppose a crime and a conviction,
- it seeks to prevent the commission from people who are considered dangerous

- ECTHR, 25 March 2003, *Madonia c. Italia*, n. 55927/00, § 4; Id., 20 June 2002, *Andersson v. Italy*, n. 55504/00, § 4; Id., 5 July 2001, *Arcuri e tre altri c. Italia*, n. 52024/99, § 5; Id., 4 September 2001, *Riela c. Italia*, n. 52439/99, § 6; Id., *Bocellari e Rizza c. Italia*, n. 399/02, § 8.

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

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

Consistency with ECHR

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

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

- the interference suffered by the applicant with the peaceful enjoyment of his possessions is proportionate to the aim pursued with the weapon of the confiscation, i.e. the fight against the scourge of **drug trafficking**" (*Butler v. Royaume – Uni*)
- Or the fight against **Mafia** (Marandino, Madonia,..)
- Or the fight against **corruption** (*Gogitidze*)

fight against Mafia

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

in *Dimitrovi v. Bulgaria* case: «*aims are too general and vague*».

- “Any interference with the enjoyment of the rights protected by Article 1 of Protocol No. 1 must also pursue a legitimate aim, principle of a “fair balance” inherent in that provision presupposes the existence of a general interest of the community..52. The Government argued that the provisions of Chapter Three of the CPA aimed to protect **justice and equality and to guarantee just conditions for economic activity** (see paragraph 34 above). *However, the Court notes that these aims are too general and vague*”.

reversal of the burden of the proof:

“the Court reiterates there can be nothing arbitrary, for the purposes of the “civil” limb of Article 6 § 1 of the Convention, in the reversal of the burden of proof onto the respondents in the forfeiture proceedings *in rem*”.

civil standard “or a high probability of illicit origins”

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

ECourtHR: Adversarial proceeding

- proceedings for the application of preventive measures must be adversarial and conducted with respect for the rights of the defence, any violation of those rights entailing their nullity

PARTLY DISSENTING OPINION OF JUDGE

PINTO DE ALBUQUERQUE in

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

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

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

Punitive nature of confiscation without conviction in the ECourtHR's autonomous meaning of penalty

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

Criminal standard

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

middle-ground system

- drawing on elements from both civil and criminal processes
- Criminal standard of the proof
- Presumption of innocence (burden of proof being imposed on the State)
- Hearsay evidence
- greater reliance on documentary evidence

Good compromise between efficiency and safeguards

Thank you for your attention